114TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
114–508

SMALL BUSINESS CREDIT AVAILABILITY ACT

APRIL 19, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HENSARLING, from the Committee on Financial Services, submitted the following

R E P O R T

[To accompany H.R. 3868]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 3868) to amend the Investment Company Act of 1940 to remove certain restrictions on the ability of business development companies to own securities of investment advisers and certain financial companies, to change certain requirements relating to the capital structure of business development companies, to direct the Securities and Exchange Commission to revise certain rules relating to business development companies, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Small Business Credit Availability Act".

SEC. 2. BUSINESS DEVELOPMENT COMPANY OWNERSHIP OF SECURITIES OF INVESTMENT ADVISERS AND CERTAIN FINANCIAL COMPANIES.

(a) IN GENERAL.—

(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Securities and Exchange Commission shall promulgate regulations to codify the order in Investment Company Act Release No. 30024, dated March 30, 2012. If the Commission fails to complete the regulations as required by this subsection, a business development company shall be entitled to treat such regulations as having been completed in accordance with the actions required to be taken by the Commission until such time as such regulations are completed by the Commission.

(2) RULE OF CONSTRUCTION.—Nothing in this subsection shall prevent the Commission from issuing rules to address potential conflicts of interest between business development companies and investment advisers.

(b) PERMISSIBLE ASSETS OF AN ELIGIBLE PORTFOLIO COMPANY.—Section 55 of the Investment Company Act of 1940 (15 U.S.C. 80a–54) is amended by adding at the end the following:

"(c) SECURITIES DEEMED TO BE PERMISSIBLE ASSETS.—Notwithstanding subsection (a), securities that would be described in paragraphs (1) through (6) of such subsection except that the issuer is a company described in paragraph (2), (3), (4), (5), (6), or (9) of section 3(c) may be deemed to be assets described in paragraphs (1) through (6) of subsection (a) to the extent necessary for the sum of the assets to equal 70 percent of the value of a business development company's total assets (other than assets described in paragraph (7) of subsection (a)), provided that the aggregate value of such securities counting toward such 70 percent shall not exceed 20 percent of the value of the business development company's total assets.".

SEC. 3. EXPANDING ACCESS TO CAPITAL FOR BUSINESS DEVELOPMENT COMPANIES.

(a) IN GENERAL.—Section 61(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–60(a)) is amended—

(1) by redesignating paragraphs (2) through (4) as paragraphs (3) through (5), respectively;

(2) by striking paragraph (1) and inserting the following:

"(1) Except as provided in paragraph (2), the asset coverage requirements of subparagraphs (A) and (B) of section 18(a)(1) (and any related rule promulgated under this Act) applicable to business development companies shall be 200 percent.

"(2) The asset coverage requirements of subparagraphs (A) and (B) of section 18(a)(1) and of subparagraphs (A) and (B) of section 18(a)(2) (and any related rule promulgated under this Act) applicable to a business development company shall be 150 percent if—

"(A) within five business days of the approval of the adoption of the asset coverage requirements described in clause (ii), the business development company discloses such approval and the date of its effectiveness in a Form 8–K filed with the Commission and in a notice on its website and discloses in its periodic filings made under section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m)—

"(i) the aggregate value of the senior securities issued by such company and the asset coverage percentage as of the date of such company's most recent financial statements; and

"(ii) that such company has adopted the asset coverage requirements of this subparagraph and the effective date of such requirements;

"(B) with respect to a business development company that issues equity securities that are registered on a national securities exchange, the periodic filings of the company under section 13(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78m) include disclosures reasonably designed to ensure that shareholders are informed of—

"(i) the amount of indebtedness and asset coverage ratio of the company, determined as of the date of the financial statements of the company dated on or most recently before the date of such filing; and

"(ii) the principal risk factors associated with such indebtedness, to the extent such risk is incurred by the company; and

"(C)(i) the application of this paragraph to the company is approved by the required majority (as defined in section 57(o)) of the directors of or general partners of such company who are not interested persons of the business development company, which application shall become effective on the date that is 1 year after the date of the approval, and, with respect to a business development company that issues equity securities that are not registered on a national securities exchange, the company extends, to each person who is a shareholder as of the date of the approval, an offer to repurchase the equity securities held by such person as of such approval date, with 25 percent of such securities to be repurchased in each of the four quarters following such approval date; or

"(ii) the company obtains, at a special or annual meeting of shareholders or partners at which a quorum is present, the approval of more than 50 percent of the votes cast of the application of this paragraph to the company, which application shall become effective on the date immediately after the date of the approval.";

(3) in paragraph (3) (as redesignated), by inserting "or which is a stock, provided that all such stock is issued in accordance with paragraph (6)" after "indebtedness";

(4) in subparagraph (A) of paragraph (4) (as redesignated)—

(A) in the matter preceding clause (i), by striking "voting"; and

(B) by amending clause (iii) to read as follows:

"(iii) the exercise or conversion price at the date of issuance of such warrants, options, or rights is not less than—

"(I) the market value of the securities issuable upon the exercise of such warrants, options, or rights at the date of issuance of such warrants, options, or rights; or

"(II) if no such market value exists, the net asset value of the securities issuable upon the exercise of such warrants, options, or rights at the date of issuance of such warrants, options, or rights; and"; and

(5) by adding at the end the following:

"(6)(A) QUALIFIED INSTITUTIONAL BUYER.—Except as provided in subparagraph (B), the following shall not apply to a senior security which is a stock and which is issued to and held by a qualified institutional buyer (as defined in section 3(a)(64) of the Securities Exchange Act of 1934):

"(i) Subparagraphs (C) and (D) of section 18(a)(2).

"(ii) Subparagraph (E) of section 18(a)(2), to the extent such subparagraph requires any priority over any other class of stock as to distribution of assets upon liquidation.

"(iii) With respect to a senior security which is a stock, subsections (c) and (i) of section 18.

"(B) INDIVIDUAL INVESTORS WHO ARE NOT QUALIFIED INSTITUTIONAL BUYERS.—Subparagraph (A) shall not apply with respect to a senior security which is a stock and which is issued to a person who is not known by the business development company to be a qualified institutional buyer (as defined in section 3(a) of the Securities Exchange Act of 1934).

"(7) RULE OF CONSTRUCTION.—Notwithstanding any other provision of law, any additional class of stock issued pursuant to this section must be issued in accordance with all investor protections contained in all applicable federal securities laws administered by the Commission.".

(b) CONFORMING AMENDMENTS.—The Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.) is amended—

(1) in section 57—

(A) in subsection (j)(1), by striking "section 61(a)(3)(B)" and inserting "section 61(a)(4)(B)"; and

(B) in subsection (n)(2), by striking "section 61(a)(3)(B)" and inserting "section 61(a)(4)(B)"; and

(2) in section 63(3), by striking "section 61(a)(3)" and inserting "section 61(a)(4)".

