Investment Company Act of 1940 — Section 57(a)(4) and Rule 17d-1
Fifth Street Finance Corp.

February 25, 2010

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

IM Ref. No. 20091241131
Fifth Street Finance Corp.
File No. 1-33901

Your letter dated February 23, 2010, requests our assurance that we would not recommend enforcement action to the Securities and Exchange Commission ("Commission") against Fifth Street Mezzanine Partners II, L.P. ("Private Fund"), a Delaware limited partnership, under Section 57(a)(4) of the Investment Company Act of 1940 ("Act") or Rule 17d-1 under the Act, if the Private Fund enters into a debt restructuring transaction, as described in your letter, in which Fifth Street Finance Corp. ("FSF"), a Delaware corporation, also would be a participant, without applying for and receiving a Commission order under Rule 17d-1 under the Act.

Facts

You state that FSF came into existence on January 2, 2008, when Fifth Street Mezzanine Partners III, L.P. (the "Prior Fund"), a private fund that relied on Section 3(c)(7) of the Act, merged with and into FSF ("Merger"), a closed-end management investment company that elected on that same date to be regulated as a business development company ("BDC") under the Act. You state that, as a result of the Merger, all of the assets and liabilities of the Prior Fund became the assets and liabilities of FSF. You state that FSF made its initial public offering on June 11, 2008. You state that FSF is a specialty finance company that lends to and invests in small and mid-sized companies. You state that, as of December 31, 2009, FSF had total assets of approximately $453.2 million.

You state that Fifth Street Management LLC ("Adviser"), an investment adviser registered under the Investment Advisers Act of 1940, serves as investment adviser to FSF. You state that Mr. Leonard M. Tannenbaum ("Tannenbaum") is the managing member of the Adviser and president, chief executive officer and chairman of the board of directors of FSF. You state that Tannenbaum also is the founder and manager of Fifth Street Capital LLC, investment adviser to the Private Fund (the "Private Fund Adviser"). You state that the Adviser and the Private Fund Adviser have investment personnel that overlap to a substantial extent. You state that the Private Fund, which relies on Section 3(c)(7) of the Act, and FSF have similar investment objectives and strategies. You state that, as of December 31, 2009, the Private Fund had total assets of approximately $66.8 million. You also state that the Private Fund's committed capital has been fully called and, other than follow-on investments in existing portfolio companies, the Private Fund is no longer making investments.

You state that in July 2007, the Prior Fund and the Private Fund participated as co-lenders on identical terms in a transaction ("2007 Transaction") to fund an acquisition by Crownbrook Debco LLC ("Crownbrook Debco") of Nicos Polymers & Grinding Inc. You state that the 2007 Transaction was structured as a $6.35 million Term A loan and an $11.25 million Term B loan to

Crownbrook Debco (together, the "Loans"), each funded equally by the Prior Fund and the Private Fund. You state that, in the 2007 Transaction, the Prior Fund and the Private Fund each also received, as consideration for providing the Loans, a 2.57% interest in the outstanding equity of Crownbrook Acquisition I LLC ("Crownbrook Acquisition"), a holding company that owns 81.09% of Crownbrook Debco, and each purchased 0.75% of the equity in Crownbrook Acquisition at an equal price per share. You state that, following the 2007 Transaction, the Private Fund and the Prior Fund owned 4.43% and 3.32%, respectively, of Crownbrook Acquisition.[1] You state that FSF's investment in the Loans and the equity interest in Crownbrook Acquisition represent less than 1.4% of the fair value of FSF's assets as of December 31, 2009. You also state that the Private Fund's investment in the Loans and the equity interest in Crownbrook Acquisition represent 8.5% of the fair value of the Private Fund's assets as of December 31, 2009.

You state that recently Crownbrook Debco's financial condition has substantially deteriorated, and it has been unable to service its outstanding debt, including the Loans. You state that Crownbrook Debco has been negotiating with its debt holders, including FSF and the Private Fund, to restructure its balance sheet (the "Proposed Restructuring").

Analysis

Section 57(a)(4) of the Act generally prohibits certain affiliated persons of a BDC from participating in a joint transaction with the BDC in contravention of such rules as the Commission may prescribe for the purpose of limiting or preventing participation by the BDC on a basis less advantageous than that of such persons. Section 57(b)(2) of the Act provides, in relevant part, that any person who is directly or indirectly controlling, controlled by, or under common control with a BDC is subject to Section 57(a) of the Act.[2] The Commission has not adopted any rules under Section 57(a) of the Act. Section 57(i) of the Act, in relevant part, provides that, until the adoption by the Commission of rules under Section 57(a) of the Act, the rules under Section 17 of the Act applicable to registered closed-end investment companies ("RICs") shall apply to transactions subject to Section 57(a) of the Act. Rule 17d-1 under the Act generally prohibits an affiliated person of a RIC from participating in a joint transaction with the RIC unless an application regarding the transaction has been filed with the Commission and has been granted by an order. Rule 17d-1(b) under the Act provides that, in passing upon such an application, the Commission will consider whether the participation of the RIC in the transaction on the basis proposed is consistent with the provisions, policies and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

You state that the Private Fund may be deemed to be an affiliated person of FSF under Section 57(b)(2) of the Act by virtue of being under common control of Tannenbaum, who controls both the Adviser and the Private Adviser, which in turn control FSF and the Private Fund, respectively. You state that the Private Fund therefore may be prohibited under Rule 17d-1 under the Act from participating in the Proposed Restructuring with FSF without first applying for and receiving a Commission order.

You state that the terms of the Proposed Restructuring, described in your letter, will treat FSF and the Private Fund equally, in proportion to their respective interests. You also state that, absent the Proposed Restructuring, FSF and the Private Fund each would stand to lose its entire investment. You further state that FSF's participation in the Proposed Restructuring has been approved by FSF's board of directors, including a majority of those directors who are not "interested persons" of FSF as defined in Section 2(a)(19) of the Act, as being on a basis no less advantageous than that of other participants

and in the best interest of FSF and its shareholders. You also state that the timing of the Proposed Restructuring make impracticable applying for and receiving a Commission order under Rule 17d-1 under the Act.

Conclusion

Based on the facts and representations in your letter, we would not recommend enforcement action to the Commission against the Private Fund under Section 57(a)(4) of the Act or Rule 17d-1 under the Act, if the Private Fund enters into the Proposed Restructuring without applying for and receiving a Commission order under Rule 17d-1 under the Act. This response represents our view on enforcement action only and does not express any legal or interpretive conclusion on the issues presented. Because our position is based on the facts and representations in your letter, any different facts or representations may require a different conclusion.[3]

Wendy Friedlander
Senior Counsel

[1] You state that the Private Fund had received 1.12% of Crownbrook Acquisition's outstanding equity in a prior, January 2007 transaction with Crownbrook Debco.

[2] Section 2(a)(9) of the Act defines "control" to mean the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.

[3] The Division of Investment Management generally permits third parties to rely on no-action or interpretive letters to the extent that the third party's facts and circumstances are substantially similar to those described in the underlying request for a no-action or interpretive letter. *See Informal Guidance Program for Small Entities*, Investment Company Act Release No. 22587 (Mar. 27, 1997) n.20. In light of the very fact-specific nature of your request, however, the position expressed in this letter applies only to the entity seeking relief, and no other entity may rely on this position.

Incoming Letter

The Incoming Letter is in Acrobat format.

http://www.sec.gov/divisions/investment/noaction/2010/fifthstreet022510.htm

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