



## **SMALL BUSINESS ADMINISTRATION**

### **13 CFR Parts 109, 115, and 120**

**RIN 3245-AF85**

### **Miscellaneous Amendments to Business Loan Programs and Surety Bond**

#### **Guarantee Program**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends SBA regulations to update, streamline and clarify rules for the Business Loan Programs (as defined below) and the Surety Bond Guarantee Program (“SBG”). For purposes of this rule, the 7(a) Loan Program, the Microloan Program, the Intermediary Lending Pilot (ILP) Program, and the Development Company Loan Program (“504 Loan Program”) are collectively referred to as the “Business Loan Programs.”

**DATES:** This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], except for the amendment to § 120.1400(a), which is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Robert Carpenter, Acting Chief, 7(a) Program and Policy Branch, Office of Financial Assistance, Office of Capital Access, Small Business Administration, 409 Third Street SW, Washington, DC 20416; telephone: (202) 205-7654; [email: robert.carpenter@sba.gov](mailto:robert.carpenter@sba.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The SBA programs that are affected by this final rule are: (1) the 7(a) Loan Program; (2) the Microloan Program; (3) the Intermediary Lending Pilot (ILP) Program; (4) the 504 Loan Program, and (5) the Surety Bond Guarantee (“SBG”) Program.

SBA published in the Federal Register (81 FR 52595, August 9, 2016) a proposed rule containing proposed regulatory revisions for the 7(a) Loan Program, the Microloan Program, the 504 Loan Program, and the SBG Program. The ILP Program was inadvertently omitted from the proposed rule; therefore, changes to the ILP Program were added to this final rule to maintain consistency across SBA loan programs. The comment period ended October 11, 2016.

## **II. Summary of Comments**

The Agency reviewed the public comments it received concerning its proposed rule changes for 13 CFR parts 115 and 120. The comment review of specific final rule changes for the 7(a) Loan Program, the Microloan Program, the 504 Loan Program, and the SBG Program is summarized as follows:

SBA received 57 comment submissions, of which two were duplicates from the same commenter. The 55 net comments were reviewed by the Agency.

The comments submitted consisted of 20 from Certified Development Companies (CDCs), 15 from banks and non-bank lenders, 12 from trade associations, three from lender service providers, two from law firms, and three from private citizens. SBA received comments from 51 commenters pertaining only to changes to the 7(a) Loan Program, the Microloan Program, and the 504 Loan Program (13 CFR part 120), and comments from three commenters pertaining only to changes in the SBG Program (13 CFR part 115).

The majority of the commenters supported the proposed changes, with some commenters recommending minor modifications. SBA addresses the comments in detail within the appropriate Section-by-Section analysis below.

### **III. Section-by-Section Analysis of Comments and Changes**

#### **A. Intermediary Lending Pilot Program**

Section 109.400 Eligible Small Business Concerns. Revisions to the ILP Program regulations were added to this final rule to conform the program to changes being made to the other Business Loan Programs. Although no new ILP intermediaries are authorized, there are currently intermediaries with outstanding revolving funds for eligible small businesses. Therefore, the ILP Program is affected by the rule changes. SBA is removing § 109.400(b)(12) to align with the removal of § 120.110(l), which stated that consumer and marketing cooperatives were not eligible to participate in the Business Loan Programs. While SBA did not originally propose any changes to this section, the removal is appropriate to align requirements consistently across SBA programs.

Section 109.510 On-site and off-site reviews. To align this section with the removal of the terms “on-site” and “off-site” from 13 CFR part 120, SBA is removing these terms from 13 CFR part 109.

#### **B. Surety Bond Guarantee Program**

Section 115.19 Denial of liability. In §§ 115.19(c)(1), (d)(2) and (e)(2), SBA proposed modifying the threshold amount for determining when an increase in the Contract or bond amounts may result in a denial of liability from “25% or \$100,000, whichever is less” to simply “25%.” One commenter noted that, under paragraph (c)(1), grounds for

denial include when the Surety has committed a material breach of the terms or conditions of the Prior Approval or Preferred Surety Bond (PSB) Agreements, and a material breach is considered to have occurred if “[s]uch breach ... causes an increase in the Contract amount or in the bond amount of at least 25% or \$100,000, whichever is less.” Similarly, under paragraph (d), grounds for denial include when the Surety has committed a substantial violation of SBA regulations, and such violation occurs when a violation “causes an increase in the bond amount of at least 25% or 100,000, whichever is less in the aggregate...” The commenter stated that they could not contemplate a scenario where a breach or violation actually causes the contract or bond amounts to increase. However, the intent of the regulation is to make this connection between the breach or violation and an increase in the contract or bond amount, and it is appropriate as written. The commenter also suggested that the rule be clarified to state that the base amount to which the 25% is being applied is the “original contract amount.” SBA agrees with this suggestion and is revising the rule accordingly.

In addition, for the reasons discussed in section 115.32 below, SBA is revising the rule to retain a dollar threshold, but to increase it from \$100,000 to \$500,000.

Section 115.22 Quarterly Contract Completion Report. As proposed, this new section would require participating Sureties to submit Contract Completion Reports within 45 days of the end of each quarter, identifying completed contracts, contract amount changes, and any related fees due. Two commenters expressed concern this may be an administrative burden limiting Sureties’ program participation. The third commenter recommended that this provision not be incorporated due to the increased administrative burden of reporting this information to SBA within 45 days.

SBA considered these comments, but has decided not to accept the recommendation. As SBA stated in the preamble to the proposed rule (81 FR 52597), SBA currently does not receive a final accounting of fees due and paid by the Surety and Principal on contracts that are successfully completed and, consequently, SBA is unable to ensure that fees due the Government as a result of an increase in the contract amount are paid in a timely manner on contracts that do not default. This report will assist SBA in ensuring that fees due for increases on successfully completed contracts are accurately calculated and paid timely. SBA is amending this section as proposed.

Section 115.30 Submission of Surety's guarantee application. SBA proposed to amend paragraph (d)(2)(i) of this section to increase the Quick Bond eligible contract limit from \$250,000 to \$400,000. Two commenters support this change to provide greater bonding opportunities for small contractors. SBA is amending this section as proposed.

Section 115.32 Fees and Premiums. In the proposed rule, SBA proposed to revise § 115.32(d)(1) to modify the threshold amount for determining when an increase in the Contract or bond amounts would require a Prior Approval Surety to notify SBA, or obtain SBA's prior written approval, from "25% or \$100,000, whichever is less" to "25%." SBA explained that it was proposing the change to better align SBA requirements with the prevailing practice in the surety industry – which now allows increases to the Contract and bond amounts without prior notification to the Surety – while managing the increased bond liability to the Government.

Three commenters generally expressed support for this provision and indicated that, with the increase in the maximum contract amount from \$2 million to \$6.5 million (and to \$10 million for certain Federal contracts), the \$100,000 threshold was too low and

unduly burdensome. However, two of the commenters also expressed concern that smaller contracts would be negatively impacted by a threshold based only on percentage. These comments have caused SBA to reconsider the effects of totally removing the dollar threshold. For example, with no dollar threshold, a \$5 million contract could be increased by \$1 million without the Prior Approval Surety notifying SBA or requesting, when required, SBA's prior approval. To minimize the risks to the Agency that would be posed by such a large increase, the Surety should be required to notify SBA or, when required, seek SBA's prior approval. Thus, upon reconsidering this issue, SBA has decided to retain a dollar threshold, but in the interests of striking a balance between the risks to the Agency and minimizing any burden on Sureties, the rule is being revised to increase the dollar threshold from \$100,000 to \$500,000,

In addition, as discussed above for § 115.19, SBA is accepting and incorporating the recommendation to add clarifying language in the final rule to read "25% of the original contract amount".

Section 115.60 Selection and admission of PSB Sureties. SBA proposed that a Surety, for the initial nine months following admission to the PSB Program, must obtain SBA's prior written approval before executing a bond greater than \$2 million. One commenter requested that SBA clarify that this change does not apply to Sureties that participate in the PSB Program prior to the effective date of this final rule. SBA confirms that this change applies only to Sureties that are admitted to the PSB Program after the effective date of the final rule.

Another commenter suggested that this requirement may discourage applications from Sureties for acceptance into the PSB Program. With PSB Sureties executing SBA-

guaranteed bonds without SBA's prior approval, SBA believes that it is in the taxpayers' and the Agency's best interests to require newer Sureties to demonstrate an understanding of the program before being allowed to issue bonds larger than \$2 million without SBA's oversight. SBA is amending this section as proposed.

Section 115.67 Changes in Contract or bond amount. In the proposed rule, SBA proposed to change the threshold for when a PSB Surety must remit additional fees due as a result of increases to the Contract or bond amount from "25% of the contract or bond amount or \$100,000, whichever is less" to "25%." As discussed above, two commenters supported this change but expressed concern that this could negatively impact smaller contracts. For the reasons discussed above for section 115.32, and because the same thresholds should apply to when PSB Sureties are required to remit the additional fees owed, the rule is being revised to retain and increase the dollar threshold from \$100,000 to \$500,000. The rule is also being revised to add clarifying language that the increases will be based on the original contract amount.

Section 115.68 Guarantee percentage. In the proposed rule, SBA proposed to revise this section to provide that SBA will reimburse a PSB Surety in the same percentages and under the same terms as set forth in § 115.31, as authorized by § 874 of Title VIII of Division A of the National Defense Authorization Act, 2016, Public Law 114-92, 129 Stat. 726. All commenters supported this revision and this provision is adopted as proposed.

**C. 7(a) Loan, 504 Loan, and Microloan Programs**

Section 120.110 What businesses are ineligible for SBA business loans?

As proposed, SBA is removing consumer and marketing cooperatives from the ineligible types of businesses identified in this section and is reserving paragraph (l). SBA received support for the proposed change from 22 commenters. With respect to the comments received, 18 commenters requested the removal of the requirement that at least one individual or entity provide an unlimited guaranty for a loan made to a consumer or marketing cooperative, and instead permit the use of a loan guarantee pool funded by cooperative enterprises. Commenters suggested that the ownership for many cooperatives consists of multiple members, and that obtaining personal guaranties from multiple members can be overly burdensome and should not apply to cooperatives. Currently, SBA allows for an entity to provide the required loan guaranty in lieu of a personal guaranty from an individual. SBA is not removing the guaranty requirements for cooperatives at this time due to the inequity it would create for all other classes of loan applicants where the unlimited guaranty of an individual or entity is required. The rules governing guaranties will continue to apply to cooperatives. SBA is amending this section as proposed.

Section 120.111 What conditions must an Eligible Passive Company satisfy?

SBA is amending this regulation as proposed with some modifications as discussed below. The amended regulation will permit SBA loan proceeds to be used to finance a change of ownership between existing owners of the Eligible Passive Company (EPC). SBA does not intend for this regulation to be used to finance a change of ownership in an EPC that has only been in existence for a limited period of time. This regulatory change is intended to assist with the preservation of a business that might otherwise cease operations due to the departure of an owner, as opposed to simply facilitating the

withdrawal of capital out of the business. SBA will include in Standard Operating Procedure (SOP) 50 10 further guidance on when an EPC may use loan proceeds to finance a change of ownership between existing owners.

