

- (ii) is located in a State that is not served by a licensee; and
- (iii) agrees to be limited to 1 tier of leverage available under section 302(b), until the applicant meets the requirements of section 302(a).

(d)²⁸ [Repealed].

(e)²⁹ FEES—

Licensing fees.

(1) IN GENERAL.—The Administration may prescribe fees to be paid by each applicant for a license to operate as a small business investment company under this Act.

(2) USE OF AMOUNTS.—Fees collected under this subsection—

(A) shall be deposited in the account for salaries and expenses of the Administration; and

(B) are authorized to be appropriated solely to cover the costs of licensing examinations.

Sec. 302. CAPITAL REQUIREMENTS³⁰

15 USC 682.

(a) AMOUNT.—

Capital requirements for SBICs.

(1) IN GENERAL.—Except as provided in paragraph (2), the private capital of each licensee shall be not less than—

(A) \$5,000,000; or

²⁸Subsection 301(d) repealed by § 208(b)(3)(A) of P.L. 104-208, approved Sept. 30, 1996 (110 Stat. 3009-742). Section 208(b)(3)(B) provides that: “[t]he repeal under subparagraph (A) shall not be construed to require the Administrator to cancel, revoke, withdraw, or modify any license issued under section 301(d) of the Small Business Investment Act of 1958 before the date of enactment of this Act”. Text of repealed provision is reprinted below:

Notwithstanding any other provision of this Act, a small business investment company, the investment policy of which is that its investments will be made solely in small business concerns which will contribute to a well-balanced national economy by facilitating ownership in such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages may be organized and chartered under State business or nonprofit corporation statutes, or formed as a limited partnership and may be licensed by the Administration to operate under the provisions of this Act.

²⁹New subsection 301(e) added by § 214 of P.L. 105-135, approved Dec. 2, 1997 (111 Stat. 2601).

³⁰Heading amended by § 203(b) of PL 90-104, approved Oct. 11, 1967 (81 Stat. 269).

(A) the number of small business investment companies the Administration licensed, the number of licensees that have been placed in liquidation, and the number of licensees that have surrendered their licenses in the previous year, identifying the amount of government leverage each has received and the type of leverage instruments each has used;

(B) the amount of government leverage that each licensee received in the previous year and the types of leverage instruments each licensee used;

(C) for each type of financing instrument, the sizes, geographic locations, and other characteristics of the small business investment companies using them, including the extent to which the investment companies have used the leverage from each instrument to make small business loans, equity investments, or both; and

(D) the frequency with which each type of investment instrument has been used in the current year and a comparison of the current year with previous years.

(h)⁸⁶ CERTIFICATIONS OF ELIGIBILITY.—

Certifications of
eligibility.

(1) CERTIFICATION BY SMALL BUSINESS CONCERN.—Prior to receiving financial assistance from a company licensed pursuant to section 301,⁸⁷ a small business concern shall certify in writing that it meets the eligibility requirements of the Small Business Investment Company Program or the Specialized Small Business Investment Company Program, as applicable.

(2) CERTIFICATION BY COMPANY.—Prior to providing financial assistance to a small business concern under this Act, a company licensed pursuant to section 301 shall certify in writing that it has reviewed the application for assistance of the small business concern and that all documentation and other information supports the eligibility of the applicant.

(3) RETENTION OF CERTIFICATIONS.—Certificates made pursuant to paragraphs (1) and (2) shall be retained by the company licensed pursuant to section 301 for the duration of the financial assistance.

(i)⁸⁸ (1) The purpose of this subsection is to facilitate the orderly and necessary flow of long-term loans and equity funds from small business investment companies to small business concerns.

Long-term loans
and equity funds

⁸⁶New subsection 308(h) added by § 214 of P.L. 103-403, approved Oct. 22, 1994 (108 Stat. 4184). For history of prior subsection 308(h), see previous edition of this Handbook.

