

Public Law 96-477
96th Congress

An Act

To amend the Federal securities laws to provide incentives for small business investment, and for other purposes

Oct. 21, 1980
[H.R. 7554]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “Small Business Investment Incentive Act of 1980”.

Small Business
Investment Incentive
Act of 1980.

**TITLE I—AMENDMENTS TO THE INVESTMENT COMPANY
ACT OF 1940**

15 USC 80a-51 note.

DEFINITIONS

SEC. 101. Section 2(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)) is amended by adding at the end thereof the following new paragraphs:

“(46) ‘Eligible portfolio company’ means any issuer which—

“(A) is organized under the laws of, and has its principal place of business in, any State or States;

“(B) is neither an investment company as defined in section 3 (other than a small business investment company which is licensed by the Small Business Administration to operate under the Small Business Investment Act of 1958 and which is a wholly-owned subsidiary of the business development company) nor a company which would be an investment company except for the exclusion from the definition of investment company in section 3(c); and

“(C) satisfies one of the following:

“(i) it does not have any 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;

“(ii) it is controlled by a business development company, either alone or as part of a group acting together, and such business development company in fact exercises a controlling influence over the management or policies of such eligible portfolio company and, as a result of such control, has an affiliated person who is a director of such eligible portfolio company; or

“(iii) it meets such other criteria as the Commission may, by rule, establish as consistent with the public interest, the protection of investors, and the purposes fairly intended by the policy and provisions of this title.

“(47) ‘Making available significant managerial assistance’ by a business development company means—

“(A) any arrangement whereby a business development company, through its directors, officers, employees, or general part-

15 USC 80a-3.

15 USC 661 note.

Post, pp. 2276, 2295.

15 USC 78g.

asset value of such stock upon the exercise of any warrant, option, or right issued in accordance with section 61(a)(3).

“ACCOUNTS AND RECORDS

“SEC. 64. (a) Notwithstanding the exemption set forth in section 6(f), section 31 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 30 shall be construed to refer to the financial statements required to be filed by such business development company pursuant to section 13 of the Securities Exchange Act of 1934.

15 USC 80a-63.
Ante, p. 2277, 15
USC 80a-30.

15 USC 80a-29.

15 USC 78m.

“(b)(1) In addition to the requirements of subsection (a), 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 shall supply copies of such statement to any registered broker or dealer upon request.

Risk factors statement.

“(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 title, 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 Commission, in making such rules and regulations, shall consider, among other matter, 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.

“LIABILITY OF CONTROLLING PERSONS; PREVENTING COMPLIANCE WITH TITLE

SEC. 65. Notwithstanding the exemption set forth in section 6(f), section 48 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 48(a) shall not be construed to require any company which is not an investment company within the meaning of section 3(a) to comply with the provisions of this title 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.”.

15 USC 80a-64.
Ante, p. 2277, 15
USC 80a-47.

15 USC 80a-3.

TITLE II—AMENDMENTS TO THE INVESTMENT ADVISERS ACT OF 1940

DEFINITION OF BUSINESS DEVELOPMENT COMPANY

SEC. 201. Section (202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)) is amended by adding at the end thereof the following new paragraph:

“(22) ‘Business development company’ means any company which is a business development company as defined in section 2(a)(48) of

Ante, p. 2275.
Ante, p. 2278.

title I of this Act and which complies with section 55 of title I of this Act, except that—

“(A) the 70 per centum of the value of the total assets condition referred to in section 2(a)(48) and 55 of title I of this Act shall be 60 per centum for purposes of determining compliance therewith;

Ante, pp. 2278-2289.

“(B) such company need not be a closed-end company and need not elect to be subject to the provisions of sections 55 through 65 of title I of this Act; and

“(C) the securities which may be purchased pursuant to section 55(a) of title I of this Act may be purchased from any person.

For purposes of this paragraph, all terms in sections 2(a)(48) and 55 of title I of this Act shall have the same meaning set forth in such title as if such company were a registered closed-end investment company, except that the value of the assets of a business development company which is not subject to the provisions of sections 55 through 65 of title I of this Act shall be determined as of the date of the most recent financial statements which it furnished to all holders of its securities, and shall be determined no less frequently than annually.”.

REGISTRATION REQUIREMENTS

Ante, p. 2278.

SEC. 202. Section 203(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(b)) is amended by striking out the period at the end of the paragraph (3) and inserting in lieu thereof the following: “, or a company which has elected to be a business development company pursuant to section 54 of title I of this Act and has not withdrawn its election. For purposes of determining the number of clients of an investment adviser under this paragraph, no shareholder, partner, or beneficial owner of a business development company, as defined in this title, shall be deemed to be a client of such investment adviser unless such person is a client of such investment adviser separate and apart from his status as a shareholder, partner, or beneficial owner.”.

INVESTMENT ADVISORY CONTRACTS

SEC. 203. Section 205 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-5) is amended—

(1) by striking out “or” immediately before “(B)” in the sentence following paragraph (3) thereof; and

(2) by striking out the period at the end of such sentence and inserting in lieu thereof the following “, or (C) apply with respect to any investment advisory contract between an investment adviser and a business development company, as defined in this title, if (i) the compensation provided for in such contract does not exceed 20 per centum of the realized capital gains upon the funds of the business development company over a specified period or as of definite dates, computed net of all realized capital losses and unrealized capital depreciation, and the condition of section 61(a)(3)(B)(iii) of title I of this Act is satisfied, and (ii) the business development company does not have outstanding any option, warrant, or right issued pursuant to section 61(a)(3)(B) of title I of this Act and does not have a profit-sharing plan described in section 57(n) of title I of this Act.”.

Ante, p. 2286.

Ante, p. 2280.

