

BDC-Related Provisions of the Consolidated Appropriations Act of 2018

On March 23, 2018, Congress passed a \$1.3 trillion omnibus spending bill titled the Consolidated Appropriations Act of 2018, which included the Small Business Credit Availability Act. Included in the Small Business Credit Availability Act are various changes to the federal securities laws and regulations that impact business development companies (“BDCs”). Most significantly, the BDC-related portions of the legislation expand the ability of BDCs to utilize leverage and provide them with the ability to rely on more flexible SEC communication and offering rules currently only available to operating companies. The chart below summarizes the BDC-related provisions of the legislation.

Small Business Credit Availability Act	Current Law	Impact on BDCs
<p><u>Section 802:</u></p> <ul style="list-style-type: none"> BDCs can issue debt securities and declare cash dividends so long as its asset coverage does not exceed 150% and the BDC: (1) adopts a 150% asset coverage requirement which is approved by either (i) a “required majority” of the non-interested directors, (which approval is effective one year after the date of such approval) or (ii) more than 50% of shareholders at a shareholder meeting with a quorum present (which approval is effective immediately the day after the approval); and (2) (i) within 5 business days of the above approval, the BDC discloses in any filings submitted to the SEC and its website that the 150% requirement was approved and the effective date of such approval, and (ii) makes certain additional disclosures in its periodic filings under section 13(a) of the Securities Exchange Act of 1934 (the “Exchange Act”). BDCs must include in each of its periodic filings disclosures regarding: (1) the amount of senior securities outstanding (and the associated asset coverage ratio), (2) that it received the required approval discussed above and the date of such approval, and (3) the risks associated with such debt. BDCs that are not listed on a national securities exchange are also required to offer to repurchase from each shareholder as of the approval date, all of the shares held by that shareholder as of the approval date (with 25% of those shares to be repurchased in each of the four quarters following the calendar quarter of the approval date). If the BDC does not meet the above criteria, the asset coverage requirement is 200%. 	<p><u>1940 Act, Section 19(a) and 61(a):</u> BDCs may not issue any class of debt security or declare cash dividends unless, immediately after the issuance, the BDC has asset coverage of at least 200%.</p>	<p>Allows BDCs to incur more leverage (and raise additional assets to invests in a greater number of small to mid-size U.S. companies).</p>

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<p><u>Section 803(b)(1)</u> The legislation instructs the SEC to, within one year of enactment, issue rules/amendments allowing BDCs to use the same “securities offering and proxy rules” that are available to reporting companies under the Exchange Act. These amendments shall include the specific amendments detailed below.</p>	<p><u>Registration and Reporting Parity</u> BDCs’ registration and reporting requirements are a mix of requirements under the 1940 Act and the Exchange Act. In certain contexts, a BDC may have to undertake greater reporting and registration efforts than a reporting company under the Exchange Act.</p>	<p>The legislation is intended to align the reporting, disclosure and filing obligations of BDCs with certain exemptions available to reporting companies under the Exchange Act.</p>
<p><u>Section 803(d)</u> Provides that BDCs will be able to treat the parity provisions regarding offering and proxy rules (discussed above) as being effective if the SEC does not revise the relevant rules within one year after the law is enacted until such time as the revisions are completed.</p>	<p>Automatic effectiveness after one year</p>	<p>The legislation ensures that the parity rules are implemented or treated as implemented by a certain date.</p>
<p><u>Section 803(c)(1)</u> The legislation instructs the SEC to, within one year of enactment, include instructions that allow for incorporation by reference in a manner similar to the instructions included in Form S-3.</p>	<p>Form N-2 – Incorporation by Reference BDCs are required to file registration statements on Form N-2. While certain other filers that are allowed to register securities on Form S-3 may incorporate information into their prospectuses by reference to earlier or subsequently filed documents, Form N-2 does not allow incorporation by reference.</p>	<p>The legislation allows BDCs to raise capital more cheaply and efficiently, and respond to market conditions more quickly, by having shorter registration statements and prospectuses. Investors are also able to readily access the most important information about an issuer.</p>
<p><u>Sections 803(b)(2)(B) and 803(b)(2)(G)</u> The legislation directs the SEC to permit BDCs to rely on the exemptions available under Rules 168 and 169 of the Securities Act of 1933 (the “Securities Act”), and to provide that nothing in Rule 156 of the Securities Act prevents BDCs from qualifying for an exemption under Rules 168 and 169.</p>	<p><u>Securities Act, Rules 156, 168 and 169</u> Rules 168 and 169 under the Securities Act allow both issuers that report under the Exchange Act and those that do not report under the Exchange Act to disseminate “regularly released factual business and forward-looking information,” even around the time of a registered offering. This safe harbor is designed to permit ongoing communications with the market, such as press releases and other information released on a regular, unscheduled or episodic basis, but cannot contain information about a potential offering and cannot be made as part of the offering process. Rules 168 and 169 specifically prohibit BDCs from relying on those rules.</p> <p>Rule 156 makes it unlawful for any person to use sales literature that is materially misleading in connection with the offer or sale of securities issued by an investment company.</p>	<p>The legislation allows BDCs to more easily communicate with the market without violating gun-jumping provisions. BDCs could release factual and forward-looking business information similar to other market participants.</p>

