



## Letter from the Investment Company Institute

January 26, 2026

Brian Daly  
Director  
Division of Investment Management  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1091

Re: *Adding Open-End Funds to Principles-Based Co-Investment Exemptive Relief*

Dear Director Daly:

The Investment Company Institute<sup>1</sup> is writing to request that the Securities and Exchange Commission (SEC) expand its principles-based co-investment relief—first issued in April 2025<sup>2</sup>—to open-end funds, thereby allowing open-end funds to participate in co-investment transactions alongside private funds under the same updated conditions as closed-end funds and business development companies. In an increasingly competitive and complex investment landscape—particularly in private markets—co-investment allows regulated funds to access attractive deal flow, participate in larger or more bespoke opportunities, and benefit from the scale and investment expertise of their affiliates. Co-investment also benefits regulated fund investors by enhancing portfolio diversification, improving potential returns through greater exposure to negotiated opportunities, and allowing funds to share overall transaction costs. In

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<sup>1</sup> The [Investment Company Institute](https://www.ici.org) (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 \$43.5 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 120 million investors. Members manage an additional \$10.8 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 Associate Members include service providers to member firms and CIT trust companies. ICI has offices in Washington DC, Brussels, and London.

<sup>2</sup> See, e.g., FS Credit Opportunities Corp., *et. al*, Application for an Order Pursuant to Sections 17(d) and 57(i) of the Investment Company Act of 1940 and Rule 17d-1 under the Investment Company Act of 1940 Permitting Certain Joint Transactions Otherwise Prohibited by Sections 17(d) and 57(a)(4) of Rule 17d-1 Under the Investment Company Act of 1940, SEC Accession No. 0001193125-25-071964 (filed April 3, 2025), *available at* <https://www.sec.gov/Archives/edgar/data/1501729/000119312525071964/d920107d40appa.htm>. Order issued on April 29, 2025. See Investment Company Act Release No. 35561, *available at* <https://www.sec.gov/files/rules/ic/2025/ic-35561.pdf>.

many instances, co-investment with affiliates is the only practical means by which regulated funds can gain access to these kinds of private market opportunities. In granting co-investment exemptive relief to an ever-growing number of market participants, the SEC has recognized the interests of regulated funds and their shareholders in participating in a co-investment program and benefiting from the diversification and capital formation opportunities that would not otherwise be available to regulated funds.

As discussed in this letter, ICI sees no persuasive policy reason for excluding open-end funds from the current form of principles-based co-investment exemptive relief.<sup>3</sup> Because open-end funds are one of the primary underlying options in target-date funds in defined contribution plans, fostering access to alternative assets in open-end funds is essential to giving plan sponsors more choice and diversification opportunities to offer to retail investors. Further, SEC actions that expand retail access to private markets will help accomplish the underlying directives in the recent Presidential Executive Order, *Democratizing Access to Alternative Assets for 401(k) Investors*.<sup>4</sup> Given that the SEC has granted co-investment relief to open-end funds in the past under prior exemptive orders, the SEC Staff should similarly expand principles-based co-investment exemptive relief to open-end funds.<sup>5</sup>

ICI also recommends that the current principles-based co-investment relief be expanded to open-end funds via a class order or no action relief to sponsors that have previously received a principles-based co-investment order and require that co-investments by open-end funds be subject to the terms and conditions of such orders.<sup>6</sup> The SEC has provided such class relief in

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<sup>3</sup> For this letter, “open-end funds” includes mutual funds and ETFs. Money market funds are not intended to be part of the principles-based co-investment relief being sought. Money market funds are separately regulated by Rule 2a-7 under the 1940 Act and have different liquidity requirements than mutual funds and ETFs.

<sup>4</sup> Executive Order, *Democratizing Access to Alternative Assets for 401(K) Investors* (Aug. 7, 2025), available at [www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/](https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/).

<sup>5</sup> See, e.g., Blackstone Alternative Alpha Fund, et. al., Application for an Order Pursuant to Sections 17(d) and 57(i) of the Investment Company Act of 1940 and Rule 17d-1 under the 1940 Act Permitting Certain Joint Transactions Otherwise Prohibited by Sections 17(d) and 57(a)(4) of the 1940 Act, SEC Accession No. 0001193125-19-242134 (filed Sept. 10, 2019), available at <https://www.sec.gov/Archives/edgar/data/1077056/000119312519242134/d801907d40appa.htm>. Order issued on December 30, 2019. See Investment Company Act Release No. 33738, available at <https://www.sec.gov/files/rules/ic/2019/ic-33738.pdf>.

