

EQUUS TOTAL RETURN, INC.  
Form 40-APP/A  
November 23, 2016

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Securities Act File No. 812-14653

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UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

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AMENDMENT NO. 3

TO THE

APPLICATION FOR AN ORDER PURSUANT TO SECTION 6(c) OF THE INVESTMENT COMPANY ACT OF 1940 (the "1940 ACT") GRANTING AN EXEMPTION FROM SECTIONS 23(a), 23(b) AND 63 OF THE 1940 ACT, PURSUANT TO SECTION 61(a)(3)(B) OF THE 1940 ACT PERMITTING AWARDS OF COMMON STOCK PURCHASE OPTIONS TO NON-EMPLOYEE DIRECTORS, PURSUANT TO SECTION 57(i) OF THE 1940 ACT AND RULE 17d-1 UNDER THE 1940 ACT AUTHORIZING CERTAIN JOINT TRANSACTIONS OTHERWISE PROHIBITED BY SECTION 57(a)(4) OF THE 1940 ACT, AND PURSUANT TO SECTION 23(c)(3) OF THE 1940 ACT GRANTING AN EXEMPTION FROM SECTION 23(c)

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EQUUS TOTAL RETURN, INC.

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700 Louisiana Street, 48<sup>th</sup> Floor

Houston, Texas 77002

(713) 529-0900

*All Communications, Notices and Orders to:*

**Mr. Kenneth I. Denos**

**Secretary and Chief Compliance Officer**

**Equus Total Return, Inc.**

**700 Louisiana Street, 48<sup>th</sup> Floor**

**Houston, Texas 77002**

**Telephone: (713) 529-0900**

**Facsimile (212) 671-1534**

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*Copies to:*

**Martin C. Glass, Esq.**

**Jenner & Block LLP**

**919 Third Avenue**

**New York, NY 10022**

**Telephone: (212) 891-1600**

**Facsimile: (212) 891-1699**

**November 23, 2016**

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the Fund's 2016 Equity Incentive Plan (the "**Plan**"). Equus hereby applies for an order (the "**Order**") of the U.S. Securities and Exchange Commission (the "**Commission**") as follows:

- (i) pursuant to Section 6(c) of the 1940 Act, granting the Fund an exemption from Sections 23(a), 23(b), and 63 to issue restricted shares of its common stock from treasury ("**Restricted Stock**") pursuant to the Plan;
  - (ii) pursuant to Section 61(a)(3)(B) of the 1940 Act, enabling the Fund to grant common stock purchase options under the Plan ("**Options**") to directors of Equus who are not employees of Equus ("**Non-Employee Directors**");
    - (iii) pursuant to Section 57(i) and Rule 17d-1 of the 1940 Act, authorizing the Fund to engage in certain joint transactions otherwise prohibited by Section 57(a)(4); and
    - (iv) pursuant to Section 23(c)(3) of the 1940 Act, granting the Fund an exemption from Section 23(c).
- The Order would permit the Fund to:

issue Restricted Stock or Options as part of the compensation package for participants in the Plan, which (i) participants would include all directors, officers, or employees of Equus (collectively, "**Participants**" and each a "**Participant**");

- (ii) withhold shares of the Fund's common stock or purchase shares of the Fund's common stock from Participants to satisfy tax withholding obligations relating to the vesting of Restricted Stock or the exercise of Options that will be granted pursuant to the Plan; and
- (iii) permit Participants to pay the exercise price of Options that will be granted to them pursuant to the Plan with shares of the Fund's common stock.

[1] Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the 1940 Act and makes available significant managerial assistance with respect to the issuers of such securities.

## II.

## BACKGROUND

### *About Equus*

Equus was formed as a Delaware corporation by Equus Investments II, L.P. (the “*Partnership*”) on August 16, 1991. On July 1, 1992, the Partnership was reorganized and all of the assets and liabilities of the Partnership were transferred to the Fund in exchange for shares of common stock of the Fund. On August 11, 2006, the Equus shareholders approved the change of the Fund’s investment strategy to a total return investment objective. This strategy seeks to provide the highest total return, consisting of capital appreciation and current income. In connection with this strategic investment change, the shareholders also approved the change of name from Equus II Incorporated to Equus Total Return, Inc. Shares of the Fund’s common stock are traded on the New York Stock Exchange under the symbol “EQS.” As of November 23, 2016, Equus had 12,673,646 shares of common stock outstanding.

Equus is governed by a seven-member Board of Directors (sometimes referred to herein as the “*Board*”), five of whom are (i) not considered “interested persons” of the Fund as defined in Section 2(a)(19) of the 1940 Act, and (ii) considered independent within the meaning of the rules of the New York Stock Exchange. The Fund attempts to maximize the return to shareholders in the form of current investment income and long-term capital gains by investing in the debt and equity securities of companies with a total enterprise value of between \$5.0 million and \$75.0 million, although the Fund may engage in transactions with smaller or larger investee companies from time to time. Equus seeks to invest primarily in companies pursuing growth either through acquisition or organically, leveraged buyouts, management buyouts and recapitalizations of existing businesses or special situations. The Fund’s income-producing investments consist principally of debt securities, which may include bonds, subordinated debt, debt convertible into common or preferred stock, or debt combined with warrants and common and preferred stock. Debt and preferred equity financing may also be used to create long-term capital appreciation through the exercise and sale of warrants received in connection with the financing. Equus also seeks to achieve capital appreciation by making investments in equity and equity-oriented securities issued by privately-owned companies or smaller public companies in transactions negotiated directly with such companies.

### *The Plan*

On April 15, 2016, by unanimous vote, the Equus Board adopted the Plan and recommended the same for approval by the Fund’s shareholders, which approval was granted at the annual meeting of Equus shareholders held on June 13, 2016. A copy of the Plan is attached to this Application as Exhibit “A”. The Plan became effective as of the date of such approval.

