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January 7, 2005

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: File Number S7-37-04

Dear Mr. Katz:

Williams & Jensen has worked with various business development companies (“BDCs”) in supporting efforts to modernize the definition of “eligible portfolio company.” We believe that the proposed rulemaking on the Definition of Eligible Portfolio Company Under the Investment Company Act of 1940 (*File No.*: S7-37-04) is not supported by the Securities and Exchange Commission’s own data, as further explained below. As such, we urge the Commission to modify the definition of eligible portfolio company to one consistent with the original intent of Congress, and the supporting market data.

Congress enacted the Small Business Investment Incentive Act of 1980 (“SBIIA”) to encourage more capital access to small businesses, whether they are private or publicly traded, through BDC investments. The legislative history authorized BDCs to provide capital to “small developing or financially troubled businesses...”¹ It further explains the scope of the eligible investments for BDCs:

“The pool of such eligible portfolio companies under the Bill is very broad... It is estimated there are about 12,000 publicly held operating companies; the definition of ‘eligible portfolio company’ would include about two-thirds, or 8,000, of those companies, plus all privately-held companies. In addition, the Commission is given

¹ House of Representatives Report No. 1341, 96th Congress, 2d Session, p. 23 (1980), (“House Report”).

rulemaking authority to expand the class of eligible portfolio companies, following certain specific standards.”²

In its rulemaking the Commission does not take into consideration this legislative history. We identify several areas below where the justifications for the rule are not supported by the SEC’s data, the data is used incorrectly, or the Congressional intent is ignored.

First, in discussing the rationale that securities listed on an Exchange or on NASDAQ should generally not be considered eligible portfolio companies, the proposed rulemaking asserts, “We generally believe that most issuers that are able to list their securities on an Exchange or on NASDAQ have access to the public capital markets.”³ The Commission’s response to our Freedom of Information Act (“FOIA”) request of data admits that no data exists to support this assertion. We requested the data used to support the Commission’s “conclusion that companies listed on NASDAQ and the Exchanges have no problems accessing public capital markets, or any other data that describes companies that have capital access problems.”⁴ In reference to this information request, the Commission responded, “With respect to items 3 and 5, our Office of Economic Analysis advised us that they did not produce any related data.”⁵

Given this response we take serious issue with the assertion in the Commission’s rulemaking that suggests that excluding from the definition of eligible portfolio company those issuers with securities listed “on an Exchange or on NASDAQ, is a rational, objective and workable test”.⁶ A rational and objective test should be supported by facts or relevant data, something which is lacking in this important premise of the rulemaking.

Second, the proposed rulemaking emphasizes that BDCs should focus on investing in financially troubled companies. It would only permit a company listed on an Exchange or on NASDAQ to be classified as an eligible portfolio company if it met two conditions: (1) it has received notice from the Exchange or NASDAQ that it does not meet the quantitative listing standards; and (2) it cannot meet the initial quantitative listing requirements of any Exchange or NASDAQ.

Companies that receive a notice of delisting frequently are facing bankruptcy and require debtor-in-possession financing. As part of our FOIA request, we also requested data that supports the notion that BDCs have expertise to provide debtor-in-possession financing.⁷ In reference to this information request, the Commission responded, “With respect to items 3 and 5, our Office of Economic Analysis advised us that they did not produce any related data.”⁸ We are concerned that the Commission did not consider the capabilities of and impacts on BDCs and

² House Report, 23.

³ Securities and Exchange Commission, Release No. IC-26647 (November 1, 2004) 69 FR 64818 (“Proposed Rulemaking”).

⁴ Letter, David A. Starr to U.S. Securities & Exchange Commission, 22 November 2004, item 5 (“FOIA Request”).

⁵ Letter, Ollie R. Wade, U.S. Securities & Exchange Commission, to David Starr, 5 January 2005 (“FOIA Response”).

⁶ Proposed Rulemaking, 69 FR 64819.

⁷ FOIA Request, item 3.

⁸ FOIA Response.

their shareholders resulting from the rulemaking's new emphasis on BDC investment in financially troubled businesses.

Third, the proposed rulemaking states that "the Office of Economic Analysis has estimated that 60% of public issuers currently do not have securities that trade on an Exchange or on NASDAQ, and thus would meet the definition of eligible portfolio company..."⁹ Data provided to us from the SEC's Office of Economic Analysis used in supporting this conclusion states that there are a total of 11,862 public companies, which includes those on the NYSE, AMEX, NASDAQ, OTCBB, and pinksheets, with 3,105 on the OTCBB and 3,108 on the pinksheets.¹⁰ Therefore, the rulemaking is incorrect to assert that 60% of public issuers are on the OTCBB and pinksheets. Using the SEC's data (which was used to support the conclusion that 60% of public issuers currently have securities that do not trade on the Exchange or NASDAQ), the correct conclusion is that 6,213 companies, or 52.4% of all public issuers, do not have securities trading on an Exchange or on NASDAQ, and thus would qualify as eligible portfolio companies under the proposed rule.

