



SMALL BUSINESS ADMINISTRATION

13 CFR Part 123

RIN 3245-AG78

Disaster Assistance Loan Program; Disaster Loan Mitigation, Contractor Malfeasance and Secured Threshold

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to amend its disaster loan program regulations in response to changes made to the Small Business Act (the Act) by the Recovery Improvements for Small Entities After Disaster Act of 2015 (the RISE Act). The first change would expand the definition of a mitigating measure to include the construction of a safe room or similar storm shelter designed to protect property and occupants. The second change would allow for an increase of the unsecured threshold for physical damage loans for non-major disasters. The third change would allow SBA to increase loan amounts to address contractor malfeasance. In addition, SBA proposes to make several technical corrections to conform certain regulatory provisions to existing statutory authority and remove an obsolete reference in part 123.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3245-AG78, by any of the following methods: (1) Federal Rulemaking Portal: <http://regulations.gov>. Follow the specific instructions for submitting comments; (2) Fax: (202) 205-7728 or Email

James.Rivera@sba.gov; or (3) Mail/Hand Delivery/Courier: James E. Rivera, Associate Administrator for Disaster Assistance, 409 3rd Street SW, Washington, DC 20416.

SBA will post all comments to this proposed rule on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, you must submit such information to U.S. Small Business Administration, Jerome Edwards, Office of Disaster Assistance, 409 3rd Street SW, Mail code 2990, Washington, DC 20416, or send an email to Jerome.Edwards@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review your information and determine whether it will make the information public.

FOR FURTHER INFORMATION CONTACT: Jerome Edwards, Office of Disaster Assistance 202-205-6734 or Jerome.Edwards@sba.gov.

SUPPLEMENTARY INFORMATION:

Section 7(b) of the Small Business Act, 15 U.S.C. 636(b), authorizes SBA to make direct loans to homeowners, renters, businesses, and non-profit organizations that have been adversely affected by a disaster. After a declared disaster, SBA makes loans of up to \$200,000 to homeowners and renters (plus up to \$40,000 for personal property) and loans of up to \$2 million to businesses of all sizes and non-profit organizations to assist with any uninsured and otherwise uncompensated physical losses sustained during the disaster. In addition to loans for the repair or replacement of damaged physical property, SBA also offers working capital loans, known as Economic Injury Disaster Loans (EIDLs), to small businesses, small agricultural cooperatives, and most private non-profit organizations that have suffered economic injury caused by a disaster. The

maximum loan amount is \$2 million for physical and economic injuries combined. SBA may waive this \$2 million limit if a business is a major source of employment.

The Recovery Improvements for Small Entities After Disaster Act of 2015, Public Law 114-88, 129 Stat. 686 (November 25, 2015), amended certain terms and conditions of SBA's Disaster Assistance program. As discussed below, this rulemaking proposes to implement three of those amendments, as set out in sections 1102, 2102 and 2107 of the RISE Act. SBA also proposes to make several minor technical amendments to the program regulations that, among other things, would ensure consistency between the program's regulatory and statutory authorities.

Changes made as a result of the RISE Act

Section 1102 of the RISE Act, Use of Physical Damage Disaster Loans to Construct Safe Rooms, expanded the definition of mitigation to include "construction of a safe room or similar storm shelter designed to protect property and occupants from tornadoes or other natural disasters, if such safe room or similar storm shelter is constructed in accordance with applicable standards issued by the Federal Emergency Management Agency." This change allows SBA to include a safe room or storm shelter as a mitigating measure; therefore, SBA proposes to amend 13 CFR 123.21 to reflect this change in the definition of a mitigation measure. By policy, SBA increases the amount of a disaster loan for mitigation purposes only when the mitigation protects or mitigates against damage from the same type of occurrence as the declared disaster. Revised § 123.21 would also clarify that a mitigation measure is something done for the purpose of protecting property (real and personal) and occupants. In addition, safe rooms and storm shelters would be included in the examples of mitigation measures.

