

FREQUENTLY ASKED QUESTIONS ABOUT BUSINESS DEVELOPMENT COMPANIES

Understanding Business Development Companies

What is a “business development company”?

Business development companies (“BDCs”) are special investment vehicles designed to facilitate capital formation for small and middle-market companies. BDCs are closed-end investment companies; however, BDCs are exempt from many of the regulatory constraints imposed by the Investment Company Act of 1940, as amended (the “1940 Act”), and the rules thereunder. Section 2(a)(48) of the 1940 Act defines “business development company” to mean a domestic closed-end company that (1) operates for the purpose of making investments in certain securities specified in Section 55(a) of the 1940 Act and, with limited exceptions, makes available “significant managerial assistance” with respect to the issuers of such securities, and (2) has elected business development company status. As a general matter, a BDC must also maintain at least 70% of its investments in eligible assets before investing in non-eligible assets.

To be treated as a BDC, a company must elect, pursuant to Section 54(a) of the 1940 Act, to be subject to

the provisions of Sections 55 through 65 of the 1940 Act.

The company must then file a Form N-6 (intent to file a notification of election) and a Form 54A (election to be regulated as a BDC).

BDCs are also typically registered under the Securities Act of 1933, as amended (the “Securities Act”), and the Securities Exchange Act of 1934, as amended (the “Exchange Act”), and are subject to all registration and reporting requirements under those two statutes. In order to register under the Securities Act, a BDC must prepare a registration statement on Form N-2. For more information regarding the registration process for BDCs, see “Disclosure Requirements” below.

Why are BDCs attractive?

BDCs can be more attractive than other types of investment funds for several reasons. First, BDCs provide investors with the same degree of liquidity as other publicly traded investments, unlike open-end investment companies, or mutual funds, in which investors can only sell and buy shares directly to, and from, the fund itself. Investors also do not need to meet the income, net worth or sophistication criteria imposed on private equity investments. Second, managers of

BDCs have access to “permanent capital” that is not subject to shareholder redemption or the requirement that capital (as well as returns on such capital) be distributed to investors as investments are realized or otherwise generate income. Third, managers of BDCs may immediately begin earning management fees after the BDCs have gone public and, unlike other registered funds, charge performance fees. Fourth, BDCs have greater flexibility than other types of registered investment funds to use leverage and engage in affiliate transactions with portfolio companies. In fact, BDCs have increasingly focused in recent years on mezzanine and debt investments that typically generate current income and provide greater upside potential.

However, BDCs (1) must maintain low leverage (total debt outstanding cannot exceed total equity); (2) typically seek to build a diversified portfolio of investments (no single investment can account for more than 25% of total holdings); (3) are required by the 1940 Act to distribute a minimum of 90% of their taxable earnings quarterly (in practice, most pay out 98% of taxable income and all short-term capital gains); and (4) pay out dividends at a relatively stable level as most of their portfolio investments are in debt securities.

What types of investments are permissible for BDCs?

Pursuant to Section 55(a) of the 1940 Act, a BDC must generally have at least 70% of its total assets in the following investments:

- privately issued securities purchased from issuers that are “eligible portfolio companies” (or from certain affiliated persons);
- securities of eligible portfolio companies that are controlled by a BDC and of which an affiliated person of the BDC is a director (a controlling interest is presumed if the BDC

owns more than 25% of a portfolio company’s voting securities);

- privately issued securities of companies subject to a bankruptcy proceeding, reorganization, insolvency or similar proceeding or otherwise unable to meet their obligations without material assistance;
- cash, cash items, government securities or high quality debt securities maturing in one year or less; and
- office furniture and equipment, interests in real estate and leasehold improvements and facilities maintained to conduct the business of the BDC.

An “eligible portfolio company” means a domestic issuer that either (1) does not have any class of securities listed on a national securities exchange, or (2) has a class of equity securities listed on a national securities exchange, but has an aggregate market value of outstanding voting and non-voting common equity of less than \$250 million and, in each case, (A) is not, with limited exceptions, a registered or unregistered investment company; or (B) either: (i) does not have a class of securities that are “margin securities,” (ii) is controlled by a BDC and has an affiliated person of the BDC as a director, or (iii) has total assets of not more than \$4 million and capital and surplus (shareholders’ equity less retained earnings) of not less than \$2 million.

