To Our Clients and Friends

Memorandum

April 13, 2020

SEC Provides Temporary Conditional Relief for COVID-19 Impacted BDCs

On April 8, 2020, the Securities and Exchange Commission (the "SEC") issued an order ("Order") granting temporary conditional relief for business development companies ("BDCs") facing challenges in providing capital to their portfolio companies due to the COVID-19 pandemic.[1] The Order states that a BDC may be unable to satisfy the asset coverage requirements under the Investment Company Act of 1940 ("Investment Company Act") due to temporary markdowns in the value of the loans to its portfolio companies. In addition, certain affiliates of a BDC may be prohibited from participating in additional investments in the BDC's portfolio companies due to restrictions in an existing exemptive order regarding co-investments. The Order provides temporary flexibility for BDCs to issue and sell senior securities and participate in certain joint transactions that would otherwise be prohibited. The relief is available to a BDC until the earlier of (i) December 31, 2020, or (ii) the date by which the BDC ceases to rely on the Order ("Exemption Period").

Relief from Asset Coverage Requirements

During the Exemption Period, a BDC may issue or sell a senior security that represents an indebtedness or that is a stock (together, the "covered senior securities"), notwithstanding the Investment Company Act's asset coverage requirements, if it satisfies the conditions below. This relief does not apply to the declaration or payment of any dividend or any other distribution.

1. *Adjusted Portfolio Value.* At the time of any issuance or sale of a covered senior security, the BDC calculates asset coverage ratios in accordance with section 18(b) of the Investment Company Act, except that 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, 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. To calculate the Adjusted Asset Coverage Ratio, the 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.

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[1] 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, Release No. 33837 (April 8, 2020).

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2. *Election.* The BDC makes an election to rely on the Order by filing a Form 8-K. The BDC may also withdraw its election to rely on the Order by filing a Form 8-K.

3. *Limitation on New Investments.* Within 90 days of electing to rely on the Order, the BDC does not make an initial investment in any portfolio company in which it was not already invested as of the date of the Order unless, at the time of investment, the BDC's 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 ("applicable asset coverage requirements").

4. *Board Approval of Reliance on Order.* Prior to relying on the Order, the BDC's board of directors or trustees ("Board"), including a "required majority" of the Board ("Required Majority"), determines that the issuance or sale of covered senior securities is permitted by the Order and is in the best interests of the BDC and its shareholders.

5. *Board Approval of Each Issuance of Senior Securities*. Prior to issuing or selling covered senior securities in reliance on the Order, the Board, including a Required Majority:

   (i) obtains and considers 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;

   (ii) obtains and considers advice from an independent person with expertise in the valuation of securities and other financial assets 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; and

   (iii) based on the foregoing, determines that each such issuance is in the best interests of the BDC and its shareholders.

6. *No Sunset Period*. The Board receives and reviews, at least monthly, reports prepared by the BDC's investment adviser regarding and assessing the efforts that the investment adviser has undertaken, and the 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. Following the expiration of the Exemption Period, if the BDC is not in compliance with the asset coverage requirements applicable to it at that time, the BDC must immediately file a 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 coverage requirements; and

   (iv) the specific steps that the BDC will be undertaking to bring itself into compliance with the asset coverage requirements.

7. *Recordkeeping*. The BDC makes and preserves, for at least six years (the first two years in an easily accessible place), minutes describing (i) the Board's deliberations in connection with the issuance or sale of covered senior securities, 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 described in paragraph 6 above, including copies of all other information provided to or relied upon by the Board.

8. *No Compensation or Remuneration of Any Kind*. Except to the extent permitted by section 57(k) of the Investment Company Act or for payments or distributions made by an issuer to all holders of a security in accordance with the security's terms, affiliated persons of the BDC and affiliated persons of such persons do not receive any transaction fees (including breakup, structuring, monitoring or commitment fees) or other remuneration from an issuer in which the BDC invests during the Exemption Period. This condition does not apply to the receipt of investment advisory fees by the BDC's investment adviser pursuant to an investment management agreement.

Expansion of Relief for BDCs with Existing Co-Investment Orders

During the Exemption Period, a BDC with an existing SEC order permitting co-investment transactions in portfolio companies with certain affiliated persons ("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.[2]

Co-investment transactions entered into by a BDC pursuant to the Order must comply with all other terms and conditions of the BDC's existing co-investment order. Non-Negotiated Follow-On Investments do not require prior approval by the Board, but are subject to the periodic reporting requirements set forth in the BDC's existing co-investment order. The Order requires that 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, must 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.

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[2] Capitalized terms used in this paragraph have the meanings ascribed to them (or a substantially similar term) in the BDC's existing co-investment order.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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