

Ropes & Gray's Investment Management Update May – June 2026

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Since our prior [IM Update](#), in separate Alerts, we covered (i) the Supreme Court's decision regarding the scope of Section 47(b) of the 1940 Act, (ii) the SEC announcing its 2026 regulatory agenda, and (iii) the SEC's proposed rule amendments that would modernize the registered offering process for closed-end funds and BDCs. The following are summaries of (with links to) our coverage:

Supreme Court Holds No Implied Private Right of Action Under Section 47(b) of the 1940 Act

On June 11, 2026, in a 6-3 decision authored by Justice Barrett, the Supreme Court issued its much-anticipated decision in *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, holding that Section 47(b) of the 1940 Act does not empower private parties to sue for rescission of contracts that allegedly violate the 1940 Act.

- The ruling eliminates a key mechanism used by activist investors in recent years to bring private enforcement actions under the 1940 Act in response to various defense measures adopted by closed-end funds and their boards.
- The ruling has substantial implications for funds, including registered closed-end funds and BDCs, as it will strengthen anti-takeover defenses, reduce litigation exposure across operations, and provide greater regulatory certainty. A summary of the decision and an analysis of its implications were the subject of a Ropes & Gray Alert: [Supreme Court Holds No Implied Private Right of Action Under Section 47\(b\) of the Investment Company Act](#).

SEC Announces 2026 Regulatory Agenda

On July 3, 2026, the Office of Information and Regulatory Affairs published the semi-annual “Unified Agenda of Federal Regulatory and Deregulatory Actions” of the various federal agencies. The Unified Agenda includes the SEC’s 2026 Agency Rule List as well as the SEC’s current timing estimates. *See* Ropes & Gray Alert: [SEC Announces 2026 Regulatory Agenda](#).

SEC Proposes Expanded Offering Reforms for Closed-End Funds and BDCs

On May 19, 2026, the SEC issued a release (the “Release”) proposing rule and form amendments intended to facilitate capital formation in the public securities markets. If adopted, the Release would represent a significant step in the modernization of the registered offering framework. The Release proposes, among other things, to revise Form S-3 eligibility requirements for operating companies and replace the “well-known seasoned issuer” framework with new issuer categories.

In addition to the Release’s broad-based amendments to the registration and offering process for operating companies, the Release also contains a set of parallel proposals (the “Proposals”) that, if adopted, would extend similar modifications to the registration, communication, and offering process for BDCs and registered closed-end investment companies (“registered CEFs,” and, collectively with BDCs, “Affected Funds”) that register securities on Form N-2. The Proposals are intended to build on amendments the SEC adopted in 2020 that streamlined the registration process for Affected Funds in parity with operating companies. *See* Ropes & Gray Alert: [SEC Proposes Expanded Offering Reforms for Closed-End Funds and BDCs](#) for a summary of and observations on the Release.

The following summarizes additional recent legal developments of note affecting the mutual fund/investment management industry.

SEC Sued Over Institutional Money Market Funds Mandatory Liquidity Fee Rule

On May 1, 2026, Federated Hermes, Inc. and two wholly owned subsidiaries filed suit¹ in the U.S. District Court for the Western District of Pennsylvania challenging the SEC’s mandatory liquidity fee for institutional prime and institutional municipal (tax-exempt) money market funds (“institutional funds”), which the SEC promulgated as part of the 2023 SEC amendments to Rule 2a-7. The complaint alleges that the SEC adopted the fee without adequate notice and comment, failed to substantiate costs and benefits, acted arbitrarily and capriciously, and exceeded its statutory authority under the 1940 Act. If successful, the action could result in vacatur of the mandatory liquidity fee and a permanent injunction against its enforcement.

Background

The plaintiffs are Federated Hermes, Inc., Federated Administrative Services (“FAS”), and Federated Investment Management Company (“FIMCO”). FAS and FIMCO serve as administrator and investment adviser, respectively, to three institutional funds with aggregate net assets of more than \$20 billion.

In December 2021, the SEC proposed amendments to Rule 2a-7 under the 1940 Act, including a swing pricing framework for institutional funds. Swing pricing drew considerable opposition. In 2023, the SEC adopted final amendments to Rule 2a-7 (by a 3-2 vote with Commissioners Peirce and Uyeda dissenting). The adopting release abandoned the proposing release’s swing pricing requirements for institutional funds. Instead, under the amended rule, if an institutional fund has total daily net redemptions

¹ *Federated Hermes, Inc. v. U.S. Securities and Exchange Commission*, Case No. 2:26-cv-00740.

that exceed five percent of the fund's net assets – or such smaller amount of net redemptions as the fund's board determines – the fund must (unless the *de minimis* exception applies) charge a mandatory liquidity fee to all shares that are redeemed at a price computed on that day. The adopting release is described in this Ropes & Gray [Alert](#).

Once the mandatory liquidity fee is triggered, the fund must charge redeeming shareholders a fee reflecting its good faith estimate, supported by data, of the liquidity costs it would incur if it sold a pro rata “vertical slice” of its portfolio. If the fund cannot reasonably estimate these costs, a one-percent default fee applies. The *de minimis* exception excuses the fee when the estimated impact is less than one basis point of gross redemptions. Amended Rule 2a-7 became effective October 2, 2023, with compliance required by October 2, 2024.

Claims

The complaint asserts four counts under the Administrative Procedure Act and the 1940 Act. Because Counts II (Failure to Substantiate Costs and Benefits) and III (Arbitrary and Capricious) overlap substantially, they are discussed together below.