SMALL BUSINESS SECURITIES ACT AMENDMENTS
OF 1980

SEPTEMBER 18 (legislative day, JUNE 12), 1980. – Ordered to be printed

Mr. SARBANES, from the Committee on Banking, Housing and Urban
Affairs, submitted the following

R E P O R T

[To accompany S. 2990]

The Committee on Banking, Housing, and Urban Affairs, to which was referred the bill (S. 2990) to amend the Federal securities laws to facilitate the activities of business development companies, to encourage the mobilization of capital for new, small and medium-size and independent business, to maintain the system of investor protection and investor confidence, and for other purposes, having considered the same, reports favorably thereon, with an amendment, and an amendment to the title, and recommends that the bill, as amended do pass.

COMMITTEE DELIBERATIONS

Senator Sarbanes introduced S. 2990 on July 29 (legislative day June 12), 1980 for himself and Senators Nelson, Proxmire, Williams, Cranston, Riegle, Stewart, Mitchell, Tower, Lugar, Weicker, and Garn. Hearings were held on a variety of bills before the Subcommittee on Securities on April 29, May 16, and June 2, 1980. On July 31, the Committee ordered S. 2990, with an amendment and an amendment to the title, to be reported to the Senate.

HISTORY OF THE LEGISLATION

S. 2990 is a composite of numerous bills which were introduced during the 96th Congress. On July 18, 1979, Senators Tower and Lugar introduced S. 1533, the "Venture Capital Company Act of 1979," to provide an exemption from the Investment Company Act of 1940 for certain qualified venture capital companies. On October 25, 1979, Senator Nelson introduced S. 1940, the "Venture Capital Investment Act

(1)

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TITLE II—AMENDMENTS TO THE INVESTMENT ADVISERS ACT OF 1940

Title II would make two changes in the Investment Advisers Act of 1940 to deal with special problems of business development companies (defined in a manner similar to that in Title I, but with exceptions that broaden the class of covered companies).

In the first change, the bill provides that an investment adviser to a privately-held business development company will generally not have the beneficial owners of that company counted as clients for purposes of Section 203 (b) (3) of the Advisers Act. Thus, the adviser would not be required to register under the Advisers Act, as long as he does not hold himself out to the public as an investment adviser or have a total of fourteen or more other clients, thereby triggering the fifteen-client threshold for registration. This provision would allow the investment advisers of privately-held business development companies to remain outside of the Commission's regulatory jurisdiction except for the relevant antifraud provisions (including Section 206 of the Investment Advisers Act), which apply at present to investment advisers excepted from registration. The Committee believes that the antifraud provision of Section 206 of the Advisers Act will continue to provide an effective check on actual instances of abuse through fraud or deception.

Second, registered investment advisers to business development companies would in certain instances be permitted to receive "performance fees," geared to appreciation of the companies' portfolios. This approach is a departure from the previous interpretations of Section 205 of the Advisers Act.

Title III—Capital Formation

Title III of the bill addresses more general concerns about the capital formation process. It is designed to assist new, small, medium-sized and independent businesses in raising capital by setting up a mechanism to improve state-federal cooperation in studying and attempting to solve the problems that such businesses have in attracting capital.

The Commission, in cooperation with other federal and state agencies, is directed to study and report upon the problems faced by small businesses in raising capital and to attempt to lessen the severity of those problems by promoting uniformity in securities regulation and reducing paperwork so that such businesses can attract public investors with minimal regulatory burdens. As part of this process, the bill directs the Commission to conduct an annual "Government-business forum" with the participation of other federal agencies, state securities commissions, and small business professional associations, to undertake an ongoing review of the financing problems of small businesses.

The Committee is cognizant of the Commission's past and present efforts in this area. It believes this bill will aid and stimulate the Commission in continuing those efforts. By enlisting the cooperation and expertise of other concerned organizations in the federal, state, and private sectors and by launching a more comprehensive and coordinated effort to achieve meaningful relief for this crucial segment of the nation's economy, the Committee believes Section 306 of the bill can be of great assistance to the reduction of regulatory burdens

broker-dealers involving business development company securities are made only to customers able to afford the risks of the investment

Section 65—Liability of Controlling Persons; Preventing Compliance with Title

New section 65 of the Act would make section 48 of the Investment Company Act, which makes certain conduct unlawful, applicable to a business development company as if it were a registered closed-end investment company, except that the provisions of subsection (a) of that section should not be construed to require any company which is not an investment company within the meaning of section 3 (a) of the Act to comply with the provisions of the Act 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. Unlike most registered investment companies, business development companies frequently have control of the operating companies in which they invest. This section makes clear that control, in and of itself, does not serve to bring those operating companies within the purview of the Investment Company Act.

TITLE II—AMENDMENT TO THE INVESTMENT ADVISERS ACT OF 1940

Section 202(a)—Definition of Business Development Company

Section 201 of the bill would amend section 202(a) of the Investment Advisers Act of 1940 (“Advisers Act”) by adding new paragraph (22) to define the term “business development company” to mean any company which is described in new section 2 (a) (48) of the Investment Company Act and which complies with section 55 of the amended Investment Company Act regarding functions and activities of business development companies except that: (A) the 70 percent test of section 55 is changed to 60 percent, that is, the company must not make any nonqualifying purchases unless the value of the assets reflected by qualified purchases at the time of the purchase constitutes at least 60 percent of the value of its total assets; (B) the company does not have to be a closed-end company or be subject to the provisions of section 55 through 65 of the Investment Company Act; and (C) the securities which may be purchased pursuant to section 55(a) of the Investment Company Act may be purchased from any person. For purposes of applying the standards of sections 2 (a) (48) and 61 of the Investment Company Act, reference is made to definitions in that Act, except that the valuation of the assets of a business development company for these purposes, would be made on the basis of the latest distributed financial statements of such company, provided that they are not more than one year old.