⁸⁷References to "subsection (c) or (d) of section 301" were replaced with references to "section 301" throughout subsection 308(h) by § 208(h)(1)(B) of P.L. 104-208, approved Sept. 30, 1996 (110 Stat. 3009-747).

⁸⁸New Sec. 308(i) added by § 1 of PL 99-226, approved Dec. 28, 1985 (99 Stat. 1744). Sec. 2 of PL 99-226 provides that the Act shall apply to maximum interest rates prescribed by the Administration on or after April 1, 1980. The Act was intended

the order complained of was entered. Upon the filing of the application the court shall cause notice thereof to be served on the licensee or other person. The evidence to be considered, the procedure to be followed, and the jurisdiction of the court shall be the same as is provided in subsection (e) for applications to set aside or modify orders.

Sec. 310. EXAMINATIONS AND INVESTIGATIONS⁹⁵

15 USC 687b
Investigation:

(a) The Administration may make such investigations as it deems necessary to determine whether a licensee or any other person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or of any rule or regulation under this Act, or of any order issued under this Act. The Administration shall permit any person to file with it a statement in writing, under oath or otherwise as the Administration shall determine, as to all the facts and circumstances concerning the matter to be investigated. For the purpose of any investigation, the Administration is empowered to administer oaths and affirmations, subpoena [sic] witnesses, compel their attendance, take evidence, and require the production of any books, papers, and documents which are relevant to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpoena [sic] issued to, any person, including a licensee, the Administration may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, and documents; and such court may issue an order requiring such person to appear before the Administration, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found.

(b) Each small business investment company shall be subject to examinations made by direction of the Investment Division of⁹⁶ the Administration, which may be conducted with the assistance of a private sector entity that has both the qualifications to conduct and expertise in conducting such examinations,⁹⁷ and the cost of such examinations, including the compensation of the examiners, may in the discretion of the Administration be assessed against the company examined and when so assessed shall be paid by such

Examination
Private sector
entity.

⁹⁵Sec. 310 added by § 9 of PL 87-341, approved Oct. 3, 1961 (75 Stat. 755). Section heading amended by § 5 of PL 89-779, approved Nov. 6, 1966 (80 Stat. 1360).

⁹⁶Phrase "Investment Division of" substituted for "examiners selected or approved by" by § 407(a) of PL 102-366, approved Sept. 4, 1992 (106 Stat. 1016). Section 407(b) provides: Effective October 1, 1992, the personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, and other funds employed, held, used, arising from, available or to be made available, which are related to the examination function provided by section 310 of the Small Business Investment Act of 1958 shall be transferred by the Inspector General of the Small Business Administration to the Investment Division of the Small Business Administration.

⁹⁷The clause allowing examinations to be performed by a private sector entity was added by § 208(f)(1) of P.L. 104-208, approved Sept. 30, 1996 (110 Stat. 3009-745).

SMALL BUSINESS INVESTMENT ACT OF 1958

§ 310(c) to
§ 310(c)(7)

company. Fees collected under this subsection shall be deposited in the account for salaries and expenses of the Administration, and are authorized to be appropriated solely to cover the costs of examinations and other program oversight activities.⁹⁸ Every such company shall make such reports to the Administration at such times and in such form as the Administration may require; except that the Administration is authorized to exempt from making such reports any such company which is registered under the Investment Company Act of 1940 to the extent necessary to avoid duplication in reporting requirements.

Fees for cost
exami
collecti

Reports.

