

115TH CONGRESS
2D SESSION

S. 2324

To amend the Investment Company Act of 1940 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.

IN THE SENATE OF THE UNITED STATES

JANUARY 18, 2018

Mr. HELLER (for himself and Mr. MANCHIN) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To amend the Investment Company Act of 1940 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,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Small Business Credit
5 Availability Act”.

1 **SEC. 2. EXPANDING ACCESS TO CAPITAL FOR BUSINESS DE-**
 2 **VELOPMENT COMPANIES.**

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

6 (1) by redesignating paragraphs (2) through
 7 (4) as paragraphs (3) through (5), respectively; and
 8 (2) by striking paragraph (1) and inserting the
 9 following:

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

15 “(2) The asset coverage requirements of sub-
 16 paragraphs (A) and (B) of section 18(a)(1) and of
 17 subparagraphs (A) and (B) of section 18(a)(2) (and
 18 any related rule promulgated under this Act) appli-
 19 cable to a business development company shall be
 20 150 percent if—

21 “(A) not later than 5 business days after
 22 the date on which those asset coverage require-
 23 ments are approved under subparagraph (D) of
 24 this paragraph, the business development com-
 25 pany discloses that the requirements were ap-

1 proved, and the effective date of the approval,
2 in—

3 “(i) any filing submitted to the Com-
4 mission under section 13(a) or 15(d) of the
5 Securities Exchange Act of 1934 (15
6 U.S.C. 78m(a); 78o(d)); and

7 “(ii) a notice on the website of the
8 business development company;

9 “(B) the business development company
10 discloses, in each periodic filing required under
11 section 13(a) of the Securities Exchange Act of
12 1934 (15 U.S.C. 78m(a))—

13 “(i) the aggregate outstanding prin-
14 cipal amount or liquidation preference, as
15 applicable, of the senior securities issued
16 by the business development company and
17 the asset coverage percentage as of the
18 date of the business development com-
19 pany’s most recent financial statements in-
20 cluded in that filing;

21 “(ii) that the business development
22 company, under subparagraph (D), has ap-
23 proved the asset coverage requirements
24 under this paragraph; and

1 “(iii) the effective date of the approval
2 described in clause (ii);

3 “(C) with respect to a business develop-
4 ment company that is an issuer of common eq-
5 uity securities, each periodic filing of the com-
6 pany required under section 13(a) of the Secu-
7 rities Exchange Act of 1934 (15 U.S.C.
8 78m(a)) includes disclosures that are reason-
9 ably designed to ensure that shareholders are
10 informed of—

11 “(i) the amount of senior securities
12 (and the associated asset coverage ratios)
13 of the company, determined as of the date
14 of the most recent financial statements of
15 the company included in that filing; and

16 “(ii) the principal risk factors associ-
17 ated with the senior securities described in
18 clause (i), to the extent that risk is in-
19 curred by the company; and

20 “(D) the company—

21 “(i)(I) through a vote of the required
22 majority (as defined in section 57(o)), ap-
23 proves the application of this paragraph to
24 the company, to become effective on the

1 date that is 1 year after the date of the
2 approval; or

3 “(II) obtains, at a special or annual
4 meeting of shareholders or partners at
5 which a quorum is present, the approval of
6 more than 50 percent of the votes cast for
7 the application of this paragraph to the
8 company, to become effective on the first
9 day after the date of the approval; and

10 “(ii) if the company is not an issuer
11 of common equity securities that are listed
12 on a national securities exchange, extends,
13 to each person that is a shareholder as of
14 the date of an approval described in sub-
15 clause (I) or (II) of clause (i), as applica-
16 ble, the opportunity (which may include a
17 tender offer) to sell the securities held by
18 that shareholder as of that applicable ap-
19 proval date, with 25 percent of those secu-
20 rities to be repurchased in each of the 4
21 calendar quarters following the calendar
22 quarter in which that applicable approval
23 date takes place.”.

