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Coalition *for* Business Development
1155 F. Street, NW, Suite 1200
Washington D.C. 20004

June 10, 2019

Ms. Dalia Blass
Director, Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. S7-03-19: Securities Offering Reform for Closed-End Investment Companies

Dear Ms. Blass:

On behalf of the Coalition for Business Development[1] and its members, we write in support of the Securities and Exchange Commission's proposal to improve the registration, communications, and offering processes for business development companies ("**BDCs**") under the Securities Act of 1933 (the "**Securities Act**").[2] We believe at least three changes are required to make the final rules more effective, but overall we applaud the Commission and its staff for the proposal, which faithfully implements the Congressional mandate found in Section 803(b) of the Small Business Credit Availability Act (the "**BDC Act**").[3]

BDCs also have a unique statutory mandate – to provide capital to the hundreds of thousands of small- and middle-market businesses that employ millions of people across our nation. Those businesses are eager for capital, but often are unable to find traditional sources of financing. BDCs fill that void and allow these businesses to expand, innovate, and hire. The Commission's proposal will enhance BDCs' ability to provide this much-needed capital to small- and middle-market businesses.

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[1] The Coalition is a member-driven, Washington-based trade association that advocates exclusively on behalf of BDCs to expand their ability to provide necessary growth capital to small- and middle-market Main Street businesses so they can expand, invest, and create jobs.

[2] Securities Offering Reform for Closed-End Investment Companies, Release Nos. 33-10619, 34-85382, IC-33427 (Mar. 20, 2019), https://www.sec.gov/rules/proposed/2019/33-10619.pdf.

[3] Public Law 115–141, 132 Stat. 348 (2018).

Together with our broad support to the Commission's timely adoption of the proposed changes, we recommend that the Commission make three changes to the rulemaking package to make it most effective:

1. Change the test for determining whether a BDC is a well-known seasoned issuer ("**WKSI**") to include a BDC that (among other factors) has either a public float or a net asset value of $700 million or more.

2. Revise the definition of "ineligible issuer" to avoid unintended consequences for BDCs.

3. Do not require BDCs to report a material write-down in fair value of a significant investment on Form 8-K.

We discuss below each of these recommendations.

Coalition Recommendations

Recommendation 1: Adopt an alternative net asset value test for determining whether a BDC is a WKSI.

The proposal would extend to BDCs that qualify as WKSIs all of the significant benefits that are available today to corporate issuer WKSIs.[4] We wholeheartedly endorse this proposal. We recommend, however, a change to the WKSI definition that is more appropriately customized to BDCs.

Under the proposal, a BDC generally must have at least $700 million in "public float" to qualify as a WKSI (in addition to satisfying other conditions).[5] The Commission's economic analysis found that only fourteen BDCs, out of a universe of 103 BDCs, would satisfy the public float test and qualify as WKSI.

The Commission requested comment about a different metric than public float, such as the net asset value ("**NAV**") for funds whose shares are not traded on an exchange. The Commission acknowledged that such an alternative methodology would increase the number of affected funds that could qualify as WKSIs and utilize the associated benefits of being a WKSI. In explaining why it did not propose such an alternative test, and instead proposed the public float test, the Commission stated merely that the BDC Act directed the Commission to allow the funds covered by that Act to use the rules available to operating companies.

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[4] As the Commission explains in the proposal, a WKSI can file a registration statement or amendment that becomes effective automatically in a broader of contexts than non-WKSIs. Subject to certain conditions, Commission rules also permit a WKSI to communicate at any time, including through a free writing prospectus, without violating the "gun-jumping" provisions of the Securities Act. In order for an issuer to qualify as a WKSI, the issuer must meet the registrant requirements of Form S-3, i.e., it must be "seasoned," and generally must have at least $700 million in "public float."

[5] The proposal explains that Form S-3 defines an issuer's "public float," as the "aggregate market value of the voting and non-voting common equity held by non-affiliates." See General Instruction I.B.1 of Form S-3. The determination of public float is based on a public trading market, such as an exchange or certain over-the-counter markets.

