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November 30, 2015

Via Electronic Submission

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

Re: Request for Comment on the Effectiveness of Financial Disclosures about Entities other than the Registrant (File Number S7-20-15)

Dear Mr. Fields:

We appreciate the opportunity to respond to the request for comment issued by the U.S. Securities and Exchange Commission (the "***Commission***") regarding the impact of certain financial disclosure requirements contained in Regulation S-X on various registrants, including business development companies ("***BDCs***"), in the above-referenced release (the "***Release***").

Sutherland Asbill & Brennan LLP is an international law firm with offices in Atlanta, Austin, Geneva, Houston, London, New York, Sacramento and Washington, DC. We have represented BDCs for more than 20 years and maintain the nation's pre-eminent practice in all aspects of the formation, operation and regulation of BDCs. We currently have a team of more than 30 attorneys who spend all or most of their time on BDC matters. These comments, while informed by our experience in representing BDCs, represent our own views and are not intended to reflect the views of our BDC clients.

We thank the Commission for this opportunity to comment on the matters addressed in the Release and look forward to similar opportunities in connection with the Disclosure Effectiveness Initiative with respect to other Commission disclosure requirements applicable to BDCs. Our comments are centered on the application of Rules 1-02(w), 3-09, 4-08(g) and 10-01(b)(1) of Regulation S-X to portfolio companies of BDCs and are set forth below.

Discussion

A. Rule 1-02(w) of Regulation S-X

1. Elimination of the Asset Test – We believe that the asset test (the "**Asset Test**") contained in Rule 1-02(w)(2) of Regulation S-X, which is calculated by dividing a BDC's

proportionate share of a portfolio company's total assets[1] by the BDC's total assets, should be eliminated given that it is not indicative of the significance of a portfolio company investment to the BDC. Outside of a liquidation scenario, it is difficult to get one's arms around why a BDC's proportionate share of a portfolio company's total assets (which is determined by multiplying a BDC's percentage equity interest in the portfolio company by the portfolio company's total assets) is an important financial metric to the BDC or investors in the BDC. For example, a portfolio company with a small amount of assets may be more profitable and valuable than a portfolio company that has a larger amount of assets. Thus, the size of a portfolio company in terms of assets (including a BDC's proportionate share thereof) is rather meaningless unless one knows how well those assets are put to work for investors. Moreover, the main component of the Asset Test (*i.e.*, a BDC's proportionate share of a portfolio company's total assets) may not even be relevant in a liquidation scenario because it does not take into account the outstanding liabilities and debt of the portfolio company (*i.e.*, while a BDC may be "entitled" to a large share of the total assets of a portfolio company based on its equity interest therein, such fact may be inconsequential if the portfolio company has a large amount of debt and liabilities outstanding). Therefore, we believe that the Asset Test should be eliminated as one of the Rule 1-02(w) significance tests for BDCs.

2. Replace the Income Test with an Alternate Test – We believe that the income test (the "**Income Test**") contained in Rule 1-02(w)(3) of Regulation S-X should be replaced with an alternate test given the anomalous results implicated by the inclusion of the change in unrealized appreciation (depreciation) recognized by a BDC with respect to its portfolio company investments in both the numerator[2] and denominator of the calculation thereof. An illustration of such a situation happened to one of our BDC clients which recorded a large amount of unrealized depreciation on its portfolio company investments during a particular quarter due to the significant widening of credit spreads. Such large amount of unrealized depreciation caused the BDC to record a smaller amount of net income[3] for the quarterly period. Because this smaller amount of net income is used as the denominator in connection with the calculation of the Income Test, it caused otherwise insignificant portfolio company investments to trigger the interim summarized income statement information requirement imposed by Rule 10-01(b)(1) of Regulation S-X.

In addition, the inclusion of the change in unrealized appreciation (depreciation) on portfolio company investments as a component of the numerator of the Income Test seems

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[1] A BDC's proportionate share of a portfolio company's total assets is determined by multiplying (A) the BDC's percentage equity interest in the portfolio company by (B) the portfolio company's total assets.

