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April 8, 2016

Via E-mail: rule-comments@sec.gov

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Simplification of Disclosure Requirements for Emerging Growth Companies and Forward Incorporation by Reference on Form S-1 for Smaller Reporting Companies; Release No. 33-10003; File No. S7-01-16

Dear Mr. Fields:

We appreciate the opportunity to respond to the request for comment issued by the U.S. Securities and Exchange Commission (the "***Commission***") regarding whether the interim final rules (the "***Amendments***") the Commission has adopted to implement Sections 71003 and 84001 of the Fixing America's Surface Transportation Act (the "***FAST Act***"), as set forth in the above-referenced release (the "***Release***"), should be expanded to include other registrants or forms, including business development companies ("***BDCs***") and Form N-2 registration statements used by BDCs.

Sutherland Asbill & Brennan LLP is an international law firm with offices in Atlanta, Austin, Geneva, Houston, London, New York, Sacramento and Washington, DC. We have represented BDCs for more than 20 years and maintain the nation's preeminent practice in all aspects of the formation, operation and regulation of BDCs. We currently have a large dedicated team of attorneys who spend all or most of their time on BDC matters.

We thank the Commission for this opportunity to comment on the matters addressed in the Release. Our comments are centered on the ability of BDCs to backward and forward incorporate information into their Form N-2 registration statements by reference to reports filed by them under the Securities Exchange Act of 1934, as amended (the "***Exchange Act***"), and are set forth below. These comments, while informed by our experience in representing BDCs, represent our own views and are not intended to reflect the views of our BDC clients.

Discussion

I. Background

BDCs are closed-end investment companies regulated by the Commission. In 1980, Congress amended the Investment Company Act of 1940, as amended (the "***1940 Act***"), to create BDCs as a new category of closed-end investment companies to encourage the establishment of public vehicles that invest in small- and middle-market U.S. operating companies in order to provide these companies with access to much-needed capital. The BDC provisions of the 1940 Act were enacted to provide incentives for small business investment, particularly so that "small, growing and financially troubled enterprises

can – in a manner consistent with the interests of investor protection – more readily raise needed capital."[1] To achieve that objective, BDCs are effectively required, with minor exceptions, to invest at least 70% of their assets in U.S. private operating companies or U.S. public operating companies with a public market capitalization of under $250 million.

Since their creation, BDCs have provided, and today are continuing to provide, access to much-needed capital, usually in the form of loans to small- and middle-market U.S. operating companies (*i.e.*, "Main Street" U.S. companies). These companies historically have not had access to the traditional capital markets as a result of a variety of factors, including, among other things, smaller size, lack of tangible assets to serve as collateral for lenders, the perception of illiquidity and the lack of ratings from credit-rating agencies. BDCs fill this financing void for small- and middle-market operating companies across the United States.

Most fundamentally, BDCs are subject to *all* of the disclosure and filing requirements under the Exchange Act as are U.S. operating companies that have a class of securities registered under the Exchange Act, and conduct registered offerings under the Securities Act of 1933, as amended (the "***Securities Act***"), in the same manner as other Exchange Act registrants that file registration statements on Forms S-1 or S-3. In this regard, we believe that BDCs are much more similar to other Exchange Act registrants than they are to "traditional" investment companies registered under the 1940 Act, including in the following ways, among others:

- BDCs are registrants under the Exchange Act; BDCs are *not* 1940 Act registrants like traditional investment companies;

- BDCs are required to file the same periodic reports under the Exchange Act as other Exchange Act registrants, including real-time reporting of events on Form 8-K;

- BDCs access the capital markets consistent with the traditional offering process applicable to other Exchange Act registrants; and

- BDCs communicate with investors in a manner substantially similar to that of other Exchange Act registrants, including through the making of press releases, quarterly earnings releases, investor presentations and other communications both within and outside of the securities offering process.

