Institute for Portfolio Alternatives

June 10, 2019

VIA ELECTRONIC DELIVERY

Vanessa Countryman
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Securities Offering Reform for Closed-End Investment Companies – File Number S7-03-19

Dear Ms. Countryman:

The Institute for Portfolio Alternatives ("IPA") is pleased to submit this letter in response to the request by the U.S. Securities and Exchange Commission (the "SEC") for comments regarding the above-referenced release (the "Proposing Release").[1] The IPA appreciates the SEC's proposed rulemaking to implement the Small Business Credit Availability Act of 2018 and the Economic Growth, Regulatory Relief, and Consumer Protection Act (collectively, the "Acts"), which seek to modify the registration, communication, and offering processes to facilitate capital raising by business development companies ("BDCs") and closed-end investment companies.

The IPA has an immediate interest in the proposed rule as it relates to BDCs. For over 30 years the IPA has raised awareness of portfolio diversifying investment (PDI) products among stakeholders and market participants, including investment professionals, policymakers and the investing public. We support increased access to investment strategies with low correlation to the equity markets, including BDCs, closed-end investment companies such as interval funds, lifecycle real estate investment trusts ("REITs"), net asset value REITs and other direct participation programs. Through advocacy and industry-leading education, the IPA is committed to ensuring that all investors have access to real assets and the opportunity to effectively balance their investment portfolios.

BDCs are highly regulated[2] closed-end investment funds created by Congress in 1980 as part of the bipartisan Small Business Investment Incentive Act of 1980.[3] BDCs play an important role in providing capital to small and mid-sized companies that may not have access to traditional sources of capital. BDCs also provide individuals with private equity and debt investment opportunities historically available only

[1] *See Securities Offering Reform for Closed-End Investment Companies*, SEC Rel. Nos. 33-10619; 34-85382; IC-33427 (March 20, 2019).

[2] Unlike other non-bank lenders, BDCs are governed by the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Company Act of 1940 ("1940 Act"). BDCs register their securities and provide extensive disclosures; file periodic and other reports, including proxy statements and Forms 10-K, 10-Q and 8-K; and comply with additional regulatory requirements under the 1940 Act. Non-traded BDCs are also subject to state oversight and regulation under state "blue sky" laws.

[3] Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, 94 Stat. 2275 (1980); *see also* S. REP. NO. 96-958 (1980); H.R. REP. NO. 96-1341 (1980). The Act was approved by the U.S. House by a vote of 395-1 and by unanimous consent in the U.S. Senate.

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to institutional or wealthy investors. Under the Investment Company Act of 1940, as amended, BDCs must also invest at least 70% of their total assets in the securities of "eligible portfolio companies," defined as private U.S. operating companies and public U.S. operating companies with a market capitalization of less than $250 million.[4] Further, BDCs must offer significant managerial and other support to their portfolio companies.[5]

BDCs are an important source of capital and support to small and middle market U.S. companies. Today, there are approximately 41 non-listed BDCs managing $32 billion of investments. Our IPA members—publicly registered, non-listed BDCs—represent 44% of the entire BDC industry and manage 35% of all BDC assets.

The IPA supports the comments and solutions proposed in the letter dated June 10, 2019 by the law firm Dechert LLP, attached as Exhibit A, in response to the request for comments in the Proposing Release. Specifically the IPA supports Dechert's comments with regard to: (I) Registration Process, (II) Communications Reforms – Forward-Looking Statements, (III) Periodic Reporting Requirements, (IV) New Current Reporting Requirements for Affected Funds (defined therein), and (V) Form N-2. We believe that the suggestions contained therein provide both BDCs and registered closed-end funds with the full parity that Congress sought to provide to them relative to operating companies through passage of the Acts.[6] Further, the IPA reiterates the Dechert letter's comments regarding the market and unique attributes of non-listed (i.e., non-traded) BDCs, and proposed solutions to allow them to fully benefit from the offering reforms contained in the Proposing Release and proposed rulemaking.

If the IPA may be of any assistance, please do not hesitate to contact me or Anya Coverman, IPA's Senior Vice President, Government Affairs and General Counsel, at [redacted].

Sincerely,

Anthony Chereso
President & CEO, Institute for Portfolio Alternatives

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[4] *See* 15 U.S.C. § 80a-2(a)(46)-(48); see also 17 C.F.R. § 270.2a-46.

[5] *Id*. §80a-2(a)(48)(B).

