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The SBIC Program

An Opportunity for Bank Investors

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The Small Business Investment Company (SBIC) Program

Background

A Small Business Investment Company (“SBIC”) is a privately owned and operated investment fund which is licensed by the United States Small Business Administration (“SBA”). As a condition of licensing, SBICs are required to make long-term investments in U.S. small businesses and submit to SBA regulation (The “SBIC Program”).

The SBIC Program was established by enactment of the Small Business Investment Act of 1958. The Act’s purpose was to stimulate long-term investment in American small businesses by authorizing the licensing and leveraging of SBICs. Since 1958, SBICs have provided billions of dollars of funding to more than 100,000 businesses, including well-known companies such as Apple Computer, Federal Express, Cray Computers, Callaway Golf and Outback Steakhouse. SBA administers the licensing, funding and regulation of SBICs, through its Investment Division which is located in the SBA’s Washington, DC headquarters office.

The SBIC Program had been revised by multiple legislative and regulatory enactments since 1958. In the early years of the SBIC Program, SBICs obtained low cost subsidized funding (“Leverage”) from SBA only by issuing debt obligations (“Debentures”) which SBA either sold to the Federal Financing Bank, or guaranteed and sold in the marketplace. The proceeds of these sales came back to the issuer from SBA for usage as investment capital or for payment of permissible fund expenses.

In 1991, because of a significant downturn in performance by multiple SBICs, SBA appointed an Advisory Commission that reviewed the legislative and regulatory basis for the SBIC Program. It recommended significant changes required to correct what were perceived to be fundamental programmatic flaws, and suggested legislative changes to implement them. As a result, legislation known as the “Small Business Equity Enhancement Act of 1992” (the “1992 Act”) was enacted. The 1992 Act authorized the issuance of a new form of preferred partnership interest instrument for obtaining SBA Leverage known as “Participating Securities”; increased the amount of Leverage available to an SBIC or group of SBICs under common management; required minimum private capital of \$10 million for SBICs issuing Participating Securities and \$5 million for SBICs issuing Debentures; mandated enhanced licensing standards for managers of SBICs; and proposed other changes intended to bring the SBIC Program into conformity with private equity and venture capital industry standards. Regulations implementing the 1992 Act became effective on April 25, 1994. The 1992 Act stimulated a significant amount of interest in the SBIC Program resulting in the licensing of multiple SBICs. The Act and regulations have undergone several revisions since 1994 which have further streamlined and improved the Program.

Current Status of the SBIC Program

As a result of the economic downturn following the collapse of the high tech bubble, a significant number of SBICs which issued Participating Securities, especially those which had invested in early-stage technology companies, were found to be in violation of SBA's regulations governing capital requirements. SBA determined that it would suffer major losses from the issuers of Participating Securities, and thereafter announced that it would stop providing Leverage backed by Participating Securities. Since October 1, 2004, SBA has not processed applications for SBICs issuing Participating Securities, and has ceased issuing prospective Commitments for Participating Securities Leverage.

Notwithstanding its concerns over the further licensing of SBICs issuing Participating Securities, SBA has continued to support that the Debenture aspect of the Program which is working well and expected to continue in operation indefinitely. SBA presently is actively seeking new Debenture issuing applicants. In fiscal year 2013, SBA licensed 34 new SBICs, and in fiscal year 2014 SBA licensed 32 new SBICs, 26 of which issue debentures.

As of September 30, 2014 there were 294 licensed SBICs, 187 of which were issuers of Debentures. In total, the 294 licensed SBICs had \$11,789,500,000 in private capital, and SBA had made \$10,669,900,000 in Leverage available to them.

Regulatory and Business Advantages for Banks

Most applicants to the SBIC Program seek to be licensed as an SBIC in order to access Federally backed Leverage provided by SBA which can accelerate returns on capital invested in the SBIC by private sector sources. This makes the SBIC Program attractive to fund managers seeking to leverage their private investment capital at low cost.

However, Banks and their holding companies and certain investment advisers can derive significant regulatory advantages from participating directly or indirectly in the SBIC Program whether or not Leverage is obtained. For example, by owning or investing in SBICs, Banks and Federal savings associations (as well as their holding companies) have the ability to own indirectly more than 5% of the voting stock of small businesses in which the SBICs invest. Banks and Federal savings associations which invest in SBIC's, and their holding companies, also may receive dollar for dollar Community Reinvestment Act Credit for those investments.