The foregoing characteristics, which are not characteristics generally shared by traditional closed-end investment companies, weigh significantly in favor of viewing and treating BDCs like other Exchange Act registrants under the federal securities laws. As a result, we see neither a policy nor a theoretical or practical basis for distinguishing among BDCs, smaller reporting companies and other Exchange Act registrants with regard to applicability of the Amendments and believe that BDCs should be afforded the same treatment (*i.e.*, the same benefits and obligations) that other Exchange Act registrants receive under the current regulatory regime and, in turn, the Amendments.

[1] H.R. Rep. No. 96-1341, 96th Cong., 2d Sess., 1980 at 4801.

II. Registered Offerings by BDCs

Despite the fact that BDCs, as a result of their election of BDC status under the 1940 Act, are subject to *all* of the same disclosure and filing requirements imposed on other Exchange Act registrants, the flexibility to regularly access the public capital markets in a nimble and efficient manner, which has become an accepted way of life for public operating companies in today's economy, has never been made available to BDCs. BDCs have to register their securities on Form N-2, the form used by conventional closed-end funds, which does not permit the use of the integrated disclosure concept available to other Exchange Act registrants.[2] That is, BDCs cannot incorporate information into their Form N-2 registration statements by reference to their periodic reports filed by them under the Exchange Act (*i.e.*, Forms 10-K, Forms 10-Q and Forms 8-K), a common, efficient and well-understood practice in today's marketplace.

In the context of shelf registration statements filed pursuant to Rule 415 under the Securities Act, the inability of BDCs to incorporate information into their registration statements to the same extent allowed for other Exchange Act registrants results in precisely the same inefficiencies sought to be addressed by the Amendments: the increased costs associated with accessing the capital markets for smaller reporting companies due to their inability to forward incorporate Exchange Act information into their Form S-1 registration statements by reference to their Exchange Act filings.

The Commission adopted Rule 415 of the Securities Act to permit companies to register any number of securities to be offered and sold on a delayed or continuous basis (such Rule 415 offerings are referred to as "shelf offerings").[3] Rule 415 contains a list of the types of offerings that may be made on a delayed or continuous basis and imposes certain requirements on those offerings. Specifically, Rule 415(a)(1) contains an exclusive list of those offers and sales of securities that an issuer may register on a shelf basis. The word "only" is included in Rule 415(a)(1) to make this clear. Rule 415(a)(1)(x) permits shelf offerings of "securities registered (*or qualified to be registered*) [emphasis added] on Form S-3 or Form F-3 which are to be offered and sold on a continuous or delayed basis by or on behalf of the registrant . . . ".

As mentioned above, BDCs are required to register their securities on Form N-2 and are not permitted to file a registration statement on any other form. However, Rule 415(a)(1)(x) does not require the securities to be registered on Form S-3; it is sufficient that the securities be "qualified" to be registered on Form S-3. Accordingly, a BDC that meets the requirements of Form S-3 is permitted to register its securities pursuant to Rule 415(a)(1)(x) even though it is required to register its securities on Form N-2.[4]

Indeed, the staff of the Commission has formally acknowledged in no-action letters that a closed-end investment company may conduct a shelf offering on Form N-2 in accordance with Rule 415(a)(1)(x)

[2] BDCs use Form N-2 because General Instruction A of such form states that "Form N-2 shall be used by all closed-end management investment companies."

[3] A "delayed offering" is one in which there is no present intention to offer securities at the time of effectiveness. A "continuous offering" is one in which securities are offered promptly after effectiveness and will continue in the future.

[4] In addition, BDCs conduct continuous shelf offerings on Form N-2 registration statements in reliance on Rule 415(a)(ix) under the Securities Act.

if such company's securities are "qualified to be registered" on Form S-3.[5] That is, a closed-end investment company that satisfies the registrant and transaction requirements of Form S-3 in connection with a primary offering may register its securities on Form N-2 for an offering to be made on a continuous or delayed basis in accordance with Rule 415(a)(1)(x).

