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SMALL BUSINESS ADMINISTRATION

Docket ID No. SBA-2015-0009

Small Business Investment Companies – Request for Comments on Credit and Risk Management Issues

AGENCY: U.S. Small Business Administration.

ACTION: Notice and Request for Comments.

SUMMARY: The Small Business Administration (SBA) has identified two issues that potentially affect SBA's ability to make recoveries from a small business investment company (SBIC) that performs poorly and poses a credit risk to SBA. The Agency seeks public input on how SBA should address its credit concerns regarding these two issues: SBICs with unsecured lines of credit, and the determination of "equity capital investments" when calculating an SBIC's capital impairment percentage.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments, identified by Docket ID No. SBA-2015-0009, at www.regulations.gov. Comments may only be submitted at this web address; follow the instructions on the website for submitting comments. All comments received will be included in the public docket without change and will be available online at www.regulations.gov. All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive information and information that you consider to be Confidential Business

Information or otherwise protected should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Lyn Womack, Office of Investment and Innovation, 409 Third St., SW, Washington, DC 20416, (202) 205-2416

SUPPLEMENTARY INFORMATION:

I. Background Information

The SBIC Program was established under the Small Business Investment Act of 1958. 15 U.S.C. §661 *et seq.* (the “Act”). SBICs are privately owned and professionally managed investment funds, licensed and regulated by SBA, that use privately-raised capital to make equity and debt investments in qualifying small businesses. SBICs may be leveraged or non-leveraged. Leveraged SBICs use privately raised capital plus funds borrowed by issuing debentures guaranteed by SBA to make such qualifying investments. Only SBICs with outstanding debenture leverage pose a credit risk to SBA, and SBA’s request for input in this notice is limited to this type of SBIC. SBA does not anticipate any changes to the regulations as a result of this notice, but will consider changes to the policy guidance that interprets the regulations.

SBICs are governed by Title 13, Part 107 in the Code of Federal Regulations (13 CFR Part 107) which may be found at www.gpo.gov/fdsys/pkg/CFR-2014-title13-vol1/xml/CFR-2014-title13-vol1-part107.xml. SBA also issues supplemental guidance through various publications which may be found at www.sba.gov/sbicpolicy.

II. Areas of Concern

SBA is seeking public input on the following areas of concern:

1. Unsecured Lines of Credit. The Act provides that SBA “(1) shall not permit a licensee having outstanding leverage to incur third party debt that would create or contribute to an unreasonable risk of default or loss to the Federal Government; and (2) shall permit such licensees to incur third party debt only on such terms and subject to such conditions as may be established by the Administrator, by regulation or otherwise.” 15 U.S.C. §683(c). Pursuant to 13 CFR 107.550, a leveraged SBIC must obtain SBA’s prior written approval before it incurs any secured third-party debt. In practice, SBA rarely approves secured third-party debt facilities because the collateral for such debt consists of the same assets SBA relies on to protect its creditor position. SBA approval is not required for unsecured third-party debt, though the Agency may review the related loan agreement(s) in connection with its oversight, including examinations, of the SBIC.

Leveraged SBICs commonly use unsecured lines of credit. Although permitted by the regulations without SBA prior approval, all such credit facilities pose a potential credit risk to SBA because, with certain limited exceptions set forth under 13 CFR 107.560, the Agency is subordinated to the first \$10 million of such debt. Furthermore, SBA is concerned that many such credit facilities contain certain provisions that may increase SBA’s credit risk. SBA is specifically concerned about provisions that, upon a default (which may include events other than a payment default; for example, failure by more than a certain number of investors in the SBIC to fund a capital call within a stated period), allow a lender to make a capital call directly on the SBIC’s investors and use the proceeds to repay the line of credit. Similarly, SBA is concerned about provisions that permit a lender to compel the SBIC’s General Partner to make a capital call, together with remedies including specific performance and/or injunctive relief. If an SBIC

defaults on its leverage and is transferred by SBA to a liquidation status in accordance with the SBIC's leverage terms, the SBIC's remaining commitments are a significant source of capital that SBA relies upon for repayment of the SBIC's leverage. However, such commitments will not be available to SBA if they have already been called to satisfy a default under the SBIC's unsecured credit facility. SBA has also observed that some SBICs use these lines on a short-term basis to fund investments, while others maintain outstanding balances on a longer-term basis for working capital or other purposes.