[6] See Section 803(b) of the BDC Act; see also Proposing Release at 15 ("[W]e believe [the BDC Act and the CEF Act] both share the overall purpose of providing offering and communication rule parity to the investment companies covered by the Acts. In particular, both Acts direct that we make available to these investment companies the securities offering rules that are available to other issuers required to file reports under section 13 or 15(d) of the Exchange Act.")

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Exhibit A
Dechert LLP Letter, Dated June 10, 2019

[redacted]

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Re: Securities Offering Reform for Closed-End Investment Companies – File Number S7-03-19

Dear Ms. Countryman:

We are pleased to submit this letter in response to the request by the U.S. Securities and Exchange Commission (the "***SEC***") for comments regarding the above-referenced release (the "***Proposing Release***").[1]

Dechert LLP is an international law firm with a wide-ranging financial services practice that serves clients in the United States and abroad. We have a large practice representing business development companies ("***BDCs***") and registered closed-end funds ("***CEFs***" and, together with BDCs, "***Affected Funds***") in all aspects of their formation, operation and regulation. Although we have discussed certain matters addressed in the Proposing Release with some of our clients, the comments that follow reflect only the views of a group of attorneys who regularly represent Affected Funds, and do not necessarily reflect the views of our clients or other members of our firm.

At the outset, we would like to applaud the SEC for carefully following the securities offering reform directives contained in the Small Business Credit Availability Act[2] (the "***BDC Act***") and the Economic Growth, Regulatory Relief, and Consumer Protection Act[3] (the "***CEF Act***" and, together with the BDC Act, the "***Acts***") in connection with the rule proposals (the "***Proposed Rules***") set forth in the Proposing Release. We believe that the enhancements and other suggested changes to the Proposed Rules described in this letter would provide Affected Funds with the full

[1] *See Securities Offering Reform for Closed-End Investment Companies,* SEC Rel. Nos. 33-10619; 34-85382; IC-33427 (Mar. 20, 2019).

[2] Pub. L. No. 115–141, 132 Stat. 348 (2018).

[3] Pub. L. No. 115–174, 132 Stat. 1296 (2018).

parity vis-à-vis operating companies that Congress sought to provide to them through the passage of the Acts.[4]

I. Registration Process

A. <u>“Seasoned” Affected Funds and “Well-Known Seasoned Issuers”</u>

In order to benefit fully from the securities offering reforms contained in the Proposed Rules, an Affected Fund must either be a “seasoned” Affected Fund[5] or a “well-known seasoned issuer.”[6] The Proposing Release requests comment on whether an Affected Fund’s net asset value (“***NAV***”) should be used in lieu of, or in addition to, its public float in determining such Affected Fund’s status as a seasoned issuer or a well-known seasoned issuer. In response to the request for comment, we believe the SEC should expand the definitions of “seasoned” Affected Fund and “well-known seasoned issuer” to include any publicly offered, non-traded closed-end fund or BDC (together, “***Non-Traded Funds***”) whose total NAV meets the applicable public float-related threshold for each such term. We set forth below the rationale for our request.

Access to Information

In *Securities Offering Reform*, Release No. 33-8501 (Nov. 3, 2004) (“***2004 Proposing Release***”), the SEC indicated that the original implementation of the three-tiered offering rules system for reporting issuers was to “ensure that investors have access to required information about all issuers.”[7] In considering the availability of information for Non-Traded Funds, it is important to understand the unique attributes of these products. Not only are such products sold in a distinct ecosystem from that of operating companies, but, given the inherent lack of a secondary market

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[4] *See* Section 803(b) of the BDC Act; *see also* Proposing Release at 15 (“[W]e believe [the BDC Act and the CEF Act] both share the overall purpose of providing offering and communication rule parity to the investment companies covered by the Acts. In particular, both Acts direct that we make available to these investment companies the securities offering rules that are available to other issuers required to file reports under section 13 or 15(d) of the Exchange Act.”).

[5] An Affected Fund is generally considered “seasoned” if it is current and has been timely in its reporting under the Securities Exchange Act of 1934 (the “***1934 Act***”) for a period of at least 12 calendar months immediately preceding the filing of the registration statement and has at least $75 million in “public float” (*i.e.*, common equity traded on an exchange and held by unaffiliated persons).

[6] In general, a seasoned Affected Fund would qualify as a well-known seasoned issuer if it had $700 million or more in public float. See Rule 405 under the Securities Act of 1933 (the “***1933 Act***”) for the definition of “well-known seasoned issuer.”