In the 504 Loan Program, the amended regulation will permit loan proceeds to be used to finance a change of ownership in the EPC when the asset(s) of the EPC are limited to real estate and/or other eligible long-term fixed assets that the EPC leases to one or more Operating Companies (“OC”) for conducting the OC’s business. SBA recognizes that an EPC’s balance sheet may include limited assets in addition to the real estate or other eligible long-term fixed assets, such as capital replacement reserves or escrow accounts for taxes and/or insurance (such assets are referred to in this discussion as “ineligible assets”). In such case, 504 loan proceeds may be used to finance a change of ownership between existing owners of the EPC as long as (1) the ineligible assets are directly related to the real estate or other eligible long-term fixed assets, (2) the amount attributable to such ineligible assets is de minimis, and (3) the ineligible assets are excluded from the Project financing. Further guidance for the 504 Loan Program will be incorporated into SOP 50 10.

SBA received 15 comments in support of this change with no objection. Nine additional commenters supported this change with minor modification and suggested language revisions to the introductory paragraph to clarify what purpose loan proceeds may be used for when an OC is a co-borrower with the EPC. One commenter suggested changing the term “Lender” to “SBA Lender” as it is a defined term that includes both a 7(a) Lender and CDC in this section. The term “lender” as used in paragraph (a)(3) of this section includes Third Party Lenders in 504 Loan projects, so it is not appropriate to

use “SBA Lender.” However, the term “lender” as used in paragraph (a)(6) is directed to both a 7(a) Lender and a CDC; therefore, SBA is accepting this recommendation for paragraph (a)(6) of this section, changing the term “lender” to read “SBA Lender.”

Eight commenters also suggested revised language that they believe would clarify the Direct Final Rule that took effect on May 17, 2012 (77 FR 19531, April 2, 2012). That revision provided that in an EPC/OC structure, when the OC is a co-borrower the Agency would allow loan proceeds to be used for working capital (as was already allowed) as well as for “the purchase of other assets for use by the OC, including the purchase of stock or intangible assets (such as trademarks, copyrights, intellectual property or goodwill).” An industry trade association, suggested in its comments that when the Direct Final Rule was published in 2012, SBA inadvertently omitted language from the introductory paragraph of § 120.111, and the omission of the language led to incorrect interpretations of the revised regulation. SBA considers this particular comment to be a logical outgrowth of reviewing § 120.111 and within the context of the proposed rule to clarify and correct areas of the regulations that are out of date or inconsistent with the current procedures. While not included in the proposed rule, based on the comments received, SBA is adding language to the introductory paragraph to clarify the eligible uses of loan proceeds when the OC is a co-borrower on the loan to the EPC.

SBA is amending § 120.111(a)(3) to clarify that rent or lease payments made by the OC to the EPC cannot exceed the amount necessary to make the loan payment to the lender, and additional amounts to cover the EPC’s direct expenses of holding the property, such as maintenance, insurance and property taxes. SBA received 32 comments concerning this proposed change, 12 in support of and 20 objecting to the

proposed change to this paragraph. Commenters recommended the proposed language be amended to specify that the rents charged by the EPC to the OC could include a reserve to cover capital asset replacement such as heating, ventilation, and air conditioning (HVAC). One commenter stated that the proposed regulation refers only to the "the loan payment to the lender" and does not take into consideration that in a 504 Loan, the EPC/OC rent includes payments to the CDC, the Third Party Lender and any junior financing such as a borrowed equity loan or other financing outside of the 504 Project. Payments to the Third Party Lender participating in a 504 project are included in the "loan payment to the lender" and SBA determined that no additional clarification for this issue is necessary.

Several commenters who objected to the proposed change recommended that SBA adopt Internal Revenue Service (IRS) standards for holding companies and not require additional regulatory requirements. IRS rules generally do not consider or address SBA Loan Program Requirements such as the prohibition of financing for investors or landlords. While SBA permits eligible EPCs to hold certain assets financed for the benefit of the OC, it is not the intent of SBA to permit the EPC to profit from its relationship with the OC.

It is SBA's position that routine maintenance costs, Project debt payments, and repairs are already included in the permissible direct expenses of holding the property and as such would be permissible under the regulation. Additional guidance on this issue will be placed in SOP 50 10.

SBA also proposed to add language to § 120.111(a)(6) to provide the Agency may, in its discretion and in consultation with the SBA Lender, require the guaranty of

individuals or entities with less than 20 percent ownership of the EPC or the OC when circumstances warrant. In 2010, the Small Business Jobs Act of 2010, Public Law 111-240, 124 Stat. 2504 (September 27, 2010) (the “2010 Jobs Act”) increased the maximum loan size for 7(a) and 504 Loans. SBA now receives more loan requests from applicants with multiple owners who may hold less than 20 percent of the company regardless of managerial responsibilities, corporate titles or ownership interest, if any.

SBA received 24 comments on this proposed change: 18 in full support, five in support with modification, and one objecting to the proposed change. Recommended modifications to this paragraph included revising the language to provide greater detail as to when individuals could be required to guarantee the loan, and to provide authority to both SBA and delegated lenders to determine when there are sufficient reasons to do so. One commenter expressed concern that the proposed change would be “all encompassing” and may result in unintended consequences.

It is prudent for SBA to require a lender to obtain a guaranty when one or more individuals or entities have the authority and responsibility to manage operations regardless of their ownership interest in the applicant business. SBA will generally not require individuals or entities with less than 20 percent ownership of the applicant business to guarantee the loan when the lender obtains a guaranty from those with 20 percent or more ownership interest. SBA considered and accepts the recommendation to include the authority for delegated lenders to obtain full or limited guaranties from appropriate individuals or entities regardless of their ownership interest in the EPC or the OC, and is modifying the rule to state that SBA and, for loans processed under a SBA Lender’s delegated authority, the SBA Lender, may determine when credit or other

reasons make it necessary to obtain a full or limited guaranty from appropriate individuals or entities. SBA will provide additional guidance on the guaranty requirements in SBA SOP 50 10. In addition, as stated above, SBA is modifying §120.111(a)(6) to replace the term “Lender” with “SBA Lender.”

Section 120.130 Restrictions on uses of proceeds. SBA proposed moving § 120.160(d) to § 120.130 as new paragraph (e) and redesignating § 120.130 (e) and (f) as paragraphs (f) and (g), respectively. The new paragraph (e) includes the text currently found in § 120.160 Loan Conditions, in paragraph (d), Taxes, which prohibits the use of proceeds for payment of past-due Federal or state payroll taxes. This requirement is a restriction, not a loan condition, and is appropriately moved to § 120.130(e). SBA also proposed revising what will become paragraph (g) to remove an inaccurate reference to § “120.203” and replacing it with § “120.202.” Section 120.203 cited in this paragraph was removed in 1996. SBA received eight comments, one in support and seven requesting a modification. The majority of commenters asked SBA to consider expanding the prohibited use of proceeds to include other similar taxes, such as sales taxes, that may be required to be collected by the small business in trust on behalf of a Federal, state or local government entity. SBA has considered and is accepting the recommendation to include the references to other local, state and Federal taxes in the final rule.

Section 120.160 Loan conditions. SBA proposed adding the word “generally” to the last sentence of § 120.160(a) to clarify that SBA may require a personal guaranty of an individual or entity with less than five percent ownership in the applicant business when the circumstances warrant. SBA received 24 comments concerning this proposed change: 22 in support, with 11 of the supporters recommending modification. Only two

commenters expressed concerns, one that wanted to require no guaranties from non-owners, while another observed that this requirement is not currently included in the regulation. Recommendation was also made to use the defined term “SBA Lender” as it is appropriate for both the 7(a) and 504 Loan Programs. Finally, one commenter expressed concern that the proposed change was “all encompassing” and may result in unintended consequences. SBA agrees with the recommendation that the term “SBA Lender” should be used since the regulation includes both 7(a) lenders and CDCs, and will replace “Participating Lender” with “SBA Lender.” As stated in the discussion of guaranties for EPCs and OCs in § 120.111 above, the 2010 Jobs Act increased the maximum loan size for 7(a) and 504 loans. Small businesses needing larger loans are more likely to have complex ownership structures and multiple owners, where each owner may hold less than five percent of the company regardless of managerial responsibilities or corporate titles. The current regulation language restricts SBA from requiring personal guaranties from individuals with less than five percent ownership under any circumstance.

SBA deems it prudent to maintain discretion for SBA, in consultation with the Lender, to require guaranties from individuals or entities with less than 20% ownership of the applicant business when they are critical to the extension of credit. The removal of the reference to 5% as the strict measure for required guaranties will allow SBA to obtain full or limited guaranties from appropriate individuals or entities regardless of their ownership interest in the applicant business, if any, when deemed necessary. In addition, SBA considered and is accepting the recommendation to provide this discretion to delegated SBA Lenders as well and, therefore, is modifying the rule to state that SBA

and, for loans processed under an SBA Lender's delegated authority, the SBA Lender, may determine when credit or other reasons make it necessary to obtain a full or limited guaranty from appropriate individuals or entities regardless of their ownership interest, if any, in the applicant business. SBA will provide additional guidance on the guaranty requirements in the appropriate SBA SOP.

Twenty commenters recommended the proposed changes to the personal guaranty rules be provided in SOPs, where exceptions can be made. While SBA provides additional detail on guaranty requirements in its SOPs, program-wide rules are appropriately included in this regulation. SBA is amending this section as proposed with the modifications discussed above.

Section 120.194 Use of computer forms. SBA is removing § 120.194 in its entirety, and reserving this section for future use. Technology has rendered this regulation unnecessary. SBA received nine comments on this proposed change: eight in support of the proposed change and one objection. The objection was based on a misconception that SBA Lenders will no longer be able to submit loan packages using their own or commercially available lending software. SBA continues to work with participants and their software sources to expand electronic access in all program applications. SBA is removing this section as proposed.

Section 120.214 What conditions apply for variable interest rates? SBA is not proceeding with the proposed revisions to § 120.214 regarding when the allowable base rate is determined and when adjustments in the variable interest rate will be permitted. SBA received 10 comments, generally in support of a change, with some comments indicating that the guidance did not fully address the issues regarding the timing of rate

changes and base rates. After reviewing current market activity, the impact of rate adjustments on the small business borrower, and the potential need to further simplify the guidance, SBA will conduct a more thorough discussion with internal and external stakeholders on how best to manage interest rate changes in the 7(a) Loan Program. SBA will not make changes to this section at this time.

Section 120.220 Fees that Lender pays SBA. As set forth in section 7(a)(31) of the Small Business Act (15 U.S.C. 636(a)(31)) (“the Act”), SBA is adding a new paragraph (a)(3) to § 120.220 to codify the statutory waiver of the up-front guaranty fee for SBA Express loans made to businesses owned and controlled by a veteran or spouse of a veteran (as defined in the Act) for fiscal years when the subsidy rate for the 7(a) program is zero. SBA received eight comments regarding the proposed changes. Of those, seven commenters recommended that SBA specifically use the term “SBA Express” to identify loans delivered under section 7(a)(31) of the Act. The conditions a business must meet to qualify for this fee waiver will be explained in SBA Loan Program Requirements.

In § 120.220(b), SBA is amending the regulation to advise Lenders to pay the guaranty fee electronically and revising the timeframe within which a Lender must pay the guaranty fee to SBA for loans with a maturity of 12 months or less (“short-term loans”). SBA is revising the timing of payment of the fee on a short-term loan from the “time of application” to “within 10 business days of SBA's approval of the loan.” The current requirements were implemented when Lenders paid fees using checks. Currently, fees are paid electronically through [www.pay.gov](http://www.pay.gov), and requiring fee payments with the application on short-term loans can delay application processing and turn-around times. SBA received eight comments on this proposed change, all in support of the change.