SEC. 4. PARITY FOR BUSINESS DEVELOPMENT COMPANIES REGARDING OFFERING AND PROXY RULES.

(a) REVISION TO RULES.—Not later than 1 year after the date of enactment of this Act, the Securities and Exchange Commission shall revise any rules to the extent necessary to allow a business development company that has filed an election pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a–53) to use the securities offering and proxy rules that are available to other issuers that are required to file reports under section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m; 78o(d)). Any action that the Commission takes pursuant to this subsection shall include the following:

(1) The Commission shall revise rule 405 under the Securities Act of 1933 (17 C.F.R. 230.405)—

(A) to remove the exclusion of a business development company from the definition of a well-known seasoned issuer provided by that rule; and

(B) to add registration statements filed on Form N–2 to the definition of automatic shelf registration statement provided by that rule.

(2) The Commission shall revise rules 168 and 169 under the Securities Act of 1933 (17 C.F.R. 230.168 and 230.169) to remove the exclusion of a business development company from an issuer that can use the exemptions provided by those rules.

(3) The Commission shall revise rules 163 and 163A under the Securities Act of 1933 (17 C.F.R. 230.163 and 230.163A) to remove a business development company from the list of issuers that are ineligible to use the exemptions provided by those rules.

(4) The Commission shall revise rule 134 under the Securities Act of 1933 (17 C.F.R. 230.134) to remove the exclusion of a business development company from that rule.

(5) The Commission shall revise rules 138 and 139 under the Securities Act of 1933 (17 C.F.R. 230.138 and 230.139) to specifically include a business development company as an issuer to which those rules apply.

(6) The Commission shall revise rule 164 under the Securities Act of 1933 (17 C.F.R. 230.164) to remove a business development company from the list of issuers that are excluded from that rule.

(7) The Commission shall revise rule 433 under the Securities Act of 1933 (17 C.F.R. 230.433) to specifically include a business development company that is a well-known seasoned issuer as an issuer to which that rule applies.

(8) The Commission shall revise rule 415 under the Securities Act of 1933 (17 C.F.R. 230.415)—

(A) to state that the registration for securities provided by that rule includes securities registered by a business development company on Form N–2; and

(B) to provide an exception for a business development company from the requirement that a Form N–2 registrant must furnish the undertakings required by item 34.4 of Form N–2.

(9) The Commission shall revise rule 497 under the Securities Act of 1933 (17 C.F.R. 230.497) to include a process for a business development company to file a form of prospectus that is parallel to the process for filing a form of prospectus under rule 424(b).

(10) The Commission shall revise rules 172 and 173 under the Securities Act of 1933 (17 C.F.R. 230.172 and 230.173) to remove the exclusion of an offering of a business development company from those rules.

(11) The Commission shall revise rule 418 under the Securities Act of 1933 (17 C.F.R. 230.418) to provide that a business development company that would otherwise meet the eligibility requirements of General Instruction I.A of Form S–3 shall be exempt from paragraph (a)(3) of that rule.

(12) The Commission shall revise rule 14a–101 under the Securities Exchange Act of 1934 (17 C.F.R. 240.14a–101) to provide that a business development company that would otherwise meet the requirements of General Instruction I.A of Form S–3 shall be deemed to meet the requirements of Form S–3 for purposes of Schedule 14A.

(13) The Commission shall revise rule 103 under Regulation FD (17 C.F.R. 243.103) to provide that paragraph (a) of that rule applies for purposes of Form N–2.

(b) REVISION TO FORM N–2.—Not later than 1 year after the date of enactment of this Act, the Commission shall revise Form N–2—

(1) to include an item or instruction that is similar to item 12 on Form S–3 to provide that a business development company that would otherwise meet the requirements of Form S–3 shall incorporate by reference its reports and documents filed under the Securities Exchange Act of 1934 into its registration statement filed on Form N–2; and

(2) to include an item or instruction that is similar to the instruction regarding automatic shelf offerings by well-known seasoned issuers on Form S–3 to provide that a business development company that is a well-known seasoned issuer may file automatic shelf offerings on Form N–2.

(c) TREATMENT IF REVISIONS NOT COMPLETED IN TIMELY MANNER.—If the Commission fails to complete the revisions required by subsections (a) and (b) by the time required by such subsections, a business development company shall be entitled to treat such revisions as having been completed in accordance with the actions required to be taken by the Commission by such subsections until such time as such revisions are completed by the Commission.

(d) RULE OF CONSTRUCTION.—Any reference in this section to a rule or form means such rule or form or any successor rule or form.

PURPOSE AND SUMMARY

Introduced by Representative Mick Mulvaney on November 2, 2015, H.R. 3868, the Small Business Credit Availability Act, amends the Investment Company Act of 1940 to modernize the regulatory regime for Business Development Companies (BDCs). BDCs are investment vehicles designed to facilitate capital formation for small and middle-market companies. The legislation streamlines the offering, filing, and registration processes for BDCs with the Securities and Exchange Commission (SEC) in order to:

- eliminate significant regulatory burdens;

- increase a BDC's ability to deploy capital to businesses by reducing its asset coverage ratio, or required ratio of assets to debt, from 200% to 150% if certain requirements are met;
- inform shareholders of a decision by the BDC to avail itself of the 150% asset coverage ratio; and
- provide liquidity to investors if a BDC or its funds are not publicly traded.

The legislation also directs the SEC, within one year, to codify an order to govern a BDC's relationship with an investment adviser and revise its rules to allow BDCs to use the streamlined securities offering provisions available to other registrants under the Securities Act of 1933 such as the ability to be a Well Known Seasoned Issuer ("WKSI"), use shelf offerings, and communicate directly with shareholders. If the SEC does not act within one year to codify its order or update its rules, the provisions of H.R. 3868 shall take effect and shall remain effective until the SEC acts.

BACKGROUND AND NEED FOR LEGISLATION

In 1980, Congress amended the Investment Company Act of 1940 to authorize the creation of BDCs in order to facilitate private finance investment in small and middle market businesses. By 1980, many banks had pulled back from lending to small businesses after the banks suffered significant losses related to oil and real estate in the 1970s. Private equity and venture capital firms represented an alternative source of credit to small businesses, but they could not provide this credit to small, growing businesses because the Investment Company Act prohibited their securities from being owned by more than 100 persons.

BDCs are closed-end funds that make investments in small and developing businesses and financially troubled firms.[1] By law, BDCs must invest at least 70 percent of their assets in so-called "eligible assets." The most common "eligible assets" are private and small public companies in the U.S. with $5 million to $150 million in annual revenues. This so-called middle market sector of the economy is responsible for one-third of the private sector GDP and these businesses produce $10 billion in revenues annually. These investments must be privately negotiated, and the BDC is required to offer managerial assistance to these companies to meet specific business challenges. BDCs have greater flexibility than other investment companies in dealing with the businesses in which they have invested; they also have greater flexibility than other investment companies in issuing securities and compensating their managers. In addition, BDCs need not register as investment companies; they are, however, required to register their securities under the Securities Exchange Act of 1934.