[7] The 2004 Proposing Release described four categories of issuers: non-reporting issuers, unseasoned issuers, seasoned issuers and well-known seasoned issuers.

for such products, investors typically do not invest in them with the expectation of generating a profit through active trading.

Accordingly, especially considering the improvements in accessibility of information provided by technological advances, we believe that metrics other than the size of their secondary market presence should be appropriately considered in determining how the information necessary to reach investment decisions regarding Non-Traded Funds can be effectively delivered to, and accessed by, investors.

Impact of Technology

In *Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 And F-3*, Release No. 33-8878 (Jan. 28, 2008) (relating to amendments to Form S-3), the 2004 Proposing Release and the Proposing Release, the SEC recognized the continued impact of technology on disclosure and has indicated that it is interested in adapting its rules as necessary to take this into account. We believe that continued changes in technology and the accessibility of significant disclosure regarding Non-Traded Funds, as detailed below, militate against relying on a large secondary market presence as a measure of information available regarding an issuer without also considering such issuer's NAV.

Given the ubiquitous access to the internet and hyperlinked documents, the average investor depends less on market analysts for access to fund financial information than was the case a decade or more ago. Indeed, electronic copies of a Non-Traded Fund's disclosure reports (which are the same reports as those prepared by their listed counterparts) are typically furnished on, or linked to, the same webpage as such fund's subscription documents. Further, given their continuous sales efforts, these funds are highly incentivized to publish information regularly regarding their activities and to disseminate such information electronically to the broadest permissible audience.

Public Float as a Proxy for Market Following

The SEC has historically viewed public float as a surrogate for an issuer's market following and, in the 2004 Proposing Release, suggested that a larger public float is significant because larger issuers "are followed by sophisticated institutional and retail investors, members of the financial press, and numerous sell-side and buy-side analysts that actively seek new information on a continual basis."[8] The SEC thus concluded that such issuers "have a more regular dialogue with investors and market participants through the press and other media" and that "communications

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[8] *See* 2004 Proposing Release.

of these well-known seasoned issuers are subject to scrutiny by investors, the financial press, analysts, and others who evaluate disclosure when it is made."[9] However, focusing solely on public float fails to take into account the robust market ecosystem in which Non-Traded Funds operate and does not differentiate between a Non-Traded Fund with $100,000 of NAV that has just commenced operations and a fund with over $1 billion of NAV that is sold across the same scores of institutional platforms by thousands of the same financial advisors who recommend the traded securities of seasoned and well-known seasoned issuers.

Market for Non-Traded Funds

Non-Traded Funds are typically offered on a continuous basis pursuant to Rule 415(a)(1)(ix) under the 1933 Act or, in the case of interval funds, Rule 415(a)(1)(xi) under the 1933 Act. These funds are offered on a daily, weekly or monthly basis depending on the nature of the underlying assets and may have a finite or unlimited offering period. Offerings are continuous during the applicable period and, absent unusual facts, do not start and stop multiple times.

Non-Traded Funds have historically been sold through a syndicate of independent broker-dealer firms, and, more recently, are increasingly offered as investment options to clients of registered investment advisors. These products are also often offered through traditional wire-house brokerage channels. Before being eligible for sale or offering through any of these platforms, funds are subject to extensive institutional-level due diligence from the applicable home offices of the most significant brokerage firms, which frequently includes analysis by one or more third-party due diligence providers. This process is extensive,[10] often lasting six months or more. Further, home offices and due diligence firms also continue to seek additional information from Non-Traded Funds on a periodic basis after the fund has been placed on a platform.

Additionally, because of the continuous nature of their offerings, wholesalers from the principal underwriters of Non-Traded Funds and fund representatives are continuously in contact with financial advisors and home office communities in a way that is equal to or greater than the level of engagement seen for listed Affected Funds.

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[9] *See id.*

[10] All aspects of a fund are scrutinized in this process, including running background checks on its directors/trustees and officers, conducting review of its organizational structure and its investment process and obtaining comfort letters and legal opinions regarding fund disclosure. We note in particular that it is common for these due diligence firms to request enhancements be made to a fund's disclosure documents and for the underlying issuer to promptly make such enhancements.

