

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 32392; 812-14653]

Equus Total Return, Inc.; Notice of Application

December 14, 2016

Agency: Securities and Exchange Commission (“Commission”).

Action: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the “Act”) for an exemption from sections 23(a), 23(b) and 63 of the Act; under section 61(a)(3)(B) of the Act permitting awards of common stock purchase options to non-employee directors; under section 57(i) of the Act and rule 17d-1 under the Act permitting certain joint transactions otherwise prohibited by section 57(a)(4) of the Act; and under section 23(c)(3) of the Act for an exemption from section 23(c) of the Act.

Summary of the Application: Equus Total Return, Inc. (“Applicant” or the “Fund”) requests an order that would permit Applicant to (a) issue restricted shares of its common stock from treasury (“Restricted Stock”) or common stock purchase options (“Options”) as part of the compensation package for certain participants in its 2016 Equity Incentive Plan (the “Plan”), (b) grant Options to directors who are not also employees or officers of the Applicant (“Non-Employee Directors”) under the Plan, (c) withhold shares of the Applicant’s common stock or purchase shares of Applicant’s common stock from participants to satisfy tax withholding obligations relating to the vesting of Restricted Stock or the exercise of Options that will be granted pursuant to the Plan, and (d) permit participants to pay the exercise price of Options with shares of Applicant’s common stock.

Filing Dates: The application was filed on May 26, 2016, and amended on August 25, 2016, September 29, 2016 and November 23, 2016.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 9, 2017, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090. Applicant, 700 Louisiana Street, 48<sup>th</sup> Floor, Houston, TX 77002.

For Further Information Contact: Robert Shapiro, Senior Counsel, at (202) 551-7758, or Mary Kay Frech, Branch Chief, at (202) 551-6821 (Chief Counsel's Office, Division of Investment Management).

Supplementary Information: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

Applicant's Representations:

1. Applicant is an internally managed closed-end investment company that has elected to be regulated as a business development company ("BDC") under the Act.<sup>1</sup> Applicant represents that it has a total return investment strategy that seeks to provide the highest total

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<sup>1</sup> Section 2(a)(48) of the Act defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial assistance with respect to the issuers of such securities.

return, consisting of capital appreciation and current income. The Fund attempts to maximize the return to shareholders in the form of current investment income and long-term capital gains by investing in the debt and equity securities of companies with a total enterprise value of between \$5.0 million and \$75.0 million, although the Fund may engage in transactions with smaller or larger investee companies from time to time. Shares of Applicant's common stock are traded on the New York Stock Exchange under the symbol "EQS." As of November 23, 2016, there were 12,673,646 shares of Applicant's common stock outstanding.

2. Applicant is governed by a seven-member board of directors (the "Board") of whom five are not "interested persons" of Applicant within the meaning of section 2(a)(19) of the Act.

3. Applicant believes that, because the market for superior investment professionals is highly competitive, Applicant's successful performance depends on its ability to offer fair compensation packages to its professionals that are competitive with those offered by other investment management businesses. Applicant states that the ability to offer equity-based compensation to its employees and Non-Employee Directors, which both aligns employee and Board behavior with stockholder interests and provides a retention tool, is vital to Applicant's future growth and success.

4. On April 15, 2016, by unanimous vote, the Board adopted the Plan and recommended the same for approval by the Fund's shareholders, which approval was granted at the annual meeting of the Fund's shareholders held on June 13, 2016. The Plan became effective as of the date of such approval. The Plan authorizes the issuance of Options and Restricted Stock to the Applicant's directors, including Non-Employee Directors, officers and other employees ("Participants").

5. The Plan will be administered by the Board or the Compensation Committee of the

Board (the Board or the Compensation Committee discharged to administer the Plan is referred to as the “Plan Administrator”). The Plan Administrator has full power to select, from among the individuals eligible for awards, the individuals to whom awards will be granted, to make any combination of awards to Participants, and to determine the specific terms and conditions of each award, subject to the provisions of the Plan. Each issuance of Restricted Stock under the Plan will be approved by the required majority, as defined in section 57(o) of the Act, of the Fund’s directors (the “Required Majority”)<sup>2</sup> on the basis that the issuance is in the best interests of the Fund and its shareholders. The date on which the Required Majority approves an issuance of Restricted Stock will be deemed the date on which the subject Restricted Stock is granted.