Section 2102 of the RISE Act, Collateral Requirements for Disaster Loans, increased SBA's unsecured loan limits for all disaster loans for a period of three years. In 2014, SBA published an Interim Final Rule, Disaster Assistance Loan Program; Disaster Loan Credit and Collateral Requirements (79 FR 22859, April 25, 2014), to raise the unsecured limit to \$25,000 for economic injury loans for all disasters and for physical damage loans for major disasters. The unsecured limit for physical damage loans for non-major disasters continued to be \$14,000, in accordance with the Small Business Act. Section 2102 of the RISE Act expanded on these previous changes by increasing the unsecured limit to \$25,000 to include physical damage loans for non-major disasters for a period of three years, until November 25, 2018. Therefore, SBA proposes to amend 13 CFR 123.11 to reflect a \$25,000 unsecured threshold for all disaster declarations. After November 25, 2018, the unsecured limit for physical damage loans for non-major disasters would revert back to \$14,000, unless Congress makes the increase permanent.

Section 2107 of the RISE Act, Contractor Malfeasance, expanded SBA's ability to provide disaster assistance by expressly allowing for supplemental assistance for malfeasance by a contractor or other person and defining what constitutes malfeasance. Prior to implementation of the RISE Act, SBA provided assistance only for malfeasance by contractors, not malfeasance by any "other person" in connection with the loan, and did not allow for increases in the loan amount beyond the regulatory limit of \$200,000 for repair or replacement of damaged property. The RISE Act gave SBA authority to increase a disaster loan when a contractor or other person engages in malfeasance in connection with repairs to, rehabilitation of, or replacement of property for which SBA made a disaster loan and the malfeasance results in substantial economic damage or

substantial risks to health or safety. SBA proposes to revise 13 CFR 123.18, 123.20, and 123.105 to include details on what constitutes malfeasance, provide guidance on when borrowers are eligible to apply for loan increases due to malfeasance, and allow home loan borrowers to increase their loans up to an additional \$200,000 for malfeasance. For business loans, the total maximum loan amount, including any increase for malfeasance, remains \$2,000,000.

The proposed changes made as a result of the RISE Act apply to all eligible recipients of SBA disaster loans for disasters declared on or after the effective date of the RISE Act, November 25, 2015.

Technical Corrections

In addition to the changes proposed as a result of the RISE Act, SBA is also proposing to make several technical corrections. SBA proposes to change the phrase “sudden physical event” to “sudden event” in 13 CFR 123.2 to conform the regulation to SBA’s statutory definition of “disaster” in 15 U.S.C. 632(k). SBA proposes to revise 13 CFR 123.3 to remove the reference to “emergency” declarations in § 123.3(a)(1) in order to conform the regulations to SBA’s statutory authority. SBA proposes this change to clarify that SBA disaster assistance is not automatically authorized when the President declares an emergency; such assistance may be available, however, if SBA declares a disaster under its own authority. Finally, SBA proposes to revise 13 CFR 123.13(a) to remove the reference to an expired OMB control number.

SBA invites comments from interested members of the public on all changes proposed in this rule. These comments must be received on or before the close of the comment period noted in the DATES section of this document.

Compliance with Executive Orders 12866, 12988, 13132, and 13563 and the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601-612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule does not constitute a significant regulatory action under Executive Order 12866.

This is not a major rule under the Congressional Review Act, 5 U.S.C. 800.

Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. This action does not have preemptive or retroactive effect.

Executive Order 13132

For the purposes of Executive Order 13132, this proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, SBA determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13563

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the

public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements and are affording the public 60 days to participate and provide comments.

Paperwork Reduction Act (44 U.S.C. Ch.35)

For purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this proposed rule would not impose any new reporting or recordkeeping requirements.

Regulatory Flexibility Act (5 U.S.C. 601-612)

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, including small businesses. According to the RFA, when an agency issues a rule, the agency must prepare an analysis to determine whether the impact of the rule will have a significant economic impact on a substantial number of small entities. However, the RFA allows an agency to certify a rule in lieu of preparing an analysis if the rulemaking is not expected to have a significant impact on a substantial number of small entities. This proposed rule conforms to recent legislative action made under the RISE Act and will implement new agency policies regarding the expansion of the definition of mitigation as it pertains to the Disaster Loan Program, and the inclusion of malfeasance.

