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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.

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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 Offerings by funds that have deregistered or withdrawn their registration statements, business development companies, and new funds that used a 1940 Act-only registration statement filing to facilitate special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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