Sutherland
Asbill & Brennan LLP
ATTORNEYS AT LAW

39

1275 Pennsylvania Avenue, NW
Washington, DC 20004-2415
202.383.0100
fax 202.637.3593
www.sablaw.com

March 18, 2005

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: File Number S7-38-04; Securities Offering Reform, Rel. Nos. 33-8501; 34-50624; IC-26649

Dear Mr. Katz:

On behalf of our client, Allied Capital Corporation ("Allied"), we appreciate the opportunity to express our views on the SEC's proposed rules referenced above (the "Proposed Rules") that would modify and advance significantly the registration, communication and offering processes under the Securities Act of 1933, as amended (the "1933 Act").[1] Although we enthusiastically support the SEC's efforts, we are disappointed by the fact that most of the Proposed Rules are, by their terms, not applicable to closed-end investment companies that have elected to be regulated as business development companies ("BDCs") under Section 54 of the Investment Company Act of 1940, as amended (the "1940 Act"). In this regard, we believe that it is important to emphasize that BDCs are subject to ***all*** of the disclosure and filing requirements under the Securities Exchange Act of 1934, as amended (the "1934 Act"), as other 1934 Act-registered companies ("Other 1934 Act Registrants") are, and conduct registered offerings under the 1933 Act in the same manner as Other 1934 Act Registrants that file registration statements on Forms S-1 or S-3. As a result, we see neither a policy nor a theoretical or practical basis for distinguishing between BDCs and Other 1934 Act Registrants in the securities offering process and we believe that BDCs should be afforded the same treatment (*i.e.*, the same benefits, obligations and liabilities) as Other 1934 Act Registrants receive under the current regulatory regime and, in turn, the Proposed Rules.

In light of Allied's special status in relation to the Proposed Rules, we first discuss the current regulatory regime and the difficulties placed on BDCs thereunder, as well as why BDCs

[1] See SEC Release No. 33-8501; Securities Offering Reform (November 17, 2004).

should be treated like Other 1934 Act Registrants under the 1933 Act. We then discuss a few specific aspects of the Proposed Rules and their applicability to BDCs.

I. Background

A. General

Allied is an internally managed closed-end investment company that has elected to be regulated as a BDC under Section 54 of the 1940 Act. As a BDC, Allied is required to register a class of our equity securities under the 1934 Act and, therefore, must comply with the periodic and current reporting requirements set forth in Section 13(a) of the 1934 Act, including Forms 10-K, Forms 10-Q and Forms 8-K. Allied has timely filed all reports and other materials required to be filed under Section 13(a) of the 1934 Act for more than 15 years preceding the date of this letter.

In addition, because Allied has a class of equity securities registered under Section 12 of the 1934 Act, it is, like Other 1934 Act Registrants, required to comply with ***all*** of the disclosure and corporate governance provisions of the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act"), including the requirement to evaluate and publicly issue a report on its internal controls over financial reporting as required by Section 404 of the Sarbanes-Oxley Act (such report being referred to herein as the "Section 404 Report"). Allied is also an "accelerated filer" within the meaning of Rule 12b-2 of the 1934 Act and, as a result, included the Section 404 Report in our annual report on Form 10-K for the fiscal year ended December 31, 2004.

Allied has been a public company since 1960 and its shares of common stock currently trade on the New York Stock Exchange under the symbol "ALD". As of December 31, 2004, the aggregate market value of its common stock held by non-affiliates was approximately $2.9 billion and there were approximately 133 million shares of its common stock outstanding in the hands of approximately 165,000 shareholders. Further, Allied's average daily trading volume is approximately 600,000 shares. There are currently 12 securities analysts who monitor and issue reports with respect to Allied and its shares of common stock, including Merrill Lynch & Co., Morningstar and Piper Jaffray.

In light of the foregoing, we believe it is significant to note that Allied would qualify, if BDCs were eligible to use Form S-3, as a "seasoned issuer" under the current regulatory regime and as a "well-known seasoned issuer" under the Proposed Rules.

B. Current Regulatory Regime Applicable to BDCs

As discussed above, BDCs are, as a result of their election of BDC status under Section 54 of the 1940 Act, subject to ***all*** of the same disclosure and filing requirements under the 1934 Act that are imposed upon Other 1934 Act Registrants. Nonetheless, the current regulatory regime applicable to BDCs impairs the ability of BDCs to raise capital when compared to Other 1934 Act Registrants, without any apparent policy justification. The flexibility to regularly access the public capital markets in a nimble and efficient manner, which has become an accepted way of life for seasoned public companies in today's economy, has never been made

available to BDCs. BDCs have to register their securities on the Form N-2, the form used by conventional closed-end funds, which is not tailored to the type of information that BDCs must or should disclose to meet investor expectations.[2] In addition, Form N-2 does not permit a presentation or format of information that is entirely consistent with the presentations made by Other 1934 Act Registrants using Form S-3. Further, BDCs cannot use the integrated disclosure concept available to Other 1934 Act Registrants – that is, BDCs cannot incorporate information into their registration statements by reference to their periodic reports filed under the 1934 Act, a common, efficient and well understood practice in today's marketplace.[3]

In short, Form N-2 requires disclosure of a type and nature and in a format that is not entirely appropriate for the market in which BDCs operate and, therefore, we believe, may be more confusing or frustrating to the investing public and the investment banking community. Moreover, we also believe that the failing of Form N-2 to permit incorporation by reference makes conducting a registered public offering for a BDC with a significant operating history and substantial market capitalization, such as that of Allied, unnecessarily cumbersome, time consuming and costly while not appreciably improving investor protection.

