

August 29, 2019

**VIA ELECTRONIC DELIVERY**

Jill M. Peterson  
Assistant Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: File No. SR-FINRA-2019-022; Release No. 34-86558**

Dear Ms. Peterson,

The Private Investor Coalition, Inc. (“Coalition”), a coalition of family offices that operates as a non-profit entity under Internal Revenue Code section 501(c)(6), submits this letter to express its views on the amendments proposed by the Financial Industry Regulatory Authority, Inc. (“FINRA”) to the definition of “family investment vehicle” (“FIV”) under FINRA Rule 5130 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings) (the “Proposed Amendments”).<sup>1</sup> The Coalition acknowledges the resources, care, and thoughtfulness that FINRA put into the preparation of the Proposed Amendments and appreciates the opportunity provided by the Securities and Exchange Commission (“SEC”) to offer comments.

The Coalition is concerned that the proposed changes to the definition of FIV are not consistent with FINRA’s objective of harmonizing Rule 5130 with Rule 202(a)(11)(G)-1 under the Investment Advisers Act of 1940 (“Advisers Act”), as amended (the “Family Office Rule”).<sup>2</sup> The Proposed Amendments seek to broaden the scope of persons allowed to invest in an FIV by adding

---

<sup>1</sup> Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Amend FINRA Rule 5130 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings) and FINRA Rule 5131 (New Issue Allocations and Distributions), Release No. 34-86558 (Aug. 2, 2019), 84 Fed. Reg. 39029 (Aug. 8, 2019) (the “Proposing Release”). The Proposing Release includes a number of other proposed changes to FINRA Rules 5130 and 5131 relating to sovereign investment entities, foreign employee retirement funds, foreign investment companies, issuer-directed securities, executives of 501(c)(3) charitable organizations and anti-dilution provisions. The Coalition is limiting its comments solely to the Proposed Amendments to the FIV provisions.

<sup>2</sup> 17 C.F.R. § 275.202(a)(11)(g)-1.

the terms “family members” and “family clients,” as those terms are defined in the Family Office Rule. The Coalition strongly supports this aspect of the proposed changes.<sup>3</sup>

However, FINRA also proposes adding a requirement that an “immediate family member” or a “family member” have “sole authority to buy or sell securities” when a “family client” participates in the FIV (the “Investment Authority Limitation”).<sup>4</sup> The Investment Authority Limitation not only fails to harmonize the rules, it contradicts a primary purpose of establishing a family office, *i.e.*, hiring professionals to help the family manage the family’s assets, and renders the proposed additions of “family members” and “family clients” to the definition of FIV meaningless. In short, the Investment Authority Limitation unnecessarily complicates the FIV provision without fixing the issue the Coalition sought to be addressed when it suggested the FIV definition changes to FINRA in the first place.

The Coalition notes that FINRA has not articulated a basis for diverging from the approach taken by the SEC with respect to non-family member participation in family offices under the Family Office Rule other than to speculate that its proviso would be a “safeguard against the abuses the rule is designed to address.”<sup>5</sup> The Coalition also respectfully notes that FINRA did not provide market participants an opportunity to comment on the language in the Proposed Amendments before submitting the Proposed Amendments to the SEC. Accordingly, the Coalition respectfully requests that FINRA either revise the Proposed Amendments to remove the Investment Authority Limitation so that family offices are treated consistently under the federal securities laws and FINRA rules, or withdraw the Proposed Amendments altogether.<sup>6</sup>

## **I. The Investment Authority Limitation Is Self-Defeating**

The Investment Authority Limitation defeats the very result that the Proposed Amendments seek to achieve in amending the definition of FIV – to harmonize the regulatory regime placed upon

---

<sup>3</sup> FINRA has previously provided interpretive relief to PIC indicating that for purposes of the limited exception in Rule 5131.02(b), a “family office,” as defined under the Advisers Act, meets the definition of “investment adviser.” Letter from Meridith Cordisco, FINRA, to Elliott R. Curzon, Dechert LLP, May 9, 2017. The Coalition understands that the Proposed Amendments would have no impact on FINRA’s previous interpretive relief.

<sup>4</sup> See Proposed Amendment.

<sup>5</sup> Proposing Release at 39031.