The Plan is intended to promote the interests of the Fund by encouraging officers, employees, and directors of the Fund and its affiliates to acquire or increase their equity interest in the Fund and to provide a means whereby they may develop a proprietary interest in the development and financial success of the Fund, to encourage them to remain with and devote their best efforts to the business of the Fund, thereby advancing the interests of the Fund and our shareholders. The Plan is also intended to enhance the ability of the Fund and its affiliates to attract and retain the services of individuals who are essential for the growth and profitability of the Fund.

### **III. EXEMPTION APPLICATION TO ISSUE RESTRICTED STOCK AND OPTIONS**

The Fund is applying for an Order of the Commission: (i) pursuant to Section 6(c), granting an exemption from Sections 23(a), 23(b), and 63, (ii) pursuant to Section 63(a)(3)(B), (iii) from Section 57(a)(4) pursuant to Section 57(i) and Rule 17d-1 authorizing certain joint transactions that would otherwise be prohibited under the 1940 Act, and (iv) pursuant to Section 23(c)(3) granting an exemption from Section 23(c). The Order, if granted, would enable Equus to issue Restricted Stock and Options under the Plan to its officers, employees, including any employees who are members of the Board of Equus ("***Employee Directors***"), and to Non-Employee Directors of Equus.

#### **Reason for Application**

##### ***Compensation Practices Generally and in the Asset Management Industry***

The market for talented directors, officers, and employees is highly competitive and, consequently, compensation arrangements with such persons are necessarily geared toward providing performance and longevity incentives that may enhance organizational effectiveness and build shareholder value. Equus believes this principle also holds true for investment professionals and the individuals who provide the governance functions for the investment organizations, and seeks to offer fair compensation packages to these individuals that are competitive with those offered by other investment management businesses. While the Fund recognizes that director, officer,

and employee retention is critical for all companies, Equus also believes that the highly specialized nature of its business, the competitiveness of its market and the small size of its potential Participant base relative to its assets and revenue make retention of these individuals even more critical for the Fund. In this regard, the ability of the Fund to offer equity-based compensation to directors, officers, and employees of Equus aligns their interests with those of the Equus shareholders and provides an incentivization and retention tool that is vital to the Fund's future growth and success.

The Plan would enable Equus to offer its directors, officers, and employees compensation packages that are competitive with those offered by other funds and operating businesses, which would enhance the ability of Equus to hire and retain superior senior management and other key personnel. Equus believes that offering competitive compensation packages is critical to the Fund's ability to generate the best possible risk-adjusted returns for its shareholders.

### ***Use of Restricted Stock and Options***

Equus strongly believes that Restricted Stock and Options offer an attractive form of equity-based compensation for all Plan Participants, whether in their capacity as a director, officer, or employee of the Fund. Relative to other forms of compensation, the award of Restricted Stock and Options will allow Equus to (1) compete more successfully with commercial banks, investment banks, other publicly traded companies, and private equity funds for skilled employees, officers, and directors; (2) develop superior alignment of the Fund's business strategy, shareholder interests and employee interests; (3) manage dilution and cash expenses associated with equity-based compensation and salaries and bonuses; and (4) match the return expectations of the business more closely with its equity based compensation. The Fund believes the award of Restricted Stock and Options will have a clear and meaningful benefit to its shareholders and its business prospects that supports approval of this Application.

### ***Successfully Competing with Private Equity Firms***

In order to compete successfully with private equity funds for talented portfolio and business management personnel, Equus ideally would be able to pass through to its employees, in the form of long-term capital gain payments, at least 20 percent of the net realized income of Equus over time. Inasmuch as Equus, as a publicly traded corporation, cannot provide a carried interest to its management team that is customarily available to the general partners of partnerships, the Plan represents the mechanism closest to replicating the fund structure.

### ***Aligning the Business Plan with Shareholder Interests and the Interests of Employees and Principals***

Alignment of a company's business plans, its shareholder expectations and its employee compensation is an essential component of long-term business success. Long-term business success is in the interest of the Fund's shareholders, directors, officers, and employees. Equus typically makes longer term investments primarily in privately held businesses that typically stay in its portfolio for the long term. The Fund's business plan involves taking on investment risk over an extended period of time, and a premium is placed on the Fund's ability to maintain stability of net asset values. The Fund's strategy is to generate capital appreciation and income from its portfolio of investments in the debt and equity securities. As a taxpayer that elects to be regulated as a RIC, Equus is required to pay out 90% of its annual

taxable income to maintain its tax advantaged status and 98% of its annual taxable income to avoid non-deductible excise taxes. Equus shareholders can benefit from the Fund's income through the payment of dividends and capital appreciation through a rising stock price. The preservation of asset values, the monetization of portfolio holdings, and generation of income from existing investments remain a principal focus of Fund management, its employees, and Non-Employee Directors.

The implications of the Fund's business model, as described above, on the attractiveness of using Restricted Stock and Options are relatively clear. Holders of Restricted Stock and Options, over time, become owners of the stock with a vested interest in value maintenance and stock appreciation. These interests are completely aligned with those of the Fund's shareholders. Moreover, the private equity funds with which Equus competes are able to pay higher total cash compensation, composed of salaries and bonuses than the Fund is able to pay because of the expenses that the Fund must pay that are related to the maintenance of its status as a publicly held company and to maintain compliance with the 1940 Act. In addition, the private firms with which Equus must compete for personnel typically permit their employees to co-invest with them, which Equus is not permitted to do under the 1940 Act.

#### ***Matching Return Expectations***

Awards of Restricted Stock and Options motivate behavior that is consistent with the type of return expectations that Equus has established for its shareholders. The Fund's strategy is to originate high quality, long-term assets and to support the risk management activity of its portfolio companies over a long period of time. Further, the Fund's business plan is to execute a methodical and conservative accumulation of assets that have a risk-based pricing premium relative to similar securities. To this end, equity-based incentives such as Restricted

Stock and Options place more value on the quality of originated assets over the quantity of originated assets, and thus, these types of incentives are an attractive compensation tool for Equus to align employee interests with shareholder interests. Awards of Restricted Stock and Options that vest over time or that are based upon performance targets will allow the Fund to set objectives and provide meaningful rewards over time to Participants who effectuate the targeted outcome of income and principal stability.