In addition, under Section 12(d)(3) of the 1940 Act, a BDC generally cannot acquire securities issued by (1) a broker-dealer, (2) an underwriter or (3) an investment adviser of an investment company or a registered investment adviser, unless such issuer is (A) a corporation all the outstanding securities of which are (or after such acquisition will be) owned by one or more

registered investment companies and (B) primarily engaged in the business of underwriting and distributing securities if the gross income of such issuer normally is derived principally from such business or related activities. However, the SEC has granted no-action relief from such prohibition in two cases. In the first, a BDC was organized in a master feeder structure and the master fund proposed to form one or more private funds for which it would serve as the investment adviser and the feeder funds would hold membership units in the master fund.¹ In the second, an internally managed BDC, which was registered as an investment adviser and served as a sub-adviser for an unaffiliated externally managed BDC, sought to transfer the sub-advisory agreement to its wholly owned subsidiary.²

Further, the SEC has granted no-action relief from Sections 2(a)(48) and 55(a) of the 1940 Act to enable a feeder fund to elect to be treated as a BDC notwithstanding the fact that the feeder fund's investment in the master fund would not be an investment in an eligible portfolio company and the feeder fund would not make significant managerial assistance available to the issuers of securities held by the master fund.³

What types of securities may BDCs issue?

BDCs may issue debt and equity securities, as well as derivative securities, including options, warrants and rights that convert into voting securities. Any debt or senior security issued by a BDC must have asset

coverage of 200%, which is less restrictive than the 300% asset coverage requirement imposed on traditional closed-end funds and mutual funds. Also, no dividends can be declared on common stock unless the BDC's debt and senior securities, if any, have asset coverage of 200%.

What constitutes "significant managerial assistance"?

Unlike typical registered investment companies, BDCs are not passive investors. Rather, a BDC is required to make available "significant managerial assistance" to the companies that it treats as satisfying the 70% standard. This includes any arrangement whereby a BDC, through its directors, officers, employees or general partners, provides significant guidance and counsel concerning the management, operations or business objectives and policies of the portfolio company. It may also mean exercising a significant controlling influence over the management or policies of the portfolio company. Note that if a BDC intends to operate under the Small Business Investment Act of 1958, making loans to a portfolio company would satisfy the "significant managerial assistance" requirement.

May BDCs operate Small Business Investment Companies?

BDCs may create wholly owned subsidiaries which are licensed by the Small Business Administration ("SBA") to operate as Small Business Investment Companies ("SBICs"). The SBIC subsidiary is able to rely on an exclusion from the definition of "investment company" under the 1940 Act. The SBIC subsidiary issues SBA-guaranteed debentures, subject to the required capitalization of the SBIC subsidiary. SBA-guaranteed debentures carry long-term fixed rates that are generally lower than rates of comparable bank and other debt.

¹ See New Mountain Finance Corporation, SEC No-Action Letter, Division of Investment Management (Nov. 4, 2013).

² See Main Street Capital Corporation, SEC No-Action Letter, Division of Investment Management (Nov. 7, 2013).

³ See Carey Credit Income Fund and Carey Credit Income Fund 2015 T, SEC No-Action Letter, Division of Investment Management (July 15, 2015).

Under the regulations applicable to SBICs, an SBIC may have outstanding debentures guaranteed by the SBA generally in an amount of up to twice its regulatory capital, which generally equates to the amount of its equity capital. The SBIC regulations currently limit the amount that an SBIC subsidiary may borrow to a maximum of \$150 million, assuming that it has at least \$75 million of equity capital. The SBIC is subject to regulation and oversight by the SBA, including requirements with respect to maintaining certain minimum financial ratios and other covenants. In addition, an SBIC subsidiary in certain instances may have to elect to be treated as a BDC and file with the SEC a registration statement on Form N-5.

In addition, a BDC may be deemed an indirect issuer of any class of “senior security” issued by its direct or wholly owned SBIC subsidiaries. In such case, the senior securities will not be treated as senior securities or indebtedness for purposes of the BDC’s asset coverage requirement of 200%, but only if the SBIC subsidiary has issued indebtedness that is held or guaranteed by the SBA.

What is the tax treatment of BDCs?

BDCs are typically organized as limited partnerships in order to obtain pass-through tax treatment. However, a BDC cannot be a “publicly traded partnership” for federal income tax purposes. Thus, if the BDC is to be a partnership for tax purposes, either (a) its interests cannot be traded on an exchange or on a secondary market or equivalent, or (b) it must qualify for one of the exceptions to treatment as a “publicly traded partnership” for U.S. federal income tax purposes. Instead of being treated as a partnership for tax purposes, some BDCs have been organized as corporations and have obtained pass-through tax

treatment by qualifying as regulated investment companies (“RICs”) under Subchapter M of the Internal Revenue Code of 1986, as amended. To qualify as an RIC, a BDC must, among other things, elect to be so treated, must hold a diversified pool of assets and must distribute substantially all (e.g., 90%) of its taxable income each year. Generally, distributions by a BDC are taxable as either ordinary income or capital gains in the same manner as distributions from mutual funds and closed-end funds, and a BDC shareholder will recognize taxable gain or loss when it sells its shares.

