SULLIVAN & CROMWELL LLP

S&C Quarterly Investment Management Newsletter

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The S&C Quarterly Investment Management Newsletter highlights key legal and regulatory developments relevant to the investment management industry. For more information on these and other developments, we encourage you to reach out to your regular Sullivan & Cromwell contact.

Highlights

- In this issue, we discuss key developments in Q1 2025 and early Q2 2025, including recent rulemakings, enforcement actions, and other key updates affecting the investment management industry.

Recent Rulemakings & Guidance

SEC Issues Updated FAQs for Form PF. On April 4, 2025, the staff of the SEC's Division of Investment Management (the "Staff") issued an update to its Frequently Asked Questions (the "FAQs") on Form PF following the SEC's 2023 and 2024 amendments to the form. The latest updates to the FAQs follow two previous rounds of updates in October and December of last year and cover a range of topics, including the recent extension of the compliance date to June 12, 2025 for filings on the revised form as well as guidance on a number of highly technical requirements, including but not limited to, reiterating that the definition of "hedge fund" remains in line with that in the 2024 release (E.1), new FAQs on calculating fund aggregated calculated value (G.2 and Question 12.1), and revising the FAQs on Aggregation (F.1), borrowing (Questions 18.1, 18.2 and 18.3), top counterparties (Questions 26-28), and reporting specific types of positions (Questions 32, 34, 35, and 37).

SEC Issues Updated Marketing Rule FAQs. On March 19, the Staff issued an update to its FAQs on compliance by registered investment advisers ("RIAs") with Rule 206(4)-1 under the Investment Advisers Act of 1940 (the "Advisers Act"), known as the "Marketing Rule." In a change from prior guidance, the FAQs clarify that the Staff would not recommend enforcement action where an RIA presents "extracted" gross performance for one investment or a group of investments in a private fund or portfolio without also presenting the net performance for such extract, as long as the extracted performance is prominently accompanied by the gross and net performance of the total portfolio over a period that includes the entire period for which the extract is calculated, and otherwise is consistent with the Marketing Rule.

In addition, the FAQs provide that the Staff would not recommend enforcement action if certain characteristics that do not clearly qualify as "performance" or cannot be calculated net of fees at all or without creating misleading or confusing results are presented only as gross characteristics, as long as the RIA also displays the gross and net performance of the total portfolio in accordance with the Marketing Rule, provides

appropriate accompanying information in a format that is not misleading and meets certain other specific conditions. The Staff lists a number of characteristics that may meet such criteria, including yield, coupon rate, contribution to return, volatility, sector or geographic returns, attribution analyses, the Sharpe ratio and the Sortino ratio. The FAQs also note that the Staff's position does not apply to characteristics that do constitute "performance," such as total return, time-weighted return, return on investment, internal rate of return, multiple on invested capital or Total Value to Paid in Capital.

SEC Grants Multi-Class Exemptive Relief for Privately Offered BDCs. On April 8, the SEC issued an order granting exemptive relief requested in the application filed by Ares Capital Management. Subsequently, the SEC granted similar exemptive relief requested in applications filed by other privately offered BDCs. The exemptive relief allows certain continuously offered registered closed-end investment companies that have elected to be regulated as BDCs to issue multiple classes of shares with varying sales loads and asset-based distribution or service fees. The exemptive relief expands the types of funds able to offer multiple classes to privately placed funds that rely on exemptions under Rules 506(b) and 506(c).

Rule 18f-3 under the Investment Company Act allows mutual funds to issue multiple classes of shares, but is not available to privately offered BDCs and other continuously offered closed-end funds. A number of continuously offered closed-end funds have also been granted exemptive relief permitting them to offer multi-class products, but the SEC has not moved forward with similar relief for privately held BDCs until now. The exemptive relief requires the privately offered BDCs to comply with regulations and compliance procedures under the Investment Company Act that apply to mutual funds that offer multiple classes of shares that would not otherwise apply to privately offered BDCs. For example, a privately offered multi-class BDC will be required to comply with FINRA Rule 2310 (which caps organizational and offering expenses and compensation payable to underwriters, broker-dealers and affiliates) and if the BDC plans to subject its various classes to differing service or distribution fees, it will need to adopt a distribution plan that complies with Rules 12b-1 and 17d-3 under the Investment Company Act. The exemptive relief expands capital-raising options for privately offered BDCs by permitting them to access various distribution channels through separate share classes with varying expense and compensation structures.