Section 203(b) (3)—Registration Requirements

Section 202 of the bill would amend section 203(b) (3) of the Advisers Act. The section presently provides that an investment adviser is excepted from registration under the Advisers Act if he has fewer than fifteen clients in the immediately preceding twelve month period and neither holds himself out to the public as an investment adviser nor acts as adviser to a registered investment company. Under the bill, an investment adviser to a business development company which has made the election to be regulated under

new section 54 and has not withdrawn that election would be treated in a different manner. Thus, an adviser to a public business development company would be required to register under the Advisers Act.

To clarify the availability of the exception of section 203(b) (3) to an investment adviser to a private business development company, the bill would deem an investment adviser to have only one client as a result of an investment advisory relationship with such a business development company unless a shareholder, partner or beneficial owner of the business development company was a client of the adviser separate and apart from his or her status as a shareholder, partner or beneficial owner of the business development company. Together with the proposed amendment of the nonpublic offering exclusion of section 3(c) (1) under the Investment Company Act, the bill would enable both a privately-held business development company and its investment adviser to operate without registration. The relevant antifraud provisions of section 206 of the Advisers Act would remain applicable, however, just as they presently do to all other investment advisers excepted from registration under the Adviser Act.

This amendment to section 203(b) (3) and the addition of new section 202(a) (22) of the Advisers Act are not intended to affect adversely the status of persons or firms which are not registered under the Advisers Act. First, with respect to persons or firms which do not advise business development companies, the amendment to section 203(b) (3) (the non-attribution of client status to a shareholder, partner or beneficial owner) is not intended to suggest that each shareholder, partner or beneficial owner of a company advised by such a person or firm should or should not be regarded as a client of that person or firm. Second, with respect to persons or firms which do advise business development companies, but which do not rely on the amendment to section 203(b) (3), such amendment is not intended to suggest that such shareholder, partner, or beneficial owner of a company advised by such person or firm should or should not be regarded as a client of that person or firm. Rather, this amendment is intended only to provide a “safe harbor” for those investment advisers which choose to comply with its provisions.

Section 205—Investment Advisory Contract

Section 203 of the bill would amend section 205(1) of the Advisers Act. That section generally prohibits an investment adviser from serving a client pursuant to a contract which provides for a “performance fee.” *i.e.*, compensation to the adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of a client. New clause (C) of section 205 would establish for registered investment advisers of business development companies, as defined in the Advisers Act, an exemption from that section’s prohibition, by permitting a performance fee arrangement, provided that the compensation described in the investment advisory contract does not exceed 20 percent of the realized capital gains (net of realized capital losses and unrealized depreciation) upon the funds of the business development company over a period of time or as of dates specified in the contract. As a result, an adviser could receive an incentive fee without the risks of a reduced fee (associated with symmetrical incentive fee arrangements) if the investment performance was below that of

an acceptable index; such adviser could receive a fee if there were significant net capital gains in the time period involved. For this purpose, the incentive fee permitted under this amendment could only reflect realized gains (rather than all unrealized appreciation) and such gains would have to be netted against all depreciation realized and unrealized. This exception to the usual prohibition on incentive fees is conditioned on the business development company's not having either an executive compensation plan as described in new section 61(a) (3) (B) of the Investment Company Act or a profit sharing plan as described in new section 57(n) of that Act. This restriction is designed to prevent the registered investment adviser of a business development company from receiving performance-based compensation where the board of directors of the business development company has already determined to provide incentive compensation through stock options or other incentive compensation plans for services rendered by its management.

The maximum percentage of net realized capital gains set forth in this section is, of course, applicable only to advisers which are registered, or are required to be registered, under the Advisers Act. It is set forth primarily to provide guidance to directors of business development companies which employ external advisers which in turn are registered advisers. In this regard, the Committee was concerned that, without some statutory guidance, directors of the first business development companies to be publicly held would not have any models available for comparison. Thus, the Committee regards the statutory compensation formula as part of this general experiment and will be interested in the empirical experience of business development companies which take advantage of this provision.

The Committee understands that a number of private business development companies may pay different or higher performance-based compensation and are concerned the statutory standard for public business development companies may be applied to them as a standard. The statutory formula is not intended to apply as a standard for determining whether other compensation arrangements, which may be different in form or amount, are appropriate for any person or firm not required to be registered under the Advisers Act. Similarly, with regard to compensation received by investment advisers to or managers of business development companies which have elected to be subject to sections 54 through 65 of the Investment Company Act, section 36 of that Act will apply to such persons but it is the intent of the Committee that the compensation arrangements which may be approved by the disinterested directors of business development companies not be compared inflexibly to those of conventional registered investment companies. For purposes of section 36(b), the reasonableness of payments made to an external investment adviser, manager or general partner of a business development company should be considered (in any actions which may be brought) in light of all the facts and circumstances, using appropriate comparisons with compensation received by persons performing comparable services for comparable companies in the context of the qualifications of and responsibilities undertaken by the investment adviser, manager or general partner.

SMALL BUSINESS INVESTMENT INCENTIVE ACT OF 1980

SEPTEMBER 17, 1980.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. STAGGERS, from the Committee on Interstate and Foreign Commerce, submitted the following

R E P O R T

[To accompany H.R. 7554]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 7554) to amend the Securities Act of 1933 and the Investment Company Act of 1940 to provide incentives for small business investment, and for other purposes, having considered the same, report favorably thereon, with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

That this Act may be cited as the “Small Business Investment Incentive Act of 1980”.

TITLE I—AMENDMENTS TO THE INVESTMENT COMPANY ACT OF
1940

DEFINITIONS

SEC. 101. Section 2(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)) is amended by adding at the end thereof the following new paragraphs:

“(46) ‘Eligible portfolio company’ means any issuer which—

“(A) is organized under the laws of, and has its principal place of business in, any State or States;

“(B) is neither an investment company as defined in section 3 (other than a small business investment company which is licensed by the Small Business Administration to operate under the Small Business Investment Act of 1958 and which is

section, and make such risk statement available on request. The Commission, 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.