Net Assets as an Alternative Proxy for Market Following

We believe that the NAV of a Non-Traded Fund is a good proxy for the number of brokerage firms that are offering the fund[11] and, accordingly, the number of home offices, financial advisors and independent due diligence providers that are following the fund and examining its activities. We believe that scrutiny from these entities is equal to the scrutiny from "... sophisticated institutional and retail investors, members of the financial press, and numerous sell-side and buy-side analysts that actively seek new information on a continual basis."[12] Further, because of the truly continuous nature of most Non-Traded Funds' offerings, we believe that engagement with the investment professional community is at least as strong as for traded products of comparable size. Accordingly, we believe that, for the purpose of the seasoned and well-known seasoned issuer offering rules being extended to Affected Funds proposed in the Proposing Release, Non-Traded Funds should be able to look to their NAV rather than public float when determining eligibility to avail themselves of incorporation by reference and other benefits that accompany seasoned and well-known seasoned issuer status.

Additionally, because Non-Traded Funds are long-term, buy-and-hold products that are generally not used or suitable for active trading, public float is not a meaningful measure of information quality or availability. Investors in these funds do not depend on up-to-the-second updated information produced by an efficient secondary market. Instead, such investors are generally more likely to be concerned with the long-term performance of the fund and its manager, product structure and costs borne by shareholders in the fund. These metrics may be assessed most appropriately at the tempo of the brokerage community and the existing disclosure regimes, rather than through immediate analyst coverage.

Congressional Intent and the Benefits of Expanded Scope

In adopting the BDC Act, Congress has stated that "[m]odernizing the regulatory regime for BDCs will allow them to amplify financing for small and medium-size businesses at a time when these companies are struggling to access capital to support growth and job creation . . ."[13] and has expressed its intent to "... eliminate onerous and unnecessary regulatory burdens on smaller public and private companies that are restricting their ability to access capital to grow and create

[11] We note that this is both because (i) many firms will not offer a non-traded product until it achieves certain levels of performance history and asset size and (ii) the larger the number of firms offering a given fund is, the larger the number of sales is likely to be.

[12] *See* 2004 Proposing Release.

[13] *See* H.R. Rep. 114-508 (2016).

jobs."[14] We note that the core intent of Congress in improving the flow of funds to middle-market companies is vindicated not just by entities listed on a national securities exchange, but equally by their non-traded counterparts. Improving the ability of Non-Traded Funds to raise capital can only help to fulfill this Congressional objective.

Further, Congress stated that it viewed "burdensome regulations" as "[a] significant cause of the decline" in closed-end funds and proposed a bill to "help reverse the trend of the declining issuance of closed-end funds as it would reduce onerous filing and offering regulations and conform the applicable regulations for such funds to ones for traditional operating companies."[15] The House of Representatives also noted that the use of incorporation by reference would save costs "while still ensuring that investors would receive relevant and necessary disclosures."[16] With appropriate modifications to these proposed regulations, such savings could accrue to Non-Traded Funds and their shareholders in the same manner as to listed Affected Funds.

Finally, we note that the SEC was provided with an explicit mandate to extend the offering rules available to operating companies to closed-end interval funds.[17] However, given that it is extremely unusual for interval funds to list their shares on an exchange, by looking only to public float, the SEC would be effectively reading interval funds out of the statute, frustrating the express intent of Congress. Given the need to address this clear Congressional intent, we believe that the SEC necessarily has both the flexibility and the mandate to read the Acts' eligibility requirements broadly and not limit the Acts by mechanically applying an outmoded reliance on "public" float.

B. Incorporation by Reference

The Proposing Release asks whether there are "incorporation by reference provisions in any other registration forms filed by affected funds that should be modified to provide parity or consistency across registration statements and, if so, in what respects?" More specifically, the Proposing Release requests comments on whether the SEC "should amend General Instruction G to Form N-14 to provide that BDCs may incorporate by reference to the same extent as registered CEFs?" In

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[14] *See* H.R. Rep. 115-153 (2017).

[15] *See* H.R. Rep. 115-517 (2018).

[16] *See* H.R. Rep. 114-508 (2016).

[17] *See* Section 509(a) of the CEF Act; *Proposing Release* at 9.

response to these requests for comments, we believe that the registration statement on Form N-14[18] should be revised as follows:

(i) General Instruction G should be amended to apply to BDCs to the same extent as CEFs; and

(ii) General Instructions F and G should be amended to permit seasoned Affected Funds to incorporate by reference into the Form N-14 prospectus the information required by Item 5 of Form N-14 from their 1934 Act reports or reports filed pursuant to Section 30 of the Investment Company Act of 1940 (the "***1940 Act***") *without* the need for such funds to deliver or file with the Form N-14 prospectus or registration statement the document from which information is incorporated by reference in response to Item 5, so long as the 20-business day condition contained in General Instruction F of Form N-14 is satisfied in connection therewith.[19]

