

## SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940  
(Release No. 33837 /April 8, 2020)

### ORDER UNDER SECTIONS 6(c), 17(d), 38(a), AND 57(i) OF THE INVESTMENT COMPANY ACT OF 1940 AND RULE 17d-1 THEREUNDER GRANTING EXEMPTIONS FROM SPECIFIED PROVISIONS OF THE INVESTMENT COMPANY ACT AND CERTAIN RULES THEREUNDER

The outbreak of coronavirus disease 2019 (COVID-19) has had far-reaching and unanticipated effects, including in our financial markets, and, in particular, our credit markets. In light of the current situation, we are issuing this Order providing exemptions from certain requirements of the Investment Company Act. The exemptions provide additional temporary flexibility for closed-end investment companies that have elected to be regulated as business development companies (“BDCs”) to issue and sell senior securities and participate in certain joint enterprises or other joint arrangements that would otherwise be prohibited by section 57(a)(4) of the Investment Company Act and Rule 17d-1 thereunder. BDCs were created to provide capital to smaller domestic operating companies that otherwise may not be able to readily access the capital markets (we refer to such companies as “portfolio companies”). The Commission recognizes that, in the current environment, many BDCs may face challenges absent these exemptions in providing capital to their affected portfolio companies, and therefore, in fulfilling their statutory mandate. A BDC may face such challenges if (i) it is unable to satisfy the asset coverage requirements under the Investment Company Act due to temporary mark-downs in the value of the loans to such portfolio companies, or (ii) certain of its affiliates are prohibited from participating in additional investments in the BDC’s portfolio companies due to restrictions in its current exemptive order permitting co-investments. In recognition of the

current facts and circumstances, and for the reasons identified above, the Commission has determined that certain BDCs may be unable to meet their statutory mandate. Therefore, the temporary exemptions herein are necessary and appropriate in order for BDCs to continue providing credit support to portfolio companies impacted by COVID-19.

In light of the current and potential effects of COVID-19, the Commission finds that the exemptions set forth below, as applicable:

Are necessary and appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Investment Company Act;

Permit transactions under the terms of which the participation of each registered investment company is consistent with the provisions, policies, and purposes of the Investment Company Act, and not on a basis different from or less advantageous than that of other participants; and

Are necessary and appropriate to the exercise of the powers conferred on it by the Investment Company Act.

The necessity for prompt action of the Commission does not permit prior notice of the Commission's action.

#### **I. TIME PERIOD FOR THE EXEMPTIVE RELIEF**

The relief provided in each of the following Sections of this Order is limited to the period from (and including) the date of this Order to the earlier of (i) December 31, 2020 (including

such date), or (ii) the date by which the BDC ceases to rely on this Order (the “Exemption Period”).

The Commission intends to continue to monitor the situation as it develops. The time period for any or all of the relief may, if necessary, be extended with any additional conditions that are deemed appropriate, and the Commission may issue other relief as necessary or appropriate.

## **II. ISSUANCE AND SALE OF SENIOR SECURITIES BY BDCs**

It is ORDERED, pursuant to sections 6(c) and 38(a) of the Investment Company Act that:

During the Exemption Period, notwithstanding the asset coverage requirements of sections 18(a)(1)(A) and 18(a)(2)(A) of the Investment Company Act, as modified for BDCs by sections 61(a)(1) and 61(a)(2), and the requirement of section 18(b) of the Investment Company Act to determine asset coverage on the basis of values calculated as of a time within forty-eight hours (not including Sundays or holidays) next preceding the time of such determination, a BDC may issue or sell a senior security that represents an indebtedness or that is a stock (together, the “covered senior securities”),

*provided that:*

- (a) *Adjusted Portfolio Value.* At the time of any issuance or sale of a covered senior security, the BDC shall calculate asset coverage ratios in accordance with section 18(b) of the Investment Company Act, except that, in reliance on this Order, with respect to portfolio company holdings (i) that the BDC held at December 31, 2019; (ii) that the BDC continues to hold at the time of such issuance or sale; and (iii) for which the BDC is

not recognizing a realized loss,<sup>1</sup> the BDC may use values calculated as of December 31, 2019, to calculate portfolio value (the “Adjusted Portfolio Value”) to meet an Adjusted Asset Coverage Ratio.<sup>2</sup> To calculate the Adjusted Asset Coverage Ratio, a BDC must reduce its asset coverage ratio using the Adjusted Portfolio Value by an amount equal to 25% of the difference between the asset coverage ratio calculated using the Adjusted Portfolio Value and the asset coverage ratio calculated in accordance with section 18(b) of the Investment Company Act.<sup>3</sup> For example a BDC has a 220% asset coverage ratio on December 31, 2019.<sup>4</sup> Its asset coverage ratio declines to 160% on March 31, 2020, not using the Adjusted Portfolio Value, and 200% if it calculated the ratio (without the 25% decrease) using the Adjusted Portfolio Value. This BDC would have an Adjusted Asset Coverage Ratio of 190% (200% minus 10% (25% of the difference between 200% and 160%)).

