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Revision of the SBA Opinion Molder Rule

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REVISION OF THE SBA OPINION MOLDER RULE

The Small Business Administration is currently re-evaluating its "opinion molder" rule which bans loan assistance to businesses which promulgate ideas or opinions. This Comment examines the justifications for and application of the rule, contends that it has serious constitutional problems, and proposes an alternative policy which is consistent with the legislative intent of the Small Business Act and more responsive to the needs of the small business community.

INTRODUCTION

The Small Business Administration (SBA) was created by Congress to "aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise."[1] The SBA's main function is to administer federal loans to small businesses that are unable to secure other forms of assistance and that demonstrate the potential to exist and grow without government aid, repay the loan, and contribute to the overall economy. Unfortunately, the SBA has a regulatory policy which inhibits its ability to pursue its statutory goal. The so-called "opinion molder" rule precludes many communication-related businesses from loan eligibility and is the source of a current controversy which may lead to a major change in SBA policy.

The rule[2] prohibits the SBA from granting financial assistance

1. 15 U.S.C. § 631(a) (1976).

2. The rule in use until 1976 banned assistance to any "newspaper, magazine, book publishing company, radio broadcasting company, television broadcasting company, film production company, or similar enterprise." 13 C.F.R. § 120.2(d)(4) (1975). The amended rule, adopted December 21, 1976, states that "financial assistance will not be granted by SBA . . . [i]f the applicant is engaged in the creation, origination, expression, dissemination, propagation or distribution of ideas, values, thoughts, opinions or similar intellectual property, regardless of medium, form, or content." 13 C.F.R. § 120.2(d)(4) (1981). Although the Small Business Act does not specifically mandate the opinion molder policy, the SBA finds legislative authority for its promulgation of the rule in § 204 of the Act. Small Business Act of

to "opinion molders"—business concerns that promote or advocate ideas, values or opinions. The SBA is not attempting to suppress particular viewpoints which it finds distasteful; instead, it denies loans to *any* applicant whose business engages in the expression of any opinion.[3] "It is immaterial whether the ideas are innocuous or controversial";[4] the SBA will simply not assist an opinion molder.

The philosophy underlying the rule is twofold. First, the Agency recognizes the first amendment freedoms of loan recipients who operate opinion molding businesses, and wants to avoid being accused of attempting to "control or influence through such loans . . . the freedom of communication and the editorial selection of such communication material."[5] Second, the SBA refuses to become identified to any degree with the opinions and information selected or distributed by such businesses.

The SBA has defended the rule on several grounds, including the rule's historical background. The SBA's predecessor agency, the Reconstruction Finance Corporation, had adopted a similar policy with respect to its business loans. As early as 1948, the rule appeared to have congressional support.[6] When the SBA was created in 1953,[7] its Loan Policy Board adopted the opinion molder rule at its first meeting.[8]

The SBA also contends that the rule "is supported on its merits by a compelling logic":[9]

> The exercise of First Amendment rights can be almost as effectively inhibited by the hope of Government assistance as by the fear of Government

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1953, Pub. L. No. 83-163, § 204, 67 Stat. 232. This language directs the Administrator of the SBA to establish general policies to govern the granting and denial of applications for financial assistance by the Administration.

3. H.R. REP. No. 840, 94th Cong., 2d Sess. 27 (1976) (statement of L. Laun).

4. 96 S.B.A. Op. Dig. 100 (1975).

5. 68 S.B.A. Op. Dig. 101 (1968).

6. S. REP. No. 974, 80th Cong., 2d Sess. 11 (1948):

> In the last analysis the determination of whether or not a particular loan will serve the public interest, must be left to the discretion of the Directors of the Corporation.
>
> In the exercise of this discretion, RFC has decided as a matter of policy not to make loans to the press or radio. It cannot be denied that a loan to a newspaper under certain circumstances might serve a very useful public purpose. It is more important, however, for the Government not to become financially concerned with the success of any industry which is engaged in the exercise of our very jealously guarded rights of freedom of speech and press. The committee believes that RFC should have the discretion to make policy decisions of this character.

7. Small Business Act of 1953, Pub. L. No. 83-163, 67 Stat. 232.

8. The opinion molder rule adopted by the first Loan Policy Board of the SBA on September 16, 1953 was expressed in § IV(E)(6) of the Loan Policy Statement, and prohibited financial assistance "if the applicant is a newspaper, magazine, radio broadcasting or television broadcasting company or similar enterprise."

9. H.R. REP. No. 840, 94th Cong., 2d Sess. 27 (1976) (statement of L. Laun).

> sanction. . . . If SBA were to abandon its present policy of nonassistance to disseminators of ideas and values, it would have to develop a substitute policy. Either assistance would be available to all disseminators, without regard to the merits of their ideas; or SBA would have to develop standards to determine which ideas were "good" and deserving of financial assistance, and which were "bad" and hence, undeserving.[10]

Despite the simple language of the opinion molder rule,[11] it has been difficult to interpret and even more difficult to apply. The difficulty is due to an expansion in the general use of mass communication media, the increasingly specialized communication-related businesses in today's market,[12] and the growing number of products and services that may express opinions.[13] Nevertheless, the SBA clings to its policy, arguing that other options present even more problems:

> Finally, because this ineligibility policy has frequently been questioned, it has been carefully weighed by each SBA Administrator. Despite the temptation to eliminate this negative policy, the alternatives of inhibiting the freedom of expressing or promoting unpopular ideas or opinions, of acting as a censor, or of making Government loans to publishers of "hate" or pornographic material, have resulted in continued affirmation of this ineligibility policy.[14]

The rule and its application represent a tension between competing priorities. The SBA's statutory goal is to foster the growth and participation of small businesses in a competitive atmosphere. The opinion molder rule, however, reflects two other government interests: (1) the desirability of avoiding "any possible accusation that the Government is attempting to control editorial freedom by subsidizing media or communication for political or propaganda purposes";[15] and (2) the concern that "constitutionally protected rights of freedom of speech and press ought not to be compromised either by the fear of government reprisal or by

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10. *Id.*

11. *See supra* note 2.

12. For example, at one time newspapers and magazines were written, edited, printed and distributed by the same company. Modernly, a newspaper may be written by one company, printed by a second and distributed by a third. It is not clear which of these is (or are) the opinion molder.