We urge the Commission to adopt an alternative NAV test for determining whether a BDC is a WKSI. Specifically, we recommend that the Commission define the term "well-known seasoned issuer" to include a BDC that (among other factors) has ***either*** a NAV ***or*** a public float of $700 million or more. We believe this change will extend the benefits of WKSI status to a greater number of BDCs than just the fourteen estimated by the Commission.

We believe our recommendation is consistent with the BDC Act. The BDC Act directs the Commission to use the rules available to operating companies, but it does not preclude changes that are necessary to accommodate the differences attributable to BDCs, as compared to corporate issuers. Indeed, the Commission itself recognizes this principle, and proposed changes to the term "ineligible issuer" for BDCs and other closed-end funds that do not apply to corporate issuers. One, which we address in our Recommendation 2, extends events that disqualify a BDC from WKSI status to an adviser or sub-adviser of the BDC. That proposal strikes us further afield from the Congressional mandate underlying the BDC Act than our recommendation to customize the WKSI test for BDCs.

More broadly, we believe the policy intent behind the BDC Act was to enhance the ability of BDCs to tap into the capital markets for the purpose of fulfilling their statutory mandate of making capital available to small- and medium-sized businesses. With this backdrop, we believe the Commission should adopt expansive rules, consistent with investor protections, to permit BDCs to more efficiently register offerings and communicate with investors.

Changing the WKSI test for BDCs to add an alternative NAV threshold is appropriate for BDCs and adds only a modest number of BDCs to the list of WKSIs. Unlike an operating company, a BDC determines a NAV, which is a significant indicator of the likely interest by investors, the analyst community, and others, which the Commission said was a consideration for establishing the WKSI standard.[6] For example, a BDC that has a NAV of $750 million, but which trades at an 8% discount to NAV would have a public float of less than $700 million. But that discount is not an indicator that investors or analysts are not interested in the BDC. Nor does it indicate that it is inappropriate, from a policy perspective, to preclude that BDC from using the streamlined processes enjoyed by WKSIs for offerings and communications to investors.

In other words, the Commission has determined that size (as measured by public float) is a proxy for investor and analyst interest in a corporate issuer. The same is true for BDCs, but BDCs have two measures of size – public float ***and*** NAV. We urge the Commission to use both measures as a proxy for investor and analyst interest in the BDC.

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[6] In this regard, the Commission has an opportunity to take a separate action to vastly improve institutional ownership of BDCs, and thereby allow more BDCs to become WKSIs. The Coalition has filed an application for exemptive relief from the SEC's 2006 Fund of Funds Rule's acquired fund fees and expenses ("AFFEs") disclosure requirements. The Coalition for Business Development, et al. (September 4, 2018) (application), https://www.sec.gov/Archives/edgar/data/1449853/000147361218000002/a26449579_12xcsbgexemptive.htm. Those requirements have negatively affected institutional ownership of BDCs. Since that rule was adopted, institutional ownership of listed BDCs has declined by almost half – from about 45% at the end of 2006 to about 25% today. The Commission would free many BDCs to become WKSIs through additional institutional investor investments, if the Commission issues the exemption we request.

Using a NAV test provides an opportunity for the Commission to extend some of the benefits of WKSI and seasoned issuer status to non-traded BDCs that conduct a public offering on Form N-2 and have a NAV of $700 million or more or $75 million or more, respectively.[7] We believe the proposal's exclusion of such non-traded BDCs from WKSI and seasoned issuer qualification would perpetuate unnecessary disclosure updates for non-traded BDCs that conduct continuous offerings pursuant to Rule 415 under the Securities Act and that provide liquidity through periodic tender offers, for example. Currently, such non-traded BDCs are not permitted to forward incorporate (a benefit enjoyed by WKSIs and seasoned issuers), which necessitates their updating their registration statements and undergoing Commission disclosure review at least annually to incorporate the BDC's annual financial statements, even if no other material updates are being made. This process adds expenses to such non-traded BDCs but does not provide meaningful benefit to investors as the requirement to update the registration statement is triggered by incorporating financial statements that are already available to investors in the BDC's publicly filed reports. Thus, a NAV test for determining whether a BDC qualifies as a WKSI or a seasoned issuer, together with other changes, would permit eligible non-traded BDCs to streamline the offering process by use of forward incorporation by reference.