- ***Failure to Provide Adequate Notice and Comment (Count I)***. Plaintiffs contend the mandatory liquidity fee was never proposed for public comment. The December 2021 proposal addressed swing pricing and mentioned a liquidity fee only as one of fifteen rejected alternatives. Neither the vertical slice methodology, the one-percent default fee, nor the one-basis-point *de minimis* exception was disclosed. By adopting the fee in the final rule without re-proposing, plaintiffs argue the SEC failed the “logical outgrowth” test – interested parties could not have reasonably anticipated the final rule from the proposal. Both dissenting Commissioners publicly stated the SEC failed to provide adequate notice.

- ***Failure to Substantiate Costs and Benefits / Arbitrary and Capricious (Counts II & III)***. Plaintiffs challenge the SEC's analytical foundation on related grounds. The SEC acknowledged it lacked fund-specific data on dilution and could not quantify its magnitude. An analysis by the Investment Company Institute, submitted in June 2023, found dilution negligible, yet the SEC discounted this evidence without adequate explanation. On the cost side, the SEC merely assumed the fee would be less costly than swing pricing, the costs of which were themselves never quantified.
- ***Exceeds Statutory Authority (Count IV)***. Plaintiffs assert the mandatory liquidity fee exceeds the SEC's authority under the 1940 Act. Section 6(c) grants exemptive authority to exempt persons from the 1940 Act's requirements, not authority to impose affirmative obligations. Additionally, the plaintiffs assert the 1940 Act's anti-dilution provision, Section 22(a), addresses dilution through pricing methodologies (minimum and maximum prices relative to NAV), not through fees imposed on shareholders. The mandatory liquidity fee, as an assessed fee imposed directly on redeeming shareholders, is substantively distinct from an NAV adjustment and thus falls outside the statutory text.

Relief Sought

Plaintiffs request that the Court enter judgment in their favor and grant declaratory and injunctive relief. They further seek vacatur of the mandatory liquidity fee provision of amended Rule 2a-7 and a permanent injunction prohibiting the SEC from enforcing it. The SEC's motion to dismiss the complaint is due to be filed on August 27, with briefing to be completed by November 3.

SEC Requests Comment on Novel ETFs

On June 30, 2026, the SEC issued a [request for comment](#) (the “Release”) soliciting public input on ETFs seeking to invest in innovative asset classes or engage in novel investment strategies (“Novel ETFs”).² The Release poses questions regarding investment company status, the application of Rule 6c-11 under the 1940 Act, and the registration framework under Rule 485 of the Securities Act. The Release does not propose amended rules but signals the SEC’s intent to evaluate whether the existing regulatory framework adequately addresses Novel ETFs and whether amendments are warranted.

I. Novel ETFs — Scope and Context

The Release defines Novel ETFs as ETFs that seek to provide exposure to innovative asset classes or to employ novel investment strategies. The Release notes that to date, these include crypto assets, commodity-focused instruments, single-stock strategies, heightened use of leverage, blockchain-enabled opportunities, private assets, event contracts, and/or combinations thereof.

The SEC states that market participants have raised questions regarding certain issues associated with Novel ETFs, including whether a Novel ETF qualifies as an “investment company” under the 1940 Act, whether it will operate consistent with Rule 6c-11 and its conditions, and whether the SEC Division of Investment Management staff has sufficient time to effectively review and address legal issues arising from Novel ETF filings that seek automatic effectiveness within prescribed time periods. The Release solicits responses to questions within each of these categories.

II. Investment Company Status

The Release solicits comment on whether Novel ETFs whose principal investment strategy is to invest in assets that are not securities under the 1940 Act (“non-securities”) qualify as “investment companies” under Section 3 of the 1940 Act. Section 3 defines an investment company under Section 3(a)(1)(A)³ (the “Subjective Test”) and under Section 3(a)(1)(C)⁴ (the “Objective Test”).

The Release asks whether a Novel ETF meets the Subjective Test by “holding itself out” as an investment company notwithstanding that its principal strategy is to invest in non-securities, and whether greater clarity is needed. It also asks why a Novel ETF with a principal investment strategy to invest in non-securities would seek to register as an investment company rather than, for example, as an exchange-traded commodity trust or another type of exchange-traded product. Additional questions probe whether the SEC should continue to apply the *Tonopah Mining* factors⁵ for Novel ETFs or consider different or additional factors, and whether a Novel ETF holding shares of wholly owned subsidiaries that are not themselves primarily invested in securities would meet the Subjective Test.

- These questions suggest the SEC may be reconsidering the scope of investment company registration for products principally focused on non-securities assets. A narrowing of the Subjective Test could affect the availability of the registered investment company structure for crypto, commodity, and private asset ETFs.

² The Release follows a May 20, 2026 statement by Chairman Atkins, in which he noted: “Novel products raise novel questions, and I appreciate the willingness fund sponsors have shown in delaying the effectiveness of a number of novel ETFs, including event contract ETFs, while we consider the implications.”

³ Section 3(a)(1)(A) defines an investment company as an issuer that “is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities.”

⁴ Section 3(a)(1)(C) defines an investment company as an issuer that is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer’s total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

⁵ In the Matter of Tonopah Mining Co., 26 S.E.C. 426 (July 21, 1947). For the Subjective Test, the SEC has historically applied the five factors enumerated in *Tonopah Mining*: (i) historical development; (ii) public representations of policy; (iii) activities of officers and directors; (iv) nature of present assets; and (v) sources of present income.

III. Novel ETFs and Rule 6c-11

Rule 6c-11 defines the fundamental structural characteristics of ETFs to support effective arbitrage but does not restrict which investment strategies or asset classes an ETF may pursue. The questions in this section of the Release explore whether Novel ETF assets or strategies present concerns related to (i) the functioning of the ETF arbitrage mechanism, (ii) investor protection, (iii) maintenance of fair, orderly, and efficient markets (including any unique challenges to market surveillance), or (iv) other structural or operational issues. Notably, the Release asks whether Rule 6c-11 should be amended to address these concerns, including through potential minimum holdings in securities, restrictions on the use of certain strategies or investment in certain asset classes, specific diversification requirements, concentration limits, or issuer-specific limits.

