

CORPORATIONS: Small business investment company may be organized under Missouri General and Business Corporation Act.

April 29, 1959

Honorable Walter H. Toberman
Secretary of State
Jefferson City, Missouri



Dear Mr. Toberman:

We have your request for an opinion of this office, reading as follows:

"Enclosed herewith is a copy of proposed articles of incorporation which have been submitted to this department for approval.

"This department is of the opinion that such a corporation may not be organized under Chapter 351, since the activities of the corporation under the Federal law extends itself into the field of the mortgage loan business. As you of course know, this activity is prohibitive under Section 351.020.

"It is deemed by this department it is of sufficient importance to request from your office an official opinion in this matter, since the Federal Government stands ready to issue charters to organizations in this State which do not have laws within the framework of the Federal Act. Any opinion as to the State of Missouri's position in this matter we feel should come from your office.

"Submitted is the following question:

"May a corporation be organized under Chapter 351 for the purpose of conducting a business within the meaning of the Small Business Investment Act of 1958?"

The "Small Business Investment Act of 1958" (Public Law 85-699, 85th Congress, Second Session, 72 Stat. 689, Title 15, U.S.C.A., Sections 661-696) provides for the incorporation of small business investment companies. Such companies may be chartered by the Small Business Administration when investment companies cannot be chartered under state laws and operate in ac-

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cordance with terms of the federal act (Section 102; 15 U.S.C.A. § 661). We must, therefore, consider the purposes which the federal act contemplates that such companies shall exercise.

Section 301 of the federal act (15 U.S.C.A. §681) provides, in part, as follows:

"(b) The articles of incorporation of any small business investment company shall specify in general terms the objects for which the company is formed, the name assumed by such company, the area or areas in which its operations are to be carried on, the place where its principal office is to be located, and the amount and classes of its shares of capital stock. Such articles may contain any other provisions not inconsistent with this Act that the company may see fit to adopt for the regulation of its business and the conduct of its affairs. Such articles and any amendments thereto adopted from time to time shall be subject to the approval of the Administration.

"(c) The articles of incorporation and amendments thereto shall be forwarded to the Administration for consideration and approval or disapproval. In determining whether to approve the establishment of such a company and its proposed articles of incorporation, the Administration shall give due regard, among other things, to the need for the financing of small-business concerns in the area in which the proposed company is to commence business, the general character of the proposed management of the company, the number of such companies previously organized in the United States, and the volume of their operations. After consideration of all relevant factors, the Administration may in its discretion approve the articles of incorporation and issue a permit to begin business.

"(d) Upon issuance of such permit, the company shall become and be a body corporate, and as such, and in the name designated in its articles shall have power -

- (1) to adopt and use a corporate seal;
- (2) to have succession for a period of thirty years, unless extended as provided in section

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308(f), or unless sooner dissolved by the act of the shareholders owning two-thirds of the stock or by an Act of Congress, or unless its franchise becomes forfeited by some violation of law or regulation issued hereunder;

(3) to make contracts;

(4) to sue and be sued, complain, and defend in any court of law or equity;

(5) by its board of directors, to appoint such officers and employees as may be deemed proper, define their authority and duties, fix their compensation, require bonds of such of them as it deems advisable and fix the penalty thereof, dismiss such officers or employees, or any thereof, at pleasure, and appoint others to fill their places;

(6) to adopt bylaws regulating the manner in which its stock shall be transferred, its officers and employees appointed, its property transferred, and the privileges granted to it by law exercised and enjoyed;

(7) to establish branch offices or agencies subject to the approval of the Administration;

(8) to acquire, hold, operate, and dispose of any property (real, personal, or mixed) whenever necessary or appropriate to the carrying out of its lawful functions;

(9) to act as depository or fiscal agent of the United States when so designated by the Secretary of the Treasury;

(10) to operate in such area or areas as may be specified in its articles of incorporation and approved by the Administration; and

(11) to exercise the other powers set forth in this Act and such incidental powers as may reasonably be necessary to carry on the business for which the company is established.

"(e) The board of directors of each small business investment company shall consist of nine members who shall be elected annually by the holders of the shares of stock of the company."

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Section 302 (15 U.S.C.A. § 682) requires that such corporation have a paid-in capital and surplus of at least \$300,000. Section 303 (15 U.S.C.A. § 683) authorizes such companies to borrow money and to issue their debenture bonds, promissory notes or other obligations. Section 304 (15 U.S.C.A. § 684) provides:

"(a) It shall be a primary function of each small business investment company to provide a source of needed equity capital for small-business concerns in the manner and subject to the conditions described in this section.