SBA is also amending paragraph (b) of this section to permit a Lender to be reimbursed by the Borrower for the guaranty fee on a short-term loan only after the Lender pays the fee to SBA. SBA will not permit Lenders to collect the guaranty fee from the Borrower prior to paying SBA. The final rule is incorporating both the 10 day fee payment guidance and the timeline for collection of the fee from the Borrower.

In § 120.220(c), SBA also proposed and is adopting the rule change removing the first two sentences which state when SBA will refund the guaranty fee paid on a short-term loan. The additional 10 day time period post-loan approval for payment of the fee negates the need for refunds. SBA received eight comments supporting the proposed change in the timing of payment to SBA of guarantee fees on loans of 12 months or less, but the commenters asked that SBA provide a provision for refund of the guaranty fee of an approved loan if the Lender had not made any disbursements. The guaranty fee is limited to one quarter of one percent of the guaranteed portion of the short-term loan and is only refundable if a short-term loan application is withdrawn by the Lender prior to approval by SBA, if SBA declines to guarantee the loan, or if SBA approves the loan but substantially changes the terms and SBA's modified terms are unacceptable to the Lender. SBA deems the fee earned for short-term loans once the SBA loan number is issued. SBA is not adopting the suggestion regarding refunds on short-term loans.

Section 120.221 Fees which the Lender May Collect from a loan applicant.

SBA is adopting, as proposed, the addition of an introductory paragraph stating that, unless otherwise permitted by SBA Loan Program Requirements (e.g., the guaranty fee under § 120.220), the fees listed in § 120.221 are the only fees a Lender is permitted to charge and collect from an Applicant or Borrower. SBA received eight comments on this

proposed change, all supporting the improvement in clarity. SBA also proposed to remove the contents of § 120.221(e), as it is not a fee a Lender may collect from a loan applicant in accordance with the stated purpose of § 120.221. SBA will insert in its place language which permits Lenders to collect fees for legal services. This change combines and provides clear guidance on the only fees a Lender is permitted to charge and collect from an Applicant or Borrower. Eight comments were received that suggested the language be revised to specifically include legal fees provided by “either outside or in-house counsel.” SBA has determined that the proposed language was somewhat cumbersome and revised the language slightly to incorporate SBA permits the Lender to charge the Borrower for legal services rendered on an hourly basis. SBA is revising the paragraph (e) to read “Legal services. Lender may charge the Borrower for legal services rendered on an hourly basis.”

Section 120.222 Fees which the Lender or Associate may not collect from the Borrower or share with third parties. As proposed, SBA is retitling § 120.222 from “Fees which the Lender or Associate may not collect from the Borrower or share with third parties” to “Prohibition on sharing premiums for secondary market sales.” SBA is also removing the contents of paragraphs (a), (b), (c), (d), and (e), and inserting the following language: “The Lender or its Associate may not share any premium received from the sale of an SBA guaranteed loan in the secondary market with a Service Provider, packager, or other loan-referral source.” All eight comments received indicated support for this proposed change. This proposed change completes the consolidation and re-organization of §§ 120.221 and 120.222, by clearly identifying the only fees that a Lender may charge and collect from an applicant. Unless otherwise permitted by SBA Loan

Program Requirements, any fee not identified in § 120.221 is prohibited. SBA is retaining the prohibition on the sharing of secondary market fees in § 120.222 for consistency with 13 CFR 103.5(c), which prohibits a Lender from sharing any secondary market premium with a lender service provider. SBA is amending this section as proposed.

Section 120.394 What are the eligible uses of proceeds? For the Builders Loan Program, SBA proposed to increase the regulatory limitation on use of proceeds for land acquisition from 20 percent to 33 percent. SBA received eight comments regarding this proposed rule change, all in support. SBA is amending this section as proposed.

Section 120.400 Loan Guarantee Agreements. Section 120.400 includes a cross reference to §§ 120.441(b) and 120.451(d). SBA proposed to delete these sections and is deleting both in this final rule. In addition, SBA proposed revisions to § 120.440, which it is adopting as proposed with a minor modification. Accordingly, SBA is revising the cross reference in § 120.400 to read “See also 120.440(c) concerning Supplemental Guaranty Agreements.” Although this revision was not included in the proposed rule, SBA is revising § 120.400 to correct this inadvertent omission from the proposed rule.

Multiple Sections - On-Site/Off-Site Reviews for 7(a) Lenders, CDCs and Microloan Intermediaries (“Intermediaries”). Due to SBA’s improved electronic methods, virtual reviews, such as Analytical Reviews, may cover much of what was previously performed in the scope of “on-site” reviews, diminishing the distinction between “off-site” and “on-site” reviews and allowing for more cost-effective reviews. Therefore, SBA proposed to remove all references to “on-site” reviews in §§ 120.410(a)(2), 120.424(b), 120.433(b), 120.434(c), 120.630(a)(5), 120.710(e)(1), 120.812(c), 120.816(c), 120.839, 120.841(c), 120.1050, 120.1051, 120.1070 and 120.1400(c)(4). SBA will retain the term

“review/examination assessments” in these regulations. SBA also proposed to replace references to “off-site” reviews and monitoring with “monitoring” in §§ 120.1025 and 120.1051(a). SBA received eight comments on the proposed changes, with no objections.

SBA is amending the specified sections to remove the terms “on-site” and “off-site” as proposed.

SBA proposed and is adopting replacement of the term “Good Standing” with “Satisfactory” as it relates to a Lender’s status with its other Federal regulators in §§ 120.410(e), 120.630(a)(4), and 120.1703(a)(4). SBA will determine if a Lender is considered “Satisfactory” by its other regulators based on, for example, information in published orders/agreements and call reports. Eight commenters provided no objection to the proposed changes.

Undesignated Center Heading - The Certified Lenders Program. SBA is adopting the proposed rule change to the heading immediately following § 120.435 in Subpart D - Lenders as proposed. SBA is removing “Certified Lenders Program (CLP)” and inserting in its place “Delegated Authority Criteria.” There were eight comments received on this change with no objections.

Section 120.440 The Certified Lenders Program. SBA is adopting the proposed rule change to remove the heading and remove §§ 120.440 and 120.441 as proposed. Implementation of more efficient technology-based processing, closing, servicing, and liquidation render this delivery method unnecessary and obsolete. SBA will remove the existing CLP language and insert guidance for Delegated Authority Criteria (see addition

of Delegated Authority Criteria below). SBA received eight comments on this proposed change with no objections.

New Section 120.440 How does a 7(a) Lender obtain delegated authority? SBA is adopting the proposed rule change adding the criteria for initial approval or renewal of delegated authority in this section as proposed with a minor modification to the heading as discussed below. As stated in the preamble to the Notice of Proposed Rulemaking, these criteria are essentially identical to the criteria currently included in SBA's SOP 50 10 5(I), Subpart A for the 7(a) Loan Program delegated authorities (e.g., PLP (including PLP-EWCP), SBA Express and Export Express Programs). In applying these criteria when processing requests for PLP-EWCP authority, SBA will continue to also consider experience in providing trade finance to exporters and active participation in SBA's EWCP program. In addition, for lenders participating in the Delegated Authority Lender Program of the Export-Import Bank (or any successor Program), such lenders are eligible to participate in the PLP-EWCP Program, pursuant to 15 USC § 636(a)(2)(C). SBA received a detailed comment and recommendations from a trade association as well as seven other comments supporting the trade association's position. The trade association commented they have no objection to the inclusion in regulations of the criteria for a Lender to obtain delegated authority and noted the listed criteria is similar to that currently provided in other SBA Loan Program Requirements. However, the trade association objected to paragraph (b) of the proposed section, which states delegated authority decisions are final. The trade association strongly recommended SBA provide a mechanism by which a Lender, if it is denied delegated authority, could provide SBA with additional information to overcome and administratively appeal such decision. SBA

reviewed the suggested modification and determined that an additional appeal of SBA's decision to deny a Lender delegated authority is not necessary because, if delegated authority is declined, the Lender will still be able to process loans on a non-delegated basis and, when the Lender has overcome the reasons for the decline, it may re-apply. SBA is amending the regulation as proposed with a slight modification in the heading to clarify this section applies to 7(a) Lenders.

Section 120.441 How does a Lender become a CLP Lender? SBA is removing and reserving § 120.441 as proposed. SBA received eight comments, all in support of the proposed change.

Section 120.451 How does a Lender become a PLP Lender? SBA is removing and reserving § 120.451 as proposed. The process for lenders to obtain delegated authority for the 7(a) program, which includes Preferred Lender Program authority, will be set forth in § 120.440 pursuant to this final rule. There is no longer a need for the specific regulation at § 120.451. SBA received eight comments, all of which provided no objection to the proposed change.

Section 120.524 When is SBA released from liability on its guarantee? In this regulation, SBA proposed to clarify its rights to collect monies paid on a guaranty from which the Agency determines it has been released of liability. This includes judicial remedies and the right to offset funds due the Lender for the guaranty purchase of another loan. SBA's right to seek these remedies arises under contract law as interpreted by the courts. SBA received eight comments on this proposed change, all of which supported the rights provided to SBA under the proposed language. The eight commenters supported the proposed language; however, they recommended the language be amended

to state such remedies will only be undertaken if all other attempts to collect from the lender have failed. Commenters also noted SBA is removing the specific language “responsible for those events” in paragraph (b) and requested an explanation of this specific change.

The Agency’s ability to recover on a loan guaranty is not limited to the actions of the current holder of the Note. For example, when a Lender acquires a guaranteed loan from another lender, the acquiring lender is ultimately responsible for any action resulting in a loss on the loan, whether the loss is the result of its actions or inaction, or the actions or inaction of the original lender. SBA is amending this section as proposed.

Section 120.660 Suspension or revocation. SBA is adopting the proposed rule change in § 120.660(a) to provide that decisions regarding a temporary suspension or revocation of a Lender from SBA’s Secondary Market under this regulation be made jointly by the Director, Office of Financial Assistance (D/FA) and the Director, Office of Credit Risk Management (D/OCRM). SBA received comments from eight commenters regarding the provisions in this proposed regulation; all registered no objection to the change. In addition, SBA is adopting as proposed a limit of no more than 120 calendar days for temporary suspensions under this regulation, and no more than two years under this regulation for temporary revocations of the privilege of a Lender, broker, dealer or Registered Holder to sell, purchase, broker or deal in loans or Certificates in SBA’s Secondary Market. All eight commenters registered support for the timeframes in the proposed rule.

In § 120.660(a)(1)(ii), SBA is removing references to SBA Form 1085 from the current regulation, as proposed. SBA Form 1085 is no longer in use in the 7(a) Loan

Program. SBA received only one comment and it was in support of the change. In § 120.660(a)(3), SBA is adding additional reasons under which SBA may temporarily suspend or revoke a Lender's privilege to participate in SBA's Secondary Market. As proposed, SBA may temporarily suspend or revoke a Lender from participation in SBA's Secondary Market when (1) a Lender receives from its primary Federal or state regulator (including SBA): (a) a cease and desist order; (b) a consent agreement affecting capital or commercial lending issues; or (c) a supervisory action citing unsafe or unsound banking practices or other items of concern to SBA that may create potential risk to SBA through loan sales; or (2) a Lender receives a going concern opinion issued by its auditor. SBA received eight comments all of which supported the proposed change with some modifications. The suggested modifications centered on better defining the phrase, "other items of concern to SBA..." and the practicality of providing SBA with notice within five business days from the issuance of the regulatory action or going concern opinion. SBA wants to avoid situations in which current supervisory actions from a Federal or state regulator are renamed, or new actions involving unsafe or unsound lending practices are created and are disclosed, but are not expressly listed in the SBA regulation.

