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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 109, 120, and 123

[Docket Number SBA-2020-0057]

RIN 3245-AH60

Ensuring Equal Treatment for Faith-Based Organizations in SBA's Loan and Disaster Assistance Programs

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (“SBA” or “Agency”) is proposing to remove five regulatory provisions that run afoul of the Free Exercise Clause of the First Amendment. All five provisions make certain faith-based organizations ineligible to participate in certain SBA business loan and disaster assistance programs because of their religious status. Because the provisions exclude a class of potential participants based solely on their religious status, the provisions violate the Free Exercise Clause of the First Amendment. SBA now proposes to remove the provisions to ensure in its business loan and disaster assistance programs the equal treatment for faith-based organizations that the Constitution requires.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3245-AH60, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.

- Mail or Hand Delivery/Courier: Valerie Mills, Executive Operations Officer, Office of General Counsel, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416.

SBA will post all comments on <https://www.regulations.gov>. If you wish to submit confidential business information (“CBI”), as defined in the User Notice at <https://www.regulations.gov>, please submit the information to Valerie Mills, Executive Operations Officer, Office of General Counsel, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416, or send an email to Valerie.Mills@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Valerie Mills, Executive Operations Officer, Office of General Counsel, (202) 619-0539, Valerie.Mills@sba.gov.

SUPPLEMENTARY INFORMATION:

I. Background Information

Consistent with its April 3, 2020, letter to Congress pursuant to 28 U.S.C. 530D (“530D letter”), SBA is proposing to remove from the Code of Federal Regulations (“CFR”) five provisions that run afoul of the Free Exercise Clause of the First Amendment. The provisions that SBA proposes to remove consist of the two provisions with which SBA’s 530D letter was concerned and three other, substantially similar provisions. All five provisions make certain faith-based organizations ineligible to participate in certain SBA business loan and disaster assistance programs because of their religious status. Because the provisions exclude a class of potential participants solely based on their religious status, the provisions violate the Free Exercise Clause of the First Amendment, as construed in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246

(2020). After consulting with the Department of Justice, in its 530D letter, SBA already has announced its decision not to enforce, apply, or administer two of the provisions, as well as its intention to propose amendments to conform those provisions to the Constitution. SBA now proposes such amendments, as well as amendments to three substantially similar provisions, to ensure in its business loan and disaster assistance programs the equal treatment for faith-based organizations that the Constitution requires.

A. The Subject Programs

Intermediary Lending Pilot Program (“ILP”). The Intermediary Lending Pilot (“ILP”) program was established as a pilot program authorized by the Small Business Jobs Act of 2010, Pub. L. No. 111-240 (2010), to provide loans of up to \$1,000,000 to nonprofit intermediaries for the purpose of providing loans to small businesses. The program authorized SBA to select up to 20 nonprofit intermediaries each year to receive loans of up to \$1,000,000, subject to the availability of funds. Selected ILP intermediaries, in turn, use the funds to make loans of up to \$200,000 to eligible startup, newly established, or growing small businesses. ILP Intermediaries continue to relend a portion of the payments received on small business loans made under the program until they have fully repaid their loans to SBA.

Business Loan Programs. SBA provides financial assistance to small businesses under three business loan programs: its general business loan program authorized by section 7(a) of the Small Business Act, 15 U.S.C. 636(a) (“7(a) loans”), its microloan program authorized by section 7(m) of the Small Business Act, 15 U.S.C. 636(m) (“microloans”), and its development company program authorized by title V of the Small Business Investment Act, 15 U.S.C. 695–697f (“504 loans”). 7(a) loans provide financing to eligible small businesses for general business purposes and are guaranteed loans by which SBA guarantees a portion of a loan made by a lender. Through its microloans, SBA makes loans to non-profit intermediaries that in turn make short-term loans with a

maximum amount of \$50,000 to eligible small businesses for general business purposes, including the purchase of furniture, fixtures, supplies, materials, equipment, and for working capital. SBA also makes technical assistance grants to intermediaries for use in providing management assistance and counseling to microloan borrowers and prospective microloan borrowers. Projects involving 504 loans require long-term, fixed-asset financing for small businesses. A 504 project has three main partners: a Third Party Lender provides 50 percent or more of the financing; a Certified Development Company (CDC) provides up to 40 percent of the financing through a 504 debenture (guaranteed 100% by SBA); and an applicant (Borrower) injects at least 10 percent of the financing.

