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VIA EMAIL (rule-comments@sec.gov)

Mr. Brent J. Fields
Secretary
US Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Release Nos. 33-10498; 34-83307; IC-33106
Covered Investment Fund Research Reports
File Number S7-11-18

Dear Mr. Fields:

We appreciate the opportunity to respond to the request for comments issued by the US Securities and Exchange Commission (the "Commission") regarding the proposal set forth in the above-referenced release (the "Release") to create a proposed safe harbor pursuant to Rule 139b (the "Proposed Rule") under the Securities Act of 1933 (the "Securities Act") for an unaffiliated broker or dealer participating in a securities offering of a "covered investment fund" to publish or distribute a "covered investment fund research report".

Eversheds Sutherland is a global legal practice and comprises two separate legal entities: Eversheds Sutherland (International) LLP (headquartered in the UK) and Eversheds Sutherland (US) LLP (headquartered in the US), with a collective 66 offices in 32 jurisdictions world-wide. Eversheds Sutherland (US) LLP has offices in Atlanta, Austin, Houston, New York, Sacramento and Washington, D.C. The firm has represented registered investment companies and business development companies ("BDCs") for over 20 years. These comments, while informed by our experience representing registered investment companies and BDCs, represent our own views and are not intended to reflect the views of our clients.

We thank the Commission for this opportunity to comment on the matter addressed in the Release. Our comments are centered on the application of certain provisions of proposed Rule 139b under the Securities Act.

A. Minimum Public Market Value Requirement

Section 2(b)(2)(B) of the Fair Access to Investment Research Act of 2017 (the "FAIR Act") provides that in creating the safe harbor established pursuant to Section (a) thereof, the Commission shall not impose a minimum float provision exceeding the relevant requirement in

Rule 139. Because many covered investment funds are not traded on a national securities exchange and therefore do not have a "public float"[1], the Proposed Rule sets forth an alternative minimum value requirement for such covered investment funds based on the net asset value per share of their shares held by non-affiliates.[2] Footnote 83 in the Release discusses the method for calculating compliance with the minimum value requirement by non-listed covered investment funds, including non-traded registered closed-end funds and non-traded BDCs. Additionally, the third question on page 35 of the Release asks whether any "more specific instructions [should be provided by the Commission] about how a covered investment fund that is not actively traded should compute . . . net asset value". However, the second clause of paragraph (a)(1)(i)(B) of the Proposed Rule appears to apply the alternative minimum value requirements to open-end investment companies only. We believe that it would be consistent with the intent of the FAIR Act and the Release, including Footnote 83 thereof, to revise paragraph (a)(1)(i)(B) to read as follows:

> "(B) The aggregate market value of voting and non-voting common equity held by non-affiliates of the covered investment fund, or, in the case of a ~~registered open-end investment company~~ covered investment fund whose common equity is not listed or traded on a national securities exchange ~~(other than an exchange-traded fund)~~its net asset value (subtracting the value of shares held by affiliates), equals or exceeds the aggregate market value specified in General Instruction I.B.1 of Form S-3 . . . ."

We understand that the Commission may believe that it is appropriate to make Rule 139b applicable to registered open-end investment companies (and not other non-traded investment companies) because of "market structure differences between registered open-end investments (other than ETFs) and all other covered investment funds."[3] Specifically, Footnote 86 to the Release references Rule 22c-1 under the Investment Company Act of 1940 which "requires registered open-end investment companies, their principal underwriters, and dealers in the investment company's shares (and certain others) to sell and redeem the investment company's shares at a price determined at least daily based on the current net asset value next computed after receipt of an order to buy or redeem." However, we believe that differential treatment on the basis of a redemption requirement would be inconsistent with the intent of the market value provision described in the Release.

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[1] The Commission's rules define "public float" in such a way that necessitates the issuer's common equity to be listed for trading on a national securities exchange.

[2] Proposed Rule 139b(a)(1)(B)

[3] The Release at page 33, footnote 86.