<sup>6</sup> To be clear, the Coalition is not suggesting that FINRA withdraw the other amendments to Rules 5130 and 5131 included in the Proposing Release; only the Proposed Amendments to the FIV provisions.

family offices. In explaining FINRA’s reasoning for aligning the definition of FIV with the Family Office Rule, the Proposing Release states with respect to the two rules that—

Although they overlap in significant respects, differences exist between a [FIV] under FINRA Rule 5130 and the family office concept under the Advisers Act. These differences create inconsistencies, which do not further the purposes of FINRA Rule 5130, with respect to the treatment of family offices under the two regimes.<sup>7</sup>

Regarding the proposal to incorporate the definitions of “family members” and “family clients” from the Family Office Rule into Rule 5130, the Proposing Release states that—

FINRA believes that an expansion that furthers regulatory consistency without undermining investor protection is appropriate. As a result, the proposed rule change will incorporate these definitions into the definition of [FIV] under Rule 5130, subject to limitations.<sup>8</sup>

However, the Investment Authority Limitation undermines the very goal the Proposed Amendments seek to accomplish and its inclusion results in the proposed definition of FIV being functionally no different from the current definition of FIV. As noted above, one of the primary purposes of establishing a family office is to hire investment professionals to help the family manage its assets.<sup>9</sup> Indeed, although the Family Office Rule requires that in order to be a “family office”, the company serving in that capacity must be “wholly owned by family clients and . . . exclusively controlled (directly or indirectly) by one or more family members and/or family entities”, it still allows for non-family member ownership and allows investment authority to be delegated to a non-family member.<sup>10</sup> Nevertheless, any family office or FIV that is structured in

---

<sup>7</sup> Proposing Release at 39030.

<sup>8</sup> *Id.*

<sup>9</sup> As noted by the SEC in the adopting release for the Family Office Rule (the “Adopting Release”), the exclusion of family offices from the definition of investment adviser was intended to allow family offices “to attract highly skilled investment professionals who may not otherwise be attracted to work at a family office.” Family Offices, 76 Fed. Reg. 37983, 37990 (Jun. 29, 2011) (“Family Office Adopting Release”).

<sup>10</sup> To help incentivize outside investment professionals to work for family offices, family offices often allow the outside experts to participate in the FIV. Under the Proposed Amendments, such

this manner, even though allowed under the Family Office Rule, would be an account that is beneficially owned by a restricted person under the current and proposed construction of FINRA Rule 5130 because the vehicle cannot qualify as an FIV.<sup>11</sup>

The Investment Authority Limitation ignores the practical realities of how family offices operate. Investment professionals hired by family offices are frequently given authority to make investment decisions for the family office, including for pooled investment vehicles, trusts and/or other “family clients” which the family office serves. In addition, persons that are not “immediate family members” or “family members” often are appointed as trustees over a trust that exclusively benefits the family and are required to retain ultimate investment authority as a matter of law. Moreover, family offices that make investment decisions through an investment committee would not be able to meet the proposed definition of FIV, even if the investment committee is made up entirely of “immediate family members” because there would not be a person with “sole investment authority.” Accordingly, under the Proposed Amendments, family offices are no closer to regulatory consistency than they are under the current definition.

---

arrangements would preclude a family office from meeting the revised definition of FIV and the FIV would still be considered a “restricted person” under FINRA Rule 5130.

<sup>11</sup> Rule 5130 generally prohibits the offer and sale of “new issues” to any account in which a *restricted person* has a beneficial interest. Accordingly, persons deemed to be “restricted persons” cannot participate in initial public offerings or new issues, except pursuant to certain conditions set forth in FINRA Rule 5130.

Under FINRA Rule 5130, a “restricted person” generally includes the following: broker-dealer personnel, *portfolio managers* and the immediate family members of such persons who receive material support from such persons. A “portfolio manager” is any person who has the authority to purchase or sell securities for a bank, savings and loan institution, insurance company, investment advisor or *collective investment account*, including other persons who make investment decisions, such as members of an investment committee. A “collective investment account” is any hedge fund, investment partnership, investment corporation or any other collective investment vehicle that is engaged primarily in the purchase and/or sale of securities, but *does not* include FIVs and “investment clubs.” A FIV means any legal entity that is beneficially owned solely by *immediate family members*. “Immediate family members” include a person’s parents, mother-in-law or father-in-law, spouse, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, and children, and any other individual to whom the person provides material support. Accordingly, family offices that are managed by non-family member investment professionals who often own a beneficial interest in the family office are not permitted to participate in new issues under FINRA Rule 5130.