Recommendation 2: Revise the definition of "ineligible issuer" to avoid unintended collateral consequences for BDCs.

We recommend changes to the Commission's proposal to amend the "anti-fraud prong" of the definition of "ineligible issuer" as it applies to BDCs and other affected funds. An issuer that otherwise qualifies as a WKSI loses that status if the issuer is an ineligible investor. The existing anti-fraud prong of the ineligible issuer definition includes an issuer that, within the past three years, was the subject of a judicial or administrative decree or order arising out of a governmental action involving violations of the anti-fraud provisions of the federal securities laws.

The proposal extends this anti-fraud prong to issuers that are BDCs or other affected funds. The proposal then adds a new element to the anti-fraud prong by providing that a BDC or other affected fund would be an ineligible issuer if "within the past three years any person or entity that at the time was an investment adviser to the issuer, including any sub-adviser" was the subject of any such judicial or administrative decree or order. The Commission explains this proposed change by stating that "investment companies typically are externally managed by an investment adviser, which is primarily responsible for the day-to-day management of the fund and the preparation of the fund's disclosures." The Commission provides no further justification for this change.

We recommend two amendments to the proposed new element of the anti-fraud prong of the ineligible investor definition. First, we urge the Commission to clarify that violations by a BDC's adviser of Section 206(4) of the Investment Advisers Act of 1940 (the "**Advisers Act**"),

[7] The public float requirement effectively excludes a non-traded BDC that files a registration statement on Form N-2 from eligibility to qualify as a WKSI or seasoned issuer because such a BDC is not publicly traded.

and all the rules adopted under that section except for Rule 206(4)-8, would not result in the BDC becoming an ineligible investor.[8]

The Commission and its staff have referred to Section 206(4) of the Advisers Act as an anti-fraud provision in the past.[9] The rules adopted under Section 206(4), however, are prophylactic in nature. They are designed to prevent – rather than prohibit – an actual antifraud violation. For example, Rule 206(4)-7 of the Advisers Act requires investment advisers to adopt written compliance programs, which typically are extensive and technical. The Commission has brought enforcement action, including in the absence of any fraudulent activity, where an adviser has not technically complied with its compliance program.

It is inherently unfair and harmful to a BDC for it to lose WKSI status because of a technical compliance program violation not involving any fraud. The same could be said for all of the rules adopted under Section 206(4), other than Rule 206(4)-8. We do not mean to diminish the importance of these rules, rather to avoid harmful consequences to a BDC whose adviser (or sub-adviser) has a technical violation of a rule other than a rule prohibiting fraud.

The problem is exacerbated by a lack of any nexus between the adviser's or sub-adviser's violation and the BDC in the proposed anti-fraud prong. A BDC could lose WKSI status, for example, because its adviser used a client testimonial about the advisers separate account management services. That use would violate Rule 206(4)-1 under the Advisers Act, but is unrelated to the BDC, which would suffer consequences.

Second, we recommend amending the text of the anti-fraud prong to remove the "at the time" element of the definition. The proposal, in effect, provides that the BDC is an ineligible issuer if its adviser or sub-adviser, at the time it was advising the BDC, becomes subject to one of the enumerated decrees or orders.[10] Nonetheless, it would not be fair to a BDC if it loses WKSI status because an adviser or sub-adviser was the subject of a Commission enforcement order if that adviser or sub-adviser no longer advises the BDC. Perhaps a better approach is to apply the test to the time in which the BDC seeks to utilize the benefits of being a WKSI, rather than look at whether the sanctioned adviser was advising the BDC at the time of the sanction.