Economic Injury Disaster Loan Program (“EIDL”). The Economic Injury Disaster Loan (“EIDL”) program provides economic relief to eligible small businesses and private nonprofit organizations that experience substantial economic injury as a direct result of a declared disaster. Substantial economic injury is such that a business concern is unable to meet its obligations as they mature or to pay its ordinary and necessary operating expenses. EIDL loan proceeds may be used only for working capital necessary to carry on the business concern until resumption of normal operations and for expenditures necessary to alleviate the specific economic injury, but not to exceed that which the business concern could have provided had the injury not occurred.

Military Reservist Economic Injury Disaster Loan Program (“MREIDL”). The Military Reservist Economic Injury Disaster Loan (“MREIDL”) program provides loan funds to eligible small businesses to meet their ordinary and necessary operating expenses that they could have met, but are unable to meet, because an essential employee was called up to active service for a period of more than 30 consecutive days in his or her role as a military reservist. The loans provide the amount of working capital that eligible small businesses need to pay their necessary obligations as they mature until operations

return to normal after the essential employee is released from active service. Loans can be provided for a maximum amount of \$2,000,000 and a maximum term of 30 years.

Immediate Disaster Assistance Program (“IDAP”). The Immediate Disaster Assistance Program (“IDAP”) is a guaranteed disaster loan program for small businesses that have suffered physical damage or economic injury due to a declared disaster. An IDAP loan is an interim loan in an amount not to exceed \$25,000 made by an IDAP lender to meet the immediate business needs of an IDAP borrower while approval of long-term financing from a disaster loan is pending with SBA. Currently, there is no funding available for IDAP loans.

B. Religious-Status-Based Exclusions in the Subject Programs and Conflict with Recent Supreme Court Decisions Construing the Free Exercise Clause

Current regulatory provisions governing the ILP, Business Loan programs, EIDL, MREIDL, and IDAP all render ineligible to participate businesses that are “[p]rincipally engaged in”—or businesses whose “principal activity” is—“teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting.” 13 CFR 109.400(b)(11), 120.110(k), 123.301(g), 123.502(n), 123.702(b)(6). Notably, these exclusions of otherwise-eligible participants are based not on any religious use of business loan funds or disaster assistance, but rather are based on the religious activities in which they generally engage, precluding them from even secular uses of business loan funds and disaster assistance. In short, they categorically disqualify otherwise-eligible faith-based organizations from receiving business loan funds and disaster assistance solely on account of their religious status.

In two recent decisions, the Supreme Court has made clear that such religious-status-based exclusions from a public benefit violate the Free Exercise Clause of the First Amendment.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Court examined a state’s “policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program.” *Id.* at 2017. The Court held that the policy violated the Free Exercise Clause. It explained that “[t]he Free Exercise Clause ‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’” *Id.* at 2019 (quoting *Church of Lukumi Babulu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993)). The Court noted that it repeatedly had applied this “basic principle” to “confirm[] that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest ‘of the highest order.’” *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion)). The state policy failed this stringent test. The Court concluded that, “[i]n the face of the clear infringement on free exercise before us,” the State’s proffered interest—a “policy preference for skating as far as possible from religious establishment concerns,” even where the Establishment Clause did not prohibit the funding at issue—“cannot qualify as compelling.” *Id.* at 2024.