In addition, the rules and regulations under the current regulatory regime do not fully or appropriately address the issues and concerns faced by BDCs in the securities offering process. The Proposed Rules emphasize the notion that there is a "separate framework [for BDCs] governing communications with investors." However, this framework was not tailored to the capital raising activities of BDCs. Instead, Rule 156 and Rule 482 under the 1933 Act, the portion of the framework that is most directly applicable to BDCs, are more suited for traditional investment companies. For example, while the term "sales literature" is broadly defined in Rule 156 and much of Rule 156 seeks to achieve the same objective as other rules under the 1933 Act, BDCs do not generally use "sales literature" for the sale of securities in the same manner that investment companies do; BDCs use prospectuses like Other 1934 Act Registrants. Rule 156 also addresses what could be loosely construed as forward-looking statements. However, that rule does not squarely apply to the type and nature of forward-looking information that BDCs must provide in order to satisfy investor expectations nor does it provide the protections afforded to Other 1934 Act Registrants under the Private Securities Litigation Reform Act[4] (the "PSLRA"). Notwithstanding, the expectations of the investing public are such that BDCs must make forward-looking statements in connection with any capital raising activities, including being consistent with recently promulgated Management Discussion and Analysis requirements (*e.g.*, trend information) that are applicable to all Other 1934 Act Registrants.

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[2] BDCs use Form N-2 because General Instruction A of such form states that "Form N-2 shall be used by all closed-end management investment companies". See SEC No-Action Letter, Biotech Capital Corporation (available March 2, 1987).

[3] Investment companies utilizing Form N-2 do not have a short-form registration statement available to them that is comparable to Form S-3 that is available for Other 1934 Act Registrants. In this respect, the concept of integrated disclosure was not appropriate under the 1940 Act regime because traditional investment companies do not file the same periodic reports that are filed by Other 1934 Act Registrants. As noted herein, BDCs are subject to ***all*** of the same disclosure and filing requirements under the 1934 Act that are imposed upon Other 1934 Act Registrants and, therefore, integrated disclosure should be an appropriate concept in the context of BDCs.

[4] Pub. L. No. 104-67, 109 Stat. 737 (1995).

In the same manner, much of Rule 482 applies to categories of investment companies in which BDCs should not readily be included and the remaining portion of such rule does not fully address the communication issues or concerns faced by BDCs during a typical securities offering. Further, the utility of Rule 482 is greatly diminished because it applies only to an advertisement or other sales material with respect to a BDC "that is selling or proposing to sell its securities pursuant to a registration statement that has been filed under the [1933] Act."[5] In this respect, the rule is ill-suited to BDCs – BDCs, unlike open-end management investment companies, do not generally conduct continuous offerings (*i.e.*, an offering in which securities are offered promptly after effectiveness and will continue in the future) but instead conduct delayed offerings (*i.e.*, offerings in which there in no present intention to offer securities at the time of effectiveness) or conduct offerings via a "road-show" process like Other 1934 Act Registrants prior to the effective date of their registration statements (*e.g.*, in connection with an initial public offering).

Like the communication rules, Rule 415 under the 1933 Act and the shelf offering process is equally difficult for BDCs to navigate. Specifically, Rule 415(a)(1) contains an exclusive list of those offers and sales of securities that an issuer may register on a shelf basis. The word "only" is included in the beginning of Rule 415(a)(1) to make this clear.[6] Rule 415(a)(1)(x) permits shelf offerings of "securities registered ***(or qualified to be registered)*** on Form S-3 or Form F-3 which are to be offered and sold on a continuous or delayed basis by or on behalf of the registrant." [Emphasis added.] As a BDC, Allied is required to register its securities on Form N-2, and is not permitted to file a registration statement on any other form. However, Rule 415(a)(1)(x) does not require the securities to be registered on Form S-3; it is sufficient that the securities be "qualified" to be registered on Form S-3. Accordingly, a BDC that meets the requirements of Form S-3 has been permitted to offer and sell its securities pursuant to Rule 415(a)(1)(x) even though it is required to register its securities on Form N-2.

Indeed, the Staff has permitted a closed-end investment company to conduct a shelf offering on Form N-2 in accordance with Rule 415(a)(1)(x) if such company's common stock is "qualified to be registered" on Form S-3.[7] Thus, a closed-end investment company that satisfies the registrant and transaction requirements of Form S-3 in connection with a primary offering may register common stock on Form N-2 for an offering to be made on a continuous or delayed basis in accordance with Rule 415(a)(1)(x). In this vein, the Staff has permitted BDCs to conduct shelf offerings on Form N-2 in accordance with Rule 415(a)(1)(x) if their securities are "qualified to be registered" on Form S-3.[8]

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[5] See Rule 482 of the 1933 Act.

