Market Trends 2019/20: Business Development Companies

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This practice note covers recent market trends affecting business development companies (BDCs), particularly focusing on various types of securities offerings undertaken by public and private BDCs. BDCs are closed-end investment management companies that are specially regulated by the Investment Company Act of 1940, as amended (the 1940 Act). BDCs provide capital to, and invest in, small and middle-market companies in the United States. As a result of this investment purpose, BDCs are exempt from certain regulatory constraints imposed by the 1940 Act on traditional investment companies and generally benefit from pass-through tax treatment (i.e., the entity is not taxed at the entity level and tax obligations pass to the owners of the entity). For additional information on BDCs, see Business Development Company Guide for Capital Markets, Business Development Companies, and Top 10 Practice Tips: Business Development Companies.

To be regulated as a BDC, a company must elect to be subject to the provisions of Sections 55–65 of the 1940 Act. Given the limited access to, and availability of, financing from traditional bank lenders for small- and medium-sized enterprises, BDCs have played an increasingly important role since the onset of the financial crisis as a source of capital to small- and mid-sized enterprises.

In addition to being subject to the 1940 Act, the securities issued by BDCs are typically also registered under the Securities Act of 1933, as amended (the Securities Act), and the Securities Exchange Act of 1934, as amended (the Exchange Act), and BDCs are subject to the registration and reporting requirements under those two regulations.

Notable Transactions

In July 2019, Owl Rock Capital Corporation (NYSE: ORCC), a BDC externally managed by an indirect subsidiary of Owl Rock Capital Partners LP, consummated an initial public offering (IPO). The IPO priced at $15.30 per share, raising approximately $153.0 million in gross proceeds for the BDC. Goldman Sachs & Co. LLC; BofA Securities, Inc.; RBC Capital Markets, LLC; SunTrust Robinson Humphrey, Inc.; and Wells Fargo Securities, LLC acted as joint book-running managers for the IPO. The BDC primarily invests in senior secured or unsecured loans, subordinated loans, and mezzanine loans. In connection with the IPO, the BDC's board of directors approved a stock repurchase plan to acquire up to $150 million of the BDC's common stock pursuant to a Rule 10b5-1 plan. For further information on 10b5-1 plans, see Rule 10b5-1 Plans and 10b5-1 Plans Best Practices Checklist.

Deal Structure and Process

Initial Public Offerings

Recently, the number of BDC IPOs has stagnated and the private BDC has emerged as a popular alternative for sponsors seeking to access the BDC structure.

To undergo an IPO, a BDC must register its securities on Form N-2. The Form N-2 registration statement should describe the terms of the IPO (including the amount of shares being offered, underwriting arrangements, and price); intended use of proceeds, any risk factors associated with investing in a BDC; details about management of the BDC; and investment policies and objectives. In addition, the registration statement must include financial statements pursuant to the requirements in Regulation S-X.

In advance of its IPO, if a BDC has identified potential portfolio companies, but has not yet purchased such portfolio companies, the Form N-2 must still describe the BDCs general criteria for identifying portfolio companies and must also describe the identified portfolio companies generally. If a BDC owns securities of a particular portfolio company at the time of the IPO, then the registration statement must identify the portfolio company and also provide the following details:

- The nature of the portfolio company's business.
- The general terms as well as the amount of all loans given to the portfolio company.
- The relationship of the portfolio company to the BDC. –and–
- The class, title, and percentage of class and value of any securities of the portfolio company in possession of the BDC.

Shelf Offerings

The use of the Shelf Registration statement process has proven useful for publicly listed BDCs that trade at a premium to net asset value (NAV) for only a short, and typically unpredictable, period of time. An effective shelf registration statement enables a BDC to access the capital markets when needed or when market conditions are optimal. The shelf registration statement can be filed with the SEC and reviewed while the BDC is trading at a discount to its NAV and then can be used to conduct an offering of the BDC's shares when market conditions permit or following receipt of approval from its stockholders for below-NAV issuances. The typical SEC review process for an initial shelf registration statement takes approximately 30 to 45 days from the filing date. Takedowns from an effective shelf registration statement can then be consummated without SEC staff review or delay. For further information on shelf registration, see Shelf Registration and Top 10 Practice Tips: Shelf Registration Statements and Takedowns. For information on the SEC review process, see SEC Review Process and Top 10 Practice Tips: Responding to SEC Comment Letters.

