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CONSECUTIVE PRIVATE AND PUBLIC OFFERINGS FOR REGISTERED FUNDS

For registered investment companies seeking to raise capital, the author suggests a little known approach: consecutive private and public offerings of shares. He discusses the legal framework for this approach, focusing on the SEC guidance on integration and 1940 Act-only registration requirements. He then turns to several historical examples of such offerings and closes with a discussion of some of their benefits.

By Christopher D. Carlson *

This article discusses an alternative method of capital raising for registered investment companies ("funds") that historically has been largely overlooked: a private offering followed by a public offering of shares. After providing an overview of the relevant legal framework (primarily, SEC guidance on integration of private and public offerings under the Securities Act of 1933 ("1933 Act") and the rules on registration under the Investment Company Act of 1940 ("1940 Act")), it summarizes the limited historical use by funds of consecutive private and public offerings over the past 10 years, and relevant details about those offerings based on a review of public filings. The article closes with a discussion of the potential benefits of this method of capital raising for funds.

For purposes of this article, "consecutive" offerings are those where the fund conducted a private placement of its shares before filing a registration statement under the 1933 Act for additional shares, and continued offering the same or a converted class of the fund under the 1933 Act registration statement after it was declared effective. The historical examples discussed below focus on funds that: (1) have raised initial capital by filing an initial registration statement on Form N-1A or Form N-2 (the registration statement forms for open-end funds and closed-end funds, respectively) under the 1940 Act only; (2) after a period of time, filed a Form N-1A or Form N-2 registration statement under the 1933 Act; and (3) currently have an effective registration statement under the 1933 Act. The examples were taken from a review of public SEC filings by funds after January 1, 2009 through December 31, 2018, and whose registration statements under the 1933 Act were declared effective on or before December 31, 2018. Offerings by funds that have deregistered or withdrawn their registration statements, business development companies, and new funds that used a 1940 Act-only registration statement filing to facilitate special initial capitalization transactions are excluded from this historical analysis.

OVERVIEW OF THE RELEVANT LEGAL FRAMEWORK

SEC Guidance on Integration

A fund that conducts a private offering followed by a registered offering raises the issue of whether the two offerings should be "integrated" and considered part of the same offering (and would thus violate Section 5 of the 1933 Act because the integrated offering was not made under an effective registration statement or

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complied with an available exemption).[1] The "integration" doctrine was developed in 1933 to prevent issuers from dividing a securities offering that would otherwise not be permissible as a whole into parts that are separately consistent with available exemptions.[2] The SEC has provided various exemptions to the integration doctrine in rules and interpretations under the 1933 Act over time. Regulation D under the 1933 Act contains a bright-line rule on non-integration for serial private placements if an issuer conducts a private offering in reliance on Regulation D, and does not make any offers or sales of similar securities for six months after the last sale is made. Rule 502(a) of Regulation D provides issuers with a list of factors that would be considered as part of a facts and circumstances analysis in other circumstances. These factors are the same as those historically used by the SEC in analyzing integration issues more generally.[3] The factors specified in Rule 502(a) are: (1) whether the sales are part of a single plan of financing; (2) whether the sales involve issuance of the same class of securities; (3) whether the sales have been made at or about the same time; (4) whether the same type of consideration is being received; and (5) whether the sales are made for the same general purpose (collectively, the "502(a) Integration Factors").

In addition, Rule 152 provides a safe harbor for transactions that fall within the private offering exemption in Section 4(a)(2) of the 1933 Act if an issuer begins a private offering, then decides to make a public offering or file a registration statement after the exempt transactions were made. Rule 155 provides an exemption for "abandoned offerings," such as a private offering followed by a registered offering, which requires, among other things, that no securities have been sold in the private offering. In a 2007 release proposing revisions to Regulation D ("Release 8828"), the SEC provided an interpretative framework that applies to concurrent private-public offerings in lieu of the factors listed in Rule 502(a) of Regulation D.[4]

Under Release 8828, the integration analysis generally turns on whether there was a complete private placement offering under Section 4(a)(2) of the 1933 Act that complied with the exemption in the first instance.[5] Release 8828 also clarified that an issuer can contemplate a public offering while making a private offering without integration concerns, which is consistent with prior SEC staff interpretive guidance that found no integration of separate offerings in factual situations where a public offering was planned before the issuer had started a private offering in a two-step private-public offering process.[6] The SEC provides certain hypothetical examples in Release 8828 of potential integration scenarios that illustrate whether an investor became interested in the private offering through the publicly filed registration statement is a facts and circumstances determination. If prospective private placement investors became interested in the private offering through substantive pre-existing relationships with the issuer or other means that did not involve general solicitation, the private placement would not be invalidated because the registration statement had been filed, and could continue while the public offering is in

[1] Section 5 of the 1933 Act prohibits any person from selling a security or delivering a security after sale using means of interstate commerce unless the security has an effective registration statement.

