2019

Business Development Companies – The Basics

Christine Lazaro

BUSINESS DEVELOPMENT COMPANIES – THE BASICS

Christine Lazaro[1]

Business Development Companies ("BDCs") are a type of closed end fund. They were created by Congress in 1980, through amendments to the Investment Company Act of 1940 (the "1940 Act").[2]

BDCs were first created when a venture capital pool manager lobbied Congress to make it easier to invest in venture capital pools and private equity investments.[3] While there was early interest in BDCs, their popularity waned through the 1990s.[4] Since 2000, they have once again regained their popularity.[5]

BDCs provide funding to small and mid-sized businesses. Following the financial crisis, BDCs were able to provide loans to businesses that may not have been able to receive financing from more traditional sources.[6] In 2009, the first non-traded public REITs were issued, raising almost $100 million that year.[7]

This article will describe the regulations that govern BDCs: federal, state, and SRO. Next, the article will examine recent enforcement actions concerning the sale of BDCs by broker-dealers. Finally, the article will discuss concerns raised by the sale of non-traded BDCs to investors.

---

[1]Christine Lazaro is a Professor of Clinical Legal Education and the Director of the Securities Arbitration Clinic at St. John's University School of Law. The author wishes to thank David Marron ('20, St. John's University School of Law).

[2]Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477,94 Stat. 2275 (1980).

[3]*See* Matt Forstenhausler, Rob Meiner, and Eyal Seinfeld, "Business development companies: history, operational, accounting and tax considerations"; EY (2016), https://www.ey.com/Publication/vwLUAssets/EY-business-development-companies-history-operational-accounting-and-tax-considerations/$File/EY-business-development-companies-history-operational-accounting-and-tax-considerations.pdf.

[4]*Id.*

[5]*Id.*

[6]*Id.*

[7]Bruce Kelly, "Nontraded BDC Sales in Worst Year Since 2010," Investment News (Nov. 22, 2017), https://www.investmentnews.com/article/20171122/FREE/171129954/nontraded-bdc-sales-in-worst-year-since-2010.

I. BDC Structure and Regulation

a. Federal Securities Acts

BDCs are defined in the 1940 Act as closed end funds that meet certain criteria.[8] BDCs must elect to be regulated by the SEC as a business development company,[9] and are restricted in terms of the types of investments the fund may make, with at least 70% of the fund assets invested in "eligible" assets.[10] Eligible assets may include "a domestic issuer that either does not have any class of securities listed on a national securities exchange, or 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."[11]

BDCs must register their securities with the SEC under the Securities Exchange Act of 1934.[12] BDCs may be public exchange traded or non-traded securities, or they may be offered as private offerings. As public companies, BDCs are still required to make the appropriate filings with the SEC on a regular basis whether they are traded or non-traded.[13]

b. Internal Revenue Code

BDCs may elect to be treated as a "regulated investment company" ("RIC") under the Internal Revenue Code.[14] To qualify as an RIC, the BDC must meet three main requirements. First, the BDC must derive at least 90% of its income from dividends, interest, gains from the sale or exchange of securities and other qualifying income associated with the business of investing in securities.[15] Second, BDCs must invest at least 50% of its assets in cash items, securities of other RICs, government securities or other securities. However, any investment in any one security may not exceed 5% of the BDC's total assets, and may not be more than 10% of the outstanding voting shares of any single issuer.[16] A BDC may not invest any more than 25% of its assets in (1) any single issuer (other than US Government securities or other RICs); (2) any two or more issuers controlled by the BDC and engaged in the same or similar businesses; or (3) one or more "qualified publicly traded partnerships."[17] Finally, the BDC must distribute at least 90% of its

---

[8]15 U.S.C.A. § 80a-2(48).

[9]15 U.S.C.A. § 80a-53.

[10]15 U.S.C.A. § 80a-54.

[11]Kevin Mahn, "The ABCs of Business Development Companies", Forbes (Dec. 1, 2014), https://www.forbes.com/sites/advisor/2014/12/01/the-abcs-of-business-development-companies/#523304f969db.

[12]15 U.S.C.A. § 80a-53.

[13]*See supra* note 3. A BDC may register as a private placement as well; however, this paper will focus on public BDCs.

[14]26 U.S.C.A. § 851.

[15]26 U.S.C.A. § 851(b)(2).

[16]26 U.S.C.A. § 851(b)(3)(A).