[6] Rule 415 under the 1933 Act begins by stating that "[s]ecurities may be registered for an offering to be made on a continuous basis or delayed basis in the future, *Provided*, that (1) The [relevant] registration statement pertains only to:".

[7] See SEC No-Action Letter Pilgrim America Prime Rate Trust (available May 1, 1998).

[8] See, e.g., Registration Statement on Form N-2 (File No. 333-113671) of Allied filed with the SEC on September 17, 2004. A number of other BDCs have also conducted shelf offering pursuant to Rule

However, notwithstanding the foregoing, the shelf offering process currently entails a number of practical difficulties for a BDC. To establish a shelf, a BDC files a registration statement on Form N-2 with the SEC to register the offer and sale of its common stock, which registration statement must be declared effective prior to any offer or sale of securities. The Form N-2 will not only include the required information about the BDC, but also certain information regarding the securities to be issued and, unlike Other 1934 Act Registrants, all of the other information required by Form N-2, including information previously filed in periodic reports under the 1934 Act. When the BDC wants to market, or "take down," a new offering from "the shelf," it needs to file a prospectus supplement or a post-effective amendment that updates the information about it contained in the Form N-2, as appropriate depending on the nature of the information to be updated, and details the offering and the securities being sold. However, such an update requires, ***at a minimum***, that the BDC, unlike Other 1934 Act Registrants, needs to update its shelf registration statement to include the information contained in its periodic reports that were filed since effectiveness. This updating practice is largely dictated by the anti-fraud and civil liability provisions of the 1933 Act, such as Section 12(a)(2), and of the 1934 Act, such as Rule 10b-5. A BDC may update its shelf registration statement to include information contained in its periodic reports filed under the 1934 Act through the use of a prospectus supplement.[9] If a periodic report contains information that would be deemed to be a "fundamental" change, then a post-effective amendment would need to be filed to reflect such change as well.[10] Moreover, a BDC must also update its shelf registration to reflect any other "fundamental" or "material" change to the information contained therein that is not yet otherwise reflected in its periodic reports. This process of updating a shelf registration statement by means other than by incorporation by reference is unusual and unnecessary for Other 1934 Act Registrants. In this respect, we believe it impedes and undermines the intent and purpose of the shelf offering process – to ***facilitate*** the offering of securities for seasoned issuers.

In summary, then, BDCs are hampered in their ability to raise capital in ways not experienced by Other 1934 Act Registrants. Such a situation stands squarely at odds with the reality that, for purposes of the protections of the federal securities laws, a BDC, with timely, publicly available reports, a substantial reporting history and significant coverage by research analysts, is no less compelling a candidate for the streamlined registration process than Other 1934 Act Registrants.

415(a)(1)(x) of the 1933 Act, including MCG Capital Corporation, American Capital Strategies, Ltd. and Gladstone Capital Corporation.

[9] A post-effective amendment must be filed "if new information is substituted for old and not merely added to it." See Louis Loss and Joel Seligman, Fundamental of Securities Regulation at 112 (Little, Brown and Company 1995).

[10] Rule 415(a)(3) of the 1933 Act requires that a company file a post-effective amendment to its shelf registration statement if (i) there is a "fundamental change" in the information in the registration statement, (ii) an update is required by Section 10(a)(3) of the 1933 Act, or (iii) there is any material change in the plan of distribution contained in the registration statement.

II. Discussion

A. BDCs Are Similar To All Other 1934 Act Registrants For Purposes of the Proposed Rules

In light of the intent of the Proposed Rules to consider problems currently arising in the securities offering process and to make that process more efficient, we believe a significant issue to be addressed is the status of BDCs under the federal securities laws. And the logical starting point in such an analysis is to determine whether BDCs are more appropriately regulated in the offering process under the regulatory regime applicable to Other 1934 Act Registrants or investment companies. In this regard we believe that BDCs are much more similar to Other 1934 Act Registrants than they are to traditional investment companies, including in the following ways, among others:

- BDCs are registrants under the 1934 Act like Other 1934 Act Registrants; BDCs are ***not*** 1940 Act registrants like traditional investment companies;
- BDCs are required to file the same periodic reports under the 1934 Act as Other 1934 Act Registrants on an accelerated basis, including real-time reporting of events on Form 8-K;
- BDCs are subject to Regulation FD;
- BDCs access the capital markets consistent with the traditional offering process applicable to Other 1934 Act Registrants;
- BDCs communicate with investors in a manner substantially similar to that of Other 1934 Act Registrants, including through the making of press releases, quarterly earnings releases, investor presentations and other communications both within and outside of the securities offering process;
- BDCs provide forward-looking information in their communications with investors like Other 1934 Act Registrants;
- Underwriters conduct offerings for BDCs in substantially the same manner as they do for Other 1934 Act Registrants;
- The investing public requires BDCs to provide other disclosure in their prospectuses that is typically required of Other 1934 Act Registrants; and
- BDCs are followed and viewed by securities analysts in a manner similar to that of Other 1934 Act Registrants.

