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Business Development Companies

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What Are BDCs?

- A business development company ("BDC") is a special closed-end investment vehicle that is registered under the Investment Company Act of 1940 ("1940 Act") and used to facilitate capital formation by smaller U.S. companies
- There are approximately 45 publicly traded BDCs operating today with approximately $15 billion in capital
- Given that banks are still subject to a fairly restrictive regulatory framework, are BDCs the best alternative source of liquidity for small and mid-sized companies?

How Are BDCs Regulated?

- A BDC elects to register and be regulated under the 1940 Act
- Section 2(a)(48) of the 1940 Act defines a BDC as:
  - "a domestic closed-end company that (i) operates for the purpose of making investments in certain securities specified in Section 55(a) of the 1940 Act and, with limited exceptions, makes available 'significant managerial assistance' with respect to the issuers of those securities; and (ii) has elected BDC status."
- In addition to the 1940 Act, BDCs and their securities are typically also registered under the Securities Act of 1933 and the Securities Exchange Act of 1934 and are subject to applicable registration and reporting requirements

Types of Permissible Investments

- A BDC must maintain at least 70% of its investments in eligible assets before investing in non-eligible assets
- Eligible assets include:
  - Privately issued securities purchased from issuers that are "eligible portfolio companies" (or from certain affiliated persons)
  - Securities of eligible portfolio companies controlled by a BDC and of which an affiliated person of a BDC is a director
  - Privately issued securities of companies subject to a bankruptcy proceeding (or similar proceeding)
  - Cash and cash equivalents or short-term high quality debt securities
  - Property and real estate necessary to operate the BDC

Eligible Portfolio Company Definition

- An "eligible portfolio company" must be a U.S. issuer that either:
  - Does not have a class of publicly traded securities

  OR

  - Has a class of publicly traded securities but has an aggregate market value of outstanding common equity of less than $250 million and meets certain other specified requirements

Investment Restrictions

- Under the 1940 Act, a BDC generally cannot acquire securities issued by:
  - a broker-dealer
  - an underwriter
  - an investment adviser of an investment company or a registered investment adviser, unless such issuer is (A) a corporation, all the outstanding securities of which are (or after such acquisition will be) owned by one or more registered investment companies and (B) primarily engaged in the business of underwriting and distributing securities if the gross income of such issuer normally is derived principally from such business or related activities

Significant Managerial Assistance

- A BDC must make available “significant managerial assistance” to those companies that the BDC treats as satisfying the 70% standard
- Significant managerial assistance includes arrangements whereby directors, officers, employees or affiliates of the BDC offer to provide, and if accepted, do so provide, guidance on the management, operations or business of the company in question
- The requirement also is satisfied if the BDC exercises a controlling interest (presumed if the BDC owns 25% or more of the voting stock) in the company in question

Affiliate Transactions

- BDCs are subject to limitations on related party transactions
- For 1940 Act purposes, generally any person that owns more than 5% of the outstanding voting securities of the BDC would be considered an “affiliate” (this is a rebuttable presumption)
- The 1940 Act imposes restrictions on transactions between affiliates (entities that are under common control), such as
  - Restrictions on co-investments
  - Restrictions on joint exits and joint restructurings
  - Restrictions on having a broker-dealer affiliate serve as “principal underwriter” or on entering into other commercial arrangements (credit agreements, swaps, etc.) with affiliated entities

Affiliate Transactions, cont'd.

- BDCs may seek exemptive relief from the SEC for co-investments, joint exits and joint restructurings; however, generally, in structuring their arrangements, to the extent possible, an objective is to avoid a determination that entities are under common control
- BDCs face increased regulatory scrutiny involving co-investments and valuation issues, among other issues, and thus require an increasing amount of resources devoted to compliance

Restricted Transactions

- Section 57 identifies four types of restricted transactions:
  - An affiliate may not knowingly sell any securities or other property to the BDC or a company controlled by it, unless the BDC is the issuer, or the affiliate is the issuer, and the security is part of a general offering
  - An affiliate may not knowingly purchase from the BDC or a company controlled by it any security or other property, except securities issued by the BDC
  - An affiliate may not knowingly borrow money or other property from the BDC or a company controlled by it (subject to limited exceptions)
  - An affiliate is prohibited from knowingly effecting any joint transactions with the BDC or a company controlled by it in contravention of SEC rules