BDCs have recently invested in small and medium-size companies that provide vital services to the American public, including companies involved in disease treatment and prevention, education, information technology security, agriculture, and construction. Many BDCs specialize in financing acquisitions made by private equity firms. While there is a wide variation among BDCs in the size of their investments, the companies they invest in, and the industries in which they concentrate, they all share a common invest-

[1] Small Business Investment Incentive Act of 1980 (P.L. 96–477).

ment objective of making it easier for small and medium-sized companies to obtain access to capital.

Funding from BDCs has become more important for small businesses as the stifling regulatory regime enacted following the 2008 financial crisis has restricted bank and other traditional financing options for these companies. As a result, for the first time since the U.S. Census Bureau began keeping data on the subject, the number of smaller companies—i.e., those with less than 500 employees—has declined over the five years since the financial crisis.[2] As lending to small and medium-sized companies from commercial banks has fallen off due to the regulatory constraints and compliance burdens imposed by the Dodd-Frank Act, BDCs now find themselves in a position similar to the one at their creation over 30 years ago—addressing the unmet capital needs of small business.[3] There are currently over 80 BDCs in existence in the U.S. with over $70 billion in outstanding loans to middle market businesses.[4] Of the 80 BDCs, 57 are publicly traded BDCs, allowing retail investors a chance to purchase shares in the growth of middle market America.[5]

Despite the important role that BDCs play in helping to fund small and medium-sized businesses, the BDC regulatory regime has prevented BDCs from playing as large a role as they might otherwise. The BDCs regulatory regime has not been significantly updated in over 30 years since Congress authorized the creation of BDCs in 1980. Currently, BDCs are limited in the amount they can borrow, as their debt to equity ratio is capped at 1 to 1. A modest increase in the leverage ratio, though still below that of other financial institutions, would enable BDCs to deploy significantly more capital to small and mid-sized businesses and still generate returns to their shareholders.

BDCs are also prohibited from investing in registered investment advisers unless the SEC uses its exemptive relief authority to allow BDCs to own registered investment advisers. Removing the exemptive relief requirement will level the playing field for all BDCs and avoid the legal costs of seeking relief as well as eliminate the lengthy time period that it takes the SEC to approve such requests.

Like other companies that regularly raise capital through securities issuances, BDCs rely on pre-filed "shelf registration" statements, which are securities filings that allow companies to position themselves to issue additional securities. Because shelf registrations contain financial information that becomes outdated as companies publicly report more recent financial information, most companies incorporate subsequent financial reports in their shelf registrations by reference. BDCs, however, are prohibited from incorporating subsequent financial information by reference. Instead, BDCs must manually update their shelf registration statements

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[2] Kate Davidson, "Two-Speed Recovery: Small firms Lag Big Business," The Wall Street Journal (Apr. 27, 2015) available at *http://blogs.wsj.com/economics/2015/04/27/two-speed-recovery-small-firms-lag-big-business/*.

[3] Testimony of Michael J. Arougheti, Chief Executive Officer, Ares Capital Corporation, before the Subcommittee on Capital Markets and Government Sponsored Enterprises, "Legislation to Further Reduce Impediments to Capital Formation" (Oct. 23, 2013), available at *http://financialservices.house.gov/uploadedfiles/hhrg-113-ba16-wstatemarougheti-20131023.pdf*.

[4] Small Business Investor Alliance, "BDC Modernization Agenda: Legislative Recommendations for Members of the 114th Congress," available at: *http://c.ymcdn.com/sites/www.sbia.org/resource/resmgr/Government_*Relations/2015_SBIA_BDC_Agenda_Web.pdf.

[5] Id.

each time they report new quarterly information, which slows a BDC's ability to issue additional securities and makes it more expensive by requiring a BDC to hire lawyers, accountants, and printers to continually update its shelf-registration statements. H.R. 3868 will streamline disclosure requirements and reduce burdensome, duplicative regulatory paperwork for BDCs, while still ensuring investors would receive relevant and necessary disclosures.

Finally, to date BDCs have been barred from the benefits associated with being a WKSI, which includes taking advantage of more flexible rules relating to communications with investors and the registration process.[6] These changes will allow eligible BDCs more flexibility and efficiency while seeking to raise capital in the public market by allowing them to time offerings for when they will best be received by the market.

Modernizing the regulatory regime for BDCs will allow them to amplify financing for small and medium-size businesses at a time when these companies are struggling to access capital to support growth and job creation. As Michael Gerber, Executive Vice President of Franklin Square Holdings, testified at a June 16, 2015, Capital Markets and Government Sponsored Enterprises Subcommittee hearing, the Small Business Credit Availability Act will:

> enable BDCs to provide even more capital to small and middle-market U.S. companies, and do so in a manner that could increase returns and decrease risk for investors, all while maintaining the strong regulatory regime and transparency that separates BDCs from many of the other non-bank lenders in the marketplace. The Great Recession changed many dynamics in the capital markets, as have new and more robust regulatory requirements. Small and mid-size U.S. businesses have struggled to access previously available sources of capital. Several non-bank lenders have emerged as significant providers of capital, but none as transparent and heavily regulated as BDCs. Franklin Square believes that the "Small Business Credit Availability Act," if enacted into law, would allow BDCs to play an even greater role in supporting the capital markets and more effectively fill the existing capital void that has hampered businesses and job growth.

While H.R. 3868 does direct the SEC to revise nineteen rules, the Committee expects that the SEC would combine many of these rulemakings as the majority of the directives apply to the BDCs'

[6] A WKSI is an issuer that is required to file reports under the Securities Exchange Act of 1934 (the Exchange Act); is a "primary eligible" issuer; and has a worldwide market capitalization of at least $700 million or has issued at least $1 billion of non-convertible securities in registered primary offerings for cash in the last three years. WKSIs benefit from a more flexible automatic securities registration process including, but not limited to, the ability to have their registration statements be deemed by the SEC as immediately effective upon filing. In addition, WKSIs can (i) register unspecified amounts of different types of securities; (ii) register additional classes of securities and eligible majority-owned subsidiaries as additional registrants after effectiveness by filing a post-effective amendment that also will be automatically effective upon filing; (iii) exclude certain additional information from a base prospectus; (iv) pay filing fees on a "pay-as-you-go" basis at the time of each takedown; and (v) use "free writing prospectuses" relating to an offering before the registration statement is filed. WKSIs "are frequent issuers in the public markets and have significant market capital size. Generally, WKSIs can take advantage of new, liberalized rules relating to communications with investors and the registration process. However, BDCs were explicitly excluded from the definition of WKSI by the SEC without any explanation or rationale.

ability to use offering provisions found in the Securities Act of 1933.