In addition, the Regulations implementing the Gramm Leach Bliley Act ("GLB Act") governing regulatory capital treatment for equity investments held by Banks and bank holding companies exempt bank related SBIC investments from capital charges otherwise mandated under the GLB Act so long as their value is less than 15% of tier one capital of the bank or bank holding company. Also, ownership of a 15% or more equity interest in a small business by a bank affiliated SBIC will not give rise to a presumption under the GLB Act that the small business is an affiliate of the bank or bank holding company.

Finally, under the Dodd-Frank Act, ownership in a fund applying to be an SBIC is exempted from the general statutory prohibition regarding bank ownership of an equity interest in or sponsorship of a private equity fund, so long as the SBIC fund is licensed or has actually received permission from SBA to file an application to become an SBIC. Also, advisers that advise only licensed SBICs, applicants that have received permission to file SBIC applications from SBA, or applicants that are affiliated with one or more licensed SBICs, are exempted from the requirements for advisers to register with the Securities and Exchange Commission otherwise imposed by the Dodd Frank Act on investment advisers to private equity funds.

There are also other compelling business reasons for Banks to invest in SBICs. For example:

Banks choose to invest in SBICs because they often provide a strong IRR. For example, the median SBIC licensed between 1998 and 2008 had an annual return of 15%, with top quartile SBICs providing an annual return of 28%. In addition, many Banks find SBICs to be useful investments in order to derive deal flow and referral opportunities. Banks often provide senior loans to the same business to which SBICs provide mezzanine or equity investments.

Also, Banks that invest in SBICs may as a result of their involvements have the opportunity to provide banking services, including cash management and other services to the SBICs' portfolio companies. Another business development opportunity for Banks is to provide private wealth services for the SBICs principals or its portfolio companies.

Finally, Banks that invest in SBICs also benefit from additional SBA scrutiny on the SBIC's management team, both during the licensing process and after. Initial due diligence during the SBIC licensing process and periodic examinations of the SBIC provide a de facto "seal of approval" from the SBA that an investor might not otherwise have when assessing other investment opportunities, including private equity and hedge funds. Additionally, following the investment, Bank investors can benefit from the oversight afforded by SBA's annual and quarterly reporting requirements for SBICs.

Characteristics of SBICs Issuing Debentures

Debentures are unsecured debt instruments issued by an SBIC to SBA. They require interest payable semi-annually to SBA, they do not amortize, and generally they have a ten year maturity. The interest rate on each Debenture is permanently established when the Debenture is guaranteed and sold by SBA (see "Leverage Mechanics" below), and recently has been less than 100 basis points in excess of the prevailing interest rate on Treasury Notes with 10-year maturities (the "Treasury Note Rate") at the time of the sale.

SBICs issuing Debentures may be structured as corporations, limited partnerships or limited liability companies. However, because of SBA's licensing requirements, virtually all SBICs are now structured as limited partnerships. The general partner of an SBIC structured as a limited partnership is not personally liable for the repayment of Debentures.

SBICs issuing Debentures may distribute their undistributed net realized, cumulative earnings less unrealized depreciation to investors. However, without SBA's prior consent (which SBA is unlikely to give), SBICs may not reduce their capital by more than 2% in any fiscal year.

Because of the requirement for payment of semiannual interest, Debenture backed Leverage is best suited to SBICs that invest in portfolio companies with the ability to service debt. Participating Securities Leverage, which carried no such requirement, was better suited for SBICs investing in seed and early stage businesses or businesses that either do not have established cash flow or need to use available cash for purposes other than debt service.

Leverage Mechanics

SBICs obtain Leverage by obtaining a Leverage Commitment from SBA and then drawing down Leverage from the Commitment as it is needed to make investments or pay permissible expenses. Normally Leverage is drawn in a ratio of \$2 from the commitment to every dollar of private capital that is drawn from Private Investors. Leverage Commitments may be obtained at the time an SBIC is licensed in an amount up to twice the SBIC's "Regulatory Capital" which is an SBA defined term meaning qualifying paid-in capital and binding commitments from the SBIC's "Institutional Investors" (also an SBA defined term). Additional Commitments for licensed SBICs also may be obtained semi-annually. When a Leverage Commitment is issued, the SBIC pays a 1%, "one time," commitment fee. Commitments expire on September 30 of the fourth Federal fiscal year following the fiscal year of their issuance.