Equus management and the Board, including the Compensation Committee of the Board, have considered each of the factors discussed above and believe that the issuance of Restricted Stock as a form of equity-based compensation is in the best interest of the Equus shareholders.

## **Summary of the Plan**

### ***Plan Administration***

The Plan will be administered by the Board or the Compensation Committee of the Board (the Board or the Compensation Committee discharged to administer the Plan is hereafter referred to as the “***Plan Administrator***”). The Plan Administrator has full power to select, from among the individuals eligible for awards, the individuals to whom awards will be granted, to make any combination of awards to participants, and to determine the specific terms and conditions of each award, subject to the provisions of the Plan. Each issuance of Restricted Stock under the Plan will be approved by the required majority, as defined in section 57(o) of the 1940 Act, of the Fund’s directors (the “***Required Majority***”)<sup>[2]</sup> on the basis that the issuance is in the best interests of the Fund and its shareholders. The date on which the Required Majority approves an issuance of Restricted Stock will be deemed the date on which the subject Restricted Stock is granted.

### ***Eligibility***

If this Application is approved, persons eligible to participate in the Plan will be those full or part-time officers, employees, and Non-Employee Directors of the Fund and its subsidiaries as selected from time to time by the Plan Administrator in its discretion. Approximately 9 individuals at Equus are currently eligible to participate in the Plan, which includes 3 officers, one employee who is not an officer, and 5 non-employee directors.

### ***Aggregate Plan Limits***

Equus has reserved 2,534,728 shares for issuance under the Plan, whether as awards of Restricted Stock or as Options. If all of the shares of Restricted Stock under the Plan were issued and all Options issued under the Plan were issued and subsequently exercised, the total amount of additional Equus common stock issued from treasury would equal 20% of the Fund’s shares of common stock presently outstanding. The Order requested hereunder is subject to the condition that the amount of voting securities that would result from the exercise of all of the Fund’s outstanding warrants, Options and rights, together with any Restricted Stock issued pursuant to the Plan, at the time of issuance shall not exceed 25% of the outstanding voting securities of the Fund, except that if the amount of voting securities

that would result from the exercise of all of the Fund's outstanding warrants, Options and rights issued to the Fund's directors, officers and employees, together with any Restricted Stock issued pursuant to the Plan, would exceed 15% of the outstanding voting securities of the Fund, then the total amount of voting securities that would result from the exercise of all outstanding warrants, Options and rights, together with any Restricted Stock issued pursuant to the Plan, at the time of issuance shall not exceed 20% of the outstanding voting securities of the Fund. Any shares withheld from an award, either to satisfy tax withholding requirements, or pursuant to the delivery of shares of common stock or Restricted Stock upon the exercise of Options, will not be returned to the Plan reserve. The combined maximum amount of Restricted Stock that may be issued under the Plan to all Participants will be 10% of the outstanding common shares of the Fund on the effective date of the Plan, plus 10% of the number of shares issued or delivered by the Fund (other than pursuant to compensation plans) during the term of the Plan. Any shares withheld from an award, either to satisfy tax withholding requirements, or pursuant to the delivery of shares of common stock or Restricted Stock upon the exercise of Options, will not be returned to the Plan reserve. The combined maximum amount of Restricted Stock that may be issued under the Plan to all Participants will be 10% of the outstanding common shares of the Fund on the effective date of the Plan, plus 10% of the number of shares issued or delivered by the Fund (other than pursuant to compensation plans) during the term of the Plan.<sup>[3]</sup>

<sup>[2]</sup> Section 57(o) provides that the term "required majority," when used with respect to the approval of a proposed transaction, plan, or arrangement, means both a majority of a BDC's directors or general partners who have no financial interest in such transaction, plan or arrangement and a majority of such directors or general partners who are not interested persons of such company.

<sup>[3]</sup> For purposes of calculating compliance with this limit, the Fund will count as Restricted Stock all shares of the Fund's common stock that are issued pursuant to the Plan less any shares that are forfeited back to the Fund and cancelled as a result of forfeiture restrictions not lapsing.

### ***Individual Plan Limits***

The maximum award of stock Options granted to any one individual will not exceed 1,000,000 shares of common stock (subject to adjustment for stock splits and similar events) for any calendar year period, net of any shares canceled or redeemed in connection with any tax withholding. The maximum award of shares of Restricted Stock issued to any one individual will not exceed 500,000 shares of common stock (subject to adjustment for stock splits and similar events) for any calendar year period, net of any shares canceled or redeemed in connection with any tax withholding.

### ***Amendment and Termination***

The Board may, without shareholder approval, modify, revise or terminate the Plan at any time and from time to time, subject to the terms of (a) the Order requested from the Commission pursuant to this Application, (b) the Fund's Certificate of Incorporation and Bylaws, and (c) applicable law. The Board will seek shareholder approval of any action modifying a provision the Plan if it is determined that such shareholder approval is appropriate under the provisions of applicable law, the Fund's Certificate of Incorporation or Bylaws, or pursuant to the Order. The Plan will terminate when all shares of the Fund's common stock reserved for issuance thereunder have been issued and the forfeiture provisions on all Restricted Stock awards have lapsed, or otherwise by action of the Board. The Board will not make any material amendment to the Plan unless the Fund receives an order from the Commission approving the terms of such amendment.