HEARINGS

The Committee on Financial Services' Subcommittee on Capital Markets and Government Sponsored Enterprises held a hearing examining a discussion draft of H.R. 3868 on June 16, 2015.

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on November 3, 2015, and adopted by voice vote an amendment to H.R. 3868 offered by Representative Velázquez. Amendments offered by Representatives Himes and Moore were each withdrawn. The Committee ordered H.R. 3868 to be reported favorably to the House as amended by a recorded vote of 53 yeas to 4 nays (recorded vote no. FC–72), a quorum being present.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. The sole recorded vote in Committee was a motion by Chairman Hensarling to report the bill favorably to the House as amended. That motion was agreed to by a recorded vote of 53 yeas to 4 nays (recorded vote no. FC–72), a quorum being present.

Record vote no. FC-72

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Hensarling	X			Ms. Waters (CA)	X		
Mr. King (NY)				Mrs. Maloney (NY)	X		
Mr. Royce	X			Ms. Velázquez	X		
Mr. Lucas	X			Mr. Sherman	X		
Mr. Garrett	X			Mr. Meeks			
Mr. Neugebauer	X			Mr. Capuano		X	
Mr. McHenry	X			Mr. Hinojosa	X		
Mr. Pearce	X			Mr. Clay	X		
Mr. Posey	X			Mr. Lynch		X	
Mr. Fitzpatrick	X			Mr. David Scott (GA)	X		
Mr. Westmoreland	X			Mr. Al Green (TX)	X		
Mr. Luetkemeyer	X			Mr. Cleaver	X		
Mr. Huizenga (MI)	X			Ms. Moore	X		
Mr. Duffy	X			Mr. Ellison		X	
Mr. Hurt (VA)	X			Mr. Perlmutter	X		
Mr. Stivers	X			Mr. Himes		X	
Mr. Fincher	X			Mr. Carney	X		
Mr. Stutzman	X			Ms. Sewell (AL)	X		
Mr. Mulvaney	X			Mr. Foster	X		
Mr. Hultgren	X			Mr. Kildee	X		
Mr. Ross	X			Mr. Murphy (FL)			
Mr. Pittenger	X			Mr. Delaney	X		
Mrs. Wagner	X			Ms. Sinema	X		
Mr. Barr	X			Mrs. Beatty	X		
Mr. Rothfus	X			Mr. Heck (WA)	X		
Mr. Messer	X			Mr. Vargas	X		
Mr. Schweikert	X						
Mr. Guinta	X						
Mr. Tipton	X						
Mr. Williams	X						
Mr. Poliquin	X						
Mrs. Love	X						
Mr. Hill	X						
Mr. Emmer	X						

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the findings and recommendations of the Committee based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee states that H.R. 3868 will help address the unmet capital needs of small businesses by modernizing the regulatory regime for business development companies.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATES

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

MARCH 17, 2016.

Hon. JEB HENSARLING,
Chairman, Committee on Financial Services,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3868, the Small Business Credit Availability Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Kim Cawley.

Sincerely,

ROBERT A. SUNSHINE
(For Keith Hall, Director).

Enclosure.

H.R. 3868—Small Business Credit Availability Act

Summary: H.R. 3868 would direct the Securities and Exchange Commission (SEC) to amend certain regulations that affect business development companies (BDCs)—companies that operate like a mutual fund to invest in the stocks of small, private companies

and offer significant managerial assistance to the issuer. H.R. 3868 would allow BDCs to invest in advisors to investment companies and would raise the limits on the amount of leverage allowed to a BDC.

The staff of the Joint Committee on Taxation (JCT) estimates that enacting H.R. 3868 would reduce federal revenues by $95 million over the 2016–2026 period; therefore, pay-as-you-go procedures apply. CBO estimates that enacting H.R. 3868 would not affect direct spending.

CBO estimates that implementing H.R. 3868 would increase spending by the SEC by less than $500,000 per year to amend certain regulations affecting BDCs. However, the SEC is authorized to collect fees sufficient to offset its annual appropriation; therefore, CBO estimates that the net effect on discretionary spending would be negligible.

CBO and JCT estimate that enacting the legislation would not increase net direct spending or on-budget deficits by more than $5 billion in any of the four consecutive 10-year periods beginning in 2027.

H.R. 3868 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated Cost to the Federal Government: The estimated budgetary effect of H.R. 3868 is shown in the following table. The costs of this legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, in millions of dollars—												
	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2016–2021	2016–2026
CHANGES IN REVENUES [a]													
Estimated Revenues	*	−1	−4	−6	−8	−9	−11	−12	−13	−14	−16	−29	−95

Notes: Details do not add to totals because of rounding; * = between zero and −$500,000
[a] Negative numbers denote decreases in revenues.

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted late in fiscal year 2016, the necessary amounts will be appropriated near the start of each year, and spending will follow historical patterns for the SEC.

Revenues

JCT estimates that revenue losses under H.R. 3868 would result from a shift in business lending and taxable income from C corporations to BDCs, which are pass-through entities for tax purposes. Specifically, H.R. 3868 would allow BDCs to take on additional debt, increasing the amount they can borrow to a maximum of $4 dollars for every $6 dollars they hold in assets; under current law, they can borrow up to $3 for every $6 they hold in assets. The bill also would allow BDCs to issue preferred stock, and BDCs would be able to invest in securities issued by certain financial institutions and by registered investment advisors.

Generally, the income of interests in pass-through entities (like BDCs) that are owned by individual taxpayers is treated as personal income; such income is subject only to the individual income tax, and is taxed at the personal income tax rates of the businesses'

owners. In contrast, taxable income from C corporations is subject to the corporate income tax, and that income can be taxed again at the individual tax level after it is distributed to shareholders or investors. JCT estimates that, by shifting income from C corporations to BDCs, this legislation would reduce tax revenues by $95 million over the 2016–2026 period.

Spending subject to appropriation

Based on information from the SEC, CBO expects that the agency would need the equivalent of two additional staff positions to meet the bill's deadline for issuing new regulations and to monitor compliance with those regulations once finalized. CBO estimates that implementing the provisions of H.R. 3868 would cost less than $500,000 per year. Because the SEC is authorized to collect fees sufficient to offset its appropriation each year, CBO estimates that implementing H.R. 3868 would have a negligible effect on net outlays each year, assuming appropriation actions consistent with the agency's authority.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in revenues that are subject to those pay-as-you-go procedures are shown in the following table.

	By fiscal year, in millions of dollars—												
	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2016–2021	2016–2026
NET INCREASE IN THE DEFICIT													
Statutory Pay-As-You-Go Impact	0	1	4	6	8	9	11	12	13	14	16	29	95

Increase in long-term direct spending and deficits: CBO and JCT estimate that enacting the legislation would not increase net direct spending or on-budget deficits by more than $5 billion in any of the four consecutive 10-year periods beginning in 2027.