6. As described in more detail in the application, under the Plan, upon issuance of the requested order, each Non-Employee Director will receive a one-time grant of up to 21,000 shares of Restricted Stock and 42,000 Options. One fourth of the Restricted Stock and one fourth of the Options will vest immediately upon their grant. If a Non-Employee Director remains in service on the Board, the remainder of his or her Restricted Stock and Options will vest upon the earliest to occur of (i) a change in control of the Fund, or (ii) ratably over a three-year period from the date of grant. The awards of Restricted Stock and Options to Non-Employee Directors contemplated by the Plan are intended to be on a one-time basis. Future awards of Restricted Stock and/or Options under the Plan to the Non-Employee Directors are not contemplated, and any such future awards or changes to the amounts set forth in the application may not be made without Commission approval.

7. The Plan will authorize the issuance of Options and Restricted Stock subject to

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<sup>2</sup> Section 57(o) of the Act provides that the term “required majority,” when used with respect to the approval of a proposed transaction, plan, or arrangement, means both a majority of a BDC’s directors or general partners who have no financial interest in such transaction, plan, or arrangement and a majority of such directors or general partners who are not interested persons of such company.

certain forfeiture restrictions. The Restricted Stock will be subject to restrictions on transferability and other restrictions as required by the Plan Administrator from time to time. Except to the extent restricted by the Plan Administrator, a Participant granted an award of Restricted Stock will have all the rights of any other shareholder, including the right to vote the Restricted Stock and the right to receive dividends. During the restriction period (i.e., prior to the lapse of applicable forfeiture provisions), the Restricted Stock generally may not be sold, transferred, pledged, hypothecated, margined, or otherwise encumbered by the Participant. Except as the Plan Administrator otherwise determines, upon termination of a Participant's service as a director, officer, and employee of the Fund during the applicable restriction period, Restricted Stock, for which forfeiture provisions have not lapsed at the time of such termination, shall be forfeited.

8. Applicant has reserved 2,534,728 shares for issuance under the Plan, whether as awards of Restricted Stock or as Options. If all of the shares of Restricted Stock under the Plan were issued and all Options issued under the Plan were issued and subsequently exercised, the total amount of additional common stock issued from treasury would equal 20% of the Fund's shares of common stock presently outstanding. Any shares withheld from an award, either to satisfy tax withholding requirements, or pursuant to the delivery of shares of common stock or Restricted Stock upon the exercise of Options, will not be returned to the Plan reserve. The combined maximum amount of Restricted Stock that may be issued under the Plan to all Participants will be 10% of the outstanding common shares of the Fund on the effective date of the Plan, plus 10% of the number of shares issued or delivered by the Fund (other than pursuant

to compensation plans) during the term of the Plan.<sup>3</sup> The maximum award of Options granted to any one individual will not exceed 1,000,000 shares of common stock (subject to adjustment for stock splits and similar events) for any calendar year period, net of any shares canceled or redeemed in connection with any tax withholding. The maximum award of shares of Restricted Stock issued to any one individual will not exceed 500,000 shares of common stock (subject to adjustment for stock splits and similar events) for any calendar year period, net of any shares canceled or redeemed in connection with any tax withholding.

9. The Plan permits the granting of (1) Options to purchase common stock intended to qualify as incentive stock options under Section 422 of the Code and (2) Options that do not so qualify. Options granted under the Plan will be non-qualified options if they fail to qualify as incentive options or exceed the annual limit on incentive stock options. Incentive stock options may only be granted to employees of the Fund and its subsidiaries. Non-qualified options may be granted to any persons eligible to receive incentive options, officers of the Fund and, subject to the requested order, to Non-Employee Directors. The option exercise price of each Option will be determined by the Plan Administrator but may not be less than 100% of the fair market value of the common stock on the date of grant, or if required under the Act, not less than the net asset value of the common stock on the date of grant. Fair market value for this purpose will be the last reported sale price of the shares of common stock on the New York Stock Exchange on the date of grant. The term of each Option will be fixed by the Plan Administrator and may not exceed ten years from the date of grant. The Plan Administrator will determine at what time or times each Option may be exercised.

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<sup>3</sup> For purposes of calculating compliance with this limit, the Fund will count as Restricted Stock all shares of the Fund's common stock that are issued pursuant to the Plan less any shares that are forfeited back to the Fund and cancelled as a result of forfeiture restrictions not lapsing.

10. The Plan provides that the Fund is authorized to withhold stock (in whole or in part) from any award of Restricted Stock granted in satisfaction of a Participant's tax obligations. In addition, as discussed more fully in the application, the exercise of Options will result in the recipient being deemed to have received compensation in the amount by which the fair market value of the shares of the Fund's common stock, determined as of the date of exercise, exceeds the exercise price. Accordingly, Applicant requests relief to withhold shares of its common stock or purchase shares of its common stock from Participants to satisfy tax withholding obligations related to the vesting of Restricted Stock or exercise of Options that will be granted pursuant to the Plan. Applicant also requests an exemption to permit Participants to pay the exercise price of Options with shares of the Fund's common stock.

