

June 17, 2022

**VIA EMAIL AT RULE-COMMENTS@SEC.GOV**

Vanessa A. Countryman  
Secretary, Securities and Exchange Commission  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

***Re: Release Nos. 33-11042; 34-94478 (File No. S7-10-22); The Enhancement and Standardization of Climate-Related Disclosures for Investors***

Dear Secretary Countryman:

Dechert respectfully submits this comment to the Securities and Exchange Commission (“SEC” or “Commission”) in connection with the Release requesting comment on the proposed rules under the Securities Act of 1933 (“Securities Act”) and Securities Exchange Act of 1934 (“Exchange Act”) that would require registrants to provide certain climate-related information in their registration statements and annual reports.<sup>1</sup> We intend for these comments to respond, in particular, to the Commission’s request for comment on whether business development companies (“BDCs”) should be excluded from all or some of the proposed climate-related disclosure rules.<sup>2</sup>

We appreciate the SEC’s initiative in considering how to enhance and standardize climate-related disclosures to investors in light of the growing importance of those disclosures to investors.

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<sup>1</sup> Dechert LLP is an international law firm with a wide-ranging financial services practice that serves clients in the United States and worldwide. Our clients include, among others, a wide variety of registered and unregistered investment companies (including mutual funds, closed-end funds and business development companies), private funds, investment advisers, broker-dealers and institutional investors. An extensive part of our services for these clients involves assistance with the federal securities laws in the organization, distribution and operation of investment funds. The comments herein reflect our own views and not necessarily the views of our clients.

<sup>2</sup> Release on the Enhancement and Standardization of Climate-Related Disclosures for Investors at 278, SEC Rel. Nos. 33-11042; 34-94478 (May 9, 2022) (“*Release*”).

However, we believe that BDCs should be excluded from the proposed climate-related disclosure requirements because (i) due to the nature of their investments, BDCs may not have access to the information required to furnish the required disclosures, nor the leverage to require prospective and actual portfolio companies to furnish such information, increasing the cost and time necessary to comply with the proposed regulations relative to other SEC registrants; (ii) BDCs are pooled investment vehicles that, for purposes of these proposals, are more akin to registered investment companies than operating companies and should not be subject to the proposed climate-related disclosure rules; and (iii) the Commission has recently proposed rules<sup>3</sup> which, if adopted, will also apply to BDCs and cover a wide array of disclosures and business practices related to ESG factors, including climate-related disclosure. While the scope of our comments is limited to this one aspect of the Release, we appreciate the opportunity to submit these comments, which are each discussed in turn below.

**I. BDCs GENERALLY INVEST IN COMPANIES THAT WILL NOT BE SUBJECT TO THE PROPOSED RULES AND THEREFORE BDCs WILL NOT HAVE ACCESS TO THE REQUIRED CLIMATE-RELATED DISCLOSURE INFORMATION FOR MANY OF THEIR INVESTMENTS.**

BDCs, among other things, are required to invest no less than 70% of their total assets in “qualifying assets,” generally defined as private companies or public U.S. companies with less than \$250 million in market capitalization.<sup>4</sup> Due to this requirement, most of a BDC’s underlying investments either would not be subject to the proposed rules or may qualify as Smaller Reporting Companies (“SRCs”) and be exempt from the scope 3 emissions disclosure requirement.<sup>5</sup> If the proposed rule were applied to BDCs, even though substantially all of their investment portfolios comprise entities exempt from the proposed ESG reporting requirements, the BDCs would still be required to make

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<sup>3</sup> Release on Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices at 24, SEC Rel. No. IA-6034; IC 34-594 (May 25, 2022) (“*IC and IA Release*”).

<sup>4</sup> *Release*, at 45. Although BDCs may invest on certain other types of qualifying assets, the vast majority of BDCs satisfy this requirement by investing in private companies, which are not otherwise subject to Exchange Act reporting requirements.

<sup>5</sup> The Commission is proposing, with good reason, to exempt Smaller Reporting Companies (“SRCs”) from the Scope 3 emissions reporting requirement and provide an accommodating phase in period, as it is attempted to reduce the economic impact on small entities. *Release at 212*. SRCs either have a public float of less than \$250 million or Annual revenues of less than \$100 million and either no public float, or a public float of less than \$700 million. See 17 CFR 240.12b-2.

this disclosure under the proposed rule. If unable to obtain this disclosure from the companies in which they invest (which we expect because such companies would not otherwise be subject to the proposed rules and would be unlikely to comply voluntarily), BDCs would have to create their own method and infrastructure for getting the information to include in their disclosures. In many instances, a BDC could be placed in the impossible position of being required to provide information in its Exchange Act reports that it cannot access or obtain. Moreover, a substantial majority of BDCs focus on debt investing, making them similar in nature to banks and private companies, such as specialty finance companies and collateral loan obligation vehicles. None of these companies will be subject to the proposed rules with respect to their borrowers or portfolio companies, yet BDCs will be required to “look through” to, and report on, the ESG characteristics of their portfolio companies under the proposed rules. This differential treatment would place BDCs at a competitive disadvantage in originating loans and impede their ability to fulfill the mission of BDCs as established by Congress, which is to foster capital formation for small and mid-sized U.S. companies.