Intergovernmental and private-sector impact: H.R. 3868 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal spending: Kim Cawley; Federal revenues: Staff of the Joint Committee on Taxation; Impact on state, local, and tribal governments: Leo Lex; Impact on the private sector: Logan Smith.

Estimate approved by: H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of the section 102(b)(3) of the Congressional Accountability Act.

EARMARK IDENTIFICATION

H.R. 3868 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to section 3(g) of H. Res. 5, 114th Cong. (2015), the Committee states that no provision of H.R. 3868 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULEMAKING

Pursuant to section 3(i) of H. Res. 5, 114th Cong. (2015), the Committee states that H.R. 3868 contains nineteen directed rulemakings.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This section cites H.R. 3868 as the "Small Business Credit Availability Act."

Section 2. Business development company ownership of securities of investment advisers and certain financial companies

This section requires the Securities and Exchange Commission (SEC) to promulgate regulations to codify the order in Investment Company Act Release No. 30024. It also amends the Investment Company Act of 1940 to expand the definition of permissible assets of an eligible portfolio company.

Section 3. Expanding access to capital for business development companies

This section provides for an increase in business development companies' (BDCs') ability to deploy capital to businesses by reducing their asset coverage ratio, or required ratio of assets to debt, from 200% to 150% if certain requirements are met. To address concerns raised by SEC Chair White regarding investors in a non-traded BDC, after a board or general partner vote to take advantage of the new asset coverage ratio, the non-traded BDC must provide its shareholders with the ability to redeem 100% of their shares over the course of the year (25% per quarter). Alternatively, both traded and non-traded BDCs can immediately reduce their asset coverage ratio after a majority shareholder vote.

Section 4. Parity for business development companies regarding offering and proxy rules

This section requires the SEC to revise its rules to allow BDCs to use the streamlined securities offering provisions available to other registrants under the Securities Act of 1933 such as the ability to be a WKSI, use shelf offerings, and communicate directly with shareholders. If the SEC does not act within one year to codify its order or update its rules, the provisions shall take effect and shall remain effective until the SEC acts.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

INVESTMENT COMPANY ACT OF 1940

TITLE I—INVESTMENT COMPANIES

* * * * * * *

FUNCTIONS AND ACTIVITIES OF BUSINESS DEVELOPMENT COMPANIES

SEC. 55. (a) It shall be unlawful for a business development company to acquire any assets (other than those described in paragraphs (1) through (7) of this subsection) unless, at the time the acquisition is made, assets described in paragraphs (1) through (6) below represent at least 70 per centum of the value of its total assets (other than assets described in paragraph (7) below):

(1) securities purchased, in transactions not involving any public offering or in such other transactions as the Commission may, by rule, prescribe if it finds that enforcement of this title and of the Securities Act of 1933 with respect to such transactions is not necessary in the public interest or for the protection of investors by reason of the small amount, or the limited nature of the public offering, involved in such transactions—

(A) from the issuer of such securities, which issuer is an eligible portfolio company, from any person who is, or who within the preceding thirteen months has been, an affiliated person of such eligible portfolio company, or from any other person, subject to such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors; or

(B) from the issuer of such securities, which issuer is described in section 2(a)(46) (A) and (B) but is not an eligible portfolio company because it has issued a class of securities with respect to which a member of a national securities exchange, broker, or dealer may extend or maintain credit to or for a customer pursuant to rules or regulations adopted by the Board of Governors of the Federal Reserve System under section 7 of the Securities Exchange Act of

1934, or from any person who is an officer or employee of such issuer, if—

(i) at the time of the purchase, the business development company owns at least 50 per centum of—

(I) the greatest number of equity securities of such issuer and securities convertible into or exchangeable for such securities; and

(II) the greatest amount of debt securities of such issuer,

held by such business development company at any point in time during the period when such issuer was an eligible portfolio company, except that options, warrants, and similar securities which have by their terms expired and debt securities which have been converted, or repaid or prepaid in the ordinary course of business or incident to a public offering of securities of such issuer, shall not be considered to have been held by such business development company for purposes of this requirement; and

(ii) the business development company is one of the 20 largest holders of record of such issuer's outstanding voting securities;

(2) securities of any eligible portfolio company with respect to which the business development company satisfies the requirements of section 2(a)(46)(C)(ii);

(3) securities purchased in transactions not involving any public offering from an issuer described in sections 2(a)(46) (A) and (B) or from a person who is, or who within the preceding thirteen months has been, an affiliated person of such issuer, or from any person in transactions incident thereto, if such securities were—

(A) issued by an issuer that is, or was immediately prior to the purchase of its securities by the business development company, in bankruptcy proceedings, subject to reorganization under the supervision of a court of competent jurisdiction, or subject to a plan or arrangement resulting from such bankruptcy proceedings or reorganization;

(B) issued by an issuer pursuant to or in consummation of such a plan or arrangement; or

(C) issued by an issuer that, immediately prior to the purchase of such issuer's securities by the business development company, was not in bankruptcy proceedings but was unable to meet its obligations as they came due without material assistance other than conventional lending or financing arrangements;

(4) securities of eligible portfolio companies purchased from any person in transactions not involving any public offering, if there is no ready market for such securities and if immediately prior to such purchase the business development company owns at least 60 per centum of the outstanding equity securities of such issuer (giving effect to all securities presently convertible into or exchangeable for equity securities of such issuer as if such securities were so converted or exchanged);

(5) securities received in exchange for or distributed on or with respect to securities described in paragraphs (1) through

(4) of this subsection, or pursuant to the exercise of options, warrants, or rights relating to securities described in such paragraphs;

(6) cash, cash items, Government securities, or high quality debt securities maturing in one year or less from the time of investment in such high quality debt securities; and

(7) office furniture and equipment, interests in real estate and leasehold improvements and facilities maintained to conduct the business operations of the business development company, deferred organization and operating expenses, and other noninvestment assets necessary and appropriate to its operations as a business development company, including notes of indebtedness of directors, officers, employees, and general partners held by a business development company as payment for securities of such company issued in connection with an executive compensation plan described in section 57(j).

(b) For purposes of this section, the value of a business development company's assets shall be determined as of the date of the most recent financial statements filed by such company with the Commission pursuant to section 13 of the Securities Exchange Act of 1934, and shall be determined no less frequently than annually.

(c) SECURITIES DEEMED TO BE PERMISSIBLE ASSETS.—Notwithstanding subsection (a), securities that would be described in paragraphs (1) through (6) of such subsection except that the issuer is a company described in paragraph (2), (3), (4), (5), (6), or (9) of section 3(c) may be deemed to be assets described in paragraphs (1) through (6) of subsection (a) to the extent necessary for the sum of the assets to equal 70 percent of the value of a business development company's total assets (other than assets described in paragraph (7) of subsection (a)), provided that the aggregate value of such securities counting toward such 70 percent shall not exceed 20 percent of the value of the business development company's total assets.

