SEC Staff Extends Co-Investment Relief to Open-End Funds: Implications for Retail Access to Private Markets

May 7, 2026

Overview

On April 27, 2026, the staff (the "Staff") of the SEC's Division of Investment Management issued a no-action letter (the "No Action Letter")[1] to J.P. Morgan Investment Management, Inc. ("JPMIM") granting relief with respect to both items included in the request letter: (1) to allow open-end registered investment companies to participate in co-investment transactions under JPM's co-investment exemptive order (the "JPM Order"),[2] and (2) to allow business development companies ("BDCs") and registered fund boards to delegate the "Required Majority" approval standard required under the JPM Order to a committee of disinterested directors. This alert describes the relief, examines the potential interplay with the Department of Labor's recently proposed safe harbor for alternative investments in 401(k) plans, and considers additional potential ramifications for retail access to private markets.

Context

The JPM Order permits BDCs and closed-end management investment companies (each, a "Regulated Fund") to participate in Co-Investment Transactions with affiliated entities ("Co-Investment Transactions"), which would otherwise be prohibited by Sections 17(d) and 57(a)(4) of the Investment Company Act of 1940, as amended (the "1940 Act") and Rule 17d-1 thereunder. The JPM Order follows the template relief granted by the SEC to FS Credit Opportunities Corp. in April 2025 (the "FS Order"),[3] which modernized the co-investment landscape by, among other things, updating

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1 J.P. Morgan Investment Management, Inc., SEC Staff No-Action Letter (Div. Inv. Mgmt. Apr. 27, 2026).

2 JPMorgan Private Markets Fund, et. al., Investment Company Act Release No. 36015 (Mar. 11, 2026) (notice) and No. 36078 (Apr. 7, 2026) (order) (File No. 812-15950); see also Application of JPMorgan Private Markets Fund, et al., File No. 812-15950 (filed Dec. 12, 2025, amended on Mar. 2, 2026 and Mar. 6, 2026).

3 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).

allocation procedures, board approval mechanics, and affiliate eligibility. Notably, under the modernized FS Order, the definition of Regulated Fund did not extend to open-end registered investment companies.

Scope of the Staff's No-Action Relief

Open-End Fund Eligibility

JPMIM asked the Staff to confirm that an open-end investment company registered under the 1940 Act whose primary investment adviser or sub-adviser is an "Adviser" under the JPM Order (an "Open-End Fund") could rely on the JPM Order as a Regulated Fund, subject to compliance with the JPM Order's terms and conditions.

In support, JPMIM made three arguments. First, allowing Open-End Funds to rely on the JPM Order would provide them access to transactions on potentially superior terms and expand the pool of favorable investment opportunities available to them and their investors. Second, participation by Open-End Funds under the JPM Order's terms and conditions would not raise novel Section 17(d) and Rule 17d-1 concerns as compared to Regulated Funds already covered under the JPM Order. Third, the JPM Order's terms and conditions protect Open-End Funds in the same manner as other Regulated Funds; although OEFs must redeem their shareholders upon demand, they are subject to Rule 22e-4 under the 1940 Act, which would prevent an Open-End Fund from participating in a co-investment transaction involving illiquid securities if such participation would cause the Open-End Fund to exceed the Rule's 15% illiquid investment threshold.

Based on these facts and representations, the Staff stated it would not recommend enforcement action under Section 17(d) and Rule 17d-1 if an Open-End Fund with a primary investment adviser or sub-adviser that is an Adviser relies on a co-investment exemptive order as a Regulated Fund, subject to compliance with the terms and conditions of the exemptive order.

Board Committee Delegation

Conditions 2 and 6(b) of the JPM Order require, with certain specified exceptions, that prior to a Regulated Fund acquiring in a Co-Investment Transaction a security issued by an entity in which an Affiliated Entity (as defined in the JPM Order) has an existing interest, or disposing of a security acquired in a Co-Investment Transaction, the

Required Majority (as defined in Section 57(o) of the 1940 Act) must take the steps described in Section 57(f) of the 1940 Act.[4]

JPMIM argued this standard creates practical difficulties for larger boards. While BDCs typically tend to have small boards, many Open-End Funds, closed-end funds registered under the 1940 Act, and some BDCs have relatively larger boards. Larger boards increase the time and resources necessary to obtain approval from a majority of all disinterested directors and require additional lead time to schedule meetings, which may not necessarily align with transaction timelines.

The Staff agreed, confirming it would not recommend enforcement action if a Regulated Fund meets the "Required Majority" definition for purposes of conditions 2 and 6(b) of the exemptive order only with respect to a committee of the board consisting of at least three directors who both have no financial interest in the relevant transaction and are not interested persons of the Regulated Fund, a majority of whom vote to approve each proposed Co-Investment Transaction. Such a committee must provide a report on all Co-Investment Transactions considered, including the committee's decision on each such transaction and the information described in Section 57(f)(3), at the next regular meeting of the full board of directors.

What Sponsors Should Do Next

Managers that have obtained exemptive relief following the FS Order precedent and which has been noticed before May 4, 2026[5] can avail themselves of the position taken under the No-Action Letter.

Several implementation steps deserve attention:

- **Governance.** Funds planning to use the committee delegation approach should constitute a committee of at least three qualifying directors, adopt a committee charter, and set up a protocol for full-board reporting at each regular meeting.

- **Investment Strategy and Objective Alignment**. Before participating in Co-Investment Transactions, sponsors will need to confirm that exposure to private

[4] The term "required majority," when used with respect to the approval of a proposed Co-Investment Transaction, means both a majority of a Regulated Fund's directors who have no financial interest in such transaction and a majority of such directors who are not interested persons of such Regulated Fund.