## II. The FIV Definition Should Align With the SEC’s Family Office Rule

FINRA Rule 5130 was adopted in its current form in 2003.<sup>12</sup> In the SEC’s release approving NASD Rule 2790, the NASD [FINRA’s predecessor] staff acknowledged commenter concerns regarding the restrictive nature of the FIV definition in light of the various investment vehicles that a family may establish for its investments.<sup>13</sup> The NASD [FINRA] expressed concern that permitting non-family persons into the exemption for FIVs could be ripe for abuse;<sup>14</sup> however, the NASD [FINRA] staff did not cite any evidence of abuses associated with professional employee, non-family investors in FIVs, nor is the Coalition aware that FINRA has ever brought a case or identified an abuse associated with an FIV or a professional employee of a family office. Likewise, in explaining FINRA’s reasoning for including the Investment Authority Limitation, the Proposing Release states that FINRA—

[B]elieves that it is necessary to impose this condition to safeguard against the abuses the rule is designed to address and to ensure that, for purposes of Rule 5130, the person who has the authority to buy or sell securities for the account is more closely aligned with the family than with key employees or others associated with the family office. FINRA believes that the proposed rule change strikes the proper balance between the treatment of [FIVs] in FINRA Rule 5130 and the recognition of the family office exemption under the Advisers Act.<sup>15</sup>

The Coalition is uncertain how – and FINRA offers no evidence to the contrary – a non-family member, key employee that makes investment decisions would be able to abuse the new issue process when, under the Family Office Rule, that key employee and the family office itself cannot serve any clients other than the family they serve and that family must retain both ownership and control of the family office itself.

Since the adoption of FINRA Rule 5130, the SEC has had the opportunity to consider the scope of persons who should be permitted to participate in family offices and has come to a directly contrary

---

<sup>12</sup> FINRA Rule 5130 was originally adopted as NASD Rule 2790 (“Rule 2790”).

<sup>13</sup> *See Restrictions on the Purchases and Sales of Initial Public Offerings of Equity Securities*, Approval of NASD Rule 2790, SEC Rel. No. 34-48701, File No. SR-NASD 99-60, (October 24, 2003).

<sup>14</sup> *Id.*

<sup>15</sup> Proposing Release at 39031.

conclusion than FINRA. In 2010, Congress directed the SEC in the Dodd-Frank Wall Street Reform and Consumer Protection Act to adopt formally the Family Office Rule and to expand the definition of family in recognition of the realities of modern family offices and the investment vehicles they manage. The SEC sought to adopt a definition that recognizes “the range of organizational, management, and employment structures and arrangements employed by family offices.”<sup>16</sup> The Family Office Rule provides “a broader exemption to accommodate typical family office structures,” which captures the various and flexible structures of contemporary family offices.<sup>17</sup> The wide variance in family office structures and the investment vehicles managed by these family offices are two of the main reasons that the SEC adopted an appropriately expansive definition of “family member” in the Family Office Rule.<sup>18</sup>

---

<sup>16</sup> Family Office Adopting Release at 37984.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The Family Office Rule reflects guidance developed by the SEC beginning in 1998. The SEC believed family offices are “not the sort of arrangement that the Advisers Act was designed to regulate and granted exemptions under Section 202(a)(11)(F), a provision that enables the SEC to exclude persons or entities from the definition of “investment adviser.” 66 SEC-Docket 1051-43 (February 12, 1998); SEC Rel. No. IA-1706 (March 10, 1998). In exempting Moreland Management Company in 1998, the SEC determined that Moreland in providing investment management services was created solely to be the “family office” for the family (including its lineal descendants), and that all of the investors were either immediate family members or entities created by an immediate family. In addition, the “family office” did not “hold itself out to the public as an investment adviser,” and it had no intention of advertising, soliciting more clients, or ever becoming a retail investment adviser. *Id.* These conditions were present in each exemptive order the SEC granted to “family offices” under Section 202(a)(11)(F) of the Advisers Act.

In 2001, the SEC expanded the breadth of the exemption awarded to “family offices” by allowing spouses of immediate family members to be included within the family office. 75 SEC-Docket 1209-62 (July 31, 2001); SEC Rel. No. IA-197 (August 27, 2001). The SEC again expanded the definition of family in 2002 when it exempted Longview Management Group LLC, a family office that allowed extended family members and long-time employees to participate in the family’s pooled investment vehicle. 76 SEC-Docket 1476-41 (January 3, 2002); SEC Rel. No. IA-2013, File No. 803-142 (February 7, 2002). Longview Management Group also separately provided investment management services to clients who were not members of the family and did not participate in the family pooled investment vehicle, including two long-time family employees. The family also allowed non-family members to participate in its pooled investment vehicle, but that participation amounted to less than 2% of the total assets in the vehicle.