* * * * * * *

TRANSACTIONS WITH CERTAIN AFFILIATES

SEC. 57. (a) It shall be unlawful for any person who is related to a business development company in a manner described in subsection (b) of this section, acting as principal—

(1) knowingly to sell any security or other property to such business development company or to any company controlled by such business development company, unless such sale involves solely (A) securities of which the buyer is the issuer, or (B) securities of which the seller is the issuer and which are part of a general offering to the holders of a class of its securities;

(2) knowingly to purchase from such business development company or from any company controlled by such business development company, any security or other property (except securities of which the seller is the issuer);

(3) knowingly to borrow money or other property from such business development company or from any company controlled by such business development company (unless the borrower is controlled by the lender), except as permitted in section 21(b) or section 62; or

(4) knowingly to effect any transaction in which such business development company or a company controlled by such business development company is a joint or a joint and several participant with such person in contravention of such rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by such business development company or controlled company on a basis less advantageous than that of such person, except that nothing contained in this paragraph shall be deemed to preclude any person from acting as manager of any underwriting syndicate or other group in which such business development company or controlled company is a participant and receiving compensation therefor.

(b) The provisions of subsection (a) of this section shall apply to the following persons:

(1) Any director, officer, employee, or member of an advisory board of a business development company or any person (other than the business development company itself) who is, within the meaning of section 2(a)(3)(C) of this title, an affiliated person of any such person specified in this paragraph.

(2) Any investment adviser or promoter of, general partner in, principal underwriter for, or person directly or indirectly either controlling, controlled by, or under common control with, a business development company (except the business development company itself and any person who, if it were not directly or indirectly controlled by the business development company, would not be directly or indirectly under the control of a person who controls the business development company), or any person who is, within the meaning of section 2(a)(3) (C) or (D), an affiliated person of any such person specified in this paragraph.

(c) Notwithstanding paragraphs (1), (2), and (3) of subsection (a), any person may file with the Commission an application for an order exempting a proposed transaction of the applicant from one or more provisions of such paragraphs. The Commission shall grant such application and issue such order of exemption if evidence establishes that—

(1) the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching of the business development company or its shareholders or partners on the part of any person concerned;

(2) the proposed transaction is consistent with the policy of the business development company as recited in the filings made by such company with the Commission under the Securities Act of 1933, its registration statement and reports filed under the Securities Exchange Act of 1934, and its reports to shareholders or partners; and

(3) the proposed transaction is consistent with the general purposes of this title.

(d) It shall be unlawful for any person who is related to a business development company in the manner described in subsection (e) of this section and who is not subject to the prohibitions of subsection (a) of this section, acting as principal—

(1) knowingly to sell any security or other property to such business development company or to any company controlled by such business development company, unless such sale involves solely (A) securities of which the buyer is the issuer, or (B) securities of which the seller is the issuer and which are part of a general offering to the holders of a class of its securities;

(2) knowingly to purchase from such business development company or from any company controlled by such business development company, any security or other property (except securities of which the seller is the issuer);

(3) knowingly to borrow money or other property from such business development company or from any company controlled by such business development company (unless the borrower is controlled by the lender), except as permitted in section 21(b); or

(4) knowingly to effect any transaction in which such business development company or a company controlled by such business development company is a joint or a joint and several participant with such affiliated person in contravention of such rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by such business development company or controlled company on a basis less advantageous than that of such affiliated person, except that nothing contained in this paragraph shall be deemed to preclude any person from acting as manager of any underwriting syndicate or other group in which such business development company or controlled company is a participant and receiving compensation therefor.

(e) The provisions of subsection (d) of this section shall apply to the following persons:

(1) Any person (A) who is, within the meaning of section 2(a)(3)(A), an affiliated person of a business development company, (B) who is an executive officer or a director of, or general partner in, any such affiliated person, or (C) who directly or indirectly either controls, is controlled by, or is under common control with, such affiliated person.

(2) Any person who is an affiliated person of a director, officer, employee, investment adviser, member of an advisory board or promoter of, principal underwriter for, general partner in, or an affiliated person of any person directly or indirectly either controlling or under common control with a business development company (except the business development company itself and any person who, if it were not directly or indirectly controlled by the business development company, would not be directly or indirectly under the control of a person who controls the business development company).

For purposes of this subsection, the term "executive officer" means the president, secretary, treasurer, any vice president in charge of a principal business function, and any other person who performs similar policymaking functions.

(f) Notwithstanding subsection (d) of this section, a person described in subsection (e) may engage in a proposed transaction described in subsection (d) if such proposed transaction is approved by the required majority (as defined in subsection (o)) of the direc-

tors of or general partners in the business development company on the basis that—

(1) the terms thereof, including the consideration to be paid or received, are reasonable and fair to the shareholders or partners of the business development company and do not involve overreaching of such company or its shareholders or partners on the part of any person concerned;

(2) the proposed transaction is consistent with the interests of the shareholders or partners of the business development company and is consistent with the policy of such company as recited in filings made by such company with the Commission under the Securities Act of 1933, its registration statement and reports filed under the Securities Exchange Act of 1934, and its reports to shareholders or partners; and

(3) the directors or general partners record in their minutes and preserve in their records, for such periods as if such records were required to be maintained pursuant to section 31(a), a description of such transaction, their findings, the information or materials upon which their findings were based, and the basis therefor.

(g) Notwithstanding subsection (a) or (d), a person may, in the ordinary course of business, sell to or purchase from any company merchandise or may enter into a lessor-lessee relationship with any person and furnish the services incident thereto.

(h) The directors of or general partners in any business development company shall adopt, and periodically review and update as appropriate, procedures reasonably designed to ensure that reasonable inquiry is made, prior to the consummation of any transaction in which such business development company or a company controlled by such business development company proposes to participate, with respect to the possible involvement in the transaction of persons described in subsections (b) and (e) of this section.

(i) Until the adoption by the Commission of rules or regulations under subsections (a) and (d) of this section, the rules and regulations of the Commission under subsections (a) and (d) of section 17 applicable to registered closed-end investment companies shall be deemed to apply to transactions subject to subsections (a) and (d) of this section. Any rules or regulations adopted by the Commission to implement this section shall be no more restrictive than the rules or regulations adopted by the Commission under subsections (a) and (d) of section 17 that are applicable to all registered closed-end investment companies.