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 pursuant to an effective shelf registration statement only to the extent that the cumulative dilution to the BDC's NAV per share does not exceed 15%. Once the cumulative dilution exceeds 15%, the BDC must file a post-effective amendment to the shelf registration statement or file a new shelf registration statement.

BDCs typically use shelf registration statements to issue debt and equity securities. Debt securities are issued by BDCs from time to time either in stand-alone offerings or as takedowns from a medium-term note program. For additional information on follow-on offerings and medium-term note programs, see Follow-On Offerings Resource Kit, Top 10 Practice Tips: Follow-on Offerings, and Medium-Term Note (MTN) Programs. BDCs also frequently list their debt securities on a national securities exchange (such debt securities, which are aimed at retail investors, are referred to as baby bonds due to their small face amount). Equity securities are issued by BDCs from time to time either in follow-on offerings or in at-the-market (ATM) offerings as described in more detail below.

In October 2019, New Mountain Finance Corporation (NYSE: NMFC) completed an underwritten shelf offering of 9,200,000 shares of its common stock at a public offering price of $13.25 per share. The total included an aggregate 400,000 shares purchased by certain interested NMFC directors and officers. NMFCs investment adviser, New Mountain Finance Advisers BDC, L.L.C., paid a sales load of $0.41 per share to the underwriters in the offering. NMFC used the net proceeds from the offering for new investments in portfolio companies in accordance with its investment objective and strategies.

In January 2020, TriplePoint Venture Growth BDC Corp. (NYSE: TPVG) completed an underwritten shelf offering of 5,000,000 shares of its common stock at a public offering price of $14.08 per share. TPVG used the net proceeds from the offering to repay outstanding debt borrowed under its credit facility.

Rights Offerings

As a result of COVID-19 pandemic-related economic concerns, some BDCs have issued and sold rights pursuant to their shelf registration statement instead of pursuing the types of securities offerings mentioned above. A rights offering allows the holder of a BDC's equity securities the opportunity to receive voting securities even when the BDC's common stock is trading below NAV, subject to certain limitations. In a rights offering, the BDC's existing stockholders receive the right to purchase, on a pro rata basis, newly issued shares of the BDC's common stock at an exercise price typically set at a significant discount to the market price of the common stock. A rights offering may be a useful way of raising capital while avoiding stockholder approval requirements. Rights may be either transferable or nontransferable. A transferable rights offering permits the subsequent sale of such rights in the open market. The SEC has generally taken the position that no more than one additional share of common stock may be issued for each three shares of common stock currently outstanding in connection with a transferable rights offering below NAV. Due to the reduced dilution concern, nontransferable rights offerings are not subject to the same limitation. For further information on rights offerings, see Rights Offerings and Rights Offering Checklist.

In April 2020, Golub Capital BDC, Inc. (Nasdaq: GBDC) issued transferable subscription rights to its stockholders entitling them to subscribe for up to an aggregate of 33,451,902 shares of GBDC's common stock. The subscription price per share was 92.5% of the volume-weighted average of the market price of GBDC's shares for the five consecutive trading days prior to the expiration date of the offering. Stockholders who fully exercise their rights were entitled to subscribe for additional shares that remain unsubscribed as a result of unexercised rights. Certain affiliates of GBDC's investment adviser oversubscribed and made a total investment of up to $125 million in shares of GBDC's common stock pursuant to the exercise of their primary subscription and/or the oversubscription privilege.