"(b) Capital shall be provided by a company to a small-business concern under this section only through the purchase of debenture bonds (of such concern) which shall -

(1) bear interest at such rate, and contain such other terms, as the company may fix with the approval of the Administration;

(2) be callable on any interest payment date, upon three months' notice, at par plus accrued interest; and

(3) be convertible at the option of the company, or a holder in due course, up to and including the effective date of any call by the issuer, into stock of the small-business concern at the sound book value of such stock determined at the time of the issuance of the debentures.

"(c) Before any capital is provided to a small-business concern under this section -

(1) the company may require such concern to refinance any or all of its outstanding indebtedness so that the company is the only holder of any evidence of indebtedness of such concern; and

(2) except as provided in regulations issued by the Administration, such concern shall agree that it will not thereafter incur any indebtedness without first securing the approval of the company and giving the company the first opportunity to finance such indebtedness.

"(d) Whenever a company provides capital to a small-business concern under this section, such

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concern shall be required to become a stockholder-proprietor of the company by investing in the capital stock of the company, in an amount equal to not less than 2 percent nor more than 5 percent of the amount of the capital so provided, in accordance with regulations prescribed by the Administrator.

Section 305 (15 U.S.C.A. § 685) provides:

"(a) Each company is authorized to make loans, in the manner and subject to the conditions described in this section, to incorporated and unincorporated small-business concerns in order to provide such concerns with funds needed for sound financing, growth, modernization, and expansion.

"(b) Loans made under this section may be made directly or in cooperation with other lending institutions through agreements to participate on an immediate or deferred basis. In agreements to participate in loans on a deferred basis under this subsection, the participation by the company shall not be in excess of 90 per centum of the balance of the loan outstanding at the time of disbursement.

"(c) The maximum rate of interest for the company's share of any loan made under this section shall be determined by the Administration.

"(d) Any loan made under this section shall have a maturity not exceeding twenty years.

"(e) Any loan made under this section shall be of such sound value, or so secured, as reasonably to assure repayment.

"(f) Any company which has made a loan to a small-business concern under this section is authorized to extend the maturity of or renew such loan for additional periods, not exceeding ten years, if the company finds that such extension or renewal will aid in the orderly liquidation of such loan."

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Section 309 (15 U.S.C.A. §688) provides:

"Any investment company chartered under the laws of any State expressly for the purpose of operating under this Act may with the approval of the Administrator be permitted to operate under the provisions of this Act. Such approval shall be given with due regard to the factors specified in section 301(c) with respect to organization of small business investment companies."

The above provisions fix the basic formation and purposes of a small business investment corporation under the federal act. May such purposes be accomplished by a corporation organized under the Missouri General and Business Corporation law, Chapter 351, RSMo 1949?

Section 351.020, RSMo 1949, provides:

"Corporations for profit except banking, insurance, railroad corporations, building and loan associations, saving banks and safe deposit companies, credit unions, mortgage loan companies, union stations, trust companies and exposition companies may be organized under this chapter for any lawful purpose or purposes."

In your opinion request, you state that it appears that a small business investment company would be engaged in the mortgage loan business and therefore could not be incorporated under Chapter 351, RSMo 1949.

It is true that the small business investment company act does contemplate that a corporation organized thereunder should engage in the business of lending money and that such loans might be secured by a mortgage upon the property of the borrower (Sec. 305, supra.) We do not feel, however, that such activity would cause it to be a mortgage loan company within the meaning of Section 351.020, supra. In our opinion, the type of corporation, the formation of which is prohibited by that section, is one which would operate under the scheme provided by Chapter 366, RSMo 1949. Corporations organized under that chapter are expressly authorized to loan money on notes secured by mortgages upon real estate. However, corporations organized under Chapter 366 are also granted further and additional powers not possessed by a general business corporation. The grant to a corporation of authority to lend money to be secured by a mortgage on real estate does not constitute such corporation a mortgage loan company within the meaning of Section 351.020 and Chapter 366 unless such additional and unique authority

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is also granted to the corporation.

That such is the situation seems clear to us in view of the provisions of Section 351.385(8), RSMo 1949, part of the General and Business Corporation law, which confers upon corporations organized under Chapter 351 the power "to lend money for its corporate purposes, and to take and hold real and personal property as security for the payment of funds so invested or loaned: * * *."

Except for the fact that it is authorized to lend money on the security of mortgages on real estate, a small business investment company has none of the essential features of a mortgage loan company under Chapter 366. Therefore, we do not feel that Section 351.020 would prohibit incorporation under the Missouri law of a corporation organized to carry on the purposes of a small business investment company.

There are two matters which should be pointed out with regard to your inquiry. Section 301(d)(9) of the federal act, supra, confers upon corporations organized under the federal act the power "to act as depository or fiscal agent of the United States when so designated by the Secretary of the Treasury; * * *."