These characteristics, which are not characteristics generally shared by traditional closed-end investment companies, weigh significantly in favor of viewing and treating BDCs like Other 1934 Act Registrants under the federal securities laws.

B. Proposed Rules Should Apply Equally to BDCs

The Proposed Rules recognize two significant changes in the securities offering process and the capital markets over the last three decades. First, technological developments have increased the demand by investors for more timely corporate disclosure and have provided public companies with the ability to deliver such disclosure at an accelerated pace. Second, the Sarbanes-Oxley Act and the SEC's recent rulemaking and interpretive actions have enhanced the amount of disclosure included by public companies in their 1934 Act reports and accelerated the 1934 Act filing deadlines for public companies. As a result, the Proposed Rules demonstrate that the SEC "believe[s] that the enhancements to the [1934 Act] . . . enable [it] to rely on these reports to a greater degree as a ***cornerstone*** of [its] proposal to reform the securities offering process." [Emphasis added.]

Because BDCs are subject to ***all*** of the same 1934 Act disclosure and filing requirements as Other 1934 Act Registrants, and access the capital markets in the same manner as Other 1934 Act Registrants that file registration statements on Forms S-1 and S-3, we believe that the SEC's rationale behind its proposed liberalization of the securities offering process for Other 1934 Act Registrants should apply equally for BDCs. In particular, we note the SEC's comments with respect to undertaking such a revision of the securities offering process:

> [W]e believe that the most far-reaching revisions of our communications rules and registration process should be considered for issuers that have a reporting history under the Exchange Act and are presumptively the most widely followed in the marketplace. We believe that these issuers have an Exchange Act record, a broad following of their Exchange Act filings, and the contemplated attention directed to their Exchange Act reports by the staff of the Division of Corporation Finance that will produce the greatest likelihood of Exchange Act reports that not only are reliable but also are broadly scrutinized by investors and the markets.
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> As a result of the active participation of these issuers in the markets and, among other things, the wide following of these issuers by market participants, the media, and institutional investors, we believe that it is appropriate to provide greater communication and registration flexibilities to these well-known seasoned issuers beyond that provided to other issuers, including other seasoned issuers.

Indeed, in light of the likely practical effect of the Proposed Rules on all securities offerings – increased filings on a more timely basis to take advantage of the flexibility provided by the Proposed Rules – the Proposed Rules should apply equally to BDCs so as to encourage more disclosure by BDCs to the investing public; encouraging more timely disclosure should be a fundamental objective of the Proposed Rules with respect to ***all*** issuers. As the Staff noted with respect to periodic reports under the 1934 Act, we believe that a "public issuer's Exchange Act record [should provide] the basic source of information to the market and to potential purchasers regarding the issuer, its management, its business, its financial condition, and its prospects." These statements just as much apply to BDCs as to any other type of issuer and, therefore, such statements make it clear that the rationale for promulgating the Proposed Rules for Other 1934

Act Registrants applies equally as well to extending the application of the Proposed Rules to BDCs; BDCs should be treated ***no*** differently than Other 1934 Act Registrants.

In addition to our general position set forth above, we discuss below specific aspects of the Proposed Rules that significantly affect, or should be applied to, BDCs.

C. Status Under the Proposed Rules; Well-Known Seasoned Issuer

The Proposed Rules set forth a new category of issuer that would permit an issuer qualifying for such category to avail itself of new, liberalized rules relating to communications with investors and the registration process generally. In connection with this proposal, the Staff requests comment on whether a well-known seasoned issuer that otherwise satisfies the eligibility conditions should be disqualified from being a "well-known seasoned issuer" under the Proposed Rules if it is ineligible under the definition of "ineligible issuer". In this regard, Rule 405 defines "ineligible issuer" so as to include a BDC. For the reasons set forth in Section II.A and II.B above, we believe that BDCs should not be included in the definition of "ineligible issuer". As previously noted, BDCs are subject to ***all*** of the disclosure and filing requirements under the 1934 Act, which requirements are a fundamental aspect of qualifying for status as either a seasoned issuer or a well-known seasoned issuer. BDCs are substantially more similar to Other 1934 Act Registrants than they are to the other ineligible issuers identified in Rule 405; given these characteristics and the dissimilarities with other investment companies and other ineligible issuers, BDCs should not be wholly included in the definition of ineligible issuers. To the extent that particular concerns exist with respect to BDC's eligibility criteria, such concerns can be more appropriately addressed by providing a disqualifying trigger, if any, in the definition.

We note that eliminating BDCs from the definition of ineligible issuer would necessarily require that there not be any other rule or regulation that wholly disqualifies BDCs from qualification as a "well-known seasoned issuer" under the Proposed Rules.

D. Communications Proposals

In general, we believe that the sufficiency and appropriateness of the separate regulatory framework that is referenced in the Proposed Rules in connection with BDCs is questionable at best. As discussed in Section I.B above, Rule 156 and Rule 482 were designed for traditional investment companies, which have operations, disclosure processes and securities issuance procedures that are substantially distinct from those of BDCs. Those rules do not fully address or account for the issues and concerns faced by BDCs in their communications with investors. Furthermore, the communication provisions in the Proposed Rules are intended to facilitate the flow of information to shareholders and other market participants and not just potential investors in a particular securities offering.