How are portfolio investments valued?

BDCs cannot establish loan loss reserves to absorb losses in their loan portfolios. Instead, BDCs must mark their loan portfolio to fair value on a quarterly basis, with any unrealized gains or losses reflected on their income statements. Fair value is determined through the cooperation of a BDC’s management and board of directors, often with participation from internal auditors and third-party valuation firms. The adoption in 2008 of SFAS 157, Fair Value Measurements, resulted in slight adjustments to BDC balance sheets and income statements as BDC fair value procedures were already similar to SFAS 157 requirements. Currently, the majority of BDC portfolio investments are deemed to be valued in the Level 3 category with unobservable inputs. As a result, BDCs conduct yield analysis and enterprise value calculations to arrive at individual portfolio valuations.

Affiliate Transactions

What are the various types of restricted transactions?

Unlike traditional investment companies, which are subject to the affiliate transaction prohibitions of

Section 17 of the 1940 Act, BDCs are subject to Section 57 of the 1940 Act, which is a substantially modified and relaxed version of Section 17. Section 57 generally prohibits BDCs from effecting or participating in transactions involving conflicts of interest unless certain procedures are satisfied. Subsections 57(a) and (d) prohibit certain persons (“affiliates”) from participating in certain transactions involving BDCs and describes the following four types of transactions (“Restricted Transactions”) that such persons (and certain affiliated persons of those persons), acting as principal, may not enter into with BDCs without prior approval:

- an affiliate may not knowingly sell any securities or other property to a BDC or a company controlled by it, unless either the BDC is the issuer of the securities being sold, or the affiliate is the issuer and the security is part of a general offering to the holders of a class of its securities;
- an affiliate may not knowingly purchase from a BDC, or a company controlled by it, any security or other property except securities issued by the BDC;
- an affiliate may not knowingly borrow money or other property from a BDC, or a company controlled by it, with limited exceptions; and
- an affiliate is prohibited from knowingly effecting any joint transactions with a BDC, or a company controlled by it, in contravention of rules of the Securities and Exchange Commission (the “SEC”).

What are the categories of BDC affiliates regulated by Section 57?

Affiliates can be grouped into one of three general categories, and this categorization determines the type of approval, if any, required before engaging in a Restricted Transaction. The categories of BDC affiliates are described below.

First Tier Affiliates: Restricted Transactions with the following “first tier affiliates” of a BDC are prohibited unless the BDC receives prior approval from the SEC:

- any director, officer or employee of the BDC;
- any entity that a director, officer or employee of the BDC controls; or
- a BDC’s investment adviser, promoter, general partner or principal underwriter, or any person that controls or is under common control with such persons or entities or is an officer, director, partner or employee of any such entities.

Second Tier Affiliates: Restricted Transactions with the following “second tier affiliates” of a BDC are prohibited unless a majority of the directors or general partners who are not interested persons of the BDC (as defined in the 1940 Act), and who have no financial interest in the transaction, approve the transaction:

- any 5% shareholder of the BDC, any director or executive officer of, or general partner in, a 5% shareholder of the BDC, or any person controlling, controlled by, or under common control with such 5% shareholder; or
- any affiliated person of a director, officer or employee, investment adviser, principal underwriter for or general partner in, or of any

person controlling or under common control with, the BDC.

The SEC has issued guidance recognizing that, in many circumstances, limited partners and shareholders should be treated comparably for purposes of determining whether a Restricted Transaction involves a first tier affiliate or second tier affiliate of a BDC. For example, where a limited partner of a private fund (under common control with a BDC by the BDC's investment adviser), who also owns 5% or more (but 25% or less) of the private fund's outstanding voting securities, is a first tier affiliate of the BDC solely because the private fund is organized as a limited partnership and the limited partner is seeking to co-invest with the BDC, the limited partner may be treated as if it were a shareholder of the private fund for purposes of determining whether it is a second tier affiliate of the BDC.

Controlled Affiliates: A "controlled affiliate" is a downstream affiliate of a BDC whose securities are more than 25% owned by the BDC. A controlled affiliate is treated in the same manner as a second tier affiliate when engaging in Restricted Transactions with the BDC. However, the affiliate transaction prohibitions of Section 57 "flow through" to all controlled affiliates of the BDC. For example, if a BDC owns 30% of Company A, Company A could not purchase securities from a first tier affiliate of the BDC, unless the BDC receives prior SEC approval.