13. 13 C.F.R. § 120.2(d)(4) (1981) lists common opinion molders: newspapers, magazines, books, greeting cards, sheet music, pictures, posters, film, tape, live broadcasts, recordings or reproductions of sight, sound or musical programs or products, or theatrical productions.

14. *Hearing Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business*, 94th Cong., 1st Sess. 84 (1975) (statement of L. Laun).

15. 45 Fed. Reg. 66,807 (1980).

the expectation of government financial assistance."[16] The SBA compromises its ability to achieve its statutory goal whenever it relies on these interests to justify the denial of a loan. Consequently, the Agency has been unable to promote small business participation where it might be the most socially valuable: in those communication fields which have been traditionally dominated by big business.

In addition to the concern that the Agency is not fulfilling its statutory objective, the constitutionality of the rule is subject to challenge on three grounds: (1) instead of protecting first amendment rights, the rule "may actually be impeding the maintenance of a free press in our society";[17] (2) the amended rule is equally as vague as an earlier version struck down by a New York federal district court as unconstitutionally vague;[18] and (3) although the SBA's classification of certain types of businesses as opinion molders may have a rational basis as required by the doctrine of equal protection, the actual *application* of that classification to particular businesses has proven to be extremely complex, and has resulted in an unfair restriction on some opinion-molding businesses. These three grounds will be explored and supported by examples of the SBA's application of the rule in certain industries. This Comment concludes with a proposal for a revised policy.

First Amendment Problems

The opinion molder rule has been invoked in a multitude of SBA decisions to preclude assistance to creators of intellectual materials, such as authors,[19] music composers and lyricists,[20] newspapers,[21] magazines,[22] radio and television broadcasting companies,[23] and the greeting card industry.[24] The rule was later extended to preclude aid to those who come in direct contact with original ideas, have the ability to edit or alter the opinion being expressed, and prepare the material for dissemination to the public. Among the industries affected by this extension are publish-

16. *Id.* at 66,608.
17. *Hearing on S.2873 Before the Subcomm. on Government Procurement of the Senate Select Comm. on Small Business*, 96th Cong., 2d Sess. 2 (1980) (statement of R. Morgan).
18. Loercher & Feminist Book Mart, Inc. v. SBA, No. 75 Civ. 5494 (S.D.N.Y. June 1, 1977).
19. 29 S.B.A. Op. Dig. I(c) (1959).
20. *See* 52 S.B.A. Op. Dig. 100 (1964).
21. 50 S.B.A. Op. Dig. 100 (1963); *see also* 13 C.F.R. § 120.2(d)(4) (1975).
22. 51 S.B.A. Op. Dig. 100 (1963); *see also* 13 C.F.R. § 120.2(d)(4) (1975).
23. 13 C.F.R. § 120.2(d)(4) (1975).
24. 96 S.B.A. Op. Dig. 100 (1975).

ing companies,[25] motion picture and record producers,[26] schools devoted to academic instruction,[27] and little theatre groups which produce and perform plays.[28] Furthermore, in a 1974 opinion which has caused some confusion,[29] the SBA recognized the importance of distributors in the communications business and struck down their eligibility, thereby eliminating those whose primary function is merely to pass on others' opinions. By denying assistance to these industries, the SBA stifles the ability of small businesses to participate in the communication fields.

The rationale for the opinion molder rule might be characterized as a kind of presumed prior restraint problem. The Agency believes that if it issues a loan to an opinion molder, his fear that the SBA may demand early repayment of its loan if he expresses a controversial opinion may cause him to alter the content of his expression. In other words, the SBA believes it would be inflicting an unconstitutional prior restraint on an opinion molder because of his presumed belief that the government may retaliate if he exercises his right to freedom of speech through his business.[30]

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25. 32 S.B.A. Op. Dig. I(B) (1959).

26. 99 S.B.A. Op. Dig. 109 (1975); 83 S.B.A. Op. Dig. 102 (1971); 78 S.B.A. Op. Dig. 106 (1970).

27. 79 S.B.A. Op. Dig. 110 (1970).

28. 81 S.B.A. Op. Dig. 155 (1971).

29. 94 S.B.A. Op. Dig. 102 (1974).

30. A second but much weaker justification for the policy rests on the argument that the SBA is not suppressing anyone's fundamental right to express protected speech; it is simply denying, due to the greater importance of competing concerns, the privilege of securing a government loan in order to start a business through which that protected speech may be expressed. The deterioration of this line of reasoning is well documented in Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). A stronger argument might be that while every citizen has a fundamental right to free speech, the government has no affirmative constitutional obligation to assist business ventures through which that right may be exercised. Thus, an administrative decision not to assist opinion-molding businesses does not directly infringe on first amendment rights. This argument finds support in several recent United States Supreme Court abortion decisions. Both Maher v. Roe, 432 U.S. 464 (1977) and Harris v. McRae, 448 U.S. 297 (1980) held that, while a woman has the freedom to choose abortion in certain circumstances, that freedom of choice does not carry with it "a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." Harris v. McRae, 448 U.S. at 316. Thus, congressional and state decisions to restrict the availability of public funds for abortions do not impinge on the constitutionally protected freedom of choice. This rationale might be valid if the SBA enforced a blanket prohibition and resisted the temptation to create exceptions for certain opinion molders. The creation of ex-

Two problems deprive this rationale of much of its legitimacy. The first arises from the fact that neither the Code of Federal Regulations nor the Small Business Act permit the SBA to recall a loan because of a recipient's opinion molding activities. As a lender, the SBA may demand repayment of the loan only in the event of default.[31] Indeed, revocation of a loan due to opinion molding activities would appear to be blatant censorship—the position the SBA wishes to avoid.

A second and more substantive problem with the rationale is that it presumes a constitutional infringement that may not exist. The Agency has never demonstrated that loan recipients fear sanction or established any other compelling government interest which could support such a rule. Litigation addressing such constitutional questions usually involves a balancing of first amendment interests against *concrete* competing government concerns.[32] The adjudication of constitutional issues requires the presence of "concrete legal issues, presented in actual cases, not abstractions."[33]

The opinion molder rule "may be working inadvertently to the detriment of the first amendment freedoms which we all support."[34] Nothing in the Constitution, the Small Business Act, or applicable case law lends support or credibility to the denial of government loans to an otherwise qualified small business simply because it is involved in communicative activities. The Supreme Court has pointed out that there is no counterpart to the religious establishment clause applicable to speech and press.[35] Thus, providing governmental financial assistance to communication-related enterprises does not appear to violate the Constitution. Conversely, "the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."[36] Regulations which infringe on first amendment free-

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ceptions within the opinion molder class raises equal protection problems. *See infra* notes 59-114 and accompanying text.