[17]26 U.S.C.A. § 851(b)(3)(B).

annual taxable income to shareholders as dividends.[18] The benefit of qualifying as an RIC is the exemption of corporate level taxes.

c. FINRA Rules

Under the FINRA rules, BDCs are regulated as Direct Participation Plans or Programs ("DPPs").[19] DPPs are any "program which provides for flow-through tax consequences regardless of the structure of the legal entity or vehicle for distribution. . ."[20] There are a number of different types of DPPs, including MLPs and REITs.

Broker-dealers are not permitted to underwrite or participate in a public offering of a BDC unless certain conditions have been met, including both the BDC and the broker-dealer establishing suitability standards; the broker-dealer making certain disclosures; and the BDC having reasonable expenses.[21] These conditions are described in further detail below.

The BDC itself must have established standards of suitability which are disclosed in the program's prospectus.[22] In addition to the broad suitability requirements contained within FINRA Rule 2111, a broker must also satisfy the stricter suitability rules for selling non-traded DPPs if recommending a non-traded BDC, which may go beyond those set forth by the BDC itself. [23] For example, the broker must have reasonable grounds to believe that the customer is "in a financial position appropriate to enable him to realize to a significant extent the benefits described in the prospectus, including the tax benefits where they are a significant aspect of the program;" and that the customer has the net worth to sustain the level of risk in the BDC, including the loss of the investment and the lack of liquidity.[24] There is also a books and record requirement; the broker must maintain documents that explain how suitability was determined for each customer.[25]

If a broker-dealer is planning on participating in a public offering of a BDC, it must "have reasonable grounds to believe, based on information made available to him by the sponsor through a prospectus or other materials, that all material facts are adequately and accurately disclosed and provide a basis for evaluating the program."[26] The broker-dealer must receive at a minimum, facts relating to: "(i) items of compensation; (ii) physical properties; (iii) tax aspects;

---

[18]26 U.S.C.A. § 852.

[19]Investopedia, "Direct Participation Program (DPP)", https://www.investopedia.com/terms/d/dpp.asp.

[20]FINRA Rule 2310.

[21]FINRA Rule 2310(b).

[22]FINRA Rule 2310(b)(2)(A).

[23]FINRA Rule 2310(b)(2)(B).

[24]*Id.*

[25]*Id.*

[26]FINRA Rule 2310(b)(3).

(iv) financial stability and experience of the sponsor; (v) the program's conflict and risk factors; and (vi) appraisals and other pertinent reports."[27]

When recommending the purchase of a BDC, the broker must tell the customer "all pertinent facts relating to the liquidity and marketability of the program." [28] Pertinent facts include whether the sponsor of the BDC has offered prior programs that had a planned liquidation date and whether the prior programs actually liquidated during that time period.[29]

Brokers are also required to consider the expenses of the BDC if it is participating in the underwriting or public offering of the program. Brokers may not participate if the organization and offering expenses are not fair and reasonable.[30] FINRA provides guidance for firms, explaining that the expenses are unfair and unreasonable if: (i) the organization and offering expenses exceed 15% of the gross offering amount; (ii) total compensation exceeds 10% of the proceeds; (iii) compensation is to be paid out of the proceeds of the offering before the proceeds are released from escrow; (iv) compensation includes any of the following: a percentage of the management fee, a profit sharing arrangement, brokerage commissions, an over-riding royalty interest, a net profits interest, a percentage of revenues, a reversionary interest, a working interest, a security or right to acquire a security having an indeterminate value; (v) the program charges to reinvest dividends; or (vi) firms are reimbursed for due diligence expenses no included in a detailed and itemized invoice.[31]

FINRA also restricts the non-cash compensation that a broker or broker-dealer may receive for selling BDCs. FINRA does permit the following types of non-cash compensation: (i) gifts that do not exceed $100 and are not conditioned on achievement of a sales target; (ii) an occasional meal or event ticket so long as they are not frequent or extensive; and (iii) payment for training or educational meetings so long as attendance is not conditioned on achievement of a sales target and the location is appropriate for the purpose of the meeting – meaning it cannot be in an exotic locale.[32]

FINRA has also expressed concerns about the valuation of BDCs on customer account statements. In 2014, FINRA filed a proposed rule change with the SEC to address this issue.[33] In October 2014, the SEC approved the proposal.[34] In its approval, the SEC stated:

[27]FINRA Rule 2310(b)(3)(B).