The Commission explains that the public market value requirement is "designed to protect investors by excluding research reports on covered investment funds with a relatively small amount of total assets, and hence a limited market following."[4] We do not believe that whether a covered investment fund's shares are subject to a redemption requirement has any bearing on the market following of the covered investment fund. Thus, because there does not appear to be any basis for distinguishing between an open-end fund and a closed-end fund in this regard, we believe that all non-traded covered investment funds that have a net asset value (subtracting the value of shares held by affiliates) that equals or exceeds the aggregate market value specified in General Instruction I.B.1 of Form S-3 should be covered by new Rule 139b under the Securities Act.

B. Definition of "Substantially Continuous Distribution"

In the Release, the Commission requested comment as to whether there are other types of funds that have a class of securities in "substantially continuous distribution" other than "open-end management investment companies and closed-end interval funds that make periodic repurchase offers pursuant to rule 23c-3". We respectfully advise the Commission that non-traded registered closed-end investment companies and non-traded BDCs also continuously offer shares of their common stock. During their fundraising period, which generally lasts for the first three years of the fund's operations, these funds conduct continuous offerings pursuant to Rule 415(a)(1)(ix) under the Securities Act. In addition, many traded registered closed-end investment companies and BDCs maintain at-the-market ("ATM") offering programs pursuant to Rule 415(a)(4) under the Securities Act. We believe that non-traded registered closed-end investment companies and non-traded BDCs conducting continuous offerings pursuant to Rule 415(a)(1)(ix) should be deemed to be in "substantially continuous distribution". Further, we believe that, to the extent that a covered investment fund maintains an ATM program over successive quarters, the fund should be deemed to be in a "substantially continuous distribution".

The carve out from the "initiation or reinitiation" requirement is important because without it no broker-dealer participating in a distribution would be able to initiate coverage under the safe harbor without ceasing its involvement in the distribution. Non-traded closed-end funds and non-traded BDCs conduct continuous offerings that closely resemble continuous offerings by open-end funds and interval funds. Although non-traded closed-end funds and non-traded BDCs are unable to file automatically-effective registration statements to update the information contained therein pursuant to Rule 486(b) thereunder or otherwise, these funds generally file post-effective amendments to their registration statements in such a manner so as to maintain a

[4] The Release at page 34.

continuously effective registration statement. We do not believe that this difference merits disparate treatment of these funds under the Proposed Rule.

Although an ATM offering is not "continuous" in the same sense as an offering conducted by the covered investment funds mentioned above, we believe that the same concern that necessitates the carve-out for funds in "substantially continuous distribution" is present in the case of funds conducting ATM programs. ATM offerings are governed by distribution agreements whereby a broker-deal is appointed as a distribution agent to sell a certain pre-determined number of shares into the active trading market at the current market price. Sales under the distribution agreement take place as frequently as agreed upon by the fund and the distribution agent (which may be daily). In many cases, several broker-dealers serve as distribution agents on a rotating basis during the course of an ATM program.

We believe that ATM offerings are "substantially continuous" and covered investment funds conducting ATM offerings should be deemed in "substantially continuous distribution." Without extending the same flexibility to broker-dealers participating in ATM offerings, these broker-dealers would be required to cease their participation in order to initiate research coverage. Further, it would be unclear to a broker-dealer serving as a distribution agent but not actively selling under the ATM program whether it could avail itself of the safe harbor.

For the reasons noted above, we believe that it is important that new Rule 139b and/or the final adopting release relating thereto specifically acknowledge that (i) non-traded registered closed-end funds and BDCs which continuously offer their shares of common stock pursuant to 415(a)(1)(ix) under the Securities Act and (ii) traded registered closed-end funds and BDCs which conduct ATM offerings pursuant to 415(a)(4) under the Securities Act will be deemed to be in a "substantially continuous distribution" in connection therewith.

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If the Commission wishes to discuss the matters mentioned in this letter, please contact me at [redacted].

Respectfully yours,

Harry S. Pangas