SBA considered the comments provided. SBA has modified the text to provide a more complete explanation of supervisory actions which are subsequently renamed or have yet to be defined. This ensures that the grounds for temporary suspension or termination from SBA's Secondary Market are not limited by the prevailing terminology used by Federal or state regulators. Regarding the practicality of a Lender providing SBA notice, commenters raised the issue of disclosure of non-public supervisory actions

and the date by which the required disclosure of public supervisory actions should be measured. At this time, Lenders will be required to notify SBA only for public actions.

SBA also modified the final rule to define the required notification date to SBA as five business days (or as soon as practicable thereafter) from the date that the regulatory action is placed into the public domain. This will establish a verifiable benchmark for when notice from the Lender is due to SBA. Note, SBA does not intend to require a Lender to disclose a non-public supervisory action unless SBA notifies the Lender that SBA has either an agreement with or consent from the regulator issuing the action. Lenders receiving a going concern opinion will have five business days (or as soon as practicable thereafter) from the date of the auditor's letter indicating a going concern opinion to provide written notice to SBA.

SBA also proposed to add a new paragraph (d) to this section to provide for early termination of a temporary suspension or revocation at the joint discretion of the D/FA and the D/OCRM, if warranted for good cause. SBA received eight comments regarding this proposed change, all in support, and SBA is adding the paragraph as proposed.

Section 120.823 CDC Board of Directors. SBA proposed to revise § 120.823(c)(5) to eliminate the language that prevents a CDC Board member from serving on the board of another entity, except for civic or charitable organizations not involved in financial services or economic development. SBA received 15 comments in support of this proposed change.

SBA also proposed in § 120.823(d)(4)(ii)(C) to clarify that individuals serving on the Loan Committee of a CDC do not have to be members of the CDC or the CDC's Board of Directors. SBA received 15 comments regarding this proposed change, all in support.

Twelve of the commenters recommended § 120.823(d)(4)(ii)(A) also be revised for consistency with the proposed revision in § 120.823(d)(4)(ii)(C). SBA considered these comments and agrees that individuals who are not CDC members, shareholders, or Board members may be appointed by the Board of Directors to serve on the Loan Committee provided that the individual has background and expertise in financial risk management, commercial lending, or legal issues relating to commercial lending and is not associated with another CDC.

In order to ensure consistency in this section on Loan Committees, SBA will revise paragraphs (d)(4)(ii)(A), (d)(4)(ii)(B), (d)(4)(ii)(C) and (d)(4)(ii)(E) references to members of the Loan Committee. SBA will revise the terms “member” and “committee member” in this section to read “Loan Committee member”.

SBA also received one comment requesting reconsideration of SBA’s general prohibition in § 120.820 against a CDC having an affiliation with a 7(a) Lender now that CDCs may offer 7(a) loans under the Community Advantage Pilot Program. Community Advantage is currently a pilot program – for which SBA has granted a regulatory waiver of the affiliation prohibition. SBA is not considering changes to this general prohibition at this time, and is adopting the changes to this section as described above.

Section 120.839 Case-by-case application to make a 504 loan outside of a CDC's Area of Operations. SBA proposed to replace the term “District Offices” in this section with “504 loan processing center” to reflect the SBA office that processes 504 loan applications. SBA received 13 comments supporting this change. One of the 13 commenters expressed concern with removing the District Office from the decision process. The commenter noted that a District Office may have local insights on markets

not available to the 504 loan processing center. However, as explained in the preamble to the proposed rule, SBA is making this change to reflect the SBA office that processes 504 loan applications. Although SBA is not making any changes to the rule as proposed, the 504 loan processing center may consider input from the local District Office when making such a determination to allow a CDC to make a loan outside of its Area of Operations.

Section 120.884 Ineligible costs for 504 loans. SBA is amending this section to define heavy duty construction equipment in § 120.884(e)(3) without reference to the IRS definition because the IRS no longer publishes a definition for “capital equipment.” SBA is adding the requirement that the equipment have a remaining useful life of at least 10 years. SBA received one comment on this section which supported the change, yet expressed concern about adding a useful life requirement. In order to be consistent with the overall purpose of the 504 program, SBA will only permit the financing of construction equipment if it is heavy duty construction equipment integral to the business' operations with a remaining useful life of at least 10 years.

Section 120.1060 Confidentiality of Reports, Risk Ratings and related Confidential Information. SBA proposed a limited expansion of its definition in § 120.1060 of “permitted parties” to include a party who demonstrates a legitimate need to know Review/Exam Report information, Risk Rating, and Confidential Information for the purpose of assisting in improving an SBA Lender's, Intermediary's or Non-Lending Technical Assistance Provider's (NTAP's) SBA program operations in conjunction with SBA's Lender Oversight Program and SBA's portfolio management. This limited expansion of permitted parties may include the lender's parent entity, directors, auditors

and those lender consultants under written contract specifically to assist the Lender in addressing SBA Findings and Corrective Actions Required to SBA's satisfaction.

Consultants do not include Lender Service Providers. The change codifies SBA's practice of approving disclosure of Reports, Risk Rating, and Confidential Information for the expanded group of permitted parties, obviating the need for case-by-case approval and the use of a Confidentiality Agreement for these parties going forward. SBA received eight comments in support of this proposed change. Commenters suggested that it may also be appropriate for SBA to consider allowing Lenders to share SBA reports and other oversight information with their regulators in order to improve the overall quality of the program. Generally, SBA manages information sharing with other regulators on a case-by-case basis and in conjunction with agency-to-agency information sharing agreements. If a Lender's other regulator requests § 120.1060 information, the Lender should refer the regulator to SBA. SBA is adopting the change to this section as proposed.

Section 120.1070 Lender oversight fees. SBA proposed to amend this section to categorize the fee components as Examinations, Reviews, Monitoring, and Other Lender Oversight Activities. The proposed section also provided that SBA has discretion in how it allocates lender oversight costs to Lenders to allow contracting flexibility in how SBA pays for this cost and the fair and efficient allocation of costs to Lenders. The change specifies, consistent with SBA's current practice and current contracts, that, in general, where the costs that SBA incurs for the oversight activity are specific to a Lender, SBA will charge that Lender for the actual costs. Where the costs SBA incurs for the oversight activity are not sufficiently specific to a particular Lender and a flat fee is paid to a vendor, SBA may charge a Lender based on that Lender's portion of SBA guaranties in

the portfolio or segment of the portfolio that the activity covers. SBA received nine comments regarding the proposed change. One commenter suggested SBA change the use of the word “Lender” to “SBA Lender,” which is a defined term in the regulations. The term “SBA Lender” is defined as 7(a) Lenders and CDCs in 13 CFR § 120.10. This regulation only applies to 7(a) Lenders in accordance with 15 USC 634(b)(14). Therefore, SBA is not adopting the suggestion to use “SBA Lender” in this regulation.

Another commenter, a trade association, joined by seven other commenters, stated that, while they have no objection to the proposed change, they have concerns that SBA has virtually no incentive to limit the costs that it imposes on program participants for the review function. The trade association expressed concern that increasing oversight costs could, at some point, make program participation too expensive for some lenders, thus limiting small business’ access to critically needed capital. The trade association recommended that SBA continue to find ways to make the OCRM review function as cost-effective as possible for SBA and for program participants.

SBA disagrees that it has little incentive to limit the costs of lender oversight. SBA is committed to developing and operating a robust risk management program at the most efficient cost possible and to reducing costs where possible. SBA will continue to minimize its oversight costs and the fees it charges program participants through competitive bidding processes, using fixed price contracts where appropriate, contract monitoring, and efficiently coordinating the work with its contractors.

In addition, one commenter requested that SBA publish its lender oversight fees annually. SBA lender oversight fees do not always change from year-to-year, so it may not be necessary to publish each fee every year. However, generally, when a lender

oversight fee changes, SBA communicates the fees to all 7(a) Lenders via SBA notice. SBA is adopting this section as proposed.

Section 120.1400 Grounds for enforcement actions – SBA Lenders. SBA proposed to amend § 120.1400(a) to provide that by making 7(a) guaranteed loans or 504 loans after a certain date, SBA Supervised Lenders (except Other Regulated Small Business Lending Companies (SBLCs)) or CDCs, as applicable, consent to the appointment of a receiver and such injunctive relief or other equitable relief as appropriate, and waive in advance any defenses to such relief as sought by SBA, in connection with an enforcement action.

There were responses from 27 commenters concerning the proposed changes in this section. There were eight commenters in support of the changes. However, there were some concerns that SBA continues to cite SBA Form 750, Loan Guaranty Agreement (Deferred Participation), as the document that Lenders should rely on as “fully” setting forth 7(a) Loan Program Requirements, considering that the current version of the SBA Form 750 in use is outdated and may not be reflective of current policy and SBA Loan Program Requirements. There were eight commenters who were concerned about the SBA’s intention when imposing a prior waiver provision – that is, whether the SBA Supervised Lender or CDC would be waiving only its defenses against having SBA bring the matter before the court, or whether it also would be waiving all of its defenses with respect to all of the actions that SBA may be seeking to enforce against the SBA Supervised Lender or CDC, and sought additional clarification on this point.

There were 18 commenters who voiced objection to the proposed language as overly broad and not necessary under the current regulations. The objecting commenters stated that, while they agree SBA has a right to regulate the 504 Loan Program, they believe

that the right of SBA to appoint an uncontested receiver for an SBA Supervised Lender or CDC over-reaches the SBA's regulatory authority over these entities. The objectors believe the language in the proposed rule is unnecessarily broad in that it seeks to include a waiver of any and all defenses an SBA Supervised Lender or CDC may validly raise to an enforcement action by the SBA. Additionally, the commenters stated that while SBA may be able to manage and service the SBA loan portfolio, they believe SBA has no interest in managing and servicing the non-SBA loans of a CDC or an SBA Supervised Lender that is a Non-Federally Regulated Lender or managing the contracts CDCs may have with their state, city, or other governmental organizations.

SBA considered the receivership comments concerning SBA Supervised Lenders and CDCs, but determined that the proposed provisions that allow SBA to seek receiverships by consent will provide the Agency added flexibility in protecting and safeguarding the security and integrity of these federally funded loan programs. SBA is conditioning its guarantee of 7(a) loans made by SBA Supervised Lenders (except Other Regulated SBLCs) and 504 debentures after a certain date on consent to this relief in connection with an enforcement action because the injury to SBA and its supervision and regulatory oversight of the SBA Supervised Lender or CDC due to the SBA Supervised Lender's or CDC's default under its agreement(s) with SBA would be irreparable and the amount of damage would be difficult to ascertain, making this relief necessary. Consent to receivership is not without precedent in Federal agency practice and has been upheld by the courts as valid and legally enforceable. SBA identified an example of such a case in the proposed rule, U.S. v. Mountain Village Company, 424 F. Supp. 822 (D. Mass. 1976). The consent to receivership does not mandate the appointment of a receiver in

connection with every enforcement action. SBA will review the facts and circumstances of the enforcement action when deciding whether or not to seek the appointment of a receiver and in determining the scope of the receiver's duties and powers, including whether the receiver's duties and powers will be limited to taking possession of, servicing and/or selling or transferring the 7(a) or 504 loan portfolios.