Because BDCs undertake many of the communication activities undertaken by Other 1934 Act Registrants, including the regular release of press releases and earnings releases (which may contain both factual and forward-looking information), we believe that BDCs, their shareholders and other market participants would greatly benefit from the regular, uninhibited

flow of pertinent business and financial information which is currently stymied due to gun-jumping and other concerns that are discussed in the Proposed Rules. Additionally, we believe that subjecting BDCs to the Proposed Rules in the same manner as Other 1934 Act Registrants will have the practical effect of encouraging, as noted above, increased disclosure to the investing public on a more timely basis so as to take advantage of the new communication proposals. For these reasons, we believe that BDCs should be treated ***no*** differently than Other 1934 Act Registrants under the communication provisions of the Proposed Rules.

1. Permitted Communication During an Offering; Safe-Harbors

The Staff is proposing two separate safe harbors from the gun-jumping provisions of the 1933 Act for continuing ongoing business communications. However, the Staff states in connection therewith that BDCs would be ineligible to use the proposed safe harbors for factual business information and forward-looking information because such issuers are "subject to a separate framework governing communications with investors." The Staff also requests comment on whether "business development companies [should] be eligible to use the proposed safe harbors for factual business information and forward-looking information."

With respect to the communication provisions of the Proposed Rules, we note that the rationale for exclusion of BDCs must be fully examined. In this regard, we note that, as discussed in Section I.B above, Rule 156 and Rule 482 – the separate framework referenced in the Proposed Rules – do not address many of the communication issues encountered by BDCs during the securities offering process as those rules were designed primarily for communications by other categories of investment companies. For example, BDCs use shelf registrations like Other 1934 Act Registrants, as discussed above, and face gun jumping issues when contemplating an offering unlike traditional investment companies. Thus, while these rules technically apply to BDCs, they do not provide a tailored and, in some cases, useful framework in which to analyze or regulate communications with investors. As such, the need for clear guidance on this issue is essential.

BDCs communicate with investors in the same manner as Other 1934 Act Registrants. In this respect, they:

- issue press releases;
- issue quarterly earnings releases and undertake investor conference calls;
- engage in investor meetings and conferences;
- conduct road shows during the securities offering process;
- meet with research analysts that cover them and their industry; and
- file periodic reports, including on Form 8-K.

The lack of a tailored communications regulatory framework applicable to BDCs combined with the necessary continuous communications with investors make clear that BDCs

should be treated like Other 1934 Act Registrants under the communication provisions of the Proposed Rules.

2. Other Permitted Communications Prior to Filing a Registration Statement; Bright-Line Exclusion

The Staff is proposing a new bright-line time period, ending 30 days prior to the filing of a registration statement, during which issuers may communicate without risk of violating the gun-jumping provisions of the 1933 Act. However, the Staff again states in the Proposed Rules that the bright-line exclusion would not be available to BDCs. The Staff also requests comment on whether the class of ineligible issuers is appropriate.

As previously discussed, we believe the referenced regulatory framework for BDC communications does not appropriately address the issues affecting BDCs. In addition, because BDCs conduct securities offerings in the same manner as Other 1934 Act Registrants and otherwise continuously communicate with investors in the same manner throughout the year, the "bright-line test would [equally] provide greater certainty in the offering process [by BDCs] and avoid unnecessary limitations on issuer communications." Further, because BDCs are already permitted to conduct shelf offerings whereby such BDCs may engage in securities offerings several times a year, BDCs would benefit substantially, just as Other 1934 Act Registrants would, from the application of the bright-line test by permitting them to monitor and police their communications with the investing public more accurately and effectively.

In light of the foregoing, there is no basis to exclude BDCs from the application of the bright-line exclusion to the same extent as it would apply to Other 1934 Act Registrants.

3. Free Writing Prospectus

The Staff is proposing a change to the use and definition of "free writing prospectuses", which, in part, would allow issuers greater freedom to use written materials in the securities offering process. However, the Staff again states in the Proposed Rules that "ineligible issuers" will not be able to avail themselves of free writing prospectuses on the basis that such issuers are "already subject to separate rules permitting use of a Section 10(b) prospectus."[11] The Staff also requests comments on whether "business development companies [should] be able to rely on [the] proposed rules permitting use of a free writing prospectus."

The Staff states that free writing prospectuses should not be available for BDCs because Rule 482 and Rule 498 provide a comparable regulatory regime that is already available to BDCs. As noted above, Rule 482 primarily applies to communications by other categories of investment companies. In this regard, BDCs do not release the same form and nature of "performance data and other information" that other categories of investment companies do.

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[11] As we noted in Section II.C above, BDCs should not be included in the definition of "ineligible issuers" for purposes of qualifying as a well-known seasoned issuer. We recognize that this position will affect provisions other than those discussed in Section II.C and Section II.E. In this regard, we believe that BDCs should be excluded from the definition of ineligible issuers for all purposes under the Proposed Rules.

