

Memorandum

Open-End Registered Funds Get a Seat at the Table: SEC Staff Extends Co-Investment Relief to All Registered Funds

April 30, 2026

Overview

One year ago, the modernized co-investment exemptive order (“**Order**”), initially issued by the U.S. Securities and Exchange Commission (“**SEC**”) to FS Credit Opportunities Corp. (“**FS Order**”),¹ marked a significant step forward for regulated fund complexes by streamlining allocation and board approval processes, modernizing the “propping up” condition and broadening the categories of affiliates eligible to participate in co-investment transactions. That relief, however, came with a notable gap. Open-end registered investment companies (“**Open-End Registered Funds**”)—*i.e.*, mutual funds and many ETFs—were left on the outside looking in.²

On April 27, 2026, the staff (“**Staff**”) of the SEC’s Division of Investment Management closed that gap by issuing a no-action letter in response to a request from J.P. Morgan Investment Management Inc. (“**JPMIM**”), confirming that Open-End Registered Funds may rely on an Order as “Regulated Funds,” subject to compliance with the Order’s terms and conditions. The Staff also addressed governance mechanics, permitting Regulated Fund (including Open-End Registered Fund) boards to delegate co-investment approval authority to a committee of at least three disinterested directors. Together, these positions extend the scope of the SEC’s co-investment framework to a broader set of vehicles. However, there are several remaining issues that would benefit from further engagement with the SEC, as discussed below.

Helpfully, sponsors that have a modernized Order can begin relying on this relief as soon as they wish to do so, without requesting an amended Order.

What JPMIM Asked For—and What the Staff Granted

JPMIM’s request had two parts.

First, JPMIM asked the Staff to confirm that an Open-End Registered Fund whose primary investment adviser or sub-adviser is an “Adviser” under an Order could rely on the Order as a Regulated Fund, participating in

¹ FS Credit Opportunities Corp., et al., Investment Company Act Release No. 35520 (Apr. 3, 2025) (notice) and No. 35561 (Apr. 29, 2025) (order) (File No. 812-15706); *see also* Application of FS Credit Opportunities Corp., et al., File No. 812-15706 (filed Feb. 21, 2025, amended Mar. 20, 2025 and Apr. 3, 2025).

² *See* Simpson Thacher & Bartlett LLP, [Co-Investment Programs: From Byzantine to Spartan](#), *The Investment Lawyer*, Vol. 32, No. 8 (August 2025).

negotiated co-investment transactions with affiliated entities that would otherwise be prohibited under Sections 17(d) of the Investment Company Act of 1940, as amended (the “**1940 Act**”) and Rule 17d-1 thereunder. JPMIM argued that such participation would not raise novel regulatory concerns compared to the business development companies (“**BDCs**”) and closed-end registered funds (*i.e.*, interval funds, tender offer funds and listed closed-end funds) already covered under an Order, and that the Order’s terms and conditions would protect Open-End Registered Fund investors in the same manner. Critically, JPMIM noted that Open-End Registered Funds are independently subject to Rule 22e-4 under the 1940 Act, which limits investments in illiquid securities to 15% of a fund’s net assets—providing a built-in guardrail against overexposure to the kinds of illiquid, negotiated investments that the Order facilitates.

The Staff agreed. Based on JPMIM’s facts and representations, the Staff stated it would not recommend enforcement action if an Open-End Registered Fund with an eligible “Adviser” relies on an Order, subject to compliance with the Order’s terms and conditions.

Second, JPMIM sought assurance that a Regulated Fund (including an Open-End Registered Fund) could satisfy the “Required Majority” definition under Conditions 2 and 6(b) of an Order through a committee of its board, rather than requiring a vote of the full board. The rationale was straightforward: While BDCs subject to Section 57(o) of the 1940 Act typically have small boards, many Open-End Registered Funds and some closed-end registered fund complexes have larger boards, making it logistically challenging to convene a majority of disinterested directors on the timelines demanded by many of the types of co-investment opportunities contemplated by an Order.

Again, the Staff agreed, so long as the delegated committee consists of at least three directors who have no financial interest in the transaction and are not “interested persons” of the fund, a majority of whom vote to approve each proposed co-investment transaction. The committee must also provide a report to the full board at its next regularly scheduled meeting, covering all transactions considered, including the committee’s decision on each transaction and the information described in Section 57(f)(3) of the 1940 Act³ that the committee recorded with respect to each transaction.