Ongoing 1940 Act Requirements

- A majority of independent directors
  - Persons who are not “interested persons” (Section 2(a)(19) of the 1940 Act).
- Assets must be held by the BDC’s custodian
- Fidelity bond covering officers and employees
- Code of ethics
  - The code must, among other things, address investments by officers and directors, and transactions among related parties, as well as reporting and recordkeeping

Ongoing 1940 Act Requirements, cont'd.

- Restrictions on investments in other investment companies and restrictions on percentage interest of BDC held by an investment fund
- Limitations on indemnities
- Bookkeeping and records requirements
- Compliance policies and procedures
- Registered investment adviser must have policies and procedures

Management of the BDC

- A BDC may be internally or externally managed
- An externally managed BDC must enter into an advisory agreement with its investment adviser and that agreement will be subject to various 1940 Act requirements, including:
  - Board approval (initially and annually) and
  - Shareholder approval
- The investment adviser also will be subject to a conflicts policy and must be registered under the Investment Advisers Act of 1940

Fees

- A BDC may pay its investment adviser performance-based compensation
  - A “base” management fee
  - An “incentive” fee
- Performance-based compensation will be subject to the various restrictions and limitations imposed by the 1940 Act

Tax Considerations

- BDCs are typically organized as corporations and obtain pass-through tax treatment by qualifying as regulated investment companies ("RICs") under Subchapter M of the Internal Revenue Code of 1986, as amended
- To qualify as a RIC, a BDC must, among other things, elect to be treated as a RIC, distribute substantially all (e.g., 90%) of its taxable income each year and meet certain income and asset diversification tests
- At least 90% of a RIC's gross income must be derived from passive sources

Capital Structure

- A BDC is subject to certain limitations on its capital structure:
  - May issue common stock, more than one class of senior secured debt, and warrants and options (subject to certain requirements)
- A BDC usually must sell shares of its common stock at net asset value ("NAV") — unless it has received shareholder approval, or it is engaging in a rights offering
  - A BDC may consider seeking approval from its shareholders at its annual meeting so that it has additional operating flexibility

Asset Coverage Ratio

- Under the 1940 Act, any debt or senior security issued by a BDC must have asset coverage of at least 200%
  - Debt and senior securities cannot exceed half of the BDC's total assets
  - No dividends can be declared on common stock unless the BDC's debt and senior securities have asset coverage of 200%
  - Small Business Credit Availability Act (incorporated into the recently passed omnibus spending legislation) reduces the applicable requirement from 200% to 150% (allowing for a 66-2/3% debt-to-total-capital ratio) for electing BDCs

Asset Coverage Ratio, cont'd.

- In order to elect to reduce the asset coverage requirement, either:
  - A majority of the BDC's board of directors and a majority of disinterested directors would be required to approve the decreased asset coverage ratio, which lower ratio would become effective one year following the approval; or
  - A majority of the BDC's stockholders may vote at a stockholders' meeting to approve the decreased ratio, which lower ratio would become effective on the first date following the stockholder approval
- In either case, a BDC that opts to rely on the reduced asset coverage requirement must disclose within five business days its election to do so, and provide additional information, including the BDC's existing leverage and the risks associated with greater leverage
- A non-traded BDC is required to offer stockholders of record on the approval date an opportunity to have their shares repurchased by tender or otherwise

Industry Reaction

- BDCs that have publicly announced approval from the required majority of their board to decrease the asset coverage ratio, include the following: Apollo Investment, New Mountain Finance, Monroe Capital, Stellus Capital, PennantPark Floating Rate Capital and Gladstone Capital
- Boards of New Mountain Finance, Monroe Capital and Stellus Capital recommended that their stockholders approve the asset coverage ratio reduction at this year's annual stockholders' meeting
- Prospect Capital and FS Investment each reversed its board of directors' prior approval to lower the asset coverage ratio

Industry Reaction, cont'd.

