Proskauer

SEC Multi-Class Exemptive Relief for Privately Offered BDCs and Closed-End Funds

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On March 12, 2025, the Securities and Exchange Commission ("SEC") issued a notice on Ares Core Infrastructure Fund's ("Ares") application[1] for multi-class exemptive relief (the "Private Placement Multi-Class Relief").[2] The Private Placement Multi-Class Relief will, for the first time, permit certain continuously offered closed-end management investment companies, including those that elect to be regulated as business development companies ("BDCs," and together with such other closed-end management investment companies contemplated in the application, "Funds"), to issue multiple classes of shares with varying sales loads and asset-based distribution and/or service fees, even if they do not publicly offer their shares. In a deviation from prior precedents, the Private Placement Multi-Class Relief expands the scope of Funds eligible to rely on the relief to include not only Funds that are publicly offered, but also those that are privately placed in reliance on an exemption from registration under the Securities Act of 1933, as amended (the "1933 Act"), such as Rules 506(b) or 506(c) of Regulation D.[3]

Similar to multi-class exemptive orders historically granted to publicly offered regulated funds, Funds that rely on the Private Placement Multi-Class Relief must accept subscriptions for their shares on a continuous basis, at offering prices that are equal to or greater than the net asset value of the relevant share class, and must additionally comply with a number of regulations that do not otherwise by their terms apply to privately offered closed-end investment companies, including Rules 6c-10, 12b-1, 17d-3, 18f-3, 22d-1 and, where applicable, 11a-3 under the Investment Company Act of 1940, as amended (the "1940 Act"), as well as FINRA Rule 2310 (which caps both a Fund's organizational and offering expenses and compensation payable to underwriters, broker-dealers and affiliates). A Fund that wishes to adopt a multi-class structure in which each class is subject to differing service and/or distribution fees would thus, for example, be required to seek shareholder approval of a distribution plan that complies with the applicable 1940 Act regulations (i.e., Rules 12b-1 and 17d-3), notwithstanding that such regulations do not otherwise apply to private BDCs or closed-end funds.

Prior to the SEC's issuance of a notice on Ares' application, a number of Funds had previously applied for similar relief and were subsequently instructed by the SEC to withdraw their applications. Since then, there has been a push from **private BDC and closed-end fund sponsors**, **asset managers** and **industry advocates** to extend **multi-class exemptive relief** to **privately offered Funds.**

The ability to offer multiple share classes should allow privately offered Funds to more easily attract a broader range of investors and offer customized fee structures to better target specific distribution channels, similar to those presently available to their publicly offered counterparts through the exemptive application process. As a result, privately offered Funds should be able to compete on a more equal footing with their publicly offered counterparts. The additional flexibility gained by expanding multi-class relief to privately offered Funds, coupled with the SEC's recent guidance increasing flexibility for private placements conducted pursuant to Rule 506(c) under Regulation D, will also likely accelerate the shift towards Funds utilizing private placement offerings to target private wealth channels. We expect that shift will likely be more pronounced among both current and future non-listed BDCs, given the lack of a state "blue sky" registration process requirement for privately offered BDCs.

Other Observations and Takeaways

- We see the Private Placement Multi-Class Relief having an outsized impact within the non-listed BDC space. Specifically, non-listed BDCs that publicly offer their shares must typically undergo a lengthy and time-consuming state "blue sky" registration process, in addition to the traditional SEC registration process. Historically, most non-listed BDCs opted to follow this publicly offered path for distribution of their shares in order to allow the use of separate share classes for different distribution channels and platforms. With the new Private Placement Multi-Class Relief, we believe that there will likely be a significant shift within the non-listed BDC space towards private placement offerings, which avoids the need for the more cumbersome state "blue sky" registration process. We think this shift will also be accelerated as a result of the SEC's recent move towards providing a clearer pathway to verify an investor's accredited investor status in connection with 506(c) private placement offerings, as described in more detail in our next bullet-point.
- We view the Private Placement Multi-Class Relief as a further step in the SEC's recent push to expand access for Funds that invest in alternative asset classes. Consistent with the shift in policy priorities previously telegraphed by the SEC,[4]

the expansion in the scope of the Private Placement Multi-Class Relief relative to historical multi-class exemptive orders comes on the heels of other significant changes in available SEC staff guidance regarding the private offering regime applicable to regulated funds, including, notably, the recent issuance of no-action relief[5] providing a more streamlined path to verification of investor accreditation under Rule 506(c), an alternative private placement exemption to Rule 506(b) that is comparatively more flexible, insofar as it permits the use of general solicitation for marketing purposes. We see this trend likely continuing in the near term, including with the SEC likely approving a more flexible principles-based approach to co-investment exemptive relief permitting Funds to co-invest alongside certain affiliates. Taken together, we believe that these policy changes reflect a move towards a greater democratization of capital, making it easier for sponsors to launch, market and operate alternative asset-focused Funds alongside existing private fund platforms, while increasing opportunities for individual investors to participate in a broader scope of asset classes that have historically been limited to institutional investors.

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[1] *See* Ares Core Infrastructure Fund et al. (File No. 812-15687), application filed 2/28/2025, available here.

[2] *See* U.S. Securities and Exchange Commission, Notice, File No. 812-15687 (March 12, 2025), available here.

[3] *See* 17 CFR § 230.506(b).

[4] For additional information regarding certain recent remarks by Acting Chair Uyeda on this and other topics at the Florida Bar's 41st Annual Federal Securities Institute and M&A Conference, please refer to our alert, SEC Acting Chair Remarks on Private Capital-Raising and Retail Access to Private Companies.

[5] *See* Latham & Watkins LLP, SEC No-Action Letter (March 12, 2025), available here. The SEC staff confirmed in this letter that, in the SEC staff's view, an issuer could reasonably conclude that it has satisfied the "reasonable steps" requirement under Rule 506(c) by imposing a minimum investment amount of $200,000 (for investors that are natural persons) or $1,000,000 (for investors that are legal entities) in a given private offering for a regulated fund, provided that certain additional written investor representations regarding such investors' accreditation status and the source of financing for this minimum investment amount are provided.

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