Recommendation 3: Do not require BDCs to report a material write-down in fair value of a significant investment on Form 8-K. That information is disclosed elsewhere.

The proposal would amend Form 8-K to add two new reporting items for BDCs, including new Item 10.02 for material write-downs in fair value of significant investments. An investment would be considered significant if the BDC's and its subsidiaries' investments in a portfolio holding exceed 10% of the total assets of the BDC and its consolidated subsidiaries. The staff requested comment as to whether to allow a BDC to not file a Form 8-K report if the

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[8] We anticipate that the Commission would wish to include as an anti-fraud provision Rule 206(4)-8, which applies antifraud prohibitions in the context of an adviser to a private fund.

[9] *See, e.g.*, Statement on Well-Known Seasoned Issuer Waivers, Division of Corporation Finance (July 8, 2011), at fn 6, available at https://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp.htm#P7_148.

[10] BDCs do not use sub-advisers as commonly as other closed-end funds do.

conclusion that a material write-down is required is made in connection with the preparation, review, or audit of financial statements required to be included in its next periodic report under the Securities Exchange Act of 1934, the periodic report is timely filed, and the conclusion is disclosed in the report.

In general, we applaud the Commission's effort to improve current reporting of information by BDCs to investors and the market, but we believe the requirement to disclose a material write-down in fair value of a significant investment should not be imposed on BDCs. The Commission likens the requirement to an existing requirement in Form 8-K applicable to operating companies to report a material impairment to an asset (such as goodwill, accounts receivable or a long-term asset). Unlike an operating company, a BDC invests in securities, which inherently change in value. While a material change in a balance sheet asset of an operating company may be an unusual event, a material change in the value of a security is not necessarily an unusual event.

The Commission's proposal would only apply to significant assets (that make up at least 10% of the BDC's total assets). Ultimately, investors are affected by a change in the overall NAV per share of a BDC, however. Information about the value of a single asset is not as useful to an investor as stating the NAV per share of a BDC.

The staff noted that BDCs typically monitor and review investment valuations between their periodic reports, particularly if a significant event occurs that is likely to impact the value of one or more sizable investments, and a BDC would be required to report on Form 8-K if it concludes that a material write-down of a significant investment is required in connection with that process.

As a practical matter, BDCs value their securities when they strike their NAV. In our experience, most BDCs only strike NAV quarterly. These BDCs would not typically assess the value of a significant asset outside of their typical NAV valuation process. Therefore, the BDC would confirm the amount of the material write-down of a significant asset simultaneously with confirming the BDC's overall NAV. Because the overall NAV is the more important measure to an investor and will be available at the same time, the requirement to report a material write-down of an individual asset (even a significant asset) does not meaningfully assist investors. As an alternative, requiring BDCs to include specific disclosure about material write-downs of significant assets in their quarterly and annual reports may be useful disclosure to an investor and would not be a significant burden on BDCs.

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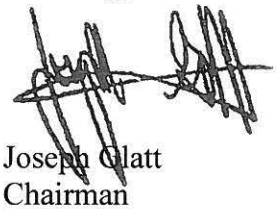
The reforms to the BDC regulatory regime proposed by the Commission are an important step towards ensuring BDCs can help Main Street businesses grow and thrive. We applaud the Commission's recognition of the importance of an efficient and cost-effective approach for BDCs to raise capital in public markets, its effort to implement the directions of Congress under the BDC Act and its effort to provide BDCs with a more flexible offering process and facilitate capital formation in our public markets. We believe the changes to the proposal suggested by our comments would further that effort.

We appreciate the opportunity to submit, and the Commission's consideration of, our comments on the proposed offering reforms for BDCs. Should the Commission have any questions regarding these comments, please feel free to contact me at [redacted] or [redacted].

Sincerely,



Joseph Glatt
Chairman
Coalition for Business Development