24 (b) CONFORMING AMENDMENTS.—

1 (1) INVESTMENT ADVISERS ACT OF 1940.—Sec-
 2 tion 205(b)(3) of the Investment Advisers Act of
 3 1940 (15 U.S.C. 80b–5(b)(3)) is amended—

4 (A) by striking “section 61(a)(3)(B)(iii)”
 5 and inserting “section 61(a)(4)(B)(iii)”; and

6 (B) by striking “section 61(a)(3)(B)” and
 7 inserting “section 61(a)(4)(B)”.

8 (2) INVESTMENT COMPANY ACT OF 1940.—The
 9 Investment Company Act of 1940 (15 U.S.C. 80a–
 10 1 et seq.) is amended—

11 (A) in section 57 (15 U.S.C. 80a–56)—

12 (i) in subsection (j)(1), by striking
 13 “section 61(a)(3)(B)” and inserting “sec-
 14 tion 61(a)(4)(B)”; and

15 (ii) in subsection (n)(2), by striking
 16 “section 61(a)(3)(B)” and inserting “sec-
 17 tion 61(a)(4)(B)”; and

18 (B) in section 63(3) (15 U.S.C. 80a–
 19 62(3)), by striking “section 61(a)(3)” and in-
 20 serting “section 61(a)(4)”.

21 **SEC. 3. PARITY FOR BUSINESS DEVELOPMENT COMPANIES**

22 **REGARDING OFFERING AND PROXY RULES.**

23 (a) DEFINITIONS.—In this section—

24 (1) the term “business development company”
 25 has the meaning given the term in section 2(a) of

1 the Investment Company Act of 1940 (15 U.S.C.
2 80a-2(a));

3 (2) the term “Commission” means the Securi-
4 ties and Exchange Commission;

5 (3) the term “Form N-2” means the form de-
6 scribed in section 239.14 of title 17, Code of Federal
7 Regulations;

8 (4) the term “Form S-3” means the form de-
9 scribed in section 239.13 of title 17, Code of Federal
10 Regulations; and

11 (5) the term “Schedule 14A” means the infor-
12 mation required under section 240.14a-101 of title
13 17, Code of Federal Regulations.

14 (b) REVISION TO RULES.—

15 (1) IN GENERAL.—Not later than 1 year after
16 the date of enactment of this Act, the Commission
17 shall make the revisions described in paragraph (2)
18 to allow a business development company that has
19 filed an election under section 54 of the Investment
20 Company Act of 1940 (15 U.S.C. 80a-53) to use
21 the securities offering and proxy rules that are avail-
22 able to other issuers that are required to file reports
23 under section 13(a) or section 15(d) of the Securi-
24 ties Exchange Act of 1934 (15 U.S.C. 78m(a);
25 78o(d)).

1 (2) REQUIRED REVISIONS.—The revisions de-
2 scribed in this paragraph are revisions to—

3 (A) section 230.405 of title 17, Code of
4 Federal Regulations—

5 (i) to remove the exclusion of a busi-
6 ness development company from the defini-
7 tion of the term “well-known seasoned
8 issuer” under that section; and

9 (ii) to add a registration statement
10 filed on Form N-2 to the definition of the
11 term “automatic shelf registration state-
12 ment” under that section;

13 (B) sections 230.168 and 230.169 of title
14 17, Code of Federal Regulations, to remove the
15 exclusion of a business development company
16 from an issuer that is eligible for the exemp-
17 tions under those sections;

18 (C) section 230.163 of title 17, Code of
19 Federal Regulations, to remove a business de-
20 velopment company from the list of issuers that
21 are ineligible for the exemption under that sec-
22 tion;

23 (D) section 230.163A of title 17, Code of
24 Federal Regulations, to remove the communica-
25 tions made by a business development company

1 from the list of communications that are ineli-
2 gible for the exemption under that section;

3 (E) section 230.134 of title 17, Code of
4 Federal Regulations, to remove the exclusion of
5 a communication relating to a business develop-
6 ment company from the application of that sec-
7 tion;

8 (F) sections 230.138 and 230.139 of title
9 17, Code of Federal Regulations, to specifically
10 include a business development company as an
11 issuer to which those sections apply;