- Certain BDCs are contractually limited in their ability to reduce their asset coverage ratio because negative financial covenants included in their credit facilities require maintenance of the 200% asset coverage threshold notwithstanding the change in law
- Several credit rating agencies view the adoption of a lower asset coverage ratio by BDCs as a negative development and believe that it generally increases credit risk in the industry
- Standard & Poor's recently provided public guidance that it would likely downgrade any BDC that obtains or seeks approval to reduce its asset coverage ratio

Registration Process

- A BDC must file:
  - A Form N-6, which is an intent to file a notification for BDC election
  - A Form 54A, which is an election to be registered as a BDC
  - Publicly traded BDCs must file a registration statement on Form N-2, which provides basic information about the BDC (e.g., the terms of the offering, the intended use of proceeds, the investment objectives and policies of the BDC, risk factors associated with an investment in the BDC, and information regarding the management of the BDC)
  - Private BDCs must file a Form 10 under the Securities Exchange Act of 1934

Emerging Growth Company Status

- A BDC may qualify as an "emerging growth company" ("EGC")
  - An EGC is an issuer with total annual gross revenues of less than $1.07 billion (with such threshold indexed to inflation every five years), and would continue to have this status until: (i) the last day of the fiscal year in which the issuer had $1.07 billion in annual gross revenues or more; (ii) the last day of the fiscal year following the fifth anniversary of the issuer's IPO; (iii) the date on which the issuer has, during the previous three-year period, issued more than $1 billion in non-convertible debt; or (iv) the date when the issuer is deemed to be a "large accelerated filer" as defined by the SEC
  - However, a BDC issuer will not be able to qualify as an EGC if it first sold its common stock in an IPO prior to December 8, 2011
- In order to qualify for the accommodations permitted to EGCs, a BDC would have to elect to be treated as an EGC
  - Any election must be made at the time the EGC files its first registration statement or Exchange Act report

Emerging Growth Company Status, cont'd.

- The benefits for a BDC of qualifying as an EGC include the following:
  - Expanded range of permissible pre-filing communications made to qualified institutional buyers or institutional accredited investors
  - Only need to provide two years of audited financial statements to the SEC (rather than three years), and the auditor attestation on internal controls requirement may be delayed
  - Exemption from the mandatory say-on-pay vote requirement and the Dodd-Frank Act required CEO pay ratio rules (to be adopted by the SEC), and the ability to use certain smaller reporting company scaled disclosure
  - No requirement to comply with any new or revised financial accounting standard until the date that such accounting standard becomes broadly applicable to private companies
  - No longer subject to any rules requiring mandatory audit firm rotation or a supplement to the auditor's report that would provide additional information regarding the audit of the issuer's financial statements (no such requirements currently exist)

Emerging Growth Company Status, cont'd.

- On March 16, 2018, the Staff of the Division of Investment Management announced that it will accept draft registration statements that are submitted by a BDC (even if the BDC does not qualify as an EGC) for nonpublic, confidential review
- The Division also will similarly accept for nonpublic, confidential review draft registration statements relating to offerings that are submitted by BDCs within one year of an IPO

Reporting Obligations

- Subject to the Securities Act of 1933 and the Securities Exchange Act of 1934, a BDC must:
  - File periodic, quarterly and annual reports and proxy statements
  - Prepare quarterly and annual financial statements identifying the current fair value of each portfolio company
- Subject to the requirements of the Sarbanes-Oxley Act of 2002
- Subject to the rules and regulations of the exchange on which the BDC's securities are listed

Shelf Offerings

- The use of the shelf registration statement process has proven particularly useful for publicly listed BDCs that trade at a premium to NAV for only a short, and typically unpredictable, period of time
- The SEC generally limits the cumulative dilution to a BDC's current NAV per share that a BDC may incur while using a shelf registration statement to sell shares of common stock at a price below NAV
- A BDC can complete multiple offerings off of an effective shelf registration statement only to the extent that the cumulative dilution to the BDC's NAV per share does not exceed 15%