[5] The No-Action letter does not extend to orders noticed on or after May 4, 2026. Sponsors with applications pending or anticipated after the cutoff should engage with the Staff to ensure that any relief granted reflects the positions taken in the No-Action Letter.

market strategies is consistent with the Open-End Fund's stated investment strategy, and objective. This analysis may require a need to update applicable disclosures and sponsors, should also anticipate substantive board discussion regarding the appropriateness of layering private market co-investments in Open-End Fund vehicles.

- **Liquidity management.** Compliance teams will need to implement real-time or near-real-time monitoring of the 15% illiquid investment threshold under Rule 22e-4, coordinating with relevant stakeholders to ensure adequate headroom when making a co-investment. Funds with thin headroom may find themselves practically excluded from co-investment opportunities, which carries its own allocation implications.

- **Allocation policies.** Existing allocation frameworks will require review to account for the participation of Open-End Funds, which have a materially different capacity for illiquid holdings than BDCs or registered closed-end funds. Large fund complexes that include many Open-End Funds and ETFs will likely require sophisticated technology to help implement allocation procedures across the broader universe of vehicles potentially eligible to participate in co-investment transactions.

- **Board education.** Open-End Fund directors may have less familiarity with the types of intra-quarter investment approvals and affiliated-party conflict issues that the co-investment exemptive order entails. Proactive engagement should reduce friction as the first transactions move through the approval process.

A Path Toward Broader Retail Access to Private Markets

The No-Action Letter takes on greater significance when viewed against the backdrop of the Department of Labor's ("DOL") proposed safe harbor for designated investment alternatives that include alternative assets in defined contribution ("DC") plans.[6] If the DOL proposal is adopted in substantially its current form, plan fiduciaries should gain a clearer pathway to including private market exposure on 401(k) menus – and the question of which vehicles are best positioned to deliver that exposure becomes a central practical concern for sponsors, recordkeepers, and consultants working through implementation.

Two vehicle types dominate the DC plan landscape today, each with distinct markets exposure. Collective investment trusts ("CITs") have become the most prevalent vehicle

[6] *See* US Department of Labor proposes landmark rule to democratize access to alternative investments in 401(k) plans.

for DC plan target date funds and core menu options, prized for their flexibility, customization and operational efficiency. Open-End Funds remain a foundational element of the DC menu.

Against this backdrop, we believe the No-Action Letter should improve the position of registered Open-End Funds as a delivery vehicle for private market exposure in DC plans. By allowing Open-End Funds to participate in co-investment transactions alongside affiliated BDCs, registered closed-end funds and private funds, the relief removes a structural barrier that has historically limited the ability of Open-End Fund sponsors to source private market investments at scale.

Furthermore, layered onto the path toward broader retail access to private markets is the question of valuation and specifically, whether private market assets can be valued appropriately for vehicles that strike a daily net asset value ("NAV"). The Investment Company Institute's ("ICI") recent paper on valuation governance for private credit assets in regulated funds provides a thoughtful framework for thinking about this question.[7] The ICI paper documents that the vast majority of Open-End Fund assets currently use Level 1 or Level 2 inputs, with less than 1% allocated to Level 3 instruments – reflecting historical care with which fund sponsors have matched vehicle structure to underlying investment strategy. Critically, the ICI paper makes clear that the fair valuation framework under Rule 2a-5 and ASC 820 does not prescribe a particular valuation frequency for any asset class. Rather, valuation frequency is a function of fund-specific facts, including investor transaction cadence, portfolio concentration and the materiality of private credit exposures relative to NAV. For an Open-End Fund holding a modest sleeve of private credit exposure within the 15% illiquid bucket, the ICI paper suggests that, subject to a fact-specific risk-based analysis, periodic formal valuations may be appropriate provided the fund maintains effective ongoing monitoring processes – including credit market surveillance, portfolio company performance review, and covenant compliance tracking – to identify developments that could result in a material change in fair value between formal valuation dates.

Taken together, the No-Action Letter, the DOL's proposed safe harbor, the rise of public and private partnerships across the asset management industry and the maturation of valuation infrastructure point toward a cumulative loosening of the structural barriers that have historically constrained DC plan and broader retail access to private markets. None of these developments alone is transformative; collectively they represent meaningful progress toward a future in which a retail investor can gain access to private markets exposure through the same vehicle types they already use for public market

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[7] *See* Valuation Governance Considerations for Private Credit Assets in Regulated Funds (April 2026) at: https://www.ici.org/system/files/2026-04/26-ppr-valuation-governance-for-private-credit-assets.pdf.

exposure. Sponsors positioning for that future will need to think about their private markets allocation frameworks across the full universe of registered and non-registered vehicles on their platforms to ensure that their compliance, valuation and sourcing infrastructure can support sourcing investments efficiently across all of them. For sponsors without internal private markets origination capacity, the partnership model offers a credible alternative path; for sponsors with that capacity in-house, the No-Action letter accelerates the strategic case for cross-pollinating it across the full vehicle stack.

Conclusion

The No Action Letter is a measured but consequential development. By confirming that Open-End Funds may participate in the co-investment framework and that boards may delegate the Required Majority vote to a committee, the SEC Staff has removed two practical barriers that limited the reach of the modernized FS Order.

Much still depends on factors beyond the No Action Letter itself, including a final DOL rule, whether courts afford the safe harbor genuine deference, and whether the SEC addresses other structural limitations in the FS Order (such as, same-terms requirements, compensation restrictions, and principal transaction prohibitions). But the trajectory is clear: the regulatory environment is moving toward broader access to private market investments through regulated vehicles, and managers who begin building the necessary infrastructure now will be best positioned to capitalize on that movement.

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