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<sup>1</sup> BDCs may not include a December 31, 2019, fair value measurement in their Adjusted Asset Coverage Ratio if the portfolio company holding is permanently impaired. For purposes of this Order, a permanently impaired holding is a holding where a BDC recognized a realized loss subsequent to December 31, 2019, and the loss is not recoverable. For example, a BDC’s portfolio company may have been impacted by events occurring in 2020, such as a natural disaster, the permanent loss of an operating license, or an enacted temporary shelter-in-place policy, and such BDC may have determined that a permanent valuation write down or a portion thereof was necessary as the loss will not be recoverable.

<sup>2</sup> As described, the adjustment permitted by this Order applies only to portfolio company holdings that are not permanently impaired, and that are held both at December 31, 2019, and at the date of issuance of the covered senior security subject to this Order. The adjustment does not apply to portfolio company holdings acquired after December 31, 2019. For purposes of this Order, all assets acquired and all senior securities issued after December 31, 2019, that are held or outstanding at the date of the calculation of the Adjusted Asset Coverage Ratio shall be included in the calculation without adjustment.

<sup>3</sup> Further, the Adjusted Portfolio Value is solely for purposes of calculating the BDC’s asset coverage ratio. BDCs must adhere to generally accepted accounting principles in the United States for purposes of financial reporting, which requires application of fair value measurement for portfolio holdings under the Financial Accounting Standards Board Accounting Standards Codification Topic 820: *Fair Value Measurements*.

<sup>4</sup> For BDCs, sections 61(a)(1) and 61(a)(2) of the Investment Company Act modify the asset coverage requirements of section 18(a) to be either 200 percent or 150 percent (provided certain conditions have been met).

- (b) *Election.* Prior to relying on section II of this Order, a BDC must make an election by filing on Form 8-K. Similarly, a BDC may withdraw its election through filing on Form 8-K.
- (c) *Limitation on New Investments.* A BDC that has elected to rely on section II of this Order shall not, for 90 days from the date of such election, make an initial investment in any portfolio company in which the BDC was not already invested as of the date of this Order, provided that a BDC may make an initial investment in such a portfolio company if at the time of investment its asset coverage ratio complies with the asset coverage ratio applicable to it under section 18 of the Investment Company Act, as modified by section 61.
- (d) *Board Approval of Reliance on this Order.* Prior to the BDC's election to rely on section II of this Order, the BDC's board of directors or trustees ("Board"), including a required majority of the Board, as defined in section 57(o) of the Investment Company Act (a "Required Majority"), shall have determined that the issuance or sale of covered senior securities is permitted by this Order and is in the best interests of the BDC and its shareholders.
- (e) *Board Approval of Each Issuance of Senior Securities.* Prior to a BDC issuing or selling covered senior securities, the Board, including a Required Majority, shall determine that each such issuance is in the best interests of the BDC and its shareholders. Prior to making such determination, the Board must obtain and consider (i) a certification from the BDC's investment adviser that the issuance of covered senior securities is in the best interests of the BDC and its shareholders; such certification shall include not only the

investment adviser's recommendation, but also the reasons therefore, including whether the adviser has considered other reasonable alternatives that would not result in the issuance or sale of a covered senior security; and (ii) advice from an Independent Evaluator<sup>5</sup> regarding whether the terms and conditions of the proposed issuance or sale of a covered senior security are fair and reasonable compared to similar issuances, if any, by unaffiliated third parties in light of current market conditions.

- (f) *No Sunset Period.* The Board of any BDC that has elected to rely on section II of this Order shall receive and review, no less frequently than monthly, reports prepared by the BDC's investment adviser regarding and assessing the efforts that the investment adviser has undertaken, and progress that the BDC has made, towards achieving compliance with the asset coverage requirements under section 18 of the Investment Company Act, as modified by section 61, by the expiration of the Exemption Period. Upon expiration of the Exemption Period, any BDC not in compliance with the asset coverage requirements applicable to such BDC at that time as described in sections 18(a)(1)(A) and 18(a)(2)(A), as modified by sections 61(a)(1) and 61(a)(2), shall immediately make a filing on Form 8-K that includes the following information: (i) the BDC's current asset coverage ratio; (ii) the reasons why the BDC was unable to comply with the asset coverage requirements; (iii) the time frame within which the BDC expects to come into compliance with the asset