After careful consideration of comments, SBA believes that it is in the best interests of the taxpayers for SBA to have the added flexibility of seeking receiverships, if necessary or appropriate, when taking enforcement actions. However, in response to comments, SBA has revised the language of the proposed rule to clarify that along with the consent to the remedies in §§ 120.1500(c)(3) or 120.1500(e)(3), the SBA Supervised Lender or CDC waives in advance any right to contest the validity of the appointment of a receiver. SBA has not adopted the proposed regulatory text providing for a waiver in advance of any defenses to the relief sought by SBA.

Section 120.1500 Types of enforcement actions — SBA Lenders. SBA proposed to revise the language permitting the Agency to initiate a request for the appointment of a receiver of an SBA Supervised Lender in §120.1500(c)(3) and proposed to add language permitting SBA to initiate a request for the appointment of a receiver of a CDC in §120.1500(e)(3). After careful consideration of comments received, SBA believes that it is in the best interests of the taxpayers for the Agency to have the added flexibility of seeking receiverships, if necessary or appropriate, when taking enforcement actions. SBA has therefore determined that it will amend this section as proposed. There were responses from 27 commenters concerning the proposed changes in this section. There were 19 commenters who voiced objection to the proposed language as overly broad and

not necessary under the current regulations. Again, the objecting commenters provided that, while they agree SBA has a right to regulate its loan programs, they believe that the right of SBA to appoint an uncontested receiver for a CDC over-reaches the SBA's regulatory authority over these entities.

While the objectors did support the need for proper oversight and supervision of SBA Supervised Lenders and CDCs, they also believe that SBA Supervised Lenders and CDCs should be afforded their constitutional right to notice and a hearing before being deprived of their property rights and interests. SBA considered the constitutional issue of due process/waiver of notice. Consent to receivership in favor of Federal agencies - including without notice - has been upheld in Federal court as valid, enforceable and meeting constitutional due process. SBA identified an example of such a case in the proposed rule, U.S. v. Mountain Village Company, supra.

As stated above, SBA considered the receivership comments concerning SBA Supervised Lenders and CDCs, but determined that the proposed provisions that allow SBA to seek receiverships by consent will provide the Agency with added flexibility in protecting and safeguarding the security and integrity of these federally funded loan programs. SBA is conditioning its guarantee of 7(a) loans made by SBA Supervised Lenders (except Other Regulated SBLCs) and 504 debentures after a certain date on consent to this relief in connection with an enforcement action because the injury to SBA and its supervision and regulatory oversight of the SBA Supervised Lender or CDC due to the SBA Supervised Lender's or CDC's default under its agreement(s) with SBA would be irreparable and the amount of damage would be difficult to ascertain, making this relief necessary. The consent to receivership does not mandate the appointment of a

receiver in connection with every enforcement action. SBA will review the facts and circumstances of the enforcement action when deciding whether or not to seek the appointment of a receiver and in determining the scope of the receiver's duties and powers, including whether the receiver's duties and powers will be limited to taking possession of, servicing and/or selling or transferring the 7(a) or 504 loan portfolios.

Section 120.1600 General procedures for enforcement actions against SBA Lenders, SBA Supervised Lenders, Other Regulated SBLCs, Management Officials, Other Persons, Intermediaries, and NTAPs. SBA proposed to add language regarding the procedures for the appointment of a receiver over a CDC or an SBA Supervised Lender in §§ 120.1600(a), 120.1600(a)(6) and 120.1600(b)(4). The proposed amendments allow SBA to follow applicable procedures under Federal law to obtain the appointment of a receiver and to enforce an SBA Supervised Lender's or CDC's consent and waiver in advance. The comments that SBA received on this section repeated the comments received on §§ 120.1400 and 120.1500. SBA considered the comments received on this section, and for the reasons stated above in response to the comments received on §§ 120.1400 and 120.1500, SBA has determined the proposed amendments to § 120.1600 will provide the Agency added flexibility in protecting and safeguarding the security and integrity of the federally funded 7(a) and 504 Loan Programs. SBA is amending this section as proposed.

Section 120.1707 Seller's retained Loan Interest. SBA proposed to replace the execution of a new First Lien Position 504 Loan Pool Guarantee Agreement with an allonge. This would obligate the purchaser of a Seller Receipt in the First Lien Position 504 Loan Pooling ("FMLP") Program to the same terms and conditions of the First Lien

Position 504 Loan Pool Guarantee Agreement. No comments were received. SBA is adopting the change into the final rule as proposed.

Subpart K – Establishment of an SBA Direct Loan Program for Systemically Important Secondary Market Broker-Dealers (SISMBD Loan Program). SBA proposed to remove §§ 120.1800 through 120.1900. These regulations relate to rules which establish a temporary, short-term loan program for systemically-important secondary market broker-dealers. Sections 120.1800 – 120.1893 set forth the program participation criteria and the conditions under which qualified participants could obtain secured debt financing from SBA. Section 120.1900 established a sunset date for the program of no later than February 16, 2011, with all loan proceeds due to be paid in full by no later than February 16, 2013. SBA received seven comments on its proposal to remove these regulations. All commenters supported the removal of the regulation and, as a result, SBA is removing these regulations in the Final Rule.

Compliance with Executive Orders 12866, 12988, 13132, 13563, 13771, and 13777, the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612).

#### Executive Order 12866

This final rule is the result of a proposed rule that the Office of Management and Budget (OMB) determined is not a “significant” regulatory action for the purposes of 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. The action does not have retroactive or preemptive effect.

Executive Order 13132

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

Executive Order 13563

SBA's Business Loan Programs operate through the Agency's lending partners, which are 7(a) Lenders for the 7(a) Loan Program, Third Party Lenders and CDCs for the 504 Loan Program, Microloan Intermediaries for the Microloan Program, and ILP Intermediaries for the ILP Program. SBA's SBG Program operates through Surety Bond Companies. The Agency has participated in public forums and meetings which have included outreach to hundreds of its lending partners and surety bond companies to seek valuable insight, guidance, and suggestions for program reform.

Executive Orders 13771 and 13777

On January 30, 2017, President Trump signed Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, which, among other objectives, is intended to ensure that an agency's regulatory costs are prudently managed and controlled so as to minimize the compliance burden imposed on the public. For every significant regulation

an agency proposes to implement, this Executive Order requires the agency to (i) identify at least two existing regulations that the agency can cancel; and (ii) use the cost savings from the cancelled regulations to offset the cost of the new regulation. On February 24, 2017, the President issued Executive Order 13777, Enforcing the Regulatory Agenda, which further emphasized the goal of the Administration to alleviate the regulatory burdens placed on the public. Under Executive Order 13777, agencies must evaluate their existing regulations to determine which ones should be repealed, replaced, or modified. In doing so, agencies should focus on identifying regulations that, among other things, eliminate jobs or inhibit job creation; are outdated, unnecessary or ineffective; impose costs that exceed benefits; create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; or implemented Executive Orders or other Presidential directives that have been rescinded or substantially modified. SBA has reviewed this final rule in light of these two new Executive Orders.

Regulation elimination as proposed for this rule will eliminate duplication of effort costs for sureties, lenders and certified development companies to develop computerized forms and sun-sets two prior SBA initiatives the CLP lender designations and the SBA Director Program for Systematically Important Secondary Market Broker-Dealers (SISMD Loan Program). The cost savings of sun-setting the two programs have already been absorbed by SBA so no further cost savings is anticipated.

The final rule increases the Quick Bond eligible contract limit in § 115.30 from \$250,000 to \$400,000. This action reduces administrative burden that results in cost savings to the sureties.

The following 29 regulations are removed as of the publication of this Federal Register document:

(1) 13 CFR 120.194 Use of computer forms

(2) 13 CFR 120.441 How does a Lender become a CLP Lender

Subpart K – Establishment of an SBA Direct Program for Systematically Important Secondary Market Broker-Dealers (SISMD Loan Program) which consists of the following regulations:

(3) 13 CFR 120.1800 Definitions used in subpart K

(4) 13 CFR 120.1801 Program Purpose

(5) 13 CFR 120.1802 How does a broker-dealer participate in the SISMD Loan Program?

(6) 13 CFR 120.1810 What is a Systematically Important SBA Secondary Market Broker-Dealer (SISMBD)?

(7) 13 CFR 120.1820 What are the basic eligibility requirements for SBA designation as a Systemically Important Secondary Market Broker-Dealer?

(8) 13 CFR 120.1821 What is the process to obtain designation as a Systematically Important Secondary Market Broker-Dealer?

(9) 13 CFR 120.1822 What is the process to apply for an SISMBD Loan?

(10) 13 CFR 120.1823 Creditworthiness

(11) 13 CFR 120.1824 How will an SISMBD receive notice of an approval of denial of a loan or request for an advance under an SISMBD Loan?

(12) 13 CFR 120.1825 May an SISMBD request reconsideration after denial?

- (13) 13 CFR 120.1830 What are the terms and conditions of an SBA loan to an SISMBD?
- (14) 13 CFR 120.1831 Is there a limit to the number of SISMBD Loans or advances that an SISMBD may request from SBA?
- (15) 13 CFR 120.1832 What is the minimum and maximum SISMBD Loan advance amount?
- (16) 13 CFR 120.1833 May an SISMBD request an increase in the loan amounts?
- (17) 13 CFR 120.1834 What fees are associated with an SISMBD Loan?
- (18) 13 CFR 120.1840 What are the allowable uses of proceeds of an SISMBD Loan?
- (19) 13 CFR 120.1850 Will the Collateral be held by SBA?
- (20) 13 CFR 120.1860 How will the SISMBD Loan be disbursed?
- (21) 13 CFR 120.1870 How does the SISMBD provide funds for the Premium?
- (22) 13 CFR 120.1880 How will the loan be repaid?
- (23) 13 CFR 120.1881 How are payments on the Collateral allocated between the SISMBD borrower and repayment of the SISMBD Loan?
- (24) 13 CFR 120.1882 What happens if funds to make required loan payments are not generated from the Collateral?
- (25) 13 CFR 120.1890 What is the maturity on a SISMBD Loan from SBA?
- (26) 13 CFR 120.1891 What happens if an SISMBD is ineligible to receive an SISMBD Loan or an adverse?

- (27) 13 CFR 120.1892 What happens if an SISMBD does not use SISMBD Loan funds for a statutorily mandated purpose?
- (28) 13 CFR 120.1893 Data collections and reporting
- (29) 13 CFR 120.1900 When does the Secondary Market Lending Authority Program end?

Paperwork Reduction Act, 44 U.S.C., Ch. 35

SBA has determined that this final rule imposes additional reporting requirements under the Paperwork Reduction Act (PRA). As described above, SBA proposed to require all participating sureties to notify SBA of all contracts that were successfully completed on a quarterly basis. SBA invited the public to comment on this proposed new report and to submit any comments by October 11, 2016.