“LIABILITY OF CONTROLLING PERSONS; PREVENTING COMPLIANCE WITH
TITLE

SEC. 65. Notwithstanding the exemption set forth in section 6(f), section 48 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 48(a) shall not be construed to require any company which is not an investment company within the meaning of section 3(a) to comply with the provisions of this title 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.”.

TITLE II—AMENDMENTS TO THE INVESTMENT ADVISERS
ACT OF 1940

DEFINITION OF BUSINESS DEVELOPMENT COMPANY

SEC. 201. Section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)) is amended by adding at the end thereof the following new paragraph:

“(22) ‘Business development company’ means any company which is a business development company as defined in section 2(a)(48) of title I of this Act and which complies with section 55 of title I of this Act, except that—

“(A) the 70 per centum of the value of the total assets condition referred to in section 2(a)(48) and 55 of title I of this Act shall be 60 per centum for purposes of determining compliance therewith;

“(B) such company need not be a closed-end company and need not elect to be subject to the provisions of sections 55 through 65 of title I of this Act; and

“(C) the securities which may be purchased pursuant to section 55(a) of title I of this Act may be purchased from any person.

For purposes of this paragraph, all terms in sections 2(a)(58) and 55 of title I of this Act shall have the same meaning set forth in such title as if such company were a registered closed-end investment company, except that the value of the assets of a business development company which is not subject to the provisions of sections 55 through 65 of title I of this Act shall be determined as of the date of the most recent financial statements which it furnished to all holders of its securities, and shall be determined no less frequently than annually.”.

REGISTRATION REQUIREMENTS

SEC. 202. Section 203(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(b)) is amended by striking out the period at the end of the paragraph (3) and inserting in lieu thereof the following: “, or a company which has elected to be a business development company pursuant to section 54 of title I of this Act and has not withdrawn its election. For purposes of determining the number of clients of an investment adviser under this paragraph, no shareholder, partner, or beneficial owner of a business development company, as defined in this title, shall be deemed to be a client of such investment adviser unless such person is a client of such investment adviser separate and apart from his status as a shareholder, partner, or beneficial owner.”.

INVESTMENT ADVISORY CONTRACTS

SEC. 203. Section 205 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-5) is amended—

(1) by striking out “or” immediately before “(B)” in the sentence following paragraph (3) thereof; and

(2) by striking out the period at the end of such sentence and inserting in lieu thereof the following: “, or (C) apply with respect to any investment advisory contract between an investment adviser and a business development company, as defined in this title, if (i) the compensation provided for in such contract does not exceed 20 per centum of the realized capital gains upon the funds of the business development company over a specified period or as of definite dates, computed net of all realized capital losses and unrealized capital depreciation, and the condition of section 61(a)(3)(B)(iii) of title I of this Act is satisfied, and (ii) the business development company does not have outstanding any option, warrant, or right issued pursuant to section 61(a)(3)(B) of title I of this Act and does not have a profit-sharing plan described in section 57(n) of title I of this Act.”.

TITLE III—AMENDMENTS TO OTHER FEDERAL SECURITIES LAWS

SMALL OFFERING INCREASE

SEC. 301. Section 3(b) of the Securities Act of 1933 (15 U.S.C. 77c(b)) is amended by striking out the “\$2,000,000” and inserting in lieu thereof “\$5,000,000”.

AMENDMENTS TO THE TRUST INDENTURE ACT OF 1939

SEC. 302. (a) Section 304(a)(8) of the Trust Indenture Act of 1939 (15 U.S.C. 77ddd(a)(88)) is amended by striking out “more than \$250,000 aggregate principal amount of any securities of the same issuer” and inserting in lieu thereof the following: “an aggregate principal amount of securities of the same issuer greater than the figure stated in section 3(b) of the Securities Act of 1933 limiting

exemptions thereunder, or such lesser amount as the Commission may establish by its rules and regulations”.

(b) Section 304(a)(9) of the Trust Indenture Act of 1939 (15 U.S.C. 77ddd(a)(9)) is amended—

(1) by striking out “\$1,000,000 or less” and inserting in lieu thereof “\$10,000,000, or such lesser amount as the Commission may establish by its rules and regulations”;

(2) by striking out “more than \$1,000,000” and inserting in lieu thereof “more than \$10,000,000”; and

(3) by inserting immediately before the semicolon at the end thereof the following: “, or such lesser amount as the Commission may establish by its rules and regulations”.

Amend the title so as to read:

A bill to amend the Federal securities laws to provide incentives for small business investment, and for other purposes.

PURPOSE OF THE BILL

The purpose of the Bill is to amend the Securities Act of 1933, the Trust Indenture Act of 1939, the Investment Company Act of 1940 and the Investment Advisers Act of 1949 so that business enterprises, particularly small growing and financially troubled enterprises, can—in a manner consistent with the interests of investor protection—more readily raise needed capital.

BACKGROUND AND NEED

H.R. 7554 was introduced on June 12, 1980 by Representative Broyhill, and was ordered to be reported on August 28, 1980. Prior to the introduction of H.R. 7554, several predecessor bills had been introduced and considered. On May 8, 1979 Representative Broyhill introduced H.R. 3991, the “Small Business Investment Incentive Act of 1975,” which was designed to provide exemptions from the Investment Company Act of 1940 and the Securities Act of 1933 for certain qualified venture capital companies in certain circumstances. Hearings were held on November 7 and 8, 1979 before the Subcommittee on Consumer Protection and Finance. During that testimony, while venture capital industry representatives supported H.R. 3991, the Securities and Exchange Commission expressed serious concerns about the provisions of H.R. 3991.