31. 13 C.F.R. § 122.23 (1981).

32. *See, e.g.*, Young v. American Mini-Theaters, 427 U.S. 50 (1976) (city supplemented its claim of public interest in preserving the quality of urban life by presenting proof that concentration of adult establishments led to increase in crime, etc.); *see also* Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 115 (1978).

33. Golden v. Zwickler, 394 U.S. 103, 108 (1969); Ackerman v. Columbia Broadcasting System, Inc., 301 F. Supp. 628, 634 (S.D.N.Y. 1969) (both citing United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947)).

34. 126 CONG. REC. 8200 (1980) (introduction of S.2873 by R. Morgan).

35. Buckley v. Valeo, 424 U.S. 1, 92 (1976).

36. Bridges v. California, 314 U.S. 252, 263 (1941).

doms are strictly scrutinized for reasonable alternatives which might have a less chilling effect on constitutional rights.[37]

The opinion molder rule appears to ignore two related principles which have long been a significant force in first amendment jurisprudence. The first is the "marketplace of ideas" concept espoused by Justice Holmes in his dissent in *Abrams v. United States*.[38] "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution."[39] *Gertz v. Welch* affirmed the importance of competition in a free marketplace: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[40] By denying financial assistance to communication-related small businesses, the SBA deprives the marketplace of their contribution. This hardly seems consistent with the broad scope of the first amendment.[41]

The SBA also ignores the concept of choice. Providing assistance to any kind of opinion molding business will not automatically and irrevocably mold opinion; the expression may never even be heard. People must choose to be exposed to the types of business typically excluded by the SBA. They must choose to buy a greeting card, go to a movie, or attend a school. Furthermore, businesses such as the greeting card industry do not convey messages from the publisher to the general public; the communication runs from the purchaser of the card to its recipient. By denying funds to these industries, the SBA prevents the exercise of these choices. The United States Supreme Court suggested an alternative to this paternalistic attitude in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*:

37. Speiser v. Randall, 357 U.S. 513 (1957); Community-Service Broadcasting, etc. v. FCC, 593 F.2d 1102 (D.C. Cir. 1978); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 591 (1978).

38. Abrams v. United States, 250 U.S. 616 (1919).

39. *Id.* at 630 (Holmes, J., dissenting).

40. Gertz v. Welch, 418 U.S. 323, 339-40 (1973).

41. Furthermore, the SBA's loan policy disallows financial assistance to those businesses that can secure funds privately (i.e., from family, friends or their own resources) or through non-government financial institutions. As a result, the only persons who can express opinions through their businesses are those who are financially secure enough to proceed without the aid of the SBA. The economically disadvantaged opinion molder is out of luck, and society is deprived of his opinion.

"to assume that . . . information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[42]

The SBA's oft-repeated "first amendment" justification for the opinion molder rule might represent an attempt to avoid involvement in controversial issues. The Agency is unwilling to risk the public outcry which would result if it abolished the rule and assisted qualified opinion-molding small businesses which express unpopular yet constitutionally protected opinions.

VAGUENESS

Prior to 1976, the opinion molder rule banned assistance to a "newspaper, magazine, book publishing company, radio broadcasting company, television broadcasting company, film production company or *similar enterprise*."[43] In 1974, the SBA considered whether a bookstore should be classified as a "similar enterprise."[44] It concluded that a "general bookstore" (i.e., one which stocks almost all subjects and viewpoints) is eligible because it would not involve the SBA in the propagation of a particular set of ideas or values.[45] This exception was not available, however, to a restrictive or "specialty" bookstore which sells books in a single or limited subject area.[46]

This distinction became the subject of much controversy in *Loercher & Feminist Book Mart, Inc. v. SBA* when the SBA was sued by an applicant desiring a business loan for a feminist bookstore.[47] The applicant advertised itself as "the largest established retail and wholesaler of strictly feminist and non-sexist children's books,"[48] apparently rendering it ineligible as a specialty bookstore. When the SBA denied the loan guarantee request, the ap-

42. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976).

43. 13 C.F.R. § 120.2(d)(4) (1975) (emphasis added).

44. 94 S.B.A. Op. Dig. 102 (1974). This decision also announced that the sale of "newspapers, magazines or books by grocery, drug or other general merchandise stores, or by motels, would not render them ineligible. We would assume that such sales were *de minimis*, i.e., an insignificant part of their gross sales or activities otherwise eligible."

45. "In determining whether a bookstore is a general bookstore, it is relevant to consider whether the store carries *in stock* (1) a variety of titles; (2) in a variety of fields; (3) from a variety of publishers; (4) *including* bestsellers (fiction or nonfiction, paperback or hardback)." 98 S.B.A. Op. Dig. 102 (1975) (emphasis original).

46. 95 S.B.A. Op. Dig. 103 (1974).

47. Loercher & Feminist Book Mart, Inc. v. SBA, No. 75 Civ. 5494 (S.D.N.Y. June 1, 1977).

48. Letter from E. Benderson, SBA Chief Counsel for Special Litigation to W. Brandt, Asst. U.S. Attorney, S.D.N.Y. (Jan. 20, 1976) (quoting plaintiff's pamphlet).

plicant filed a class action suit in a New York federal district court, alleging that the SBA denied the request "based upon a policy and practice of the SBA to disfavor women on the basis of sex, to disfavor businesses which are 'non-sexist,' and by the SBA's invocation of the 'opinion molder rule,' 13 C.F.R. § 120.2(d)(4) (1975), which plaintiffs allege to be unconstitutional."[49] Although the court held that the SBA's reason for denying the loan was in fact based on the opinion molder rule and not because of an intent to discriminate, it struck down the rule as unconstitutionally vague:

> A statute or regulation is unconstitutional if "men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Baggett v. Bullett*, 377 U.S. 360, 367 (1964). The "opinion molder rule" in effect in 1975 clearly must fall within this definition. Plaintiff was found to fall within the scope of a "similar enterprise." It is impossible to tell from a reading of the regulation that a bookstore would be covered by its prohibitions.[50]

The court also examined the SBA's administrative decisions and interpretations of the regulation and found that SBA attorneys themselves "could not agree how the applicant was covered by the rule."[51]

While this case was being decided, congressional opposition to the rule was mounting. Although Congress had never objected to the rationale underlying the rule, it began to inquire about the peculiar application of the rule by the SBA. At a 1975 hearing before the U.S. House of Representatives Subcommittee on SBA Oversight and Minority Enterprise of the Committee on Small Business, the SBA Administrator was questioned about the seemingly unnecessary classification of the greeting card industry as a "similar enterprise."[52] In 1976, the same House subcommittee

49. Loercher & Feminist Book Mart, Inc. v. SBA, No. 75 Civ. 5494 (S.D.N.Y. June 1, 1977).

50. *Id.* at 5.