SBA invited comments on: (1) whether the proposed collection of information is necessary for the proper performance of SBA's functions, including whether the information will have a practical utility; (2) the accuracy of SBA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology. Three comments were received related to the requirement of this proposed form. A discussion of the comments received is included in the section-by-section analysis of § 115.22. As stated above, SBA considered the comments, but will proceed with requiring the form as proposed. SBA

will submit the final form and other documents required under the Paperwork Reduction Act to OMB for review and approval.

A summary description of this information collection, the respondents, and the estimate of the annual hour burden resulting from this new process is provided below. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering information needed, and completing and reviewing the responses.

Title: Quarterly Contract Completion Report (SBA Form 2461).

Description: The Quarterly Contract Completion Report will be submitted by all participating surety companies to provide SBA with information about successfully completed contracts. The information reported will include the Surety Bond Guarantee number, the name of the Principal, the original Contract dollar amount, the revised Contract dollar amount (if applicable), the date of Contract completion, and a fee recap. Reports will be due to SBA within 45 days of each fiscal quarter end.

OMB Control Number: 3245-0395.

Description of and Estimated Number of Respondents: The collection will be submitted by the surety companies that participate in the SBG Program. The burden estimate for this requirement is based on the 30 current participants.

Estimated Number of Responses: Each of the estimated 30 sureties would be required to submit the report to SBA four times per year, for a total of 120 responses.

Estimated Response Time: It is estimated that each surety would need approximately one hour to complete the proposed report.

Total Estimated Annual Hour Burden: 120 hours.

Estimated Annual Cost Burden: \$6,005.

Regulatory Flexibility Act, 5 U.S.C. 601-612

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, requires the agency to “prepare and make available for public comment an initial regulatory analysis” which will “describe the impact of the proposed rule on small entities.” Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Currently, there are 30 Sureties that participate in the SBG Program, and no part of this rule would impose any significant cost or burden on them. Although the rulemaking will impact all of the approximately 6,000 7(a) Lenders (some of which are small), all of the approximately 230 CDCs (all of which are small), all of the approximately 145 Microloan Intermediaries (most of which are small), and all of the approximately 35 ILP Intermediaries (most of which are small), SBA does not believe the impact will be significant. This rule will reduce the burden of the Agency’s lending partners because they choose their own level of program participation (i.e., 7(a) Lenders and CDCs are not required to process more loan applications simply because there is a reduced burden for small businesses to apply for a business loan). Therefore, the proposed modernization of certain program participation requirements would not have a substantial economic impact or cost on the small business borrower, lender, or CDC, and in fact, may reduce costs to lender participants.

SBA’s final rule encompasses clear and transparent best practice guidance that aligns with the Agency’s mission to increase access to capital for small businesses and facilitate American job preservation and creation by removing unnecessary regulatory

requirements. A review of the summary and preamble provides more detailed discussion on the specific improvements that will reduce regulatory burdens and encourage increased program participation. For these reasons, SBA has determined that there is no negative impact on a substantial number of small entities.

#### List of Subjects

##### 13 CFR Part 109

Community development, Loan programs-business, Reporting and recordkeeping requirements, Small businesses, Intermediary lending pilot program.

##### 13 CFR Part 115

Claims, Reporting and recordkeeping requirements, Small businesses, Surety bonds.

##### 13 CFR Part 120

Community development, Equal employment opportunity, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA amends 13 CFR parts 109, 115, and 120 as follows:

#### PART 109—INTERMEDIARY LENDING PILOT PROGRAM

1. The authority citation for part 109 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), and 636(l).

##### § 109.400 [Amended]

2. Amend § 109.400 by removing and reserving paragraph (b)(12).
3. Revise § 109.510 to read as follows:

##### § 109.510 Reviews.

(a) General. SBA may conduct reviews and monitoring of ILP Intermediaries, including ILP Intermediaries' self-assessments. SBA may also perform reviews of ILP Intermediaries as needed, as determined by SBA in its discretion.

(b) Corrective actions. SBA may require an ILP Intermediary to take corrective actions to address findings from reviews. Failure to take required corrective actions may constitute an event of default, as described in § 109.520(c).

(c) Confidentiality of reports. Review reports and other SBA prepared review related documents are subject to the confidentiality requirements of § 120.1060.

#### PART 115 – SURETY BOND GUARANTEE

4. The authority citation for part 115 continues to read as follows:

Authority: 5 U.S.C. app 3; 15 U.S.C. 687b, 687c, 694a, 694b note; and Pub. L. 110-246, Sec. 12079, 122 Stat. 1651.

#### § 115.19 [Amended]

5. Amend § 115.19 by removing the phrase “\$100,000, whichever is less” and by adding in its place the phrase “\$500,000 of the original contract or bond amount, whichever is less” in paragraph (c)(1), the second sentence of paragraph (d), and paragraph (e)(2).

6. Add § 115.22 to subpart A to read as follows:

#### § 115.22 Quarterly Contract Completion Report.

The Surety must submit a Quarterly Contract Completion Report within 45 days after the close of each fiscal year quarter ending December 31, March 31, June 30, and September 30, that identifies each contract successfully completed during the quarter.

The report shall include:

(a) The SBA Surety Bond Guarantee Number,

- (b) Name of the Principal,
- (c) The original Contract Dollar Amount,
- (d) The revised Contract Dollar Amount (if applicable),
- (e) The date of Contract completion, and
- (f) A summary specifying the fee amounts paid to SBA by the Surety and Principal, the fee amounts due to SBA as a result of any increases in the Contract amount, and the fee amounts to be refunded to the Principal or rebated to the Surety as a result of any decreases in the Contract amount.

§ 115.30 [Amended]

7. Amend § 115.30 by removing “\$250,000” from the second sentence of paragraph (d)(2)(i) and adding in its place “\$400,000.”

§ 115.32 -- [Amended]

8. Amend § 115.32 by removing the phrase “or \$100,000, whichever is less” and adding in its place the phrase “or \$500,000 of the original contract or bond amount, whichever is less” after “25%” in the first and second sentences of paragraph (d)(1).

9. Amend § 115.60 by adding third and fourth sentences at the end of paragraph (b) to read as follows:

§ 115.60 Selection and admission of PSB Sureties.

\* \* \* \* \*

(b) \* \* \* For a period of nine months following admission to the PSB program, the Surety must obtain SBA’s prior written approval before executing a bond greater than \$2 million so that SBA may evaluate the Surety’s performance in its underwriting and

claims and recovery functions. At the end of this nine month period, SBA may in its discretion extend this period to allow SBA to further evaluate the Surety's performance.

10. Amend § 115.67 by revising the second sentence of paragraph (a) to read as follows:

§ 115.67 Changes in Contract or bond amount.

(a) \* \* \* The Surety must present checks for additional fees due from the Principal and the Surety on any increases aggregating 25% of the original Contract or bond amount or \$500,000, whichever is less, and attach such payments to the respective monthly bordereau. \* \* \*

\* \* \* \* \*

11. Revise § 115.68 to read as follows:

§ 115.68 Guarantee percentage.

SBA reimburses a PSB Surety in the same percentages and under the same terms as set forth in § 115.31.

PART 120 - BUSINESS LOANS

12. The authority citation for part 120 is revised to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), (b)(14), (h) and note, 636(a), (h) and (m), 650, 687(f), 696(3) and 697(a) and (e); Pub. L. 111-5, 123 Stat. 115; Pub. L. 111-240, 124 Stat. 2504; Pub. L. 114-38, 129 Stat. 437.

§ 120.110 [Amended]

13. Amend § 120.110 by removing and reserving paragraph (l).

14. Amend § 120.111 by revising the introductory text and paragraphs (a)(3) and (6) to read as follows:

§ 120.111 What conditions must an Eligible Passive Company satisfy?

An Eligible Passive Company must use loan proceeds only to acquire or lease, and/or improve or renovate, real or personal property (including eligible refinancing), that it leases to one or more Operating Companies for conducting the Operating Company's business, or to finance a change of ownership between the existing owners of the Eligible Passive Company. When the Operating Company is a co-borrower on the loan, loan proceeds also may be used by the Operating Company for working capital and/or the purchase of other assets, including intangible assets, for the Operating Company's use as provided in paragraph (a)(5) of this section. (References to Operating Company in paragraphs (a) and (b) of this section mean each Operating Company.) In the 504 loan program, if the Eligible Passive Company owns assets in addition to the real estate or other eligible long-term fixed assets, loan proceeds may not be used to finance a change of ownership between existing owners of the Eligible Passive Company unless the additional assets owned by the Eligible Passive Company are directly related to the real estate or other eligible long-term fixed assets, the amount attributable to the additional assets is de minimis, and the additional assets are excluded from the Project financing. Any ownership structure or legal form may qualify as an Eligible Passive Company. Any ownership structure or legal form may qualify as an Eligible Passive Company.

(a) \* \* \*

(3) The lease between the Eligible Passive Company and the Operating Company must be in writing and must be subordinate to SBA's mortgage, trust deed lien, or security interest on the property. The Eligible Passive Company (as landlord) must furnish as collateral for the loan an assignment of all rents paid under the lease. The rent

or lease payments cannot exceed the amount necessary to make the loan payment to the lender, and an additional amount to cover the Eligible Passive Company's direct expenses of holding the property, such as maintenance, insurance and property taxes;

\* \* \* \* \*

(6) Each holder of an ownership interest constituting at least 20 percent of either the Eligible Passive Company or the Operating Company must guarantee the loan. The trustee shall execute the guaranty on behalf of any trust. When deemed necessary for credit or other reasons, SBA or, for a loan processed under an SBA Lender's delegated authority, the SBA Lender may require other appropriate individuals or entities to provide full or limited guarantees of the loan without regard to the percentage of their ownership interests, if any.

\* \* \* \* \*

15. Amend § 120.130 by redesigning paragraphs (e) and (f) as paragraphs (f) and (g) respectively, adding new paragraph (e), and revising newly redesignated paragraph (g).

The addition and revision read as follows:

§ 120.130 Restrictions on uses proceeds.

\* \* \* \* \*

(e) The applicant may not use any of the proceeds to pay past-due Federal, state, or local payroll taxes, sales taxes, or other similar taxes that are required to be collected by the applicant and held in trust on behalf of a Federal, state, or local government entity.

\* \* \* \* \*

(g) Any use restricted by §§ 120.201, 120.202, and 120.884 (specific to 7(a) loans and 504 loans respectively).

16. Amend § 120.160 by revising the second sentence of paragraph (a) and by removing paragraph (d).

The revision reads as follows:

§ 120.160 Loan conditions.

\* \* \* \* \*

(a) \* \* \* When deemed necessary for credit or other reasons, SBA or, for a loan processed under an SBA Lender's delegated authority, the SBA Lender, may require other appropriate individuals or entities to provide full or limited guarantees of the loan without regard to the percentage of their ownership interests, if any.

\* \* \* \* \*

§ 120.194 [Removed and Reserved]

17. Remove and reserve § 120.194.

18. Amend § 120.220 by adding paragraph (a)(3), revising the first, second, and third sentences of paragraph (b), and removing the first two sentences of paragraph (c).

The addition and revisions read as follows:

§ 120.220 Fees that Lender pays SBA.

\* \* \* \* \*

(a) \* \* \*

(3) For loans approved under section 7(a)(31) of the Small Business Act (SBA Express loans) to veterans and/or the spouse of a veteran. In fiscal years when the 7(a) program is at zero subsidy, SBA will not collect a guarantee fee in connection with a loan made under section 7(a)(31) of the Small Business Act to a business owned and controlled by a veteran or the spouse of a veteran.