[28]FINRA Rule 2310(b)(3)(D).

[29]*Id.*

[30]FINRA Rule 2310(b)(4)(A).

[31]FINRA Rule 2310(b)(4)(B).

[32]FINRA Rule 2310(c)(2).

[33]Securities Exchange Act Release No. 71545 (Feb. 12, 2014), 79 FR 9535 (Feb. 19, 2014) (Notice of Filing of Proposed Rule Change Relating to Per Share Estimated Valuations for Unlisted DPP and REIT Securities).

[34]Securities Exchange Act Release No. 73339 (Oct. 10, 2014), 79 FR 62489 (Oct. 17, 2014) (Order Approving SR-FINRA-2014-006, as Modified by Amendment No. 1).

> The proposal, as amended, is designed to address longstanding concerns with the current industry practice of displaying a DPP [BDC] or REIT security's immutable offering price as its per share estimated value on customer account statements throughout the offering period (which can last several years), despite the fact that the value of the DPP [BDC] or REIT security fluctuates. FINRA's proposed rule change would require members to include in customer account statements per share estimated values of unlisted DPP [BDC] and REIT securities that are developed in a manner reasonably designed to ensure they are reliable. The Commission believes that the proposal would, therefore, greatly improve the accuracy and transparency of the value of DPP [BDC] and REIT securities and, in turn, better protect the investing public.[35]

Under the amended rule, firms may only report values of BDCs based on one of two methodologies: (1) the net investment value; or (2) the appraisal value. The net investment methodology provides that, within 150 days of the second anniversary of the program breaking escrow, the firm may use the "net investment" value disclosed by the issuer's most recent periodic or current report.[36] For the appraisal value methodology, the firm may use a per share estimated value reflecting an appraised valuation disclosed in the issuer's most recent periodic or current report, which is consistent with the valuation requirements of the 1940 Act and the rules thereunder."[37]

In addition to the new valuation methodologies, broker-dealers also have new disclosure obligations. If the firm is using the "net investment" methodology, the firm must include the following statement: "IMPORTANT—Part of your distribution includes a return of capital. Any distribution that represents a return of capital reduces the estimated per share value shown on your account statement." [38] The broker-dealer must also disclose that the BDC is "not listed on a national securities exchange, are generally illiquid and that, even if a customer is able to sell the securities, the price received may be less than the per share estimated value provided in the account statement."[39]

Although the rule amendment was approved in October 2014, it was not effective until April 11, 2016.[40] As a result of this amendment, non-traded BDCs were revalued on customer account statements by April 2016, sometimes resulting in sharp drops in their valuations, which had been otherwise consistent since purchase.

---

[35] *Id.* at 62491.

[36] FINRA Rule 2231(c)(1)(A).

[37] FINRA Rule 2231(c)(1)(B).

[38] FINRA Rule 2231(c)(2).

[39] *Id.*

[40] FINRA Reg. Notice 15-02, "DPP and Unlisted REIT Securities; SEC Approves Amendments to FINRA Rule 2310 and NASD Rule 2340 to Address Values of Direct Participation Program and Unlisted Real Estate Investment Trust Securities" (Jan. 2015), http://finra.complinet.com/net_file_store/new_rulebooks/f/i/FINRA_Notice_15-02.pdf.

d. NASAA Guidance

NASAA, the North American Securities Administrators Association, "formulates Model Rules and Statements of Policy for implementation by its members as an ongoing priority to promote and encourage uniformity among its members in the interest of investor protection and to provide a regulatory framework for responsible capital formation."[41] Although NASAA has not adopted a Statement of Policy specifically for BDCs, it has adopted Omnibus Guidelines, which apply to any securities for which NASAA has not developed a specific policy statement.[42]

The Omnibus Guidelines set forth a number of requirements that must be met for a BDC to comply with state blue sky laws. For example, the Omnibus Guidelines mandate a minimum amount of experience that a Sponsor of the BDC must have.[43] The Sponsor must have "at least three years relevant experience demonstrating the knowledge and experience to acquire and manage the type of assets being acquired."[44] With respect to net worth, the Sponsor must a net worth that is the greater of either (i) $100,000, or (ii) 5% of the first $20 million of this offering and any DPP offerings within the prior 12 months, and 1% of any amount in excess of $20 million.[45]

---

[41]NASAA, "Regulatory Policy", https://www.nasaa.org/policy/regulatory-policy/.

