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## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 107

RIN 3245-AE88

#### Small Business Investment Companies

**AGENCY:** U.S. Small Business Administration (SBA).

**ACTION:** Final rule.

**SUMMARY:** This final rule allows a Small Business Investment Company (SBIC) to assume control over a small business concern, without notice to the SBA, and to retain such control for a period of up to seven years, or longer with SBA approval. The final rule also allows an SBIC to sell equity securities in a portfolio concern to a competitor of that portfolio concern.

**DATES:** This rule is effective on November 21, 2002.

**FOR FURTHER INFORMATION CONTACT:** Carol Fendler, Director, Office of Licensing and Program Standards, Investment Division, Office of Capital Access, (202) 205-7559 or [carol.fendler@sba.gov](mailto:carol.fendler@sba.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Small Business Investment Corrections Act of 2000, Public Law 106-554, Title IV, section 402, amended section 103(5)(A)(i) of the Small Business Investment Act (Act) to clarify that a small business concern controlled by venture capital firms, including licensed small business investment companies (SBICs), does not for that reason cease to qualify as independently owned and operated. Under the statute, a business would be considered a small business concern "regardless of the allocation of control during the investment period under any investment agreement between the business concern and the entity making

the investment." (15 U.S.C. 662(5)(A)(i)).

On May 17, 2002, SBA published in the **Federal Register** a proposed rule (67 FR 35055) to simplify its regulation governing control of a small business and bring it into conformity with the Act, as amended in 2000. The proposed rule also removed a regulatory restriction on the right of an SBIC to sell securities of a small business to a competitor of that business.

SBA received six comments on the proposed rule. These are discussed in the following section-by-section analysis.

##### II. Section-by-Section Analysis

SBA amends § 107.865 by revising the heading. This change recognizes that SBICs are now allowed to exercise control over a Small Business.

SBA amends paragraph (a) of § 107.865 to allow an SBIC to exercise control over a Small Business. The period of control is limited to the seventh anniversary of the date on which control was initially acquired. This is a change from the proposed rule, which would have permitted control for up to five years.

SBA received six comments on the proposed rule. Four of those submitted comments supported the proposed rule as drafted. The other two that commented supported the concept that SBICs should be permitted to take control of portfolio companies but indicated that the proposed five year period of control was insufficient. One proposed that a seven year time frame would be more appropriate, particularly where investments are in seed stage companies. This commenter indicated that such investments typically have a 4-7 year investment horizon. SBA recognizes that some investments, particularly earlier stage investments, may require additional time for the investment to mature. Recent historical experience indicates that the percentage of SBIC investments in start-up businesses has ranged from approximately 30 percent to 45 percent. By including add-on investments in companies that were originally financed as start-ups by SBICs, the percentage increases to over 50 percent. In view of this investing pattern and the potential need to grow and support start-up businesses, SBA has modified the rule to allow for control to be exercised for a period of seven years.

The final commenter stated that a ten year period would be more appropriate than the proposed five year term, for a number of reasons. First, the commenter pointed out that market conditions may require SBICs to seek extensions of the control period beyond five years. The commenter expected that SBA would likely grant these extension requests, but suggested that SBA would be spared the expenditure of scarce resources needed to address such requests by adopting the ten year period at the outset. SBA believes that extension requests will be considerably less frequent with the change to a seven-year control period, and believes that it has the resources to respond to those requests that will be received.

The commenter also noted that a ten-year term would be consistent with the regulations promulgated by the Board of Governors of the Federal Reserve System and the Department of Treasury in implementing the Gramm-Leach-Bliley Act (GLB), Public Law 106-102. The commenter suggested that a differing time period for the exercise of control between SBA's regulations and those implementing GLB may result in the SBIC program being less attractive to banks and may limit their participation in the program.

SBA believes that the SBIC program will continue to be an attractive option for banks interested in making equity investments. Although the regulations promulgated under GLB do permit control for a period of up to ten years, the restrictions on the exercise and scope of that control are greater than in the SBIC program. For example, banks taking controlling positions in a portfolio company under GLB are prohibited from managing or operating that portfolio company. SBICs, however, are not subject to that same type of restriction.

SBA also believes that banks will remain interested in the SBIC program for reasons other than the ability to take controlling positions in their investments. Many banks find the SBIC program to be an attractive option since investment in an SBIC by a bank is presumed to meet the standards for a qualified investment for purposes of investment performance under the Community Reinvestment Act regulations. Furthermore, many banks continue to invest in SBICs that obtain

financial assistance from SBA at favorable rates.