SEC Publishes Notice of Intent to Grant More Flexible Co-Investment Relief for Business Development Companies ("BDCs"), Closed-End Funds and Other Regulated Funds. On April 3, the SEC published a notice of intent to grant an application for a co-investment exemptive order filed by FS Credit Opportunities Corp. et al. ("FS"), which would offer substantial benefits and a meaningful shift in the current prescriptive framework governing co-investment transactions by BDCs and registered closed-end funds (collectively, "Regulated Funds") that are otherwise prohibited under Sections 17(d) and 57(a)(4) of the Investment Company Act of 1940 (the "Investment Company Act") and Rule 17d-1 thereunder unless the Regulated Fund obtains exemptive relief from the SEC. At a high level, the relief implements a principles-based

framework governing affiliated co-investment transactions that would, among other things, (i) in a reversal from existing requirements, permit Regulated Funds to participate in negotiated co-investments where an affiliated entity already holds an interest in such investment, (ii) allow a Regulated Fund to participate in negotiated co-investments so long as the Regulated Fund's board (a) reviews the co-investment policies of the Regulated Fund's adviser to ensure that they are reasonably designed to prevent the Regulated Fund from being disadvantaged by participation in the co-investment program and (b) approves policies and procedures of the Regulated Fund that are reasonably designed to ensure compliance with the terms of the exemptive order, alleviating existing requirements that the board approve in advance all negotiated co-investment transactions (including follow-on investments), (iii) reduce board reporting requirements, and (iv) alleviate the strict allocation requirements imposed by existing co-investment exemptive orders issued by the SEC and permit investment advisers to make fair and equitable allocations. The order is currently towards the end of a 25-day comment period, after which the SEC will grant the order unless it orders a hearing.

The SEC's notice of its intent to grant the FS application follows the Investment Company Institute's letter to the SEC to encourage the agency to approve the principles-based co-investment framework proposed by FIS and to take further steps to improve the existing co-investment framework, including considering further amendments to exemptive relief and potential amendments to Rule 17d-1. In connection with issuing the letter, the CEO of the Investment Company Institute commented, "this relief would be an important move towards expanding retail access to private market investment opportunities while maintaining the underlying protections of the Investment Company Act."

SEC Issues No-Action Letter Removing Significant Impediment to Privately Offered Funds Relying on Rule 506(c) of Regulation D. On March 12, the Staff of the SEC's Division of Corporate Finance (the "CF Staff") issued a no-action letter which issuers, including privately offered BDCs and other funds, can rely on to satisfy the accredited investor-verification requirement in connection with Rule 506(c) offerings. Specifically, the CF Staff agreed that an issuer can reasonably conclude that it has satisfied the Rule 506(c) requirement that issuers take reasonable steps to verify the "accredited investor" status of purchasers if: (i) each purchaser agrees to an investment amount of at least $200,000 for natural persons or $1,000,000 for legal entities (the "Minimum Investment"); (ii) each purchaser makes written representations regarding its status as an accredited investor and that its Minimum Investment is not financed in whole or in part by a third party for the purpose of making such Minimum Investment (items (i) and (ii) together, the "Representations"); and (iii) the issuer has no actual knowledge of any facts that indicate the purchaser's Representations are false.

Under Rule 506(c), issuers can offer securities through the means of general solicitation and general advertising, provided that, among other critical requirements, the issuers take reasonable steps to verify the "accredited investor" status of purchasers. Historically, privately offered funds have been reluctant to use Rule 506(c) because the

verification requirement was generally viewed as cumbersome for issuers and invasive for investors. The no-action letter from the CF Staff should facilitate the use of Rule 506(c) by private fund sponsors.