These proposed Form N-14 amendments are consistent conceptually with the Form N-2 incorporation by reference provisions mandated by the Acts and contained in the Proposed Rules. In addition, these proposed Form N-14 amendments would put Affected Funds on equal footing with operating companies which use the Form S-4 registration statement for the same purposes that Affected Funds use the Form N-14 registration statement.[20] Specifically, General Instructions A.2 and B of Form S-4 collectively permit operating companies to incorporate by reference from their 1934 Act reports similar information as Form N-14 currently permits CEFs to incorporate by reference. However, these regulations do not require operating companies to cause such incorporated information to "accompany" the Form S-4 registration statement filing or the delivery of the Form S-4 prospectus so long as the registrant complies with the 20-business day condition contained in General Instruction A.2 of Form S-4. In light of the legislative intent of the Acts,[21] we believe that the SEC should amend Form N-14 as noted above to provide

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[18] The Form N-14 is the registration statement form used to register securities issued by Affected Funds in connection with certain business combinations, reclassifications, mergers and consolidations.

[19] We note that Form N-14 currently permits CEFs (and <u>not</u> BDCs) to incorporate by reference the information required by Items 5, 6 and 11 through 14 of Form N-14 from their 1940 Act reports but requires that information incorporated by reference in response to Item 5 of Form N-14 "must accompany the registration statement filed with the Commission and the prospectus."

[20] Similar to the Form N-14, the Form S-4 is the registration statement form used to register securities issued by operating companies in connection with certain business combinations, reclassifications, mergers and consolidations.

[21] *See supra* note 4.

Affected Funds with parity to operating companies in connection with the registration of their securities for issuance in business combinations, reclassifications, mergers and consolidations.

C. Additional Information in Periodic Reports

We refer to new proposed Instruction 6.i to Item 24 of Form N-2 which would require an Affected Fund "that files a registration statement pursuant to General Instruction A.2, and includes in any annual or semi-annual report to shareholders or periodic report filed under the Exchange Act information not otherwise required to be included in the report in order to update the [Affected] Fund's prospectus or SAI . . . [to] include a statement in the report identifying all information included for this purpose." We have strong reservations about the utility to investors of this proposed identification requirement and believe that it may draw undue attention to such identified information as compared to other, potentially more pertinent, information included elsewhere in an Affected Fund's 1934 Act or 1940 Act reports to the detriment of investors. For example, we currently anticipate that BDCs may include the following Form N-2-required disclosures in their 1934 Act periodic reports even though such information is not otherwise required to be included in such reports:

- the "Effects of Leverage" risk factor required by Item 8.3.b of Form N-2, including related periodic non-material updates;

- the disclosures required by Item 9.1 of Form N-2 relating to their investment advisors, administrators and custodians, including changes in such entities' principal business addresses;

- the "Outstanding Securities" table required by Item 10.5 of Form N-2, including related periodic non-material updates; and

- the "Legal Proceedings" disclosure required by Item 12 of Form N-2 relating to their investment advisors, including related periodic updates disclosing that their investment advisors are not subject to any material legal proceedings.[22]

Depending on the circumstances, some or all of this information may not convey material information to investors, but the proposed instruction would attract unnecessary attention to it as compared to other material information included in BDCs' 1934 Act reports (*e.g.,* updated quarterly and annual financial statements and the associated "Management's Discussion and

[22] Item 3 of Part I of Form 10-K and Item 1 of Part II of Form 10-Q require disclosure similar to that required by Item 12 of Form N-2 but only with respect to the BDCs themselves, as well as their subsidiaries (and *not* with respect to the BDCs' investment advisors).

Analysis of Financial Condition and Results of Operations" disclosure) that is not specifically identified to investors. Under the proposed Instruction 6.i to Item 24, Affected Funds may also need to repeat this information in a separately captioned section of their periodic reports in order to satisfy the identification requirement even though such information is disclosed in a more appropriate location elsewhere in the reports. This required identification and potential repetition would place unnecessary emphasis on certain information and potentially distract investors from other information that may be more material to their investment decisions.