In adopting seven years as the allowable control period, SBA also considered the structure of the SBIC program and SBICs. For most SBICs, the projected investment cycle is a 3–5 year investing program with exits anticipated after a 3–5 year holding period. Since SBICs typically do not expect to hold investments for ten years, a control period of that length should not generally be necessary. Although SBA recognizes that company and market conditions may impact the ability to exit an investment, SBA believes that a seven year control period should be sufficient.

SBA amends § 107.865(b) to clarify that this paragraph, which sets forth conditions that create a presumption of control over a small business concern, relates only to control based on ownership of voting securities. Control may still exist by other means as outlined in § 107.865 (a). No comments were received on this change.

SBA amends § 107.865(d) to allow for extension of the control period in certain circumstances, with SBA's approval. One commenter indicated that the reasons for granting an extension should be expanded to allow for consideration of the financial stability of the SBIC in addition to the financial stability of the portfolio concern. SBA recognizes that relinquishment of control may be difficult to accomplish; however, SBA also recognizes that the financial stability of the SBIC may have no relationship to its control position in a particular portfolio concern and that allowing control to continue may be viewed as being adverse to the interests of the portfolio concern. SBA will consider the reasons why divestiture cannot be completed within seven years when reviewing the request for an extension, and will consider the best interests of both the SBIC and the small business concern. SBA believes the regulations as promulgated have sufficient breadth to allow for a number of considerations. Therefore, SBA does not believe that the financial stability of the SBIC should be a specifically enunciated consideration.

SBA amends § 107.865 by deleting paragraphs (e) and (f) and redesignating paragraph (g) as (e). The deleted paragraphs are no longer necessary.

SBA amends § 107.885 by removing paragraph (b) and removing the designation "(a)". This change allows a SBIC to sell its interests in a portfolio concern to a competitor of that portfolio concern. This change recognizes that in the venture capital industry a likely exit for an investment is the sale of an

interest in a portfolio concern to a competitor of the portfolio concern. Three commenters addressed this provision directly, all favorably.

**Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)**

*Compliance With Executive Order 12866*

The Office of Management and Budget (OMB) did not review this rule as a "significant" regulatory action under Executive Order 12866. The rule implements technical corrections to the SBIC program. The rule will not have an annual effect on the economy of \$100 million or more, adversely affect the economy in a material way, create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, materially alter the budgetary impact of loan programs or other governmental programs, or raise novel legal or policy issues arising out of legal mandates or the President's priorities.

*Compliance With Executive Order 12988*

For purposes of Executive Order 12988, the SBA has determined that this rule was drafted, to the extent practicable, in accordance with the standards set forth in section 3 of that order.

*Compliance With Executive Order 13132*

For purposes of Executive Order 13132, SBA has determined that the rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, under Executive Order 13132, SBA has determined that the rule does not have sufficient federalism implications warranting the preparation of a Federalism Assessment.

*Compliance with Paperwork Reduction Act, 44 U.S.C. Ch. 35*

The rule does not impose any new information collection requirements from SBA which require approval by OMB under the Paperwork Reduction Act, 44 U.S.C. Ch. 35.

*Compliance with the Regulatory Flexibility Act, 5 U.S.C. 601–612*

SBA determined that the rule will not have a significant impact on a substantial number of small entities.

SBA invited comments on this determination but received none.

**List of Subjects in 13 CFR Part 107**

Investment companies, Loan programs-business, Reporting and recordkeeping requirements, Small Businesses.

For the reasons stated in the preamble, amend part 107 of title 13 of the Code of Federal Regulations as follows:

**PART 107—SMALL BUSINESS INVESTMENT COMPANIES**

1. The authority citation for part 107 continues to read as follows:

**Authority:** 15 U.S.C. 681 *et seq.*, 683, 687(c), 687b, 687d, 687g, and 687m.

2. In § 107.865, revise the section heading and paragraphs (a), (b), and (d), remove paragraphs (e) and (f), and redesignate paragraph (g) as paragraph (e) to read as follows:

**§ 107.865 Control of a small business by a licensee.**

(a) *In general.* You, or you and your Associates (in the latter case, the "Investor Group"), may exercise Control over a Small Business for purposes connected to your investment, through ownership of voting securities, management agreements, voting trusts, majority representation on the board of directors, or otherwise. The period of such Control will be limited to the seventh anniversary of the date on which such Control was initially acquired, or any earlier date specified by the terms of any investment agreement.