SBICs may draw down committed Leverage on one day's notice through an interim credit facility provided to the SBIC Program by the Federal Home Loan Bank of Chicago. A 2% "user" fee payable to SBA, 37.5 basis points of underwriting fees and 5 basis points of selling fees are deducted from each draw. When it makes a draw, the SBIC pays an interim interest rate on Debenture Leverage of LIBOR plus 30 basis points and the amount of the "SBA Fee" described below. Every six months in March and September of each year all Debentures funded under the interim process, during the preceding six months are guaranteed and pooled by SBA. Fractional Interests in the pools are then sold to investors and a permanent interest rate based upon the prevailing interest rate for 10 year Treasury Notes and the premium amount described below is established for each of the Debentures in the pool, which is then fixed until the Leverage is repaid.

Fractional Interests are sold at a premium with the assistance of a consortium of investment Banks (who receive a 37.5 basis point fee) to institutional purchasers. The amount of this premium fluctuates with economic conditions at the time the interests are sold. In September 2014 the premium was .424% and the Treasury Note Rate was 2.591%, resulting in an interest rate for the Debentures in the pool sold at that time of 3.015%. In September 2015 the premium was .620% and the Treasury Note Rate was 2.209% resulting in an interest rate for the \$1.2 Billion of Debentures in the pool sold at that time of 2.829%.

The amount of Debentures that may be guaranteed and pooled by SBA each year is subject to a Congressional authorization. In recent years, Congress has enacted authorized levels in three-year cycles. The Federal fiscal year 2013 budget authorized \$3 Billion and the 2014 and 2015 budgets authorized \$4 Billion of Debenture Leverage for each of those fiscal years.

Under the SBIC Act of 1958, the maximum amount of Leverage available to a single SBIC is \$150 million and the maximum Leverage permissible for a group of commonly managed SBICs is an aggregate of \$225 million. The actual amount of Leverage available to a particular SBIC is limited to a multiple of its paid-in private capital and binding commitments from Institutional Investors (“Regulatory Capital”).

Under the SBIC Act of 1958, the amount of Debentures (and Participating Securities) that could be guaranteed each year was also made subject to an annual Congressional appropriation of an amount of funds necessary to cover anticipated losses on the Leverage. Beginning on September 1, 1996, SBA charged a 1.00% annual “SBA Fee” on Leverage it provided to SBICs, causing significant reductions in required Congressional appropriations needed to support increasing amounts of available Leverage. The amount of the “SBA Fee” is determined in the fiscal year in which a Leverage Commitment is issued and applies to all Leverage drawn pursuant to that Commitment.

In December 2000 legislation was enacted requiring SBA to set the amount of the Fee it imposed on Commitments issued each fiscal year so that the sum of all fees charged for the use of Leverage (including 1% commitment fees, 2% user fees, the annual “SBA Fee” and anticipated profit distributions from Participating Securities issuers) would equal the amount of anticipated losses for the SBIC Program, and would result in a zero subsidy for the SBIC Program. The SBA Fee for Debenture Commitments issued in FY 2014 was .355% and in FY 2015 is .742%.

The SBA Fee is added to and becomes a part of the interest rate on the Debentures when the permanent interest rate is established, so that the permanent interest rate on Debentures is the combination of the prevailing Treasury Note Rate, the premium paid to investors and the SBA Fee, associated with the applicable commitment.

Private Investors in SBICs

Under SBA’s rules investors in SBICs may be either domestic or foreign individuals or entities. As part of the licensing process, most investors owning 33% or more of an SBIC are required to submit background information to SBA and are subject to background checks that require fingerprinting. All investors in an SBIC owning 10% or more and anyone owing 10% or more of any investor owning 10% of an SBIC must be identified to SBA as part of the SBIC’s application for licensing.

SBA regulations require that an SBIC utilizing Leverage receives significant investments from investors who do not participate in or otherwise control its management. An SBIC must receive at least 30% of its private capital from a total of three or more investors who are unrelated to its management or from a single such

investor meeting certain specific qualifications (such as a bank, insurance company or certain publicly traded corporations). An individual investor may own no more than 70% of an SBIC's private capital without SBA consent.