Instead, BDCs release information that is substantially similar in form and nature to information released by Other 1934 Act Registrants. In addition, Rule 498 does not apply to BDCs. Therefore, the rationale for excluding BDCs from the application of the Proposed Rules is unfounded; there is, in fact, no appropriately tailored regulatory framework governing communications by BDCs during the securities offering process.

In this regard, BDCs do not, as discussed elsewhere herein, engage in capital raising activities like other investment companies; the model for a BDC's capital raising activities, in the typical situation, is that which is applicable to Other 1934 Act Registrants – BDCs generally issue an announcement of a proposed transaction, print a preliminary prospectus, conduct a road show and investor presentations, go effective, price the offering, print a final prospectus and issue a final press release. As such, BDCs need the flexibility to communicate with potential investors and the investing public in the same manner as Other 1934 Act Registrants. In light of the foregoing, we believe that BDCs should be excluded from the definition of "ineligible issuer" so as to permit the use of free writing prospectuses in the manner described in the Proposed Rules.

4. Rule 138 and Rule 139

The Staff requests comment on whether "the Rule 138 safe harbor [should] be available if the issuer is a business development company filing periodic reports on Forms 10-K and 10-Q." Likewise, the Staff requests comment on whether "reliance on proposed Rule 139 [should] be permitted if the issuer is an open-end management investment company or other investment company (e.g., closed-end management investment company, unit investment trust, business development company)."

In this respect, we note that BDCs are followed by securities analysts in the same manner as Other 1934 Act Registrants. In Allied's case, as noted above in Section I.A, there are currently 12 securities analysts who monitor and issue reports with respect to Allied and its shares of common stock. In addition, as noted above, BDCs access the capital markets in the same manner as Other 1934 Act Registrants. As such, BDCs need the same flexibility and freedom that Other 1934 Act Registrants have with respect to brokers and dealers participating in the distribution of their securities. We believe that Rule 138 and Rule 139 should apply to BDCs.

E. Liability Issues

Without addressing the specific details of the liability provisions of the Proposed Rules, we nonetheless believe that such liability provisions should apply to BDCs in the same manner as they apply to Other 1934 Act Registrants. However, we note that BDCs should be treated equally with Other 1934 Act Registrants for all purposes under the Proposed Rules so as to avoid an inappropriate and disproportionate burden falling on BDCs; that is, subjecting BDCs to the same liability standards as Other 1934 Act Registrants without providing them the offsetting benefits of a liberalized communication and registration process would be disproportionately burdensome and unfair, without any logical rationale. We do not believe such a circumstance

will facilitate communications and increase disclosure to the investing public. Application of these provisions should be consistent with all other provisions in the Proposed Rules.

F. Securities Act Registration Proposals

We note that, while we do not address each provision of the Proposed Rules individually, our discussion herein necessarily has consequences in many other provisions of the Proposed Rules, including the Securities Act Registration Proposals. Nonetheless, we discuss several particular provisions below.

1. At-The-Market Offerings

The Staff is proposing to eliminate the restrictions on primary "at-the-market" offerings and requests comment as to whether it should "continue to impose Form S-3 or F-3 eligibility as a condition to conducting primary "at-the-market" offerings of equity securities". The Staff notes that consideration of these changes is appropriate because the "market today has greater information about issuers than it did at the adoption of the 'at the market' limitations, due to enhanced Exchange Act reporting" and because "trading markets for issuers' securities have grown significantly since that time." These events, as the Staff notes, make the imposition of limitations "artificial".

In light of the Staff's comments, we believe that Form S-3 and F-3 eligibility is not the appropriate standard for permitting an issuer to engage in "at-the-market" offerings. As noted, the primary rationale for eliminating these restrictions for a particular issuer relate to the availability of information about such issuer. In this regard, the standard should be predicated on the application of the disclosure and filing requirements of the 1934 Act to a particular issuer; it should not be based on form eligibility, which – as it does in the case of BDC – implicates factors unrelated to the issue at hand. In short, with respect to the at-the-market provisions of the Proposed Rules, BDCs should be treated like Other 1934 Act Registrants notwithstanding form eligibility.

2. Automatic Shelf Registration

The Staff is proposing to update the shelf registration process by establishing a significantly more flexible version of shelf registration for offerings by well-known seasoned issuers – "automatic shelf registration". In connection therewith, the Staff seeks comments on whether "eligibility for automatic shelf registration [should] be limited to well-known seasoned issuers". In this respect, we fully agree with the premise of the Proposed Rules on this point – that automatic shelf registration be limited to well-known seasoned issuers. Instead, as discussed above, we believe that the definition of well-known seasoned issuers should be such that it includes otherwise qualifying BDCs.

As discussed in Section I.B above, we note that BDCs are permitted to engage in shelf offerings, albeit through a more cumbersome process than it is for Other 1934 Act Registrants. In addition, it is clear from the Proposed Rules that a primary focus and concern of this change is the extent to which "issuers are followed by analysts and investors in the market."

