

114TH CONGRESS  
1ST SESSION

# 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.

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## IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 2, 2015

Mr. MULVANEY introduced the following bill; which was referred to the  
Committee on Financial Services

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## A BILL

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.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Small Business Credit  
3 Availability Act”.

4 **SEC. 2. BUSINESS DEVELOPMENT COMPANY OWNERSHIP**  
5 **OF SECURITIES OF INVESTMENT ADVISERS**  
6 **AND CERTAIN FINANCIAL COMPANIES.**

7 (a) IN GENERAL.—Not later than 1 year after the  
8 date of enactment of this Act, the Securities and Ex-  
9 change Commission shall promulgate regulations to codify  
10 the order in Investment Company Act Release No. 30024,  
11 dated March 30, 2012. If the Commission fails to com-  
12 plete the regulations as required by this subsection, a busi-  
13 ness development company shall be entitled to treat such  
14 regulations as having been completed in accordance with  
15 the actions required to be taken by the Commission until  
16 such time as such regulations are completed by the Com-  
17 mission.

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

22 “(c) SECURITIES DEEMED TO BE PERMISSIBLE AS-  
23 SETS.—Notwithstanding subsection (a), securities that  
24 would be described in paragraphs (1) through (6) of such  
25 subsection except that the issuer is a company described  
26 in paragraph (2), (3), (4), (5), (6), or (9) of section 3(c)

1 may be deemed to be assets described in paragraphs (1)  
2 through (6) of subsection (a) to the extent necessary for  
3 the sum of the assets to equal 70 percent of the value  
4 of a business development company's total assets (other  
5 than assets described in paragraph (7) of subsection (a)),  
6 provided that the aggregate value of such securities count-  
7 ing toward such 70 percent shall not exceed 20 percent  
8 of the value of the business development company's total  
9 assets.”.

10 **SEC. 3. EXPANDING ACCESS TO CAPITAL FOR BUSINESS DE-**  
11 **VELOPMENT COMPANIES.**

12 (a) IN GENERAL.—Section 61(a) of the Investment  
13 Company Act of 1940 (15 U.S.C. 80a–60(a)) is amend-  
14 ed—

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

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

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

24 “(2) The asset coverage requirements of sub-  
25 paragraphs (A) and (B) of section 18(a)(1) and of

1 subparagraphs (A) and (B) of section 18(a)(2) (and  
2 any related rule promulgated under this Act) appli-  
3 cable to a business development company shall be  
4 150 percent if—

5 “(A) within five business days of the ap-  
6 proval of the adoption of the asset coverage re-  
7 quirements described in clause (ii), the business  
8 development company discloses such approval  
9 and the date of its effectiveness in a Form 8-  
10 K filed with the Commission and in a notice on  
11 its website and discloses in its periodic filings  
12 made under section 13 of the Securities Ex-  
13 change Act of 1934 (15 U.S.C. 78m)—

14 “(i) the aggregate value of the senior  
15 securities issued by such company and the  
16 asset coverage percentage as of the date of  
17 such company’s most recent financial  
18 statements; and

19 “(ii) that such company has adopted  
20 the asset coverage requirements of this  
21 subparagraph and the effective date of  
22 such requirements;

23 “(B) with respect to a business develop-  
24 ment company that issues equity securities that  
25 are registered on a national securities exchange,

1 the periodic filings of the company under sec-  
2 tion 13(a) of the Securities Exchange Act of  
3 1934 (15 U.S.C. 78m) include disclosures rea-  
4 sonably designed to ensure that shareholders  
5 are informed of—

6 “(i) the amount of indebtedness and  
7 asset coverage ratio of the company, deter-  
8 mined as of the date of the financial state-  
9 ments of the company dated on or most re-  
10 cently before the date of such filing; and

11 “(ii) the principal risk factors associ-  
12 ated with such indebtedness, to the extent  
13 such risk is incurred by the company; and

14 “(C)(i) the application of this paragraph to  
15 the company is approved by the required major-  
16 ity (as defined in section 57(o)) of the directors  
17 of or general partners of such company who are  
18 not interested persons of the business develop-  
19 ment company, which application shall become  
20 effective on the date that is 1 year after the  
21 date of the approval, and, with respect to a  
22 business development company that issues eq-  
23 uity securities that are not registered on a na-  
24 tional securities exchange, the company extends,  
25 to each person who is a shareholder as of the

1 date of the approval, an offer to repurchase the  
2 equity securities held by such person as of such  
3 approval date, with 25 percent of such securi-  
4 ties to be repurchased in each of the four quar-  
5 ters following such approval date; or

6 “(ii) the company obtains, at a special or  
7 annual meeting of shareholders or partners at  
8 which a quorum is present, the approval of  
9 more than 50 percent of the votes cast of the  
10 application of this paragraph to the company,  
11 which application shall become effective on the  
12 date immediately after the date of the ap-  
13 proval.”;

14 (3) in paragraph (3) (as redesignated), by in-  
15 serting “or which is a stock” after “indebtedness”;

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

18 (A) in the matter preceding clause (i), by  
19 striking “voting”; and

20 (B) by amending clause (iii) to read as fol-  
21 lows:

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

1                   “(I) the market value of the se-  
2                   curities issuable upon the exercise of  
3                   such warrants, options, or rights at  
4                   the date of issuance of such warrants,  
5                   options, or rights; or