Section 57(h) of the 1940 Act also requires the directors or general partners of the BDC to maintain procedures to monitor the possible involvement of first and second tier affiliates in Restricted Transactions. Attached to these FAQs as Exhibit A is a chart showing various possible affiliates of a BDC and whether such affiliates are first tier, second tier or controlled affiliates. Also

attached as Exhibit B is a table showing examples of affiliate transactions of BDCs and guidance on whether such transactions require the SEC's or the BDC's board of directors' approval. Note that an examination of all potential affiliate transactions is beyond the scope of these FAQs.

Internal Versus External Management Issues

What are the advantages of internal management?

A BDC may be internally or externally managed. In some instances, the officers and directors of internally managed BDCs supervise daily operations. In other instances, an internally managed BDC will establish a wholly owned subsidiary to conduct daily operations. The officers, directors or wholly owned subsidiary of an internally managed BDC are not registered with the SEC as investment advisers. Internally managed BDCs generally have lower expense ratios because the BDC pays the operating costs associated with employing investment management professionals as opposed to an investment advisory fee, which includes a profit margin. Internally managed BDCs also have fewer conflicts between the interests of the manager and the owners of the BDC. However, an internally managed BDC must develop the infrastructure and hire employees or establish a subsidiary to manage the BDC and must address issues related to having custody of the portfolio assets.

Note that it should be possible to limit the activities of investment professionals invested in an internally managed BDC to avoid registration under the Investment Advisers Act of 1940 (the "Advisers Act"), given that the investment professionals invested in the

few existing internally managed BDCs have not yet registered under the Advisers Act.

What are the advantages of external management?

An externally managed BDC must contract with a third party to provide investment advisory services. An external investment adviser presumably already has the infrastructure, staff and expertise to satisfy the regulatory requirements applicable to BDCs, including requirements relating to custody of assets. However, the investment advisory agreement memorializing the third-party contract is subject to the requirements of the 1940 Act, which include, among other things, approval by the board of directors and shareholders of the BDC. Certain inherent conflicts of interest may exist regarding the adviser's allocation of investment opportunities between the BDC and the adviser's other clients. Investment advisers to externally managed BDCs also must be registered with the SEC. Therefore, if an adviser previously operated as an unregistered investment adviser, the adviser may be required to register with the SEC before serving as the BDC's investment adviser.

Registration as an investment adviser also adds another layer of regulatory requirements, including, among other things, adoption of a compliance program, appointment of a chief compliance officer and adoption of a code of ethics for directors, officers and investment personnel governing personal investing activities.

What fees may be paid to an investment adviser?

Typically, an investment adviser is paid a management fee equal to an annual rate of 1.75% to 2.5% of the gross assets of the BDC's portfolio (including any borrowings), paid quarterly in arrears. Section 205(b)(3) of the Advisers Act permits an investment adviser of a

BDC to also receive performance-based compensation, provided that it does not exceed 20% of the realized capital gains of the BDC, net of realized capital losses and unrealized capital appreciation over a specified time period or as of specified dates. The SEC staff has stated that the 20% limitation is the maximum performance fee, and not the maximum total compensation. Thus, the investment adviser can receive a management fee in addition to the performance fee. The performance fee is typically paid out as follows:

- 0% of all net investment income earned at or below a "hurdle rate" of 7%;
- 100% of all net investment income earned above the 7% hurdle rate but below a "catch-up rate" of 8.75%; and
- 20% of all net investment income earned above the 8.75% "catch-up rate."

Finally, as is the case with traditional closed-end funds, brokers that sell BDC shares generally receive significant compensation from front-end sales loads charged to investors.

If a BDC elects to pay its investment adviser performance-based compensation, then the BDC cannot maintain an executive compensation plan that would otherwise be permitted under the 1940 Act. Section 61(a)(3)(B) of the 1940 Act permits a BDC to issue to certain directors, officers and employees warrants, options and rights to purchase voting securities of the BDC pursuant to an executive compensation plan if, among other requirements: (1) the issuance is approved by the partners and directors of the BDC (also requires SEC approval if issuance is to a director who is not also an officer or employee of the BDC); (2) the exercise or conversion price of such warrants, options and rights is no less than the current market value or net asset value

of the voting securities; (3) the voting securities are non-transferable (except by gift, will or intestacy); and (4) the warrants, options and rights are not separately transferable (unless no class of such warrants, options or rights and the securities accompanying them have been publicly distributed).