### ***Stock Options***

The Plan permits the granting of (1) Options to purchase common stock intended to qualify as incentive stock options under Section 422 of the Code and (2) Options that do not so qualify. Options granted under the Plan will be non-qualified options if they fail to qualify as incentive options or exceed the annual limit on incentive stock options. Incentive stock options may only be granted to employees of the Fund and its subsidiaries. Non-qualified options may be granted to any persons eligible to receive incentive options, officers of the Fund and, subject to the Order requested hereby, to non-employee directors. The option exercise price of each Option will be determined by the Plan Administrator but may not be less than 100% of the fair market value of the common stock on the date of grant, or if required under the 1940 Act, not less than the net asset value of the common stock on the date of grant. Fair market value for this purpose will be the last reported sale price of the shares of common stock on the New York Stock Exchange on the date of grant.

The term of each Option will be fixed by the Plan Administrator and may not exceed ten years from the date of grant. The Plan Administrator will determine at what time or times each Option may be exercised. Options may be made exercisable in installments and the exercisability of Options may be accelerated by the Plan Administrator. In general, unless otherwise permitted by the Plan Administrator, no Option granted under the Plan is transferable by the optionee other than by will or by the laws of descent and distribution, and Options may be exercised during the optionee's lifetime only by the optionee, or by the optionee's legal representative or guardian in the case of the optionee's incapacity.

Upon exercise of Options, the Option exercise price must be paid in full either in cash, by certified or bank check or other instrument acceptable to the Plan Administrator or by delivery (or attestation to the ownership) of shares of common stock that are beneficially owned by the optionee for at least six months or were purchased in the open market. Subject to applicable law, the exercise price may also be delivered to the Fund by a broker pursuant to irrevocable instructions to the broker from the optionee. In addition, the Plan Administrator may permit non-qualified options to be exercised using a net exercise feature which reduces the number of shares issued to the optionee by the number of shares with a fair market value equal to the exercise price.

To qualify as incentive options, Options must meet additional federal tax requirements, including a \$100,000 limit on the value of shares subject to incentive options that first become exercisable by a Participant in any one calendar year.

### ***Restricted Stock***

Subject to the Order requested hereby, the Plan Administrator will be authorized to grant Restricted Stock awards. A grant of Restricted Stock is a grant of shares of the Fund's common stock that, at the time of issuance, are subject to certain forfeiture provisions, and thus are restricted as to transferability until such forfeiture restrictions have lapsed. The Restricted Stock will be subject to restrictions on transferability and other restrictions as required by the Plan Administrator from time to time. Except to the extent restricted by the Plan Administrator, a Participant granted an award of Restricted Stock will have all the rights of any other shareholder, including the right to vote the Restricted Stock and the right to receive dividends. During the restriction period (i.e., prior to the lapse of applicable forfeiture provisions), the Restricted Stock generally may not be sold, transferred, pledged, hypothecated, margined, or otherwise encumbered by the Participant. Except as the Plan Administrator otherwise determines, upon termination of a Participant's service as a director, officer, and employee of the Fund during the applicable restriction period, Restricted Stock, for which forfeiture provisions have not lapsed at the time of such termination, shall be forfeited.

### ***Performance Goals***

The Plan Administrator may determine, in its discretion, that an award of Restricted Stock to the Chief Executive Officer or certain of the Fund's other most highly compensated officers will be designed to comply with the performance-based exception under Section 162(m) of the Code. In such case, the level of vesting of the award will depend on the attainment of any of the following performance criteria, either alone or in any combination, which may be expressed with respect to the Fund or one or more operating units or groups, as the Plan Administrator may determine: (a) cash flow; (b) cash flow from operations; (c) total earnings; (d) earnings per share, diluted or basic; (e) earnings per share from continuing operations, diluted or basic; (f) earnings before interest and taxes; (g) earnings before interest, taxes, depreciation, and amortization; (h) earnings from operations; (i) net asset turnover; (j) inventory turnover; (k) capital expenditures; (l) net earnings; (m) operating earnings; (n) gross or operating margin; (o) debt; (p) working capital; (q) return on equity; (r) return on net assets; (s) return on total assets; (t) return on capital; (u) return on investment; (v) return on sales; (w) net or gross sales; (x) market share; (y) economic value added; (z) cost of capital; (aa) change in assets; (bb) expense reduction levels; (cc) debt reduction; (dd) productivity; (ee) delivery performance; (ff) safety record; (gg) stock price; and (hh) total shareholder return. Performance goals may be determined on an absolute basis or relative to internal goals or relative to levels attained in prior years or related to other companies or indices or as ratios expressing relationships between two or more performance goals. Performance goals may but need not be determinable in conformance with generally accepted accounting principles.

### ***Change of Control Provisions***

The Plan provides that, upon the effectiveness of a "change of control" as defined in the Plan, unless otherwise determined by the Plan Administrator at the time an award is made under the Plan, all stock Options and shares of Restricted Stock may vest upon and subject to the closing of the change of control and all outstanding Options will be assumed or continued by the successor entity. In addition, in the event an optionee's employment or other service terminates upon or following a change of control, any then outstanding Options (or other award continued or substituted therefor) shall remain exercisable for a period of 6 months following such termination, or, if earlier, the expiration date of such option.

### ***Adjustments for Stock Dividends, Stock Splits, Etc.***

The Plan requires the Plan Administrator to make appropriate adjustments to the number of shares of common stock that are subject to the Plan, to certain limits in the Plan, and to any outstanding awards to reflect stock dividends, stock splits, extraordinary cash dividends and similar events.

***Tax Withholding***

Participants in the Plan are responsible for the payment of any federal, state or local taxes that the Fund is required by law to withhold upon the exercise of Options or stock appreciation rights or vesting of other awards. Subject to approval by the Plan Administrator, Participants may elect to have the minimum tax withholding obligations satisfied by authorizing the Fund to withhold shares of common stock to be issued pursuant to the exercise or vesting. Any such shares, however, will not be added back to the number of shares reserved or otherwise available for issuance under the Plan.