12 (G) section 230.156 of title 17, Code of
13 Federal Regulations, to provide that nothing in
14 that section may be construed to prevent a
15 business development company from qualifying
16 for an exemption under section 230.168 or
17 230.169 of title 17, Code of Federal Regula-
18 tions, as amended by the Commission in accord-
19 ance with the requirements of this section;

20 (H) section 230.164 of title 17, Code of
21 Federal Regulations, to remove a business de-
22 velopment company from the list of issuers that
23 are excluded under that section;

24 (I) section 230.433 of title 17, Code of
25 Federal Regulations, to specifically include a

1 business development company that is a well-
2 known seasoned issuer as an issuer to which
3 that section applies;

4 (J) section 230.415 of title 17, Code of
5 Federal Regulations to state that the registra-
6 tion for securities under section
7 230.415(a)(1)(x) of title 17, Code of Federal
8 Regulations, includes securities registered on
9 Form N-2 by a business development company
10 that would otherwise meet the eligibility re-
11 quirements of Form S-3;

12 (K) section 230.497 of title 17, Code of
13 Federal Regulations, to include a process for a
14 business development company to file a form of
15 prospectus in the same manner as the process
16 for filing a form of prospectus under section
17 230.424(b) of title 17, Code of Federal Regula-
18 tions;

19 (L) sections 230.172 and 230.173 of title
20 17, Code of Federal Regulations, to remove the
21 exclusion of an offering of a business develop-
22 ment company from the application of those
23 sections;

24 (M) section 230.418 of title 17, Code of
25 Federal Regulations, to provide that a business

1 development company that would otherwise
2 meet the eligibility requirements of Form S-3
3 shall be exempt from paragraph (a)(3) of that
4 section;

5 (N) Schedule 14A to revise item 13(b)(1)
6 of that Schedule to include a business develop-
7 ment company that would otherwise meet the
8 requirements of note E of that Schedule as an
9 issuer to which that item applies;

10 (O) section 243.103 of title 17, Code of
11 Federal Regulations, to provide that paragraph
12 (a) of that section applies for the purposes of
13 Form N-2; and

14 (P) item 34 on Form N-2 to require a
15 business development company to provide un-
16 dertakings that are no more restrictive than the
17 undertakings that are required of a registrant
18 under section 229.512 of title 17, Code of Fed-
19 eral Regulations.

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

23 (1) to include an item or instruction that is
24 similar to item 12 on Form S-3 to provide that a
25 business development company that would otherwise

1 meet the requirements of Form S-3 shall incor-
2 porate by reference the reports and documents filed
3 by the business development company under the Se-
4 curities Exchange Act of 1934 (15 U.S.C. 78a et
5 seq.) into the registration statement of the business
6 development company filed on Form N-2; and

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

13 (d) TREATMENT IF REVISIONS NOT COMPLETED IN
14 TIMELY MANNER.—If the Commission fails to complete
15 the revisions required under subsections (b) and (c) by the
16 dates described in those subsections, a business develop-
17 ment company, during the period beginning on the date
18 that is 1 day after 1 year after the date of enactment of
19 this Act and ending on the date that the Commission com-
20 pletes those revisions, may deem those revisions to have
21 been completed in accordance with the actions required to
22 be taken by the Commission under those subsections.

23 (e) RULES OF CONSTRUCTION.—

24 (1) TREATMENT OF SUCCESSOR REGULATIONS
25 AND FORMS.—Any reference in this section to a reg-

1 ulation or form shall be construed as a reference
2 to—

3 (A) that regulation or form, as in effect on
4 the day before the date of enactment of this
5 Act; or

6 (B) any successor to that regulation or
7 form.

8 (2) DISTRIBUTION OF SALES MATERIAL.—

9 Nothing in this section, or in the amendments made
10 pursuant to the requirements of this section, may be
11 construed to prevent a business development com-
12 pany from distributing sales material under section
13 230.482 of title 17, Code of Federal Regulations.

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