SBA is seeking comments as to how the Agency can best address its credit concerns while continuing to permit SBICs to utilize unsecured lines of credit. Among other things, SBA is seeking input from the public with regard to the following questions:

- (a) What credit concerns should SBA have regarding an SBIC's credit facility if the maximum extension of credit under such a facility is in the amount of \$10 million or less?
- (b) How frequently, or what percent of total dollars or lines of credit, do lenders provide unsecured credit to SBICs in an amount above \$10 million?
- (c) What are the typical maturity dates for such credit facilities (e.g., 12 month term) and are they routinely extended?
- (d) What is the average balance and settlement of credit lines extended to SBICs?
- (e) Based on SBA's view that short-term borrowings pose a lower credit risk, what restrictions, if any, should SBA consider placing on the length of time a balance may remain outstanding on an unsecured line?
- (f) Should SBA permit such facilities only during time periods of an SBIC's lifecycle when the risk to SBA is lower, for example during the early years of

the SBIC's life or before additional leverage is drawn? If so, what considerations should SBA take into account in determining the timing and duration of these periods?

- (g) Are there certain provisions in unsecured loan agreements that SBA should be especially concerned about with respect to credit risk (e.g., remedies available to a lender such as specific performance or injunctive relief) and how should SBA deal with those provisions?
- (h) What type of credit risk policies would be most effective in managing SBA's credit risk with respect to unsecured lines of credit?

2. Determination of Equity Capital Investments (ECI) in the calculation of an SBIC's maximum allowable Capital Impairment Percentage (CIP). 13 CFR 107.1830(c) defines the maximum allowable CIP for a leveraged SBIC that is not an Early Stage SBIC. If an SBIC exceeds its maximum allowable CIP, it constitutes a condition of Capital Impairment, which is an event of default under the terms of its leverage. 13 CFR 107.1810(f)(5). An SBIC's maximum allowable CIP depends on two variables: (1) the percentage at cost of ECI in the SBIC's portfolio, and (2) the ratio of outstanding leverage to Leverageable Capital.

Under 13 CFR 107.50, ECI generally means investments in a small business in the form of common or preferred stock, limited partnership interests, options, warrants, or similar equity instruments, including subordinated debt with equity features if such debt provides only for interest payments contingent upon and limited to the extent of earnings. Further, Leverageable Capital means, as more fully described in 13 CFR 107.50, paid-in capital of an SBIC.

SBA's regulations permit a higher maximum allowable CIP when the percentage of ECI in an SBIC's portfolio is higher in recognition that equity-type investment strategies are inherently riskier and frequently require a longer holding period relative to debt investments before a successful exit can be achieved.

SBA has observed over the last few years that SBICs seeking to avoid Capital Impairment have converted non-ECI investments to ECI solely for the purpose of attaining an increase in maximum allowable CIP. For example, an SBIC can convert a loan into equity, which would cause the investment to then qualify as ECI. Depending on the circumstances of the SBIC, the converted security could cause the SBIC's maximum allowable CIP to increase and artificially forestall the SBIC from having a condition of Capital Impairment, which creates risk to taxpayers.

SBA has also observed the deteriorating performance of portfolio companies held in a particular SBIC can likewise result in an SBIC's maximum allowable CIP increasing. Using the example in the prior paragraph, the loan could have been converted to equity as a result of a distressed restructuring of the company. In either case, the increased ECI was not the result of the SBIC making an ECI investment from the outset, but instead converting non-ECI based on the impairment status of the SBIC or the deteriorated status of a small concern.

SBA aims to prevent conversions specifically and solely intended to artificially increase maximum allowable CIP, because such conversions result in the SBIC having a reduced collateral position in the portfolio company at a time when that collateral may be critical for SBA to obtain a recovery from the SBIC. However, in considering any policy changes to managing its credit risk with respect to ECI, SBA does not seek to create

unnecessary burdens for SBICs who may convert an investment to ECI for business reasons unrelated to solely avoiding Capital Impairment (e.g., the exercise of conversion rights prior to a planned IPO). Accordingly, the Agency welcomes comments from the public on how to achieve this objective. Comments may be general in nature and/or answer the following questions:

- (a) Other than the examples provided in this notice, what transactions or circumstances can result in an original non-ECI becoming qualified as an ECI?
- (b) What specific factors should SBA consider in determining that investments are disqualified as ECI for the purposes of calculating an SBIC's maximum allowable CIP?
- (c) Without creating an undue reporting burden on SBICs, how can SBA differentiate between investments converted for legitimate business reasons and those converted for other reasons, including solely to inflate total ECI in the SBIC's portfolio?

Authority: 15 U.S.C. 681

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