The SEC also asks whether steps should be taken to help investors better understand Novel ETF features and what distinguishes them from other ETFs, including whether the use of the term “ETF” or “fund” by non-investment company ETPs creates investor confusion.

- These questions signal a possible expansion of Rule 6c-11’s conditions that could constrain certain Novel ETF strategies or require restructuring of products currently operating under the rule.

IV. Registration and Rule 485 under the Securities Act

The Release also presents operationally significant questions concerning the registration process under Rule 485. Rule 485(a) allows existing investment companies to add new series or make material changes by filing a post-effective amendment to a registration statement that becomes automatically effective in 75 or 60 days. The Release raises a series of questions regarding whether this framework is adequate for Novel ETFs.

A. Timing and Effectiveness Periods

The SEC asks whether the 75-day and 60-day automatic effectiveness periods should be extended for Novel ETFs, whether effectiveness should be automatically tolled if a registrant fails to respond to staff comments within a specified period (*e.g.*, five business days) before effectiveness, and whether Rule 485 should be amended to enable the SEC to delay effectiveness on its own initiative.

The SEC additionally asks whether additional clarity is needed regarding a Novel ETF seeking to become effective before its investment strategy can be implemented (*e.g.*, where an asset class or instrument is not yet available for investment).

- These amendments, if adopted, would directly affect the speed at which sponsors can bring Novel ETFs to market.

B. Early Engagement & Innovation

The SEC asks whether it should consider mechanisms for early engagement for Novel ETFs (*e.g.*, pre-filing consultation or confidential draft registration statements) to permit the SEC staff and sponsors of Novel ETFs to work together on potential issues before the sponsor makes a public filing and whether the SEC should publicly report on these consultations to provide for a measure of accountability in the process. More broadly, the SEC asks whether there are additional amendments to Rule 485(a) that can be made to better support innovation, while protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

C. Competitive Pressures and First-Mover Dynamics

The Release devotes significant attention to competitive dynamics among Novel ETFs. The SEC observes that market participants have raised concerns about competitive pressures that incentivize rapid or successive filings, which could result in rushed or

incomplete filings, ETFs that never launch, or sponsors repurposing unused series to take advantage of shorter waiting periods. Notably, the SEC states that its staff has observed several Novel ETF filings submitted in rapid succession that are “largely identical” and that market participants suggest AI may be “significantly accelerating mimicry.”

In response, the Release asks whether Rule 485(a)(2) filings should remain nonpublic for part of the 75-day period to promote innovation and reduce imitative filings, whether, to encourage filing only fully developed new series, Rule 485(a) should require a fund’s board or authorized signatories specifically to identify each new series in the filing, and whether the SEC should take action with respect to funds that become effective but never launch (*e.g.*, rule amendments that provide that such funds would be automatically deregistered after a defined period). The Release also asks whether the SEC should develop additional mechanisms to address unresolved staff comments (*e.g.*, requiring funds to disclose material unresolved staff comments, similar to the approach used for certain closed-end funds and Form 10-K and Form 20-F filers).

- These questions suggest the SEC may impose confidentiality periods or procedural requirements that would alter the current first-mover dynamic.

D. Material Changes During Review or Pre-Launch

The SEC also asks questions about registrants that make material changes to the investment strategy for a Novel ETF during review or pre-launch. The SEC asks whether Rule 485 should be amended to require a new 75-day or 60-day filing for changes not made in response to SEC staff comments, and whether the rule should provide for automatic suspension or delay of effectiveness for a Novel ETF when a material pre- or at-launch change occurs. The SEC also asks whether it should consider heightened disclosure requirements for Novel ETFs.

- This concept is notable because it would represent a departure from the current self-effectuating registration process and could introduce a form of informal gatekeeping that, depending on implementation, could impede the launch of innovative products.

E. Suspension Authority

Rule 485 allows the SEC to suspend a registrant’s ability to file under Rule 485(b) if it appears the registrant has not complied with the applicable conditions of the rule or to suspend the effective date of a Rule 485(a) filing that is materially incomplete or inaccurate. The Release asks whether the circumstances for suspension should be expanded, whether the SEC should have authority to suspend effectiveness of a specific post-effective amendment (or a particular series within an amendment) after it has become effective, and whether Rule 6c-11 should be conditioned on compliance with filing requirements or reserve the ability to suspend the use of Rule 482 advertisements.

V. Comment Due Date. Comments must be received no later than August 31, 2026.

VI. Observations

The Release indicates a willingness to re-think the regulatory framework for Novel ETFs at a time of significant growth and innovation in the ETF market. The SEC is at an early stage of deliberation and input provided now may inform potential future action. Investment managers and ETF sponsors, especially those developing products involving crypto assets, private assets, event contracts, or other innovative strategies, may wish to consider submitting comments. The Release raises several issues of immediate practical significance on which managers and sponsors may want to comment:

- It would be important to engage with the SEC staff regarding the scope of the definition of a “Novel ETF,” including seeking clarification regarding what the SEC deems to be an “innovative” asset class and a “novel” investment strategy.
- The investment company status questions are existential for sponsors of products principally focused on non-securities assets. If the SEC narrows its interpretation of the Subjective Test, certain products may need to pursue alternative structures.
- Potential new portfolio-level conditions under Rule 6c-11, such as minimum securities holdings, diversification limits, or asset-class restrictions, could require restructuring of certain strategies or limit the categories of assets permissible in a registered ETF.
- The competitive dynamics discussion, including potential confidentiality periods and AI-driven filing concerns, suggests procedural changes that could meaningfully alter first-mover incentives in the ETF industry.
- Extended effectiveness periods, tolling provisions, and SEC-initiated delays could significantly extend, potentially indefinitely, time-to-market for new products. Sponsors should evaluate how these changes could affect product development timelines and competitive positioning. The nature of these SEC inquiries could also have implications for existing ETFs seeking to make changes to their investment programs, including to incorporate “novel” investment strategies and/or asset classes in response to evolving industry practice.
- Expanded post-effectiveness suspension authority and disclosure of unresolved staff comments would introduce new regulatory risk for products already on the market.