Coming Securities Law Reforms

Recently adopted legislation requires that the SEC undertake rulemaking (within one year) to implement various securities law changes applicable to BDCs, including the following:

- BDCs will be able to qualify as well-known seasoned issuers (“WKSIs”); WKSIs are able to file automatic shelf registration statements
- A WKSI is able to use free writing prospectuses (“FWPs”) before the filing of a registration statement (Rule 163) and may engage in certain pre-filing communications (Rule 163A)
- A WKSI is also able to use a FWP after a registration statement is filed provided the registration statement includes a preliminary or base prospectus
- BDCs will be able to rely expressly on Rule 415 to file shelf registration statements (instead of relying on no-action letter guidance), rely on incorporation by reference in their filings and avail themselves of the ability to file a form of and final prospectus under Rule 424

Coming Securities Law Reforms, cont'd.

- BDCs also will be able to avail themselves of:
  - The safe harbor for offering communications prior to declaration of effectiveness of a registration statement (Rule 134)
  - The safe harbors for regularly published research reports by broker-dealers (Rules 138 and 139)
  - The safe harbor for post-filing FWPs (Rule 164)
  - The safe harbor for regularly released factual business information (Rules 168 and 169)

Coming Securities Law Reforms, cont'd.

- Rule 497 will be amended to allow BDCs to file a prospectus supplement that will reflect substantive changes or additions to effective registration statements, rather than require them to file a new post-effective amendment
- BDCs that qualify for Form S-3 will be permitted to incorporate future SEC filings by reference, which eliminates the need to amend shelf registration statements when new period reports are filed with the SEC
- Form N-2 currently does not allow incorporation by reference of past or future periodic filings

Coming Securities Law Reforms, cont'd.

- BDCs will be able to rely on Rule 172, which exempts issuers or broker-dealers from the requirement to deliver a prospectus in connection with an offering, so long as the issuer files the final prospectus with the SEC
- BDCs will also be able to rely on Rule 173, which allows underwriters or dealers participating in an offering to provide a copy of a final prospectus to a purchaser, or send a notice that the final sale was made pursuant to a registration statement, within two days following the completion of the sale
- The rules eliminate the requirement for BDCs to deliver paper or electronic copies of prospectuses

BDCs and Volcker Rule

- If you were a bank, and wanted to find a vehicle through which you could invest in small and middle market U.S. companies, could a BDC be an option?
- For Volcker Rule purposes, although a BDC is a "passive investment vehicle," it is not considered a "covered fund," since a BDC is subject to regulation under the 1940 Act
- For this reason, among others, many entities that are "banking entities" ("BE") for Volcker purposes have formed BDCs as a means of continuing their private equity/venture type investments
- A BE may want to limit the percentage of its interest in voting equity securities it holds in the BDC (as well as other indicia of control, other than voting power) in order to avoid having the BDC be considered an "affiliate" of the BE

BDCs and Volcker Rule, cont'd.

- If the BDC is considered an affiliate of the BE, the BDC itself will be subject to the Volcker prohibitions
  - The BDC will be required to maintain policies and procedures designed to address the Volcker Rule giving rise to additional costs
  - For this reason, the voting equity interest is generally limited to under 15% and total equity interests to under 33%
  - A registered investment adviser, which might be an affiliate of the BE, could serve as the investment adviser of the BDC
- A national bank can own an equity interest in a BDC
  - To the extent that the BDC is owned by the bank (rather than by the bank holding company), the BDC may be limited in its ability to take equity interests in connection with its loan originations (i.e., no equity kickers)

BDCs and Volcker Rule, cont'd.