Why This Matters: Filling the Gap in the Modernized Co-Investment Framework

The significance of this no-action letter is best understood against the backdrop of the SEC’s broader modernization initiative. As discussed in detail in the Simpson Thacher article titled [Co-Investment Programs: From Byzantine to Spartan](#) (*The Investment Lawyer*, August 2025), the SEC’s updated Order—first granted in connection with an application by FS Credit Opportunities Corp. and subsequently replicated in “copycat” applications—represented a significant overhaul of the co-investment landscape for regulated funds.

³ Section 57(f)(3) of the 1940 Act provides that such directors shall record in their minutes and preserve in their records, a description of such transaction, their findings, the information or materials upon which their findings were based, and the basis therefor.

There were several limitations, including a quite conspicuous one: Even though the original application requested that the relief extend to Open-End Registered Funds, the granted Order did not extend to Open-End Registered Funds, meaning that such funds could not participate in negotiated co-investments with affiliates in reliance on an Order. The JPMIM no-action letter corrects this exclusion, opening the door for Open-End Registered Funds to access the same streamlined co-investment framework.

The committee delegation relief similarly resolves one of the practical challenges that the modernized Order did not address. The Order reduced the frequency of board approval but still mandated a “Required Majority” vote for transactions where a regulated fund is acquiring the security of an issuer in which an affiliate holds an existing position and where a regulated fund is disposing of a security, absent certain exceptions. For fund complexes with larger boards, which are common for Open-End Registered Funds, the mechanics of assembling that majority on fast-moving deal timelines could be prohibitive. The JPMIM no-action letter tackles this problem with a sensible delegation mechanism.

Important Limitations of the JPMIM No-Action Letter

The JPMIM no-action letter comes with several important caveats that fund managers and compliance professionals should keep in mind.

The no-action position is limited to orders that impose conditions “substantially identical” to those in the FS Order (which is the template for the modernized Order) and only to Orders that were published for public notice by the SEC before May 4, 2026.⁴

Moreover, Open-End Registered Funds relying on an Order must still comply with Rule 22e-4’s 15% illiquid investment threshold, which will meaningfully constrain the volume of co-investment activity in which any individual Open-End Registered Fund can participate.

Practical Implications for Fund Managers and Advisers

Here is what fund managers, advisers, and compliance teams may wish to consider in light of the JPMIM no-action letter:

Expand the opportunity set for Open-End Registered Fund clients. Advisers can now offer access to negotiated private investments across a broader range of vehicles with various liquidity profiles. This is particularly valuable for sponsors with active alternative investment platforms that serve investors across the liquidity spectrum. For existing products, sponsors will likely want to socialize these changes and developments with their Open-End Registered Fund boards, whose directors are less likely to be familiar with the routine intra-quarter approvals that an Order requires, as well as the conflicts that may arise with respect to investing in private

⁴ Presumably, future co-investment orders issued by the SEC will include Open-End Registered Funds directly in the definition of “Regulated Fund,” as well as the delegation concept. We recommend that near-term new applicants engage with the Staff on new language to minimize delays due to comments on language implementing the JPMIM no-action letter.

structures. The development also expands the potential for alternative asset managers to sub-advise a sleeve of a more liquid product sponsored by traditional asset managers, from mutual funds and ETFs to investment options within variable insurance contracts.

Build the governance infrastructure. Funds that intend to rely on a committee delegation approach will need to establish the requisite board committee structure, adopt committee charters and develop reporting protocols that satisfy the conditions outlined in the no-action letter—including the requirement that the committee report on all considered transactions at the next regular board meeting.

Mind illiquidity guardrails. Open-End Registered Funds will need to develop and implement relevant compliance protocols to ensure that participation in co-investment transactions does not push them beyond the 15% illiquid investment threshold under Rule 22e-4. This means that co-investment programs involving Open-End Registered Funds are likely to require additional coordination between portfolio management and compliance teams to address the different restraints, monitoring and reporting around liquidity to which Open-End Registered Funds are subject.

Advisers should review allocation policies. The modernized Order’s principles-based allocation framework requires investment advisers to adopt policies that are reasonably designed to ensure fair and equitable allocation of co-investment opportunities. Advisers seeking to add Open-End Registered Funds to their co-investment programs will need to consider how to modify and implement these policies to contemplate the participation of Open-End Registered Funds alongside BDCs, closed-end registered funds and other affiliated entities.

Be aware of limitations. The Staff’s position is limited to co-investment exemptive orders that impose conditions “substantially identical” to those in the FS Order. Sponsors continuing to rely on co-investment exemptive orders that contain an earlier set of conditions (*i.e.*, co-investment exemptive orders that do not follow the template of the FS Order) cannot rely on the JPMIM no-action letter.

Apply for an Order. Firms without co-investment relief that intend to apply for an Order should expect to spend significant time on the process, which includes obtaining any required board approvals and SEC EDGAR codes for each co-investment exemptive applicant, as well as engaging and clearing comments with the Staff.