How may a BDC compensate its management?

Internally managed BDCs may compensate management through either (i) performance-based compensation, including issuance of at-the-market options, warrants or rights under an executive compensation plan; or (ii) through the maintenance of a profit-sharing plan. If an internally managed BDC elects not to adopt either of these options, they may compensate management through the use of cash compensation. An externally managed BDC which receives an incentive fee cannot participate in any equity-based compensation plan.

Disclosure Requirements

What is a Form N-2?

A BDC that registers under the Securities Act must register its securities on Form N-2. The registration statement must provide enough “essential information” about the BDC so as to help the investor make informed decisions about whether to purchase the securities being offered. Generally, the registration statement must describe, among other things:

- the terms of the offering, including the amount of shares being offered, price, underwriting arrangements and compensation;
- the intended use of the proceeds;

- investment objectives and policies, including any investment restrictions;
- risk factors associated with investing in the BDC, including special risks associated with investing in a portfolio of small and developing or financially troubled businesses; and
- the management of the BDC, including directors, officers and the investment adviser.

The registration statement must also include financial statements of the BDC meeting the requirements of Regulation S-X. In addition, BDCs with certain significant subsidiaries may need to provide separate financial statements or summarized financial information for those subsidiaries as required by Regulation S-X. Rule 3-09 under Regulation S-X describes, among other things, the circumstances under which separate financial statements of an unconsolidated majority-owned subsidiary are required to be filed with the SEC. Rule 4-08(g) under Regulation S-X generally requires registrants to present in the notes to their financial statements summarized financial information for all unconsolidated subsidiaries when any unconsolidated subsidiary, or combination of unconsolidated subsidiaries, meets the definition of a “significant subsidiary” in Rule 1-02(w) under Regulation S-X. If a BDC is required to present summarized financial information, the SEC generally will not object if the BDC presents summarized financial information in the notes to the financial statements only for each unconsolidated subsidiary which individually meets the definition of a “significant subsidiary” in Rule 1-02(w) but does not present summarized financial information in the notes to the financial statements for all unconsolidated subsidiaries.

What information regarding prospective portfolio companies and the BDC's investment methodology must be included?

To the extent that a BDC has identified but not yet purchased prospective portfolio companies in anticipation of its initial public offering ("IPO"), the initial registration statement should, at a minimum, describe the general characteristics of the prospective portfolio companies and the BDC's criteria for identifying prospective portfolio companies. The description should include general guidelines used in making investment decisions and any key elements of the BDC's investment methodology. If the BDC owns the portfolio company at the time of registration, then the registration statement must (1) identify each portfolio company; and (2) disclose the following: (A) the nature of the portfolio company's business, (B) the title, class, percentage of class and value of the portfolio company's securities held by the BDC, (C) the amount and general terms of all loans to the portfolio company, and (D) the relationship of the portfolio company to the BDC.

What are the ongoing reporting requirements for BDCs?

BDCs are required to (1) file a notice with the SEC pursuant to which the BDC elects to be treated as a BDC, (2) register a class of equity securities under Section 12 of the Exchange Act, (3) file periodic reports under the Exchange Act, including 10-Ks, 10-Qs and 8-Ks, and (4) file proxy statements pursuant to Section 14(a) of the Exchange Act. Additionally, management must report their ownership of, and trading in, securities in the BDC and are subject to the short swing profits rules.

Can a BDC use a shelf registration statement for registering multiple offerings of securities?

Yes, a BDC can use a shelf registration statement on Form N-2 to register multiple offerings of securities. However, the SEC has recently imposed a limit on the cumulative dilution to a BDC's current net asset value ("NAV") per share that a BDC may incur while using a shelf registration statement to sell shares of its common stock at a price below NAV. A BDC can complete multiple offerings off of an effective shelf registration statement only to the extent that the cumulative dilution to the BDC's NAV per share does not exceed 15%. Once the cumulative dilution exceeds 15%, the BDC must file a post-effective amendment to the shelf registration statement or file a new shelf registration statement. A BDC also must provide (1) in the related prospectus supplement for the offering, specific dilution tables showing the dilutive or accretive effects that the offering will have on different types of investors and a chart based on the number of shares offered and the discount to the most recently determined NAV, and (2) in the shelf registration statement or post-effective amendment, an additional undertaking that it will file a post-effective amendment if its common stock is trading below NAV.

