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Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: Proposed Rules 2a-46 and 55a-1 under the Investment Company Act of 1940, as amended (File Number S7-37-04)

Members of the Commission:

On behalf of the Committee on Federal Regulation of Securities of the Section of Business Law of the American Bar Association (the "Committee"), we are writing to express our views on proposed Rules 2a-46 and 55a-1 issued by the Securities and Exchange Commission ("Commission") under the Investment Company Act of 1940 ("1940 Act").[1] This letter was drafted by a task force of members of the Committee whose names are set forth below, and the members are available to discuss the matters discussed herein with the Commission and its staff. The comments expressed in this letter represent the views of the Committee only and have not been approved by the American Bar Association's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, they do not represent the position of the ABA Section of Business Law, nor do they necessarily reflect the views of all members of the Committee on every comment herein.

As a preliminary matter, we commend the Commission and its staff for taking the initiative to address the problem that has occurred with respect to business development companies ("BDCs") as a result of the amendments made to Regulation T by the Board of Governors of the Federal Reserve System ("Federal Reserve Board") in 1998. We believe that the full ramifications (and collateral consequences) of the amendments made to Regulation T

[1] Investment Company Act Release No. 26647 (November 1, 2004) ("Proposing Release").

were not realized until the spate of registration statements filed by BDCs this past Spring and Summer. Although the Commission's staff raised questions with individual registrants during the processing of those registration statements, we believe that the Commission staff wisely chose to recommend that proposed rules be issued to provide the opportunity for comment to resolve the issue for all BDCs rather than attempt to resolve potential problems on a registrant-by-registrant basis.

Rule 2a-46 under the 1940 Act:

Proposed Rule 2a-46 would define the term "eligible portfolio company" to include (i) any issuer that does not have a class of securities listed on an exchange or on NASDAQ, and (ii) any issuer that has a class of securities listed on an exchange or on NASDAQ but that has received a notice of non-compliance with listing standards or does not meet the initial quantitative listing requirements. This would be consistent with the intent of the Small Business Investment Incentive Act of 1980 ("1980 Amendments") to permit BDCs to make investments (with respect to at least 70% of their assets) in domestic operating companies and would "cure" the effect of the 1998 amendments by the Federal Reserve Board to Regulation T on the companies that would otherwise have satisfied the definition of "eligible portfolio company" in Section 2(a)(46) of the 1940 Act. In our experience, the approach underlying proposed Rule 2a-46 adequately describes issuers that meet the purpose of the 1980 Amendments, and we are not aware of an alternative approach that would better describe those issuers or be more objective or workable than proposed Rule 2a-46. Moreover, the approach will be simple for BDCs to administer and to monitor.

Rule 55a-1 under the 1940 Act:

Proposed Rule 55a-1would permit BDCs to make follow-on investments in certain issuers that met the definition of "eligible portfolio company" under proposed Rule 2a-46 when the BDC made its initial investment(s) in the issuer, but that do not meet the definition at the time of the follow-on investment because the issuer subsequently listed a class of securities on an exchange or on NASDAQ in connection with a non-public offering by the issuer or certain of its affiliated persons. An important principle embraced by the 1980 Amendments was the concept that "the law" should not dictate when BDCs should sell investments in eligible portfolio companies: that should be an economic decision made by management of the BDCs. For that reason, we would not support any time restiction on follow-on investments or any other kind of restriction that is not presently embodied in Section 55(a)(1) of the 1940 Act. Instead, we support proposed Rule 55a-1 as drafted and believe that the Commission should not modify the proposal to provide any time restiction on follow-on investments.

Additional Comments:

In the Release, the sentence that ends with footnote 11 implies that a BDC must invest its 30% basket consistent with the overall purpose of the 1980 Amendments. We believe, however, that Section 55(a)(1), the various definitions applying to that section, and the legislative and

administrative history support the view that the only investment restrictions applicable to BDCs are restrictions on the 70% basket, not on the 30% basket. We understand that the Commission staff has informally imposed a 5%-of-assets limit on certain non-complying issuers. We believe that there is no basis for such a limitation and, if it is to be imposed, believe that it should be subjected to the same notice and comment process as other topics described in the Release.

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We look forward to working with the Commission as this rulemaking process moves forward. Members of the Committee are available to discuss these comments. If you believe that such discussions would be helpful, please contact the undersigned.

Respectfully submitted,

Committee on Federal Regulation of Securities

/s/ Dixie L. Johnson
Committee Chair

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