Room for Improvement

While the JPMIM no-action letter is a welcome correction on the heels of the FS Order, there are several remaining issues that would benefit from further engagement with the Staff, including restrictions on investing in different parts of the capital structure, compensation limitations and principal transaction prohibitions involving issuers that become affiliates of regulated funds.

Same Terms and Classes of Securities. Affiliates currently must invest on the same terms and in the same classes of securities. Permitting affiliates to participate in different parts of the capital structure, subject to

supplementary board approval and enhanced reporting requirements, could provide greater flexibility while addressing potential conflicts of interest.

Compensation Restrictions. Affiliates must share transaction fees pro rata and generally cannot accept other compensation related to a Regulated Fund's participation in a co-investment transaction, aside from limited exceptions for certain brokerage, underwriting or advisory compensation. Given the financial complexity of many co-investment transactions and the value that various entities contribute in sourcing and managing them, the framework could be revised to permit compensation for these valuable services, while still protecting against conflicts of interest.

Tailored Relief for Principal Transactions. The 1940 Act's principal transaction prohibitions frequently prevent affiliates in a co-investment program from making follow-on investments in issuers that become affiliated as a result of the initial co-investment transaction. This limitation restricts retail investor access to strategies such as private equity or infrastructure that involve control investments or exert technical control over portfolio companies. Targeted exemptions from the 1940 Act prohibition on principal transactions could be introduced to facilitate follow-on investments in issuers that become affiliates of regulated funds through an initial co-investment transaction.

Conclusion

The JPMIM no-action letter is a logical extension of the Order overhauled in 2025. Open-End Registered Funds are no longer shut out of the co-investment framework. Board governance can become more practical. And the SEC has signaled that it is receptive to removing barriers that prevent retail investors from accessing the kinds of investment opportunities historically reserved for institutional capital.

Ongoing engagement with the SEC remains essential to ensure that the remaining limitations with the co-investment framework discussed above are addressed. For now, though, fund managers and advisers can evaluate how this new flexibility fits within their existing fund complexes and investment strategies and move to take advantage of additional opportunities.

For further information regarding this memorandum, please contact one of the following:

WASHINGTON, D.C.

David W. Blass

+1-202-636-5863
david.blass@stblaw.com

Nathan Briggs

+1-202-636-5915
nathan.briggs@stblaw.com

Ryan Brizek

+1-202-636-5806
ryan.brizek@stblaw.com

Justin L. Browder

+1-202-636-5990
justin.browder@stblaw.com

Rajib Chanda

+1-202-636-5543
rajib.chanda@stblaw.com

Anne C. Choe

+1-202-636-5997
anne.choe@stblaw.com

Steven Grigoriou

+1-202-636-5592
steven.grigoriou@stblaw.com

Daniel B. Honeycutt

+1-202-636-5924
daniel.honeycutt@stblaw.com

Meaghan A. Kelly

+1-202-636-5542
mkelly@stblaw.com

Matthew C. Micklavzina

+1-202-636-5916
matthew.micklavzina@stblaw.com

Jonathan Pacheco

+1-202-636-5876
jonathan.pacheco@stblaw.com

Nicholas Olumoya Ridley

+1-202-636-5826
nicholas.ridley@stblaw.com

Neesa Sood

+1-202-636-5580
neesa.sood@stblaw.com

Debbie Sutter

+1-202-636-5508
debra.sutter@stblaw.com

Joseph A. Goldman

+1-202-636-5808
joseph.goldman@stblaw.com

Erin M. Randall

+1-202-636-5590
erin.randall@stblaw.com

NEW YORK CITY

Meredith J. Abrams

+1-212-455-3095
meredith.abrams@stblaw.com

Bissie K. Bonner

+1-212-455-7026
bissie.bonner@stblaw.com

Jacqueline Edwards

+1-212-455-3728
jacqueline.edwards@stblaw.com

Jonathan H. Gaines

+1-212-455-3974
jonathan.gaines@stblaw.com

Manny M. Halberstam

+1-212-455-2388
manny.halberstam@stblaw.com

Evan Hudson

+1-212-455-7016
evan.hudson@stblaw.com

William LeBas

+1-212-455-2617
william.lebas@stblaw.com

Benjamin Wells

+1-212-455-2516
bwells@stblaw.com

Ari Zak

+1-212-455-2159
ari.zak@stblaw.com

BOSTON

Kenneth E. Burdon

+1-617-778-9001
kenneth.burdon@stblaw.com

Nathan D. Somogie

+1-212-455-2851
nathan.somogie@stblaw.com

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.