BDCs typically use shelf registration statements to issue debt and equity securities. Debt securities are issued by BDCs from time to time either in follow-on offerings or takedowns from a medium-term note program (in which case a prospectus supplement for the medium-term note program is first filed with the SEC).⁴ BDCs also frequently list their debt securities on a

⁴ For more information on medium-term note programs, see our "Frequently Asked Questions About Medium-Term Note Programs," available at: <http://media.mofo.com/files/Uploads/Images/FAQAtTheMarketOfferings.pdf>.

national securities exchange (such debt securities are referred to as “baby bonds” due to their low minimum denominations). Equity securities are issued by BDCs from time to time either in follow-on offerings or in “at-the-market” offerings. An “at-the-market” offering is an offering of securities into an existing trading market for outstanding shares of the same class at other than a fixed price on, or through the facilities of, a national securities exchange, or to or through a market maker otherwise than on an exchange. Equity distribution programs often are established for “at-the-market” offerings (in which case a prospectus supplement for the equity distribution program is first filed with the SEC), and these programs are considered the equity analogue to a medium-term note program.⁵

Can a BDC qualify as an “emerging growth company” and what are the benefits?

Yes, a BDC may qualify as an “emerging growth company” (“EGC”), which is a new category of issuer under Title I of the Jumpstart Our Business Startups (JOBS) Act enacted on April 5, 2012, which amends Section 2(a) of the Securities Act and Section 3(a) of the Exchange Act. An EGC is an issuer with total annual gross revenues of less than \$1 billion (with such threshold indexed to inflation every five years), and would continue to have this status until: (i) the last day of the fiscal year in which the issuer had \$1 billion in annual gross revenues or more; (ii) the last day of the fiscal year following the fifth anniversary of the issuer’s IPO; (iii) the date on which the issuer has, during the previous three-year period, issued more than \$1 billion in non-convertible debt; or (iv) the date when the issuer

is deemed to be a “large accelerated filer” as defined by the SEC. However, a BDC issuer will not be able to qualify as an EGC if it first sold its common stock in an IPO prior to December 8, 2011.

The benefits for a BDC of qualifying as an EGC include the following:

- may file a registration statement with the SEC on a confidential basis;
- expanded range of permissible pre-filing communications made to qualified institutional buyers or institutional accredited investors;
- only need to provide two years of audited financial statements to the SEC (rather than three years), and the auditor attestation on internal controls requirement may be delayed;
- exemption from the mandatory say-on-pay vote requirement and the Dodd-Frank Act required CEO pay ratio rules (to be adopted by the SEC), and the ability to use certain smaller reporting company scaled disclosure;
- no requirement to comply with any new or revised financial accounting standard until the date that such accounting standard becomes broadly applicable to private companies; and
- no longer subject to any rules requiring mandatory audit firm rotation or a supplement to the auditor’s report that would provide additional information regarding the audit of the issuer’s financial statements (no such requirements currently exist).

An EGC may forego reliance on any exemption available to it. However, if it chooses to comply with financial reporting requirements applicable to non-EGCs, the EGC must comply with all such standards

⁵ For more information on “at-the-market” offerings, see our Frequently Asked Questions About At-the-Market Offerings,” available at: <http://media.mofo.com/files/Uploads/Images/080818FAQsMTN.pdf>.

and cannot selectively opt in or opt out of requirements. Any election must be made at the time the EGC files its first registration statement or Exchange Act report.

Ongoing 1940 Act Requirements

Are there certain requirements regarding the board of directors of a BDC?

Since the enactment of the 1940 Act, Congress and the SEC have emphasized the role that boards of directors play in overseeing investment companies and policing the conflicts between investment companies and their investment advisers. To ensure that a board is unbiased when policing conflicts, a majority of the board of directors must be persons who are not “interested persons” of the BDC. Under the 1940 Act, an “interested person” is defined to include the following: (1) any officer, director and employee of the BDC (however, no person is deemed to be an interested person solely by reason of being a member of the board of directors); (2) a five percent or more voting shareholder of the BDC; (3) a person who is a member of the immediate family of an affiliate of the BDC; (4) legal counsel to the BDC; or (5) any natural person who the SEC determines to have had a material business relationship in the past two completed fiscal years with the BDC or the BDC’s chief executive officer.

In addition to traditional corporate responsibilities and fiduciary duties imposed on the board of directors of a BDC by common law as well as state law, directors are charged with certain responsibilities under the 1940 Act. The board of directors must approve any underwriting agreements, valuation policies, compliance policies and the investment advisory agreement.

What policies and procedures must the BDC adopt?