Thereafter a new bill was introduced in an attempt to accommodate these concerns. That bill was H.R. 6723, the “Small Business Investment Incentive Act of 1980,” introduced by Representative Broyhill on March 6, 1980. On June 4, 1980 the Commission’s own legislative proposal in this area, H.R. 7491, the “Business Development Company Act of 1980,” was introduced by Representative Scheuer. On June 12, 1980 Representative Broyhill introduced the present bill, H.R. 7554, to replace H.R. 6723. On June 17, 1980, a hearing on these bills was held before the Subcommittee on Consumer Protection and Finance. After extensive discussions among the staffs of the Committee and the Securities and Exchange Commission and representatives of the venture capital industry to resolve remaining substantive differences with respect to the bills’ contents, the present version of H.R. 7554 was ordered reported by the Subcommittee on July 30, 1980. In this regard, the Committee

more than 10 percent of an investment company's voting securities without having its own shareholders or partners treated as owners of that investment company's securities, so long as the entity does not devote more than 10 percent of its assets to investment in such investment companies. This provision is intended to eliminate a problem that some privately-held investment companies, including venture capital companies, have confronted in attracting substantial amounts of capital from institutional investors and other entities without exceeding the 100-investor ceiling for exclusion from registration under the Investment Company Act. This provision would be available to all private investment companies, not just business development companies.

Second, Section 104 of the Bill embodies a general revision of Section 47 of the Act, dealing with enforceability of illegal contracts, and is designed to provide clearer statutory guidance in interpreting that equitable recession remedy. The Committee intends this change to assure that contracts made in violation of any provision of the Act are enforceable only to the extent that enforcement would be more equitable than non-enforcement and would not be inconsistent with the Act's purposes. However, when those conditions are met, the court is given the discretion to require compliance with the contract. Similarly, if the contract has already been performed, rescission may not be denied unless such denial would be more equitable and consistent with the Act's purposes.

TITLE II—AMENDMENTS TO THE INVESTMENT ADVISERS ACT OF 1940

Title II makes two changes in the Investment Adviser Act of 1940 to deal with special problems of business development companies (defined in a manner similar to that in Title I, but with exceptions that broaden the class of covered companies).

The Bill first provides that an investment adviser to a privately held business development company (including a general partner of a limited partnership) will generally not have the beneficial owners of that company counted as clients for purposes of Section 203(b)(3) of that Act. Thus, the adviser would not be required to register under the Adviser Act, as long as he does not hold himself out to the public as an investment adviser or have a total of fourteen or more other clients, thereby triggering the fifteen-client threshold for registration. This provision of the Bill would allow the investment advisers of privately-held business development companies to remain outside of the Commission's regulatory jurisdiction except for the relevant antifraud provisions (including Section 206 of the Investment Advisers Act), which are presently applicable to investment advisers excepted from registration. As further discussed below, the Committee believes that the antifraud provision of Section 206 will continue to provide an effective check on actual instances of abuse through fraud or deception.

Second, registered investment advisers to business development companies would in certain instances be permitted to receive "performance fees," geared to appreciation of the companies' portfolios. This approach is a departure from the prior rule in Section 205 of the Advisers Act, which generally prohibits the use of performance-based compensation arrangements.

The Committee wishes to make plain that it expects the courts to imply private rights of action under this legislation, where the plaintiff falls within the class of persons protected by the statutory provision in question. Such a right would be consistent with and further Congress' intent in enacting that provision, and where such actions would not improperly occupy an area traditionally the concern of the state law.⁷ In appropriate instances, for example, breaches of fiduciary duty involving personal misconduct should be remedied under Section 36(a) of the Investment Company Act. With respect to business development companies, the Committee contemplates suits by shareholders as well as by the Commission, since these are the persons the provision is designed to protect, and such private rights of action will assist in carrying out the remedial purposes of Section 36.⁸

SECTION-BY-SECTION ANALYSIS

TITLE I—AMENDMENTS TO THE INVESTMENT COMPANY ACT OF 1940

Section 101. Definitions

Section 101 of the bill amends section 2(a) of the Investment Company Act of 1940 (“Act”) by adding new paragraphs 46, 47 and 48. New section 2(a)(46) defines the term “eligible portfolio company” to mean any issuer which meets certain specified requirements.

First, section 2(a)(46)(A) requires that an eligible portfolio company be organized under the laws of, and have its principal place of business in, any state or states. Thus, for example, the company could be organized under the laws of New Jersey and have its principal place of business in California. This requirements is consistent with the bill's purpose of encouraging the furnishing of capital to small, developing businesses or financially troubled businesses organized and operated throughout the United States.

Second, section 2(a)(46)(B) requires that, with one exception, an eligible portfolio company be neither an investment company as defined in section 3 of the Act nor a company which is excluded from the definition of investment company solely by section 3(c) of the Act. The lone exception allows the eligible portfolio company to be a small business investment company (“SBIC”) which is licensed by the Small Business Administration and which is a wholly-owned subsidiary of the business development company. This requirement ensures that the business development company will invest in operating companies rather than investing in other financial institutions. For example, an eligible portfolio company could not be a broker, bank or insurance company.

Third, section 2(a)(46)(C) requires that the eligible portfolio company fall within one of the following three categories. The first category consists of companies which do not have any class of securi-

Footnotes continued from last page

monetary loss as a result, the Court would not imply a private cause of action for damages on their behalf.

⁷ These are essentially the tests enunciated by the Court in *Cort v. Ash*, 422 U.S. 66 (1975).

⁸ See *Tannenbaum v. Zelier*, 552 F.2d 402, 416-17 (2d Cir. 1976), *cert. denied*, 434 U.S. 934 (1977); *Moses v. Burgin*, 445 F.2d 369, 373 (1st Cir.), *cert. denied*, 404 U.S. 994 (1971); H.R. Rep. No. 1382, 91st Cong., 2d Sess. 38 (1970).

rant proposals of specific standards designed for interests in all business development companies. However, in considering whether to propose any such rules, the Committee expects that the NASD would take into account, among other things, whether any such rule or regulation would impose any unreasonable burdens on brokers or dealers or unreasonable [sic] impair the maintenance of fair and orderly markets for such securities.