51. *Id.*

> While the majority felt plaintiffs were covered by the rule, they could not agree if plaintiff Feminist Book Mart was a specialty bookstore and denied the loan on that basis, or whether it was a general bookstore, but denied the loan because it was still an opinion molder. While it is clear that the loan was denied because of the SBA's interpretation of this rule, it is just as clear that the rule is unconstitutionally vague. The constitutional standard of vagueness is strictly applied where the statute concerns the regulation of rights protected by the first amendment. *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

52. *Hearing Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business*, 94th Cong., 1st Sess. 82 (1975) (statement of L. Laun).

concluded:

> that SBA's rules and regulations do not adequately state the Agency's policy on this issue. In fact, the regulations merely list examples of ineligible concerns, and broadens its impact by including the term "similar enterprise." The Subcommittee finds that such regulations do not provide the small business community with sufficient notice as to the actual operating restrictions in this area.[53]

The SBA finally revised the language of the opinion molder rule on December 21, 1976,[54] "in an attempt to clarify its dimensions—not tighten its restrictions."[55] Instead of listing ineligible businesses, the current regulations prohibit assistance to any applicant engaged in the "creation, origination, expression, dissemination, propagation, or distribution of ideas, values, thoughts, opinions or *similar intellectual property*, regardless of medium, form or content."[56] The current regulation enumerates specific exceptions to the prohibition[57] and also provides a one-sentence explanation of the reason for the rule.[58] Nevertheless, it is arguable that the current language is just as vague as that used prior to 1976. Furthermore, previous administrative decisions with respect to eligibility continue to apply. Thus, inconsistent opinions rendered under a vague rule persist, and the small business community remains no less confused.

The Application of the Rule and Equal Protection Problems

The distinction made between types of businesses in the opinion molder policy has evoked much criticism from Congressional committees.[59] The objections stem from the SBA's selection of opinion-molding small businesses for treatment different from that accorded non-opinion-molding small businesses. According to one senator, "the SBA has acted to restrict one particular class of applicants from eligibility without statutory basis and without

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53. H.R. Rep. No. 840, 94th Cong., 2d Sess. 28 (1976).

54. 41 Fed. Reg. 55,508 (1976) (codified at 13 C.F.R. § 120.2(d)(4) (1977)).

55. 117 S.B.A. Op. Dig. 102 (1980).

56. 13 C.F.R. § 120.2(d)(4) (1981) (emphasis added).

57. The exceptions include commercial printers, publishers of advertising and technical materials, firms providing communications production facilities, broadcasters, and the cable television industry. 13 C.F.R. § 120.2(d)(4)(i)-(v) (1981).

58. "Financial assistance to such applicants is barred in order to avoid Government interference, or the appearance thereof, with the constitutionally protected freedoms of speech and press . . . ." 13 C.F.R. § 120.2(d)(4) (1981). Although this sentence does not provide substantial guidance to the applicant, it is at least an improvement over the old version of the rule.

59. *See, e.g., Hearing on S.2873 Before the Subcomm. on Government Procurement of the Senate Select Comm. on Small Business*, 96th Cong., 2d Sess. (1980) (statement of R. Morgan). There have been at least three legislative attempts to abolish the policy: H.R. 2378, 95th Cong., 1st Sess. (1977); H.R. 2725, 96th Cong., 1st Sess. (1979); S.2873, 96th Cong., 2d Sess. (1980).

a demonstration of a compelling Government interest."[60]

It is not clear that a compelling government interest is necessary to justify the rule. Under traditional equal protection analysis,[61] strict scrutiny of legislative or administrative classifications is triggered only when fundamental rights or suspect classes are burdened by the regulation.[62] Demonstration of a compelling government interest may not be necessary in a business or economic context.[63] In evaluating challenged business or economic regulations, United States Supreme Court decisions "presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."[64] Even if the classification is rational and is delineated in clear language, discrimination in the application of the opinion molder rule may nonetheless constitute a violation of equal protection.[65] A look at several examples of the SBA's application of the rule is instructive.[66]

Music and Dramatic Arts

The SBA's administrative decisions with respect to the music and dramatic arts industries demonstrate the pitfalls into which the Agency has fallen in attempting to interpret and apply its own rule. These decisions illustrate the hazy lines of distinction that have necessarily been drawn in order to accommodate competing policies.

60. *Hearing on S.2873 Before the Subcomm. on Government Procurement of the Senate Select Comm. on Small Business*, 96th Cong., 2d Sess. 2 (1980) (statement of R. Morgan).

61. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16.6, at 1000 (1978).

62. *Id.* This discussion assumes arguendo that the opinion molder rule does not infringe upon fundamental speech rights.

63. New Orleans v. Dukes, 427 U.S. 297 (1975).

64. *Id.* at 303.

65. 16A AM. JUR. *Constitutional Law* § 802 (1979). "While the mere possibility of arbitrary action, where discretion is vested in an administrative agency, does not render a statute vulnerable to the charge that it denies equal protection of the laws, actual discrimination in administration would violate the constitutional guaranty." *Id.* at 949.

66. These examples demonstrate that the SBA has gone from making a distinction between opinion molders and non-opinion molders to making distinctions within the opinion molder class itself. Because this class by definition expresses opinions, most distinctions will have the appearance of censorship or favoritism. This is the constitutional problem the SBA intended to avoid by adopting the opinion molder rule. *See supra* note 14 and accompanying text.