The SEC's main reason for proposing this identification requirement appears to be that it "would provide context for investors in considering [the] additional disclosure, akin to the context funds today provide investors when they mail prospectus 'stickers' updating disclosure in the prospectus."[23] However, this rationale fails to take into account that the Acts have ushered in a new era in which 1934 Act and 1940 Act reports that are incorporated by reference into Form N-2 prospectuses serve as the "stickers." The SEC acknowledged this notion in 2005 when it cited to the following quote from Milton Cohen in the final rule release in connection with its adoption of securities offering reforms for operating companies that are similar to those contained in the Proposing Release:

> It is my thesis that the combined disclosure requirements of these statutes would have been quite different if the 1933 and 1934 Acts . . . had been enacted in opposite order, or had been enacted as a single, integrated statute—that is, if the starting point had been a statutory scheme of continuous disclosures covering issuers of actively traded securities and the question of special disclosures in connection with public offerings had been faced in this setting. Accordingly, it is my plea that there now be created a new coordinated disclosure system having as its basis the continuous disclosure system of the 1934 Act and treating the "1933 Act" disclosure needs on this foundation.[24]

We hope that the SEC continues to embrace "the evolution of the offering process under the Securities Act" through the "integration of the requirements" under the federal securities laws that it ensconced in its rules in connection with the 2005 securities offering reform rulemaking by not adopting proposed Instruction 6.i to Item 24 of Form N-2 in its final rule release relating to the Proposed Rules.[25]

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[23] *See* Proposing Release at 36–37.

[24] *See Securities Offering Reform*, SEC Rel. Nos. 33-8591 and 34-52056 (July 19, 2005) at 13, citing Milton H. Cohen, *"Truth in Securities" Revisited*, 79 HARV. L. REV. 1340, 1341–42 (1966).

[25] *See id*. at 13.

II. Communication Reforms – Forward-Looking Statements

We believe that the SEC should exercise the authority granted to it by Congress in paragraph (b) of Section 27A of the 1933 Act and Section 21E of the 1934 Act to promulgate rules that remove Affected Funds from being excluded from relying on the safe harbors for forward-looking statements described therein. Such action would further the overarching goal espoused by Congress in the Acts of putting Affected Funds on equal footing with operating companies in connection with, among other things, the types of offering communications that they make when conducting registered offerings.

In this regard, and in accordance with the mandate set forth in the Acts, the SEC has proposed to permit Affected Funds "to rely on Rule 168 under the 1933 Act to publish or disseminate regularly released . . . *forward-looking information* at any time, including around the time of a registered offering."[26] Moreover, certain of the SEC's rules applicable to BDCs *require* them to include forward-looking information in their 1933 Act and 1934 Act filings.[27] The SEC "also encourage[s] [BDCs] to discuss prospective matters and include forward-looking information in circumstances where that information may not be required, but will provide useful material information for investors that promotes understanding."[28]

As a practical matter and aside from the "known material trends and uncertainties" disclosures required by Items 303(a)(1), (2)(ii) and 3(ii) of Regulation S-K applicable to BDCs, Affected Funds routinely issue forward-looking statements, or earnings guidance, in connection with registered offerings and otherwise regarding their projected net investment income, NAV and dividend policies.

In light of the foregoing, it seems unfair for Affected Funds to be required and/or encouraged by the SEC and the market to issue forward-looking information while also being unable to rely on the safe harbors for forward-looking statements contained in Section 27A of the 1933 Act and Section 21E of the 1934 Act that are available to operating companies. As a result, we believe that the SEC should correct this inequality by exercising the authority set forth in paragraph (b) of Section 27A of the 1933 Act and Section 21E of the 1934 Act to permit Affected Funds to rely on these forward-looking statement safe harbors.

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[26] *Id*. at 52 (emphasis added).

[27] *See, e.g.*, Items 303(a)(1), (2)(ii) and 3(ii) of Regulation S-K; *Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, SEC Rel. Nos. 33-8350; 34-48960 (Dec. 29, 2003) [hereinafter SEC 2003 MD&A Release].

[28] SEC 2003 MD&A Release.

III. Periodic Reporting Requirements

A. New Annual Report Requirements

The SEC has proposed to require seasoned Affected Funds that register using the proposed Form N-2 short-form registration statement to include certain key information in their annual reports regarding fees and expenses, premiums and discounts and outstanding senior securities that the Affected Funds currently disclose in their Form N-2 prospectuses.[29] One of the SEC's rationales for including this proposal "is that investors should have no less current information than they do today about these items when the fund is offering its shares."[30] While we note that Affected Funds would either include the above-described updated "key" information in (i) a prospectus supplement in connection with an offering off of their Form N-2 shelf registration statements or (ii) 1934 Act or 1940 Act reports incorporated by reference into their Form N-2 shelf registration statements even absent this proposed requirement, we do not object to the requirement for other reasons noted in the Proposing Release, including that "requiring the disclosure in both the prospectus and annual report should not require duplicative disclosure" because "the annual report will be incorporated by reference into the fund's prospectus."[31]

However, we do not believe that it is necessary to mandate the next step suggested in the Proposing Release of requiring "these affected funds to provide this information in their semi-annual and other periodic reports[.]"[32] This is because the proposed annual update of such key information in annual reports as supplemented by the provision of the most current information relating thereto at the time of any shelf takedown (generally via the prospectus supplement used in connection with the applicable offering) is sufficient to provide investors with the same information that they have today about these items when an Affected Fund is offering its securities without the undue burden that would result from requiring Affected Funds to provide this information more frequently than annually in their other 1934 Act and 1940 Act reports.