### ***Amendments and Termination***

The Board may at any time amend or discontinue the Plan and the Plan Administrator may at any time amend or cancel any outstanding award for the purpose of satisfying changes in the law or for any other lawful purpose. However, no such action may adversely affect any rights under any outstanding award without the holder's consent. To the extent required under the rules of the New York Stock Exchange, or by the 1940 Act, any amendments that materially change the terms of the Plan will be subject to approval by the Equus shareholders. Amendments shall also be subject to approval by the Equus shareholders if and to the extent determined by the Plan Administrator to be required by the Code to preserve the qualified status of incentive options.

### ***Compliance***

Equus will comply with all disclosure requirements applicable to BDCs, including the amended disclosure requirements for executive officer and director compensation, related party transactions, director independence and other corporate governance matters, and security ownership of officers and directors to the extent adopted and applicable to BDCs and the Fund in particular.<sup>[4]</sup>

### **Applicable Law and Need for Relief**

#### ***Restrictions of Section 23(b)***

Section 63 of the 1940 Act makes applicable to BDCs the provisions of: (i) Section 23(a), which generally prohibits a registered closed-end investment company from issuing securities for services or for property other than cash or securities, and (ii) Section 23(b), which generally prohibits a registered closed-end investment company from selling any common stock of which it is the issuer at a price below the stock's current net asset value, except with the consent of a majority of the company's common shareholders or under certain other enumerated circumstances not applicable to the Plan. Section 63(2) provides that, notwithstanding Section 23(b), a BDC may sell any common stock of which it is the issuer at a price below the current net asset value of such stock and may sell warrants, options, or rights to acquire any such common stock at a price below the current net asset value of such stock if, (1) the holders of a majority of the BDC's outstanding voting securities, and the holders of a majority of the BDC's voting securities who are not affiliated persons of the BDC, approved the BDC's policy and practice of making such sales of securities at the last annual meeting of shareholders within one year immediately prior to any such sale; (2) a required majority, as defined in Section 57(o) of the 1940 Act, of the BDC's directors have determined that such sale would be in the best interests of the BDC and its shareholders; and (3) a required majority, as defined in Section 57(o) of the 1940 Act, of the BDC's directors, have determined immediately prior to the issuance of such securities that the price at which such securities are to be sold is not less than a price which closely approximates the market value of those securities. Because awards of Restricted Stock that would be granted under the Plan would not meet the first prong of Section 63(2)(A) described in the preceding sentence (i.e., the Plan will not be approved by the holders of a majority of the Fund's outstanding voting securities that are not affiliated persons of Equus), Sections 23(b) and 63 would operate to prevent the issuance of Restricted Stock.

#### ***Restrictions on Joint Transactions***

Section 57(a) proscribes certain transactions between a BDC and persons related to the BDC in the manner described in Section 57(b) (“**57(b) persons**”), absent a Commission order. Section 57(a)(4) generally prohibits a 57(b) person from effecting a transaction in which the BDC is a joint participant absent such order. Rule 17d-1, made applicable to transactions subject to Sections 57(a)(4) by Section 57(i) to the extent the Commission has not adopted a rule under Section 57(a)(4), generally proscribes participation in a “joint enterprise or other joint arrangement or profit-sharing plan,” which includes, pursuant to paragraph 17d-1(c), a stock option or purchase plan. Officers, employees and directors of a BDC are 57(b) persons. Thus, although a compensation plan involving grants of restricted stock or options is not specifically referred to by Section 57(a)(4) or Rule 17d-1, the issuance of Restricted Stock or Options as contemplated under the Plan could be deemed to involve a joint transaction involving a BDC and a 57(b) person in contravention of Section 57(a)(4).

### *Standards for Relief*

Section 6(c) provides, in part, that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes thereof, from any provision of the 1940 Act, if and to the extent that the exemption is necessary or appropriate, in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

<sup>[4]</sup> See Executive Compensation and Related Party Disclosure, Securities Act Release No. 8655 (Jan. 27, 2006) (proposed rule); Executive Compensation and Related Party Disclosure, Securities Act Release No. 8732A (Aug. 29, 2006) (final rule and proposed rule), as amended by Executive Compensation Disclosure, Securities Act Release No. 8756 (Dec. 22, 2006) (adopted as interim final rules with request for comments).

Section 61(a)(3)(B) provides that the Commission may, by order upon application, permit a BDC to issue common stock purchase options to non-employee directors pursuant to an executive compensation plan if (i) the options expire by their terms within ten years, (ii) the exercise price of such options is not less than the current market value at the date of issuance or, if no such market value exists, the then current net asset value of such underlying voting securities, (iii) the proposal to issue such options is authorized by the company's stockholders, and is approved by order of the Commission, upon application, on the basis that the terms of the proposal are fair and reasonable and do not involve overreaching of the company or its stockholders, (v) no investment adviser of the company receives any compensation described in Section 205(a)(1) of the Advisers Act (e.g., "performance-based" compensation), except to the extent permitted by Section 205(b)(1) or (2) thereunder; and (vi) that the company does not have a profit-sharing plan described in Section 57(n) of the 1940 Act.

Section 57(a)(4) and Rule 17d-1 provides that the Commission may, by order upon application, grant relief under Section 57(a)(4) and Rule 17d-1 permitting certain joint enterprises or arrangements and profit-sharing plans. Rule 17d-1(b) further provides that in passing upon such an application, the Commission will consider (i) whether the participation of the BDC in such enterprise, arrangement, or plan is consistent with the policies and purposes of the 1940 Act and (ii) the extent to which such participation is on a basis different from or less advantageous than that of other participants.

## **Argument**

### ***The Standard of Section 6(c)***

Section 6(c) of the 1940 Act, which governs the Fund's request for exemptive relief from Section 23 provides, in part, that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes thereof, from any provisions of the 1940 Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the 1940 Act's policy and provisions.