(b) \* \* \* For a loan with a maturity of twelve (12) months or less, the Lender must pay the guaranty fee to SBA electronically within 10 business days after receiving SBA loan approval. The Lender may only charge the Borrower for the fee after the Lender pays the guaranty fee. For a loan with a maturity in excess of twelve (12) months, the Lender must pay the guaranty fee to SBA electronically within 90 days after SBA gives its loan approval. \* \* \*

\* \* \* \* \*

19. Amend §120.221 by revising the section heading, adding introductory text, and revising paragraph (e) to read as follows:

§ 120.221 Fees and expenses which the Lender may collect from a loan applicant or Borrower.

Unless otherwise allowed by SBA Loan Program Requirements, the Lender may charge and collect from the applicant or Borrower only the following fees and expenses:

\* \* \* \* \*

(e) Legal services. Lender may charge the Borrower for legal services rendered on an hourly basis.

20. Revise § 120.222 to read as follows:

§ 120.222 Prohibition on sharing premiums for secondary market sales.

The Lender or its Associates may not share in any premium received from the sale of an SBA guaranteed loan in the secondary market with a Service Provider, packager, or other loan-referral source.

§ 120.394 [Amended]

21. Amend § 120.394 in the third sentence by removing the number “20” and adding in its place the number “33”.

§ 120.400 [Amended]

22. Amend § 120.400 by removing the phrase “§§120.441(b) and 120.451(d)” and adding in its place “§120.440(c)”.

23. Amend § 120.410 in paragraph (a)(2) by removing the term “on-site” and by revising paragraph (e).

The revision reads as follows:

§ 120.410 Requirements for all participating Lenders.

\* \* \* \* \*

(e) Be in good standing with SBA, as defined in § 120.420(f) (and determined by SBA in its discretion), and, as applicable, with its state regulator and be considered Satisfactory by its Federal Financial Institution Regulator (as determined by SBA and based on, for example, information in published orders/agreements and call reports); and

\* \* \* \* \*

§ 120.424 [Amended]

24. In § 120.424, amend paragraph (b) by removing the term “on-site”.

§ 120.433 [Amended]

25. In § 120.433, amend paragraph (b) by removing the term “on-site”.

§ 120.434 [Amended]

26. In § 120.434, amend paragraph (c) by removing the term “on-site”.

27. Revise the undesignated center heading following § 120.435 to read “Delegated Authority Criteria”.

28. Revise § 120.440 to read as follows:

§ 120.440 How does a 7(a) Lender obtain delegated authority?

(a) In making its decision to grant or renew a delegated authority, SBA considers whether the Lender, as determined by SBA in its discretion:

(1) Has the continuing ability to evaluate, process, close, disburse, service, liquidate and litigate SBA loans. This includes the ability to develop and analyze complete loan packages. SBA may consider the experience and capability of Lender's management and staff.

(2) Has satisfactory SBA performance (as defined in § 120.410(a)(2));

(3) Is in compliance with SBA Loan Program Requirements (e.g., Form 1502 reporting, timely payment of all fees to SBA);

(4) Has completed to SBA's satisfaction all required corrective actions;

(5) Whether Lender is subject to any enforcement action, order or agreement with a regulator or the presence of other regulatory concerns as determined by SBA; and

(6) Whether Lender exhibits other risk factors (e.g., has rapid growth; low SBA activity; SBA loan volume; Lender, an officer or director is under investigation or indictment).

(b) Delegated authority decisions are made by the appropriate SBA official in accordance with Delegations of Authority, and are final.

(c) If delegated authority is approved or renewed, Lender must execute a Supplemental Guarantee Agreement, which will specify a term not to exceed two years. SBA may grant shortened renewals based on risk or any of the other delegated authority

criteria. Lenders with less than 3 years of SBA lending experience will be limited—o a term of 1 year or less.

§ 120.441 [Removed and Reserved]

29. Remove and reserve § 120.441.

§ 120.451 [Removed and Reserved]

30. Remove and reserve § 120.451.

31. Amend § 120.524 by revising paragraph (b) to read as follows:

§ 120.524 When is SBA released from liability on its guarantee?

\* \* \* \* \*

(b) If SBA determines, at any time, that any of the events set forth in paragraph (a) of this section occurred in connection with that loan, SBA is entitled to recover any moneys paid on the guarantee plus interest from the Lender. In the exercise of its rights, SBA may utilize all legal means available, including offset and judicial remedies.

\* \* \* \* \*

32. Amend § 120.630 by revising paragraph (a)(4) and in paragraph (a)(5) by removing the term “on-site”.

The revision reads as follows:

§ 120.630 Qualifications to be a Pool Assembler.

(a) \* \* \*

(4) Is in good standing with SBA (as the D/FA determines in his or her discretion), and is Satisfactory with the Office of the Comptroller of the Currency (“OCC”) if it is a national bank, the Federal Deposit Insurance Corporation if it is a bank not regulated by

the OCC, or the Financial Industry Regulatory Authority (“FINRA”) if it is a member as determined by SBA.

\* \* \* \* \*

33. Amend § 120.660 by:

- a. Revising paragraphs (a) introductory text, (a)(1)(ii), and (a)(2);
- b. Adding paragraph (a)(3);
- c. Revising paragraph (c); and
- d. Adding paragraph (d).

The revisions and additions read as follows:

§ 120.660 Suspension or revocation.

(a) Temporary suspension or revocation of Lender, broker, dealer, or Registered Holder for violation of Secondary Market rules and regulations or other risks to SBA.

The D/FA together with the Director, Office of Credit Risk Management (D/OCRM) may suspend for a period of no more than 120 calendar days or revoke for a period of no more than two (2) years, the privilege of a Lender, broker, dealer, or Registered Holder to sell, purchase, broker, or deal in loans or Certificates for:

(1) \* \* \*

(ii) Any provisions in the contracts entered into by the parties, including SBA Forms 1086, 1088 and 1454;

(2) Knowingly submitting false or fraudulent information to the SBA or FTA; or

(3) A Lender’s receipt, from its primary Federal or state regulator (including SBA), of a cease and desist order, a consent agreement affecting capital or commercial lending issues, a supervisory action citing unsafe or unsound banking practices, or any other

supervisory action a primary regulator establishes hereafter that addresses unsafe or unsound lending practices; or a going concern opinion issued by the Lender's auditor. A Lender subject to a public action or going concern opinion must notify the D/FA and the D/OCRM within five (5) business days (or as soon as practicable thereafter) of the public issuance of any such action or the issuance of a going concern opinion. The Lender notice shall include copies of all relevant documents for SBA review.

\* \* \* \* \*

(c) Notice to suspend or revoke. The D/FA and the D/OCRM shall notify the affected party in writing, providing the reasons therefore, at least 10 business days prior to the effective date of the suspension or revocation. The affected party may appeal the suspension or revocation made under this section pursuant to the procedures set forth in part 134 of this chapter. The action taken by the D/FA and the D/OCRM will remain in effect pending resolution of the appeal.

(d) Early termination of suspension or revocation. SBA may, by written notice, terminate a Secondary Market suspension or revocation under this section, if the D/FA and the D/OCRM, in their sole discretion, determine that such termination is warranted for good cause.

§ 120.710 [Amended]

34. Amend § 120.710 by removing the term “on-site” from the third sentence of paragraph (e)(1).

35. Amend § 120.812 by revising the last sentence of paragraph (c) to read as follows:

§ 120.812 Probationary period for newly certified CDCs.

\* \* \* \* \*

(c) \* \* \* Other factors may include, but are not limited to, review/examination assessments, historical performance measures, loan volume to the extent that it impacts performance measures, and other performance related measurements and information (such as contribution toward SBA mission).

\* \* \* \* \*

36. Amend § 120.816 by revising the last sentence of paragraph (c) to read as follows:

§ 120.816 CDC non-profit status and good standing.

\* \* \* \* \*

(c) \* \* \* Other factors may include, but are not limited to, review/examination assessments, historical performance measures, loan volume to the extent that it impacts performance measures, and other performance related measurements and information (such as contribution toward SBA mission).

37. Amend § 120.823 by revising paragraphs (c)(5) and (d)(4)(ii)(A) through (C) and (E) to read as follows:

§ 120.823 CDC Board of Directors.

\* \* \* \* \*

(c) \* \* \*

(5) No CDC Board member may serve on the Board of another CDC .

(d) \* \* \*

(4) \* \* \*

(ii) \* \* \*

(A) Be chosen by the Board of Directors, and consist of individuals with a background in either financial risk management, commercial lending, or legal issues relating to commercial lending who are not associated with another CDC ;

(B) Have a Quorum of at least five (5) Loan Committee members authorized to vote;

(C) Have at least two (2) Loan Committee members with commercial lending experience satisfactory to SBA;

\* \* \* \* \*

(E) Consist of Loan Committee members who live or work in the Area of Operations of the State where the 504 project they are voting on is located unless the project falls under one of the exceptions listed in §120.839.

\* \* \* \* \*

38. Amend § 120.839 by revising the introductory text to read as follows:

§ 120.839 Case-by-case application to make a 504 loan outside of a CDC's Area of Operations.

A CDC may apply to make a 504 loan for a Project outside its Area of Operations by submitting a request to the 504 loan processing center. The applicant CDC must demonstrate that it can adequately fulfill its 504 program responsibilities for the 504 loan, including proper servicing. In addition, the CDC must have satisfactory SBA performance, as determined by SBA in its discretion. The CDC's Risk Rating, among other factors, will be considered in determining satisfactory SBA performance. Other factors may include, but are not limited to, review/examination assessments, historical performance measures, loan volume to the extent that it impacts performance measures,

and other performance related measurements and information (such as contribution toward SBA mission). The 504 loan processing center may approve the application if:

\* \* \* \* \*

39. Amend § 120.841 by revising the last sentence of paragraph (c) to read as follows:

§ 120.841 Qualifications for the ALP.

\* \* \* \* \*

(c) \* \* \* Other factors may include, but are not limited to, review/examination assessments, historical performance measures, loan volume to the extent that it impacts performance measures, and other performance related measurements and information (such as contribution toward SBA mission);

\* \* \* \* \*

40. Amend §120.884 by revising paragraph (e)(3) to read as follows:

§ 120.884 Ineligible costs for 504 loans

\* \* \* \* \*

(e) \* \* \*

(3) Construction equipment (except for heavy duty construction equipment integral to the business' operations with a remaining useful life of a minimum of 10 years).

41. Amend § 120.1025 by revising the section heading and removing the phrase “off-site reviews and monitoring” and adding in its place “monitoring”.

The revision reads as follows:

§ 120.1025 Monitoring.

\* \* \* \* \*

42. Amend § 120.1050 by revising the section heading and removing the phrase “on-site” wherever it occurs.

The revision reads as follows:

§ 120.1050 Reviews and examinations.

\* \* \* \* \*

43. Amend §120.1051 by revising the section heading, removing the phrase “on-site” from the introductory text, and revising paragraph (a).

The revisions read as follows:

§ 120.1051 Frequency of reviews and examinations.

\* \* \* \* \*

(a) Results of monitoring, including an SBA Lender’s, Intermediary’s or NTAP’s Risk Rating;

\* \* \* \* \*

44. Amend § 120.1060 by revising paragraph (b) to read as follows:

§ 120.1060 Confidentiality of Reports, Risk Ratings and related Confidential Information.