[2] *See, e.g.,* Rel. No. 10649 (June 18, 2019), 84 Fed. Reg. 30460 (June 26, 2019) (Section III) (the "2019 Private Offering Concept Release"); Rel. No. 7943 (Jan. 26, 2001), 66 Fed. Reg. 8887 (Feb. 5, 2001) at 8888 (Section II.A.).

[3] Rel. No. 7943 (Jan. 26, 2001), 66 Fed. Reg. 8887 at 8888, nn. 19 – 20 and accompanying text.

[4] Rel. No. 33-8828 (2007), 72 Fed. Reg. 45116. *See also* SEC Compliance and Disclosure Interpretations, Securities Act Sections: Question 139.25 (Nov. 26, 2008) (stating that the guidance in Release 8828 should be used to analyze potential integration issues for concurrent private and public offerings).

[5] Rel. No. 33-8828 (2007), 72 Fed. Reg. 45116 at 45129 (Section II.C.).

[6] *Quad City Holdings, Inc.,* Apr. 9, 1993 (staff found no integration for contemplated consecutive private placement and public offering where the private offering was intended to fund the incorporation, organization, and regulatory applications of a new bank, and to provide initial investors additional consideration to compensate them for the risk that the new bank's business plan may not succeed).

registration.[7] By contrast, if an issuer sold securities to an investor who became interested in the private offering because of the registration statement, this would foreclose the use of the private offering exemption for that offering. Release 8828 also cautions in a footnote that the guidance contained therein does not mean that the SEC or a court could not find a violation of Section 5 of the 1933 Act if an issuer continues an incomplete exempt offering through a registered offering.[8] This is distinct from a situation where an issuer conducts an exempt offering that is "abandoned" (because no securities have been sold), which can be followed by a registered offering in the circumstances described in Rule 155 of the 1933 Act.[9]

This guidance in Release 8828 thus fills a gap within the scope of exemptions in the integration doctrine between a private offering followed by a public offering where no securities are sold in the private offering (Rule 155) and a completed private offering, where the issuer subsequently decides to file a registration statement for a public offering (Rule 152). There is a risk that the relief provided by Release 8828 would not be available if a fund makes an "incomplete" private offering that is continued publicly. In order to mitigate this risk, funds should look to the 502(a) Integration Factors noted above and relevant no-action letter guidance.[10]

The most pertinent factors from Rule 502(a) of Regulation D in the fund context are items (1) and (2) of the 502(a) Integration Factors noted above (whether the sales are part of a single plan of financing and whether the sales involve issuance of the same class of securities, respectively). In most situations, the consideration received by a fund and the general purpose for the use of proceeds (items (4) and (5) of the 502(a) Integration Factors) would be the same in both private and public offerings, as funds generally only issue shares for cash and raise equity to pursue their investment objectives and strategies. Because Release 8828 permits concurrent exempt and registered offerings, issuers relying on this guidance would be expected to make private and public sales at or about the same time, which means that item (3) of the 502(a) Integration Factors is not useful in distinguishing "artificially" separated offerings.

The examples discussed below provide confirmation of the above analysis, to the extent possible in public disclosures, regarding how Release 8828 can be applied to consecutive private-public offerings in the fund context. In the examples cited below, two of the funds changed their class or fee structure in the public offering compared to the securities that were offered in the private offering. It is not clear from public filings whether these funds differed in their specific financing plans, but this disclosure is not typical in fund registration statements generally. To the extent that the issue highlighted in Release 8828 regarding integration of incomplete offerings was considered, the issuer's specific financing plans for the private and public offerings may have been documented in other ways.

1940 Act-Only Registration Requirements

Both open- and closed-end funds initially register by filing a notification of registration on Form N-8A with the SEC prior to filing a registration statement on Form N-1A or Form N-2 with the SEC. Under Section 8(a) of the 1940 Act, a fund is deemed registered under the 1940 Act once the Form N-8A is filed. Within three months after the Form N-8A is filed, a fund is required to file a registration statement on Form N-1A or Form N-2 that includes information about the fund, its investment policies and strategies, and costs.[11] This 1940 Act-only registration statement on Form N-1A or Form N-2 is immediately effective.