Section 362.415(2), RSMo 1949, provides:

"2. No corporation, domestic or foreign, other than a national bank or a federal reserve bank, unless expressly authorized by the laws of this state, shall employ any part of its property, or be in any way interested in any fund which shall be employed for the purpose of receiving deposits, making discounts, or issuing notes or other evidences of debt to be loaned or put into circulation as money."

As above pointed out, Section 351.020 prohibits the organization of banking corporations under Chapter 351, and we are of the opinion that a small business investment company organized under the Missouri General and Business Corporation Act could not be given the power conferred upon federally chartered companies to act as a depository or fiscal agent for the United States.

Another problem arises by reason of the provisions of Section 351.165, RSMo 1949, which prohibits loans by a corporation to its stockholders. Said section provides:

"No note or obligation given by any shareholder, whether secured by deed of trust, mortgage or otherwise, shall be considered as payment of any part of any share or shares, and no loan of money shall be made by the corporation to any

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shareholder therein; and if such loan shall be made to a shareholder, the officers making it, or who shall assent thereto, shall be jointly and severally liable to the corporation for the repayment of such loan and interest."

Under the federal act, when the small business investment company furnishes equity capital for a small business company by the purchase of convertible debentures of the small business concern, the issuing company is required to purchase stock in the small business investment company in an amount equal to not less than 2 per cent nor more than 5 per cent of the amount of capital so provided (Sec. 304, supra). The issuing company, therefore, must, upon selling debentures to the small business investment company, become a stockholder in said company. The issuer is not a stockholder at the time of the transaction and the transaction at that time does not partake of the nature of dealings intended to be prohibited by Section 351.165. However, after the original indebtedness has been contracted, subsection (c)(2) of Section 304 contemplates that the issuing concern must first give the small business investment company an opportunity to meet its needs before becoming indebted elsewhere. The transaction which this provision contemplates might involve the provisions of Section 351.165, although the possibility exists that it might be considered an investment rather than a loan. Such distinction is recognized in the banking field. See Sections 362.105 and 362.170, RSMo 1949. Should a transaction under Section 305 of the federal act be contemplated following the completion of a transaction with the same concern under Section 304, the provisions of Section 351.165 would clearly be involved and would prohibit the transaction. This possibility would not, however, in our opinion justify the Secretary of State's refusal to issue a certificate of incorporation when the articles of incorporation are otherwise in proper form. The rule in this regard is stated in 18 C.J.S., Corporations, Section 59, page 443, as follows:

"Under some statutes, application must be made to the governor, secretary of state, or other officer for approval by him of the articles, certificate, or charter, or which provide for the filing of the articles, certificate, or charter with the secretary of state or other officer, and expressly or impliedly permit him to refuse to file the same if it is not in proper form or does not come within the statute. Under such a statute, the secretary of state or other officer, although generally a ministerial officer, is clothed with a quasi-judicial judgment, and he may and should refuse to approve articles or a certificate or charter if it is not in proper form and not in

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accordance with the statutory requirements; if it is for a purpose which is unauthorized by the statute or contains unauthorized provisions; if it is for an unlawful purpose or contains unlawful provisions; or where it plainly appears from the charter itself that the functions of the proposed corporation are impossible of performance. If, however, the proposed articles, certificate, or charter is in proper form and is for an authorized and lawful purpose, he generally is bound to approve the same, although there is an apprehension that applicants contemplate doing something in violation of the law, or may perform acts ultra vires. In such a case his duties are purely ministerial, and he cannot go outside of the application and proposed charter and determine disputed questions of fact on the evidence, but such questions must be left for the courts after the charter has been granted.* * * (Emphasis ours.)

Under Section 351.060, RSMo 1949, the Secretary of State is required to issue a certificate of incorporation if he "finds that the articles of association conform to law." We do not believe that this would authorize his refusal to approve articles of incorporation on the grounds that powers conferred therein might be abused when such power is not on its face contrary to law.

What effect the limitation of Section 351.165 might have upon federal approval of a corporation organized under Missouri law would be a matter for the federal administrator to determine.

With your opinion request you submitted a form of proposed articles of incorporation which merely sets forth in general terms that the corporation shall have the authority conferred upon small business investment companies by the federal act, except insofar as they are contrary to Missouri law. It would appear that the Secretary of State could properly require a specific statement of the purposes of the corporation proposed to be organized, so that reference to the federal law would not be necessary in order to ascertain the extent of the authority conferred.

CONCLUSION

It is the opinion of this office that a corporation may be organized under the General and Business Corporation Act of Missouri (Chapter 351, RSMo 1949) for the purpose of conducting

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a small business investment company under the Federal Small Business Investment Act, but that a corporation so organized may not be authorized to act as a depository or fiscal agent of the United States.

The foregoing opinion, which I hereby approve, was written by my Assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton
Attorney General

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