- A bank holding company can own an equity interest in a BDC
  - This may provide for more flexibility than having an equity interest in the BDC held by the bank and is the most common approach
  - However, it will nonetheless be important to consider whether the bank holding company would be deemed to "control" the BDC
  - If the bank holding company were deemed to "control" the BDC, the Bank Holding Company Act may limit the activities of the BDC
    - For example, if the BDC receives an equity interest in portfolio companies that are non-financial companies, then that may be considered to be a merchant banking investment subject to limitations on transactions with affiliates, the ability to participate in the management of the eligible portfolio companies of the BDC and other requirements

Using a BDC

- The BDC approach may be most helpful to BEs that intend to continue to make investments (loans, warrants, equity interests) in "eligible portfolio companies"
  - Holdings of "debt securities" will present fewer regulatory concerns
- The BDC is still subject to various 1940 Act requirements, including leverage limits, governance requirements, asset diversification requirements and limitations on transactions with affiliates
  - Structuring the BDC will require careful evaluation of the BE's "control" over the BDC through its equity interest and through the advisory relationship
  - The BDC will need to have an independent board of directors

Private BDCs

- Recently the number of IPOs consummated by BDCs has been limited and the private BDC has emerged as a popular alternative for sponsors seeking to access the BDC structure
- Combines elements of a private fund with elements of a traditional BDC
- Shares are sold through a private placement offering to accredited investors
- More than 10 private BDCs have been brought to market since 2016
- Usually sponsored or formed by parent private equity firms or financial institutions that already have the necessary pre-existing relationships with the needed accredited third-party investors
- Notwithstanding the lack of a public securities offering, the private BDC must still comply with the Exchange Act reporting requirements similar to its public company BDC peers

Private BDCs, cont'd.

- Must comply with the 1940 Act governance and investment limitations and restrictions applicable to traditional BDCs
- Allows flexibility to structure with a fixed term in order to address merchant banking rules that require liquidation within a fixed time period
- Could structure with a contemplated liquidity event (like an IPO or a private offering) after the fixed term expires
- Capital generally drawn via a capital call model, similar to a private fund structure
- Private BDC can call committed funds as investment opportunities arise
- Another advantage to the private BDC structure is that, instead of using a Form N-2 for an IPO, private BDCs may file a Form 10 under the Securities Exchange Act of 1934 which is typically subject to a shorter review period by the SEC

Areas for Future Reform

- In 2014, Standard & Poor’s and the Russell indices removed BDCs from their indices as a result of concerns related to the reporting of BDC expenses
- The inclusion of BDCs in an index can inflate its expense ratio because BDC’s expenses are treated differently than the expenses of other companies
- Management fees and other costs become “acquired fund fees and expenses” (AFFE) for a fund or index owning BDC shares
- The calculation of AFFE typically results in an overstated expense ratio

Areas for Future Reform, cont'd.

- Given the growth in the BDC sector, shouldn't policymakers want to facilitate index inclusion?
- Many BDC industry participants have recommended that the Staff remove or alter the line item titled "Acquired Fund Fees and Expenses" (AFFE) that is currently required to be included in a BDC's prospectus fee table

BDC-Related Provisions of the Consolidated Appropriations Act of 2018

On March 23, 2018, Congress passed a $1.3 trillion omnibus spending bill titled the Consolidated Appropriations Act of 2018, which included the Small Business Credit Availability Act. Included in the Small Business Credit Availability Act are various changes to the federal securities laws and regulations that impact business development companies ("BDCs"). Most significantly, the BDC-related portions of the legislation expand the ability of BDCs to utilize leverage and provide them with the ability to rely on more flexible SEC communication and offering rules currently only available to operating companies. The chart below summarizes the BDC-related provisions of the legislation.