Because the 1940 Act-only registration statement is effective upon filing, all material arrangements and requirements of the form and related rules (other than those that are required under the 1933 Act and Regulation C), such as information about the advisory contract, the composition of the fund's board, and the identity of its service providers, must be complete prior

[7] *Id.*

[8] Rel. No. 33-8828 (2007), 72 Fed. Reg. 45116 at 45129, n. 122.

[9] *Id.*

[10] *See, e.g., Verticom Inc.*, Feb. 12, 1986 (staff found no integration for a planned public offering following a completed private placement for a start-up venture capital company where the financing plans and general purpose of the private and public offerings were distinct) and *Quad City Holdings, Inc.*, *supra* note 6. The 2019 Private Offering Concept Release (cited in note 2, above) discussed Release 8828 and other integration analyses promulgated by the SEC in the context of soliciting comment on potential future action to harmonize or simplify the current integration frameworks that apply to various types of offerings, which may supersede or modify the framework contained in Release 8828. If Release 8828 is modified or superseded, the analysis and discussion in this article of how consecutive private-public offerings can be used by funds may no longer be accurate.

[11] Section 8(b) of and Rule 8b-5 under the 1940 Act.

to filing. This requires that, prior to filing its registration statement on Form N-1A or Form N-2, the fund hold an organizational meeting and engage service providers necessary for the fund to commence operations.

Specific instructions for the form and content of registration statements include the rules under Section 8(b) of the 1940 Act (Rules 8b-1 through 8b-32) in lieu of the requirements under Regulation C. The instructions for the facing sheet and General Instruction G.3. of Form N-2 and General Instruction B.2.(b) of Form N-1A provide the items that can be omitted for a 1940 Act-only registration statement filing. A fund should carefully consider whether to include items that otherwise could be omitted under these instructions from the prospectus (such as the fee table) to provide all material information to investors to address liability concerns under federal and state securities laws and preserve consistency between the private and public offering materials.

In addition, because the initial seed capital requirement in the 1940 Act only applies to public offerings, if the fund's registration statement filing is made before it has assets and commences operations, initial 1940 Act-only registration statements do not require seed financial statements or an audit opinion.[12] Audited financials showing assets that meet the $100,000 net worth requirement will be needed before the 1933 Act registration statement is declared effective.

Typically for new registration statements (including 1940 Act-only registration statements), the SEC staff provides comments in 30 days. Although changes in response to SEC comments are not mandatory unless they relate to a material omission, a fund should consider or address the comments and provide responses for non-material items, as the public offering filing will require acceleration, and the SEC staff can delay this action until prior comments have been resolved.

This article assumes familiarity with and does not discuss the legal framework that generally applies for fund registration statements filed under the 1933 Act. In practice, the registration process for a fund conducting consecutive private and public offerings will proceed from the point in time when the 1933 Act registration statement is filed in the same way as a new fund initially conducting a public offering, except that most items (other than seed financial statements) required in a1933 Act registration statement will have already been completed or prepared.

[12] Section 14(a) of the 1940 Act.

HISTORICAL USES OF CONSECUTIVE PRIVATE AND PUBLIC OFFERINGS IN THE FUND CONTEXT

Scope

The examples discussed below are the results of a search of public SEC filings by funds from January 1, 2009 through December 31, 2018, whose registration statements under the 1933 Act were declared effective on or before December 31, 2018. As noted in the introduction, the focus of this search was for funds that: (1) have raised initial capital by filing an initial registration statement on Form N-1A or Form N-2 under the 1940 Act only; (2) after a period of time, filed a Form N-1A or Form N-2 registration statement under the 1933 Act; and (3) currently have an effective registration statement under the 1933 Act. Few funds or groups of funds meet these criteria, but there are at least three examples: AMG Pantheon Fund, LLC (formerly, AMG Pantheon Private Equity Fund) (the "AMG Feeder Fund"), Franklin Pelagos Commodities Strategy Fund (the "Franklin Commodity Fund"), a series of Franklin Alternative Strategies Funds ("FASF"), and Grosvenor Registered Multi-Strategy Fund (TI 1), LLC (the "TI 1 Fund") and Grosvenor Registered Multi-Strategy Fund (TI 2), LLC (the "TI 2 Fund"). These examples are discussed below, including details pertinent to the integration analysis to the extent available in public filings.

