

April 9, 2020

MEMORANDUM

TO: SBIA's BDC Council

FROM: Brett Palmer, President
Small Business Investor Alliance (SBIA)

RE: SEC Open Meeting Re: Small Business Credit Availability Act Rules

The Securities and Exchange Commission (SEC) met in open meeting on Wednesday, April 8th to adopt [rules](#) pursuant to the Small Business Credit Availability Act and the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018. These rules include reforms to the registration, proxy process, and offering process for business development companies to bring them in line with requirements for other investment companies. A fact sheet summarizing the rules is available [here](#).

The SEC adopted the rules by a 3-1 vote with Chairman Clayton, Commissioner Roisman, and Commissioner Peirce voting in support. Commissioner Lee opposed the rulemaking. There were differences of opinion amongst the commissioners both on the substance of the rulemaking itself but also the timing and whether the SEC should be advancing non-COVID related matters at this time. (described in more detail below)

Key provisions of the final rules:

- The rules apply to all BDCs, including those listed on an exchange and unlisted funds, as well as registered closed-end funds (including interval funds)
- Affected funds will now be eligible to file a short-form registration statement on Form N-2 (Similar to a Form S-3 for an operating company). Funds will be able to satisfy Form N-2's disclosure requirements by incorporating by reference information from the fund's Exchange Act reports
- Affected funds will be eligible to qualify as "well-known seasoned issuers" (WKSIs), which affords greater ability to communicate with investors and a flexible registration process. Funds would have to meet certain reporting requirements and have a public float of \$700 million to be eligible for WSKI status
- The rules expand the scope of Rule 486 under the '33 Act to allow certain changes made to a fund's registration statement to become immediately effective
- Funds will now be eligible for safe harbors for use of a "free writing prospectus," forward-looking statements, and other communication tools typically used by operating companies
- Affected funds under the rules will be required to tag certain registration statements using inline XBRL, including for funds that file Form 24F-2
- The rules will allow access to equal delivery for prospectus delivery so that affected funds can make incorporated materials readily available on a website (as opposed to the current requirement of providing new purchasers with a copy of all previously-filed materials that are incorporated by reference).

In his [statement](#), Chairman Clayton noted that past efforts to modernize offering and communications processes for operating companies and certain funds had not been extended to BDCs. He stated that the reforms should “promote capital formation with respect to both the funds themselves and the small businesses in which they invest.”

In her supporting statement, [Commissioner Peirce](#) said she supported the rules but was disappointed that the SEC did not go further in providing relief for BDCs and other affected funds. Peirce noted that the rules adopt the \$700 million well-known seasoned issuer (“WKSI”) threshold for BDCs to be eligible for certain reforms, but adopting this threshold (which is what currently applies to operating companies) may not be appropriate for BDCs and end up being underinclusive. She noted that under the rule only about 12.5% of affected BDCs and closed-end funds would be eligible for WKSI status. She also had reservations over the requirements in the final rules for BDCs to adopt inline XBRL.

[Commissioner Roisman](#) in his statement pushed back on arguments that the SEC should set aside non-COVID related matters and that it was entirely appropriate for the SEC to hold this open meeting and adopt rules for BDCs. He said the SEC pulling back on its agenda would be a “disservice” to the staff and the SEC’s mission and questioned why the SEC should drop rulemaking projects it has been working on for months or years. He expressed his support for the rulemaking and praised the rules for going beyond Congressional mandates in order to align rules for BDCs with those of other funds.

In her dissenting statement, [Commissioner Lee](#) again argued that the SEC should “proceed cautiously before undertaking action outside of what is specifically called for by the market effects of the immediate public health crisis.” She then explained her two main points of contention with the final rules: 1) That the SEC dropped requirements from its 2019 proposal that would have required BDCs to report on a Form 8-K a material change in the fund’s investment strategies or policies, or a material write-down of a significant investment of the fund; and 2) the allowance for non-WKSI BDCs to make changes to their registration statement without requiring those changes to be declared effective by the staff. She described the rules as a “particularly ill-timed additional rollback of protections for investors”

After the Commissioners finished their prepared statements, Commissioners Peirce and Roisman provided additional comments supporting the SEC continuing with its agenda at this time, and also reaffirming the staff’s view that the rules do not undermine investor protection or the flow of information to investors.