(j) Notwithstanding subsections (a) and (d) of this section, any director, officer, or employee of, or general partner in, a business development company may—

(1) acquire warrants, options, and rights to purchase voting securities of such business development company, and securities issued upon the exercise or conversion thereof, pursuant to an executive compensation plan offered by such company which meets the requirements of ⟦section 61(a)(3)(B)⟧ *section 61(a)(4)(B)*; and

(2) borrow money from such business development company for the purpose of purchasing securities issued by such company pursuant to an executive compensation plan, if each such loan—

(A) has a term of not more than ten years;

(B) becomes due within a reasonable time, not to exceed sixty days, after the termination of such person's employment or service;

(C) bears interest at no less than the prevailing rate applicable to 90-day United States Treasury bills at the time the loan is made;

(D) at all times is fully collateralized (such collateral may include any securities issued by such business development company); and

(E)(i) in the case of a loan to any officer or employee of such business development company (including any officer or employee who is also a director of such company), is approved by the required majority (as defined in subsection (o)) of the directors of or general partners in such company on the basis that the loan is in the best interests of such company and its shareholders or partners; or

(ii) in the case of a loan to any director of such business development company who is not also an officer or employee of such company, or to any general partner in such company, is approved by order of the Commission, upon application, on the basis that the terms of the loan are fair and reasonable and do not involve overreaching of such company or its shareholders or partners.

(k) It shall be unlawful for any person described in subsection (l)—

(1) acting as agent, to accept from any source any compensation (other than a regular salary or wages from the business development company) for the purchase or sale of any property to or for such business development company or any controlled company thereof, except in the course of such person's business as an underwriter or broker; or

(2) acting as broker, in connection with the sale of securities to or by the business development company or any controlled company thereof, to receive from any source a commission, fee, or other remuneration for effecting such transaction which exceeds—

(A) the usual and customary broker's commission if the sale is effected on a securities exchange;

(B) 2 per centum of the sales price if the sale is effected in connection with a secondary distribution of such securities; or

(C) 1 per centum of the purchase or sale price of such securities if the sale is otherwise effected,

unless the Commission, by rules and regulations or order in the public interest and consistent with the protection of investors, permits a larger commission.

(l) The provisions of subsection (k) of this section shall apply to the following persons:

(1) Any affiliated person of a business development company.

(2)(A) Any person who is, within the meaning of section 2(a)(3) (B), (C), or (D), an affiliated person of any director, officer, employee, or member of an advisory board of the business development company.

(B) Any person who is, within the meaning of section 2(a)(3)(A), (B), (C), or (D), an affiliated person of any investment adviser of, general partner in, or person directly or indirectly either controlling, controlled by, or under common control with, the business development company.

(C) Any person who is, within the meaning of section 2(a)(3)(C), an affiliated person of any person who is an affiliated person of the business development company within the meaning of section 2(a)(3)(A).

(m) For purposes of subsections (a) and (d), a person who is a director, officer, or employee of a party to a transaction and who receives his usual and ordinary fee or salary for usual and customary services as a director, officer, or employee from such party shall not be deemed to have a financial interest or to participate in the transaction solely by reason of his receipt of such fee or salary.

(n)(1) Notwithstanding subsection (a)(4) of this section, a business development company may establish and maintain a profit-sharing plan for its directors, officers, employees, and general partners and such directors, officers, employees, and general partners may participate in such profit-sharing plan, if—

(A)(i) in the case of a profit-sharing plan for officers and employees of the business development company (including any officer or employee who is also a director of such company), such profit-sharing plan is approved by the required majority (as defined in subsection (o)) of the directors of or general partners in such company on the basis that such plan is reasonable and fair to the shareholders or partners of such company, does not involve overreaching of such company or its shareholders or partners on the part of any person concerned, and is consistent with the interests of the shareholders or partners of such company; or

(ii) in the case of a profit-sharing plan which includes one or more directors of the business development company who are not also officers or employees of such company, or one or more general partners in such company, such profit-sharing plan is approved by order of the Commission, upon application, on the basis that such plan is reasonable and fair to the shareholders or partners of such company, does not involve overreaching of such company or its shareholders or partners on the part of any person concerned, and is consistent with the interests of the shareholders or partners of such company; and

(B) the aggregate amount of benefits which would be paid or accrued under such plan shall not exceed 20 per centum of the business development company's net income after taxes in any fiscal year.

(2) This subsection may not be used where the business development company has outstanding any stock option, warrant, or right issued as part of an executive compensation plan, including a plan pursuant to **[**section 61(a)(3)(B)**]** *section 61(a)(4)(B)*, or has an investment adviser registered or required to be registered under title II of this Act.

(o) The term "required majority", when used with respect to the approval of a proposed transaction, plan, or arrangement, means both a majority of a business development company's directors or general partners who have no financial interest in such trans-

action, plan, or arrangement and a majority of such directors or general partners who are not interested persons of such company.

* * * * * * *

CAPITAL STRUCTURE

SEC. 61. (a) Notwithstanding the exemption set forth in section 6(f), section 18 shall apply to a business development company to the same extent as if it were a registered closed-end investment company, except as follows:

[(1) The asset coverage requirements of section 18(a)(1) (A) and (B) applicable to business development companies shall be 200 per centum.]

(1) Except as provided in paragraph (2), the asset coverage requirements of subparagraphs (A) and (B) of section 18(a)(1) (and any related rule promulgated under this Act) applicable to business development companies shall be 200 percent.

(2) The asset coverage requirements of subparagraphs (A) and (B) of section 18(a)(1) and of subparagraphs (A) and (B) of section 18(a)(2) (and any related rule promulgated under this Act) applicable to a business development company shall be 150 percent if—

(A) within five business days of the approval of the adoption of the asset coverage requirements described in clause (ii), the business development company discloses such approval and the date of its effectiveness in a Form 8–K filed with the Commission and in a notice on its website and discloses in its periodic filings made under section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m)—

(i) the aggregate value of the senior securities issued by such company and the asset coverage percentage as of the date of such company's most recent financial statements; and

(ii) that such company has adopted the asset coverage requirements of this subparagraph and the effective date of such requirements;

(B) with respect to a business development company that issues equity securities that are registered on a national securities exchange, the periodic filings of the company under section 13(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78m) include disclosures reasonably designed to ensure that shareholders are informed of—

(i) the amount of indebtedness and asset coverage ratio of the company, determined as of the date of the financial statements of the company dated on or most recently before the date of such filing; and

(ii) the principal risk factors associated with such indebtedness, to the extent such risk is incurred by the company; and

(C)(i) the application of this paragraph to the company is approved by the required majority (as defined in section 57(o)) of the directors of or general partners of such company who are not interested persons of the business development company, which application shall become effective on the date that is 1 year after the date of the approval,

and, with respect to a business development company that issues equity securities that are not registered on a national securities exchange, the company extends, to each person who is a shareholder as of the date of the approval, an offer to repurchase the equity securities held by such person as of such approval date, with 25 percent of such securities to be repurchased in each of the four quarters following such approval date; or

(ii) the company obtains, at a special or annual meeting of shareholders or partners at which a quorum is present, the approval of more than 50 percent of the votes cast of the application of this paragraph to the company, which application shall become effective on the date immediately after the date of the approval.