In addition, even if a BDC could obtain information from its underlying investments, the Proposing Release does not properly consider the costs of obtaining such information. The Proposing Release provides cost estimates and analysis for various types of operating companies. However, BDCs are not operating companies and do not have the infrastructure that is assumed in these estimates. Additionally, BDCs would need this information for each underlying investment, which may number in the hundreds of companies. The Proposing Release does not contemplate the cost or impact of placing this disclosure requirement on BDCs. These additional costs would undermine the purpose of the BDC, potentially reducing the investment that Congress sought in 1980 when it created the business development company through the Small Business Investment Incentive Act of 1980 in an effort to promote investment in small and middle-market companies.<sup>6</sup>

**II. BDCs, IN THIS INSTANCE, SHOULD BE TREATED LIKE MUTUAL FUNDS AND NOT BE REQUIRED TO MAKE THE PROPOSED CLIMATE-RELATED DISCLOSURES.**

Regarding climate-related disclosures, BDCs are similar to mutual funds rather than operating companies. Unlike operating companies, BDCs do not have much, if any, control over the disclosure items dictated by the proposed rules. BDCs are predominantly externally managed and do not have employees. The climate-related risks and greenhouse gas emissions of a BDC would have to reflect a composite of the portfolio companies in which the BDC invests but which it does

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<sup>6</sup> Small Business Investment Incentive Act of 1980, Pub. L. No. 96-447, H.R. 7554, 96<sup>th</sup> Cong.

not control. Therefore, there would be little benefit to expanding the requirements to BDCs while the costs, as explained in Section I, above, would be significant.

We suggest that the Commission treat BDCs like mutual funds and not extend the proposed climate-related disclosure requirements applicable to operating companies to BDCs. BDCs elect to register and be regulated under the Investment Company Act of 1940, which has reporting requirements better designed for BDCs due to the similarity of BDCs to mutual funds. BDCs, because of their structure, will not have any more relevant emissions related information than mutual funds. Like mutual funds, BDCs pool money from many investors and invest that money in operating companies without controlling the operating company. When a BDC invests in the debt or, at times, the equity of a portfolio company, it generally does not control such company and has limited ability to influence the climate policy of that company. Additionally, like mutual funds, BDCs are unlikely to generate their own climate risks or greenhouse gas emissions at a level that would make reporting beneficial. We agree with the wisdom of the SEC's decision to exclude mutual funds from the proposed climate-related disclosure requirement and believe that the structure and purpose of a BDC merits the same treatment.

### **III. BDCs WILL BE SUBJECT TO AMENDED RULES PROPOSED ON MAY 25, 2022 AND MAKING BDCs SUBJECT TO TWO DIFFERENT ESG REPORTING REGIMES WOULD BE INEFFICIENT.**

On May 25, 2022, the SEC proposed amendments designed to enhance the ESG disclosures of registered investment companies, BDCs, registered investment advisers, and certain unregistered investment advisers.<sup>7</sup> The proposed disclosures encompass similar requirements to those proposed for operating companies in the Release but are designed to better capture information pertinent to the structure and purpose of a BDC. Given the existence of the IC and IA Release, subjecting BDCs to an additional reporting regime that is not designed to account for the particularities of a BDC is at best duplicative and at worst unduly burdensome and ineffective.

### **IV. CONCLUSION**

BDCs have been an important part of the investing ecosystem since their inception, providing a flow of public capital to small and middle-market companies. By imposing additional costs to BDC investors for information BDCs either do not have access to or the ability to influence and subjecting BDCs to duplicative regulatory regimes, the proposed climate disclosures may reduce

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<sup>7</sup> *IC and IA Release.*

overall investments by BDCs, reducing the flow of public capital to small and middle-market companies for minimal benefit. Therefore, we respectfully suggest that BDCs should be excluded from the proposed climate-related disclosure requirements.

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We appreciate the opportunity to comment on the Release. If the Commission or its staff have any questions or wish to discuss the matters discussed in this letter, please contact: William Bielefeld [REDACTED] or Thomas Friedmann [REDACTED].

Very Truly Yours,

/s/ Dechert LLP

Dechert LLP

cc: The Honorable Gary Gensler  
The Honorable Hester M. Peirce  
The Honorable Allison Herren Lee  
The Honorable Caroline A. Crenshaw

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