Individual investors owning 10% or more of an SBIC may not transfer their interests without SBA's prior consent. Additionally, as a condition to providing Leverage to the SBIC, SBA presently requires investors owning 50% or more of an SBIC (as well as the SBIC's managers and other "control persons") to enter into a written agreement with SBA making them personally liable for repayment of the Leverage if they directly or indirectly participate in a change of control of an SBIC without SBA's prior consent. Also, without SBA's consent, an SBIC may not release any of its investors from the liability to make the full amount of their capital contribution.

SBA regulations describe the qualifications of "Institutional Investors" in great detail. They can be most forms of business entities with a net worth of at least \$10 million, or Banks or savings and loan associations or their holding companies, insurance companies, pension plans for private or public sector employees, and tax-exempt foundations or trusts, in each case with a net worth of at least \$1 million. Institutional Investors also include individuals with a net worth of at least \$10 million (exclusive of the equity of their most valuable residence) or \$2 million if the amount committed to the SBIC does not exceed 10% of their net worth. Not more than 33% of the SBIC's private capital may come from government entities.

SBIC Operations

Under SBA regulations an SBIC and its Associates may provide certain management services to investees, but only may charge for those services at competitive rates for services actually rendered.

SBA must approve the Management fees paid by SBICs using Leverage. Leveraged SBICs are permitted to pay a management fee of up to 2.5% of three times the amount of their Regulatory Capital (without subtracting distributions made) for the lesser of five years or until 80% of Private Capital and the maximum permissible Leverage have been drawn, and thereafter 2.5% of their cost basis of loans and investments in active portfolio companies. If the base on which the fee is calculated exceeds \$60 million, the permissible rate declines to 2% when the base is \$120 million or more. Management fees must be reduced by all consulting, board and other fees received from portfolio companies by affiliates of the SBIC's general partner (except for fees paid to licensed broker-dealers).

The General Partner of an SBIC is required to value the SBIC's assets annually, or semi-annually if Leverage is used, pursuant to valuation guidelines approved by SBA. SBA has issued model valuation guidelines that are required to be made an exhibit to the SBICs operating agreement.

If an SBIC uses Leverage, it must avoid "Capital Impairment" which will be considered to exist if the SBIC's "Capital Impairment Ratio" (calculated by adding the SBIC's realized losses and net unrealized depreciation and dividing the result by the SBIC's private capital) exceeds permitted levels detailed in SBA's regulations.

SBA regulations restrict an SBIC's ability to borrow funds from third parties. Debt incurred by Debenture issuing SBICs may be secured only with SBA's approval. SBA's policies currently permit borrowing only until Leverage is drawn down (which may then be used to repay a loan), but precludes third party loans after Leverage is outstanding.

SBICs are required by regulation to file a number of reports with SBA including an annual financial statement which is certified by the SBIC's independent certified public accountants (and contains information concerning each portfolio company), valuation reports as described above, reports as to changes in the SBIC's management and material litigation, a brief report describing each investment, and copies of reports sent to investors and, if applicable, to the SEC. SBA attempts to conduct regulatory examinations of each SBIC on an annual basis.

SBICs using Leverage are subject to regulations and policies that provide SBA with multiple remedies for violations of SBA's regulations. The remedies are graduated in severity depending on the seriousness of the SBIC's financial condition or its misconduct. For minor regulatory infractions, warnings are given. For serious infractions (including Capital Impairment), SBA may restrict or eliminate additional Leverage, prohibit distributions to investors until SBA has been repaid, prohibit investments without SBA's consent, negotiate a reduction of the amount of permissible management fees, and require investors to pay their unfunded capital commitments to the SBIC. In the most severe cases, SBA may require the removal of an SBIC's General Partner or its officers, directors, partners or managers and SBA may obtain appointment of a receiver to operate or liquidate the SBIC.

SBIC Investments

An SBIC must invest in "Small Businesses," and must invest at least 25% of its invested funds in "Smaller Enterprises." SBA regulations define a Small Business as one with net worth (excluding goodwill) of less than \$19.5 million and average after-tax income (exclusive of loss carry-forwards) for the prior 2 years of less than \$6.5 million. In the alternative, size standards for the industry group in which the company is classified, based on its number of employees (typically 500 to 1,000 for a manufacturing company) or gross revenues may be used to qualify a business as small. A "Smaller Enterprise" must have a net worth (excluding goodwill) of less than \$6 million and average after-tax income for the prior 2 years of less than \$2 million.