[(2)] *(3)* Notwithstanding section 18(c), a business development company may issue more than one class of senior security representing indebtedness *or which is a stock, provided that all such stock is issued in accordance with paragraph (6).*

[(3)] *(4)* Notwithstanding section 18(d)—

(A) a business development company may issue warrants, options, or rights to subscribe or convert to [voting] securities of such company, accompanied by securities, if—

(i) such warrants, options, or rights expire by their terms within ten years;

(ii) such warrants, options, or rights are not separately transferable unless no class of such warrants, options, or rights and the securities accompanying them has been publicly distributed;

[(iii) the exercise or conversion price is not less than the current market value at the date of issuance, or if no such market value exists, the current net asset value of such voting securities; and]

(iii) the exercise or conversion price at the date of issuance of such warrants, options, or rights is not less than—

(I) the market value of the securities issuable upon the exercise of such warrants, options, or rights at the date of issuance of such warrants, options, or rights; or

(II) if no such market value exists, the net asset value of the securities issuable upon the exercise of such warrants, options, or rights at the date of issuance of such warrants, options, or rights; and

(iv) the proposal to issue such securities is authorized by the shareholders or partners of such business development company, and such issuance is approved by the required majority (as defined in section 57(o)) of the directors of or general partners in such company on the basis that such issuance is in the best interests of such company and its shareholders or partners;

(B) a business development company may issue, to its directors, officers, employees, and general partners, warrants, options, and rights to purchase voting securities of such company pursuant to an executive compensation plan, if—

(i)(I) in the case of warrants, options, or rights issued to any officer or employee of such business development company (including any officer or employee who is also a director of such company), such securities satisfy the conditions in clauses (i), (iii), and (iv) of subparagraph (A); or (II) in the case of warrants, options, or rights issued to any director of such business development company who is not also an officer or employee of such company, or to any general partner in such company, the proposal to issue such securities satisfies the conditions in clauses (i) and (iii) of subparagraph (A), is authorized by the shareholders or partners of such company, 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 such company or its shareholders or partners;

(ii) such securities are not transferable except for disposition by gift, will, or intestacy;

(iii) no investment adviser of such business development company receives any compensation described in section 205(a)(1) of title II of this Act, except to the extent permitted by paragraph (1) or (2) of section 205(b); and

(iv) such business development company does not have a profit-sharing plan described in section 57(n); and

(C) a business development company may issue warrants, options, or rights to subscribe to, convert to, or purchase voting securities not accompanied by securities, if—

(i) such warrants, options, or rights satisfy the conditions in clauses (i) and (iii) of subparagraph (A); and

(ii) the proposal to issue such warrants, options, or rights is authorized by the shareholders or partners of such business development company, and such issuance is approved by the required majority (as defined in section 57(o)) of the directors of or general partners in such company on the basis that such issuance is in the best interests of the company and its shareholders or partners.

Notwithstanding this paragraph, the 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 25 per centum of the outstanding voting securities of the business development company, except that if the amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights issued to such company's directors, officers, employees, and general partners pursuant to any executive compensation plan meeting the requirements of subparagraph (B) of this paragraph would exceed 15 per centum of the outstanding voting securities of such company, 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 per centum of the outstanding voting securities of such company.

[(4)] *(5)* For purposes of measuring the asset coverage requirements of section 18(a), a senior security created by the guarantee by a business development company of indebtedness issued by another company shall be the amount of the maximum potential liability less the fair market value of the net unencumbered assets (plus the indebtedness which has been guaranteed) available in the borrowing company whose debts have been guaranteed, except that a guarantee issued by a business development company of indebtedness issued by a company which is a wholly-owned subsidiary of the business development company and is licensed as a small business investment company under the Small Business Investment Act of 1958 shall not be deemed to be a senior security of such business development company for purposes of section 18(a) if the amount of the indebtedness at the time of its issuance by the borrowing company is itself taken fully into account as a liability by such business development company, as if it were issued by such business development company, in determining whether such business development company, at that time, satisfies the asset coverage requirements of section 18(a).

(6)(A) QUALIFIED INSTITUTIONAL BUYER.—Except as provided in subparagraph (B), the following shall not apply to a senior security which is a stock and which is issued to and held by a qualified institutional buyer (as defined in section 3(a)(64) of the Securities Exchange Act of 1934):

(i) Subparagraphs (C) and (D) of section 18(a)(2).

(ii) Subparagraph (E) of section 18(a)(2), to the extent such subparagraph requires any priority over any other class of stock as to distribution of assets upon liquidation.

(iii) With respect to a senior security which is a stock, subsections (c) and (i) of section 18.

(B) INDIVIDUAL INVESTORS WHO ARE NOT QUALIFIED INSTITUTIONAL BUYERS.—Subparagraph (A) shall not apply with respect to a senior security which is a stock and which is issued to a person who is not known by the business development company to be a qualified institutional buyer (as defined in section 3(a) of the Securities Exchange Act of 1934).

(7) RULE OF CONSTRUCTION.—Notwithstanding any other provision of law, any additional class of stock issued pursuant to this section must be issued in accordance with all investor protections contained in all applicable federal securities laws administered by the Commission.

(b) A business development company shall comply with the provisions of this section at the time it becomes subject to sections 55 through 65, as if it were issuing a security of each class which it has outstanding at such time.

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DISTRIBUTION AND REPURCHASE OF SECURITIES

SEC. 63. Notwithstanding the exemption set forth in section 6(f), section 23 shall apply to a business development company to the same extent as if it were a registered closed-end investment company, except as follows:

(1) The prohibitions of section 23(a)(2) shall not apply to any company which (A) is a wholly-owned subsidiary of, or directly or indirectly controlled by, a business development company, and (B) immediately after the issuance of any of its securities for property other than cash or securities, will not be an investment company within the meaning of section 3(a).

(2) Notwithstanding the provisions of section 23(b), a business development company 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—

(A) the holders of a majority of such business development company's outstanding voting securities, and the holders of a majority of such company's outstanding voting securities that are not affiliated persons of such company, approved such company's policy and practice of making such sales of securities at the last annual meeting of shareholders or partners within one year immediately prior to any such sale, except that the shareholder approval requirements of this subparagraph shall not apply to the initial public offering by a business development company of its securities;

(B) a required majority (as defined in section 57(o)) of the directors of or general partners in such business development company have determined that any such sale would be in the best interests of such company and its shareholders or partners; and

(C) a required majority (as defined in section 57(o)) of the directors of or general partners in such business development company, in consultation with the underwriter or underwriters of the offering if it is to be underwritten, have determined in good faith, and as of a time immediately prior to the first solicitation by or on behalf of such company of firm commitments to purchase such securities or 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, less any distributing commission or discount.

(3) A business development company may sell any common stock of which it is the issuer at a price below the current net asset value of such stock upon the exercise of any warrant, option, or right issued in accordance with [section 61(a)(3)] *section 61(a)(4)*.

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