With that in mind, we believe that a BDC that otherwise qualifies as a "well-known seasoned issuer" should be able to avail itself of the "automatic shelf registration" process. First, with respect to analyst and investor following, BDCs are no different that Other 1934 Act Registrants. Indeed, they are followed by such market participants in the same way and to the same degree as Other 1934 Act Registrants. Second, BDCs are already permitted to use the shelf registration process. As such, permitting qualifying BDCs to use the automatic shelf registration process would be an appropriate extension of an already existing practice under the current regulatory regime.

3. Rule 415 Amendments

In connection with the Staff's consideration of amendments to Rule 415 under the 1933 Act, we believe that it is important for the SEC to formally codify the Staff's position that a BDC that meets the registrant and transaction requirements of Form S-3 is permitted to offer and sell its securities pursuant to Rule 415(a)(1)(x) of the 1933 Act even though it is required to register its securities on Form N-2.[12]

4. Other Amendments

Rule 497 of the 1933 Act should be revised to provide for the filing of a form of prospectus used in connection with a primary offering of securities on a delayed basis pursuant to Rule 415(a)(1)(x) that discloses the public offering price, description of securities, specific method of distribution or similar matters.[13] By doing so, it will be clear that proposed Rule 430B (which would codify the existing practices in most respects regarding the relationship between base prospectuses and prospectus supplements in shelf offerings) and the proposed amendments to Rule 415 of the 1933 Act (which would permit immediate takedowns from a shelf registration statement and eliminate the limitation on the amount of securities to be registered in connection with certain shelf offerings) would apply equally to BDCs' undertaking offerings pursuant to Rule 415 under the 1933 Act, including Rule 415(a)(1)(x) thereof.

We believe that the foregoing revisions are in line with the objective of the Proposed Rules – to "seek to streamline the registration process for most types of reporting issuers." We also believe that subjecting BDCs to the Proposed Rules in the same manner as Other 1934 Act Registrants will have the practical effect of encouraging, as noted above, increased disclosure to the investing public on a more timely basis so as to take advantage of the new registration proposals. Achieving such an objective would be entirely consistent with the policies underlying the 1933 Act and the 1934 Act.

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[12] See Section I.B. in this letter for a detailed discussion of the Staff's position with respect to this matter.

[13] See, e.g., Rule 424(b)(2) of the 1933 Act.

G. Prospectus Delivery Reforms

Under proposed Rule 172, a final prospectus would be deemed to precede or accompany a security for sale or for delivery after sale for purposes of satisfying Section 5(b)(2) of the 1933 Act so long as the final prospectus is filed with the SEC by the required filing date under the 1933 Act. However, the Staff states in the Proposed Rules that "registered investment companies and business development companies would not be able to rely on the proposed rule [because these] entities are subject to a separate framework governing communications with investors." We are not aware of ***any*** legal or practical differences that should exist with respect to the prospectus delivery requirements between BDCs and Other 1934 Act Registrants. In this regard, a prospectus meeting the requirements of Section 10(a) of the 1933 (*i.e.*, a final prospectus) is required to be delivered to each investor in a registered BDC offering conducted at or prior to the earlier of delivery of a confirmation of sale and delivery of the securities. This legal requirement is ***no different*** from the current prospectus delivery obligations of Other 1934 Act Registrants. As a result, we believe that BDCs should be treated ***no differently*** than Other 1934 Act Registrants under proposed Rule 172.[14]

In addition, failing to apply proposed Rule 172 to BDCs would result in different securities offering procedures for what should otherwise be substantially similar capital raising activities under the 1933 Act; such a difference, we believe, would be confusing to both the investment banking community and the investing public. In light of the foregoing, we believe proposed Rule 172, and any related provisions under the Proposed Rules, should apply to BDCs in a manner so as to avoid these unnecessary and largely artificial distinctions from Other 1934 Act Registrants.

H. Additional 1934 Act Disclosure Proposals

The Staff is proposing to require risk factor disclosure in periodic reports filed under the 1934 Act. We agree with this proposal. First, the inclusion of risk factor disclosure in periodic reports is already a common "best" practice among many seasoned issuers, notwithstanding that such disclosure is not specifically required. Second, such disclosure would provide greater information about an issuer to the investing public on a more timely basis. Third, such disclosure is more appropriately included in an issuer's periodic reports rather than "one-off" registration statements because such information is important to all investors or potential investors in an issuer's securities and not just those investors engaged in a particular offering of such issuer's securities.

In this regard, we note that Allied, like many other BDCs, already provide risk factor disclosure in its periodic reports. And while we believe the proposed requirements are appropriate, we nonetheless believe that such requirements should be promulgated and

[14] As a corollary to proposed Rule 172, proposed Rule 173 would require that for each transaction involving a sale of securities that requires delivery of a final prospectus, each underwriter, broker, or dealer participating in such offering send to each purchaser, not later than two business days after the completion of the sale, a notice providing that the sale was made pursuant to a registration statement, in lieu of a final prospectus. The proposal would also permit purchasers to request a physical copy of the final prospectus. For the reasons discussed herein, proposed Rule 173 should ***not*** exclude offerings by BDCs.

implemented in a manner so as to avoid imposing unnecessarily duplicative disclosure requirements on BDCs. We note that one manner of achieving this result is to, as discussed in Section II.I.1 below, permit BDCs to incorporate by reference to their periodic reports filed under the 1934 Act, just as Other 1934 Act Registrants are permitted to do today.