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<p><u>Sections 803(b)(2)(C–E)</u> The legislation directs the SEC to revise Rules 134, 163A and 163 of the Securities Act to allow BDCs to rely on such rules.</p>	<p><u>Securities Act</u>, Rules 134, 163A and 163 BDCs are prohibited from relying on the following rules:</p> <ul style="list-style-type: none"> • Rule 134 provides a safe harbor that allows issuers to make certain written statements regarding an offer after a prospectus is filed, provided certain conditions are met. • Rule 163A provides a safe harbor from the gun-jumping provisions for communications that do not reference an offering and that are made more than 30 days before a registration statement is filed, provided certain conditions are met. • Rule 163 is a safe harbor from the gun-jumping provisions that allows well-known seasoned issuers (“WKSIs”) to engage in unrestricted oral and written communications before filing a registration statement, provided certain conditions are met. 	<p>The legislation permits BDCs to release factual business information with more certainty, and to have more flexibility in communications with investors.</p>
<p><u>Section 803(b)(2)(F)</u> The legislation directs the SEC to revise Rules 138 and 139 under the Securities Act to specifically include BDCs as issuers to which such rules apply.</p>	<p><u>Securities Act</u>, Rules 138 and 139 BDCs are not specifically permitted to rely on Rules 138 or 139:</p> <ul style="list-style-type: none"> • Rule 138 permits a broker-dealer participating in a distribution of securities of an issuer to publish research reports about that issuer if certain conditions are met. • Rule 139 permits a broker-dealer participating in a distribution of securities of an issuer to publish research reports concerning that issuer or any class of its securities if certain conditions are met. • Research reports permitted by Rules 138 and 139 are not considered general advertising or solicitation for purposes of Rule 144A offerings nor do they constitute a directed selling effort or be inconsistent with the offshore transaction requirement for offerings under Regulation S. 	<p>The legislation permits broker-dealers and other providers of market research more flexibility to disseminate research on BDCs and allows more communication of information to the market about BDCs.</p>

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<p><u>Section 803(b)(2)(A)</u> The legislation directs the SEC to revise Rule 405 of the Securities Act of 1933 (the “Securities Act”) to remove the exclusion for BDCs from the definition of a WKSIs, and to add Form N-2 to the definition of “automatic shelf registration statement.”</p> <p><u>Section 803(c)(2)</u> The legislation directs the SEC to, within one year of enactment, allow BDC’s that are WKSIs to be able to file automatic shelf offerings on Form N-2.</p>	<p><u>Securities Act, Rule 405</u> SEC Rules allow WKSIs to benefit from a more flexible registration process that includes, among other things, automatic effectiveness of a WKSIs’ registration statement, and reduced information included in the registration statement. BDCs are prohibited from qualifying as WKSIs, and Form N-2 may not receive automatic shelf registration (which applies only to registration statements filed on Form S-3).</p>	<p>The legislation allows BDCs to file automatic shelf registrations to take advantage of frequently changing market windows, and other benefits applicable to WKSIs.</p>
<p><u>Section 803(b)(2)(H) and 803(b)(2)(I)</u></p> <p>The legislation directs the SEC to revise Rule 433 of the Securities Act to specifically state that BDCs that qualify as WKSIs can rely on that rule. Additionally, the legislation allows BDCs to rely on Rule 164 under the Securities Act.</p>	<p><u>Securities Act, Rules 433 and 164</u> Rule 433 generally permits issuers to use free writing prospectuses after a prospectus has been filed. Issuers that do not comply with the conditions set forth in Rule 433 with respect to free writing prospectuses violate Section 5(b)(1) of the Securities Act. However, Rule 164 provides a safe harbor from the gun-jumping provisions and relief from the failure to qualify under Rule 433 for “immaterial or unintentional” deviations. BDCs are prohibited from relying on Rule 164.</p>	<p>The legislation allows BDCs that qualify as WKSIs to use free writing prospectuses, which allow for greater communication with the market, including information that may not be included in the registration statement. BDCs now benefit from a safe harbor for unintentional violations of the gun-jumping provisions.</p>
<p><u>Section 803(b)(2)(J) and 803(b)(2)(P)</u></p> <ul style="list-style-type: none"> • The legislation directs the SEC to revise Rule 415 under the Securities Act to specifically state that registration for securities provided for in Rule 415 includes BDC securities registered on Form N-2 that would otherwise meet the eligibility requirements of Form S-3. • On Form N-2, BDCs are now only required to provide undertakings that are no more restrictive than those of applicable registrants on Form S-3. This includes no longer being required to make the undertaking in Item 34.4 of Form N-2. 	<p><u>Securities Act, Rule 415</u></p> <ul style="list-style-type: none"> • Rule 415 provides the basis for shelf registration, and specifically lists the types of shelf offerings that may be effected on an immediate, a delayed or a continuous basis. Rule 415 limits the amount of securities that can be registered for a continuous offering to two years for registration statements not filed on Form S-3. Other provisions of Rule 415 are applicable registrants using Form S3. • For registration statements on Form N-2, Rule 415 requires registrants to provide an undertaking (contained in Item 34.4 of Form N-2) “to file, during any period in which offers or sales are being made, a post-effective amendment to the registration statement: (1) to include any prospectus required by Section 10(a)(3) of the 1933 Act.” 	<p>The legislation allows for SEC review of BDC N-2 shelf registration statements in advance of accessing public markets and offers more certainties with respect to timing.</p>