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<sup>5</sup> The term "Independent Evaluator" shall mean a person who has expertise in the valuation of securities and other financial assets and who is not an interested person, as defined in section 2(a)(19) of the Investment Company Act, of the BDC, or any affiliate thereof.

coverage requirements; and (iv) the specific steps that the BDC will be undertaking to bring itself into compliance with the asset coverage requirements.<sup>6</sup>

(g) *Recordkeeping.* Each BDC shall make and preserve, for a period of not less than six years, the first two years in an easily accessible place, minutes describing (i) the Board's deliberations in connection with paragraph (e) above, including the factors considered by the board in connection with such determinations, as well as all information, documents and reports provided to the Board in connection therewith; and (ii) the reports made to the Board pursuant to paragraph (f) above, including copies of all other information provided to or relied upon by the Board.

(h) *No Compensation or Remuneration of Any Kind.* Except (i) to the extent permitted by section 57(k) of the Investment Company Act; or (ii) for payments or distributions made by an issuer to all holders of a security in accordance with the security's terms, no affiliated person of the BDC nor any affiliated person of such a person, shall receive any transaction fees (including break-up, structuring, monitoring or commitment fees) or other remuneration from an issuer in which the BDC invests during the Exemption Period. For the avoidance of doubt, this condition does not apply to the receipt of investment advisory fees by an investment adviser to the BDC under an investment management agreement entered into in accordance with section 15 of the Investment Company Act.

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<sup>6</sup> Sections 18 and 61 of the Investment Company Act generally prohibit a BDC that is not in compliance with its asset coverage requirements from paying a cash dividend or issuing additional senior securities.

- (i) This Order provides relief only to issue or sell senior securities representing an indebtedness or that is a stock. This Order does not provide relief in connection with the declaration or payment of any dividend or any other distribution.

### **III. EXPANSION OF RELIEF FOR BDCs WITH EXISTING CO-INVESTMENT ORDERS**

It is ORDERED, pursuant to sections 17(d) and 57(i) of the Investment Company Act and rule 17d-1 thereunder that:

During the Exemption Period, notwithstanding sections 17(d) and 57(a)(4) of the Investment Company Act and rule 17d-1 thereunder, any BDC to which a Commission order permitting co-investment transactions in portfolio companies with certain affiliated persons is currently applicable (“existing co-investment order”) may:

Participate in a Follow-On Investment (which may include a Non-Negotiated Follow-On Investment) with one or more Regulated Funds and/or Affiliated Funds, provided that (i) if such participant is a Regulated Fund, it has previously participated in a Co-Investment Transaction with the BDC with respect to the issuer, and (ii) if such participant is an Affiliated Fund, it either (X) has previously participated in a Co-Investment Transaction with the BDC with respect to the issuer, or (Y) is not invested in the issuer;<sup>7</sup>

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<sup>7</sup> The terms Follow-On Investment, Regulated Fund, Affiliated Fund and Co-Investment Transaction shall have the same meanings ascribed to them in the BDC’s existing co-investment order, or, if the BDC’s existing co-investment order uses a substantially similar term, the substantially similar term. For purposes of this Order, the term Affiliated Fund does not include any open or closed-end investment company registered under the Investment Company Act or a BDC.



*provided that:*

(a) Any such transaction is otherwise effected in accordance with the terms and conditions of the existing co-investment order; and

(b) *Board Oversight.*

(1) *Non-Negotiated Follow-On Investments.* Non-Negotiated Follow-On Investments do not require prior approval by the Board; however they are subject to the periodic reporting requirements set forth in the BDC's existing co-investment order.

(2) *Follow-On Investments other than Non-Negotiated Follow-On Investments.* In connection with making the findings required by the BDC's existing co-investment order with respect to Follow-On Investments that are not Non-Negotiated Follow-On Investments, the Board, and a Required Majority, shall review the proposed Follow-On Investment both on a stand-alone basis and in relation to the total economic exposure of the BDC to the issuer.<sup>8</sup>

By the Commission.

J. Matthew DeLesDernier  
Assistant Secretary

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The term "Non-Negotiated Follow-On Investment" shall be given the meaning ascribed to it in existing co-investment orders. For purposes of this Order, a BDC may participate in a Non-Negotiated Follow-On Investment in reliance on this Order whether or not such term is used in its existing co-investment order.

<sup>8</sup> For purposes of complying with this condition of this Order, the Board, and a Required Majority, need not make the findings required with respect to Enhanced Review Follow-On Investments, as such term is defined in existing co-investment orders.