Notwithstanding the foregoing, the shelf offering process currently entails a number of practical difficulties for BDCs. To establish a shelf, a BDC must file with the SEC a registration statement on Form N-2 to register the offer and sale of its securities, which registration statement must be declared effective prior to any offer or sale of securities. The Form N-2 will not only include the required information about the BDC, but also certain information regarding the securities to be issued and, unlike other Exchange Act registrants, all of the other information required by Form N-2, including information previously filed in periodic reports under the Exchange Act. When the BDC wants to market, or "take down," a new offering from "the shelf," it must file a prospectus supplement or a post-effective amendment that updates the information about the BDC contained in the Form N-2, as appropriate depending on the nature of the information to be updated, and details the offering and the securities being sold. However, such an update requires, *at a minimum*, that the BDC, unlike other Exchange Act registrants, update its shelf registration statement to include the information contained in its periodic reports that were filed since effectiveness. This updating practice is largely dictated by the anti-fraud and civil liability provisions of the Securities Act, such as Section 12(a)(2), and of the Exchange Act, such as Rule 10b-5.

A BDC may update its shelf registration statement to include information contained in its periodic reports filed under the Exchange Act through the use of a prospectus supplement.[6] If a periodic report contains information that would be deemed to be a "fundamental" change, then a post-effective amendment would need to be filed to reflect such change as well.[7] Moreover, a BDC must also update its shelf registration statement to reflect any other "fundamental" or "material" change to the information contained therein that is not yet otherwise reflected in its periodic reports. This process of updating a shelf registration statement by means other than incorporation by reference is unusual and unnecessary for other Exchange Act registrants. In this respect, we believe the above-referenced update procedure

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[5] *See* Securities and Exchange Commission No-Action Letter, *Nuveen Virginia Premium Income Municipal Fund* (available Oct. 6, 2006); Securities and Exchange Commission No-Action Letter, *Pilgrim America Prime Rate Trust* (available May 1, 1998).

[6] A post-effective amendment must be filed "if new information is *substituted* for old and not merely *added* to it." *See* LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 112 (1995).

[7] Rule 415(a)(3) of the Securities Act requires that a company file a post-effective amendment to its shelf registration statement if (i) there is a "fundamental change" in the information in the registration statement, (ii) an update is required by Section 10(a)(3) of the Securities Act, or (iii) there is any material change in the plan of distribution contained in the registration statement. Section 10(a)(3) of the Securities Act states that "when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use . . . ." Take, for example, a BDC that registers the sale of securities on a Form N-2 shelf registration statement, which includes audited financial statements for the year ended December 31, 2015 and that is declared effective on March 31, 2016. If the registration statement is used nine months from the effective date, then the information contained therein must be as of a date not more than sixteen months prior to such use. The sixteen months is interpreted to start as of the date of the last audited financial statements included in the registration statement. Therefore, the initial registration statement could be used until April 30, 2017 (*i.e.*, December 31, 2015 plus 16 months). After April 30, 2017, the BDC would be required to file a post-effective amendment pursuant to Section 10(a)(3) of the Securities Act.

impedes and undermines the intent and purpose of the shelf offering process – to *facilitate* the efficient offering of securities by issuers.

This interplay between the shelf offering process under Rule 415 and the requirements of Form N-2 causes a myriad of filing inefficiencies for, and imposes significant costs upon BDCs – inefficiencies and costs that were taken into consideration and sought to be reduced by the Commission with the Amendments for smaller reporting companies.[8] Because BDCs are subject to the same periodic reporting requirements as smaller reporting companies, and considering that the Amendments are intended to "further integrate disclosures under the Securities Act and the Exchange Act and increase regulatory simplification," there does not appear to be any basis in policy or practice for the Commission to deny BDCs the ability to incorporate information into Form N-2 registration statements by reference to periodic reports to the same extent allowed for smaller reporting companies by the Amendments.