SEC and CFTC Joint Request for Comment on Further Definition of “Swap” and “Security-Based Swap” and on Alternative Compliance

On June 18, 2026, the SEC and CFTC (together, the “Commissions”) issued a joint [request for comment](#) (the “Request”) soliciting public input on potential opportunities to update, clarify, and harmonize certain derivatives product definitions and interpretive issues. The Request also solicits comment on potential approaches to enable alternative compliance where products or structures may touch on the regulatory interests of both Commissions. Key areas where comment is solicited include the regulatory treatment of event contracts and innovative products, the definitional boundaries among swaps, security-based swaps, and mixed swaps, the treatment of perpetual contracts and security futures, and the line between excluded instruments (such as notes, bonds, and security forwards) and swaps or security-based swaps. The breadth of the questions posed and the absence of proposed rule text suggest the Commissions are at an early stage of deliberation. Comments must be received no later than August 24, 2026.

SEC Staff Permits BDC to Employ a Novel Seed-Capital Arrangement

On April 16, 2026, the staff of the SEC’s Division of Investment Management issued a no-action [letter](#) (the “Letter”) to Third Point Private Capital Income Fund, a closed-end fund that intends to elect to be regulated as a BDC (the “Fund”).

- The Letter confirms that the SEC staff would not recommend enforcement action under Sections 18(a)(2)(A), (B), and (E) of the 1940 Act, as modified by Section 61(a) of the 1940 Act, if the Fund issues certain preferred shares (the “Seed Shares”) to one or more affiliates of Third Point LLC (“Third Point”) (each, a “Seed Investor”), and subsequently repurchases such Seed Shares pursuant to their terms.

- The Letter also confirms that the SEC staff's no-action position applies equally to any registered closed-end fund subject to Section 18(a).

Background

Section 18(a)(2) provides that a registered closed-end fund may not issue any class of senior security representing stock unless, among other things, (i) immediately after issuance, such class will have an asset coverage of at least 200 percent, (ii) the registered closed-end fund prohibits the declaration of any dividend (except a dividend payable in common stock) or any other distribution where such class does not have asset coverage of at least 200 percent after deducting the amount of such dividend or distribution when declared, and (iii) such class will have complete priority over any other class as to distribution of assets and payment of dividends, which dividends shall be cumulative. Section 61(a) makes Section 18 applicable to a BDC to the same extent as if it were a registered closed-end fund, except as specified therein. The Fund has elected to be subject to the 150 percent asset coverage requirement permitted under Section 61(a)(2) of the 1940 Act instead of the 200 percent asset coverage requirement specified in Section 18(a)(2).

The Fund filed a registration statement on Form 10 to register its common shares of beneficial interest (the "Common Shares") under the Exchange Act. The Fund will conduct a continuous offering of its Common Shares on a private-placement basis. Third Point Private Capital LLC, an affiliated person of Third Point, will serve as the Fund's investment adviser. The Seed Investors collectively intend to subscribe for up to approximately \$240 million in the Fund, consisting of approximately \$15 million in Common Shares and approximately \$225 million in Seed Shares.

In its request letter, the Fund contended that:

- Although the Seed Shares will be designated as a class of preferred shares, they carry no "involuntary liquidation preference" within the meaning of

Section 18(h) over the Fund's Common Shares.

In the event of a Fund liquidation, the Seed Shares would never be entitled to receive more than, and may receive less than, each Common Share.

- Once Seed Shares have been issued, the Fund will be contractually obligated to apply at least 50% of the net proceeds from any subsequent subscriptions for Common Shares made in cash to repurchase any outstanding Seed Shares. This conditional repurchase obligation should not be viewed as the equivalent of a liquidation preference under Section 18(h) as it requires the Fund to repurchase Seed Shares only when, and to the extent that, new capital is raised. Such repurchases are limited to the net proceeds of new subscriptions and do not apply in the event of liquidation.
- The Seed Shares do not raise the types of concerns that prompted Congress to adopt Section 18 of the 1940 Act. The Seed Shares, although designated as a class of preferred shares, do not exhibit the common features of a "preference stock." As long as the distribution rate on the Fund's Common Shares remains above the "floor rate," as defined in the Letter, the Seed Shares will have no claim of priority on earnings, nor require that any unpaid dividends be satisfied before dividends may be declared on the Common Shares. The Seed Shares also do not implicate the underlying policy considerations reflected in Section 1(b) of the 1940 Act (*e.g.*, concerns about excessive borrowing and the issuance of excessive amounts of senior securities, as well as the risks when investment companies operate without adequate capital reserves). The Seed Shares are repurchased on a limited basis only in connection with new capital and impose no ongoing repayment obligation.
- Accordingly, the Seed Shares do not resemble the "preference stock" or "excessive borrowing" that Section 18 was intended to address and are consistent with the broader policies expressed in Section 1(b) of the 1940 Act.