Last year the House passed legislation, H.R. 3170, which would use a \$250 million market capitalization standard, along with all OTCBB and pinksheet companies. Using the Commission's data and approach of excluding financial companies,¹¹ a total of 7,437 non-financial companies (2,816 pinksheet, 2,826 OTCBB, and 1,795 NYSE/AMEX/NASDAQ), or about 63% of all publicly traded companies, could qualify as eligible portfolio companies under H.R. 3170. This is very close to the number of publicly traded companies, as identified in the legislative history (8,000 or two-thirds) that fall within the definition of eligible portfolio company. When using the very data the SEC staff used in formulating its proposed rule, applying a market capitalization standard of \$250 million would return the definition of eligible portfolio company to that intended by Congress.

We appreciate the opportunity to comment on the proposed rulemaking. We urge the Commission to provide a more meaningful update to the definition of eligible portfolio company. The definition should reflect the original intent of Congress. This will enable BDCs to provide financing to more small businesses, which will in turn promote increased economic and job growth.

Sincerely,



David A. Starr

Enclosures

⁹ Proposed Rulemaking, 69 FR 64822.

¹⁰ Zane Williams, Office of Economic Analysis, to Elizabeth Osterman, Division of Investment Management, memorandum regarding "Calculations of the Number of US-Based Operating Companies," September 23, 2004, Securities and Exchange Commission.

¹¹ BDCs are frequently not permitted to invest in certain financial companies under the Act.



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
OPERATIONS CENTER
6432 GENERAL GREEN WAY
ALEXANDRIA, VA 22312-2413

OFFICE OF FILINGS AND
INFORMATION SERVICES

BY FACSIMILE AND MAIL: (202) 496-0699

Mail Stop 0-5

January 5, 2005

Mr. David Starr
Williams & Jensen
1155 21st Street, NW
Washington, DC 20036-3308

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. 2005-01452-FOIA

Dear Mr. Starr:

This letter is our final response to your request dated November 22, 2004, and received in this office on November 23, 2004, for certain data compiled by our Office of Economic Analysis.

After consulting with other Commission staff, we have determined to release to you information responsive to Items 1, 2, and 4 of your request (See Enclosure). With respect to items 3 and 5, our Office of Economic Analysis advised us that they did not produce any related data.

The processing cost incurred is \$28.00, to research and review the responsive information. Please send your payment along with a copy of the enclosed invoice to our Office of Financial Management.

If you have any questions, please call me at (202) 942-4330.

Sincerely,

A handwritten signature in cursive script that reads "Ollie R. Wade".

Ollie R. Wade
FOIA/Privacy Act Research Specialist

Enclosure

O E A M E M O R A N D U M

TO: ELIZABETH OSTERMAN, DIVISION OF INVESTMENT MANAGEMENT
FROM: ZANE WILLIAMS, OFFICE OF ECONOMIC ANALYSIS
SUBJECT: CALCULATIONS OF THE NUMBER OF US-BASED OPERATING COMPANIES
DATE: 9/23/04
CC: ROCHELLE PLESSET, DIVISION OF INVESTMENT MANAGEMENT
JONATHAN SOKOBIN, OFFICE OF ECONOMIC ANALYSIS
MIKE PIWOWAR

This memo sets out our methodology for calculating the total number of U.S.-based public non-financial companies.

To calculate the total, we looked at companies based on where their common equity trades: the exchanges, NASDAQ, OTC Bulletin board, or the pinksheet markets. For the exchange-traded and NASDAQ companies, we used data furnished by the Center for Research in Securities Prices (CRSP). Data on the OTC bulletin board was taken from the OTCBB.com website; data from the pinksheets was taken from pinksheets.com. Data was collected as of the end of 2003 for the exchange-traded, NASDAQ, and OTCBB companies. For the pinksheet companies, our data is as of August 2004.

For each market, we began with a list of all companies with common equity trading on those markets¹. There were 2,386 issues on the NYSE/AMEX markets, 3,263 on NASDAQ, 3,105 on the OTCBB and 3,108 on the pinksheets, for a total of 11,862.

We then eliminated securities associated with companies headquartered outside the United States and those issued by financial institutions to narrow the sample to U.S.-based operating companies.

We identified 1,582 NYSE/AMEX companies (17%), 2,240 NASDAQ companies (24%), 2,826 OTC Bulletin Board companies (30%), and 2,816 PinkSheet companies (30%) using the above approach, for a total of 9,464 U.S.-based operating companies. Together, the OTCBB and the pinksheet companies accounted for 60% of our sample.

