Proskauer

SEC Excludes Certain BDCs from Accelerated Filer and Large Accelerated Filer Status

March 13, 2020

On March 12, 2020, the Securities and Exchange Commission (the "SEC") adopted amendments to the definitions of accelerated filer and large accelerated filer in Rule 12b-2 under the Securities Exchange Act of 1934, as amended.[1] As part of these amendments, the SEC adopted an exclusion for any business development company ("BDC") that: (1) has a public float of $75 million or more, but less than $700 million; and (2) has "annual revenues" of less than $100 million. For this purpose, a BDC's annual revenue is its annual investment income, as defined in Rule 6-07.1 of Regulation S-X.

Once the amendments take effect, BDCs that satisfy these conditions will no longer be required to obtain a separate attestation of their internal control over financial reporting from their independent auditors. They also will have 45 days after the end of the fiscal quarter to file their Quarterly Reports on Form 10-Q and 90 days after the end of the fiscal year to file their Annual Reports on Form 10-K. The Adopting Release estimates that approximately 28 BDCs will be newly classified as non-accelerated filers because they are currently accelerated filers and have annual investment income of less than $100 million.[2]

The SEC did not originally propose an exclusion for BDCs from the definitions of accelerated filer and large accelerated filer. In describing its rationale for adopting the BDC exclusion in the final rules, the SEC cited extensively to a comment letter submitted by Proskauer noting, in part, "[Proskauer] urged that we adopt such an approach, stating that, among other reasons, the policy reasons that support providing regulatory relief to smaller reporting companies should apply equally to smaller BDCs."[3]

The amendments will be effective 30 days after publication in the Federal Register and will apply to an annual report filing due on or after the effective date. As of the date of this Client Alert, the rule amendments have not been published.

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[1] Amendments to the Accelerated Filer and Large Accelerated Filer Definitions, Exchange Act Release No. 34-88365 (March 12, 2020) (the "Adopting Release").

[2] According to the SEC, this includes seven BDCs that are emerging growth companies and therefore already exempt from the internal control over financial reporting auditor attestation requirement. We also note that BDCs that do not have a class of common equity securities listed on a national securities exchange are also non-accelerated filers.

[3] *See* Adopting Release at p. 43.