The Staff's Response

Based on these facts and representations, the SEC staff stated that it would not recommend enforcement action under Section 18(a)(2), as modified by Section 61(a), if the Fund issues Seed Shares to Seed Investors, and subsequently repurchases such Seed Shares, as described in the request letter, provided that no BDC or registered closed-end fund may rely on the SEC staff's no-action position if it (i) owns assets, or accepts investments, prior to the filing of its election to be regulated as a BDC or its registration as an investment company under the 1940 Act, as applicable, or (ii) receives assets as part of a reorganization involving another entity at, or around, the time of such election or registration.

Additionally, the SEC staff's position is only available where (i) Seed Investors purchase Seed Shares solely in cash, and (ii) a BDC or registered closed-end fund will not acquire assets from an affiliated person of the BDC or registered closed-end fund or an affiliated person of such an affiliated person until the Seed Shares have been fully repurchased following the BDC or registered closed-end fund's final offering of Seed Shares, except for purchases permitted by Rule 17a-7 or Section 57(f) of the 1940 Act, as applicable.

Observations

While the Letter represents a helpful development for BDCs and registered closed-end funds seeking to raise initial capital through affiliated seed investors, the SEC staff's position is limited to the situations as indicated in the Letter.

SEC Staff Permits Multi-Class BDCs to Rely on FINRA Sales-Charge Cap

On June 4, 2026, the staff of the SEC's Division of Investment Management issued a no-action [letter](#) to Blackstone Private Credit Fund ("BCRED"), Blackstone Private Credit Strategies LLC ("BPCS")

and Blackstone Credit BDC Advisors LLC ("BCBA" and, collectively with BCRED and BPCS, the "Requestors").

- The BCRED no-action letter confirms that the SEC staff would not recommend enforcement action under Sections 18(a)(2), 18(c), 18(i) and 61(a) of the 1940 Act if BCRED relies on its multi-class exemptive order (the "Order")⁶ to issue multiple classes of common shares by complying with Rule 2310 of the FINRA Manual ("FINRA Rule 2310") but without calculating the sales charge cap on a per-share basis (the "Per-Share Cap").
- The BCRED no-action letter also confirms that the SEC staff's no-action position equally applies to a multi-class BDC that may issue shares on a private placement basis and that is subject to the same per-share cap under its exemptive order.

Background

BCRED is a closed-end fund that has elected to be regulated as a BDC under the 1940 Act. BCRED publicly offers its shares on a continuous basis pursuant to an effective registration statement under the Securities Act, and its shares are not listed on a securities exchange. BPCS serves as BCRED's investment adviser, and BCBA serves as BCRED's investment sub-adviser. BCRED relies on the Order to offer multiple classes of shares.

FINRA Rule 2310 applies to unlisted, continuously publicly offered BDCs, like BCRED, because such BDCs' offerings meet the rule's definition of a "direct participation program." FINRA Rule 2310 caps the amount of (i) organization and offering expenses at 15% of gross proceeds, and (ii) all items of compensation from whatever source payable to underwriters, broker-dealers, and affiliates thereof at 10% of gross proceeds (the "FINRA 10% Cap"). Each class of BCRED's shares complies with the FINRA 10% Cap. Multi-class BDCs that issue shares on a

⁶ GSO Asset Management LLC and Blackstone Private Credit Fund, Rel. Nos. IC-34011 (Sept. 14, 2020) (notice) and IC-34044 (Oct. 6, 2020) (order).

private placement basis also must comply with FINRA Rule 2310 and the FINRA 10% Cap under the terms of their orders.⁷

In addition to the FINRA 10% Cap, the application for the Order stated that the Requestors intended “to calculate the sales charge cap on a per Share basis, such that underwriting compensation paid with respect to each individual Share will not exceed 10% of the offering price of such Share.” The Per-Share Cap is not a FINRA requirement but is solely a representation in the application for the Order that imposed a requirement different from and in addition to what FINRA Rule 2310 requires.

The Requestors’ Letter

In the Requestors’ letter, the Requestors represented that the Per-Share Cap introduces substantial additional operational complexity that is not necessary to achieve the investor protection objectives of FINRA Rule 2310. In particular, the Requestors contended:

- Calculating the FINRA 10% Cap and the Per-Share Cap are entirely separate and distinct exercises. The FINRA 10% Cap applies to the overall offering, which covers successive three-year periods (*i.e.*, each “new” registration statement filed under Rules 415(a)(5)-(6) of the Securities Act is a new offering for purposes of applying and tracking the FINRA 10% Cap), and entails tracking underwriting compensation paid as a percentage of gross proceeds — a straightforward calculation. When and if the FINRA 10% Cap is hit for a three-year period within the overall offering, all shares sold in that offering are converted together to a share class that does not pay ongoing underwriting compensation.
- In contrast, compliance with the Per-Share Cap entails tracking underwriting compensation on a more granular level. For BCRED, which conducts monthly sales of shares, tracking the Per-Share Cap is not as simple as merely tracking underwriting compensation with respect to total monthly sales. Rather, compliance with the Per-Share Cap entails tracking underwriting compensation on an account-by-account and lot-by-lot basis across over 170,000 accounts because underwriting compensation and the rate of its accrual can vary based on a variety of factors, such as different upfront commissions, investor participation in the dividend reinvestment plan, and whether the investor has purchased on multiple subscription dates.
- The conversion process to accounts or lots that do not pay ongoing underwriting compensation itself becomes an ongoing operational and logistical hurdle under the Per-Share Cap because accounts or lots convert every month, as opposed to one mass conversion for all shares when and if the FINRA 10% Cap is hit for a given offering period.
- The Per-Share Cap necessitates the creation, distribution, and review of significantly more reporting by BCRED and BCRED’s transfer agent to ensure and confirm compliance on a per-account and per-lot basis each month, and the added transaction volume requires distribution partners to process account or lot conversions that do not pay ongoing underwriting compensation on a more frequent and individualized basis, translating into significantly higher administrative expenses borne by BCRED and its shareholders.
- No similar per-share cap is included in multi-class exemptive orders the SEC has issued to registered closed-end funds (“Multi-Class closed-end funds”). This difference results in a competitive disadvantage for multi-class BDCs relative to Multi-Class closed-end funds, particularly interval funds.
- Adequate investor protections exist without the Per-Share Cap because of (i) the FINRA 10% Cap and (ii) Rule 12b-1 under the 1940 Act, which

⁷ The same representation regarding calculating the sales charge cap on a per-share basis has been included in BDC multi-class exemptive relief applications for privately offered BDCs.

requires, among other things, initial and annual approval by the independent board of trustees for plans of distribution.