A BDC and, if applicable, its external investment adviser, must adopt a code of ethics reasonably designed to prevent certain persons who may have access to information regarding securities trades made on behalf of the BDC (such people are referred to as “access persons”) from engaging in any fraudulent, deceptive, or manipulative acts. The code of ethics must require periodic reporting by such access persons and impose recordkeeping requirements on the BDC and investment adviser, as applicable. Under the periodic reporting requirements, the access persons must provide three types of reports: (i) an initial holdings report, disclosing the securities held by the person upon becoming an “access person”; (ii) a quarterly transaction report, disclosing transactions during a calendar quarter including the nature of the transactions; and (iii) an annual holdings report, disclosing securities held by the access person at the end of a calendar year. Annually, the BDC must provide its board of directors with a report describing issues arising under the code of ethics, material violations and sanctions in response to material violations of the code of ethics.

Additionally, every registered investment company must adopt and implement policies and procedures reasonably designed to prevent violations of the federal securities laws and must designate a chief compliance officer to oversee the administration of these policies and procedures. The BDC’s compliance procedures must address, at a minimum, the following areas: (i) portfolio management processes; (ii) trading practices; (iii) accuracy of disclosures; (iv) safeguards on client assets from advisory personnel; (v) accurate creation of records; (vi) valuation of portfolio holdings; (vii) identification of affiliated persons; (viii) protection of non-public information; and (ix) compliance with the

various governance requirements. The compliance procedures must be approved by the board of directors, including a majority of the independent directors. Annually, the board of directors must review the compliance policies to ensure the ongoing effectiveness of the procedures.

Section 31 of the 1940 Act requires that every registered investment company maintain and preserve records as prescribed under the rules adopted by the SEC. The rules require, among other items, that all investment companies maintain and keep current the following documents: (i) all documents relating to the filing of financial statements; (ii) records relating to the purchase and sale of securities (including the commissions paid); (iii) all ledgers reflecting assets and liabilities; (iv) corporate charters; (v) proof of cash balances; (vi) persons and groups of persons authorized to transact in securities; and (vii) brokerage orders. The records may be maintained in electronic format as long as they are arranged and indexed in a manner that permits easy access and a legible true and complete copy of the document can be promptly provided. It is recommended that every BDC adopt a records retention policy to ensure reasonable compliance with the SEC rules.

Furthermore, all securities of the BDC must be held by a custodian meeting the requirements of Section 26(a)(1) of the 1940 Act.

Note that an examination of all of the required policies and procedures are beyond the scope of this FAQ.

Are there any specific insurance requirements a BDC must comply with?