Small Business Credit Availability Act	Current Law	Impact on BDCs
Section 802: • BDCs can issue debt securities and declare cash dividends so long as its asset coverage does not exceed 150% and the BDC: (1) adopts a 150% asset coverage requirement which is approved by either (i) a "required majority" of the non-interested directors, (which approval is effective one year after the date of such approval) or (ii) more than 50% of shareholders at a shareholder meeting with a quorum present (which approval is effective immediately the day after the approval); and (2) (i) within 5 business days of the above approval, the BDC discloses in any filings submitted to the SEC and its website that the 150% requirement was approved and the effective date of such approval, and (ii) makes certain additional disclosures in its periodic filings under section 13(a) of the Securities Exchange Act of 1934 (the "Exchange Act"). • BDCs must include in each of its periodic filings disclosures regarding: (1) the amount of senior securities outstanding (and the associated asset coverage ratio), (2) that it received the required approval discussed above and the date of such approval, and (3) the risks associated with such debt. • BDCs that are not listed on a national securities exchange are also required to offer to repurchase from each shareholder as of the approval date, all of the shares held by that shareholder as of the approval date (with 25% of those shares to be repurchased in each of the four quarters following the calendar quarter of the approval date). • If the BDC does not meet the above criteria, the asset coverage requirement is 200%.	1940 Act, Section 19(a) and 61(a): BDCs may not issue any class of debt security or declare cash dividends unless, immediately after the issuance, the BDC has asset coverage of at least 200%.	Allows BDCs to incur more leverage (and raise additional assets to invests in a greater number of small to mid-size U.S. companies).

Small Business Credit Availability Act	Current Law	Impact on BDCs
Section 803(b)(1) The legislation instructs the SEC to, within one year of enactment, issue rules/amendments allowing BDCs to use the same "securities offering and proxy rules" that are available to reporting companies under the Exchange Act. These amendments shall include the specific amendments detailed below.	Registration and Reporting Parity BDCs' registration and reporting requirements are a mix of requirements under the 1940 Act and the Exchange Act. In certain contexts, a BDC may have to undertake greater reporting and registration efforts than a reporting company under the Exchange Act.	The legislation is intended to align the reporting, disclosure and filing obligations of BDCs with certain exemptions available to reporting companies under the Exchange Act.
Section 803(d) Provides that BDCs will be able to treat the parity provisions regarding offering and proxy rules (discussed above) as being effective if the SEC does not revise the relevant rules within one year after the law is enacted until such time as the revisions are completed.	Automatic effectiveness after one year	The legislation ensures that the parity rules are implemented or treated as implemented by a certain date.
Section 803(c)(1) The legislation instructs the SEC to, within one year of enactment, include instructions that allow for incorporation by reference in a manner similar to the instructions included in Form S-3.	Form N-2 – Incorporation by Reference BDCs are required to file registration statements on Form N-2. While certain other filers that are allowed to register securities on Form S-3 may incorporate information into their prospectuses by reference to earlier or subsequently filed documents, Form N-2 does not allow incorporation by reference.	The legislation allows BDCs to raise capital more cheaply and efficiently, and respond to market conditions more quickly, by having shorter registration statements and prospectuses. Investors are also able to readily access the most important information about an issuer.
Sections 803(b)(2)(B) and 803(b)(2)(G) The legislation directs the SEC to permit BDCs to rely on the exemptions available under Rules 168 and 169 of the Securities Act of 1933 (the "Securities Act"), and to provide that nothing in Rule 156 of the Securities Act prevents BDCs from qualifying for an exemption under Rules 168 and 169.	Securities Act, Rules 156, 168 and 169 Rules 168 and 169 under the Securities Act allow both issuers that report under the Exchange Act and those that do not report under the Exchange Act to disseminate "regularly released factual business and forward-looking information," even around the time of a registered offering. This safe harbor is designed to permit ongoing communications with the market, such as press releases and other information released on a regular, unscheduled or episodic basis, but cannot contain information about a potential offering and cannot be made as part of the offering process. Rules 168 and 169 specifically prohibit BDCs from relying on those rules. Rule 156 makes it unlawful for any person to use sales literature that is materially misleading in connection with the offer or sale of securities issued by an investment company.	The legislation allows BDCs to more easily communicate with the market without violating gun-jumping provisions. BDCs could release factual and forward-looking business information similar to other market participants.

