

April 21, 2025

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission (SEC)
100 F Street NE
Washington, DC 20549-1091

Re: Notice of Filing of a Proposed Rule Change To Exempt Certain Business Development Companies From FINRA Rules 5130 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings) and 5131 (New Issue Allocations and Distributions) (Release No. 34-102723; **File No. SR-FINRA-2025-001**)

Dear Ms. Countryman:

The Investment Company Institute¹ is writing in support of the Financial Industry Regulatory Authority's (FINRA) proposed rule change to create a new exemption for non-traded business development companies ("BDCs") from FINRA Rule 5130 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings) and FINRA Rule 5131 (New Issue Allocations and Distributions).² As a trade group representing BDCs, ICI supports rule amendments that foster increased development of BDC regulations and expanded investment access that benefits shareholders investing via BDCs. Thus, ICI supports adopting a new FINRA Rule 5130 and 5131 exemption that would expand access for non-traded BDCs seeking to invest in initial equity public offerings and align with existing exemptions currently available for SEC-registered investment companies and publicly listed companies.

¹ The [Investment Company Institute](https://www.govinfo.gov/content/pkg/FR-2025-03-31/pdf/2025-05448.pdf) (ICI) is the leading association representing the asset management industry in service of individual investors. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$39.1 trillion invested in funds registered under the US Investment Company Act of 1940 (1940 Act), serving more than 120 million investors. Members manage an additional \$9.3 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London.

² Notice of Filing of a Proposed Rule Change To Exempt Certain Business Development Companies From FINRA Rules 5130 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings) and 5131 (New Issue Allocations and Distributions), Exchange Act Release No. 102723, 90 Fed. Reg. 14284 (March 31, 2025), *available at* <https://www.govinfo.gov/content/pkg/FR-2025-03-31/pdf/2025-05448.pdf> ("FINRA Notice").

ICI believes, however, that the proposed non-traded BDC exemption should be expanded to cover all BDCs, including privately offered BDCs (“private BDCs”).³ FINRA states that it is proposing the non-traded BDC exemption because none of the existing exemptions are directly applicable and the representation requirements under FINRA Rules 5130 and 5131 are generally not feasible for BDCs given their size and operational structure.⁴ This policy rationale is equally applicable to private BDCs. Similar to non-traded BDCs, private BDCs are not able to utilize the existing exemptions from FINRA Rules 5130 and 5131. Also, beneficial shareholders in a private BDC can be widely dispersed with shares purchased through an intermediary.⁵ Thus, similar to non-traded BDCs and registered investment companies, a private BDC’s size and operational structure may result in the representation requirements of FINRA Rules 5130 and 5131 being difficult, if not impossible, to satisfy.

Further, ICI does not agree with FINRA’s policy rationale for excluding private BDCs. FINRA states that it is not extending the proposed exemption to private BDCs because private BDCs do not register their equity offerings with the SEC under the Securities Act of 1933 (“Securities Act”), and thus shares are not publicly offered.⁶ FINRA states that because the other relevant exemptions from the new issue rules are for accounts that are available to the public, the new proposed exemption will not be extended to cover private BDCs.⁷ However, that reasoning is not reflective of how the existing exemptions—in particular the SEC-registered investment company exemption—operate. Closed-end funds that are SEC-registered investment companies can choose to not register their shares under the Securities Act.⁸ Yet, such closed-end funds are still able to avail themselves of the SEC-registered investment company exemption under FINRA Rules 5130 and 5131.

³ We note that listed BDCs can utilize the publicly listed company exemption. Thus, the recommended expansion to cover all BDCs would apply solely to expanding coverage to private BDCs.

⁴ See FINRA Notice at 14285-86 & n.11.

⁵ Given the SEC’s recent action to grant multi-share class exemptive relief for private BDCs, and thus permitting private BDCs to simultaneously access different distribution channels (*e.g.*, registered investment advisers (RIAs), broker-dealers and other high-net-worth investor channels) via the issuance of multiple share classes with differing distribution expense and compensation structures tailored to the particular channel, the organizational structure and shareholder ownership of private BDCs is likely to only more closely reflect that of non-traded and listed BDCs going forward, such as a widely dispersed shareholder base with shares beneficially owned through an intermediary and the BDC only knowing record ownership. See Ares Core Infrastructure Fund, *et al.*, Investment Company Act Release No. 35523 (April 8, 2025) (Order). These recent developments only further underscore that the policy rationale given by FINRA for adding an exemption from FINRA Rules 5130 and 5131 to non-traded BDCs applies equally to private BDCs.

⁶ See FINRA Notice at n.11.

⁷ *Id.*

⁸ This is actually quite common for closed-end funds utilizing a “master-feeder” structure. The master closed-end fund will register with the SEC as an investment company, but it will not register its shares under the Securities Act. The master closed-end fund, even though its shares are not publicly offered, can still avail itself of the SEC-registered investment company exemption under FINRA Rules 5130 and 5131.

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The decision for a BDC to privately offer its shares often relates to issues surrounding distribution and state registration complexities. The decision for a BDC to launch as a private BDC is often distinct from a desire to invest in assets that could not otherwise be invested in by a listed or non-traded BDC. A private BDC is very different than a private fund, as a private fund is not regulated by the 1940 Act and generally has a much higher investment standard reflecting the associated investor sophistication and risk tolerance attributes.⁹ A BDC, in contrast, is subject to extensive regulation by the SEC under the 1940 Act, regardless of whether the BDC registers its shares under the Securities Act. As FINRA has noted, there are many overlapping SEC statutes and regulations applicable to both BDCs and registered investment companies. It does not logically flow, therefore, that a privately offered registered closed-end fund can avail itself of an exemption from FINRA Rules 5130 and 5131 but a privately offered BDC cannot.

Additionally, from a policy perspective, Rules 5130 and 5131 aim to protect the integrity of the public offering process by, among other things, ensuring broker-dealers do not allocate new issues to industry insiders or as a quid pro quo for future business opportunities. Allocations of new issues to private BDCs do not implicate industry insider or quid pro quo dealings any more than non-traded BDCs or other investment companies for which there is an existing exemption otherwise would. Moreover, as FINRA notes, BDCs (both non-traded and private) are subject to investment limitations under Section 55(a) of the 1940 Act. As a result, it is unlikely a private BDC would be formed for the purpose of investing in new issues. Extending the exemption to private BDCs does not, therefore, impact the integrity of the public offering process. Thus, we urge FINRA to amend the proposed non-traded BDC exemption to cover all BDCs.

We appreciate the opportunity to comment on this proposed FINRA rulemaking. If you have any questions or require further information regarding our comments, please do not hesitate to contact Kevin Ercoline, Assistant General Counsel, at kevin.ercoline@ici.org.

Regards,

/s/ Kevin Ercoline
Kevin Ercoline
Assistant General Counsel

cc: Ilana Reid, Associate General Counsel, Office of General Counsel, FINRA
David Saltiel, Acting Director, Division of Trading and Markets, SEC

⁹ To invest in a private BDC, one would need to be an “accredited investor” under the Securities Act, which is generally an individual with income exceeding \$200,000 in each of the two most recent calendar years (or joint income with a spouse or spousal equivalent exceeding \$300,000 for those years) or an individual with a net worth (or joint net worth with a spouse or spousal equivalent) of at least \$1 million, not including the value of his or her primary residence. In contrast, the most common exemption from the 1940 Act for private funds is Section 3(c)(7), which requires investors to be “qualified purchasers” and generally requires, for a natural person, ownership of not less than \$5,000,000 in investments (inclusive of any joint, community property, or other similar shared ownership interest).