(c)⁹⁹ Each small business investment company shall be examined at least every two years in such detail so as to determine whether or not--

- this title;
- (1) it has engaged solely in lawful activities and those contemplated by
 - (2) it has engaged in prohibited conflicts of interest;
 - (3) it has acquired or exercised illegal control of an assisted small business;
 - (4) it has made investments in small businesses for¹⁰⁰ not less than 1 year;
 - (5) it has invested more than 20 per centum of its capital in any individual small business, if such restriction is applicable¹⁰¹;
 - (6) it has engaged in relending, foreign investments, or passive investments; or
 - (7) it has charged an interest rate in excess of the maximum permitted by law:

Provided, That the Administration may waive the examination (A) for up to one additional year if, in its discretion, it determines such a delay would be appropriate, based upon the amount of debentures being issued by the company and its repayment record, the prior

⁹⁸ Second sentence in subsection 310(b) added by § 216 of P.L. 105-135, approved Dec. 2, 1997 (111 Stat. 2603).

⁹⁹Section 104 of PL 100-590, approved Nov. 3, 1988 (102 Stat. 2993), added section 310(c) and deleted the following from section 310(b):

Each such company shall be examined at least once each year, except that the Administrator may waive examination in the case of a company whose operations have been suspended by reason of the fact that the company is involved in litigation or is in receivership.

¹⁰⁰The phrase "not less than four years in the case of section 301(d) licensees and in all other cases," was deleted by § 208(h)(1)(C) of P.L. 104-208, approved Sept. 30, 1996 (110 Stat. 3009-747). The time was changed from 5 years to 1 year by § 406 of P.L. 106-554, approved Dec. 21, 2000 (114 Stat. 2763).

¹⁰¹Phrase "if such restriction is applicable" added by § 408(b) of PL 102-366, approved Sept. 4, 1992 (106 Stat. 1016).

are Affiliates of each other. This presumption may be rebutted by evidence satisfactory to SBA.

Control means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Licensee or other concern, whether through the ownership of voting securities, by contract, or otherwise.

Control Person means any Person that controls a Licensee, either directly or through an intervening entity. A Control Person includes:

(1) A general partner of a Partnership Licensee;

(2) Any Person serving as the general partner, officer, director, or manager (in the case of a limited liability company) of any entity that controls a Licensee, either directly or through an intervening entity;

(3) Any Person that—

(i) Controls or owns, directly or through an intervening entity, at least 10 percent of a Partnership Licensee or any entity described in paragraphs (1) or (2) of this definition; and

(ii) Participates in the investment decisions of the general partner of such Partnership Licensee;

(4) Any Person that controls or owns, directly or through an intervening entity, at least 50 percent of a Partnership Licensee or any entity described in paragraphs (1) or (2) of this definition.

Corporate Licensee. See definition of Licensee in this section.

Cost of Money has the meaning set forth in §107.855.

Debenture Rate means the interest rate, as published from time to time in the FEDERAL REGISTER by SBA, for ten year debentures issued by Licensees and funded through public sales of certificates bearing SBA's guarantee. User or guarantee fees, if any, paid by a Licensee are not considered in determining the Debenture Rate.

Debentures means debt obligations issued by Licensees pursuant to section 303(a) of the Act and held or guaranteed by SBA.

Debt Securities has the meaning set forth in §107.815.

Disadvantaged Business means a Small Business that is at least 50 percent owned, and controlled and man-

aged, on a day to day basis, by a person or persons whose participation in the free enterprise system is hampered because of social or economic disadvantages.

Distributable Securities means equity securities that are determined by SBA (with the advice of a third party expert in the marketing of securities) to meet each of the following requirements:

(1) The securities (which may include securities that are salable pursuant to the provisions of Rule 144 (17 CFR 230.144) under the Securities Act of 1933, as amended) are salable immediately without restriction under Federal and state securities laws;

(2) The securities are of a class:

(i) Which is listed and registered on a national securities exchange, or

(ii) For which quotation information is disseminated in the National Association of Securities Dealers Automated Quotation System and as to which transaction reports and last sale data are disseminated pursuant to Rule 11Aa3-1 (17 CFR 240.11Aa3-1) under the Securities Exchange Act of 1934, as amended; and

(3) The quantity of such securities to be distributed to SBA can be sold over a reasonable period of time without having an adverse impact upon the price of the security.