Examples of Consecutive Private and Public Offerings

AMG Feeder Fund. The AMG Feeder Fund is a closed-end feeder fund that invests all of its assets in AMG Pantheon Master Fund, LLC (the "AMG Master Fund"). The AMG Master Fund is also a closed-end fund whose strategy is to make private equity fund investments and co-investments.[13] The AMG Feeder Fund commenced a private offering to accredited investors relying on Rule 506(b) of Regulation D under a 1940 Act-only registration statement on Form N-2 on October 1, 2014 with a single class of shares (Advisory Class Units).[14] The AMG Feeder Fund then commenced a public offering under an effective registration statement dated October 27, 2015, following the

[13] AMG PANTHEON FUND, LLC PROSPECTUS (Oct. 27, 2015) ("AMG Feeder Prospectus").

[14] AMG PANTHEON PRIVATE EQUITY FUND, LLC CONFIDENTIAL PRIVATE PLACEMENT MEMORANDUM 1 (Jul. 11, 2014) ("AMG Feeder PPM") and AMG Pantheon Private Equity Fund, LLC Notice of Exempt Offering of Securities (Form D) (Oct. 8, 2014).

conversion on October 1, 2015 of the Advisory Class Units into "Institutional Plus Class Units."

In the transition to a public offering, the AMG Feeder Fund's class and fee structure materially changed, which suggests an intention to meaningfully distinguish the securities offered in the private offering compared to the public offering. While the AMG Feeder Fund's public filings do not explicitly provide a rationale for these changes, they nonetheless provide a relevant data point for one of the most important 502(a) Integration Factors (factor (2), regarding whether the offerings are for the same class of shares discussed above) to substantiate why the offerings should not be integrated. For example, in the private offering, the Advisory Class Units had a minimum investment of $50,000, paid a management fee of 1.25%, and had total and net expense ratios of 5.82% and 3.59%, respectively.[15] The shares were also subject to an expense cap of 2.00%, subject to exclusions (such as the fees of underlying private equity funds). For the public offering, Institutional Plus Class Units had a minimum investment of $25,000,000, paid a management fee of 0.70% (consistent with other classes of the AMG Feeder Fund), and had total and net expense ratios of 3.29% and 2.79%, respectively. The shares were subject to a different expense cap of 1.45%, which was subject to the same exclusions as the cap for the Institutional Plus Class Units pre-conversion.[16]

Franklin Commodity Fund. Franklin Commodity Fund is a series of FASF, an open-end fund organized as a series trust.[17] Franklin Commodity Fund seeks to provide total return through a fundamental and quantitative investment process that invests in commodity-linked derivative instruments and U.S. Government securities and other fixed income securities. Franklin Commodity Fund filed an amended offering circular dated February 23, 2012 to commence a private offering under Section 4(a)(2) of the 1933 Act to accredited investors as defined in Regulation D.[18] The Franklin Commodity Fund filed a post-effective amendment to FASF's registration statement under the 1933 Act to commence a public offering on December 31, 2013.[19] The Franklin Commodity Fund was initially registered only under the 1940 Act to privately offer its shares only to other Franklin Templeton mutual funds.[20]

Similar to the AMG Feeder Fund's offering, the Franklin Commodity Fund's fee and class structure were also materially changed in the transition to a public offering, which is relevant for factor (2) discussed above, and provides support for why the separate offerings should not be integrated. Specifically, Franklin Commodity Fund's investors in the private offering paid a management fee of 0.65% and were subject to an overall expense cap of 1.10%. When the Franklin Commodity Fund commenced a public offering, the initial class of shares that were privately offered were redesignated as Advisor Class shares, the management fee increased from 0.65% to 0.85%, and the expense cap was lowered to 0.95%.[21]

TI 1 Fund and TI 2 Fund. The TI 1 Fund and TI 2 Fund were registered under the 1940 Act on January 1, 2010 and March 29, 2010, respectively, and commenced a private offering under Rule 506(b) of Regulation D in May 2010 and July 2010, respectively.[22] Both the TI 1 Fund and the TI 2 Fund are closed-end funds that invest in the Grosvenor Registered Multi-Strategy Master Fund, LLC, a closed-end fund that employs a multi-manager investment strategy and invests in underlying funds whose investment managers employ non-traditional investment strategies that are expected to be non-correlated with broad market indices and each other. On August 16, 2013, the TI 1 Fund and TI 2 Fund each had an effective registration statement for a public

[15] AMG Feeder PPM, *supra* note 15, at p. 27.