In May 2020, Bain Capital Specialty Finance, Inc. (NYSE: BCSF) issued transferable subscription rights to its stockholders entitling them to subscribe for up to an aggregate of 12,912,453 shares of BCSF's common stock. The subscription price per share was 92.5% of the volume-weighted average of the market price of BCSF's shares for the five consecutive trading days prior to the expiration date of the offering. Stockholders who fully exercised their rights were entitled to subscribe for additional shares that remain unsubscribed as a result of unexercised rights. Certain affiliates of BCSF's adviser fully exercised their rights to over-subscribe in order to make an aggregate investment of up to $50 million in shares of BCSF's common stock. The BCSF rights offering represented immediate dilution of approximately $1.62 per share to its existing stockholders.

ATM Offerings

Given the recent securities offering reforms detailed below, ATM offerings are likely to become a more cost-efficient alternative for BDCs seeking to raise capital. An ATM offering is an offering of securities into a BDC's existing trading market for outstanding shares of the same class at other than a fixed price (1) executed on, or through the facilities of, a national securities exchange or (2) to or through a market maker. Therefore, the price at which securities are sold in an ATM offering will vary because it is based on the price of the securities in the BDC's trading market. An equity distribution program provides a means for a BDC to conduct offerings from time to time using a shelf registration statement to or through a broker-dealer acting either on a principal or agency basis. Each ATM offering then is a takedown from the related shelf registration statement. For further information, see At-the-Market Offerings and Equity Distribution Agreements for At-the-Market Offerings.

Private BDCs

Recently, as discussed above, 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 permanent capital. A private BDC offers and sells its securities in a private placement to accredited third-party investors without registering its securities under the Securities Act. More than 10 private BDCs have been brought to market since 2016. For additional information on private placements, see Private Placements Resource Kit and Top 10 Practice Tips: Private Placements.

Private BDCs are usually sponsored or formed by parent private equity firms or financial institutions that already have the necessary preexisting 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 because it is required to register under the 1940 Act.

This private BDC structure provides sponsors an alternative that combines elements of a private fund with elements of a traditional BDC. For instance, the private BDC must still comply with the 1940 Act governance and investment limitations and restrictions applicable to traditional BDCs.

However, the private BDC has the flexibility to build committed capital calls into its structure similar to other private funds in order to allocate capital as investment opportunities arise and provide investors with a defined liquidity event.

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 Exchange Act that is typically subject to a shorter review period by the SEC. For additional information on Form 10, see Form 10 Drafting.

A private BDC has the option of conducting an exchange offer pursuant to which BDC investors, including directors and officers of the BDC, may elect to exchange their BDC shares for shares in a new split-off extension fund. The new split-off extension fund would receive a pro rata portion of the BDC's assets and liabilities, including each of the BDC's portfolio investments, in proportion to the percentage of the BDC shares exchanged. As private BDCs do not have publicly traded shares, this exchange option provides private BDC investors with a potential liquidity opportunity following the extension fund's IPO.

Commercial Trends

BDCs have faced a significant amount of investor activism in recent years. There have been a number of questions raised as to whether management fees and management interests generally align with shareholder interests. There has been an increase in consolidation in the BDC sector recently. This has been driven by the shares of many listed BDCs trading below the NAV, an increased interest in filling gaps in the kinds of assets under management and BDC activism pushing for the maximization of shareholder value.

There also has been an increased interest in joint ventures throughout the BDC sector in recent years. This is primarily driven by the goal to increase portfolio yields. Many BDCs have entered into Senior Loan Fund (SLF) Joint Ventures. SLFs are investment vehicles whereby the BDC and a third party (typically an insurance company or asset manager) commit capital to invest in unitranche and first lien secured loans. Ares Capital Corporation, Capitala Finance Corporation, and New Mountain Finance Corporation have all entered into these types of arrangements in recent years. These SLFs have faced scrutiny by some in the sector especially before the reduction in the asset coverage ratio. This is because the implicit leverage in the SLF is not counted towards the BDC's overall asset coverage ratio.