The Staff's Response

Based on the facts and representations in the Requestors' letter, the SEC staff stated that it would not recommend enforcement action to the SEC under Sections 18(a)(2), 18(c), 18(i), and 61(a) of the 1940 Act against the Requestors if BCRED relies on the Order by complying with FINRA Rule 2310 but without calculating the Per-Share Cap. The SEC staff's no-action position applies equally to a multi-class BDC that may issue shares on a private placement basis that is subject to the Per-Share Cap under its exemptive order. On the last point, the SEC staff noted that exemptive orders for privately offered BDCs require compliance with FINRA Rule 2310 as if the rule applies to such BDCs.

Observations

- The BCRED no-action letter is a noteworthy development for multi-class BDCs, both publicly offered and privately offered, that rely on exemptive orders requiring a per-share sales charge cap. By confirming that BDCs may comply with FINRA Rule 2310 without separately calculating the Per-Share Cap, the BCRED no-action letter removes a substantial operational burden for BDC sponsors and their distribution partners.
- The relief addresses a meaningful disparity between multi-class BDCs and Multi-Class CEFs. Multi-class exemptive orders for registered closed-end funds have not included a per-share cap, and the BCRED no-action letter effectively eliminates this competitive disadvantage for multi-class BDCs.

REGULATORY PRIORITIES CORNER

The following brief updates exemplify trends and areas of current focus of relevant regulatory authorities.

Effective Date

Inflation Adjustments to the “Qualified Client”

Tests. Rule 205-3(d)(1) under the Advisers Act defines “qualified client.” The effective date of the SEC [order](#) – making inflation adjustments to the dollar-amount thresholds in Rule 205-3(d)(1) – was **June 29, 2026**. The adjustments increased the AUM test from \$1.1 million to \$1.4 million and the net-worth test from \$2.2 million to \$2.7 million (as summarized in a Ropes & Gray [IM Update](#)).

Division of Examinations Publishes Risk Alert Regarding Adviser Conflicts of Interest

On June 9, 2026, the SEC Division of Examinations (the “Division”) published a [Risk Alert](#) titled *Examinations Observations of Investment Adviser Obligations Related to Economic Conflicts of Interest*. The purpose of the Risk Alert is to “assist advisers in developing effective compliance programs and disclosures with respect to economic conflicts of interest” and, consistent with earlier Division Risk Alerts, it is based upon observations by the Division’s staff during examinations of SEC-registered investment advisers. The Risk Alert identified the following conflict-of-interest deficiencies observed in the examinations.

A. Conflicts of Interest Associated with Cash Management Recommendations

The Division staff observed advisers recommending programs in which clients’ uninvested cash was automatically moved into interest-bearing accounts, including accounts held at affiliated parties. Advisers receiving revenue from these recommendations created

economic conflicts of interest that, as fiduciaries, should have been fully and fairly disclosed to clients to obtain informed consent. Key deficiencies identified include:

- **Revenue sharing disclosure failures.** Advisers omitted material information or provided misleading disclosures regarding revenue sharing arrangements with clearing broker-dealers or custodians, including failing to disclose revenue received from custodians based on client cash balances and incentives to recommend sweep vehicles that maximized adviser compensation.
- **Misleading use of “may” language.** Advisers disclosed that they “may” receive revenue from third-party bank deposit sweep programs when they in fact did receive such revenue, rendering the disclosures inadequate.
- **Incomplete fee and expense disclosures.** Advisers failed to disclose that client cash balances were subject to asset-based fees or that fees could result in negative returns on cash holdings.
- **Money market fund share class selection.** Advisers did not disclose that their cash management recommendations were limited to higher-cost money market funds with revenue sharing programs, or that lower-cost share classes of the same funds were available without such arrangements.

B. Conflicts of Interest Associated with Other Revenue Opportunities

The Division staff observed conflicts related to advisers’ selection of mutual fund share classes that paid fees (pursuant to Rule 12b-1) to the adviser, its related entities, or its individual representatives, when lower-cost share classes of the same funds were available to clients. Additional observations include:

- **Mutual fund share class selection disclosures.** Advisers did not make full and fair disclosure regarding economic benefits received from fund share class selection recommendations.
- **Other economic benefits.** Advisers did not provide full and fair disclosure regarding custodial credits, margin loans and credits, and transaction markup fees. In some cases, advisers failed to disclose that affiliated broker-dealers received revenue from interest rate markups on client margin loans, or that advisers received credits from custodial and clearing relationships that would trigger termination fees if ended.
- **Undisclosed additional fees.** Advisers assessed fees and expenses to clients that were not charged by clearing broker-dealers, including marking up the clearing brokers' fees without disclosure.

C. Disclosing Fees and Economic Conflicts of Interest in Form ADV

The Division staff examined advisers' compliance with Form ADV Part 2A brochure disclosure requirements and identified the following deficiencies:

- **Item 10 (Financial Industry Activities and Affiliations).** Advisers did not fully disclose material conflicts of interest created through compensation agreements with affiliates, such as arrangements where an affiliated broker-dealer would benefit from clearing firm revenue generated by advisory clients.
- **Item 12 (Brokerage Practices).** Advisers made disclosures that were inconsistent with other disclosures or were incomplete, including failing to disclose all material facts regarding revenue sharing arrangements with clearing agencies.

