

folio 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 80a-2(a)(46)(C)(ii) of this title;

(3) securities purchased in transactions not involving any public offering from an issuer described in sections 80a-2(a)(46)(A) and (B) of this title 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 com-

pany, 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 80a-56(j) of this title.

(b) Valuation of assets

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 78m of this title, and shall be determined no less frequently than annually.

(Aug. 22, 1940, ch. 686, title I, § 55, as added Pub. L. 96-477, title I, § 105, Oct. 21, 1980, 94 Stat. 2278; amended Pub. L. 100-181, title VI, § 626, Dec. 4, 1987, 101 Stat. 1263; Pub. L. 104-290, title V, § 505, Oct. 11, 1996, 110 Stat. 3446.)

REFERENCES IN TEXT

The Securities Act of 1933, referred to in subsec. (a)(1), is act May 27, 1933, ch. 38, title I, 48 Stat. 74, as amended, which is classified generally to subchapter I (§ 77a et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77a of this title and Tables.

AMENDMENTS

1996—Subsec. (a)(1)(A). Pub. L. 104-290 substituted “from any person” for “or from any person” and inserted before semicolon “, 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”.

1987—Subsec. (a)(1)(B). Pub. L. 100-181 substituted “described in section” for “described in sections”.

§ 80a-55. Qualifications of directors

(a) Non-interested persons

A majority of a business development company's directors or general partners shall be persons who are not interested persons of such company.

(b) Vacancies; suspension of provisions

If, by reason of the death, disqualification, or bona fide resignation of any director or general partner, a business development company does not meet the requirements of subsection (a) of this section, or the requirements of section 80a-15(f)(1) of this title with respect to directors, the operation of such provisions shall be suspended for a period of 90 days or for such longer period as the Commission may prescribe, upon its own motion or by order upon application, as not inconsistent with the protection of investors.

(Aug. 22, 1940, ch. 686, title I, § 56, as added Pub. L. 96-477, title I § 105, Oct. 21, 1980, 94 Stat. 2280.)

§ 80a-56. Transactions with certain affiliates

(a) Transactions involving controlling or closely affiliated persons

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 80a-21(b) or section 80a-61 of this title; 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) Controlling or closely affiliated persons

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 80a-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 80a-2(a)(3)(C) or (D) of this title, an affiliated person of any such person specified in this paragraph.

(c) Exemption orders

Notwithstanding paragraphs (1), (2), and (3) of subsection (a), any person may file with the Commission an application for an order exempt-

ing 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 [15 U.S.C. 77a et seq.], its registration statement and reports filed under the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], and its reports to shareholders or partners; and

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

(d) Transactions involving noncontrolling shareholders or affiliated persons

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 80a-21(b) of this title; 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) Noncontrolling shareholders or affiliated persons; executive officer

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 80a-2(a)(3)(A) of this title, 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) Approval of proposed transactions

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 directors 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 [15 U.S.C. 77a et seq.], its registration statement and reports filed under the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], 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 80a-30(a) of this title, a description of such transaction, their findings, the information or materials upon which their findings were based, and the basis therefor.

(g) Transactions in the ordinary course of business

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) Inquiry procedures

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) Rules and regulations of Commission

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 80a-17 of this title 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 80a-17 of this title that are applicable to all registered closed-end investment companies.

(j) Warrants, options, and rights to purchase voting securities; loans to facilitate executive compensation plans

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 80a-60(a)(3)(B) of this title; 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 com-

pany (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) Restriction on brokerage commissions

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) Persons subject to brokerage commission restrictions

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 80a-2(a)(3)(B), (C), or (D) of this title, an affiliated person or 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 82a-2(a)(3)(A), (B), (C), or (D) of this title, 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 80a-2(a)(3)(C) of this title, an affiliated person of any person who is an affiliated person of the business development company within the meaning of section 80a-2(a)(3)(A) of this title.

(m) Receipt of fee or salary from transaction participant

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) Profit-sharing plans

(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 80a-60(a)(3)(B) of this title, or has an investment adviser registered or required to be registered under subchapter II of this chapter.

(o) Required majority for approval of proposed transactions

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 transaction, plan, or ar-

rangement and a majority of such directors or general partners who are not interested persons of such company.

(Aug. 22, 1940, ch. 686, title I, § 57, as added Pub. L. 96-477, title I, § 105, Oct. 21, 1980, 94 Stat. 2280; amended Pub. L. 100-181, title VI, § 627, Dec. 4, 1987, 101 Stat. 1263.)

REFERENCES IN TEXT

The Securities Act of 1933, referred to in subsecs. (c)(2) and (f)(2), is act May 27, 1933, ch. 38, title I, 48 Stat. 74, as amended, which is classified generally to subchapter I (§77a et seq.) of chapter 2A of this title. For complete classification of this Act to the Code, see section 77a of this title and Tables.

The Securities Exchange Act of 1934, referred to in subsecs. (c)(2) and (f)(2), is act June 6, 1934, ch. 404, 48 Stat. 881, as amended, which is classified principally to chapter 2B (§78a et seq.) of this title. For complete classification of this Act to the Code, see section 78a of this title and Tables.

AMENDMENTS

1987—Subsec. (i). Pub. L. 100-181 substituted “subsections (a) and (d) of section 80a-17 of this title” for “sections 80a-17(a) and (d) of this title” in two places.

§ 80a-57. Changes in investment policy

No business development company shall, unless authorized by the vote of a majority of its outstanding voting securities or partnership interests, change the nature of its business so as to cease to be, or to withdraw its election as, a business development company.

(Aug. 22, 1940, ch. 686, title I, § 58, as added Pub. L. 96-477, title I, § 105, Oct. 21, 1980, 94 Stat. 2285.)

§ 80a-58. Incorporation of subchapter provisions

Notwithstanding the exemption set forth in section 80-6(f) of this title, sections 80a-1, 80a-2, 80a-3, 80a-4, 80a-5, 80a-6, 80a-9, 80a-10(f), 80a-15(a), (c), and (f), 80a-16(b), 80a-17(f) through (j), 80a-19(a), 80a-20(b), 80a-31(a) and (c), 80a-32 through 80a-46, and 80a-48 through 80a-52 of this title shall apply to a business development company to the same extent as if it were a registered closed-end investment company.

(Aug. 22, 1940, ch. 686, title I, § 59, as added Pub. L. 96-477, title I, § 105, Oct. 21, 1980, 94 Stat. 2285.)

§ 80a-59. Functions and activities of business development companies

Notwithstanding the exemption set forth in section 80a-6(f) of this title, section 80a-12 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 Commission shall not prescribe any rule, regulation, or order pursuant to section 80a-12(a)(1) of this title governing the circumstances in which a business development company may borrow from a bank in order to purchase any security.

(Aug. 22, 1940, ch. 686, title I, § 60, as added Pub. L. 96-477, title I, § 105, Oct. 21, 1980, 94 Stat. 2285.)

§ 80a-60. Capital structure

(a) Exceptions for business development company

Notwithstanding the exemption set forth in section 80a-6(f) of this title, section 80a-18 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 asset coverage requirements of section 80a-18(a)(1)(A) and (B) of this title applicable to business development companies shall be 200 per centum.

(2) Notwithstanding section 80a-18(c) of this title, a business development company may issue more than one class of senior security representing indebtedness.

(3) Notwithstanding section 80a-18(d) of this title—

(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

(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 80a-56(o) of this title) 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;