In a 1964 case, the SBA determined the eligibility of a writer/publisher of music and lyrics.[67] Rather than draw an analogy between this applicant and the author/publisher of a book, the SBA examined the sheet music material and records presented to it, and ruled that it was "merely entertainment music and [did] not express an editorial policy of the applicant."[68] The applicant, therefore, was eligible for assistance. In 1975, the Agency admitted its error in that case.[69] By reviewing the subject matter of the music and finding it to be unobjectionable, the SBA in effect determined eligibility on the basis of content, and thereby directly contravened its noncensorship position.

This opinion raises an important issue; one that is perhaps the basis of many of the SBA's difficulties in uniformly applying the opinion molder rule. Instead of rigidly adhering to its regulation, the SBA deferred to its primary objective of increasing small business participation by considering seemingly ineligible materials and formulating a vague exception where the exclusion of those materials did not seem to serve the purpose of the rule. This practice has created the exceptions that are swallowing the rule.

In another series of opinions related to the arts, the SBA has ruled that the musician who writes music and lyrics,[70] the little theatre group which produces and performs plays,[71] and the motion picture producer[72] are all ineligible for assistance. In contrast, the owner of the recording studio whose premises are leased for production of the music,[73] the "applicant who provides premises, an auditorium or a theater for entertainment by bands or orchestras,"[74] the group which leases a theater building to showcase a variety of musical talent, cultural programs, community art groups and art workshops,[75] and the movie theater owner who merely exhibits films produced by others[76] are all eligible. In drawing this fine line, the Agency stated:

> The ineligibility policy applies to the writer, the publisher, the distributor, or the promoter of mass communication material. The ineligibility policy has not been applied to businesses which assist or supply services to a mass communication industry, and which are not directly involved in the

67. 52 S.B.A. Op. Dig. 100 (1964), *overruled by* 99 S.B.A. Op. Dig. 109 (1975).
68. *Id.*
69. 99 S.B.A. Op. Dig. 109 (1975).
70. 52 S.B.A. Op. Dig. 100 (1964), *overruled by* 99 S.B.A. Op. Dig. 109 (1975).
71. 81 S.B.A. Op. Dig. 155 (1971).
72. 14 S.B.A. Op. Dig. I(A)(2)(a) (1956).
73. 83 S.B.A. Op. Dig. 100 (1971).
74. 83 S.B.A. Op. Dig. 101 (1971).
75. 92 S.B.A. Op. Dig. 103 (1974).
76. *Id.*

creation, promotion or distribution of the ideas and opinions.[77]

This distinction produces inconsistent results. It is difficult to reconcile the eligibility of a restaurant/club owner who deliberately books Bob Dylan or Joan Baez with the ineligibility of a little theatre group that produces "Snow White." The club owner did not "create" Joan Baez' political views, but he is certainly promoting and distributing them. He has the ability to select musical acts for booking, and in that sense is just as effective an opinion molder as is the book publisher or movie producer. Furthermore, the distributor concept in itself is troubling. Although a "distributor of mass communication material" was declared ineligible in 1974,[78] it is not unreasonable to equate a club owner, a movie theater owner or the cable television industry (all of which are currently eligible) with a "distributor" of opinion-molding material.

The Advertising Industry

In a series of disturbing opinions, the SBA has excepted from its prohibition the quintessential opinion molder: the advertising industry. According to the SBA, the general ban on financial assistance "has never included advertising publications . . . (i.e., publications consisting solely of advertisements with no editorial material intended to be of an entertaining or informative nature apart from the advertisements themselves). . . ."[79] In addition to assisting advertising magazines, the SBA will also assist an advertising agency "that does no public relations work,[80] advertising for political candidates, or other opinion molding,[81] as that term is

77. 83 S.B.A. Op. Dig. 100 (1971).
78. 94 S.B.A. Op. Dig. 102 (1974).
79. 93 S.B.A. Op. Dig. 104 (1974).
80. "Public relations work" has been vaguely distinguished from advertising through the use of the following two examples: "An advertising campaign whose theme is 'vote for X' or one dedicated to the proposition that 'our stockholders are just plain folks' would represent ineligible opinion molding." 104 S.B.A. Op. Dig. 108 (1977). Although the first example is obviously political and its exclusion is consistent with the spirit of the opinion molder rule, the second example is arguably advertising, which is eligible.
81. The Agency later softened its stance:
> It would not be inconsistent with our opinion molders' policy to apply a *de minimis* test to determine whether a given advertising agency is eligible for SBA financial assistance; that is, a commercial advertising agency is presumptively eligible for SBA financial assistance, whether it creates the advertising material or merely functions as a media broker, *unless* a significant amount of its work consists of noncommercial advertising.

Id. (emphasis original).

commonly understood. . . ."[82]

Although the United States Supreme Court has commented on the significance of accurate commercial speech in promoting an informed society,[83] it has not given commercial speech the same degree of protection as political speech.[84] It appears that the SBA is dangerously underestimating the power of advertising to mold social, economic and political values. The SBA's blanket statement of eligibility ("while opinion molding in one sense is an inevitable objective of any advertising agency, it is not the kind of opinion molding that would make the agency ineligible for SBA financial assistance"[85]) is hardly persuasive enough to justify the special treatment given to the advertising industry. The essential objective of advertising is the molding of opinions.

The exception for advertising publications and agencies was articulated in the SBA's 1976 amended regulations.[86] A comment in a 1977 opinion illustrates the irony of the rule:

> The availability of the "advertising" exception . . . does not depend on the nature of the goods or services for which the applicant prepares or places advertising. Advertising to induce the public to see a particular movie, or to subscribe to a certain magazine, or to attend a particular college, is no less permissible as far as eligibility is concerned as attempting to induce the public to use a particular kind of toothpaste.[87]

The movie, the magazine and the college are all ineligible for SBA assistance because they have the potential to disseminate and mold opinion. Nevertheless, the advertising agency, which is paid by the ineligible concern to convince the public to see, read or at-

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82. *Id.* Whether there is a "common understanding" of the definition and dimensions of the term is highly debatable.

83. "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976).

84. Indeed, a plurality of the United States Supreme Court explicitly reaffirmed a statement in Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1979), that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507 (1981). *But see* Lehman v. City of Shaker Heights, 418 U.S. 298 (1973) (United States Supreme Court upheld municipal policy which permitted commercial advertising but disallowed political advertising inside city transit buses).

85. 98 S.B.A. Op. Dig. 101 (1975).