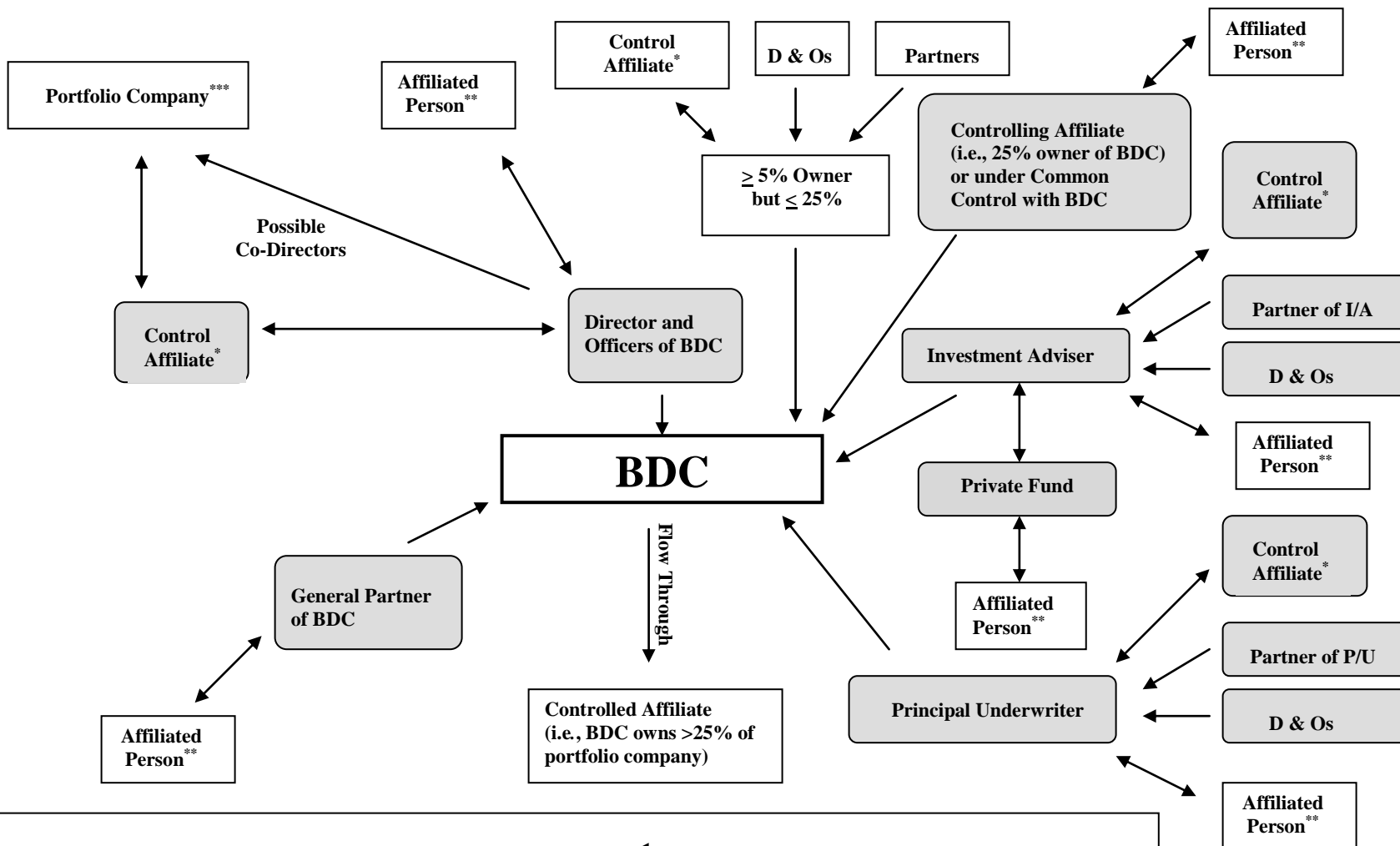
A BDC must provide and maintain a bond issued by a fidelity insurance company to protect the BDC against embezzlement and larceny. The fidelity bond must

cover each officer and employee who has access to funds and securities. The amount of coverage is tied to the amount of the BDC's assets.

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Exhibit A



Shaded Entities = First Tier Affiliates (SEC Approval Required)
Unshaded Entities = Second Tier Affiliates (Board Approval Required)

← = one way affiliation
 ↔ = two way affiliation

* Any person that controls (i.e., >25% owner), is controlled by (i.e., >25% owned), or is under common control with the other person.
 ** Any person that owns at least 5%, but not more than 25% of the other person.
 *** No approval required if only relationship is with a common director.

Exhibit B

| Proposed Transaction | Result Under Section 57 of the 1940 Act |
|--|--|
| Sale by a 25% shareholder of a BDC of securities of Company A to the BDC | Prohibited without prior SEC approval |
| Simultaneous investment by a BDC and a general partner of the BDC in Company A | Prohibited without prior SEC approval |
| Sale by a director, officer or employee of a BDC of securities of Company A to the BDC | Prohibited without prior SEC approval |
| Joint venture between a controlling interestholder in the BDC and a portfolio company | Prohibited without prior SEC approval <i>if</i> the portfolio company is a controlled affiliated of the BDC; otherwise permissible |
| Simultaneous investment by a BDC and a 5% shareholder of the BDC in Company A | Permissible with prior approval of the BDC's independent directors |
| Sale by a BDC of securities of Company A to a 5% shareholder of the BDC's investment adviser | Permissible with prior approval of the BDC's independent directors |
| Sale by a 5% shareholder of a BDC of securities of Company A to Company B, 25% of which is owned by the BDC | Permissible with prior approval of the BDC's independent directors |
| Simultaneous investment by a BDC and a limited partner of a private fund (under common control with the BDC by the BDC's investment adviser), who also owns 5% or more (but 25% or less) of the private fund's outstanding voting securities | Permissible with prior approval of the BDC's independent directors |
| Loan by a BDC to a company which is 50% owned by the BDC* | Not Prohibited |
| Acquisition by a BDC of securities of Company A, which is 25% owned by the BDC, from a director and 10% shareholder of Company A* | Not Prohibited |
| Follow-on investment by a BDC in an existing portfolio company | Not Prohibited |
| Sale by a BDC officer of securities of Company A, 5% of which is owned by the BDC, to Company A | Not Prohibited |

* Provided that the portfolio company (or director) does not own 5% of the BDC, and is not an affiliated person of a director, officer, employee, principal underwriter, a general partner of, or any person controlling (25% owner) the BDC.