New Compliance and Disclosure Interpretations ("C&DIs") on Shareholder Engagement Published. On February 11, the CF Staff published one new and one revised C&DI under Regulations 13D-G under the Securities Exchange Act of 1934 (the "Exchange Act"). The C&DIs address circumstances in which a greater-than-5% shareholder's engagement with an issuer's management could cause the shareholder to be deemed by the CF Staff to hold the subject securities with a "purpose or effect of changing or influencing control of the issuer" and, therefore, lose eligibility to report its beneficial ownership on Schedule 13G. The new C&DI notes that the determination of whether a shareholder acquired or is holding the subject securities with a purpose or effect of "changing or influencing" control of the issuer is based on the relevant facts and circumstances and the meaning of "control" as defined in Rule 12b-2 under the Exchange Act. The CD&I goes on to note that the "control" determination may be based on (i) the subject matter of the shareholder's engagement with the issuer's management (e.g., engagements that specifically call for the sale of the issuer or a significant portion of its assets, its restructuring or the election of its directors other than those nominated by the shareholder would indicated that Schedule 13G would not be available to the shareholder) or (ii) the context in which the engagement occurs (i.e., whether the shareholder discusses only its views and voting policies with an issuer versus exerting pressure on an issuer to implement specific measures or changes to policy).

The revised C&DI clarifies the CF Staff's view that a shareholder's efforts to influence an issuer's management on a particular topic that disqualifies it from the exemption to the Hart-Scott-Rodino Act's notification and waiting period provisions does not, by itself, disqualify the shareholder from initially reporting or continuing to report its beneficial ownership on Schedule 13G.

Although the extent to which the C&DIs may result in a change in practice by filers is unclear, institutional investors may wish to review their approach to interactions with companies in which they have reportable investments. For more information on the new C&DIs, please see our firm publication here.

SEC Extends Compliance Date for Names Rule (Rule 35d-1). On March 14, the SEC announced a six-month extension for compliance with the Names Rule under the September 2023 amendments to the rule.

The compliance date is extended to (1) June 11, 2026 (from December 11, 2025), for fund groups with net assets of $1 billion or more as of the end of their most recent fiscal year and (2) December 11, 2026 (from June 11, 2026), for fund groups with less than $1 billion in net assets as of the end of their most recent fiscal year.

Further, in order to allow for compliance based on the timing of funds' annual disclosure and reporting obligations, the SEC also made the following adjustments: (a) new funds are required to be in compliance at the time of the effective date of their initial registration

statements that the funds file on or after the applicable new compliance date set forth above; (b) existing open-end funds (or other continuously offered funds) are required to be in compliance at the time of the effective date of their first “on-cycle” annual prospectuses update that the funds file on or after the applicable new compliance date; (c) existing registered closed-end funds that rely on Rule 8b-16(b) are required to be in compliance at the time of the transmittal of their first annual report to shareholders on or after the applicable new compliance date; and (d) existing BDCs that are not engaged in a continuous offering are required to be in compliance at the time of the filing of their first annual report on Form 10-K on or after the applicable new compliance date.

For more information on the 2023 amendments, see our firm publication here.

SEC Extends Compliance Dates and Provides Temporary Exemption for Rule Related to Clearing of U.S. Treasury Securities. On February 25, the SEC extended compliance dates for Rule 17ad-22(e)(18)(iv)(A) and (B) under the Exchange Act, which require covered clearing agencies (“CCAs”) that provide central counterparty services for U.S. Treasury securities to (i) have written policies and procedures reasonably designed to require every direct participant of the CCA submit for clearance and settlement all eligible secondary market transactions in U.S. Treasury securities to which it is a counterparty and (ii) identify and monitor its direct participants’ submission of transactions for clearing, including how the agency would address a failure to submit transactions. The compliance dates have been extended to December 31, 2026 (from December 31, 2025) for eligible cash market transactions and to June 30, 2027 (from June 30, 2026) for eligible repo market transactions.

On the same day, the SEC also issued a temporary exemption from Rule 17ad-22(e)(6)(i) under the Exchange Act, which requires CCAs to have written policies and procedures reasonably designed to calculate, collect and hold margin accounts from a direct participant for its proprietary positions in U.S. Treasury securities separately and independently from margin calculated and collected from that direct participant in connection with U.S. Treasury securities transactions by an indirect participant that relies on services provided by the direct participant to access the CCA’s payment, clearing or settlement facilities. Under the exemption, CCAs are not required to enforce policies and procedures against direct participants not prepared to comply with the rule until September 30, 2025 (previously March 31, 2025). The exemption does not affect the requirement to enforce policies and procedures against direct participants that are ready to comply.