[42]NASAA, "Omnibus Guidelines" (May 7, 2007), https://s30730.pcdn.co/wp-content/uploads/2011/07/f-Omnibus_Guidelines.pdf.

[43]Sponsor is defined within the Omnibus Guidelines as:

> Any PERSON directly or indirectly instrumental in organizing, wholly or in part, a PROGRAM or any PERSON who will control, manage or participate in the management of a PROGRAM, and any AFFILIATE of such PERSON. Not included is any PERSON whose only relation with the PROGRAM is that of an independent manager of a portion of PROGRAM assets, and whose only compensation is as such. "SPONSOR" does not include wholly independent third parties such as attorneys, accountants, and underwriters whose only compensation is for professional services rendered in connection with the offering of PROGRAM INTERESTS. A PERSON may also be deemed a SPONSOR of the PROGRAM by:
>
> > (a) taking the initiative, directly or indirectly, in founding or organizing the business or enterprise of the PROGRAM, either alone or in conjunction with one or more other PERSONS;
> > (b) receiving a material participation in the PROGRAM in connection with the founding or organizing of the business of the PROGRAM, in consideration of services or property, or both services and property;
> > (c) having a substantial number of relationships and contacts with the PROGRAM;
> > (d) possessing significant rights to control PROGRAM properties;
> > (e) receiving fees for providing services to the PROGRAM which are paid on a basis that is not customary in the industry; or
> > (f) providing goods or services to the PROGRAM on a basis which was not negotiated at arm's length with the PROGRAM.

Omnibus Guidelines I.B.27.

[44]Omnibus Guidelines II.A.

[45]Omnibus Guidelines II.B.

The Omnibus Guidelines also set forth program suitability requirements, requiring that investors have (i) a minimum annual income of $70,000 and a minimum net worth of $70,000; or (ii) a minimum net worth of $250,000.[46]

Both the Sponsor and the broker must determine that the BDC is a suitable and appropriate investment for the investor.[47] The suitability requirements are similar to those set forth by FINRA Rule 2310. Either the Sponsor or the broker must determine that the prospective investor (i) meets the minimum income and net worth standards; (ii) can benefit from participation in the program; (iii) is able to bear the economic risk of the investment; and (iv) understands the risks of the investment, including that the investor may lose their investment, the lack of liquidity, the restrictions on transferring the BDC, and the tax consequences.[48]

The Omnibus Guidelines also set forth content requirements and restrictions with respect to the BDC's subscription agreements. For example, the Sponsor may require that an investor make the following representations in the subscription agreement: (i) the investor meets the income and net worth standards; (ii) the investor has received a copy of the prospectus; and (iii) the investor knows the investment is illiquid.[49]

The Sponsor may not require that investor make any representations which are "subjective or unreasonable" that would cause the investor to believe they have given up rights they have under federal or state law, or shift the burden to determine suitability to the investor.[50] Additionally, the Sponsor may not require that the investor make any of the following representations: (i) the investor understands or comprehends the risks associated with the investment; (ii) the investment is suitable; (iii) the investor has read the prospectus; or (iv) the investor relied solely on the prospectus and not any representations from any person (such as the broker).[51]

Finally, Sponsors may earn reasonable management compensation, however, for BDCs, such compensation is limited to participation of net gains.[52]

Many states' blue sky regulations contain an explicit adoption of the NASAA Statements of Policy. For example, Kansas adopted the Omnibus Guidelines as well as a number of other statements.[53] Certain states, including Kansas, have also adopted additional suitability requirements:

> In addition to the income and net worth standards and other suitability requirements contained within the NASAA guidelines and statements of policy adopted under subsection (b), the administrator may require that the registration

[46]Omnibus Guidelines III.B.1.

[47]Omnibus Guidelines III.C.1.

[48]Omnibus Guidelines III.C.2.

[49]Omnibus Guidelines III.D.2.

[50]Omnibus Guidelines III.D.4.

[51]Omnibus Guidelines III.D.5.

[52]Omnibus Guidelines IV.D.2.(a).

[53]Kan. Admin. Regs. 81-7-2(b)(10).

> statement include a statement that recommends or requires each purchaser to limit the purchaser's aggregate investment in the securities of the issuer and other similar investments to not more than 10 percent of the purchaser's liquid net worth. For purposes of this subsection, liquid net worth shall be defined as that portion of the purchaser's total net worth that is comprised of cash, cash equivalents, and readily marketable securities, as determined in conformity with GAAP.[54]

It is important to check the relevant state's blue sky regulations to determine whether the NASAA Omnibus Guidelines apply to the purchase of a particular BDC.

