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SEC Signals Adoption of Innovative Co-Investment Exemptive Relief

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The Securities and Exchange Commission's Division of Investment Management (SEC) recently issued public notices indicating its imminent decision to grant several applications for a new form of exemptive relief for certain business development companies and closed-end management investment companies to co-invest in portfolio companies with each other and certain affiliates. The granting of these applications, which is expected within the next 30 days, signals the SEC's approval of an innovative variant of the existing co-investment exemptive relief paradigm.[1] The new co-investment relief reflects a more principles-based approach to compliance with the salient provisions of the Investment Company Act of 1940, as amended (the 1940 Act), related to co-investment transactions, and features streamlined terms and conditions as compared to the existing co-investment relief.

The new co-investment relief introduces new technology to the existing co-investment relief that, among other things, promotes board oversight efficiencies, helps facilitate financial product innovation for fund sponsors and expands the scope of affiliates who are eligible to participate in co-investment transactions, all within a more efficient, thoughtfully prescribed compliance framework.

The following provides a summary chart comparing certain key considerations of the new co-investment relief against the existing co-investment relief.

Comparison of Existing Co-Investment Relief and New Co-Investment Relief

	Existing Co-Investment Relief	New Co-Investment Relief
Co-Investment Opportunities and Allocation Policies	Investment opportunities that fall within a regulated fund's investment objectives and strategies and the "board-established criteria" must be made available to the regulated fund.	There is no longer a requirement to make investment advisers share investment opportunities with regulated funds or require the establishment of "board-established criteria." Rather, investment advisers will adopt and implement "co-investment policies" reasonably designed to ensure

	Existing Co-Investment Relief	New Co-Investment Relief
		(i) the fair and equitable allocation of opportunities to participate in co-investment opportunities; and (ii) the investment adviser negotiating the co-investment opportunity considers the interest in the transaction of any participating regulated fund. This new condition relies on the investment adviser's fiduciary duty in connection with the co-investment allocation process.
Pre-Existing Investments in the Issuer	Regulated funds are prohibited from participating in an initial co-investment transaction where an affiliate already holds a security in the same issuer.	The new relief eliminates the "propping up" condition so that a regulated fund is no longer barred from participating in a co-investment transaction where an affiliate already holds a security in the same issuer if the regulated fund's board approves the transaction and makes certain findings regarding the transaction. In particular, prior to a regulated fund acquiring in a co-investment transaction a security of an issuer in which an affiliate has an existing interest, the "required majority," as defined in Section 57(o) of the 1940 Act, of the regulated fund will take the steps set forth in Section 57(f) of the 1940 Act, unless: (i) the regulated fund already holds the same security as each such affiliate; and (ii) the regulated fund and each of the other affiliates holding the security is participating in the acquisition in approximate proportion to its then-current holdings.

	Existing Co-Investment Relief	New Co-Investment Relief
Follow-On Transactions	A regulated fund or affiliated fund may not participate in a follow-on transaction in an issuer unless: (i) the regulated fund or affiliated fund participated in the initial co-investment and holds the security; or (ii) the affiliated fund does not have an investment in the issuer.	The new relief allows regulated funds and affiliates to participate in a follow-on transaction without having an investment in the issuer, subject to certain board approval.
Expanded Scope of Relief	The existing relief is limited to regulated funds and affiliated funds, which include private funds and "proprietary accounts." Also, the existing relief is limited to private funds that would be investment companies but for Sections 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the 1940 Act.	The new relief is extended to sub-advised unaffiliated regulated funds, such that an investment adviser may serve as a sub-adviser to a regulated fund in circumstances where an unaffiliated investment adviser serves as the primary investment adviser to such regulated fund. Also, the new relief permits private funds that rely on any of the provisions of Section 3(c), *et seq*., of the 1940 Act, to participate in co-investment transactions as affiliates.
Board Oversight	The existing relief places specific requirements on regulated fund boards with which to comply in connection with the approval of co-investment transactions, including a requirement to approve each potential co-investment transaction and non-pro rata follow-ons and dispositions.	The new relief reduces the administrative burdens on boards, which features a board oversight model. Directors provide oversight of a regulated fund's participation in the co-investment program in the exercise of their reasonable business judgment.
Reporting Requirements	The existing relief requires quarterly reports that include information about a regulated fund's co-investment transactions over the relevant quarterly period, including potential co-investment opportunities that the regulated fund declined. The regulated fund's chief compliance officer is required to prepare an annual report to the board to evaluate compliance with the terms and	The new relief features less onerous reporting requirements. For example, prior to participating in a co-investment transaction, a regulated fund's board will: (i) review the "co-investment policies" to ensure that they are reasonably designed to prevent the regulated fund from being disadvantaged by participation in the co-investment program; and (ii) approve "policies and

	Existing Co-Investment Relief	New Co-Investment Relief
	conditions of the fund's exemptive order. Also, on an annual basis, the regulated fund's board shall determine whether continued participation in the co-investment program is in the fund's best interests.	procedures" of the regulated fund that are reasonably designed to ensure compliance with the terms of the fund's exemptive order. At least quarterly, each regulated fund's investment adviser and chief compliance officer will provide the regulated fund's board with reports or other information requested by the board related to the fund's participation in co-investment transactions and a summary of matters, if any, deemed significant that may have arisen during the period related to the implementation of the "co-investment policies" and the regulated fund's "policies and procedures."

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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[1] *See In the Matter of FS Credit Opportunities*, *et al.*, Investment Company Act Release No. 35520 (April 3, 2025) (notice); *BlackRock Growth Equity Fund LP*, *et al.*, Investment Company Act Release No. 35525 (April 8, 2025) (notice); *Blue Owl Capital Corporation*, *et al.*, Investment Company Act Release No. 35529 (April 9, 2025) (notice); *Sixth Street Specialty Lending, Inc.*, *et al.*, Investment Company Act Release No. 35531 (April 10, 2025) (notice).