### ***Necessary or Appropriate in the Public Interest***

Both the Commission and Congress have long recognized the importance of equity-based compensation in attracting and retaining qualified personnel. In particular, Section 61 of the Small Business Investment Act of 1980 amended the 1940 Act to permit BDCs to issue their directors, officers, and employees warrants, options, and voting securities of the BDC pursuant to compensation plans in compliance with certain conditions. The Fund's desire to attract and retain highly qualified personnel to further its objective of developing growth-oriented small and medium-sized companies is in the public interest, including the interests of the Fund's shareholders. Equus competes for talent with commercial banks, investment banks, and other publicly traded companies that also are not investment companies registered under the 1940 Act and are not subject to the limitations of the 1940 Act. These organizations are able to offer all types of equity-based compensation to their employees and directors, including restricted stock and options, and, therefore, have an advantage over Equus in attracting and retaining highly qualified personnel. For Equus to compete on a more

equal basis with such organizations, it must be able to attract and retain talented personnel and offer them comparable compensation packages.

With respect to the Fund's primary competition, private equity funds, Equus has proportionately greater overhead unrelated to its investment personnel and therefore cannot pay total salaries and bonuses as high as those of its competition without increasing its total overhead. Availability of Restricted Stock and Options would enable Equus to substitute or augment the overall cash compensation to directors, officers, and employees, and compensate its management for the loss of the carried interest that the Fund's investment professionals would receive at a private equity firm, among other things. The Plan will enhance the Fund's ability to compensate its personnel competitively, while also aligning the interests of its personnel with the success of Equus and the interests of its shareholders and preserving cash for further investment.

### ***Consistency with the Protection of Investors***

Investors will be protected to at least the same extent that they are currently protected under Section 61(a)(3) of the 1940 Act. The Plan has been approved by Equus shareholders in accordance with Section 61(a)(3)(A)(iv). The proxy statement submitted to the Equus shareholders in connection with the meeting wherein the Plan was approved contained a concise "plain English" description of the Plan and its potential dilutive effect. Furthermore, each award of Restricted Stock or Options must be approved by the Required Majority on the basis that the issuance is in the best interests of the Fund and its shareholders. For purposes of disclosure to shareholders, Equus is subject to the standards and guidelines adopted by the Financial Accounting Standards Board for operating companies relating to the accounting for and disclosure of Restricted Stock and Options, and the Securities Exchange Act of 1934 ( "***Exchange Act***" ) requirements relating to executive compensation disclosure.

Section 61(a)(3) provides that the amount of voting securities that would result from the exercise of all of a BDC's outstanding warrants, options, or rights, at the time of issuance, may not exceed 25 percent of the outstanding voting securities of such BDC, except that if the amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights issued to such BDC's directors, officers, and employees, would exceed 15 percent of the outstanding voting securities of such BDC, then the total amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights, at the time of issuance shall not exceed 20 percent of the outstanding voting securities of such BDC. Pursuant to the Plan a maximum of 20 percent of the Fund's total voting securities will be available for awards under the Plan. Under the Plan, the maximum amount of Restricted Stock that may be outstanding at any particular time will be ten percent of the Fund's voting securities. No Restricted Stock has been issued to date; therefore, any specified maximums under the Plan do not include outstanding Restricted Stock. For purposes of determining the Fund's compliance with the limits in Section 61(a)(3), Equus will treat Restricted Stock issued under the Plan as voting securities that would result from the exercise of all outstanding warrants, options and rights issued to directors, officers and employees.

In addition to aggregate limitations on awards of Restricted Stock and Options, the Plan also contains individual limitations concerning such awards that may not be exceeded in any calendar year. Moreover, any awards of Restricted Stock or Options that lapse or become forfeited by a Participant will not be added back into the number of shares reserved for issuance under the Plan. Equus acknowledges that awards granted under the Plan may have a dilutive effect on the shareholders' equity per share in Equus, but believes that effect would be outweighed by the anticipated benefits of the Plan to Equus and its shareholders.

#### ***Consistency with the Purposes of the 1940 Act***

As described above, Equus is at a disadvantage in competing with other publicly-traded companies and financial services companies, particularly private equity firms, in attracting and retaining management personnel because it cannot offer equity incentives to its personnel as part of a compensation plan that would have a long-term capital gain component, and the Fund's overhead associated with being a reporting issuer under the Exchange Act and subject to compliance with the 1940 Act reduces the cash compensation it can pay to such personnel. In addition, Equus believes it also competes directly for experienced executives and other professionals with other public companies and non-public companies, many of which offer restricted stock and options as part of their equity incentive plans.

The Commission previously recognized the problem of restricting equity compensation in the context of small business investment companies in 1971 and granted a limited exemption from the 1940 Act's provisions to permit them to issue qualified stock options. Congress amended the 1940 Act in 1980 to permit BDCs also to issue warrants, options, and rights subject to certain conditions and limitations. The Commission again recognized these problems in the context of closed-end investment companies in 1985 and granted a limited exemption from the 1940 Act's provisions to permit certain internally managed closed-end investment companies to issue incentive stock options. In 1998, the Commission issued the *Baker Fentress* Order and subsequently issued additional orders, some of which are summarized below, which permitted numerous types of equity compensation. In each of these instances, it was found that equity compensation would not offend the 1940 Act's policies and purposes.

Equus further submits that the Plan would not violate the purposes behind Sections 23(a) and (b). The concerns underlying the enactment of those provisions included (i) preferential treatment of investment company insiders and the use of options and other rights by insiders to obtain control of the investment company; (ii) complication of the investment company's structure that made it difficult to determine the value of the company's shares; and (iii) dilution of shareholders' equity in the investment company.

The Plan does not raise concerns about preferential treatment of the Fund's insiders because, among other reasons: (i) the Plan is a bona fide compensation plan of the type that is common among corporations generally and contemplated by Section 61 of the 1940 Act, (ii) is substantially similar to other equity compensation plans previously approved by the Commission as discussed below, and (iii) in addition to limitations on individual awards that may be made in a calendar year, the Plan is subject to percentage limitations regarding the aggregate awards that would be available for issuance to all Participants, which could therefore not, in and of itself, become a means for insiders to obtain control of Equus.

