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Via Email to rule-comments@sec.gov

Ms. Vanessa A. Countryman
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: **Amendments to the Accelerated Filer and Large Accelerated Filer Definitions**
Release No. 34-85814 (the “Proposing Release”)
File No. S7-06-19

Dear Ms. Countryman:

We are submitting this letter in response to the rule proposal referenced above. Our comments reflect our experience representing public companies, registered investment companies, and business development companies in capital raising activities and advising them on their public reporting obligations. While we have discussed the Proposing Release with certain of our clients, our comments reflect only the views of those attorneys at our firm who regularly represent business development companies (“BDCs”) and not those of any client.

Proskauer has an interdisciplinary BDC practice, and we regularly represent advise clients on all aspects of BDCs, including on regulatory, financing, capital markets, tax, governance, and other transactional matters. Our clients include BDCs, their investment advisers/asset manager platforms, underwriters and independent directors. In the past five years, Proskauer has represented approximately half of public BDCs and has been a key player in a majority of the initial public offerings by BDCs since 2015.

We appreciate the Commission’s proposal to amend the definitions of accelerated filer and large accelerated filer and support the Commission’s objective of promoting capital formation for smaller reporting issuers by more appropriately tailoring the types of issuers that are included in these categories. While we generally support the proposed amendments, we recommend further changes that would extend the benefits of non-accelerated filer status to BDCs that meet certain criteria.

As of June 30, 2019, there were 47 BDCs with common equity securities listed on a national securities exchange (“public BDCs”) with a total market capitalization of nearly \$35 billion.¹ New issuances of BDC securities (debt and equity) in registered offerings often exceeds \$1.5 billion per year. Although the bulk of recent growth in the BDC market has been through BDCs that do not list their

¹ See Keefe, Bruyette & Woods Weekly BDC/RIC Market Overview, July 3, 2019.

common equity securities on a national securities exchange (“private BDCs”),² there has been one BDC initial public offering in each of 2017, 2018 and 2019. In addition, a number of private BDCs have sought liquidity events, several of which have included providing investors with liquidity through the listing of shares on a national securities exchange.

In the Proposing Release, the Commission requested comment on whether it should permit BDCs, which are excluded from the definition of “smaller reporting company” (“SRC”),³ to qualify as non-accelerated filers if they meet the SRC revenue test thresholds, as well as whether there are alternative metrics that should be applied to BDCs instead of revenue for determining accelerated filer status. We support raising the threshold for BDCs to qualify as non-accelerated filers, consistent with the proposal relating to SRCs. Moreover, we believe that a BDC’s accelerated filer status should be based on a metric other than revenue and which is appropriately tailored to the attributes of BDCs and their financial statements.

Specifically, we recommend that the Commission expand the proposed amendment to the definition of accelerated filer and large accelerated filer to exclude BDCs with total investment income of less than \$80 million in the most recently completed fiscal year for which audited financial statements are available and either no public float or public float of less than \$700 million. As noted in the Proposing Release, the SRC revenue test is not meaningful to BDCs because BDCs prepare financial statements under Article 6 of Regulation S-X and report investment income in lieu of revenue.⁴ With respect to the proposed transition provisions, we recommend adding language to provide that a BDC would no longer be an accelerated filer or a large accelerated filer if it determines at the end of its fiscal year that it had total investment income of less than \$80 million.

Alternatively, we suggest that the Commission adopt a new definition for non-accelerated filer that includes the following:

- Issuers with less than \$75 million in public float;
- Issuers that satisfy the revenue test in the “smaller reporting company” definition; and
- Issuers that are BDCs with total investment income of less than \$80 million in the most recent fiscal year and either no public float or public float less than \$700 million.

² In this context, “private BDC” refers to a BDC that has a class of equity securities registered under Section 12 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), and is subject to periodic reporting under Section 13(a) of the Exchange Act. Private BDCs, which have represented the majority of growth in the BDC market over the past five years, are not accelerated or large accelerated filers because they have no public float and therefore are not subject to auditor attestation requirements.

³ See Rule 12b-2 (17 CFR 240.12b-2) under the Exchange Act and Rule 405 (17 CFR 230.405) under the Securities Act of 1933, as amended (the “Securities Act”).

⁴ We note that certain other types of registrants, including mortgage real estate investment trusts, may not report revenue but are not excluded from the ability to qualify as SRCs (and are not excluded from the scope of the proposed amendments).

We believe a separate definition would reduce regulatory complexity by establishing clear criteria for BDCs (and other issuers) to qualify as non-accelerated filers, rather than adding further exclusions from the definition of accelerated filer. This, in turn, would provide straightforward distinctions between the three categories that are easy to apply, which would ease the compliance burden for smaller companies.