Loan Modifications

The sharp economic decline caused by the COVID-19 pandemic has placed added stress on the ability of BDCs to support their portfolio companies as certain covenants, such as minimum shareholder equity and asset coverage ratios, continue to face pressure as a result of the pandemic. Despite this added stress, BDCs need to provide continued support to their portfolio companies as the COVID-19 pandemic continues to negatively impact valuations. To provide this support, some BDCs have relied on lenders to extend or increase the size of existing revolving lines of credit or term loans. To prevent adverse outcomes and technical defaults, BDCs are increasingly working with their lenders to negotiate amendments to their existing credit facilities or temporarily waive certain covenants.

In May 2020, Owl Rock Capital Corporation (NYSE: ORCC) amended its existing credit agreements to (1) reduce the applicable minimum asset coverage ratio from 200% to 150% and (2) change the covenant requiring minimum shareholders equity. ORCC has also communicated that it gradually plans to target a debt-to-equity range of 0.90x to 1.25x while maintaining its existing investment philosophy.

Also in May 2020, FS KKR Capital Corp (NYSE: FSK) amended certain financial covenants in its existing credit agreement, including resetting the minimum shareholders' equity covenant to reference shareholders' equity as of March 31, 2020, rather than November 7, 2019 (the facility restatement closing date).

Legal and Regulatory Updates

On March 12, 2020, the SEC adopted amendments to the accelerated filer and large accelerated filer definitions in Rule 12b-2 under the Exchange Act. The amendments are intended to reduce the number of issuers that qualify as accelerated filers and reduce compliance costs for smaller reporting companies. The amendments allow BDCs to qualify for this exclusion if they meet the requirements of the smaller reporting company revenue test using annual investment income as the measure of annual revenue, although they will continue to be ineligible to be smaller reporting companies. As a result of the amendments, certain low revenue BDCs will not be subject to the SOX Section 404(b) auditor attestation requirements regarding internal control over financial reporting. In addition, these low revenue BDCs will not need to comply with the shorter SEC reporting deadlines that apply to accelerated and large accelerated filers.

On November 25, 2019, the SEC proposed a new rule to clarify the use of derivatives by BDCs. The proposed rule would provide a more comprehensive approach to the regulation of a BDC's use of derivatives. Proposed Rule 18f-4 would permit BDCs to enter into derivatives transactions and certain other transactions notwithstanding the restrictions under Section 18 of the 1940 Act and impose a uniform set of conditions for such transactions. Conditions would include implementation of a derivatives risk management program and a limit on the BDC's use of leverage.

On July 6, 2020, the SEC adopted rule amendments (1) establishing an expedited review process for exemptive applications under the 1940 Act that are substantially similar to other recently approved applications and (2) introducing a new informal process for applications that do not qualify for the new expedited process. The amendments are expected to make the application process more efficient and transparent. Expedited review would be available if an application is substantially similar to two other applications for which an order granting relief has been issued within three years of the date of the application's initial filing.

On September 26, 2019, the SEC adopted new Rule 163B and related amendments under the Securities Act to expand the permitted use of "testing-the-waters" communications to all companies regardless of size or reporting status, including BDCs. The new rule enables any BDC, including one that is not an emerging growth company, or any person authorized to act on the BDC's behalf, to make oral and written offers to qualified institutional buyers and institutional accredited investors before or after the filing of a registration statement to gauge investors' interest in an offering of securities by the BDC.

COVID-19 Pandemic Relief

Due to the global COVID-19 pandemic, on April 8, 2020, the SEC announced temporary, conditional exemptive relief for BDCs to enable them to make additional investments in their existing portfolio companies. The relief provides additional flexibility for BDCs to (1) issue and sell senior securities in order to provide capital to such companies and (2) participate in investments in such companies alongside certain private funds that are affiliated with the BDC. The relief continues until December 31, 2020, and is subject to certain investor protection conditions, including specific requirements for obtaining an independent evaluation of the issuances' terms and approval by a majority of a BDC's independent board members.

Under the SEC's order, an electing BDC can use a modified formula to calculate its asset coverage ratio for purposes of the 1940 Act's asset coverage requirements and, in doing so, can rely in part on the fair value of its assets as of December 31, 2019. The overall effect is to make it easier for the BDC to meet its applicable asset coverage ratio, as well as satisfying covenants referencing the asset coverage requirements, which could result in the BDC incurring additional leverage, but also providing the BDC with additional flexibility to manage its portfolio and support its portfolio companies during the economic disruption caused by the COVID-19 pandemic.