II. BDC Enforcement Actions

There are not many enforcement actions related to the sale of BDCs due to their relatively recent increase in popularity. However, in 2016, FINRA issued a targeted examination letter seeking information from firms regarding their sales of non-traded BDCs and their due diligence practices.[55] FINRA requested information about the BDCs each firm sold; the firm's role in the offering; which other broker-dealers had selling agreements for the BDCs; how many customers purchased the BDC; and the firm's due diligence procedures.[56] Additionally, in 2014, FINRA conducted a review of firms selling non-traded REITs and BDCs to ensure customers had received volume discounts.[57] FINRA has not released the results from these examinations and reviews.

In addition to the targeted examinations and reviews, FINRA has also fined several firms for their BDC sales practices. Two FINRA enforcement actions focused on issues with concentration limits. First, FINRA fined Berthel Fisher $775,000 in part because it did not have adequate procedures to ensure the firm complied with concentration levels for BDCs. Berthel did not appropriately identify BDCs as alternative investments for purposes of calculating the account concentration levels.[58] It also did not train its supervisory staff to analyze state suitability standards.[59]

FINRA also fined LPL $950,000 in part for failing to have adequate procedures to ensure the firm complied with both internal concentration limits, as well as limits set by the BDCs or the states.[60]

---

[54]Kan. Admin. Regs. 81-7-2(c).

[55]FINRA, "Targeted Examination Letter on Non-Traded Business Development Companies" (Aug. 2016), http://www.finra.org/industry/non-traded-business-development-companies.

[56]*Id.*

[57]FINRA, NAC Decision Enforcement No: 2014042291901- Gopi Krishna Vungarala, 11 (Oct. 2, 2018), http://www.finra.org/sites/default/files/NAC_2014042291901_Vungarala_100218_0.pdf.

[58]FINRA, Letter of Acceptance, Waiver and Consent No. 2012032541401 - Berthel Fisher & Company Financial Services, Inc. and Securities Management & Research, Inc. (Dec. 2013), http://www.finra.org/sites/default/files/fda_documents/2012032541401_FDA_DM7X1975.pdf.

[59]*Id.*

[60]FINRA, Letter of Acceptance, Waiver and Consent No. 2011027170901 – LPL Financial LLC (Jan. 2014), http://www.finra.org/sites/default/files/fda_documents/2011027170901_FDA_D823266.pdf.

LPL was also fined by the Arkansas Securities Commissioner because it inconsistently classified non-traded BDCs and REITs as equities rather than alternative investments.[61]

The final case concerns sales of non-traded REITs and BDCs to a Native American Tribe. With respect to the firm, FINRA found that:

> FINRA found that from July 2011 through at least January 15, 2015, Vungarala was the tribe's PKS registered representative and also the tribe's Treasury Investment Manager responsible for managing the tribe's investment portfolio. PKS failed to adequately review the risks inherent in that relationship or establish procedures designed to mitigate the risks. FINRA found that as a result of these supervisory failures, Vungarala was able to misrepresent to the tribe that neither PKS nor he would receive commissions on its purchases, and he was therefore able to induce the tribe to invest more than $190 million in non-traded REITs and BDCs. In fact, Vungarala personally received at least $9 million in commissions from the tribe's investments.
>
> FINRA also found that PKS failed to identify that more than 200 of the tribe's purchases were eligible for discounts based on the volume of the purchases. FINRA found that Vungarala's commissions would have been reduced to approximately $6 million if the tribe received the volume discounts for which it was eligible; however, Vungarala misrepresented to PKS that the tribe did not want to receive the volume discounts. PKS failed to take reasonable steps to verify this statement even after it received inquiries about the missed discounts from a REIT issuer and FINRA staff.
>
> In addition, FINRA found that, between April 2009 and October 31, 2014, PKS failed to maintain and enforce an adequate supervisory system and written supervisory procedures to ensure compliance with the securities laws and FINRA rules when it sold non-traded REITs and BDCs. PKS did not have procedures that were reasonably designed to identify accounts that were eligible for volume discounts, and did not provide any guidance to its representatives or supervisors regarding how to ensure that the sales volume discounts were applied appropriately.[62]

FINRA fined the firm $750,000 and ordered restitution in the amount of $3,373,303.68.[63] Additionally, FINRA barred the broker for the fraudulent misrepresentations and omissions he made with respect to his receipt of commissions on the trades, and the Tribe's eligibility to receive

---

[61] *In the Matter of LPL Financial LLC*, Case No. S-16-0069, Arkansas Securities Commissioner (Jan. 2019), http://www.securities.arkansas.gov/!userfiles/LPL%20Financial%20LLC%20S-16-0069-19-OR02(1).pdf.