SEC Provides Temporary Exemption from Compliance with Rule 13f-2 and Related Form SHO Filing Requirements Related to Short-Selling Information. On February 7, the SEC issued an order providing a temporary exemption from compliance with Rule 13f-2 under the Exchange Act and from reporting on Form SHO. As a result of the exemption, the date for filing an initial Form SHO report has been delayed one year, and the initial Form SHO will now be due by February 17, 2026 (previously February 14, 2025). Rule 13f-2 mandates that institutional managers that satisfy certain criteria file a Form SHO within 14 calendar days after the end of each calendar month for certain equity securities. Rule 13f-2 and Form SHO were designed to increase the

availability of short-sale-related information and thereby increase transparency within the market through the SEC's publication of certain aggregated information regarding each security reported on Forms SHO. In the order, the SEC emphasized that "the temporary exemption will facilitate realization of the benefits of the Rule by enhancing the accuracy of the data that would ultimately be provided to investors." For more information on the SEC's short-sale transparency rules, see our firm publication here.

Commissioner Peirce Issues Crypto RFI. On February 21, SEC Commissioner Hester M. Peirce issued a request for information ("RFI") seeking public input on a number of questions under consideration by the SEC's Crypto Task Force. The RFI—which is divided into 10 categories that include security status of crypto assets, public offerings, trading, custody and crypto exchange-traded products—identifies particular statutes and rules that the Task Force believes may present challenges to firms seeking to innovate with crypto assets and blockchain technology and invites commenters to identify other laws that present challenges to innovation. Commissioner Peirce notes that there is no deadline to respond and the Task Force will accept input at any time; however, the earlier input is received, the more likely it is to inform the options under consideration by the Task Force.

Recent Enforcement Actions

SEC Published Final Rule Revoking Delegation of Authority to the Director of the Division of Enforcement to Issue Formal Orders of Investigation and Subpoenas. On March 10, the SEC published a final rule revoking the Commission's delegation of authority to the Director of the Division of Enforcement (the "Director") to issue formal orders of investigation, which designate the enforcement staff authorized to issue subpoenas in connection with investigations under the federal securities laws. The delegation of authority to the Director had been in place for the past 15 years, going back to the financial crisis. The release notes that the change "is intended to increase effectiveness by more closely aligning the Commission's use of its investigative resources with Commission priorities." The final rule went into effect on March 14.

SEC Announces Dismissal of Case Alleging RIA Failed to Establish Policies to Safeguard Material Nonpublic Information ("MNPI"). On April 4, the SEC announced that it filed a joint stipulation with an RIA to dismiss its December 2024 complaint accusing the RIA of failing to establish rules requiring consultants, such as outside counsel, to be monitored by the firm's compliance department to ensure that any MNPI obtained while working with the private side of the firm is not shared with the public side in violation of the Investment Company Act. The SEC noted that its decision to dismiss the action was based on the specific facts and circumstances of the case and "does not necessarily reflect the Commission's position on any other case."

SEC Announces Dismissal of Civil Enforcement Action Against Coinbase. On February 27, the SEC announced that it filed a joint stipulation with Coinbase Inc. and Coinbase Global Inc. (together "Coinbase") to dismiss the ongoing civil enforcement action against the entities. On June 6, 2023, the SEC charged Coinbase with operating its crypto asset trading platform as an unregistered national securities exchange, broker and clearing agency, in addition to failing to register the offer and sale of its crypto asset staking-as-a-service program. The SEC's press release noted that it had decided to

dismiss the matter in light of the formation of the Crypto Task Force and to "facilitate the Commission's ongoing efforts to reform and renew its regulatory approach to the crypto industry." The SEC's press release noted that the dismissal was not an assessment of the merits of the claims alleged in the action and does not reflect the SEC's position on any other case.