List of Subjects in 13 CFR Part 123

Disaster assistance, Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

For reasons set forth in the preamble, SBA proposes to amend 13 CFR part 123 as follows:

PART 123 – DISASTER LOAN PROGRAM

1. The authority citation for part 123 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 636(d), 657n; Pub. L. 102-395, 106 Stat. 1828, 1864; Pub. L. 103-75, 107 Stat. 739; and Pub. L. 106-50, 113 Stat. 245.

2. Amend § 123.2 by revising the seventh sentence to read as follows:

§ 123.2 What are disaster loans and disaster declarations?

* * * Sudden events that cause substantial economic injury may be disasters even if they do not cause physical damage to a victim's property. * * *

3. Amend § 123.3 by revising paragraph (a)(1) to read as follows:

§ 123.3 How are disaster declarations made?

(a) * * *

(1) The President declares a Major Disaster and authorizes Federal Assistance, including individual assistance (Assistance to Individuals and Households Program).

* * * * *

4. Amend § 123.11 by revising paragraph (a)(2) to read as follows:

§ 123.11 Does SBA require collateral for any of its disaster loans?

(a) * * *

(2) Physical disaster home and physical disaster business loans. Generally, SBA will not require that you pledge collateral to secure a physical disaster home or physical

disaster business loan of \$25,000 or less. This authority expires on November 25, 2018, unless extended by statute.

* * * * *

§ 123.13 [Amended]

5. Amend § 123.13 by removing the parenthetical phrase “(OMB Approval No. 3245-0122.)” from paragraph (a).

6. Amend § 123.18 by:

- a. Redesignating the undesignated text as paragraph (a);
- b. Revising the first sentence of the redesignated paragraph (a); and
- c. Adding paragraph (b).

The revisions and additions read as follows:

§ 123.18 Can I request an increase in the amount of a physical disaster loan?

(a) Generally, SBA will consider your request for an increase in your loan if you can show that the eligible cost of repair or replacement of damages increased because of events occurring after the loan approval that were beyond your control. * * *

(b) For all disasters occurring on or after November 25, 2015, you may also request an increase in your loan if you suffered substantial economic damage or substantial risks to health or safety as a result of malfeasance in connection with the repair or replacement of real property or business machinery and equipment for which SBA made a disaster loan. See § 123.105 for limits on home loan amounts and § 123.202 for limits on business loan amounts. Malfeasance may include, but is not limited to, nonperformance of all or any portion of the work for which a contractor was paid, work that does not meet acceptable standards, or use of substandard materials.

7. Amend § 123.20 by redesignating the undesignated text as paragraph (a) and adding paragraph (b) to read as follows:

§ 123.20 How long do I have to request an increase in the amount of a physical disaster loan or an economic injury loan?

(a) * * * * *

(b) For physical disaster loan increases requested under § 123.18(b) as a result of malfeasance, the request must be received not later than two years after the date of final disbursement.

8. Amend § 123.21 by revising the first and third sentences to read as follows:

§ 123.21 What is a mitigation measure?

A mitigation measure is something done for the purpose of protecting property and occupants against disaster related damage. * * * Examples of mitigation measures include building retaining walls, sea walls, grading and contouring land, elevating flood prone structures, relocating utilities, constructing a safe room or similar storm shelter (if such safe room or similar storm shelter is constructed in accordance with applicable standards issued by the Federal Emergency Management Agency), or retrofitting structures to protect against high winds, earthquakes, flood, wildfires, or other physical disasters. * * *

9. Amend § 123.105 by:

- a. Revising paragraph (a) introductory text;
- b. Removing the word “and” from paragraph (a)(3);
- c. Revising paragraph (a)(4); and
- d. Adding paragraph (a)(5).

The revisions and additions read as follows:

§ 123.105 How much can I borrow with a home disaster loan and what limits apply on use of funds and repayment terms?

(a) There are limits on how much money you can borrow for particular purposes:

* * * * *

(4) 20 percent of the verified loss (not including refinancing or malfeasance), before deduction of compensation from other sources, up to a maximum of \$200,000 for post-disaster mitigation (see § 123.107); and

(5) \$200,000 for eligible malfeasance, pursuant to § 123.18.

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Dated: March 30, 2016.

Maria Contreras-Sweet,
Administrator

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