The relief is subject to several conditions, including that for 90 days from the date of the election, the BDC may not make an initial investment in a portfolio company in which it was not already invested as of April 8, 2020, unless at the time of investment the BDC can meet its applicable asset coverage ratios without relying on the election. The BDC's board must also determine that the issuance of the senior security is in the best interests of the BDC and its shareholders. In making such determination, the BDC's board must obtain (1) a certification from the BDC's investment adviser that the issuance of the senior security is in the best interests of the BDC and its shareholders and (2) advice from an independent evaluator that the terms and conditions of the proposed issuance is fair and reasonable compared to similar issuances, if any, by unaffiliated third parties in light of current market conditions. On April 13, 2020, Prospect Capital Corporation elected to rely on the modified asset coverage ratio.

Additionally, on March 13, 2020 (as amended on March 25, 2020), the SEC issued an order granting relief to funds, including BDCs, from the in-person voting requirements under the 1940 Act to approve investment advisory agreements, principal underwriting agreements, auditors and plans regarding distribution-related payments from fund assets subject to satisfying certain conditions. Reliance must be necessary or appropriate due to circumstances related to current or potential effects of COVID-19 and votes must be cast at a meeting in which all directors may participate and hear each other simultaneously. The board, including a majority of the directors who are not interested persons, must ratify the approval at the next in-person board meeting. On June 19, 2020, the SEC extended this relief through December 31, 2020.

For an overview of practical guidance on COVID-19 covering various practice areas, including capital markets, see Coronavirus (COVID-19) Resource Kit.

Small Business Credit Availability Act

The Small Business Credit Availability Act reduced the asset coverage requirement applicable to electing BDCs from 200% to 150%. This reduction allows electing BDCs to maintain a maximum 2:1 debt-to-equity leverage ratio. Increasing the leverage limit may allow BDCs to deploy additional (possibly lower-risk senior) capital to borrowers and potentially increase their total returns without needing to deploy higher-risk junior capital in order to obtain higher yields. In order to elect to reduce the asset coverage requirement, the Small Business Credit Availability Act requires that either one of the following be true:

- A majority of the BDC's board of directors and a majority of its disinterested directors (as defined under the 1940 Act) approve the decreased asset coverage ratio, which effectiveness would be delayed one year following the approval.
- A majority of the BDC's stockholders approve the decreased asset coverage ratio, which would be immediately effective following the approval.

In either scenario, a BDC that opts to rely on the reduced asset coverage requirement must publicly disclose within five business days its election to do so and provide the market with the BDC's existing leverage ratio and risks associated with increasing the leverage ratio. Further, a BDC that is not traded on a national securities exchange is required to offer its stockholders an opportunity to have their shares repurchased by the BDC following the approval to increase the leverage ratio.

The board of directors or shareholders of numerous BDCs, including Ares Capital, Apollo Investment, Goldman Sachs BDC, Hercules Capital, New Mountain Finance, Owl Rock Capital Corporation, PennantPark Floating Rate Capital, Solar Capital, and TCG BDC, have approved the reduced 150% asset coverage level.

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. As a result, many BDCs entered into new financing arrangements to increase the availability of debt relative to equity.

Several credit rating agencies, including Standard & Poor's, Fitch Ratings, and Kroll Bond Rating Agency, 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 provided public guidance that it would likely downgrade any BDC that obtains or seeks approval to reduce its asset coverage ratio. The 2019 Fitch Ratings report set forth a negative outlook for BDCs due to the change in the asset coverage requirement. The 2020 Fitch Rating sector outlook for BDCs remained negative and predicted that some BDC asset coverage ratios are expected to come under pressure because the sector will experience negative portfolio valuation marks and future elevated portfolio credit issues because of the COVID-19 pandemic.