Three years later, in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), the Court examined a state-court decision that had applied a state constitutional provision to invalidate a tax-credit scholarships program solely on the ground that some scholarship recipients had sought to use their scholarships at religious schools. The question presented was “whether the Free Exercise Clause precluded” the state court “from applying [the state constitutional] provision to bar religious schools from the scholarship program.” *Id.* at 2254. The Court answered that question in the affirmative. The Court began by reiterating the basic principle that “[t]he Free Exercise Clause . . . ‘protects religious observers against unequal treatment’ and against ‘laws that

impose special disabilities on the basis of religious status,” *id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2019), and by noting *Trinity Lutheran*’s “‘unremarkable’ conclusion that disqualifying otherwise eligible recipients from a public benefit ‘solely because of their religious character’ imposes ‘a penalty on the free exercise of religion that triggers the most exacting scrutiny,’” *id.* at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). The Court then observed that, as construed by the state court, the state constitutional provision “bars religious schools from public benefits solely because of the religious character of the schools” and “also bars parents who wish to send their children to a religious school from those same benefits, again solely because of the religious character of the school.” *Id.* at 2255. The Court was unpersuaded by the State’s assertion that the status-based exclusion aimed to prevent religious uses of funds. “Status-based discrimination,” the Court concluded, “remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses.” *Id.* at 2256. Accordingly, the Court held “that strict scrutiny applies under *Trinity Lutheran* because [the state constitutional] provision discriminates based on religious status,” *id.* at 2257, and that, like the state policy it examined in *Trinity Lutheran*, the state constitutional provision under review failed that test, *id.* at 2260–63.

Like the state policy that the Court declared unconstitutional in *Trinity Lutheran* and the state constitutional provision that the Court declared unconstitutional in *Espinoza*, the five subject provisions deny a public benefit solely on account of religious status. Each categorically renders ineligible to participate in an SBA business loan or disaster assistance program all businesses that are “[p]rincipally engaged in”—or businesses whose “principal activity” is—“teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting.” 13 CFR 109.400(b)(11), 120.110(k), 123.301(g), 123.502(n), 123.702(b)(6). Notably, none of these exclusions concerns religious uses of business loan or disaster assistance funds.

Instead, each prohibits an otherwise-eligible applicant from receiving such funds solely on account of its religious activities, even if it uses the funds for secular purposes. And any interest in prohibiting religious uses of funds cannot justify such a sweeping, status-based exclusion. As the Court held in *Espinoza*, “[s]tatus-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses.” 140 S. Ct. at 2256. Moreover, SBA cannot identify any other possible interest underlying the subject provisions, much less one that would pass muster under the ““strictest scrutiny,”” *id.* at 2257 (quoting *Trinity Lutheran*, 137 S. Ct. at 2019), that the Court applies to such religious-status-based exclusions.

In addition, the five subject regulatory provisions cannot be justified under *Locke v. Davey*, 540 U.S. 712 (2004), because they are not restrictions on religious uses of business loans or disaster assistance. Rather, they exclude certain recipients from even secular uses of business loans and disaster assistance based solely on their religious status.

Therefore, the five subject provisions—13 CFR 109.400(b)(11), 120.110(k), 123.301(g), 123.502(n), and 123.702(b)(6)—are inconsistent with the Free Exercise Clause of the First Amendment, as construed by the Supreme Court in *Trinity Lutheran* and *Espinoza*.

C. SBA’s 530D Letter and Subsequent Review of SBA Regulations

In light of the Supreme Court’s decision in *Trinity Lutheran*, and after consultation with the U.S. Department of Justice, SBA determined that the religious-status-based exclusions in its Business Loan and EIDL programs—13 CFR 120.110(k) and 123.301(g)—are unconstitutional. In a letter submitted on April 3, 2020, pursuant to 28 U.S.C. 530D, SBA informed Congress of its determination. SBA explained that the provisions “impermissibly exclude a class of potential recipients based solely on their religious identity, just like the State policy that was struck down in *Trinity Lutheran*”;

that they “categorically exclude religious organizations simply because they are religious”; and that “[t]hese status-based prohibitions also cannot be justified under *Locke v. Davey*, 540 U.S. 712 (2004)” because they “are not limited to religious uses of business loans or economic disaster assistance, but rather exclude certain recipients from even secular uses based on their religious character.” SBA notified Congress that it would “refrain from enforcing, applying, or administering” the subject provisions, and that it intended to “propose amendments to 13 CFR 120.110 and 123.301 that will conform these provisions to the Constitution.”