[2] Based on our discussions with the Commission staff, we understand that the following three components should be used by BDCs in connection with calculating the Income Test numerator for a portfolio company: (1) interest, dividend and other income recorded by the BDC from the portfolio company during the measurement period, (ii) the change in unrealized appreciation (depreciation) recognized by the BDC with respect to the portfolio company investment during the measurement period and (iii) any realized gains (losses) recognized by the BDC with respect to the portfolio company investment during the measurement period.

[3] For purposes of the letter, the terms "net income" and "net loss" mean a net increase in net assets resulting from operations and a net decrease in net assets resulting from operations, respectively.

misplaced given that investors typically invest in BDCs for their ability to generate and pay out income distributions (i.e., interest, dividend and other forms of income). Thus, a significance test that requires BDCs to include additional financial disclosures regarding a portfolio company that is triggered in part based on the unrealized appreciation (depreciation) of the portfolio company fails to fully acknowledge such fact as well as the fact that BDC investors would be better served if the significance test only required additional financial disclosures for portfolio companies that generate a significant portion of a BDC's distributable income.

In light of the foregoing, we believe that the Income Test should be replaced by an alternate test that is more geared towards the income-oriented nature of most BDCs. Any potential alternate test should focus on the income that a portfolio company generates for the BDC and its investors, and require enhanced disclosure only for those portfolio companies that generate a significant amount of the BDC's investment income during the applicable measurement period. Such potential alternate tests include an investment income or a net investment income test. These tests would be more pertinent to BDC investors and would also avoid the anomalous results discussed above.

3. Revise the Significance Tests to be Conjunctive (Rather than Disjunctive) – In lieu of or in addition to adopting the preceding recommendations, we believe that it would be appropriate to require that all (or at least two) of the significance tests set forth in Rule 1-02(w) of Regulation S-X be satisfied before a BDC is required to include additional financial disclosures about a portfolio company in its Commission filings. This approach would ensure that a portfolio company is of such significance from a financial standpoint to a BDC to merit the time, effort and expense involved in preparing and including additional financial disclosure about it in the BDC's Commission filings. It would also guard against the situation, which has caused a number of BDCs to seek and receive waivers from the requirements of Rule 3-09, Rule 4-08(g) and Rule 10-01(b)(1) of Regulation S-X from the Commission staff, in which one of the significance tests of Rule 1-02(w) was triggered due to some sort of anomaly (e.g., similar to the anomaly noted above), while the other significance tests clearly demonstrated the portfolio company's relative insignificance to the BDC.

B. Rules 3-09, 4-08(g) and 10-01(b)(1) of Regulation S-X

1. Codify Informal Positions Regarding Applicability of Rules 3-09, 4-08(g) and 10-01(b)(1) to Majority-Owned and Controlled Portfolio Companies – We applaud the Commission staff for issuing informal interpretations with respect to the application of certain aspects of the above-referenced rules to the portfolio companies of BDCs and believe that it would be extremely helpful if the Commission were to codify the following interpretations in these rules:

- Rule 3-09 of Regulation S-X applies to majority-owned portfolio companies of a BDC.

- Rule 4-08(g) of Regulation S-X applies to "controlled" portfolio companies of BDCs (as such term is defined in Section 2(a)(9) of the Investment Company Act of 1940).

- The "aggregated" or "group" basis concepts contained in Rule 4-08(g) of Regulation S-X do not apply to the portfolio companies of BDCs.

2. Revise Rules 3-09, 4-08(g) and 10-01(b)(1) to Clarify their Inapplicability to Portfolio Companies No Longer Held by the BDC – We believe that the above-referenced rules should be revised to clarify that they do not apply to portfolio company investments that are no longer held by the BDC at the applicable measurement date. In this regard, once a portfolio company investment has been sold, the additional financial disclosures required by Rules 3-09, 4-08(g) and 10-01(b)(1) of Regulation S-X are no longer of any relevance or importance to investors in the BDC and should not be required. This conclusion is supported by the fact that the BDC may not be able to obtain or have difficulty in obtaining the information needed to prepare the additional financial disclosures required by these rules for the portfolio company for inclusion in its Commission filings from the entity that now owns/controls the portfolio company.