Securities Offering Reforms

On April 8, 2020, the SEC voted to adopt final rule amendments that modernize the offering-related provisions of the Securities Act and the communications safe harbors available to BDCs. The SEC also adopted accompanying amendments to Form N-2. The SEC was required to undertake rulemaking by the Small Business Credit Availability Act. The new rules allow BDCs to avail themselves of the securities offering and communication rules that are available to operating companies. Among the most important changes are (1) the ability for BDCs to qualify as well-known seasoned issuers (WKSIs) to the extent that the BDC meets the reporting history and public float requirements and to benefit as WKSIs from the ability to engage in certain communications and rely on expedited shelf registration provisions, (2) the ability for other BDCs to use more streamlined shelf registration statement procedures, and (3) the ability for BDCs to rely on a number of important communications safe harbors. The rule and form amendments become effective on August 1, 2020.

WKSI Status

A BDC is no longer considered an ineligible issuer and, as a result, will be able to qualify as a WKSI, file an automatically effective shelf registration statement, and use free writing prospectuses. Many BDCs already meet the public float requirement ($700 million) for WKSI status. For further information, see WKSIs and Seasoned Issuers.

Incorporation by Reference

Amended Form N-2 allows for incorporation by reference in the same manner as Form S-3. A BDC that meets the Form S-3 eligibility requirements is able to backward incorporate and forward incorporate subsequently filed Exchange Act documents. BDCs meeting the Form S-3 eligibility requirements may also rely on Rule 430B in order to omit certain information from their registration statements and rely on the prospectus to provide the omitted information. Rule 497 has also been amended by the SEC to allow BDCs to file form prospectus supplements in a process resembling that available to operating companies relying on Rule 424. For further information, see Rule 424 Prospectus Supplements Filing.

Access Equals Delivery

Rules 172 and 173 under the Securities Act, which permit access equals delivery, becomes applicable to BDCs. The prospectus and incorporated materials are required to be made available on a website. This eliminates the outdated process of having to print prospectuses and deliver physical copies of prospectuses to investors in BDC offerings.

Communications Safe Harbors

BDCs are able to rely on Rules 168 and 169 under the Securities Act, which allow companies to disseminate regularly released factual business and forward-looking information even around the time of a securities offering without having such information considered an offer, so long as no reference is made to any potential offering and the other conditions of the safe harbors are met.

BDCs are also able to rely on the safe harbors under Rules 134, 163A, and 163 under the Securities Act. 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 Section 5(c) prohibition on prefiling offers for communications that do not reference an offering, and that are made more than 30 days prior to the filing of a registration statement, provided certain conditions are met. Rule 163 provides a safe harbor from the Section 5(c) prohibition on prefiling offers for WKSIs to engage in unrestricted oral and written communications before the filing of a registration statement, if certain conditions are met.

Rule 139b under the Securities Act establishes a nonexclusive research report safe harbor for unaffiliated brokers or dealers that publish or distribute research reports regarding BDCs. The safe harbor is available even if the broker-dealer is participating in or may participate in a registered offering of the BDC's securities. This safe harbor reduces obstacles that previously prevented investors from accessing research reports on BDCs, given that, prior to these changes, the research safe harbors were not available to BDCs and broker-dealers generally refrained from publishing research reports about BDCs in proximity to securities offerings for such entities.

Other SEC Developments

On April 21, 2020, the SEC proposed new Rule 2a-5 under the 1940 Act which is intended to address valuation practices and the role of the board of directors with respect to the fair value of the investments of a BDC. If adopted, the rule would establish requirements in connection with the determination of fair value in good faith of a BDC's investments and would permit a BDC's board of directors to assign the fair value determination to its investment adviser, subject to board oversight and certain other conditions. In order to determine fair value in good faith, the BDC must assess and manage valuation risks, establish and apply fair value methodologies, perform testing of valuation methodologies, establish a process for evaluating pricing service providers, and maintain appropriate recordkeeping.