Since submitting its 530D letter, SBA has reviewed its other regulations and identified three other substantially similar provisions—13 CFR 109.400(b)(11), 123.502(n), and 123.702(b)(6)—that suffer from the same constitutional defect identified in the 530D letter. Accordingly, SBA now proposes to remove all five of the invalid provisions to conform its regulations to the requirements of the Free Exercise Clause.

D. President Trump’s Executive Order 13798 and the Attorney General’s Memorandum on Religious Liberty

SBA’s proposal not only follows from recent Supreme Court precedent and will ensure compliance with the Constitution, but also accords with Executive Branch policy. On May 4, 2017, President Trump issued Executive Order 13798, Presidential Executive Order Promoting Free Speech and Religious Liberty, 82 FR 21675 (May 9, 2017). Executive Order 13798 states that “Federal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government” and further provides that the executive branch will honor and enforce those protections. It also directed the Attorney General to “issue guidance interpreting religious liberty protections in Federal law.” 82 FR at 21675. Pursuant to this instruction, the Attorney General, on October 6, 2017, issued the Memorandum for All Executive Departments and Agencies, “Federal Law Protections

for Religious Liberty,” 82 FR 49668 (Oct. 26, 2017) (the “Attorney General’s Memorandum on Religious Liberty”).

Consistent with *Trinity Lutheran*, the Attorney General’s Memorandum on Religious Liberty emphasized that individuals and organizations do not forfeit religious-liberty protections by receiving government grants or otherwise interacting with Federal, state, or local governments, and that “government may not exclude religious organizations as such from secular aid programs . . . when the aid is not being used for explicitly religious activities such as worship or proselytization.” 82 FR at 49669.

II. Section by Section Analysis

A. Section 109.400 – Eligible Small Business Concerns.

SBA is proposing to amend 13 CFR 109.400 to remove paragraphs (b)(11) and (b)(12) and redesignate the following paragraphs accordingly. 13 CFR 109.400(b) currently enumerates a list of “types of businesses” that “are not eligible to receive a loan from an ILP Intermediary under” the ILP. Included in this list is 13 CFR 109.400(b)(11), “[b]usinesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting[.]” This exclusion based on religious status violates the Free Exercise Clause of the First Amendment to the Constitution. Therefore, SBA proposes to remove it but leave intact the other exclusions listed in 13 CFR 109.400(b).

B. Section 120.110 – What Businesses Are Ineligible for SBA Business

Loans?

SBA is proposing to amend 13 CFR 120.110 to remove paragraphs (k) and (l) and redesignate the following paragraphs accordingly. 13 CFR 120.110 currently enumerates a list of “types of businesses” that “are ineligible for SBA business loans.” Included in this list is 13 CFR 120.110(k), “[b]usinesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular

setting[.]” This exclusion based on religious status violates the Free Exercise Clause of the First Amendment to the Constitution. Therefore, SBA proposes to remove it but leave intact the other exclusions listed in 13 CFR 120.110.

C. Section 123.301 – When Would My Business Not Be Eligible to Apply for an Economic Injury Disaster Loan?

SBA is proposing to amend 13 CFR 123.301 to remove paragraph (g) and redesignate the following paragraph accordingly. 13 CFR 123.301 currently enumerates a list of types of businesses that “are not eligible for an economic [injury] disaster loan.” Included in this list is 13 CFR 123.301(g), businesses that are “[p]rincipally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting[.]” This exclusion based on religious status violates the Free Exercise Clause of the First Amendment to the Constitution. Therefore, SBA proposes to remove it but leave intact the other exclusions listed in 13 CFR 123.301.

D. Section 123.502 – Under What Circumstances Is Your Business Ineligible to Be Considered for a Military Reservist Economic Injury Disaster Loan?