Distribution means any transfer of cash or non-cash assets to SBA, its agent or Trustee, or to partners in a Partnership Licensee, or to shareholders in a Corporate Licensee. Capitalization of Retained Earnings Available for Distribution constitutes a Distribution to the Licensee's non-SBA partners or shareholders.

Earmarked Assets has the meaning set forth in §107.1510(b). (See also §107.1590.)

Earmarked Profit (Loss) has the meaning set forth in §107.1510.

Earned Prioritized Payments has the meaning set forth in §107.1520.

Equity Capital Investments 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

Small Business Administration

§ 107.620

(2) You must preserve for at least six years all supporting documentation (such as vouchers, bank statements, or canceled checks) for the records listed in paragraph (b)(1) of this section.

(3) After final disposition of any item in your Portfolio, you must preserve for at least six years:

(i) Financing applications and Financing instruments.

(ii) All loan, participation, and escrow agreements.

(iii) Size status declarations (SBA Form 480) and Financing Eligibility Statements (SBA Form 1941).

(iv) Any capital stock certificates and warrants of the Portfolio Concern that you did not surrender or exercise.

(v) All other documents and supporting material relating to the Portfolio Concern, including correspondence.

(4) You may substitute a microfilm or computer-scanned or generated copy for the original of any record covered by this paragraph (c).

§ 107.610 Required certifications for Loans and Investments.

For each of your Loans and Investments, you must have the documents listed in this section. You must keep these documents in your files and make them available to SBA upon request.

(a) SBA Form 480, the Size Status Declaration, executed both by you and by the concern you are financing. By executing this document, both parties certify that the concern is a Small Business. For securities purchased from an underwriter in a public offering, you may substitute a prospectus showing that the concern is a Small Business.

(b) SBA Form 652, a certification by the concern you are financing that it will not illegally discriminate (see part 112 of this chapter).

(c) SBA Form 1941 (for Section 301(d) Licensees only), executed both by you and by the concern you are financing. By executing this document, both parties certify that the concern is a Disadvantaged Business.

(d) A certification by the concern you are financing of the intended use of the proceeds. For securities purchased from an underwriter in a public offer-

ing, you may substitute a prospectus indicating the intended use of proceeds.

(e) For each LMI Investment:

(1) A certification by the concern, dated as of the date of application for SBIC financing, as to the basis for its qualification as an LMI Enterprise,

(2) If the concern qualifies as an LMI Enterprise as defined in paragraph (2) of the definition of LMI Enterprise in § 107.50, an additional certification dated no later than the date 180 days after the closing of the LMI Investment, as to the location of the concern's employees or tangible assets or the principal residences of its full-time employees as of the date of such certification; and

(3) Certification(s) by the SBIC, made contemporaneously with the certification(s) of the concern, that the concern qualifies as an LMI Enterprise as of the date(s) of the concern's certification(s) and the basis for such qualification.

[61 FR 3189, Jan. 31, 1996, as amended at 64 FR 52646, Sept. 30, 1999]

§ 107.620 Requirements to obtain information from Portfolio Concerns.

All the information required by this section is subject to the requirements of § 107.600 and must be in English.

(a) *Information for initial Financing decision.* Before extending any Financing, you must require the applicant to submit such financial statements, plans of operation (including intended use of financing proceeds), cash flow analyses and projections as are necessary to support your investment decision. The information submitted must be consistent with the size and type of the business and the amount of the proposed Financing.

(b) *Updated financial information.* (1) The terms of each Financing must require the Portfolio Concern to provide, at least annually, sufficient financial information to enable you to perform the following required procedures:

(i) Evaluate the financial condition of the Portfolio Concern for the purpose of valuing your investment;

(ii) Determine the continued eligibility of the Portfolio Concern; and

(iii) Verify the use of Financing proceeds.

