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United States Senate

WASHINGTON, DC 20510

April 24, 2006

The Honorable Christopher Cox
Chairman
U.S. Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman Cox:

We write to express our concern about the need to modernize the definition of "eligible portfolio company" under the Investment Company Act of 1940. The lack of final action by the Securities and Exchange Commission has created tremendous uncertainty for business development companies (BDCs) and their public shareholders, and is impeding the market's ability to address the capital needs of small and growing businesses.

As you know, the current definition of "eligible portfolio company" is tied to the Federal Reserve Board's margin rules, which have changed over the years, resulting in the unintended consequence of significantly limiting the number of public companies that can access capital from a BDC.

On November 1, 2004 the Division of Investment Management proposed a rulemaking that would change the definition of eligible portfolio company. However, the initial proposal suggested that, "most issuers that are able to list their securities on an Exchange or on NASDAQ have access to the public capital markets; so therefore, are not in need of capital from a BDC." This proposal, in our opinion, reflects a lack of understanding of the need for capital by many small and medium sized public companies, even some of those listed on an exchange. This new staff interpretation of the law is contrary to Congressional intent. The legislative history states the following: "...It is estimated there are about 12,000 publicly held operating companies; the definition of 'eligible portfolio company' would include about two-thirds, or 8,000, of those companies, plus all privately-held companies. In addition, the Commission is given rulemaking authority to expand the class of eligible portfolio companies..."

Moreover, the proposed rule suggested that it would be inappropriate to adopt a definition that relies on market capitalization, the approach that has unanimously passed the House and been adopted by the Commission in many similar situations. While we support the House-passed legislation (HR 436) and the companion introduced in the Senate, we would strongly encourage the Commission to take prompt action to adopt a rule that expands the definition consistent with Congress' original intent and current Congressional proposals.

Finally, we must act quickly to modernize the definition and provide certainty to market participants. BDCs fear that their current practices could be alleged to be in violation of the securities law.

We look forward to receiving your comments, and the views of your fellow Commissioners, as to the timing of a potential final rulemaking and the scope of an appropriate and updated definition. A prompt remedy to the current situation is necessary to provide fairness to BDCs and their shareholders, as well as companies that lack access to traditional forms of capital.

Sincerely,

Charles E. Schumer
United States Senator

Robert Menendez
United States Senator

Cc: Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Annette L. Nazareth