[16] AMG Feeder Prospectus, *supra* note 14, at pp. 31–34.

[17] Franklin Alternative Strategies Funds, Amended and Restated Agreement and Declaration of Trust of Franklin Alternative Strategies Funds (Ex. A to Form 485BPOS) (May 17, 2018).

[18] FRANKLIN PELAGOS COMMODITIES STRATEGY FUND OFFERING CIRCULAR (Feb. 23, 2012) (the "Franklin Commodity PPM").

[19] FRANKLIN PELAGOS COMMODITIES STRATEGY FUND PROSPECTUS (Dec. 31, 2013) (the "Franklin Commodity Prospectus").

[20] *Id.*

[21] Franklin Commodity PPM, *supra* note 19, and Franklin Pelagos Commodities Strategy Fund Annual Report for the period ended May 31, 2012 (Form N-CSR) (Jul. 30, 2012).

[22] Grosvenor Registered Multi-Strategy Fund (TI 1) Registration Statement (Form N-2) (Mar. 29, 2010); Grosvenor Registered Multi-Strategy Fund (TI 1) Notice of Exempt Offering (Form D) (Nov. 29, 2010); Grosvenor Registered Multi-Strategy Fund (TI 2), LLC Registration Statement (Form N-2) (March 29, 2010) and Grosvenor Registered Multi-Strategy Fund (TI 2), LLC Notice of Exempt Offering (Form D) (Nov. 29, 2010). The Form D filings reference Rule 506 of Regulation D before it was amended to implement a provision of the Jumpstart Our Business Startups Act. *See Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings,* Rel. No. 33-9415 (July 10, 2013).

offering of its shares.[23] For reasons that are unclear from public filings, the management fees for both the TI 1 Fund and TI 2 Fund remained the same upon the commencement of the public offerings.

BENEFITS OF CONSECUTIVE PRIVATE-PUBLIC OFFERINGS FOR FUNDS

Consecutive private and public offerings for funds can have the following potential benefits compared with a typical launch via a single public registration: (1) tailored terms for initial "seed" investors; (2) lack of a regulatory net worth and seed audit requirement prior to the initial offering of shares; (3) easier transition from a private offering for a pooled investment vehicle that relies on the exception from the definition of "investment company" contained in Sections 3(c)(1) or 3(c)(7) of the 1940 Act ("private fund") to public fund registration; and (4) time saved in the registration process prior to launching privately and publicly. These are discussed in more detail below.

Tailored Terms for Initial "Seed" Investors

Section 18 of the 1940 Act generally prohibits funds from issuing a class of "senior securities," which may take the form of equity or debt. In the case of equity, a senior security is defined as "stock of a class having priority over any other class as to distribution of assets or payment of dividends."[24] Shares of a fund that pay lower fees compared to other shares would be paid a greater portion of any dividend and would therefore violate this provision.[25] Although common in the private fund industry, "side letters" whereby certain investors agree with the manager to pay lower management fees or less expenses than other investors in a fund, would be inconsistent with Section 18. Open-end funds can rely on an exemptive rule (Rule 18f-3 under the 1940 Act) and closed-end funds can obtain individual exemptive relief that permits multiple share classes that have different class-specific expenses, but Sections 18(a)(2) (for closed-end funds) and 18(f)(1) (for open-end funds) of the 1940 Act would prohibit intra-class differences.

By offering shares in consecutive private and public offerings, a fund could give initial investors in the private offering an opportunity to invest with lower fund-level expenses (such as management fees) to compensate them for the risk that the fund may not perform well or achieve scale. This would be consistent with Section 18 if the change in terms upon the transition to the public offering takes effect for all shareholders at the same time, so there would not be an existing class having priority to dividends over another class (except to the extent that would otherwise be permitted by Rule 18f-3 or an exemptive order providing similar treatment for closed-end funds). This could encourage asset managers to make more strategies available for fund investors by providing a potential source of outside capital from investors that are willing to take a risk that a fund may not be viable or perform well.

As described above, the relevant sample of funds that have used consecutive private and public offerings appear to have ignored this potential benefit. Fund-level expenses, such as management fees, were in two cases lower for the public offering and in one case were the same.