D. Fees Deviating from Advisory Agreements and Fee-Related Disclosures

The Division staff observed advisers charging fees inconsistent with their agreements, disclosures, or both. Specific findings include:

Fee calculation inconsistencies:

- Prorating fees for mid-period deposits or withdrawals when agreements and disclosures did not address proration.
- Charging asset-based fees on holdings specifically excluded from billing (*e.g.*, initial cash inflows, fixed income assets).
- Applying incorrect fee rates and failing to household accounts for breakpoint calculations, including not identifying fixed income mutual funds as subject to lower rates.
- Failing to rebate transaction fees despite agreements stating clients would not incur such fees.

Fees for services not provided and failure to refund unearned fees:

- Charging fees for wealth management and advisory services not provided because managing personnel departed and accounts were not reassigned, and charging advisory fees on inactive accounts not receiving supervisory or management services, including accounts clients had requested in writing to close.
- Duplicative billing resulting from internal asset transfers.
- Advisers that did not issue refunds to clients billed in advance who terminated their advisory agreements prior to the end of the billing period, including where clients had not provided written notice seeking refunds upon termination.

E. Compliance Programs Identifying and Addressing Fee-Related Issues

The Division staff observed that many advisers did not adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act, as required by Rule 206(4)-7. Specific weaknesses included:

- **Incomplete billing procedures.** Policies did not fully address all billing arrangements applicable to clients, such as prepaid fees, fee reductions (*e.g.*, householding), and margin on client accounts.
- **Conflicting or unclear documentation.** Compliance policies, client disclosures, and agreements contained conflicting information regarding fees, including schedules or narratives that were inconsistent or overly complicated.
- **Inadequate monitoring controls.** Advisers lacked controls for accurate fee calculations and billing, including failure to (i) monitor the accuracy of all types of client fees assessed, (ii) establish procedures to test for calculation errors, and (iii) evaluate whether rebates and refunds were issued to terminated accounts or validate that fees ceased upon client termination.

SEC Rescinds Policy Regarding Denials in Settled Enforcement Actions

On May 18, 2026, the SEC issued a [final rule](#) rescinding Rule 202.5(e) of its rules of informal procedure (the “Rule”),⁸ which had been in effect since 1972. The rescission eliminates the SEC’s longstanding policy that conditioned settlement of enforcement actions in which a sanction is imposed on the defendant’s or respondent’s agreement not to publicly deny the allegations in the complaint or administrative order.

- Prior to the Rule’s rescission, the SEC would not agree to settle an enforcement action on a “no-deny” basis unless the settling party also agreed to a contractual obligation not to make any public statement denying, directly or indirectly, the allegations in the complaint or order, or creating the impression that the complaint was without factual basis.

- With the rescission of the Rule, the SEC will no longer require these no-deny provisions as a precondition to settlement.⁹

Prospective Implications. Because the Rule bound the staff of the Division of Enforcement (“Enforcement”) in settlement negotiations, the Rule’s rescission permits Enforcement staff to negotiate and recommend settlements without insisting on a no-deny provision. Following the rescission, the SEC may accept settlement offers from defendants and respondents who would otherwise have been unwilling to agree to a no-deny provision. This should expand the range of possible settlements negotiated in SEC enforcement actions.

- Nonetheless, the Rule’s rescission does not affect the SEC’s discretion to negotiate for admissions as part of a settlement. In cases involving parallel criminal proceedings in which a defendant has pleaded or is expected to plead guilty, or has been convicted, the SEC may continue to address admissions and denials in settlement agreements to ensure consistency between the SEC settlement and the resolution of the parallel matter.

Retroactive Applications. In addition to rescinding the Rule, the SEC announced that it will not enforce existing no-deny provisions in previously entered settlements. If a defendant or respondent previously agreed to a no-deny provision, and that defendant subsequently breaches the provision, the SEC will not seek to reopen the otherwise settled case, will not ask a district court to vacate the settlement, and will not seek to reopen an adjudicatory proceeding.

Effective Date. The Rule was rescinded effective May 21, 2026, when the final rule was published in the *Federal Register*.

⁸ 17 C.F.R. § 202.5(e).

⁹ Settlements can include entry into consent judgments in district court and the acceptance of settlement offers in an order issued in an SEC administrative adjudication.

Staff Statement Regarding Pooled Employer Plans

On May 4, 2026, the staff of the Division of Investment Management issued a [statement](#) (the “Statement”) providing its views regarding the applicability of (i) the “single trust exclusion” in Section 3(c)(11) of the 1940 Act to pooled employer plans, and (ii) Rule 180 under the Securities Act to interests in collective investment trusts (“CITs”) maintained by a bank and issued to those pooled employer plans that cover self-employed individuals.

- Pooled employer plans (“PEPs”) are a type of defined contribution retirement plan created by Congress under the Setting Every Community Up for Retirement Enhancement Act of 2019 (the “SECURE Act”).
- PEPs permit multiple, unrelated employers to join a single retirement plan and offer retirement benefits to their employees through the plan, subject to the requirements in ERISA and the Internal Revenue Code (the “IRC”). Different types of employers may participate in a PEP, including employers with one or more employees that are “self-employed individuals” as defined in Section 401(c)(1) of the IRC.

Applicability of the “Single Trust Exclusion” in Section 3(c)(11) to PEPs. Employee benefit plans often rely on the exclusion from the definition of “investment company” in Section 3(c)(11) of the 1940 Act for “[a]ny employees . . . profit-sharing trust which meets the requirements for qualification under section 401 of [the IRC],” commonly referred to as the “single trust exclusion.”