SBA regulations provide that a Leveraged SBIC may not invest more than 30% of its Regulatory Capital in any single company. SBA may approve a larger percentage if necessary to protect the SBIC's investment.

SBA regulations prohibit investment in the following types of businesses: companies whose principal business is relending or reinvesting (venture capital firms, leasing companies, factors, Banks); investments in speculative real estate; single purpose projects that are not continuing businesses; for use outside of the United States; passive businesses that do not carry on an active trade or business; and businesses that use 50% or more of the funds to buy goods or services from an associated supplier.

Under SBA regulations, an SBIC and its Associates may control a Small Business for up to 7 years, and with SBA's consent, for a longer period, to permit an orderly sale of the investment or to ensure the financial stability of the small business. SBICs may not make investments in a Small Business that give rise to a conflicts of interest. A conflict of interest may arise if an Associate of a Leveraged SBIC has or makes an investment in the Small Business or serves as one of its officers or directors or would otherwise benefit from the financing. Therefore SBICs and their Associates may coninvest only if it is done on identical terms or on terms that are otherwise fair to the SBIC.

Investment Financing Terms

An SBIC may make investments in the form of Loans, debt with equity features (“Debt Securities”) or Equity Securities. Debt Securities must be issued for a term of not less than one year (except for bridge loans in anticipation of a permanent financing in which the SBIC intends to participate, or to protect its prior investment) and must have amortization not exceeding “straight line.” The permissible interest rate on Debt Securities depends on whether they are “straight debt” or debt with equity features. For Loans, the permitted rate is the higher of (i) 19%, or (ii) 11% over the higher of the SBIC’s weighted cost of Debenture Leverage or the current Debenture Rate. For Debt Securities, the permitted rate of the loan component is the higher of (i) 14%, or (ii) 6% over the higher of the SBIC’s weighted cost of Debenture Leverage or the current Debenture Rate. SBA's regulations define an SBIC’s weighted cost of Debenture Leverage and describe the permitted rate when more than one SBIC participates in the same financing.

The applicable interest rate associated with an investment includes all points, fees, discounts and other costs of money other than application and closing fees of up to 5% of the financing (if it is a Debt Security, i.e., debt with equity features) or 3% for Loans (without equity features), that may be charged in addition to the permitted interest. In addition, an SBIC may be reimbursed for its routine closing costs (including legal fees).

An SBIC may structure a financing to receive a royalty based on improvement in the performance of a portfolio company after the financing.

An SBIC may require a Small Business to redeem the SBIC’s equity investment after one year, and only for a price premised on a pre-determined formula based on book value and/or earnings or a third-party appraisal by a mutually agreed upon, qualified appraiser. Mandatory redemption provisions not complying with these requirements will cause the investment to be treated as if it were a Debt Security. A Small Business may, however, be required to redeem the SBIC’s equity security if the Small Business has a public offering, has a change of control or management or defaults under its investment agreement.

An SBIC may retain its investment in a business that ceases to be small, and may continue to invest in such a “large” business until it has a public offering. Following a public offering by such a “large”

business, the SBIC still may exercise rights to acquire securities that were obtained while the business was small.

Licensing

SBA uses a two-step licensing process for new applicants. As a first step, an applicant completes SBA's Management Assessment Questionnaire ("MAQ"). The answers provided indicate the applicant's business plan as well as detailed information concerning the capability of each of its management team ("Principals") to carry out the business plan. SBA requires that at least two substantially full-time, Principals have at least five years of successful private equity investment experience at a decision-making level. The MAQ is then reviewed by SBA's "Investment Committee", after which the Principals, if SBA deems them qualified, are invited to meet with the members of the Investment Committee. After the meeting with the applicant's Principals, the Investment Committee may turn the application down or issue a "go forth" letter to the applicant indicating that it has passed the first part of the application process and is authorized to file a formal application. At the present time, a "go forth" letter usually is issued 3 months following submission of the MAQ.