Applicant's Legal Analysis:

Sections 23(a) and (b), Section 63

1. Section 63 of the Act makes applicable to BDCs the provisions of section 23(a) of the Act, which generally prohibit a registered closed-end investment company from issuing securities for services or for property other than cash or securities. These provisions would prohibit the issuance of Restricted Stock as a part of the Plan.

2. Section 23(b) of the Act generally prohibits a registered closed-end investment company from selling any common stock of which it is the issuer at a price below its current net asset value. Section 63(2) of the Act makes section 23(b) applicable to BDCs unless certain conditions are met. Because Restricted Stock that would be granted under the Plan would not meet the terms of section 63(2), sections 23(b) and 63 would prevent the issuance of Restricted Stock.

3. Section 6(c) provides, in part, that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes thereof, from any provision of the Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Applicant requests an order pursuant to section 6(c) of the Act granting an exemption from the provisions of sections 23(a), 23(b) and 63 of the Act. Applicant states that the Plan would not violate the concerns underlying these sections, which include: (a) preferential treatment of investment company insiders and the use of options and other rights by insiders to obtain control of the investment company; (b) complication of the investment company's structure that made it difficult to determine the value of the company's shares; and (c) dilution of shareholders' equity in the investment company. Applicant asserts that the Plan does not raise concerns about preferential treatment of Applicant's insiders because the Plan is a bona fide compensation plan of the type that is common among corporations generally. In addition, Applicants state that investors in the Fund will be protected to at least the same extent that they are currently protected under section 61(a)(3) of the Act. Applicant also asserts that the issuance of Restricted Stock would not become a means for insiders to obtain control of Applicant because the maximum amount of Restricted Stock that may be issued under the Plan at any one time will be ten percent of the outstanding shares of common stock of Applicant.

5. Applicant further states that the Plan will not unduly complicate Applicant's capital structure because equity-based incentive compensation arrangements are widely used among corporations and commonly known to investors. Applicant notes that the Plan has been submitted to and approved by the Fund's stockholders. Applicant represents that the proxy



materials submitted to Applicant's stockholders contain a concise "plain English" description of the Plan and its potential dilutive effect. Applicant also states that on an ongoing basis it will comply with the proxy disclosure requirements in Item 10 of Schedule 14A under the Securities Exchange Act of 1934. Applicant further notes that the Plan will be disclosed to investors in accordance with the requirements of the Form N-2 registration statement for closed-end investment companies and pursuant to the standards and guidelines adopted by the Financial Accounting Standards Board for operating companies. Applicant also will comply with the disclosure requirements for executive compensation plans applicable to BDCs.<sup>4</sup> Applicant thus concludes that the Plan will be adequately disclosed to investors and appropriately reflected in the market value of Applicant's shares.

6. Applicant acknowledges that awards granted under the Plan may have a dilutive effect on the stockholders' equity per share in Applicant, but believes that effect would be outweighed by the anticipated benefits of the Plan to Applicant and its stockholders. Applicant asserts that availability of Restricted Stock and Options would enable the Fund to substitute or augment the overall cash compensation to directors, officers, and employees, and compensate its management for the loss of the carried interest that the Fund's investment professionals would receive at a private equity firm, among other things. Applicant further asserts that the Plan will enhance the Fund's ability to compensate its personnel competitively, while also aligning the interests of its personnel with the success of the Fund and the interests of its shareholders and preserving cash for further investment. In addition, Applicant states that its stockholders will be

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<sup>4</sup> See Executive Compensation and Related Party Disclosure, Securities Act Release No. 8655 (Jan. 27, 2006) (proposed rule); Executive Compensation and Related Party Disclosure, Securities Act Release No. 8732A (Aug. 29, 2006) (final rule and proposed rule), as amended by Executive Compensation Disclosure, Securities Act Release No. 8756 (Dec. 22, 2006) (adopted as interim final rules with request for comments).

further protected by the conditions to the requested order that assure continuing oversight of the operation of the Plan by the Plan Administrator.