86. 13 C.F.R. § 120.2(d)(4):

> *Provided, however*, that nothing herein shall preclude financial assistance to any otherwise eligible applicants engaged in . . .
>
> . . . .
>
> (iii) *Advertising and technical material*: Firms producing advertisements and promotional material for a client's goods or services, or of technical or instructional material relating to such goods or services.

87. 105 S.B.A. Op. Dig. 104 (1977).

tend its "opinion molder" is eligible.[88]

Broadcasting and Motion Pictures

Opinions pertaining to the broadcasting and motion picture industries best exemplify the equal protection problem. In these industries the unfair application of the opinion molder is most evident, resulting in the eligibility of two powerful and pervasive industries while other qualified, similarly situated industries remain ineligible for assistance.

When the SBA first considered the eligibility of the skyrocketing cable television industry,[89] its regulations specifically denied assistance to over-the-air television (and radio) broadcasting companies. Seizing the opportunity to increase the participation of small business concerns in the broadcasting industry, the SBA exempted cable television from the general prohibition against broadcasting. The exception only applied to those cable television stations which were "merely passive receivers and transmitters of broadcast signals," those stations which did not "originate or exercise selective judgment for programs transmitted over its cable system."[90] Thus, a cable television station which had no control over its program content was eligible, while a station with a channel or the capability of live broadcasting was ineligible. Furthermore, the SBA announced that it would require an agreement that the borrower would not offer or install a live television channel while the loan was outstanding.

The eligibility of cable television companies is confusing. In terms of capacity to mold opinion, it makes no sense to distinguish a cable television station from a television station with live broadcasting capacity. The inability of a cable television station owner to originate programming or exercise selective judgment over the programs broadcast does not reduce the opinion-molding effectiveness of the programming in general.[91]

88. The SBA also summarily dismissed the advertising agency's participation in the creative and/or editorial process in connection with the preparation of advertising material by begging the question—because the agency creates and edits eligible material, the prohibition against those two processes has no application. 105 S.B.A. Op. Dig. 103 (1977).

89. 75 S.B.A. Op. Dig. 103 (1969).

90. *Id.*

91. The SBA was not unaware of the apparent contradiction in its reasoning. A subsequent opinion stated:

If we were examining this question for the first time today, we would

The SBA repeated its warning that the "present exception in favor of passive CATV must be narrowly construed"[92] in 1976, but that policy did not last long. In 1977, the SBA exempted from the prohibition not only all cable television companies but *all* otherwise qualified applicants for the purchase or construction of broadcasting stations (radio or television) or cable television systems.[93] The Federal Communications Commission's regulation of the industry relieved the SBA of one of the major reasons for previously invoking the opinion molder rule: the first amendment rights of those who run the industry are *already* curbed. Two problems, however, remain with this revised policy: an SBA loan to a broadcaster could still easily prompt an accusation that the government is attempting to control editorial freedom by subsidizing the media for political or propaganda purposes; and, by exempting the entire broadcasting industry while continuing to include newspapers, magazines and publishers within the prohibition, the SBA is unfairly restricting financially qualified, similarly situated, opinion-molding industries that are not "fortunate" enough to be regulated. The SBA's ability to hide behind a layer of governmental regulation has resulted in the eligibility of a pervasive industry; other less powerful but unregulated opinion-molding industries, however, are still bound by the ban.

Early SBA decisions concerning the motion picture industry reflected the idea that the motion picture producer[94] and the filmstrip producer[95] were ineligible as engaging in a "similar enterprise," based on their ability to exercise "artistic and editorial judgments in order to illustrate, emphasize and dramatize the film's message."[96] Similarly, an importer of foreign films whose "selection of which films to import involves a discretionary judgment similar to that exercised by a publisher in deciding which books or material he will be engaged in publishing" was ruled ineligible.[97] Even those producers whose movie scripts were pro-

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probably not consider *any* TV cable system eligible for SBA assistance. We would have to place them in the same category as any other radio or television broadcaster or distributor, i.e., ineligible as a distributor of opinion molding material. (See 94 S.B.A. Op. Dig. 102). It is not clearly consistent with this latter opinion for passive TV distribution to be eligible. However, in view of the eligibility precedent restated in 75 S.B.A. Op. Dig. 103, we have no legal objection to the continuation of the exception for passive cable TV. We do not believe, however, that it would be legally acceptable for this exception to be further extended.

96 S.B.A. Op. Dig. 101 (1975) (emphasis original).

92. 101 S.B.A. Op. Dig. 102 (1976).

93. 42 Fed. Reg. 58,538 (1977) (codified at 13 C.F.R. § 120.2(d)(4)(v) (1979)).

94. 14 S.B.A. Op. Dig. I(A)(2)(a) (1966).

95. 92 S.B.A. Op. Dig. 103 (1974); 84 S.B.A. Op. Dig. 107 (1972).

96. 83 S.B.A. Op. Dig. 102 (1971).

97. 59 S.B.A. Op. Dig. 100 (1965).

vided by clients were ruled ineligible.[98]

In the midst of this broad base of ineligibility, two exceptions emerged. The first involved a special SBA program, the Small Business Investment Companies (SBIC) program. An SBIC is a privately owned and operated, income-producing enterprise which is licensed, regulated and financed by the SBA.[99] The SBIC in turn selects and finances a portfolio of small businesses, including "small business concerns which deal in mass media publication or opinion molding."[100] The result is another example of "layering." The SBA stresses the fact that it has no control over the financing decisions made by the SBIC. The SBICs "are independently owned and operated, . . . make their own investment judgments, and are, therefore, free from any accusation of government or political control or suppression as a result of their loan-making activities."[101] Nonetheless, the SBICs do operate within a specific set of regulations[102] that impose content restrictions on the projects which the SBICs are allowed to finance.[103] The inconsistency emerges once again: the SBA, stifled by its own rule from furthering its statutory goal, hides behind an "independent enterprise," claims it has no control over the content of the opinion expressed, and ends up assisting the opinion molder in a roundabout way.[104]

The other exception involved the eligibility of motion picture theaters. Early opinions with respect to theaters employed a rationale similar to the one used for restaurant/club owners who book bands or orchestras for entertainment.[105] These opinions held that those who merely exhibit films produced by others were eligible.[106] This reasoning fails for the same reason as was

98. 83 S.B.A. Op. Dig. 102 (1971); 78 S.B.A. Op. Dig. 106 (1970); 59 S.B.A. Op. Dig. 100 (1965).