We acknowledge the Commission's statement in the Proposing Release that expanding BDCs' ability to be considered non-accelerated filers would reduce auditor review of internal controls for a significant majority of BDCs. However, if the Commission were to adopt a threshold for total investment income of less than \$80 million, we estimate that approximately one-third of BDCs, representing approximately 79% of total equity market capitalization of public BDCs as of June 30, 2019, would remain either accelerated or large accelerated filers subject to auditor attestation requirements. We also note and agree with the Commission's statement that the proposed amendments would not affect the independent auditor's obligation to consider internal controls over financial reporting in its audit of the issuer's financial statements.

We further note the Commission's assertion that investors in BDCs may place greater significance on the financial reporting of BDCs, many of which hold illiquid securities that are carried on the balance sheet at fair value and that, if included in an expanded definition of non-accelerate filer, audit review of internal controls for a significant majority of BDCs would be reduced. We respectfully submit that valuation of investments is a significant area of focus in connection with both the quarterly review by independent public accountant of interim financial statements and the audit of the annual financial statements. For example, as part of the typical quarterly review of a BDC's financial statements, the independent public accountant reviews quarter over quarter fluctuations in fair value and discusses material fluctuations with management. In addition, the independent public accountants typically have their own internal valuation teams that will seek to validate valuations of certain of the BDC's investments on a quarterly basis, with a validation process of the BDC's entire portfolio as part of the annual financial statement audit.

The policy reasons that support providing regulatory relief to smaller reporting companies should apply equally to smaller BDCs. BDCs were created by Congress in 1980 to provide capital to small and middle market companies and companies in restructuring. BDCs originally were intended to provide retail investors with access to venture capital although, at present, the majority of BDCs have focused on debt investments in small and middle market companies. Notwithstanding this shift in investment strategy across the industry, BDCs continue to create opportunities for retail investors to access both public and private growth stage companies, with the benefits of regular distributions of net investment income and capital gains and, in the case of BDCs with common equity listed on a national securities exchange, the additional benefit of liquid trading markets. In its recent concept release on the exempt offering framework, the Commission notes that BDCs, along with registered investment companies, allow retail investors to obtain exposure to exempt offerings through an entity that is subject to extensive disclosure requirements under the Securities Act, the Exchange Act and the Investment Company Act of 1940, as amended.⁵

⁵ Concept Release on Harmonization of Securities Offering Exemptions, SEC Release No. 33-10649 (Jun. 18, 2019), §IV.C.



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Moreover, Congress embraced the notion of reducing regulatory asymmetry between BDCs and operating companies in the Small Business Credit Availability Act (“SBCAA”), which was signed into law on March 23, 2018.⁶ The SBCAA directed the Commission to adopt rules that would allow a BDC to use the securities offering and proxy rules that apply to operating companies. While the changes mandated by the SBCAA focused on securities offering and proxy rules, the spirit of the SBCAA was to create parity for BDCs, which by rule were excluded from certain benefits afforded to operating companies. We believe the Commission should apply the same spirit of parity in its consideration of the accelerated filer and large accelerated filer definitions and extend the benefits of non-accelerated filer status to BDCs that have larger public float and lower investment income.

Allowing smaller BDCs to benefit from non-accelerated filer status, and thereby ease regulatory costs and burdens, could encourage more BDCs to enter the public markets, creating greater access to capital for small operating companies and expanding investment opportunities for retail investors. Congress created BDCs to spur investment in small and middle market companies and passed the SBCAA to bolster that goal.⁷ In doing so, Congress acknowledged that BDCs play an important role in filling a void in the middle market lending space created by the continued exit of commercial banks from that market and recognized the significance of BDCs to small businesses and economic growth.⁸ Extending non-accelerated filer status to BDCs that have limited total investment income could benefit not only BDCs but also the small businesses that benefit from investments from BDCs.

* * *

We appreciate the opportunity to comment on this important proposal. In the event the Commission or the staff has any questions about our comments, please do not hesitate to contact William J. Tuttle or Nicole M. Runyan of this firm at (202) 416-6800.

Very truly yours,

Proskauer Rose LLP

⁶ Small Business Credit Availability Act, Pub. L. No. 115-141, 132 Stat. 348 (2018).

⁷ See H.R. Rep. No. 1341, 96th Cong., 2d Sess 21-22 (1980).

⁸ See, e.g., *Hearing on Improving Communities’ and Businesses’ Access to Capital and Economic Development Before the Subcomm. on Securities, Insurance, and Investment of the Sen. Comm. on Banking, Housing and Urban Affairs*, 114th Cong. (2016) (statement of Sen. Toomey).