Expanding applicability of the Amendments to BDCs and the registration of their securities on Form N-2 could greatly reduce the amount of time required for BDCs to prepare their initial shelf registration statements and the post-effective amendments and prospectus supplements thereto, thus reducing the reporting and offering costs incurred by BDCs, including legal, accounting and printing costs. Moreover, and despite the reduction in the overall quantity and frequency of public filings, if BDCs were allowed to incorporate information into their Form N-2 registration statements by reference to their periodic and current reports to the same extent that the Amendments permit smaller reporting companies to do so, investors would continue to have access to the same quantity and quality of information about BDC registrants due to the availability of reports filed by them on the Commission's EDGAR database and on their own websites. Enabling BDCs to incorporate information into their Form N-2 registration statements to the same extent allowed for smaller reporting companies by the Amendments will be consistent with the expectations of an investing public already familiar with the concept of integrated disclosure, and which views BDCs in much the same way as other Exchange Act registrants.

Conclusion

The scope of the Amendments should be expanded to permit BDCs to incorporate information into Form N-2 registration statements to the same extent that the Amendments permit smaller reporting companies to do so.[9] An expansion of the Amendments in this fashion would reduce the impact on BDCs

[8] The Release states that

> [t]he amendment pursuant to Section 84001 of the FAST Act to permit forward incorporation by reference by [smaller reporting companies] in Form S-1 will further integrate disclosures under the Securities Act and the Exchange Act and increase regulatory simplification. Forward incorporation by reference will eliminate the need to update information in a filing that has become stale or is incomplete. The amendment should decrease the existing filing burdens by reducing multiple disclosure filings, thereby allowing [smaller reporting companies] to satisfy Form S-1 disclosure requirements and access capital markets at a lower cost. In addition to the reduced audit and legal costs of not having to file post-effective amendments, cost savings could also result from lower printing and delivery costs for a smaller sized prospectus. Such reduction in costs could be offset, to some extent, by ongoing costs related to the issuer's new obligations to make the incorporated Exchange Act reports and other materials readily available and accessible to investors on a web site maintained by or for the issuer, or provided upon request.

[9] Although Form S-1 permitted smaller reporting and other companies to use backward incorporation of reports filed under the Exchange Act by reference to such reports and the Amendments pertain only to the use of forward

of regulatory impediments that make the capital raising process less flexible and inefficient, and allow BDCs to access the capital markets in the same way as other Exchange Act registrants, including smaller reporting companies. Access to this streamlined reporting and registration process under the federal securities laws, where the information included in a company's periodic reports is seamlessly integrated into a registration statement, would enable BDCs to quickly and efficiently access the public equity and capital markets at opportune times, thereby enabling BDCs to fulfill their congressional mandate to bring this capital more quickly to small and growing U.S. businesses. The ability to quickly and efficiently access the equity and/or capital markets during brief windows of opportunity is especially important in the current environment. An expansion of the Amendments to apply to BDCs and registration statements on Form N-2 would also reduce legal, accounting and printing costs currently incurred by BDCs due to the interplay between the shelf offering process under Securities Act Rule 415 and the requirements of Form N-2. Further, in contrast to other, traditional investment companies registered under the 1940 Act, BDCs are subject to the same disclosure and filing requirements under the Exchange Act as other Exchange Act registrants (including smaller reporting companies) and, accordingly, should have access to the same integrated disclosure regime as other Exchange Act registrants in the absence of a policy justification indicating otherwise. We are not aware of any such policy justification.

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If the Commission or its staff wishes to discuss the matters mentioned in this letter, please contact Steven B. Boehm at [redacted], Cynthia M. Krus at [redacted] Harry S. Pangas at [redacted], Lisa A. Morgan at [redacted] or Cynthia R. Beyea at [redacted].

Respectfully yours,

SUTHERLAND ASBILL & BRENNAN LLP

incorporation by reference, we believe that BDCs should be able to use both backward and forward incorporation by reference in their Form N-2 registration statements for the reasons set forth in this letter.