I. Other Issues

In light of the Staff's consideration of substantial and comprehensive revisions to the securities offering process, we believe this to be the ideal time to address other issues affecting securities offerings by BDCs or the ability of BDCs to engage in securities offerings, notwithstanding that such issues, as they relate to BDCs, are not otherwise specifically discussed in the Proposed Rules. The following discussion highlights two such important issues currently affecting BDCs.

1. Incorporation By Reference

As noted above, BDCs are barred from taking advantage of the integrated disclosure system, not because of any unique operating characteristics of BDCs or investor protection considerations, but merely because the Form N-2 on which they register their securities does not permit incorporation by reference to their periodic reports. We believe that, ***at a minimum***, Form N-2 should be modified to permit BDCs to incorporate by reference to their previously filed periodic reports under the 1934 Act. Moreover, we believe that BDCs that satisfy the registrant and transaction requirements of Form S-3 should be able incorporate by reference future 1934 Act reports and documents into their registration statements on Form N-2. There is no basis in policy to prohibit BDCs from participating in the integrated disclosure system; indeed barring them from doing so runs completely counter to the efficient operation of the securities markets and the purpose of BDCs. Enabling BDCs to incorporate by reference in the Form N-2 will create efficiencies in preparing the Form N-2, with respect to the cost and time involved, which will enable BDCs to more readily respond to business opportunities. Likewise, such treatment will be consistent with the expectations of the investing public that already is familiar with the concept of integrated disclosure and which views BDCs in much the same way as Other 1934 Act Registrants.

2. Safe Harbor for Forward-Looking Statements

The proposing release requests comment on whether the Staff should consider using its authority, including its exemptive authority in Section 27A of the 1933 Act, to propose a projections and forward-looking information safe harbor for non-reporting issuers engaging in an initial public offering. In this regard, we believe that the SEC should use its exemptive authority more broadly – to provide a projections and forward-looking information safe harbor from liability for the forward-looking statements made by BDCs that would be similar to the liability safe harbor for forward-looking statements contained in Section 27A of the 1933 Act and Section 21E of the 1934 Act.

The rationale for not extending the safe harbor to investment companies was based on the belief that "the nature of information reported by investment companies is sufficiently distinct to

warrant separate consideration."[9] Disclosure for an investment company is premised on the concept that the "past is prologue," such that investors will make their investment decision based on the past performance of the investment company. As a result, such companies do not provide forward-looking statements.

This is not the case for BDCs, which are required to make forward-looking statements as a matter of course in their registration statements on Form N-2 and 1934 Act reports. In this regard, the SEC has stated that "there are circumstances, particularly known trends and uncertainties, where forward-looking information is ***required*** to be disclosed."[10] [Emphasis added.] "In addition, forward-looking information is ***required*** in connection with the disclosure in MD&A regarding off-balance sheet arrangements."[11] [Emphasis added.] Moreover, the pressure for BDCs to make projections about their future operations is driven by the expectations of investors and securities analysts that public companies will provide projections about operations and the practice of Other 1934 Act Registrants that compete with BDCs. Thus, BDCs require the protections for forward-looking statements afforded Other 1934 Act Registrants.

In view of the foregoing, we believe that the SEC should use its exemptive authority under Section 27A of the 1933 Act and Section 21E of the 1934 to provide a projections and forward-looking information safe harbor from liability for the forward-looking statements made by BDCs that would be similar to the liability safe harbor for forward-looking statements contained in Section 27A of the 1933 Act and Section 21E of the 1934 Act.

III. Conclusion

Because BDCs are subject to ***all*** of the same 1934 Act disclosure and filing requirements as other public companies, and access the public capital markets in the same manner as public companies that file registration statements on Forms S-1 or S-3, we believe that BDCs should be afforded the same treatment (*i.e.*, the same benefits, obligations and liabilities) as such companies under the Proposed Rules. We further believe that subjecting BDCs to the Proposed Rules in the same manner as Other 1934 Act Registrants will have the practical effect of encouraging increased disclosure to the investing public on a more timely basis, thereby achieving one of the primary objectives of the 1933 Act, 1934 Act and the Proposed Rules.

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[9] Safe Harbor for Forward-Looking Statements, SEC Concept Release No. 33-7101, at 10 (October 1994).

[10] See SEC Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8350 (Dec. 19, 2003).

[11] Id.

On behalf of our client, Allied, we would appreciate your consideration of these comments. We would be pleased to discuss these matters further or to meet with you if it would be helpful.

Sincerely,

Steven B. Boehm
Partner

Cynthia M. Krus
Partner

cc: Kieran Brown
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0402

Ms. Joan Sweeney
Chief Operating Officer
Allied Capital Corporation
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006