Section 61(a)(3)(B)

7. Section 63(3) of the Act permits a BDC to sell its common stock at a price below current net asset value upon the exercise of any option issued in accordance with section 61(a)(3). Section 61(a)(3)(B) provides, in pertinent part, that a BDC may issue common stock purchase options to non-employee directors pursuant to an executive compensation plan if: (i) the options expire by their terms within ten years; (ii) the exercise price of such options is not less than the current market value at the date of issuance or, if no such market value exists, the then current net asset value of such underlying voting securities; (iii) the proposal to issue such options is authorized by the company's stockholders, and is approved by order of the Commission, upon application, on the basis that the terms of the proposal are fair and reasonable and do not involve overreaching of the company or its stockholders; (iv) the options are not transferable except for disposition by gift, will or intestacy; (v) no investment adviser of the company receives any compensation described in section 205(a)(1) of the Investment Advisers Act of 1940 (e.g., "performance-based" compensation), except to the extent permitted by section 205(b)(1) or (2) thereunder; and (vi) that the company does not have a profit-sharing plan described in section 57(n) of the Act.

8. In addition, section 61(a)(3) provides that the amount of the BDC's voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance may not exceed 25% of the BDC's outstanding voting securities, except that if the amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights issued to the BDC's directors, officers and employees pursuant to any

executive compensation plan would exceed 15% of the BDC's outstanding voting securities, then the total amount of voting securities that would result from the exercise of all outstanding warrants, options and rights at the time of issuance will not exceed 20% of the outstanding voting securities of the BDC.

9. Applicant represents that its proposal to grant Options to Non-Employee Directors meets all of the requirements of section 61(a)(3) of the Act. Applicant believes that that the Options to be granted to Non-Employee Directors under the Plan will provide significant at-risk incentives to the Fund's Non-Employee Directors to remain on the Board and to devote their best efforts to the success of the Fund's business and the enhancement of stockholder value in the future. Applicant state that the Options will also provide a means for Non-Employee Directors to increase their ownership interests in the Fund, thereby ensuring close alignment of their interests with those of the Fund and its stockholders. Applicant asserts that by providing incentives in the form of such Options to its Non-Employee Directors, the Fund will be better able to maintain continuity in the membership of its Board and to attract, when necessary, and to retain as Non-Employee Directors the highly experienced, successful and motivated business and professional people that are critical to the Fund's success as a BDC.

10. As noted above, Applicant states that the maximum number of voting securities of the Fund that would result from the exercise of all Options issuable under the Plan, combined with all shares of Restricted Stock that would be possible to award under the Plan is not more than 20% of the Fund's outstanding shares of common stock, or 2,534,728 shares, which amount is below the percentage limitations in the Act. Applicant asserts that, given the relatively small number of Restricted Shares and Options that are proposed to be issued to Non-Employee Directors under the Plan, even if all Options granted thereunder were to vest and become

immediately exercisable, the issuance of these securities under the Plan should not have a substantial dilutive effect on the net asset value of the common stock of the Fund.

Section 57(a)(4), Rule 17d-1

11. Section 57(a) proscribes certain transactions between a BDC and persons related to the BDC in the manner described in section 57(b) (“57(b) persons”), absent a Commission order. Section 57(a)(4) generally prohibits a 57(b) person from effecting a transaction in which the BDC is a joint participant absent such an order. Rule 17d-1, made applicable to BDCs by section 57(i) to the extent the Commission has not adopted a rule under section 57(a)(4), generally proscribes participation in a “joint enterprise or other joint arrangement or profit-sharing plan,” which includes a stock option or purchase plan. Officers, employees and directors of a BDC are 57(b) persons. Thus, the issuance of shares of Restricted Stock or Options could be deemed to involve a joint transaction involving a BDC and a 57(b) person in contravention of section 57(a)(4). Rule 17d-1(b) provides that, in considering relief pursuant to the rule, the Commission will consider (a) whether the participation of the BDC in a joint enterprise is consistent with the policies and purposes of the Act and (b) the extent to which such participation is on a basis different from or less advantageous than that of other participants.

12. Applicant requests an order pursuant to section 57(i) of the Act and rule 17d-1 under the Act to permit Applicant to issue Restricted Stock and Options under the Plan. Applicant acknowledges that its role is necessarily different from the other Participants because the other Participants are its directors, officers, and employees. Applicant asserts, however, that the Fund’s participation with respect to the Plan will not be “less advantageous” than that of the Participants. Applicant states that the Fund, either directly or indirectly, is responsible for the compensation of the Participants; the Plan is simply the Fund’s chosen method of providing such

compensation. Moreover, Applicant believes that the Plan will benefit the Fund by enhancing its ability to attract and retain highly qualified personnel. Applicant further asserts that the Plan, although benefiting the Participants and the Fund in different ways, is in the interest of the Fund's stockholders, because it will help align the interests of its directors, officers, and employees with those of its stockholders, which will encourage conduct on the part of these individuals to produce a better return for the Fund's stockholders. Applicant also states that section 57(j)(1) of the Act expressly permits any director, officer or employee of a BDC to acquire warrants, options and rights to purchase voting securities of such BDC, and the securities issued upon the exercise or conversion thereof, pursuant to an executive compensation plan which meets the requirements of section 61(a)(3)(B) of the Act. Applicant submits that the issuance of Restricted Stock pursuant to the Plan poses no greater risk to stockholders than the issuances permitted by section 57(j)(1) of the Act.