B. "Portfolio Companies" Table

In the Proposing Release, the SEC has proposed several new annual report requirements reflecting the elevated importance of periodic reporting relative to prospectus disclosure for Affected Funds. We note that the SEC did not propose carrying over the "Portfolio Companies"

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[29] *See* proposed Instructions 4.h and 10 to Item 24 of Form N-2.

[30] *See* Proposing Release at 82.

[31] *Id*.

[32] *See id*. at 84.

table set forth in Item 8.6.a of Form N-2 to Affected Funds' annual reports via proposed Instruction 4.h of Form N-2. We believe that the SEC likely determined that the material substance of the information required by Item 8.6.a of Form N-2 is already required to be included in the Regulation S-X Rule 12-12-related schedules of investments contained in the annual reports of Affected Funds and, as a result, a requirement to carry-over the Form N-2 Item 8.6.a information into the annual reports of Affected Funds would be redundant and unnecessary. We support this position and believe that the SEC should add an instruction to Item 8.6.a of Form N-2 to clarify that the Regulation S-X Rule 12-12-related schedules of investments that are included in annual, semi-annual and quarterly reports of Affected Funds will be deemed to satisfy the requirements of Item 8.6.a of Form N-2 after the initial effectiveness of the relevant registration statement.

IV. New Current Reporting Requirements for Affected Funds

We refer to proposed Instruction 3 to proposed Item 10.01 of Form 8-K which provides that an Affected Fund would not be required to file a Form 8-K thereunder if it discloses "substantially the same information in a post-effective amendment to its Securities Act registration statement or in a subsequent prospectus filed under Securities Act Rule 424." We believe that this instruction (i) fails to take into account that the Acts effectively create a new regime in which 1934 Act and 1940 Act reports that are incorporated by reference into Form N-2 prospectuses serve as prospectus supplements or stickers[33] and (ii) is inconsistent with General Instruction B.3 to Form 8-K even though they both relate to the same concept (*i.e.*, the avoidance of filing previously disclosed information under cover of a Form 8-K).

More specifically, General Instruction B.3 to Form 8-K provides that "[i]f the registrant *previously* has *reported* substantially the same information as required by this form, the registrant need not make an additional report of the information on this form" (emphasis added). The term "previously reported" "mean[s] previously . . . reported in . . . a statement under section 12, *a report under section 13 or 15(d)*, a definitive proxy statement or information statement under section 14 of the Act, or a registration statement under the Securities Act of 1933."[34] Thus, General Instruction B.3 to Form 8-K is broader than proposed Instruction 3 to proposed Item 10.01 of Form 8-K given that it references methods other than a post-effective amendment and prospectus supplement as a way to satisfy the Form 8-K disclosure requirement.

In light of the foregoing, we believe that the SEC should delete proposed Instruction 3 to proposed Item 10.01 of Form 8-K in connection with the adoption of any of the Form 8-K

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[33] *See* section I.C of this letter.

[34] Rule 12b-2 under the 1934 Act (emphasis added).

amendments contained in the Proposing Release and instead have Affected Funds look to existing General Instruction B.3 to Form 8-K in connection therewith.[35]

V. Form N-2

A. Dividend or Interest Reinvestment Plan Check Box

We note that the SEC has proposed to add a check box to the outside cover page of the Form N-2 in the event that the "only securities being registered on this Form are being offered pursuant to dividend or interest reinvestment plans." While we have no objection to the addition of the check box, we believe that it would be helpful if the SEC could indicate in its final adopting release that the addition of this check box to the outside cover page of the Form N-2 is not intended to rescind the guidance contained in, or otherwise impact the ability of Affected Funds to rely on, "Guide 5. Dividend Reinvestment Plans" to Form N-2.