3. Eliminate Audited Financial Statement Requirement of Rule 3-09 or Provide for a Higher Threshold for the Trigger Thereof – We believe that Rule 3-09 of Regulation S-X should be revised to eliminate the audited financial statement requirement contained therein given that unaudited financial statements would serve the same purpose as audited financial statements (*i.e.*, informing BDC investors about the financial condition and results of operations of significant majority-owned portfolio company investments), but avoid the enormous amount of time, effort and expense spent by the BDC in obtaining such audited financial statements. Because BDCs primarily invest in private, small and mid-sized businesses, it is often the case that many of their portfolio companies do not as a matter of course obtain audited financial statements given, among other things, the significant costs associated therewith. Moreover, those businesses that do obtain audited financial statements often do not engage accounting firms that are registered with the Public Company Accounting Oversight Board ("***PCAOB***") to do so (*i.e.*, an accounting firm permitted to certify financial statements contained in Commission filings). Thus, when a portfolio company investment triggers the audited financial statement requirement of Rule 3-09 of Regulation S-X, BDCs often find themselves scrambling to obtain such financial statements and end up spending an inordinate amount of time and effort cajoling their portfolio companies to either obtain such an audit or switch to a PCAOB registered audit firm to have their financial statements re-audited by such a firm. However, in many cases these efforts are unfruitful and BDCs have had to submit waiver requests to the Commission staff in order to be able to include unaudited financial statements for the portfolio companies in its Commission filings in lieu of audited financial statements. In our experience, the Commission staff has almost always granted such waiver requests. In light of the foregoing, we believe that the Rule 3-09 audited financial statement requirement should be eliminated.

Alternatively, the Commission could revise Rule 3-09 of Regulation S-X to provide that portfolio company financial statements are only required to be audited when the portfolio

company triggers the significance thresholds at a much higher level than the current 20% level. For example, the Commission could adopt the 80% significance threshold that is currently used in Rule 3-05(b)(4)(iii) of Regulation S-X as an indicator of "major significance."

In any event, the Commission should revise Rule 3-09 of Regulation S-X in a manner to alleviate the current burden placed on BDCs and their portfolio companies by the audited financial statement requirement contained therein, particularly given that unaudited financial statements would serve the same purpose as audited financial statements.

4. Revise Rule 10-01(b)(1) to Clarify that it Only Applies to Portfolio Companies that have Previously Triggered Rule 3-09 or Rule 4-08(g) – We believe that the Commission should revise Rule 10-01(b)(1) of Regulation S-X to clarify that it only applies to portfolio companies that have previously triggered Rule 3-09 or Rule 4-08(g) of Regulation S-X at the end of the most recently completed fiscal year. Such an approach would be consistent with the concept that quarterly reports on Form 10-Q (which is where Rule 10-01(b)(1) interim disclosures appear) represent a quarterly supplement to the financial disclosures included in the most recent annual report on Form 10-K filed by BDCs with the Commission.[4] In fact, request for comment no. 30 contained in the Release suggests the same when asking whether the Commission should revise the "requirements to provide interim disclosures about Investees to focus on **significant changes** similar to Rule 10-01(a)(5) of Regulation S-X, which allows registrants to apply judgment and omit details of accounts that **have not changed significantly in amount or composition since the end of the most recently completed fiscal year**." [Emphasis added.]

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If the Commission or its staff wishes to discuss the matters mentioned in this letter, please contact Harry S. Pangas at [redacted] or Lisa A. Morgan at [redacted].

Respectfully yours,

SUTHERLAND ASBILL & BRENNAN LLP

[4] See, e.g., Rule 10-01(a)(5) of Regulation S-X.