LIABILITY OF CONTROLLING PERSONS; PREVENTING COMPLIANCE WITH TITLE

Section 48(a) of the Act makes it unlawful for any person, directly or indirectly, to cause to be done an act or thing through or by means of any other person which it would be unlawful for such person to do under the Act or any rules or orders thereunder. Section 48(b) makes it unlawful for any person without just cause to hinder, delay or obstruct the making, filing or keeping of any information, document, record, report or account required to be made, file or kept under any provision of the Act or any rules or orders thereunder.

Notwithstanding the general exemption for business development companies from the provisions of the Act provided by section 6(f), section 65 makes section 48 applicable to a business development company as if it were a registered closed-end investment company, except that the provisions of subsection (a) of that section should not be construed to require any company which is not an investment company within the meaning of section 3(a) of the Act to comply with the provisions of the Act 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. Unlike most registered investment companies, business development companies frequently have control of the operating companies in which they invest. This section makes clear that control, in and of itself, does not serve to bring those operating companies within the purview of the Investment Company Act.

TITLE II—AMENDMENTS TO THE INVESTMENT ADVISERS ACT OF 1940

Section 201. Definition of business development company

Section 201 of the bill amends section 202(a) of the Investment Advisers Act of 1940 (“Advisers Act”) by adding new paragraph (22). Section 202(a) defines certain terms used in the Advisers Act. New paragraph (22) thereof defines the term “business development company” to mean any company which is described in new section 2(a)(48) of the Investment Company Act and which complies with section 55 of the amended Investment Company Act regarding functions and activities of business development companies except that: (A) the 70 percent test of section 55 is changed to 60 percent, that is, the company must not make any nonqualifying purchases unless the value of the assets reflected by qualified purchases at the time of the purchase constitutes at least 60 percent of the value of its total assets; (B) the company does not have to be a closed-end company or be subject to the provisions of sections 55 through 65 of the Investment Company Act; and (C) the securities which may be

purchased pursuant to section 55(a) of the Investment Company Act may be purchased from any person. for purposes of applying the standards of sections 2(a)(48) and 55 of the Investment Company Act, reference is made to definitions in that Act, except that the valuation of the assets of a business development company for these purposes, should be made on the basis of the latest distributed financial statements of such company, provided that they are not more than one year old.

Section 202. Registration requirements

Section 202 of the bill amends section 203(b)(3) of the Advisers Act, which presently provides that an investment adviser is excepted from registration under the Advisers Act if he has fewer than fifteen clients in the immediately preceding twelve month period and neither holds himself out to the public as an investment adviser nor acts as adviser to a registered investment company. The bill treats differently an investment adviser to a business development company which has made the election to be regulated under section 54 of the bill and has not withdrawn that election. Thus, an adviser to a public business development company has to register under the Advisers Act.

To clarify the availability of the exception of section 203(b)(3) to an investment adviser to a business development company which has not elected to be regulated under section 54, the bill deems an investment adviser to have only one client as a result of an investment advisory relationship with such a business development company unless a shareholder or beneficial owner of the client company is a client of the adviser separate and apart from his or her status as a shareholder, partner or beneficial owner of the business development company. Together with the proposed amendment of the nonpublic offering exclusion of section 3(c)(1) under the Investment Company Act, the bill thus enables both a privately-held business development company and its investment adviser to remain outside of the Commission's direct regulatory jurisdiction. The relevant antifraud provisions of section 206 of the Advisers Act remain applicable, however, just as they presently do to all other investment advisers excepted from registration under the Advisers Act.

This amendment to section 203(b)(3) and the addition of section 202(a)(22) of the Advisers Act are not intended to affect adversely the status of investment advisers which are not registered under the Advisers Act. First, with respect to persons or firms which do not advise business development companies, the second amendment to section 203(b)(3) (the attribution of client status to a shareholder, partner or beneficial owner) is not intended to suggest that each shareholder, partner or beneficial owner of a company advised by such a person or firm should or should not be regarded as a client of that person or firm. Second, with respect to persons or firms which do advise business development companies, but which do not rely on that second amendment to section 203(b)(3), such amendment is not intended to suggest that such shareholder, partner or beneficial owner of a company advised by such person or firm should or should not be regarded as a client of that person or firm. Rather, this amendment is intended only to provide a "safe

harbor” for those investment advisers which choose to comply with its provisions.

Section 203. Investment advisory contracts

Section 203 of the bill amends section 205 of the Advisers Act. That section generally prohibits an investment adviser from serving a client pursuant to a contract which provides for a “performance fee,” i.e., compensation to the adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of a client. The existing section excepts from that prohibition a fee which increases and decreases proportionately with the investment performance of the company over a specified period in relation to the investment record of an appropriate index of securities prices or measure of investment performance, so-called symmetric incentive fees. New clause (C) of section 205 establishes for registered investment advisers of business development companies, as defined in the Advisers Act, an exemption from that section’s prohibition, by permitting a performance fee arrangement, provided that the compensation described in the investment advisory contract does not exceed 20 percent of the realized capital gains (net of realized capital losses and unrealized depreciation) upon the funds of the business development company over a period of time or as of dates specified in the contract. An adviser could thereby receive an incentive fee without the risks of a reduced fee (associated with symmetrical incentive fee arrangements) if the investment performance was below that of an acceptable index; such adviser could receive a fee if there were significant net capital gains in the time period involved. For this purpose, the incentive fee permitted under this amendment could only reflect realized gains (rather than all unrealized appreciation) and such gains would have to be netted against realized capital losses and unrealized capital appreciation. This exception to the usual prohibition or incentive fees is conditioned on the business development company’s not having either an executive compensation plan as described in new section 61(a)(3)(B) of the Investment Company Act or a profit sharing plan as described in new section 57(n) of that Act. This restriction is designed to prevent the investment adviser of a business development company from receiving performance-based compensation where the board of directors or general partners of the business development company has already determined to provide incentive compensation through stock options or other incentive compensation plans for services rendered by its management.