6                   “(II) if no such market value ex-  
7                   ists, the net asset value of the securi-  
8                   ties issuable upon the exercise of such  
9                   warrants, options, or rights at the  
10                  date of issuance of such warrants, op-  
11                  tions, or rights; and”;

12                  (5) in paragraph (2), by inserting “or which is  
13                  a stock, provided that all such stock is issued in ac-  
14                  cordance with paragraph (6)” after “indebtedness”;  
15                  and

16                  (6) by adding at the end the following:

17                  “(6)(A) QUALIFIED INSTITUTIONAL BUYER.—  
18                  Except as provided in subparagraph (B), the fol-  
19                  lowing shall not apply to a senior security which is  
20                  a stock and which is issued to and held by a quali-  
21                  fied institutional buyer (as defined in section  
22                  3(a)(64) of the Securities Exchange Act of 1934):

23                  “(i) Subparagraphs (C) and (D) of section  
24                  18(a)(2).

1           “(ii) Subparagraph (E) of section 18(a)(2),  
2           to the extent such subparagraph requires any  
3           priority over any other class of stock as to dis-  
4           tribution of assets upon liquidation.

5           “(iii) With respect to a senior security  
6           which is a stock, subsections (c) and (i) of sec-  
7           tion 18.

8           “(B) INDIVIDUAL INVESTORS WHO ARE NOT  
9           QUALIFIED INSTITUTIONAL BUYERS.—Subparagraph  
10          (A) shall not apply with respect to a senior security  
11          which is a stock and which is issued to a person who  
12          is not known by the business development company  
13          to be a qualified institutional buyer (as defined in  
14          section 3(a) of the Securities Exchange Act of  
15          1934).

16          “(7) RULE OF CONSTRUCTION.—Notwith-  
17          standing any other provision of law, any additional  
18          class of stock issued pursuant to this section must  
19          be issued in accordance with all investor protections  
20          contained in all applicable federal securities laws ad-  
21          ministered by the Commission.”.

22          (b) CONFORMING AMENDMENTS.—The Investment  
23          Company Act of 1940 (15 U.S.C. 80a–1 et seq.) is amend-  
24          ed—

25                 (1) in section 57—

1 (A) in subsection (j)(1), by striking “sec-  
2 tion 61(a)(3)(B)” and inserting “section  
3 61(a)(4)(B)”;

4 (B) in subsection (n)(2), by striking “sec-  
5 tion 61(a)(3)(B)” and inserting “section  
6 61(a)(4)(B)”;

7 (2) in section 63(3), by striking “section  
8 61(a)(3)” and inserting “section 61(a)(4)”.

9 **SEC. 4. PARITY FOR BUSINESS DEVELOPMENT COMPANIES**

10 **REGARDING OFFERING AND PROXY RULES.**

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

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

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

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

8 (2) The Commission shall revise rules 168 and  
9 169 under the Securities Act of 1933 (17 C.F.R.  
10 230.168 and 230.169) to remove the exclusion of a  
11 business development company from an issuer that  
12 can use the exemptions provided by those rules.

13 (3) The Commission shall revise rules 163 and  
14 163A under the Securities Act of 1933 (17 C.F.R.  
15 230.163 and 230.163A) to remove a business devel-  
16 opment company from the list of issuers that are in-  
17 eligible to use the exemptions provided by those  
18 rules.

19 (4) The Commission shall revise rule 134 under  
20 the Securities Act of 1933 (17 C.F.R. 230.134) to  
21 remove the exclusion of a business development com-  
22 pany from that rule.

23 (5) The Commission shall revise rules 138 and  
24 139 under the Securities Act of 1933 (17 C.F.R.  
25 230.138 and 230.139) to specifically include a busi-

1       ness development company as an issuer to which  
2       those rules apply.

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

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

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

14                       (A) to state that the registration for secu-  
15       rities provided by that rule includes securities  
16       registered by a business development company  
17       on Form N-2; and

18                       (B) to provide an exception for a business  
19       development company from the requirement  
20       that a Form N-2 registrant must furnish the  
21       undertakings required by item 34.4 of Form N-  
22       2.

23               (9) The Commission shall revise rule 497 under  
24       the Securities Act of 1933 (17 C.F.R. 230.497) to  
25       include a process for a business development com-

1 pany to file a form of prospectus that is parallel to  
2 the process for filing a form of prospectus under  
3 rule 424(b).

4 (10) The Commission shall revise rules 172 and  
5 173 under the Securities Act of 1933 (17 C.F.R.  
6 230.172 and 230.173) to remove the exclusion of an  
7 offering of a business development company from  
8 those rules.

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

15 (12) The Commission shall revise rule 14a-101  
16 under the Securities Exchange Act of 1934 (17  
17 C.F.R. 240.14a-101) to provide that a business de-  
18 velopment company that would otherwise meet the  
19 requirements of General Instruction I.A of Form S-  
20 3 shall be deemed to meet the requirements of Form  
21 S-3 for purposes of Schedule 14A.

22 (13) The Commission shall revise rule 103  
23 under Regulation FD (17 C.F.R. 243.103) to pro-  
24 vide that paragraph (a) of that rule applies for pur-  
25 poses of Form N-2.

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

4 (1) to include an item or instruction that is  
5 similar to item 12 on Form S-3 to provide that a  
6 business development company that would otherwise  
7 meet the requirements of Form S-3 shall incor-  
8 porate by reference its reports and documents filed  
9 under the Securities Exchange Act of 1934 into its  
10 registration statement filed on Form N-2; and

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

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

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

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