After receipt of the "go forth" letter and obtaining commitments for at least the minimum required Regulatory Capital (\$5 million for SBICs using Debentures) from investors satisfying the diversity requirement, the applicant files a formal application which contains additional information about the applicant and its management team, as well as its legal formation documents. At this time SBA determines finally if there is a qualified management team and the SBIC has a good chance of operating successfully. It again reviews the applicant's business plan and projections, its legal documents, and it conducts reference and other background checks on the management team. This part of the process presently is taking approximately four to six months. SBA requires applicants to advise their investors that they are not entitled rely on SBA's review of the applicant in deciding whether to invest.

Investments made by a prospective SBIC prior to filing its formal license application with SBA will not be included in the SBIC's "Regulatory Capital" once it is licensed. However, after an application is filed, an applicant may make "pre-licensing investments" which will be included in the applicant's Regulatory Capital if they are submitted to SBA for approval prior to the investment being made. SBA requires 10 business days to review such pre-licensing investments (but approvals now typically take 30 days or more), during which it determines if the investment is made in compliance with SBA Regulations. Once the applicant receives a license, such pre-approval of investments is not required. SBA requires all Principals to attend a one-day regulations class run by SBA and will only permit one "pre-licensing" investment to be made prior to at least one person from the applicant attending the class. Arrangements for attending the regulations class are made by contacting the Small Business Investment Alliance (SBIA) www.sbia.org.

Timeline

Applicants should assume the following timeline for securing a license and Leverage.

Management Assessment Questionnaire	3 months
Formal License Approval	4-6 months
Receipt of Leverage Following Licensing	<u>1-2 months</u>
	8-12 months
Use of More than One-Half of One Tier of Leverage Following Licensing	6-12 months after licensing

This timeline assumes the license application is filed immediately upon receipt of the “go-forth” letter.

Licensing Second Funds

For “second” SBIC Funds, SBA follows a process that is similar to licensing new funds. The first step consists of SBA's Office of Operations analyzing the prior fund (similarity of business plan, changes in management team, track record, profitability, liquidity and prior SBA compliance record) and making a recommendation to the Investment Committee that ultimately leads to issuance of a “go forth” letter. Following its receipt, when the new fund has received commitments for the minimum required capital that satisfies the “diversity” requirement, the fund may submit a formal application for processing.

For more information please contact:

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Martin Teckler is a partner in the firm's Washington, D.C. office. Mr. Teckler is experienced in general corporate law, real estate, administrative law, securities and venture capital. Mr. Teckler also has experience in the programs of the Small Business Administration and other federal agencies which provide capital to small businesses, such as the U.S. Department of Agriculture, OPIC and the Export-Import Bank, as well as areas of government contracting and the provision of set-asides to small and minority-owned businesses. His principal areas of practice include representation of venture capital and private equity funds which are structured as Small Business Investment Companies (SBICs) and representation of specialty lenders that make financial assistance available to small and mid-sized businesses.

Mr. Teckler is a frequent speaker on SBIC, Certified Development Company, and Small Business Lending Fund matters. He participates in, and has presented before, the Small Business Investor Alliance and the National Association of Government Guaranteed Lenders.

Prior to joining Kelley Drye, Mr. Teckler served as deputy general counsel for the U.S. Small Business Administration between 1984 and 1997. In that capacity, he was senior counsel for SBA's Business Lending, Small Business Investment Company (Venture Capital and Private Equity) and Development Company Programs. This work involved preparation of significant securities transactions and interaction with sources of lending and venture capital for small businesses.

Representative Experience

Formation and licensing of multiple Small Business Investment Companies (SBICs) including structuring of fund entities, representation of principal groups before the Small Business Administration (SBA), resolution of investor issues, obtaining leverage from SBA and resolving regulatory matters on behalf of licensed SBICs.

Structuring multiple venture capital and private equity investments by SBICs and other funds in a manner that complies with applicable SBA regulations.

Formation and structuring of non-SBIC venture capital and private equity funds.

Representing multiple lending institutions in obtaining authority to make SBA and U.S. Department of Agriculture guaranteed loans.

Representation of multiple issuers, acquirers and broker-dealers, in secondary market and securitization transactions involving government-guaranteed loans.

Memberships and Associations

D.C. Bar Association

Bar Admissions

District of Columbia, 1972

Education

George Washington University Law School

J.D., *with honors*, 1972

Boston University

B.A., *with distinction*, 1968