SBA POLICY AND PROCEDURAL RELEASE #2017

Subject: Determination of "Disadvantaged Small Business Concern."

The purpose of this memorandum is to provide guidance to Section 301(d) and other licensees in their determination that a small business concern is socially or economically disadvantaged, and to outline minimum information needed for such determination.

I. STATEMENT OF POLICY

A disadvantaged small business is a small business concern which is at least 50 percent owned, and controlled and managed by socially or economically disadvantaged individuals. No assistance may be provided by Section 301(d) licensees to small business concerns unless such concerns are socially or economically disadvantaged.

II. LEGISLATION RELATING TO 301(d) LICENSEES

Section 301(d) of the Small Business Investment Act of 1958 was added in 1972 to give legislative authority to a program of providing assistance to present or potential business persons whose participation in the free enterprise system is hampered because of social or economic disadvantages. Prior to the 1972 amendment to the Act, the Small Business Administration had licensed a special class of small business investment companies (MESBICs). These MESBICs were licensed solely for the purpose of rendering financial and management assistance to members of minority races and to those persons who are socially or economically disadvantaged.

Section 301(d) of the Act provides for the licensing by SBA of a small business investment company, "the investment policy of which is that its investments will be made solely in small business concerns which will contribute to a well-balanced national economy by facilitating ownership in such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages ..."

III. REGULATIONS

Pursuant to this authority, SBA has defined a Section 301(d) license in Section 107.3 of the Regulations as "a licensee organized under a State business or nonprofit corporation statute, and licensed pursuant to Section 301(d) of the Act" and having an investment policy limited to "making investments solely in Small Concerns which will contribute to a well-balanced national economy by facilitating ownership of such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages." "Disadvantaged Concern" is defined in terms of the statutory language as one "owned by a person or persons whose participation in the free enterprise system is hampered because of social or economic disadvantages." The regulations also make special provisions for investments in disadvantaged concerns by Licensees other than Section 301(d) Licensees. See, for example §107.301(a).

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IV. MEANING OF SOCIALLY OR ECONOMICALLY DISADVANTAGED

Except to recommend the elimination of any suggestion that only members of minority groups are eligible for assistance under this program and to specify that the program is to aid all who are hampered in achieving full citizenship in our economic system by virtue of their social or economic disadvantages, Congress has not fully defined the words "socially or economically disadvantaged." This lack of precise legislative definition suggests that a precise definition is inappropriate, and that flexibility is warranted.

V. PROCEDURES RELATING TO ELIGIBILITY DETERMINATIONS OF DISADVANTAGED BUSINESSES

If the business owner is a member of a designated group specified in CFR 13 Section 124.105(b) (i.e., African Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans), then he/she may be assumed to be socially disadvantaged, and no further information (including the financial status of the owner) will be considered.

In determining whether other owners of small business concerns are socially or economically disadvantaged, reliance should not be placed upon a single factor, but on a composite of such factors as the social or economic background of the principal owners, controlling individuals and managers of the concern, along with the general pattern of their life, opportunities and education which have prevented them from obtaining financial or other assistance available to the average entrepreneur in the economic mainstream. Consideration may be given to such factors as contribute to a disadvantaged condition in the ordinary (dictionary) meaning of that word - lacking in basic resources or conditions necessary to an equal position in society - as well as to such specific factors as:

- (a) low income;
- (b) unfavorable location, such as urban ghettos or depressed rural areas and areas of high unemployment or under-employment;
- (c) limited education;
- (d) physical or other special handicap;
- (e) inability to compete effectively in the marketplace because of prevailing or past restrictive practices; and
- (f) Vietnam era service in the Armed Forces, (August 5, 1964 to May 7, 1975).

VI. DOCUMENTATION

The composite of the foregoing factors and other pertinent information will establish a profile to be used as the basis for determining eligibility. A separate profile should be completed by the licensee with respect to each small business concern assisted, and maintained for SBA's inspection.