ICI notes that the inclusion of open-end funds—albeit ultimately removed in the final amendment—was part of the original principles-based co-investment relief application. See, e.g., FS Credit Opportunities Corp., et. al., Application for an Order Pursuant to Sections 17(d) and 57(i) of the Investment Company Act of 1940 and Rule 17d-1 under the Investment Company Act of 1940 Permitting Certain Joint Transactions Otherwise Prohibited by Sections 17(d) and 57(a)(4) of Rule 17d-1 Under the Investment Company Act of 1940, SEC Accession No. 0001193125-25-030936 (filed Feb. 21, 2025), available at <https://www.sec.gov/Archives/edgar/data/1501729/000119312525030936/d909521d40app.htm>.

<sup>6</sup> Further, ICI also encourages the SEC to allow regulated funds to create a committee of the board specifically responsible for approving co-investment transactions, if board approval is needed pursuant to the conditions of

the past, including in the context of co-investments, and thus there is precedent for following this approach.<sup>7</sup> Given the over 170 principles-based co-investment relief applications filed since the SEC first approved the relief in April 2020, requiring individual amendments of these applications to add open-end funds would impose enormous time and costs on the part of both the industry and the SEC Staff. A blackline between the first FS Credit Opportunities Corp. application filed, which included co-investment relief for open-end funds, and the final amended FS Credit Opportunities Corp. application that the Commission approved, which did not include co-investment relief for open-end funds, demonstrates only minor textual differences related to open-end funds. Thus, because the addition of open-end funds to the current principles-based co-investment relief would require relatively minor textual changes as opposed to a reworking of the underlying conditions to the relief, class-wide exemptive or no-action relief would produce a more workable and efficient result with no downside to investors.

ICI looks forward to engaging with the SEC on further expansions of co-investment relief that will allow greater flexibility on the “same terms, same price, same class, and same security” condition, make private equity investments more operationally feasible with respect to follow-on investments in downstream affiliated companies of affiliated private funds, and enable additional types of follow-on transactions that will provide greater opportunities for regulated funds to source advantageous capital investments. However, before those discussions begin, it is important that the unfinished aspect of the original model for principles-based co-investment relief application be addressed and expanded to include open-end funds.

## **Liquidity in Open-End Funds is Separately Regulated Under the Liquidity Risk Management Rule and Therefore Does Not Present a Valid Policy Justification for Denying Co-Investment Relief**

There has been growing interest in the market for open-end fund strategies that include an allocation to private assets as an incremental source of return. However, because open-end funds were removed from the final version of principles-based co-investment relief approved by the SEC, open-end funds have been unable to participate in affiliated co-investment transactions, unless in reliance on certain no action letters that provide limited scope as it

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the co-investment order. Often, private deals require a very fast turnaround, and boards of open-end funds are typically much bigger than the boards of closed-end funds. Obtaining approval of the “required majority” of independent directors under the current co-investment order will likely be significantly more time consuming for open-end funds than it currently is for closed-end funds.

<sup>7</sup> E.g. Order under Sections 6(c), 17(d), 38(a), and 57(i) of the Investment Company Act of 1940 and Rule 17d-1 Thereunder Granting Exemptions from Specified Provisions of the Investment Company Act and Certain Rules Thereunder, Investment Company Act Release No. 33837 (April 8, 2020), *available at* <https://www.sec.gov/files/rules/exorders/2020/ic-33837.pdf>; see also Commission Statement on Insurance Product Fund Substitution Applications, Investment Company Act Release No. 34199 (Feb. 23, 2021), *available at* <https://www.sec.gov/files/rules/policy/2021/ic-34199.pdf>.

relates to price negotiation.<sup>8</sup> Adding open-end funds to existing principles-based co-investment relief via a class order or no action relief would provide flexibility for open-end funds to engage in co-investment transactions that may provide investment opportunities beneficial to long-term retail investors that otherwise would not be available. In line with the Executive Order, *Democratizing Access to Alternative Assets for 401(k) Investors*, expanded co-investment relief to open-end funds, which are one of the primary underlying options in target date funds in 401(k) plans, will lead to further increased diversification and capital formation opportunities in regulated fund products that provide retail access to private market assets.