The maximum percentage of net realized capital gains set forth in this section is, of course, applicable only to advisers which are registered, or should be registered, under the Advisers Act. It is set forth primarily to provide guidance to directors of, or general partners in, business development companies which employ external advisers which in turn are registered advisers. In this regard, the Committee was concerned that, without some statutory guidance, directors of, or general partners in, the first business development companies to be publicly held would not have any models available for comparison. Thus, the Committee regards the statutory compensation formula as part of this general experiment and will be

interested in the empirical experience of business development companies which take advantage of this provision.

The statutory formula is not intended to apply as a standard for determining whether other compensation arrangements, which may be different in form or amount, are appropriate for any adviser not required to be registered under the Advisers Act. Similarly, with regard to compensation received by investment advisers to business development companies which have elected to be subject to sections 54 through 65 of the Investment Company Act, section 36 of that Act will apply to such investment advisers but it is the intent of the Committee that the compensation arrangements which may be approved by the disinterested directors of, or disinterested general partners in, business development companies not be compared inflexibly to those of conventional registered investment companies. For purposes of section 36(b), the reasonableness of payments made to an external investment adviser, manager or general partner of a business development company should be considered (in any actions which may be brought) in light of all the facts and circumstances, using appropriate comparisons with compensation received by persons performing comparable services for comparable companies in the context of the qualifications of and responsibilities undertaken by the investment adviser, manager or general partner.

COMMITTEE CONSIDERATION

The Subcommittee on Consumer Protection and Finance held hearings on H.R. 7554 on June 17, 1980. The Subcommittee heard testimony from the Securities and Exchange Commission, the National Venture Capital Association, and the National Association of Small Business Investment Companies.

The Subcommittee unanimously reported H.R. 7554, as amended, on August 1, 1980. The full Committee favorably ordered the bill to the House without amendment. The bill was ordered reported by voice vote, a quorum being present, on August 28, 1980.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

No findings or recommendations on oversight activity pursuant to clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives have been submitted by the Committee on Government Operations for inclusion in this report.

INFLATIONARY IMPACT STATEMENT

Pursuant to rule XI, clause 2(1)(4) of the Rules of the House of Representatives, the Committee makes the following statement regarding the inflationary impact of the bill:

The Committee is unaware that any inflationary impact on the economy will result from the passage of H.R. 7554.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 11, 1980.

Hon. HARLEY O. STAGGERS,
*Chairman, Committee on Interstate and Foreign Commerce, U.S. House of
Representatives, Rayburn House Office Building, Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 7554, the Small Business Investment Incentive Act of 1980, as ordered reported by the House Committee on Interstate and Foreign Commerce on August 28, 1980.

Title I of H.R. 7554 would create a new category for venture-capital companies called business development companies (BDCs). Currently regulated under the provisions of the Investment Company Act of 1940, venture capital companies could elect to be regulated under a separate regulatory process as outlined in the bill. Title II would amend the Investment Advisors Act of 1940 to clarify registration and fee requirements for investment advisors of privately-held BDCs. Title III would allow the Securities and Exchange Commission (SEC) to increase the small offering exemption of section 3(b) of the Securities Act of 1933 from \$2 million to \$5 million; make the small offering exemption under section 304(a)(8) of the Trust Indenture Act consistent with the 3(b) ceiling; and increase the amount of the section 304(a)(9) exemption from \$1 million to \$10 million.

Title I is designed to make investment capital more readily accessible to businesses by reducing some of the regulatory requirements resulting from current securities laws. Consistent with the intent of the legislation, therefore, it is anticipated that a number of venture capital companies will take advantage of the new BDCs and register (or change their status) with the SEC. The precise number of firms which register as BDCs is difficult to estimate since it is largely dependent upon economic conditions in the marketplace as well as the universe of potential venture capital firms seeking to make public offerings, which is currently not known. According to the SEC, approximately 20 to 50 firms may likely register as BDCs within the first year after the date of enactment, assumed to be around October 1, 1980. Based on current processing practices, it is estimated that approximately 2 to 5 professional staff (plus some clerical and computer support staff) would be required to review the net additional increases in requests for registration and interpretations. This assumes a slight decrease in some classes of requests for interpretations as well as a similar decrease in the number of registrations of small business investment companies (SBICs) under the Investment Company Act of 1940.

Currently, the SEC has a program of regular inspections, including a policy of inspecting newly registered firms within the first year, with periodic inspections thereafter. Since the number of inspections is directly dependent upon the number of registrations, and assuming 20 to 50 additional firms register in the first year, it is estimated that approximately 2 to 5 professional staff (plus clerical and travel expenses) would be required to conduct the inspections.

The level of resources required by the SEC for additional registrations and inspections beyond fiscal year 1981 is not certain at this time.

Independent from the number of additional registrations, the SEC will incur certain fixed costs as a result of H.R. 7554. The SEC will be required to issue approximately three complex rulemaking procedures and develop new registration forms for BDCs. Based on data provided by the SEC, it is estimated that approximately 4 professional and 1 clerical staff would be required in fiscal year 1981 to handle these requirements. After the first year, the additional resources needed by the SEC will depend primarily upon the number of registrations and the extent to which the problems occur with the rulemakings.