SBA is proposing to amend 13 CFR 123.502 to remove paragraph (n) and redesignate the following paragraph accordingly. 13 CFR 123.502 currently enumerates a list of types of businesses that are “ineligible for a Military Reservist EIDL.” Included in this list is 13 CFR 123.502(n), listing businesses whose “[p]rincipal activity is teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting[.]” This exclusion based on religious status violates the Free Exercise Clause of the First Amendment to the Constitution. Therefore, SBA proposes to remove it but leave intact the other exclusions listed in 13 CFR 123.502.

E. Section 123.702 – What Are the Eligibility Requirements for an IDAP

Loan?

SBA is proposing to amend 13 CFR 123.702 to remove paragraph (b)(6) and redesignate the following paragraphs accordingly. 13 CFR 123.702(b) currently enumerates a list of types of businesses that are “not eligible for an IDAP loan.” Included in this list is 13 CFR 123.702(b)(6), businesses that are “[p]rincipally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting[.]” This exclusion based on religious status violates the Free Exercise Clause of the First Amendment to the Constitution. Therefore, SBA proposes to remove it but leave intact the other exclusions listed in 13 CFR 123.702(b).

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

A. Executive Order 12866

Under Executive Order 12866, the Office of Information and Regulatory Affairs (OIRA) must determine whether this regulatory action is “significant” and, therefore, subject to the requirements of the executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action likely to result in a regulation that may (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as an “economically significant” regulation); (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or

policy issues arising out of legal mandates, the President’s priorities, or the principles stated in Executive Order 12866.

OIRA has determined that this proposed rule is a significant, but not economically significant, regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

The proposed rule removes paragraphs that excluded from SBA’s loan and disaster assistance programs types of businesses that were “principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs”

Executive Order 12866 requires assessment of available alternatives. An alternative to the proposed rule’s elimination of invalid provisions is to take no action regarding the invalid exclusions. This alternative is untenable as it would leave in place provisions that are invalid under the Free Exercise Clause. The other alternative to the proposed rule’s elimination of the invalid provisions is to create new restrictions barring religious uses of business loans and disaster assistance. This alternative is unnecessary under the First Amendment;¹ would create unnecessary regulation as current regulations already specify—in secular terms—the permissible uses of funds;² and would thus be inconsistent with the Administration’s deregulatory agenda, *see* Executive Order 13771, Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, 82 FR 9,339 (Feb. 3, 2017).

¹ *See Religious Restrictions on Capital Financing for Historically Black Colleges and Universities*, 43 Op. O.L.C. -- **7–15 (Aug. 15, 2019) (slip op.) (analyzing a loan program substantially similar to SBA’s business loan programs and concluding that the Establishment Clause did not require any use-of-funds restrictions); *Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy*, 26 Op. O.L.C. 114, 122–32 (2002) (analyzing a disaster assistance program substantially similar to SBA’s disaster assistance programs and concluding that the Establishment Clause permitted the provision of disaster assistance to a religious school).

² *See* 13 CFR 109.430, 120.120, 120.130, 120.131, 123.303, 123.508, 123.509, and 123.704.

In accordance with Executive Order 12866, SBA has assessed the potential costs and benefits of this regulatory action. SBA estimates that no quantifiable effects exist from this proposed rule relative to a baseline that represents the state of SBA's programs in the absence of this action. Because these exclusions are not enforceable (and, indeed, SBA has informed Congress of its determination not to enforce 13 CFR 120.110(k) and 123.301(g)), SBA expects the removal of these exclusions to impose no additional costs or significant benefits.

In terms of benefits, SBA recognizes a nonquantifiable benefit to religious liberty that comes from removing exclusions of faith-based organizations, in conflict with the Free Exercise Clause. SBA also recognizes a nonquantifiable benefit to participants in SBA's loan and disaster assistance programs that comes from increased clarity in the regulatory requirements that apply to faith-based organizations operating in these programs. Benefits may also accrue from the increased capacity of faith-based social-service providers to provide services, both because these providers will be able to allocate resources with less uncertainty and because more faith-based organizations may participate. The SBA does not expect the proposed rule to materially alter the budgetary impact of its loan programs or the rights and obligations of recipients.