SEC Files Settled Charges Against an RIA and Its Former Representative for Violations of the Antifraud and Compliance Provisions Under the Advisers Act. On February 14, the SEC announced that it had filed settled charges and entered a consent order against an RIA and one of its former representatives for recommending that its customers at an unaffiliated broker-dealer, which employed the former representative, convert more than 180 brokerage accounts, mostly belonging to elderly customers, to advisory accounts at the RIA. The order further alleged that the RIA and its former representative violated their fiduciary duties by failing to adequately disclose (i) that the conversions would result in significantly higher fees for the clients and increased compensation for the representative and (ii) the conflict of interest that would result from the conversion. The order found that the clients did not receive additional services or benefits to offset the increased costs and that the RIA and its former representative failed to adequately consider whether it was in their clients' best Interests to convert brokerage accounts to advisory accounts in violation of the antifraud provisions of Section 206(2) and the compliance rule provisions of Rule 206(4)-7 promulgated under the Advisers Act.

Other Recent Key Updates

Eighth Circuit Grants Democratic State AGs' Motions to Intervene as Respondents to Litigation Challenging SEC's Final Climate Disclosure Rules. On April 24, the U.S. Court of Appeals for the Eighth Circuit (the "Eighth Circuit") granted the motions to intervene filed by a group of Democratic attorneys general from 18 states and the District of Columbia in litigation challenging the SEC's final climate-related disclosure rules adopted on March 6, 2024, which would significantly expand the climate-related information that U.S. public companies and foreign private issuers (other than Canadian issuers reporting on Form 40-F) would be required to disclose in their periodic reports and registration statements. The state AGs filed their motions to intervene following the SEC's March 27 vote to end its defense of the rules against various legal challenges which were consolidated for review by the Eighth Circuit. Last spring, the SEC stayed the implementation of the final rules pending judicial review.

For more information, please see our firm publications providing an overview of the final rules and their implications, as well as a discussion of the SEC's stay of the rules' implementation and the SEC's vote to end its defense of the rules.

Kentucky Legislature Overrides Governor Beshear's Veto of Senate Bill 183. On March 27, the Kentucky legislature overrode Governor Andy Beshear's (D-KY) veto of Senate Bill (SB) 183, which requires proxy advisory firms contracted by Kentucky retirement plans to either follow the recommendations of a company's board of directors or, if such a firm recommends voting against such recommendations, that it conduct and document an economic analysis demonstrating that the vote against management's recommendations would be solely in the interests of the retirement plan members and

beneficiaries. SB 183 was passed in the wake of growing national scrutiny over the influence of proxy advisory firms, such as ISS and Glass Lewis, on proxy voting decisions by investment managers. The law is intended to block proxy advisory firms from putting environmental, social, and governance goals ahead of financial performance. In his veto message, Governor Beshear argued that the bill prevents pension board members from carrying out their fiduciary duties.

European Commission Releases Omnibus Package Proposing Changes to the Corporate Sustainability Reporting Directive ("CSRD") and the Corporate Sustainability Due Diligence Directive ("CSDDD"). On February 26, the European Commission published an omnibus package that, among other things, proposed amendments to the CSRD and the CSDDD that would significantly limit the number of companies in scope of these requirements and, for many in-scope companies, delay initial compliance deadlines. However, the amendments would maintain the "double materiality" standard under the CSRD reporting requirements and would not specifically limit the extraterritorial application of the CSRD and CSDDD. For more information on the proposed changes to the CSRD and the CSDDD, please see our firm publication here.

Republican State Attorneys General Send Letter to U.S. Asset Managers Regarding Chinese Investments. On February 6, 17 Republican state attorneys general issued a letter to a number of large asset managers, noting concerns about their investments in China and allegedly deficient disclosures relating to such investments. The letter alleges that these asset managers made apparent misstatements or material omissions in related disclosures in violation of their duties to investigate facts underlying investments, in turn making it "impossible for state defined benefit plans, public 457 plans, businesses offering 401(k) plans, or other fiduciaries to invest in funds with China exposure without violating their fiduciary duty." In addition, the letter alleges that asset managers may be breaching their duty of loyalty to their clients given the Chinese Communist Party's "interference in markets and companies" and the asset managers' "mixed motives" arising from their businesses in China and promotion of Chinese investments.

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