

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 270

[Release No. IC-28266; File No. S7-37-04]

RIN 3235-AJ31

Definition of Eligible Portfolio Company under the Investment Company Act of 1940

AGENCY: Securities and Exchange Commission (the “Commission”).

ACTION: Final rule.

SUMMARY: The Commission is adopting an amendment to a rule under the Investment Company Act of 1940 to more closely align the definition of eligible portfolio company, and the investment activities of business development companies (“BDCs”), with the purpose that Congress intended. The amendment expands the definition of eligible portfolio company to include certain companies that list their securities on a national securities exchange.

EFFECTIVE DATE: [insert date 60 days after publication of the Federal Register].

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SUPPLEMENTARY INFORMATION: The Commission today is adopting amendments to Rule 2a-46 [17 CFR 270.2a-46] under the Investment Company Act of 1940 [15 U.S.C. 80a].¹

¹ The amendments were proposed in Definition of Eligible Portfolio Company under the Investment Company Act of 1940, Investment Company Act Release No. 27539 (Oct. 25, 2006) [71 FR 64093 (Oct. 31, 2006)] (“Reproposing Release”).

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I. EXECUTIVE SUMMARY

A BDC is a closed-end investment company that Congress established for the purpose of making capital more readily available to certain types of companies. Under the Investment Company Act (“Investment Company Act” or “Act”), a BDC must invest at least 70 percent of its assets in “eligible portfolio company” securities and certain other securities. Rule 2a-46 defines the term eligible portfolio company to include any company whose securities are not listed on a national securities exchange (“Exchange”).² When we adopted Rule 2a-46 in 2006, we also requested comment on whether to further expand the definition to include Exchange-listed companies that have (i) less than \$75 million in public float or (ii) less than \$150 million in market capitalization or less than \$250 million in market capitalization.³ Today we are amending Rule 2a-46 to expand the definition of eligible portfolio company to include Exchange-listed companies that have less than \$250 million in market capitalization.

² Definition of Eligible Portfolio Company under the Investment Company Act of 1940, Investment Company Act Release No. 27538 (Oct. 25, 2006) [71 FR 64086 (Oct. 31, 2006)] (“Adopting Release”).

³ See Reproposing Release, supra note 1.

II. BACKGROUND

Congress established BDCs as a new category of closed-end investment companies when it enacted the Small Business Investment Incentive Act (“SBIIA”) in 1980.⁴ Congress intended that BDCs would make capital more readily available to certain types of companies.⁵ To accomplish this purpose, the Investment Company Act generally prohibits a BDC from making any investment unless, at the time of the investment, at least 70 percent of its total assets (“70% basket”) are invested in securities of certain specific types of companies, including “eligible portfolio companies.”⁶

The Investment Company Act defines eligible portfolio company to include any domestic operating company⁷ that does not have a class of securities with respect to which a member of an Exchange, broker, or dealer may extend margin credit pursuant to rules promulgated by the Federal Reserve Board under Section 7 of the Securities Exchange Act of 1934 (“Exchange

⁴ Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, 94 Stat. 2274 (1980) (codified at scattered sections of the United States Code).

⁵ See generally H.R. Rep. No. 1341, 96th Cong., 2d Sess. 21 (1980) (“House Report”).

⁶ See Section 2(a)(46) of the Investment Company Act (statutory definition of eligible portfolio company) [15 U.S.C. 80a-2(a)(46)]. See also Section 55(a) of the Investment Company Act (regulating the activities of BDCs) [15 U.S.C. 80a-54(a)]. Among other things, the 70% basket may include securities of eligible portfolio companies purchased in transactions not involving any public offering, securities of eligible portfolio companies already controlled by the BDC without regard to the nature of the offering, and securities of certain financially distressed companies that do not meet the definition of eligible portfolio company and that are purchased in transactions not involving any public offering. See Section 55(a).

⁷ Section 2(a)(46) of the Investment Company Act defines eligible portfolio company to include any company that satisfies the criteria set forth in each of Section 2(a)(46)(A) and Section 2(a)(46)(B) in addition to one of the three criteria set forth in Section 2(a)(46)(C). Section 2(a)(46)(A) defines eligible portfolio company to include any company organized under the laws of, and with its principal place of business in, one or more states of the United States. Section 2(a)(46)(B) of the Investment Company Act generally excludes from the definition of eligible portfolio company any company that meets the definition of investment company under Section 3 of the Investment Company Act, or that is excluded from the definition of investment company by Section 3(c) of the Act, but includes as an eligible portfolio company any small BDC that is licensed by the Small Business Administration and that is a wholly-owned subsidiary of a BDC.