Small Business Credit Availability Act	Current Law	Impact on BDCs
Sections 803(b)(2)(C–E) The legislation directs the SEC to revise Rules 134, 163A and 163 of the Securities Act to allow BDCs to rely on such rules.	Securities Act , Rules 134, 163A and 163 BDCs are prohibited from relying on the following rules: • Rule 134 provides a safe harbor that allows issuers to make certain written statements regarding an offer after a prospectus is filed, provided certain conditions are met. • Rule 163A provides a safe harbor from the gun-jumping provisions for communications that do not reference an offering and that are made more than 30 days before a registration statement is filed, provided certain conditions are met. • Rule 163 is a safe harbor from the gun-jumping provisions that allows well-known seasoned issuers ("WKSIs") to engage in unrestricted oral and written communications before filing a registration statement, provided certain conditions are met.	The legislation permits BDCs to release factual business information with more certainty, and to have more flexibility in communications with investors.
Section 803(b)(2)(F) The legislation directs the SEC to revise Rules 138 and 139 under the Securities Act to specifically include BDCs as issuers to which such rules apply.	Securities Act, Rules 138 and 139 BDCs are not specifically permitted to rely on Rules 138 or 139: • Rule 138 permits a broker-dealer participating in a distribution of securities of an issuer to publish research reports about that issuer if certain conditions are met. • Rule 139 permits a broker-dealer participating in a distribution of securities of an issuer to publish research reports concerning that issuer or any class of its securities if certain conditions are met. • Research reports permitted by Rules 138 and 139 are not considered general advertising or solicitation for purposes of Rule 144A offerings nor do they constitute a directed selling effort or be inconsistent with the offshore transaction requirement for offerings under Regulation S.	The legislation permits broker-dealers and other providers of market research more flexibility to disseminate research on BDCs and allows more communication of information to the market about BDCs.

Small Business Credit Availability Act	Current Law	Impact on BDCs
Section 803(b)(2)(A) The legislation directs the SEC to revise Rule 405 of the Securities Act of 1933 (the "Securities Act") to remove the exclusion for BDCs from the definition of a WKSI, and to add Form N-2 to the definition of "automatic shelf registration statement." Section 803(c)(2) The legislation directs the SEC to, within one year of enactment, allow BDC's that are WKSIs to be able to file automatic shelf offerings on Form N-2.	Securities Act, Rule 405 SEC Rules allow WKSIs to benefit from a more flexible registration process that includes, among other things, automatic effectiveness of a WKSI's registration statement, and reduced information included in the registration statement. BDCs are prohibited from qualifying as WKSIs, and Form N-2 may not receive automatic shelf registration (which applies only to registration statements filed on Form S-3).	The legislation allows BDCs to file automatic shelf registrations to take advantage of frequently changing market windows, and other benefits applicable to WKSIs.
Section 803(b)(2)(H) and 803(b)(2)(I) The legislation directs the SEC to revise Rule 433 of the Securities Act to specifically state that BDCs that qualify as WKSIs can rely on that rule. Additionally, the legislation allows BDCs to rely on Rule 164 under the Securities Act.	Securities Act, Rules 433 and 164 Rule 433 generally permits issuers to use free writing prospectuses after a prospectus has been filed. Issuers that do not comply with the conditions set forth in Rule 433 with respect to free writing prospectuses violate Section 5(b)(1) of the Securities Act. However, Rule 164 provides a safe harbor from the gun-jumping provisions and relief from the failure to qualify under Rule 433 for "immaterial or unintentional" deviations. BDCs are prohibited from relying on Rule 164.	The legislation allows BDCs that qualify as WKSIs to use free writing prospectuses, which allow for greater communication with the market, including information that may not be included in the registration statement. BDCs now benefit from a safe harbor for unintentional violations of the gun-jumping provisions.
Section 803(b)(2)(J) and 803(b)(2)(P) • The legislation directs the SEC to revise Rule 415 under the Securities Act to specifically state that registration for securities provided for in Rule 415 includes BDC securities registered on Form N-2 that would otherwise meet the eligibility requirements of Form S-3. • On Form N-2, BDCs are now only required to provide undertakings that are no more restrictive than those of applicable registrants on Form S-3. This includes no longer being required to make the undertaking in Item 34.4 of Form N-2.	Securities Act, Rule 415 • Rule 415 provides the basis for shelf registration, and specifically lists the types of shelf offerings that may be effected on an immediate, a delayed or a continuous basis. Rule 415 limits the amount of securities that can be registered for a continuous offering to two years for registration statements not filed on Form S-3. Other provisions of Rule 415 are applicable registrants using Form S3. • For registration statements on Form N-2, Rule 415 requires registrants to provide an undertaking (contained in Item 34.4 of Form N-2) "to file, during any period in which offers or sales are being made, a post-effective amendment to the registration statement: (1) to include any prospectus required by Section 10(a)(3) of the 1933 Act."	The legislation allows for SEC review of BDC N-2 shelf registration statements in advance of accessing public markets and offers more certainties with respect to timing.