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<p><u>Section 803(b)(2)(K)</u> The legislation directs the SEC to revise Rule 497 under the Securities Act to include a parallel rule allowing BDCs to file form prospectus supplements in the same manner as the process under Rule 424(b).</p>	<p><u>Securities Act, Rule 497</u></p> <ul style="list-style-type: none"> • Rule 424(b), which is not applicable to BDCs, allows form prospectus supplements to be filed that contain only substantive changes from or additions to previously filed prospectuses. • Rule 497, which is applicable to BDCs, does not allow for form prospectuses. 	<p>The legislation reduces the filing burden on BDCs, synchronizes BDC prospectus filing requirements with those of other registrants, and saves considerable time and money.</p>
<p><u>Section 803(b)(2)(L)</u> The legislation directs the SEC to revise Rules 172 and 173 under the Securities Act to remove the exclusion for BDCs.</p>	<p><u>Securities Act, Rules 172 and 173</u> BDCs are prohibited from relying on the following rules:</p> <ul style="list-style-type: none"> • Rule 172 exempts an issuer or broker-dealer from delivering a prospectus in connection with a registered offering, so long as the final prospectus is filed with the SEC. • Rule 173 requires that each underwriter or dealer participating in a registered offering must provide to each purchaser a copy of the final prospectus or, in lieu of the final prospectus, a notice that the sale was made pursuant to a registration statement, within two business days following the completion of such sale. 	<p>The legislation permits BDCs greater flexibility in the sales process in parity with other issuers covered by the rule, and reduces the prospectus delivery burden and costs associated with offerings.</p>
<p><u>Section 803(b)(2)(M)</u> The legislation directs the SEC to revise Rule 418 under the Securities Act to provide that a BDC that otherwise meets the eligibility requirements under General Instruction IA of Form S-3 shall be exempt from Rule 418(a)(3).</p>	<p><u>Securities Act, Rule 418</u> Rule 418(a)(3) exempts already registered entities from having to provide certain supplemental engineering, management or other reports to the SEC upon request, on the basis that they are already registered and have complied with the requirements in General Instruction IA of Form S-3.</p>	<p>The legislation removes the obligation on BDCs to be ready to supply certain supplemental material upon request from the SEC, in line with the obligations of already registered issuers compliant with General Instruction IA of Form S-3.</p>
<p><u>Section 803(b)(2)(N)</u> The legislation directs the SEC to revise Item 13(b)(1) of Schedule 14A to provide that a BDC that meets the eligibility requirements under General Instruction IA of Form S-3 shall be deemed to meet the requirements of Form S-3 for the purposes of Schedule 14A.</p>	<p><u>Exchange Act, Rule 14a-101</u> Item 13 of Schedule 14A (information required in a Proxy Statement) allows previously filed financial reports to be incorporated by reference in any Proxy Statement for issues of securities or exchange offerings, as directed by Rule 14a-101.</p>	<p>The legislation allows BDCs to incorporate previously filed financial statements into Proxy Statement forms, bringing the BDC's obligations into line with already registered issuers compliant with General Instruction IA of Form S-3.</p>

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<p><u>Section 803(b)(2)(O)</u> The legislation directs the SEC to revise Rule 103 under the Exchange Act to provide that Rule 103(a) applies to BDCs for the purposes of Form N-2.</p>	<p><u>Exchange Act, Rule 103 under Regulation FD</u> Rule 103 clarifies that a failure to make public disclosure under Regulation FD shall not affect whether a registered issuer, for the purposes of Forms S-2, S-3, S-8 and SF-3, is deemed to have filed all material required to be filed pursuant to sections 13 or 15(d) of the Exchange Act.</p>	<p>The legislation aligns BDCs' reporting obligations with those of other reporting companies under the Exchange Act, whereby a failure to disclose material information under Regulation FD would not affect the validity of a later Form N-2 registration statement.</p>

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