\* \* \* \* \*

(b) Disclosure prohibition. Each SBA Lender, Intermediary, and NTAP is prohibited from disclosing its Report, Risk Rating, and Confidential Information, in full or in part, in any manner, without SBA’s prior written permission. An SBA Lender, Intermediary, and NTAP may use the Report, Risk Rating, and Confidential Information for confidential use within its own immediate corporate organization. SBA Lenders, Intermediaries, and NTAPs must restrict access to their Report, Risk Rating and Confidential Information to

their respective parent entities, officers, directors, employees, auditors and consultants, in each case who demonstrate a legitimate need to know such information for the purpose of assisting in improving the SBA Lender's, Intermediary's, or NTAP's SBA program operations in conjunction with SBA's Program and SBA's portfolio management (for purposes of this regulation, each referred to as a "permitted party"), and to those for whom SBA has approved access by prior written consent, and those for whom access is required by applicable law or legal process. If such law or process requires SBA Lender, Intermediary, or NTAP to disclose the Report, Risk Rating, or Confidential Information to any person other than a permitted party, SBA Lender, Intermediary, or NTAP will promptly notify SBA and SBA's Information Provider in writing and in advance of such disclosure so that SBA and the Information Provider have, within their discretion, the opportunity to seek appropriate relief such as an injunction or protective order prior to disclosure. For purposes of this regulation, "consultants" means only those consultants that are under written contract with an SBA Lender, Intermediary or NTAP specifically to assist with addressing its Report Findings and Corrective Actions to SBA's satisfaction. The consultant contract must provide for both the consultant's agreement to abide by the disclosure prohibition in this paragraph and the consultant's agreement not to use the Report, Risk Rating, and Confidential Information for any purpose other than to assist with addressing the Report Findings and Corrective Actions. "Information Provider" means any contractor that provides SBA with the Risk Rating. Each SBA Lender, Intermediary, and NTAP must ensure that each permitted party is aware of and agrees to these regulatory requirements and must ensure that each such permitted party abides by them. Any disclosure of the Report, Risk Rating, or Confidential Information

other than as permitted by this regulation may result in appropriate action as authorized by law. An SBA Lender, Intermediary, and NTAP will indemnify and hold harmless SBA from and against any and all claims, demands, suits, actions, and liabilities to any degree based upon or resulting from any unauthorized use or disclosure of the Report, Risk Rating, or Confidential Information. Information Provider contact information is available from the Office of Capital Access.

45. Amend § 120.1070 by:

- a. Revising the section heading;
- b. Revising paragraphs (a)(1) through (4);
- c. Redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively;
- d. Adding a new paragraph (b);
- e. Revising the first and second sentences of newly redesignated paragraph (c); and
- f. Revising the final sentence of newly redesignated paragraph (d)

The addition and revisions read as follows:

§ 120.1070 SBA Lender oversight fees.

\* \* \* \* \*

(a) \* \* \*

(1) Examinations. The costs of conducting a safety and soundness examination and related activities of an SBA-Supervised Lender, including any expenses that are incurred in relation to the examination and such activities.

(2) Reviews. The costs of conducting a review of a 7(a) Lender or a 7(a) Lender's loans, and related review activities (e.g., corrective action assessments, delegated loan

reviews), including any expenses that are incurred in relation to the review and such activities.

(3) Monitoring. The costs of conducting monitoring reviews of a 7(a) Lender, including any expenses that are incurred in relation to the monitoring review activities.

(4) Other lender oversight activities. The costs of additional expenses that SBA incurs in carrying out other lender oversight activities (for example, the salaries and travel expenses of SBA employees and equipment expenses that are directly related to carrying out lender oversight activities, technical assistance and analytics to support the monitoring and review program, and supervision and enforcement activity costs).

(b) Allocation. SBA will assess to 7(a) Lender(s) the costs associated with the review, examination, monitoring, or other lender oversight activity, as determined by SBA in its discretion. In general:

(1) Where the costs that SBA incurs for a review, exam, monitoring or other lender oversight activity are specific to a particular 7(a) Lender, SBA will charge that 7(a) Lender a fee for the actual costs of conducting the review, exam, monitoring or other lender oversight activity; and

(2) Where the costs that SBA incurs for the lender oversight activity are not sufficiently specific to a particular Lender, SBA will assess a fee based on each 7(a) Lender's portion of the total dollar amount of SBA guarantees in SBA's total portfolio or in the relevant portfolio segment being reviewed or examined, to cover the costs of such activity. SBA may waive the assessment of this fee for all 7(a) Lenders owing less than a threshold amount below which SBA determines that it is not cost effective to collect the fee.

(c) \* \* \* For the examinations or reviews conducted under paragraphs (a)(1) and (2) of this section, SBA will bill each 7(a) Lender for the amount owed following completion of the examination, review or related activity. For monitoring conducted under paragraph (a)(3) of this section and the other lender oversight activity expenses incurred under paragraph (a)(4) of this section, SBA will bill each 7(a) Lender for the amount owed on an annual basis. \* \* \*

(d) \* \* \* In addition, a 7(a) Lender's failure to pay any of the fee components described in this section, or to pay interest, charges and penalties that have been charged, may result in a decision to suspend or revoke a participant's eligibility, limit a participant's delegated authority, or other remedy available under law.

46. Effective [insert date 60 days from date of publication in the Federal Register], amend § 120.1400 by revising paragraph (a) to read as follows:

§ 120.1400 Grounds for enforcement actions - SBA Lenders.

(a) Agreements. By making SBA 7(a) guaranteed loans or 504 loans, SBA Lenders automatically agree to the terms, conditions, and remedies in Loan Program Requirements, as promulgated or issued from time to time and as if fully set forth in the SBA Form 750 (Loan Guaranty Agreement), Development Company 504 Debenture, CDC Certification, Servicing Agent Agreement, or other applicable participation, guaranty, or supplemental agreement. SBA Lenders further agree that a violation of Loan Program Requirements constitutes default under their respective agreements with SBA.

(1) Additional agreements by CDCs. By obtaining approval for 504 loans after [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL

REGISTER], a CDC consents to the remedies in § 120.1500(e)(3) and waives in advance any right it may have to contest the validity of the appointment of a receiver. The CDC agrees that its consent to SBA's application to a Federal court of competent jurisdiction for appointment of a receiver of SBA's choosing, an injunction or other equitable relief, and the CDC's consent in advance to the court's granting of SBA's application, may be enforced upon any basis in law or equity recognized by the court.

(2) Additional agreements by SBA Supervised Lenders (except Other Regulated SBLCs). By making SBA 7(a) guaranteed loans after [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], an SBA Supervised Lender (except an Other Regulated SBLC) consents to the remedies in § 120.1500(c)(3) and waives in advance any right it may have to contest the validity of the appointment of a receiver. The SBA Supervised Lender agrees that its consent to SBA's application to a Federal court of competent jurisdiction for appointment of a receiver of SBA's choosing, an injunction or other equitable relief, and the SBA Supervised Lender's consent in advance to the court's granting of SBA's application, may be enforced upon any basis in law or equity recognized by the court.

\* \* \* \* \*

47. Amend § 120.1500 by revising paragraph (c)(3) and adding paragraph (e)(3) to read as follows:

§ 120.1500 Types of enforcement actions - SBA Lenders.

\* \* \* \* \*

(c) \* \* \*

(3) Initiate request for appointment of receiver and/or other relief. The SBA may make application to any Federal court of competent jurisdiction for the court to take exclusive jurisdiction, without notice, of an SBA Supervised Lender, and SBA shall be entitled to the appointment of a receiver of SBA's choosing to hold, administer, operate, and/or liquidate the SBA Supervised Lender; and to such injunctive or other equitable relief as may be appropriate. Without limiting the foregoing and with SBA's written consent, the receiver may take possession of the portfolio of 7(a) loans and sell such loans to a third party, and/or take possession of servicing activities of 7(a) loans and sell such servicing rights to a third party.

\* \* \* \* \*

(e) \* \* \*

(3) Apply to any Federal court of competent jurisdiction for the court to take exclusive jurisdiction, without notice, of the CDC, and SBA shall be entitled to the appointment of a receiver of SBA's choosing to hold, administer, operate and/or liquidate the CDC; and to such injunctive or other equitable relief as may be appropriate. Without limiting the foregoing and with SBA's consent, the receiver may take possession of the portfolio of 504 loans and/or pending 504 loan applications, including for the purpose of carrying out an enforcement order under paragraph (e)(1) of this section.

48. Amend §120.1600 by:

- a. Revising paragraph (a) introductory text;
- b. Adding paragraph (a)(6); and
- c. Revising paragraph (b)(4).

The revisions and addition read as follows:

§ 120.1600 General procedures for enforcement actions against SBA Lenders, SBA Supervised Lenders, Other Regulated SBLCs, Management Officials, Other Persons, Intermediaries, and NTAPs.

(a) In general. Except as otherwise set forth for the enforcement actions listed in paragraphs (a)(6), (b) and (c) of this section, SBA will follow the procedures listed below.

\* \* \* \* \*

(6) Receiverships of Certified Development Companies and/or other relief. If SBA undertakes the appointment of a receiver for a Certified Development Company and/or injunctive or other equitable relief, paragraphs (a)(1) through (5) of this section will not apply and SBA will follow the applicable procedures under Federal law to obtain such remedies and to enforce the Certified Development Company's consent and waiver in advance to those remedies.

(b) \* \* \*

(4) Receiverships, transfer of assets and servicing activities. If SBA undertakes the appointment of a receiver for, or the transfer of assets or servicing rights of an SBA Supervised Lender and/or injunctive or other equitable relief, SBA will follow the applicable procedures under Federal law to obtain such remedies and to enforce the SBA Supervised Lender's consent and waiver in advance to those remedies.

\* \* \* \* \*

49. Amend § 120.1703 by revising paragraph (a)(4) to read as follows:

§ 120.1703 Qualifications to be a Pool Originator.

(a) \* \* \*

(4) Is in good standing with SBA (as the SBA determines), and is Satisfactory with the Office of the Comptroller of the Currency (OCC) if it is a national bank, the Federal Deposit Insurance Corporation if it is a bank not regulated by the OCC, the Financial Institutions Regulatory Authority if it is a member, the National Credit Union Administration if it is a credit union, as determined by SBA; and

\* \* \* \* \*

50. Amend § 120.1707 by revising the fifth sentence and adding a sixth sentence to read as follows:

§120.1707 Seller's retained Loan Interest.

\* \* \* In addition, in order to complete such sale, Seller must have the purchaser of its rights to the Pool Loan execute an allonge to the Seller's First Lien Position 504 Loan Pool Guarantee Agreement in a form acceptable to SBA, acknowledging and accepting all terms of the Seller's First Lien Position 504 Loan Pool Guarantee Agreement, and deliver the executed original allonge and a copy of the corresponding First Lien Position 504 Loan Pool Guarantee Agreement to the CSA. All Pool Loan payments related to a Seller Receipt and Servicing Retention Amount proposed for sale will be withheld by the CSA pending SBA acknowledgement of receipt of all executed documents required to complete the transfer.

Subpart K [Removed]

51. Remove Subpart K, consisting of §§ 120.1800 through 120.1900.

Dated: August 11, 2017

Linda E. McMahon,  
Administrator.