ICI's understanding is that open-end funds may have been removed from the final version of principles-based co-investment relief due to concerns about the liquidity of the assets that would be obtained via co-investment transactions. If that in fact was the rationale for the exclusion, the concern was misplaced. While assets sourced via co-investment transactions tend to be less liquid, liquidity itself is not a valid reason to deny the ability of open-end funds to engage in co-investment transactions. Liquidity in open-end funds is regulated separately pursuant to Rule 22e-4 under the 1940 Act (the "Liquidity Risk Management Rule").<sup>9</sup> The Liquidity Risk Management Rule prohibits open-end funds, including ETFs transacting in-kind, from acquiring any illiquid investments if, immediately after acquisition, the fund would hold more than 15% of its net assets in illiquid investments.<sup>10</sup> If illiquid investments exceed 15% of net assets, including as a result of market fluctuations, the Liquidity Risk Management Rule requires an open-end fund to report to its board on how the fund plans to bring its illiquid investments to below 15% of net assets within a reasonable amount of time.

Open-end funds already can—and do—invest in less liquid assets, subject to the Liquidity Risk Management Rule. Permitting open-end funds to participate in principles-based co-investment relief does not fundamentally change the type of assets that open-end funds can invest in—or the liquidity of those assets. Rather, relief would merely expand the investment opportunities available to open-end funds. The result would be that open-end funds would now have access to larger issues and deals, on potentially better available terms, than a fund could otherwise source and negotiate as a sole counterparty without co-investment relief. Because the SEC already has a separate and fulsome regulatory framework to address open-end fund liquidity, ICI is unaware of a justifiable policy decision driving the exclusion of open-end funds from co-investment relief.<sup>11</sup>

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<sup>8</sup> See, e.g., Massachusetts Mutual Life Insurance Company No Action Letter (pub. avail June 7, 2000); Massachusetts Mutual Life Insurance Company II No Action Letter (pub. avail July 28, 2000).

<sup>9</sup> 17 CFR § 270.22e-4.

<sup>10</sup> The one exception to this rule is money market funds regulated by Rule 2a-7 under the 1940 Act. Money market funds are separately regulated under Rule 2a-7 and are not intended to be part of the principles-based co-investment relief being sought.

<sup>11</sup> To the extent other issues, such as valuation or affiliated transactions generally, impacted the decision to exclude open-end funds from co-investment relief, ICI notes that those issues are also separately regulated by

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ICI appreciates the opportunity to engage with the SEC Staff on co-investment reform. While ICI looks forward to longer-term conversations about possible future reforms, expanding the current principles-based co-investment relief to open-end funds is the unfinished aspect of the current relief that can and should be addressed in the short-term. If you have any questions, please contact Paul G. Cellupica, General Counsel, at [paul.cellupica@ici.org](mailto:paul.cellupica@ici.org), and Kevin Ercoline, Associate General Counsel, at [kevin.ercoline@ici.org](mailto:kevin.ercoline@ici.org).

Sincerely,

/s/ Paul Cellupica  
Paul G. Cellupica  
General Counsel

/s/ Kevin Ercoline  
Kevin Ercoline  
Assistant General Counsel

cc: The Honorable Paul S. Atkins, Chairman  
The Honorable Hester M. Peirce, Commissioner  
The Honorable Mark T. Uyeda, Commissioner  
Holly Hunter-Ceci, Chief Counsel, Division of Investment Management

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Rule 2a-5 under the 1940 Act and Section 17 of the 1940 Act, respectively. However, because both of those issues exist equally in closed-end funds—and the same regulations apply to both open-end and closed-end funds with respect to such issues—ICI’s understanding was that liquidity concerns were the driving reason behind excluding open-end funds from the principles-based co-investment relief. As discussed, because liquidity is separately regulated by the Liquidity Risk Management Rule for open-end funds, ICI does not believe liquidity is a valid policy rationale for denying open-end funds flexibility to invest alongside private funds in co-investment transactions pursuant to principles-based co-investment relief.