B. Senior Securities Table

In connection with the SEC's proposal to add proposed Instruction 4.h(1) to the instructions to Item 24 of Form N-2, which would require seasoned Affected Funds that file a registration statement pursuant to General Instruction A.2 to include the updated senior securities table required by Item 4.3 in their annual reports, we believe the SEC should revise the instructions to Item 4.3 of Form N-2 to state that an Affected Fund need only audit the information in the senior securities table for the same periods as contained in the audited balance sheet included in the fund's annual report. We note that current Instruction 1 to Item 4.3 of Form N-2 cross-references Instruction 8 to Item 4.1 of Form N-2 and requires that the senior securities information included in a Form N-2 registration statement pursuant to Item 4.3 "for at least the latest five fiscal years must be audited and must so state." However, given the inclusion of the five-year audited senior securities table in an Affected Fund's initial Form N-2 filing, we question the utility of requiring the senior securities table to be audited for periods prior to the other balance sheet information included in such fund's applicable annual report and believe the SEC should revise the instruction accordingly.[36]

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[35] We note that the SEC has proposed to amend this instruction to make it clear that CEFs are not required to submit an additional report on Form 8-K if they have previously reported an event or transaction in a publicly available filing described in Rule 8b-2(i) of the 1940 Act.

[36] We note that investors will have access to the registration statements and reports filed in prior periods to the extent they would like to review the report on the senior securities table of a fund's independent accountants for such period.

C. Form N-2 Item 34.1 Undertaking

We note that the SEC refers to the undertaking in Item 34.1 of Form N-2 in the Proposing Release and poses a number of questions relating to the interaction of such undertaking and a new hypothetical Form 8-K item that mimics the substantive provisions of the undertaking. We do not believe that any such new Form 8-K item is necessary. Investors will receive updated financial statements relating to any such decline in NAV in connection with any registered securities offering by an Affected Fund via the prospectus supplement to, or 1934 Act/1940 Act reports incorporated by reference into, the Form N-2 prospectus. Moreover, even if such a decline were to materialize between financial reporting periods, Affected Funds and their underwriters would be compelled by Sections 11 and 12 of the 1933 Act and the general anti-fraud provisions of the federal securities laws to disclose such information in connection with a securities offering in the manner noted above.

In addition, given that NAV calculations are made by Affected Funds to comply with applicable 1940 Act regulatory requirements[37] and are generally disclosed soon thereafter in accordance with SEC rules or market practice, we do not believe it is necessary to adopt a Form 8-K disclosure item relating to a specified percentage decline in NAV.

Finally, we believe that the undertaking in Item 34.1 of Form N-2 should *not* be applicable to shelf offerings conducted pursuant to proposed General Instruction A.2 of Form N-2. It makes no sense to apply such an undertaking to a delayed or continuous offering that may extend over a period of three and one-half years.[38] Moreover, given that the Form N-2 prospectus for such offerings will be updated through the incorporation by reference of reports filed under the 1934 Act or 1940 Act, such an undertaking would not appear necessary for shelf offerings conducted pursuant to proposed General Instruction A.2 of Form N-2.

D. Form N-2 Item 34.3 Undertaking

On March 20, 2019, the SEC adopted amendments to modernize and simplify disclosure requirements for public companies, investment advisors and investment companies.[39] The amendments, consistent with the SEC's mandate under the Fixing America's Surface Transportation Act (the "***FAST Act***"), were based on recommendations by the SEC's staff as mandated by the FAST Act and a broader review of the SEC's disclosure rules. The amendments

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[37] *See, e.g.,* Section 55(b) of the 1940 Act and Rule 23c-3 under the 1940 Act.

[38] *See* Rule 415(a)(5) under the 1933 Act.

[39] *See FAST Act Modernization and Simplification of Regulation S-K*, SEC Rel. Nos. 33-10618; 34-85381; IA-5206; IC-33426 (Mar. 20, 2019).

eliminated a number of undertakings contained in Item 512 of Regulation S-K because they are either no longer necessary or have become obsolete, including the exact same undertaking contained in Item 34.3 of Form N-2. As a result, we believe that the SEC should eliminate the Item 34.3 Form N-2 undertaking for the same reason that it eliminated the equivalent undertaking which was previously contained in Item 512(c) of Regulation S-K.

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We appreciate the opportunity to comment on the Proposing Release. Please feel free to contact William J. Bielefeld at [redacted], Stephen Bier at [redacted], Thomas J. Friedmann at [redacted], Allison Fumai at [redacted], Richard Horowitz at [redacted], Harry S. Pangas at [redacted] Jonathan H. Gaines at [redacted] or Clay Douglas at [redacted] with any questions regarding this submission.

Very truly yours,

Dechert LLP

Dechert LLP