[62] FINRA, "FINRA Orders Purshe Kaplan Sterling Investments to Pay $3.4 Million in Restitution to Native American Tribe; Firm Also Fined $750,000 for Failures to Supervise" (Feb. 22, 2017), http://www.finra.org/newsroom/2017/finra-orders-purshe-kaplan-sterling-pay-34-million-native-american-tribe; FINRA, *Dep't of Enforcement v. Purshe Kaplan Sterling Investments and Gopi Krishna Vungarala*, Disciplinary Proceeding No. 2014042291901, Order Accepting Offer of Settlement (Feb. 21, 2017), http://www.finra.org/sites/default/files/PKSI_action_022217.pdf.

[63] *Id.*

volume discounts.[64] FINRA also ordered that the broker disgorge the $9,682,629 he received in commissions on the trades.[65]

III. BDC Concerns

Non-traded BDCs raise many of the same concerns as non-traded REITs. BDCs are structured very similarly to REITs, both a form of DPP. They have high costs, liquidity concerns, and transparency issues.[66] BDCs are raising less money each year. When non-traded BDCs were first sold in 2009, they raised almost $100 million.[67] The following year, sales more than tripled to $369 million. Non-traded BDCs hit their peak in 2014, raising $5.5 billion. In 2016, non-traded BDCs raised $1.5 billion. For the first nine months of 2017, non-traded BDCs raised only $624 million.

Non-traded BDCs, like non-traded REITs have high expenses. Broker-dealers may receive 10% of the offering proceeds for selling shares,[68] making them a very lucrative investment for the firm. Under the FINRA rules, the startup costs are considered unreasonable if they exceed 15%, so it is not unusual to see such high levels of initial expenses. This means that for a $10 investment, only $8.50 is being invested.

When FINRA changed the statement valuation rules in 2016, this affected both non-traded BDCs and non-traded REITs. Overnight, investors saw the values of their holdings decline, sometimes dropping 15% or more. In anticipation of this rule change, "shareholders withdrew $25.7 million from non-traded BDCs in the second quarter of 2015 and another $47.3 million in the third quarter."[69] Some BDCs, such as Business Development Corp. of America, froze redemptions.[70]
Both non-traded BDCs and REITs also suffer similar liquidity concerns. They do not trade on an exchange, so beyond the redemption programs offered by the BDC itself, there may be limited opportunities to sell shares on a secondary market. As stated above, the redemption programs are also often subject to suspension. The BDCs often hold illiquid investments, so there are limitations on redemptions built into the prospectus. Accordingly, if a BDC suspends redemptions, investors may be stuck holding the BDC for years.

---

[64] *See supra* note 57 at 44.

[65] *Id.*

[66] Daniel Kurt, "What Are Nontraded BDCs?," Investopedia (Oct. 24, 2018), https://www.investopedia.com/articles/retirement/051616/what-are-nontraded-bdcs-and-should-you-stay-away-them.asp.

[67] Bruce Kelly, "Nontraded BDC Sales in Worst Year Since 2010," Investment News (Nov. 22, 2017), https://www.investmentnews.com/article/20171122/FREE/171129954/nontraded-bdc-sales-in-worst-year-since-2010.

[68] *Id.*

[69] *Id.*

[70] *Id.*

Non-traded BDCs may also retain discretion as to the payment of interest. While BDCs are obligated to pay out 90% of their taxable income to retain their status as RICs, if it is an unprofitable year, there may be no income to pay out. Distributions may be suspended, leaving investors with an illiquid investment that is not generating any yield at all.

CONCLUSION

BDCs have been around for decades, but they were not used much during the 1990's and only recently have surged in popularity. Although BDCs are closed-end funds, they are very similar to non-traded REITs. As the recent enforcement actions demonstrate, non-traded BDCs and non-traded REITs raise many of the same concerns. Although they may appear to be high yield investments, they come with a lot of risks.