(b) *Presumption of control.* Control over a Small Business based on ownership of voting securities will be presumed to exist whenever you or the Investor Group own or control, directly or indirectly:

(1) At least 50 percent of the outstanding voting securities, if there are fewer than 50 shareholders; or

(2) More than 25 percent of the outstanding voting securities, if there are 50 or more shareholders; or

(3) At least 20 percent of the outstanding voting securities, if there are 50 or more shareholders and no other party holds a larger block.

\* \* \* \* \*

(d) *Extension of Control.* With SBA's prior written approval you, or the Investor Group, may retain Control for such additional period as may be reasonably necessary to complete divestiture of Control or to ensure the financial stability of the portfolio company.

\* \* \* \* \*

**§ 107.885 [Amended]**

3. Amend § 107.885 by removing paragraph (b) and removing the paragraph designation “(a)”.

Dated: October 10, 2002.

**Hector V. Barreto,**

*Administrator.*

[FR Doc. 02-26546 Filed 10-21-02; 8:45 am]

BILLING CODE 8025-01-P

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

[Docket No. 2002-SW-06-AD; Amendment 39-12918; AD 2002-21-12]

RIN 2120-AA64

**Airworthiness Directives; Agusta S.p.A. Model A109E Helicopters**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) for the specified Agusta S.p.A. (Agusta) helicopters that requires establishing or reducing the life limits of various parts listed in the airworthiness limitations section (ALS) of the maintenance manual. This amendment is prompted by the results of fatigue tests and analysis to determine life limits for various parts. The actions specified by this AD are intended to establish or reduce the life limits to prevent failure of specified parts and subsequent loss of control of the helicopter.

**DATES:** Effective November 26, 2002.

**FOR FURTHER INFORMATION CONTACT:** Carroll Wright, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations Group, Fort Worth, Texas 76193-0111, telephone (817) 222-5120, fax (817) 222-5961.

**SUPPLEMENTARY INFORMATION:** A proposal to amend 14 CFR part 39 to include an AD for the Agusta Model A109E helicopters was published in the **Federal Register** on July 15, 2002 (67 FR 46425). That action proposed to require establishing or reducing the life limits of specified parts of the main transmission assembly and supports, the tail rotor

assemblies, the main rotor control bolt, and the fuselage left-hand elevator, and revising the ALS of the maintenance manual accordingly.

This helicopter model is manufactured in Italy and is type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. The FAA has reviewed all available information and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received on the proposal or the FAA's determination of the cost to the public. The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

The FAA estimates that this AD will affect 31 helicopters of U.S. registry. The total cost of the 11 parts listed in Table 1 of this AD is approximately \$41,294. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$1,280,114, assuming that all 11 parts are replaced on each helicopter in the entire fleet. There will be no additional labor costs because the parts will be replaced during the normal maintenance process.

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action: (1) Is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules

Docket at the Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

**Adoption of the Amendment**

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

**PART 39—AIRWORTHINESS DIRECTIVES**

1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

**2002-21-12 Agusta S.p.A.:** Amendment 39-12918. Docket No. 2002-SW-06-AD.

**Applicability:** Model A109E helicopters, certificated in any category.

**Note 1:** This AD applies to each helicopter identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For helicopters that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

**Compliance:** Required within 100 hours time-in-service (TIS), unless accomplished previously.

To prevent failure of specified parts of the main transmission assembly and supports, the tail rotor assemblies, the main rotor control bolt, or the fuselage left-hand elevator, and subsequent loss of control of the helicopter, accomplish the following:

(a) Replace each part listed in Table 1 with an airworthy part on or before reaching the specified hours TIS as shown in Table 1 of this AD as follows:

TABLE 1

Part Name	Part Number	Hours TIS
(1) Main transmission gear pinion .....	109-0403-05-111 .....	6,100
(2) Main transmission gear driver .....	109-0403-04-3 .....	8,300
(3) Main transmission shaft assembly .....	109-0405-76-107 .....	25,000
(4) Tail rotor retention strap assembly .....	109-8131-07-1 .....	1,800
(5) Tail rotor hub assembly .....	109-0131-06-7 .....	3,000
(6) Tail rotor 90-degree gearbox pinion gear .....	109-0433-01-107 .....	6,100