#### Section 23(c)

13. Section 23(c) of the Act, which is made applicable to BDCs by section 63 of the Act, generally prohibits a BDC from purchasing any securities of which it is the issuer except in the open market pursuant to tenders, or under other circumstances as the Commission may permit to ensure that the purchases are made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicant states that the withholding or purchase of shares of Restricted Stock and common stock in payment of applicable withholding tax obligations or of common stock in payment for the exercise price of an Option might be deemed to be purchases by the Fund of its own securities within the meaning of section 23(c) and therefore prohibited by the Act.

14. Section 23(c)(3) of the Act permits a BDC to purchase securities of which it is the issuer in circumstances in which the repurchase is made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicant believes that the requested relief meets the standards of section 23(c)(3).

15. Applicant submits that these purchases will be made in a manner that does not unfairly discriminate against Applicant's stockholders because Applicant will use the closing sales price of its shares of common stock on the New York Stock Exchange (or any primary exchange on which its shares of common stock may be traded in the future) as the "fair market value" of its common stock under the Plan (i.e., the public market price on the date of grant of Restricted Stock and the date of grant of Options). Applicant submits that because all transactions with respect to the Plan will take place at the public market price for the Fund's common stock, these transactions will not be significantly different than could be achieved by any stockholder selling in a transaction on the New York Stock Exchange. Applicant represents that no transactions will be conducted pursuant to the requested order on days where there are no reported market transactions involving Applicant's shares.

16. Applicant represents that the withholding provisions in the Plan do not raise concerns about preferential treatment of Applicant's insiders because the Plan is a bona fide compensation plan of the type that is common among corporations generally. Furthermore, the vesting schedule is determined at the time of the initial grant of the Restricted Stock and the option exercise price is determined at the time of the initial grant of the Options. Applicant represents that all purchases may be made only as permitted by the Plan, which has been approved by the Fund's stockholders. Applicant believes that granting the requested relief would be consistent with the policies underlying the provisions of the Act permitting the use of equity

compensation as well as prior exemptive relief granted by the Commission under section 23(c) of the Act.

Applicant's Conditions:

Applicant agrees that the order granting the requested relief will be subject to the following conditions:

1. The Plan will be authorized by the Fund's shareholders.
2. Each issuance of Restricted Stock to a Participant will be approved by the Required Majority on the basis that such grant is in the best interest of the Fund and its shareholders.
3. The amount of voting securities that would result from the exercise of all of the Fund's outstanding warrants, Options and rights, together with any Restricted Stock issued pursuant to the Plan, at the time of issuance shall not exceed 25% of the outstanding voting securities of the Fund, except that if the amount of voting securities that would result from the exercise of all of the Fund's outstanding warrants, Options and rights issued to the Fund's directors, officers and employees, together with any Restricted Stock issued pursuant to the Plan, would exceed 15% of the outstanding voting securities of the Fund, then the total amount of voting securities that would result from the exercise of all outstanding warrants, Options and rights, together with any Restricted Stock issued pursuant to the Plan, at the time of issuance shall not exceed 20% of the outstanding voting securities of the Fund.
4. The maximum amount of shares of Restricted Stock that may be issued under the Plan will be 10% of the outstanding shares of common stock of the Fund on the effective date of the Plan plus 10% of the number of shares of the Fund's common stock issued or delivered by the Fund (other than pursuant to compensation plans) during the term of the Plan.

5. The Board will review the Plan at least annually. In addition, the Board will review periodically the potential impact that the issuance of Restricted Stock under the Plan could have on the Fund's earnings and net asset value per share, such review to take place prior to any decisions to grant Restricted Stock under the Plan, but in no event less frequently than annually. Adequate procedures and records will be maintained to permit such review. The Board will be authorized to take appropriate steps to ensure that the issuance of Restricted Stock under the Plan will be in the best interest of the Fund and its shareholders. This authority will include the authority to prevent or limit the granting of additional Restricted Stock under the Plan. All records maintained pursuant to this condition will be subject to examination by the Commission and its staff.

For the Commission, by the Division of Investment Management, under delegated authority.

Brent J. Fields  
Secretary