Further, the Plan would not unduly complicate the Fund's capital structure because equity-based incentive compensation arrangements are widely used among corporations and commonly known to investors. Equus also states that on an ongoing basis it will comply with the proxy disclosure requirements in Item 10 of Schedule 14A under the Exchange Act. Equus further notes that the Plan will be disclosed to investors in accordance with the requirements of the Form N-2 registration statement for closed-end investment companies and the standards and guidelines adopted by the Financial Accounting Standards Board for operating companies. Equus thus concludes that the Plan will be adequately disclosed to investors and appropriately reflected in the market value of the Fund's shares. Equus also states that its shareholders will be further protected by the conditions to this Application and requested Order that assure continuing oversight of the operation of the Plan by the Plan Administrator.

*Analysis of Section 61(a)(3)*

Section 61(a)(3)(B) of the 1940 Act provides that the Commission may, by order upon application, grant relief thereunder and permit a BDC to issue common stock purchase options to non-employee directors if the issuance of such securities meets the requirements of Section 61(a)(3) as described above.

The Plan has been designed to meet all of the requirements of Section 61(a)(3), inasmuch as any Options granted to Non-Employee Directors thereunder:

1. will have been approved by Order of the Commission prior to the issuance thereof;
2. will expire by their terms within ten years from the date of grant;
3. will have an exercise price not less than the fair market value of the Fund's shares at the date of grant;
4. will have been issued pursuant to the Plan, which was approved by the Fund's stockholders on June 13, 2016; and
5. will not be transferable except for disposition by will or the laws of descent or distribution.

The final requirement under Section 61(a)(3) limits to 25% the amount of the Fund's outstanding voting securities that can be issued upon the exercise of all outstanding warrants, Options and rights; provided, however, that this limitation is reduced to 20% if the amount of voting securities issuable to directors, officers and employees exceeds 15% of the Fund's outstanding voting securities. The number of shares issuable under the Plan is within these thresholds. Further, since there are presently no other awards of Restricted Stock, warrants, Options, or rights presently outstanding, the maximum aggregate number of shares of the Fund that may be issued under the Plan will not exceed the limitations in Section 61(a)(3) of the 1940 Act.

In addition, should the Order requested hereunder be granted (the date such Order is granted is hereinafter referred to as the "**Order Date**"), the maximum number of voting securities of the Fund that would result from the award of all

Restricted Stock issuable under the Plan is not more than 10% of the Fund's outstanding shares of common stock as of the Order Date, or 1,267,365 shares. Similarly, on the Order Date, the maximum number of voting securities of the Fund that would result from the exercise of all Options issuable under the Plan, combined with all shares of Restricted Stock that would be possible to award under the Plan is not more than 20% of the Fund's outstanding shares of common stock as of the Order Date, or 2,534,728 shares, which amount is below the percentage limitations in the 1940 Act.

Given the small number of Restricted Shares and Options that are proposed to be issued to Non-Employee Directors as set forth in the tables below, even if all Options granted thereunder were to vest and become immediately exercisable, the issuance of these securities under the Plan should not have a substantial dilutive effect on the net asset value of the common stock of the Fund. Additionally, only one-fourth of the shares of Restricted Stock and Options granted under the Plan to Non-Employee Directors will be immediately vested. The remainder of the unvested shares of Restricted Stock and Options are not vested and, in the case of Options, will not be exercisable at the date of grant, absent extraordinary circumstances. The unvested portion of such awards vest in three annual installments on each of the first three anniversaries of the date of grant. The absence of a substantial dilutive effect along with compliance with each of the conditions of Section 61(a)(3) indicates that the terms of the Plan are fair and reasonable and do not involve overreaching of Equus or its stockholders.

Finally, the Non-Employee Directors of Equus have no opportunity to exercise discretion to benefit themselves. No additional awards of Restricted Stock or Options will be made and the amounts presently proposed to be issued to such Non-Employee Directors as set forth in the tables below cannot be changed without Commission approval. Consequently, no discretionary Board level functions exist that could present a conflict. Equus submits, therefore, that its proposal to award Restricted Stock and Options to its Non-Employee Directors pursuant to the Plan meets all requirements of Section 61(a)(3) of the 1940 Act and are fair and reasonable and do not involve any overreaching of the Fund or its stockholders.

Equus believes that the options to be granted to Non-Employee Directors under the Plan will provide significant at-risk incentives to the Fund's Non-Employee Directors to remain on the Board and to devote their best efforts to the success of the Fund's business and the enhancement of stockholder value in the future. The Options will also provide a means for Non-Employee Directors to increase their ownership interests in the Fund, thereby ensuring close alignment of their interests with those of the Fund and its stockholders. The Options granted pursuant to the Plan will have no value unless the price of the Fund's common stock exceeds the exercise price of such Options. Thus, Non-Employee Directors will benefit from them only to the extent that the Fund's business succeeds and the market value of its common stock increases and remains above the exercise price of the Options. By providing incentives in the form of such Options to its Non-Employee Directors, the Fund will be better able to maintain continuity in the membership of its Board and to attract, when necessary, and to retain as Non-Employee Directors the highly experienced, successful and motivated business and professional people that are critical to the Fund's success as a business development company.

Accordingly, Equus respectfully requests that the Commission issue an order under Section 61(a)(3) of the 1940 Act:

- (i) approving Plan on the basis that the terms thereof are fair and reasonable and do not involve overreaching of the Fund or its stockholders; and
- (ii) approving the grant of Options to Non-Employee Directors pursuant to the Plan on the terms described below, on the basis that the terms are fair and reasonable and do not involve overreaching of the Fund or its stockholders.