99. *See generally* 13 C.F.R. § 107 (1980).

100. 45 Fed. Reg. 66,808 (1980); *see also* 42 Fed. Reg. 60,729 (1977) (introduction of a pilot program allowing SBICs to invest in motion pictures).

101. 45 Fed. Reg. 66,808 (1980).

102. 42 Fed. Reg. 60,729 (1977), *amended by* 43 Fed. Reg. 21,439 (1978).

103. For example, 43 Fed. Reg. 21,441 (1978) states that "pilot SBICs will be prohibited from making any investments related to the production or distribution of X-rated or unrated films regardless of the method of their exhibition . . . or of films having a predominant theme of a political or religious nature."

104. For a more comprehensive treatment of motion picture financing by SBICs, see Holmes, *Investing in Independent Motion Pictures Through Small Business Investment Companies*, 13 U.C. DAVIS L. REV. 955 (1980).

105. 83 S.B.A. Op. Dig. 101 (1971).

106. 92 S.B.A. Op. Dig. 103 (1974); 81 S.B.A. Op. Dig. 155 (1971).

pointed out earlier: the "mere exhibitor" is just as able to exercise selective judgment in choosing the films shown at his theater and is just as powerful an opinion molder as the newspaper, magazine or publisher.[107]

In 1978, however, the SBA overruled its prior theater decisions in light of its 1976 amended regulations and its "distributor" opinion:[108] "motion picture theaters come within the general prohibition of Section 120.2(d)(4) of SBA's Regulations and are therefore *ineligible* to receive SBA financial assistance. . . . Indeed, a motion picture theater is a '[distributor] of communications, including . . . pictures . . .' pursuant to subsection (ii) of Section 120.2(d)(4)."[109]

The status of motion picture theaters must have caused great consternation at the SBA. While two prior opinions specifically declared them eligible, the rather sweeping language of the amended regulations and the troublesome "distributor" concept threatened to preclude eligibility. With its commitment to increased small business participation at stake, the Agency once again shifted course.

In 1980, the Administration announced the reversal of the 1978 theater ineligibility opinion.[110] It declared that equating a motion picture theater with a distributor was interpreting the regulation's language too broadly and unfairly restricting small businesses which had previously been eligible under the old version of the regulations. Thus, the SBA returned to its original position. Motion picture theaters are once again eligible for assistance. The SBA must now confront its worst fear: "making Government loans to publishers of 'hate' or pornographic material."[111] Ironically, the opinion molder rule, which was intended to preclude this precise possibility, still exists.

CONCLUSION

These examples of the SBA's application of the opinion molder rule furnish a factual basis for deciding whether the doctrine of equal protection has been violated on the basis of discriminatory administration. Something more than mere error of judgment of officials is required to sustain such a charge. "There must be

107. *See supra* note 76 and accompanying text.
108. 94 S.B.A. Op. Dig. 102 (1974).
109. 111 S.B.A. Op. Dig. 104 (1978) (emphasis added).
110. 117 S.B.A. Op. Dig. 102 (1980).
111. *Hearing Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business*, 94th Cong., 1st Sess. 84 (1975) (statement of L. Laun).

something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity."[112] "[A] discriminatory purpose is not presumed; there must be a showing of 'clear and intentional discrimination.' "[113] No accusation of purposeful discrimination is being leveled at the SBA, and it is doubtful one could be proven. Indeed, the *Loercher* case is a good example of a court's refusal to find such requisite intent.[114] The language of the SBA's opinions reflects a desire to assist as many small businesses as possible. Nonetheless, the decisions also reveal the Agency's hesitance to subject itself to public criticism. The importance of the Agency's statutory goal and the needs of small business concerns demand a bolder approach by the SBA.

PROPOSAL

In a recent advance notice of proposed rulemaking,[115] the SBA announced its intent to make major revisions in the opinion molder policy, and solicited public comment regarding seven different plans for modifying the rule. The seven options vary in their degree and manner of retreat from the present policy.[116]

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112. Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 353 (1917).

113. Snowden v. Hughes, 321 U.S. 1, 8 (1943) (citing Gundling v. Chicago, 177 U.S. 183, 186 (1899)).

114. Loercher & Feminist Book Mart, Inc. v. SBA, No. 75 Civ. 5494 (S.D.N.Y. June 1, 1977).

115. 45 Fed. Reg. 66,807 (1980). On July 24, 1980, the SBA reported the same decision to the United States Senate Subcommittee on Government Procurement of the Select Committee on Small Business:

> We are aware of recent mergers and acquisitions in the media industry, and we are concerned about the tendency that these takeovers have to eliminate many media-oriented small businesses. We are also concerned that our present opinion molder policy relative to media industry eligibility may be unnecessarily inhibiting our ability to assist these small businesses. . . . We feel that the time has come for a complete revision of the opinion molder policy.

Hearing Before the Subcomm. on Government Procurement of the Senate Select Comm. on Small Business, 96th Cong., 2d Sess. 5 (1980) (statement of H. Theiste).

116. Briefly summarized, the seven alternatives and their rationales are as follows:

(1) Retain the present rule, but provide a waiver procedure by which media concerns denied assistance could demonstrate that the purpose of the rule is not served by the denial of assistance.

(2) Expand the exceptions in the current rule to allow SBA assistance to those types of businesses that meet the present broad definition of an opinion molder, but that do not primarily mold opinions, and the funding of which would not be likely to promote governmental interference with freedom of speech and press.

The following proposal, however, goes one step beyond those outlined in the advance notice. The SBA should consider a rule which allows all small businesses to be eligible, except those to which the grant of assistance would constitute a violation of the religious establishment clause of the first amendment.[117]

Under this proposal, the SBA would be forced to approve loans to qualified businesses that deal in materials which are sexually

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This proposal would eliminate many of the case-by-case determinations involved in the waiver procedure described above.

(3) Replace the present broad proscription against assisting opinion molders with specific prohibitions against certain types of enterprises. This proposal appears to be a reversion to the original language of the rule.

(4) Prohibit SBA assistance to certain forms of media enterprises which advocate a particular religious, political, social or economic point of view. Refraining from assisting all such businesses (regardless of what point of view is advocated), while funding other media concerns which do not advocate a particular point of view, would reasonably accommodate SBA's desire to assist eligible media enterprises while avoiding actual or apparent government censorship of the media.