Avoidance of Regulatory Net Worth and Seed Audit Requirements Prior to Initial Offering of Shares

As noted above, Section 14(a) of the 1940 Act requires a fund, before making a public offering of its securities, to have a net worth of at least $100,000, to have previously made a public offering with a net worth of $100,000 or to effectively have an escrow of $100,000 from a small circle of investors. Form N-1A and Form N-2 require audited balance sheets prepared in accordance with Regulation S-X under the 1933 Act before a fund's registration statement under the 1933 Act can be declared effective.[26] By privately offering its securities before a public offering, a fund can avoid the requirement to have a $100,000 net worth prior to initially offering its shares and to have a seed audit for which the fund's auditors would charge a separate fee. The fund would need to raise enough capital during its private offering to meet the $100,000 net worth requirement prior to launching its public offering.

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[23] GROSVENOR REGISTERED MULTI-STRATEGY FUND (TI 1) PROSPECTUS (Aug. 16, 2013) and GROSVENOR REGISTERED MULTI-STRATEGY FUND (TI 2), LLC PROSPECTUS (Aug. 16, 2013).

[24] Section 18(g) of the 1940 Act.

[25] Registered closed-end funds are permitted by Section 18(a)(2) of the 1940 Act to issue a single class of senior security that is stock in the form of preferred equity that has certain rights. Preferred equity is generally issued by closed-end funds to obtain leverage for investment purposes.

[26] Item 27 of Form N-1A and Item 24 of Form N-2.

Potential Time Savings in the Registration Process Prior to Launch and in the Public Offering

A fund conducting consecutive private-public offerings will likely spend less time responding to SEC staff comments during the registration process for the private offering, which will save time prior to the launch of the private offering. This is because a 1940 Act-only registration on Form N-1A or Form N-2 typically only involves one round of SEC staff comments, while a registration statement for a fund's initial offering under the 1933 Act and the 1940 Act often involves multiple rounds of comments. Thus, addressing staff comments on disclosures in the context of the 1940 Act-only registration statement is likely to save time prior to launch compared with the time required for an initial public registration statement to become effective. It will also save time in the subsequent public offering, since SEC staff comments on the disclosures will to some extent at least have been addressed in the private offering.

Easier Transition from Private Fund to Public Fund Registration

Private funds have converted to public funds through shell reorganizations and other ways, and are able to include prior performance of the private fund in the fund's prospectus, provided relevant SEC staff interpretative guidance is complied with.[27] The SEC disclosure review staff has imposed requirements in addition to what is contemplated by applicable interpretative guidance, including a requirement that the fund's prospectus contains the financial statements of the private fund that were prepared in compliance with Regulation S-X.[28] Because a fund using consecutive private and public offerings would be required to prepare financial statements in compliance with Regulation S-X, this requirement would already be satisfied.[29]

Another benefit of a consecutive private-public offering compared to a conversion of an existing private fund is consistent taxation as a "regulated investment company" ("RIC") under subchapter M of the Internal Revenue Code. Similar to taxation as a partnership, RIC taxation treatment provides the fund's investors with "pass-through" tax treatment so that the fund does not pay a separate tax on its own but with the added benefit of simpler tax reporting for investors. (Both the AMG Feeder Fund and the Franklin Commodity Fund were taxed as RICs during their private offering phases, according to the disclosures in their 1940 Act-only registration statements.)

Before commencing a private offering for a fund, fund sponsors should note that if the fund did not qualify as a "publicly offered RIC" (which is defined, in part, as an RIC with at least 500 shareholders at all times during the taxable year), adverse tax consequences could arise. If the fund is not a publicly offered RIC, then as a general matter fund expenses are treated as taxable dividends paid to the fund's shareholders and are deductible by those shareholders, subject to the limitations on itemized deductions set forth in the Code.[30]

CONCLUSION

This article discussed an alternative method of capital raising for funds using a private offering followed by a public offering of shares. It provided an overview of the relevant legal framework, summarized the limited historical use of consecutive private and public offerings over the past 10 years, and discussed the potential benefits of the use of consecutive private and public offerings by funds. By and large, funds that have conducted private and public offerings consecutively have not taken full advantage of these benefits, such as the ability to offer "seed" investors lower fees. A fund sponsor that takes advantage of these benefits could potentially offer a greater variety of funds to different types of investors. ■

[27] *Massachusetts Mutual Life Insurance Co.,* Sept. 28, 1995.

[28] Letter to Michelle Roberts, SEC, from Northern Lights Fund Trust II dated November 5, 2015 (Form CORRESP).

[29] Rule 1-01(a) of Regulation S-X, Item 27 of Form N-1A and Item 24 of Form N-2.

[30] *See* Temp. Treas. Reg. Section 1.67-2T.