The NYSE/AMEX companies had market capitalizations that ranged from \$1.2 million to \$311 billion. The NASDAQ companies had market capitalizations from \$1.1 million to \$296 billion. Comprehensive data on the market capitalizations of the OTCBB and pinksheet companies was not readily available.

¹ We corrected for cases when individual companies had multiple classes of equity trading

BREAKDOWN OF NYSE/NASDAQ COMPANIES BY MARKET CAP

| | Number of non-financial US companies | | Cumulative % | NYSE/ AMEX | NASDAQ |
|---------------------------------|--------------------------------------|--------------|--------------|------------|-----------|
| | | | | Companies | Companies |
| | Pinksheet Companies | 2,816 | 30% | | |
| | OTCBB | 2,826 | 60% | | |
| NYSE/ AMEX/ NASDAQ companies | Under \$25 million | 437 | 64% | 293 | 144 |
| | Under \$50 million | 739 | 67% | 512 | 227 |
| | Under \$75 million | 987 | 70% | 662 | 305 |
| | Under \$100 million | 1,149 | 72% | 802 | 347 |
| | Under \$250 million | 1,795 | 79% | 1,305 | 490 |
| | Under \$500 million | 2,328 | 84% | 1,681 | 647 |
| | Under \$1 billion | 2,840 | 90% | 1,962 | 878 |
| | Total | 9,464 | | | |

Data as of 12/31/03 for US-based financial companies
Source: CRSP

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November 22, 2004

U.S. Securities & Exchange Commission
FOIA Office, Stop O-5
6432 General Green Way
Alexandria, VA 22312-2413

Dear Madame/Sir:

Under the Freedom of Information Act (FOIA), please send me the following information.

- (1) For the most recent period for which information has been compiled by the Office of Economic Analysis please provide copies of all relevant information that includes the following data:
- (A) The total number of public companies (other than ADRs) traded on the Exchanges;
 - (B) The total number of public companies (other than ADRs) traded on NASDAQ;
 - (C) The total number of Bulletin Board companies;
 - (D) The total number of Pink Sheet companies;
 - (E) The total number of public companies (other than ADRs and financial institutions) traded on the Exchanges with market capitalization of less than \$250 million;
 - (F) The total number of public companies (other than ADRs and financial institutions) traded on NASDAQ with market capitalization of less than \$250 million;
 - (G) The total number of Bulletin Board companies (other than ADRs and financial institutions) with market capitalization of less than \$250 million; and
 - (H) The total number of Pink Sheet companies (other than ADRs and financial institutions) with market capitalization of less than \$250 million.

We understand that the above information, or data similar to the above, was compiled by the Office of Economic Analysis in support of the Division of Investment Management's efforts to develop a staff position on H.R. 3170, and ultimately the Commission's proposed rulemaking on the Definition of Eligible Portfolio Company under the Investment Company Act of 1940 (*File No.*: S7-37-04). Please provide any other data reflecting the number of companies and, to the extent available, their trading platform used to determine the percentage of public companies that might become eligible portfolio companies under H.R. 3170.

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- (2) Please provide all supporting data (including raw number totals) used in analyzing the percentage of public companies that would be considered eligible portfolio companies under H.R. 3170.
- (3) Please provide any data that supports the notion that Business Development Companies currently provide or have expertise as providers of debtor-in-possession financing used in the development of the Commission's proposed rulemaking on the Definition of Eligible Portfolio Company under the Investment Company Act of 1940 (*File No.:* S7-37-04).
- (4) Please provide all data used by the Office of Economic Analysis supporting the estimate in the Commission's proposed rulemaking on the Definition of Eligible Portfolio Company under the Investment Company Act of 1940 (*File No.:* S7-37-04) that 60% of public issuers currently do not have securities that trade on an Exchange or on NASDAQ. Please identify whether the data supporting this percentage includes private companies issuing debt securities.
- (5) Please provide all data used by the Commission staff in developing the proposed rule on the Definition of Eligible Portfolio Company under the Investment Company Act of 1940 (*File No.:* S7-37-04) that supports the conclusion that companies listed on NASDAQ and the Exchanges have no problems accessing public capital markets, or any other data that describes companies that have capital access problems.

The information requested herein is necessary for the purpose of filing comments on the proposed rulemaking on the Definition of Eligible Portfolio Company under the Investment Company Act of 1940 (*File No.:* S7-37-04). Therefore we would appreciate receiving the requested information as soon as possible.

I will pay up to \$2,000 for search and review fees. Should the fee amount exceed \$2,000 please inform me so that I can determine if additional amounts should be authorized. My daytime telephone number is (202)973-5995.

Sincerely,



David A. Starr