Section 3(a)(2) of the Securities Act includes a similar exemption under the Securities Act for interests in what are commonly referred to as “single trusts.” Historically, the staffs of the Divisions of Investment Management and Corporation Finance interpreted the single trust provisions in both statutes as referring to

(i) a trust fund for employees of a single employer, (ii) a trust fund for employees of employers so closely related as to be regarded as a single employer (*e.g.*, a parent and its subsidiaries), or (iii) a trust fund established and controlled by employers and/or a union representing the employees of such employers.

- PEPs do not fall into any of these categories because a PEP is typically structured as a trust fund for employees of multiple, unrelated employers.
- The Statement emphasizes that Congress enacted the SECURE Act for, among other things, removing legal barriers preventing the broader use of multiple employer plans. In particular, Congress amended ERISA and the IRC to treat PEPs as single employer plans for purposes of those statutes.

Accordingly, the Statement notes, the SEC staff would not object if a PEP treats itself as a single employer plan for purposes of the 1940 Act and relies on the single trust exclusion from registration as an investment company in Section 3(c)(11), provided that the PEP (i) is subject to ERISA, and (ii) meets all of the requirements of the relevant section of the IRC referenced in Section 3(c)(11) of the 1940 Act.

Applicability of Rule 180 to Interests in CITs Issued to Certain PEPs. PEPs may offer CITs as investment options to employers participating in the plan and their employees. CITs typically do not register the offer and sale of their interests under Section 5 of the Securities Act in reliance on the exemption in Section 3(a)(2) of the Securities Act. However, CITs that accept assets from plans covering “self-employed individuals,” as defined in Section 401(c)(1) of the IRC, cannot rely on this exemption because Section 3(a)(2) exempts from the Securities Act’s registration requirements interests issued in connection with certain qualified employee benefit plans. Section 3(a)(2) also does not apply to interests in plans covering self-employed individuals, as defined in the IRC, or to interests in CITs and separate accounts that fund such plans. Consequently, CITs that accept such assets may

seek to rely on Rule 180 under the Securities Act for an exemption from registering their interests under Section 5.

Rule 180 (17 CFR § 230.180) exempts from Securities Act registration any interest or participation in a CIT issued to an employee benefit plan that covers self-employed individuals, provided that the plan and issuer meet the criteria set forth in the rule. Among other criteria, Rule 180(a)(2) requires that “[t]he plan covers only employees of a single employer or employees of interrelated partnerships.” In addition, Rule 180(a)(3) generally requires that the issuer have reasonable grounds to believe that the employer has (or obtains advice from a certain person or entity reflecting) “knowledge and experience in financial and business matters” so the interests of the employer and its employees are adequately represented.

The Statement reports that the SEC staff is aware that sponsors of CITs have interpreted Rule 180 as being unavailable to interests issued to PEPs that cover self-employed individuals because such plans cover multiple, unrelated employers, which is seemingly inconsistent with the requirement in Rule 180(a)(2), and CITs are uncertain as to how they can satisfy the rule’s sophistication requirement with respect to these plans. As a result, the Statement notes, (i) PEPs covering self-employed individuals generally do

not have access to investments in CITs, and (ii) this interpretation may cause PEPs to exclude employers with self-employed individuals from joining the plan to retain the PEP’s ability to include CITs as plan investment options.

Citing the SECURE Act’s intent to expand the ability of small employers, including self-employed individuals, to participate in PEPs, the Statement notes that the SEC staff believes it is reasonable to treat PEPs as single employer plans for purposes of Rule 180(a)(2). The Statement reports that the SEC staff would not object if a CIT issues interests to a PEP that covers self-employed persons without registering the offer and sale of the CIT’s interests under Section 5 of the Securities Act in reliance on Rule 180, provided that the plan (i) is subject to ERISA, and (ii) the issuance meets all of the requirements in Rule 180(a)(1) and (a)(3). The Statement also notes that ERISA requires the pooled plan provider to provide most of the administrative and fiduciary responsibilities with respect to that plan, effectively assuming the role of the employer. However, the SEC staff takes the view that a CIT may apply the rule’s sophistication requirement with respect to the plan’s pooled plan provider, rather than any employer, to confirm that the provider is able to adequately represent the interests of plan participants.

ROPES & GRAY ALERTS AND PODCASTS SINCE OUR March – April Update

[Rewriting the Rulebook: CFTC Proposes Rule Changes for Prediction Market Contracts Against Public Policy](#)

June 16, 2026

On June 10, 2026, the Commodity Futures Trading Commission published a Notice of Proposed Rulemaking titled “Prediction Markets; Public Interest Determinations,” proposing amendments to 17 C.F.R., Part 40 (“Rule 40.11”) governing the review and permissibility of event contract derivatives listed on CFTC-registered prediction markets (the “Proposed Rule”). The Proposed Rule would establish a three-step analytical framework for evaluating whether event contracts “involve” unlawful activity, terrorism, assassination, war, or gaming, thus warranting heightened scrutiny, and, if so, whether they are contrary to the public interest. If adopted, the amended rule would represent the most comprehensive federal regulatory framework for prediction markets to date. Comments on the Proposed Rule are due on July 27, 2026.

[Insights from Ropes & Gray’s 2026 Credit Funds Forum](#)

June 3, 2026

Ropes & Gray hosted the 2026 Credit Funds Forum on May 20 in New York, bringing together over 160 credit professionals to discuss current trends and the outlook for the credit market. The forum featured panels on a variety of topics, including distress and restructuring, developments in retail alternatives, regulatory updates, new fund products, and more. This Alert contains some key takeaways from the panels.

* * *

If you would like to learn more about the developments in this Update, please contact your usual Ropes & Gray attorney contacts.

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