

MEMORANDUM

To: File

From: Hester Peirce

Re: Proposed Rule: Definition of Eligible Portfolio Company under the Investment Company Act of 1940
File No.: S7-37-04

Date: March 14, 2007

On March 14, 2007, David Franasiak and David Starr of Williams & Jensen and Samuel Flax of American Capital met with Commissioner Paul Atkins and his counsel, Hester Peirce, to discuss the Commission's Eligible Portfolio Company Rulemaking. They submitted the attached chronology and discussed the issues raised in American Capital's comment letter of December 21, 2006 and Williams & Jensen's comment letter of December 18, 2006.

Attachment

**CHRONOLOGY OF
ELIGIBLE PORTFOLIO COMPANY DEFINITION
AMENDMENT EFFORTS**

July 2000 and Fall 2001

Representatives of the BDC industry meet with SEC staff in the Division of Investment Management to request, among other items, a rulemaking to redefine "eligible portfolio company." Commission staff responds that committing staff time for a rulemaking is not viable in light of the small size of the BDC industry relative to other issues confronting the staff.

June 26, 2001

BDC coalition presents testimony to the Financial Services Subcommittee on Oversight calling for, among other changes, a modernization of the term "eligible portfolio company."

June 10, 2002

SEC staff offer suggestions to House Financial Services Committee staff on proposed draft amendments to the business development company provisions of the Investment Company Act of 1940. The draft amendments would, among other things, allow an "eligible portfolio company" to include companies with a market capitalization of \$1 billion or less. SEC staff expresses concern over whether the proposed new definition of "eligible portfolio company" is a standard "consistent with the intent of SBIIA", adding they would "be happy to help you devise an appropriate standard."

July 26, 2002

Representatives Kelly and Velazquez introduce H.R. 5258 to redefine eligible portfolio company to include companies with a market capitalization of \$1 billion or less.

May 7, 2003

BDC representatives meet with SEC staff in the Division of Investment Management to seek help in clarifying what changes need to be made to the legislation. No suggestions are received.

September 24, 2003

H.R. 3170 is introduced by Kelly and Velazquez which significantly narrows the definition of "eligible portfolio company" compared with the 2002 legislation. The market capitalization threshold is reduced from \$1 billion to \$250 million.

September & October 2003

BDC representatives meet with majority of the SEC Commissioners explaining the need for legislation.

December 2003

BDC representatives meet with SEC staff from the Division of Investment Management and the Office of Small Business Policy to explain again the need for the legislation. The representatives are asked to provide additional market capitalization data to the staff.

January 20, 2004

Additional material is provided the SEC staff demonstrating that the proposed definition of eligible portfolio company is consistent with the original legislative history enacting BDCs. The material assembled by Merrill Lynch showed that 7,974 of publicly traded companies have market capitalizations of less than \$250 million, a figure just slightly lower than the 8,000 public companies Congress stated it intended to be eligible for BDC financing in 1980.

March 2004

SEC staff provide comments to House Financial Services Committee staff on H.R. 3170 suggesting that it be modified to enable BDCs to invest only in public companies traded on the bulletin board and pink sheets, consistent with the current law scope of public companies that are eligible portfolio companies.

April 28, 2004

House (108th Congress) passes H.R.3170 by a unanimous voice vote.

August 2004

SEC staff informs Senate Banking Committee staff that the Commission is preparing a rulemaking.

November 1, 2004

SEC proposes rule to modify the definition of eligible portfolio company. The rule effectively excludes companies listed on an exchange or Nasdaq from being eligible portfolio companies, except in the case that such securities do not meet the quantitative listing requirements of that market and they do not meet the initial listing requirements for any other exchange or Nasdaq.

January 7, 2005

Comment period ends for SEC's proposed rule to modify the definition of eligible portfolio company.

February 1, 2005 (109th Congress)

H.R. 436 is introduced by Representatives Kelly and Velazquez. H.R. 436 is identical to legislation passed in the 108th Congress that would define an eligible portfolio company as one with a market capitalization of \$250 million or less. Chairman Oxley and Chairman Baker join as original cosponsors.

April 6, 2005

House passes H.R. 436 by a unanimous vote.

July 14, 2005

Senators Allen and Santorum introduce S.1396, which is companion legislation to H.R. 436.

August 2005

In a conference call with the SEC's Division of Investment Management and Office of Economic Analysis staff and BDC representatives discuss potential compromise using a market capitalization standard and other factors for defining eligible portfolio company.

October 31, 2005

The SEC's Semiannual Regulatory Agenda is published, which indicates that a final action date for a rulemaking on the eligible portfolio company definition would be in November 2005.

November 28, 2005

SEC Chairman Christopher Cox sends letters to Representatives Oxley, Baker, Kelly, and Velazquez, indicating that the Division of Investment Management is working to resolve the definitional issue and that the staff hopes to send its recommendations to the Commission by the end of the year.

December 2005

Staff of SEC's Investment Management Division meet with Senate Banking Committee regarding the status of efforts to modernize the definition of eligible portfolio company. IM staff indicate a new rulemaking would be forthcoming shortly.

April 4, 2006

Senator Dole joins as a cosponsor to the legislation, S.1396.

April 6, 2006

14 BDCs send a letter to Banking Committee Chairman Shelby and Ranking Member Sarbanes requesting that the bill (H.R. 436/S.1396) be passed by the Senate.

April 24, 2006

Senators Schumer and Menendez write a letter to SEC Chairman Cox, expressing support for H.R. 436 / S. 1396 and encouraging the Commission "to take prompt action to adopt a rule that expands the definition consistent with Congress' original intent and current Congressional proposals."

May 3, 2006

At a hearing before the House Financial Services Committee, Representative Velazquez asks SEC Chairman Cox when the Commission would address the BDC eligible portfolio company definition rule. Cox responded that a new rule will be promulgated and will be out by "late summer" if not sooner.

October 25, 2006

The SEC repropose a rule to modify the definition of eligible portfolio company, proposing two different alternatives: (a) Alternative One, which would define eligible portfolio company to include companies whose securities are listed on an Exchange and have a public float of less than \$75 million; and (b) Alternative Two, which would define eligible portfolio company to include companies that have securities listed on an Exchange based upon a market capitalization of \$150 million or \$250 million.

January 2, 2007

The comment period ends for the repropose rule to modify the definition of eligible portfolio company. Fifteen comment letters were filed with the Commission by January 3, 2007, and all but one commenter recommended adoption of a rule that modifies the definition of eligible portfolio company to include companies that have securities listed on an Exchange with a market capitalization standard of \$250 million or less (the one commenter did not express a particular view on what market capitalization level should be used).