Small Business Credit Availability Act	Current Law	Impact on BDCs
Section 803(b)(2)(K) The legislation directs the SEC to revise Rule 497 under the Securities Act to include a parallel rule allowing BDCs to file form prospectus supplements in the same manner as the process under Rule 424(b).	Securities Act, Rule 497 • Rule 424(b), which is not applicable to BDCs, allows form prospectus supplements to be filed that contain only substantive changes from or additions to previously filed prospectuses. • Rule 497, which is applicable to BDCs, does not allow for form prospectuses.	The legislation reduces the filing burden on BDCs, synchronizes BDC prospectus filing requirements with those of other registrants, and saves considerable time and money.
Section 803(b)(2)(L) The legislation directs the SEC to revise Rules 172 and 173 under the Securities Act to remove the exclusion for BDCs.	Securities Act, Rules 172 and 173 BDCs are prohibited from relying on the following rules: • Rule 172 exempts an issuer or broker-dealer from delivering a prospectus in connection with a registered offering, so long as the final prospectus is filed with the SEC. • Rule 173 requires that each underwriter or dealer participating in a registered offering must provide to each purchaser a copy of the final prospectus or, in lieu of the final prospectus, a notice that the sale was made pursuant to a registration statement, within two business days following the completion of such sale.	The legislation permits BDCs greater flexibility in the sales process in parity with other issuers covered by the rule, and reduces the prospectus delivery burden and costs associated with offerings.
Section 803(b)(2)(M) The legislation directs the SEC to revise Rule 418 under the Securities Act to provide that a BDC that otherwise meets the eligibility requirements under General Instruction IA of Form S-3 shall be exempt from Rule 418(a)(3).	Securities Act, Rule 418 Rule 418(a)(3) exempts already registered entities from having to provide certain supplemental engineering, management or other reports to the SEC upon request, on the basis that they are already registered and have complied with the requirements in General Instruction IA of Form S-3.	The legislation removes the obligation on BDCs to be ready to supply certain supplemental material upon request from the SEC, in line with the obligations of already registered issuers compliant with General Instruction IA of Form S-3.
Section 803(b)(2)(N) The legislation directs the SEC to revise Item 13(b)(1) of Schedule 14A to provide that a BDC that meets the eligibility requirements under General Instruction IA of Form S-3 shall be deemed to meet the requirements of Form S-3 for the purposes of Schedule 14A.	Exchange Act, Rule 14a-101 Item 13 of Schedule 14A (information required in a Proxy Statement) allows previously filed financial reports to be incorporated by reference in any Proxy Statement for issues of securities or exchange offerings, as directed by Rule 14a-101.	The legislation allows BDCs to incorporate previously filed financial statements into Proxy Statement forms, bringing the BDC's obligations into line with already registered issuers compliant with General Instruction IA of Form S-3.

Small Business Credit Availability Act	Current Law	Impact on BDCs
Section 803(b)(2)(O) The legislation directs the SEC to revise Rule 103 under the Exchange Act to provide that Rule 103(a) applies to BDCs for the purposes of Form N-2.	Exchange Act, Rule 103 under Regulation FD Rule 103 clarifies that a failure to make public disclosure under Regulation FD shall not affect whether a registered issuer, for the purposes of Forms S-2, S-3, S-8 and SF-3, is deemed to have filed all material required to be filed pursuant to sections 13 or 15(d) of the Exchange Act.	The legislation aligns BDCs' reporting obligations with those of other reporting companies under the Exchange Act, whereby a failure to disclose material information under Regulation FD would not affect the validity of a later Form N-2 registration statement.