B. Executive Order 13771

This proposed rule is not expected to be an Executive Order 13771 regulatory action.

C. 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.

D. Executive Order 13132

This proposed rule does not have federalism implications as defined in Executive Order 13132. It would 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, as specified in the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

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

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

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

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (“RFA”) generally requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” that will “describe the impact of the proposed rule on small entities.” 5 U.S.C. 603(a). But the RFA allows the head of 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. 5 U.S.C. 605(b).

The RFA defines “small entity” to include small businesses, small organizations, and small governmental jurisdictions. 5 U.S.C. 601(6). This proposed rule concerns participation in SBA’s business loan and disaster assistance programs by certain faith-based organizations. As such, the rule relates to small organizations.

Small organizations that are the subject of this proposed rule include entities in NAICS Code 813110 – Religious Organizations. According to the Census Bureau’s Statistics of U.S. Businesses (SUSB), in 2012, approximately 182,000 organizations in

this NAICS code met the definition for SBA's Small Business Size Standards, as updated in 2019.³ The number of those organizations that meet the general requirements for eligibility to participate in SBA's business loan and disaster assistance programs is likely much smaller.

Considering that the proposed rule imposes no costs while ensuring that SBA's regulations conform with requirements of the Free Exercise Clause, SBA estimates that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities. SBA does not believe that the impact will be significant within any size groupings because this proposed rule eliminates invalid provisions in its business loan and disaster assistance programs. Accordingly, the Administrator of the SBA hereby certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. SBA invites comment from members of the public who believe there will be a significant impact on any small entities, including small businesses.

List of Subjects

13 CFR Part 109

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

13 CFR Part 120

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

³ According to the SUSB, 183,411 establishments were under NAICS Code 813110 in 2012, the last year for which this data set is available. Of the total number of establishments, 181,298 have annual receipts under \$7.5 million. SBA uses a revenue standard for determining small businesses in NAICS 813110. In the 2019 SBA Table of Size Standards, that revenue standard was \$8 million and below. SUSB information is arranged in dollar ranges of receipt size, with the next category ranging from above \$7.5 million to \$9,999,999, which is in excess of SBA's small business standard. 660 establishments were in that category.

13 CFR Part 123

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

Accordingly, for the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 109, 120, and 123 as follows:

PART 109 – INTERMEDIATE LENDING PILOT PROGRAM

1. The authority citation for 13 CFR 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 paragraph (b)(11) and redesignating paragraphs (b)(13) through (23) as paragraphs (b)(11) through (21), respectively.

PART 120 – BUSINESS LOANS

3. The authority citation for 13 CFR part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b) (6), (b) (7), (b) (14), (h), and note, 636(a), (h) and (m), and note, 650, 657t, and note, 657u, and note, 687(f), 696(3) and (7), and note, and 697(a) and (e), and note.

§ 120.110 – [Amended]

4. Amend § 120.110 by removing paragraph (k) and redesignating paragraphs (m) through (s) as paragraphs (k) through (q), respectively.

PART 123 – DISASTER LOAN PROGRAM

5. The authority citation for 13 CFR part 123 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 636(d), and 657n.

§ 123.301 – [Amended]

6. Amend § 123.301 by:

a. Adding the word “or” to the end of paragraph (f); and

b. Removing paragraph (g) and redesignating paragraph (h) as paragraph (g).

§ 123.502 – [Amended]

7. Amend § 123.502 by:

a. Adding the word “or” to the end of paragraph (m); and

b. Removing paragraph (n) and redesignating paragraph (o) as paragraph (n).

§ 123.702 – [Amended]

8. Amend § 123.702 by removing paragraph (b)(6) and redesignating paragraphs (b)(7) through (25) as paragraphs (b)(6) through (24), respectively.

Signed in Washington, D.C.

Jovita Carranza,
Administrator.

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