On February 25, 2020, the SEC granted an exemptive order to permit a non-traded BDC (FS Energy and Power Fund) to offer investors multiple classes of shares. The exemptive order provides a new path for non-traded BDCs to offer separate classes of shares with different investment, pricing, fee, and expense structures. Previously, only mutual funds and certain registered closed-end funds (such as interval funds) had been able to offer multi-class share structures. Any non-traded BDC seeking to rely on similar exemptive relief must agree to provide a certain degree of liquidity to its shareholders similar to an interval fund and must also comply with Rule 18f-3 under the 1940 Act.

On February 28, 2019, the Staff of the SEC's Division of Investment Management (the Staff) issued a no-action letter to the Independent Directors Council permitting board members of a BDC to vote by telephone, video conference, or other remote means in certain circumstances. This position softens, but does not eliminate, the burden for BDCs and their boards to adhere to certain in-person voting requirements. For example, the approval or renewal of an advisory contract requires the vote of directors at an in-person board meeting. The no-action relief may be relied upon if a director is unable to meet at an in-person board meeting as a result of unforeseen or emergency circumstances. Such circumstances could include illness or death, including of family members, weather events or natural disasters, acts of terrorism, and disruptions in travel that prevent some or all directors from attending an in-person board meeting. Additionally, either no material changes may be proposed at the board meeting to the existing contract, plan, or arrangement or the material aspects of the proposed new contract, plan, or arrangement must have been previously discussed at a prior in-person board meeting (without a vote). If relying upon the no-action relief, the directors are required to ratify the prior approval at the next in-person board meeting.

Market Outlook

The global impact of the COVID-19 pandemic across the financial sector plays a significant role in a predominately negative market outlook for BDCs. While some BDCs are better positioned than others to absorb losses and maintain appropriate asset coverage ratios, sector wide portfolio markdowns resulting from the COVID-19 pandemic are having and will continue to have a negative impact on the sector. Because of the pandemic, many BDC industry participants have felt increased pressure as the sector experiences current negative portfolio valuation and potential future credit issues.

On January 23, 2020, the SEC declined to exempt BDCs from the Acquired Fund Fees and Expenses (AFFE) disclosure requirement included in a BDC's prospectus fee table. Pushing back on this disclosure requirement, BDCs cite that the calculation of AFFE typically results in an overstated expense ratio because an acquiring fund's indirect expenses are often significantly greater than the expense ratio of the BDC. The SEC's decision to decline this exemption to BDCs garnered attention outside the BDC industry. In a March 5, 2020 letter to the SEC, a bipartisan group of Congress members joined the effort to exempt BDCs from AFFE restrictions. The letter outlines the opinion that the SEC's application of the AFFE disclosure requirements to BDCs is inconsistent with statutory mandates and SEC objectives for AFFE disclosure. Pointing to the decline in institutional ownership of BDC stocks since the adoption of AFFE, which in turn has reduced liquidity in the market, these lawmakers see the AFFE disclosure requirement as threatening the ability of BDCs to serve as vehicles for providing capital to small- and mid-sized businesses. The letter encourages the SEC to tailor AFFE rules to better align with the unique nature of BDCs and alleviate the harm already caused.

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She works closely with financial institutions to create and structure innovative financing techniques, including new securities distribution methodologies and financial products. She has particular financing experience in certain industries, including technology, telecommunications, healthcare, financial institutions, REITs and consumer finance. Anna has worked closely with foreign private issuers in their securities offerings in the United States and in the Euro markets. She also works with financial institutions in connection with international offerings of equity and debt securities, equity- and credit-linked notes, and hybrid and structured products, as well as medium term note and other continuous offering programs.

In the derivatives area, Anna counsels a number of major financial institutions acting as dealers and participants in the commodities and derivatives markets. She advises on structuring issues as well as on regulatory issues, including those arising under the Dodd-Frank Act. Her work focuses on foreign exchange, equity and credit derivatives products, and structured derivatives transactions. Anna has experience with a wide range of transactions and structures, including collars, swaps, forward and accelerated repurchases, forward sales, hybrid preferred stock and off-balance sheet structures. She also has advised derivatives dealers regarding their Internet sites and other Internet and electronic signature/delivery issues, as well as on compliance matters.

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