***Proposed Awards of Restricted Stock to Non-Employee Directors***

The following schedule summarizes the proposed awards of Restricted Stock and associated vesting terms, that are intended to be issued to Non-Employee Directors of Equus within thirty (30) days after receipt of an Order by the Commission as requested herein. The awards of Restricted Stock to Non-Employee Directors set forth below are intended to be on a one-time basis. Future awards of Restricted Stock under the Plan to these persons are not contemplated, and any such future awards or changes to the amounts set forth below may not be made without Commission approval.

<b>Name of Director</b>	<b>Number of Shares</b>	<b>Value<sup>(1)</sup></b>	<b>Vesting Terms</b>	<b>Percentage of Outstanding<sup>(2)</sup></b>
Fraser Atkinson	19,500	\$ 37,830	One-fourth of the shares vest immediately. If the director remains in service on the Board, the remainder vest upon the earliest to occur of (i) a change of control of the Fund, or (ii) ratably over a three-year period from the date of grant.	0.15%
Richard F. Bergner	19,500	\$ 37,830		0.15%
Henry W. Hankinson	19,500	\$ 37,830		0.15%
Robert L. Knauss	21,000	\$ 40,740		0.17%
Bertrand des Pallieres	15,000	\$ 29,100		0.12%
<b>TOTAL</b>	<b>94,500</b>			<b>0.75%</b>

(1) Based on an assumed price of \$1.94 per share, the closing trading price of the Fund's common stock as of November 22, 2016.

(2) Based on 12,673,646 shares of Equus common stock outstanding.

***Proposed Awards of Options to Non-Employee Directors***

The following schedule summarizes the proposed awards of Options and associated vesting terms, that are intended to be issued to Non-Employee Directors of Equus within thirty (30) days after receipt of an Order by the Commission as requested herein. The awards of Options to Non-Employee Directors set forth below are intended to be on a one-time basis. Future awards of Options under the Plan to these persons are not contemplated, and any such future awards or changes to the amounts set forth below may not be made without Commission approval. The exercise price for each of the Options proposed hereunder shall be equal to the closing trading price of the Fund's common stock on the date of grant.

<b>Name of Director</b>	<b>Number of Options</b>	<b>Value<sup>(1)</sup></b>	<b>Vesting Terms</b>	<b>Percentage of Outstanding<sup>(2)</sup></b>
Fraser Atkinson	39,000	\$ 0	One-fourth of the Options vest immediately. If the director remains in service on the Board, the remainder vest upon the earliest to occur of (i) a change of control of the Fund, or (ii) ratably over a three-year period from the date of grant.	0.31%
Richard F. Bergner	39,000	\$ 0		0.31%
Henry W. Hankinson	39,000	\$ 0		0.31%
Robert L. Knauss	42,000	\$ 0		0.33%
Bertrand des Pallieres	30,000	\$ 0		0.24%
<b>TOTAL</b>	<b>189,000</b>			<b>1.49%</b>

(1) Based on the difference between the exercise price and the closing trading price of the Fund's common stock on the date of grant.

(2) Based on 12,673,646 shares of Equus common stock outstanding.

***Other Non-Plan Compensation to Non-Employee Directors***

The following table sets forth cash compensation that the Fund paid to each of its current Non-Employee Directors during 2015. Equus expects similar amounts to be paid to these individuals in 2016:

Name of Director	Director Fees	Other Fees <sup>(1)</sup>	Total
Fraser Atkinson	\$96,000	\$0	\$96,000
Richard F. Bergner	\$41,000	\$0	\$41,000
Henry W. Hankinson	\$36,000	\$72,000	\$108,000
Robert L. Knauss	\$56,000	\$0	\$56,000
Bertrand des Pallieres	\$23,000	\$0	\$23,000

(1) In 2015, we paid Global Energy Associates, LLC (“GEA”), a consulting firm owned by Henry W. Hankinson, \$75,000 pursuant to a consulting agreement with Equus Energy, LLC., a wholly-owned subsidiary of the Fund, in respect of sourcing and reviewing investment opportunities in the energy sector. The agreement with GEA provides for monthly payments of \$6,250 in respect of services rendered in connection with the engagement.

***Standard for an Order under Rule 17d-1***

Section 57(a)(4) and Rule 17d-1, made applicable to BDCs by Section 57(i), provides that the Commission may, by order upon application, grant relief under Section 57(a)(4) and Rule 17d-1 permitting certain joint enterprises or arrangements and profit-sharing plans. Rule 17d-1(b) further provides that in passing upon such an application, the Commission will consider (i) whether the participation of the BDC in such enterprise, arrangement or plan is consistent with the policies and purposes of the 1940 Act and (ii) the extent to which such participation is on a basis different from or less advantageous than that of other participants.

***Consistency with the 1940 Act’s Policies and Purposes***

The arguments as to why the Plan is consistent with the 1940 Act are almost identical to the standards for exemptions under Section 6(c) and have been set forth above. Additionally, Section 57(j)(1) expressly permits any director, officer or employee of a BDC to acquire warrants, options and rights to purchase voting securities of such BDC, and the securities issued upon the exercise or conversion thereof, pursuant to an executive compensation plan which meets the requirements of Section 61(a)(3)(B). In respect of awards of Restricted Stock, Equus submits that the issuance of Restricted Stock pursuant to the Plan poses no greater risk to shareholders than the issuances permitted by Section 57(j)(1).

***Differences in Participation***

The Fund's role is necessarily different from that of other participants in the Plan since the other participants in the Plan are its directors, officers and employees. Since Equus and its officers and employee-Participants are in an employer/employee relationship, their respective rights and duties are different and not comparable. Likewise, the respective rights and duties of Equus and its Non-Employee Directors are different and not comparable. However, the Fund's participation with respect to the Plan will not be "less advantageous" than that of the Participants. Equus, either directly or indirectly, is responsible for the compensation of the Participants; the Plan is simply the Fund's chosen method of providing such compensation. Moreover, Equus believes that the Plan will benefit the Fund by enhancing its ability to attract and retain highly qualif