The SEC continued to expand the family office structures to which it awarded exemptive relief, including pooled investment vehicles that included a family’s in-laws and those in-law’s immediate family members,<sup>18</sup> and adopted and step children. SEC Rel. No. IA-2772, File No. 803-192 (August

In permitting key employees of the family office to invest in FIVs, the SEC acknowledged in the Family Office Adopting Release that allowing investment participation by certain non-family members would help mitigate the risks associated with an unregistered investment adviser by “align[ing] [its] interests with those of family members.”<sup>19</sup> Accordingly, the SEC determined that it would not serve to protect investors to require the registration of family offices even if certain of the investment professionals were not “family members” or had a beneficial interest in the family office.<sup>20</sup>

In providing exemptive relief to family offices to allow key employees to invest in FIVs, and in adopting the Family Office Rule, the SEC accepted that non-family members that are integral to the functioning of the family office should be able to invest alongside family members in order to align their interests with the interests of the family. The Coalition sees no reason why FINRA should come to a contrary conclusion and continue to prohibit most family offices from

---

26, 2008); SEC Rel. No. IA-2787 (September 24, 2008). In 2008, the SEC granted exemptive relief to a family office that allowed one of its long-time employees to participate in the family’s pooled investment vehicle. SEC Rel. No. IA-2500 (March 21, 2008); SEC Rel. No. IA-2745 (June 20, 2008). As a condition of the family office’s relief, the employee could not invest any more funds than were invested at the time of the exemptive application and was prohibited from participating in other family pooled investment vehicles.

Later in 2008, the SEC granted exempted relief to WLD Enterprises, Inc., an investment adviser created to serve a family office that allowed its executive-level employees, or “key employees,” to participate in the family’s pooled investment vehicle. SEC Rel. No. IA-2804, File No. 803-180 (October 17, 2008); SEC Rel. No. IA-2807 (November 14, 2008). The key-employees had “significant involvement with the investment advisory process.” Additionally, WLD Enterprises, Inc. could also provide investment advisory services to entities created by the key employees that were established for the benefit of themselves and their families pursuant to the exemptive order.

<sup>19</sup> Family Office Adopting Release at 37989.

<sup>20</sup> See Family Office Adopting Release at 37991. As noted above, the Family Office Rule requires that to be a family office it must be “wholly owned by family clients and . . . exclusively controlled (directly or indirectly) by one or more family members and/or family entities . . . .” Thus, as a matter of law in order to be a family office under the Family Office Rule one or more family members must retain ultimate investment authority, however such authority may be (and often is) delegated to non-family members working for the family office. In this regard, the SEC noted that with respect to non-family member ownership that it “remain[s] convinced, however, that for [its] core policy rationale to be fulfilled—that a family office is essentially a family managing its own wealth—the family, directly or indirectly, should control the family office. Accordingly, the final rule provides that while family clients may own the family office, family members and family entities (i.e., their wholly owned companies or family trusts) must control the family office.” *Id.*

participating in new issues under FINRA Rule 5130, especially when there is no empirical evidence supporting a need for the Investment Authority Limitation.

### **III. Suggested Revisions to the Proposed Amendments**

The Coalition respectfully requests that FINRA revise the Proposed Amendments to remove the Investment Authority Limitation. While the Coalition agrees with FINRA that it would be beneficial to harmonize the treatment of FIVs under Rule 5130 and family offices under the Family Office Rule, the Investment Authority Limitation would frustrate FINRA's goal of achieving consistency across regulatory regimes. Moreover, the SEC has previously concluded that neither the delegation of investment authority to non-family members nor participation by key employees in FIVs would adversely affect the family served by the family office. Accordingly, the Coalition respectfully proposes that the definition of FIV in the Proposed Amendments be revised to remove the Investment Authority Limitation, or, in the alternative, if FINRA declines to revise the definition of FIV, to withdraw the proposed definition of FIV, or for the SEC to disapprove the Proposed Amendments.

\* \* \* \* \*

The Coalition appreciates the opportunity to comment on the Proposed Amendments. If you have any questions concerning the foregoing, please contact the undersigned at [REDACTED] or [REDACTED], or Robert Rhatigan at [REDACTED] or [REDACTED].

Very truly yours,

/s/ Elliott R. Curzon

Elliott R. Curzon

25997559