(5) Prohibit SBA assistance to an applicant if more than thirty percent of the applicant's annual gross income is derived from the sale, rental, or lease of religious products, materials or services. The SBA contends that the thirty percent income limitation contained in the proposal is a reasonable standard by which SBA could determine that assisting an enterprise would violate the first amendment.

(6) Prohibit SBA assistance to an applicant if more than thirty percent of the applicant's annual gross income is derived from the sale, rental or lease of sexually explicit products, materials or services.

(7) Prohibit direct SBA loans to opinion molders. Presently, all financial assistance, including SBA loan guarantees as well as direct loans, are denied to opinion molders. The dangers of government interference with freedom of speech and press is greatest where direct loans are involved. This proposal would be a reasonable accommodation between SBA's desire to assist eligible media enterprises while minimizing the danger of actual or apparent government censorship of the media.

For a more detailed description of the proposed alternatives, see 45 Fed. Reg. 66,808 (1980).

117. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

The exception to the proposed regulation is necessary because a loan to a religious-oriented business or school could be construed as "sponsorship, financial support, and active involvement of the sovereign in religious activity," Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (citing Walz v. Tax Comm., 397 U.S. 664, 668 (1970)), all of which are prohibited by the establishment clause of the first amendment. The Supreme Court, in Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1972), summarized the "well-defined three-part test" used in evaluating the constitutionality of laws which aid religious institutions: "first, [the law] must reflect a clearly secular legislative purpose; . . . second, [it] must have a primary effect that neither advances nor inhibits religion; and, third, [it] must avoid excessive government entanglement with religion." *Id.* at 772-73. While any encouragement of small business participation is clearly a secular purpose, the propagation of religious tenets which would result from a loan to a religious-oriented business might be considered a "primary effect that . . . advances . . . religion," and the length and continuous servicing of the loan by the SBA could be construed as "excessive government entanglement." The only problem inherent in this exception is the determination of exactly what constitutes a "religion" or "religious activity," but this problem is common in first amendment law.

explicit but not legally obscene,[118] such as adult theaters, bookstores and shops. Although the SBA and the majority of the American public may find it offensive and indecent, this expression is protected by the first amendment. Recent United States Supreme Court cases have struck down laws which discriminate against certain types of protected speech based on the content of the opinion expressed.[119] Government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.[120] It is arguable, however, that the SBA is again presuming the existence of a problem which may never materialize. This proposal will not make these or any other businesses automatically eligible for assistance. Other SBA eligibility criteria, such as size, inability to secure assistance elsewhere and creditworthiness, must still be satisfied. The SBA itself pointed out in its notice of proposed rulemaking that "hard-core sex industries . . . are generally not in need of governmental assistance and thus SBA's finite resources could be more productively applied to other types of businesses."[121]

118. The SBA's regulations have historically contained a provision prohibiting the Agency from assisting an illegal enterprise. 13 C.F.R. § 120.2(d)(9) (1981). Therefore, the SBA would clearly be justified in denying a loan to a business which creates or distributes materials which are determined legally obscene in light of "contemporary community standards." Roth v. United States, 354 U.S. 476 (1956). The SBA would also be justified in procuring an agreement from all loan recipients that the production of obscene materials will result in an immediate liquidation of the loan. Such an agreement would not be an unconstitutional prior restraint on protected speech because obscenity is not protected.

119. *See, e.g.*, Grayned v. Rockford, 408 U.S. 104 (1972); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

120. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

121. 45 Fed. Reg. 66,809 (1980). An examination of the future of obscenity law is beyond the scope of this Comment. It is worth noting, however, that two recent Supreme Court decisions, FCC v. Pacifica Foundation, 438 U.S. 726 (1978) and Young v. American Mini-Theaters, 427 U.S. 50 (1976), have received much attention. In *Young*, four Justices agreed that "even though . . . the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, *and lesser* magnitude than the interest in untrammeled political debate. . . ." 427 U.S. at 70 (emphasis added). Similarly, in *Pacifica*, the Court hinted that patently offensive but nonobscene materials might not be entitled to full protection: "the constitutional protection accorded to a communication containing such patently offensive sexual . . . language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances." 438 U.S. at 746-47. Although both cases have been described as aberrations, *see, e.g.*, Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO.

There is substantial justification for a complete revision of the opinion molder policy. The rule as drafted and interpreted by the SBA has not been and cannot be consistently applied. Because it is reasonable to assume that the number and scope of communication-related businesses will increase as time passes, it is also reasonable to assume that the SBA's task will become even more complex should it retain the rule.

The current opinion molder policy should be replaced with a rule that furthers the purpose of the Agency rather than one that hinders it; one which would assist small businesses in all fields, particularly those areas in which the previous policy has indirectly promoted big business concentration, such as newspapers and magazines. Aggressive small businesses can provide diversity and innovative competition, which gives established businesses the incentive to lower prices and develop better products. A loan policy that encourages these small businesses seems more consistent with the goal of the SBA than a policy which threatens their existence. Justification for the current opinion molder rule has largely evaporated—the application of the rule has been inconsistent and unfair, the legal basis for the policy is extremely doubtful, and the rule unnecessarily dilutes the Agency's effectiveness in strengthening the participation of small businesses in key fields. The SBA should be neither a censor nor a moralizer; instead, it should be a lender whose priority should be to increase the contribution of small businesses toward the national economy and whose eligibility decisions should be based on creditworthiness.[122]

With the SBA's proposed revision of its opinion molder rule yet to be announced, one can only guess at the method it will adopt to modify its stance. At the very least, the proposal should demonstrate that the Agency has recaptured its identity as a lending agency, and is on the road to achieving its statutory goal by fully serving all qualified small businesses.

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L.J. 727 (1980), they may provide a clue as to the opinion and direction of the Court concerning nonobscene erotica. Thus, there is some hope for the SBA in its desire to avoid assisting these businesses.

122. It could be argued that a "creditworthiness" decision which involves a determination of the potential marketability or a product of service is inherently subjective and may be tainted by the decision-maker's values. It should be remembered, however, that a "creditworthiness" determination would also consider other weightier factors, such as personal and business credit ratings, personal and business income tax returns, a projection of future sales and expenses, and (for existing businesses) a balance sheet and profit and loss statement.