

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) For purposes of measuring the asset coverage requirements of section 80a-18(a) of this title, 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 [15 U.S.C. 661 et seq.] shall not be deemed to be a senior security of such business development company for purposes of section 80a-18(a) of this title 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 80a-18(a) of this title.

(b) Compliance

A business development company shall comply with the provisions of this section at the time it becomes subject to sections 80a-54 through 80a-64 of this title, as if it were issuing a security of each class which it has outstanding at such time.

(Aug. 22, 1940, ch. 686, title I, § 61, as added Pub. L. 96-477, title I, § 105, Oct. 21, 1980, 94 Stat. 2286; amended Pub. L. 104-290, title V, § 506, Oct. 11, 1996, 110 Stat. 3446.)

REFERENCES IN TEXT

Section 80b-5 of this title, referred to in subsec. (a)(3)(B)(iii), was amended generally by Pub. L. 100-181, title VII, § 703, Dec. 4, 1987, 101 Stat. 1263, and, as so amended, the subject matter of former paragraph (1) and clauses (A) and (B) of section 80b-5 is contained in subsections (a)(1) and (b)(1) and (2) of section 80b-5.

The Small Business Investment Act of 1958, referred to in subsec. (a)(4), is Pub. L. 85-699, Aug. 21, 1958, 72 Stat. 689, as amended, which is classified principally to chapter 14B (§ 661 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 661 of this title and Tables.

AMENDMENTS

1996—Subsec. (a)(2). Pub. L. 104-290, § 506(1), substituted a period for “if such business development company does not have outstanding any publicly held indebtedness, and all such securities of each class are—

“(A) privately held or guaranteed by the Small Business Administration, or banks, insurance companies, or other institutional investors; and

“(B) not intended to be publicly distributed.”

Subsec. (a)(3)(A). Pub. L. 104-290, § 506(2)(A), (B), inserted “accompanied by securities,” after “of such company,” and struck out “senior securities represent-

ing indebtedness accompanied by” before “warrants, options, or rights”.

Subsec. (a)(3)(A)(ii). Pub. L. 104-290, § 506(2)(C), struck out “senior” before “securities”.

Subsec. (a)(3)(C). Pub. L. 104-290, § 506(3), added subpar. (C).

§ 80a-61. Loans

Notwithstanding the exemption set forth in section 80a-6(f) of this title, section 80a-21 of this title shall apply to a business development company to the same extent as if it were a registered closed-end investment company, except that nothing in that section shall be deemed to prohibit—

(1) any loan to a director, officer, or employee of, or general partner in, a business development company for the purpose of purchasing securities of such company as part of an executive compensation plan, if such loan meets the requirements of section 80a-56(j) of this title; or

(2) any loan to a company controlled by a business development company, which companies could be deemed to be under common control solely because a third person controls such business development company.

(Aug. 22, 1940, ch. 686, title I, § 62, as added Pub. L. 96-477, title I, § 105, Oct. 21, 1980, 94 Stat. 2287.)

§ 80a-62. Distribution and repurchase of securities

Notwithstanding the exemption set forth in section 80a-6(f) of this title, section 80a-23 of this title 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 80a-23(a)(2) of this title 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 80a-3(a) of this title.

(2) Notwithstanding the provisions of section 80a-23(b) of this title, 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 80a-56(o) of this title) 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 80a-56(o) of this title) 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 80a-60(a)(3) of this title.

(Aug. 22, 1940, ch. 686, title I, § 63, as added Pub. L. 96-477, title I, § 105, Oct. 21, 1980, 94 Stat. 2289.)

§ 80a-63. Accounts and records

(a) Exception for business development company

Notwithstanding the exemption set forth in section 80a-6(f) of this title, section 80a-30 of this title shall apply to a business development company to the same extent as if it were a registered closed-end investment company, except that the reference to the financial statements required to be filed pursuant to section 80a-29 of this title shall be construed to refer to the financial statements required to be filed by such business development company pursuant to section 78m of this title.

(b) Risk factors statement; availability

(1) In addition to the requirements of subsection (a) of this section, a business development company shall file with the Commission and supply annually to its shareholders a written statement, in such form and manner as the Commission may, by rule, prescribe, describing the risk factors involved in an investment in the securities of a business development company due to the nature of such company's investment portfolio and capital structure, and shall supply copies of such statement to any registered broker or dealer upon request.

(2) If the Commission finds it 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 this subchapter, the Commission may also require, by rule, any person who, acting as principal or agent, sells a security of a business development company to inform the purchaser of such securities, at or before the time of sale, of the existence of the risk statement prepared by such business development company pursuant to this subsection, and make such risk statement available on request. The Commis-

sion, in making such rules and regulations, shall consider, among other matters, whether any such rule or regulation would impose any unreasonable burdens on such brokers or dealers or unreasonably impair the maintenance of fair and orderly markets.

(Aug. 22, 1940, ch. 686, title I, § 64, as added Pub. L. 96-477, title I § 105, Oct. 21, 1980, 94 Stat. 2289; amended Pub. L. 104-290, title V, § 507, Oct. 11, 1996, 110 Stat. 3446.)

AMENDMENTS

1996—Subsec. (b)(1). Pub. L. 104-290 inserted “and capital structure” after “portfolio”.

§ 80a-64. Preventing compliance with subchapter; liability of controlling persons

Notwithstanding the exemption set forth in section 80a-6(f) of this title, section 80a-47 of this title shall apply to a business development company to the same extent as if it were a registered closed-end investment company, except that the provisions of section 80a-47(a) of this title shall not be construed to require any company which is not an investment company within the meaning of section 80a-3(a) of this title to comply with the provisions of this subchapter which are applicable to a business development company solely because such company is a wholly-owned subsidiary of, or directly or indirectly controlled by, a business development company.

(Aug. 22, 1940, ch. 686, title I, § 65, as added Pub. L. 96-477, title I, § 105, Oct. 21, 1980, 94 Stat. 2289.)

SUBCHAPTER II—INVESTMENT ADVISERS

§ 80b-1. Findings

Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission made pursuant to section 79z-4¹ of this title, and facts otherwise disclosed and ascertained, it is found that investment advisers are of national concern, in that, among other things—

(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce;

(2) their advice, counsel, publications, writings, analyses, and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and

(3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy.

(Aug. 22, 1940, ch. 686, title II, § 201, 54 Stat. 847.)

¹ See References in Text note below.