Section 301, Title III, gives the SEC broader rulemaking powers regarding section 3(b) small business exemptions. As a result of increasing the exemption from \$2 million up to \$5 million, fewer full-registration statements will probably be filed with the SEC, but the number of filings resulting from the proposed legislation may increase. According to the SEC, the only significant additional requirement upon the agency as a result of section 301 of the bill would be to develop new rules, requiring approximately 1 to 2 additional staff for the next two years. It is estimated that section 302 of Title III, which gives the SEC power to create new exemptions under the Trust Indenture Act of 1939, would require minimum rulemaking by the SEC and could be done with existing resources.

Based on the above assumptions, it is estimated that the cost of Titles I, II, and III of H.R. 7554 will range between \$375,000 and \$650,000 in fiscal year 1981, and will likely remain in the lower end of that estimate range for the next several fiscal years.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN,
Director.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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

INVESTMENT COMPANY ACT OF 1940

* * * * *

GENERAL DEFINITIONS

SEC. 2(a) When used in this title, unless the context otherwise requires—

(1) “* * *

* * * * *

(45 “Savings and loan association” means a savings and loan association, building and loan association, cooperative bank, home-

DEFINITIONS

SEC. 202. (a) When used in this title, unless the context otherwise requires—

(1) * * *

* * * * *

(22) “Business development company means any company which is a business development company as defined in section 2(a)(48) of title I of this Act and which complies with section 55 of title I of this Act, except that—

(A) the 70 per centum of the value of the total assets condition referred to in section 2(a)(48) and 55 of title I of this Act shall be 60 per centum for purposes of determining compliance therewith;

(B) such company need not be a closed-end company and need not elect to be subject to the provisions of sections 55 through 65 of title I of this Act; and

(C) the securities which may be purchased pursuant to section 55(a) of title I of this Act may be purchased from any person.

For purposes of this paragraph, all terms in sections 2(a)(48) and 55 of title I of this Act shall have the same meaning set forth in such title as if such company were a registered closed-end investment company, except that the value of the assets of a business development company which is not subject to the provisions of sections 55 through 65 of title I of this Act shall be determined as of the date of the most recent financial statements which it furnished to all holders of its securities, and shall be determined no less frequently than annually.

* * * * *

REGISTRATION OF INVESTMENT ADVISERS

SEC. 203. (a) Except as provided in subsection (b), it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

(b) The provisions of subsection (a) shall not apply to—

(1) any investment adviser all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange;

(2) any investment adviser whose only clients are insurance companies; or

(3) any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under title I of this Act, or a company which has elected to be a business development company pursuant to section 54 of title I of this Act and has not withdrawn its election. For purposes of determining the number

of clients of an investment adviser under this paragraph, no shareholder, partner, or beneficial owner of a business development company, as defined in this title, shall be deemed to be a client of such investment adviser unless such person is a client of such investment adviser separate and apart from his status as a shareholder, partner, or beneficial owner.

* * * * *

INVESTMENT ADVISORY CONTRACTS

SEC. 205. No investment adviser, unless exempt from registration pursuant to section 203(b), shall make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to enter into, extend, or renew any investment advisory contract, or in any way to perform any investment advisory contract entered into, extended, or renewed on or after the effective date of this title, if such contract—

(1) provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

(2) fails to provide, in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or

(3) fails to provide, in substance, that the investment adviser if a partnership, will notify the other party to the contract of any change in the membership of such partnership within a reasonable time after such change.

Paragraph (1) of this section shall not (A) be construed to prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period or as of definite dates, or taken as of a definite date, [or] (B) apply to an investment advisory contract with—

(i) an investment company registered under title I of this Act, or

(ii) any other person (except a trust, collective trust fund or separate account referred to in section 3(c) (11) of title I of this Act), provided that the contract relates to the investment of assets [sic] in excess of \$1 million,

which contract provides for compensation based on the asset value of the company or fund under management averaged over a specified period and increasing and decreasing proportionately with the investment performance of the company or fund over a specified period in relation to the investment record of an appropriate index of securities prices or such other measure of investment performance as the Commission by rule, regulation, or order may specify, *or (C) apply with respect to any investment advisory contract between an investment adviser and a business development company, as defined in this title, if (i) the compensation provided for in such contract does not exceed 20 per centum of the realized capital gains upon the funds of the business development company over a specified period or as of definite dates, computed net of all realized capital losses and unrealized capital depreciation, and the condition of section 61(a)(3)(B)(iii) of title I of this Act is satisfied, and (ii) the business development company does not have outstanding any option, warrant, or right issued pursuant to section 61(a)(3)(B) of*

title I of this Act and does not have a profit-sharing plan described in section 57(n) of title I of this Act. For purposes of clause (B) of the preceding sentence, the point from which increases and decreases in compensation are measured shall be the fee which is paid or earned when the investment performance of such company or fund is equivalent to that of the index or other measure of performance, and an index of securities prices shall be deemed appropriate unless the Commission by order shall determine otherwise. As used in paragraphs (2) and (3) of this section, “investment advisory contract” means any contract or agreement whereby a person agrees to act as investment adviser or to manage any investment or trading account of another person other than an investment company registered under title I of this Act.

* * * * *

SECTION 3 OF THE SECURITIES ACT OF 1933

EXEMPTED SECURITIES

SEC. 3. (a)

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds [~~\$2,000,000.~~] *\$5,000,000.*

* * * * *

SECTION 304 OF THE TRUST INDENTURE ACT OF 1939

EXEMPTED SECURITIES AND TRANSACTIONS

SEC. 301. (a) The provisions of this title shall not apply to any of the following securities:

(1) any security other than (A) a note, bond, debenture, or evidence of indebtedness, whether or not secured, or (B) a certificate of interest or participation in any such note, bond, debenture, or evidence of indebtedness, or (C) a temporary certificate for, or guarantee of, any such note, bond debenture, evidence of indebtedness, or certificate;

(2) any certificate of interest or participation in two or more securities having substantially different rights and privileges, or a temporary certificate for any such certificate;

(3) any security which, prior to or within six months after the enactment of this title, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer subsequent to such six months;