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ABBREVIATIONS USED IN THIS CHAPTER:
SBA = *Small Business Administration*. SBID = *The Small Business Investment Division of SBA*. RFC = *Reconstruction Finance Corporation*.

CHAPTER I—SMALL BUSINESS ADMINISTRATION

EDITORIAL NOTE: The Small Business Administration has asked the Director of the Federal Register to inform users of this chapter that parts 143, 145, and 146 are common rule regulations that cannot be amended by the Small Business Administration unilaterally.

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PART 101—ADMINISTRATION

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101.500 Small Business Energy Efficiency Program.

AUTHORITY: 5 U.S.C. 552 and App. 3, secs. 2, 4(a), 6(a), and 9(a)(1)(T); 15 U.S.C. 633, 634, 687; 31 U.S.C. 6506; 44 U.S.C. 3512; 42 U.S.C. 6307(d); 15 U.S.C. 657h; E.O. 12372 (July 14, 1982), 47 FR 30959, 3 CFR, 1982 Comp., p. 197, as amended by E.O. 12416 (April 8, 1983), 48 FR 15887, 3 CFR, 1983 Comp., p. 186.

SOURCE: 61 FR 2394, Jan. 26, 1996, unless otherwise noted.

Subpart A—Overview

§ 101.100 What is the purpose of SBA?

The U.S. Small Business Administration (SBA) aids, counsels, assists, and protects the interests of small business concerns, and advocates on their behalf within the Government. It also helps victims of disasters. It provides financial assistance, contractual assistance, and business development assistance. For a more detailed description of the functions of SBA see The United States Government Manual, a special publication of the FEDERAL REGISTER, which is available from Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954.

§ 101.101 Who manages SBA?

(a) An Administrator, appointed by the President with the advice and consent of the Senate, manages SBA. The Administrator—

(1) Is responsible to the President and Congress for exercising direction, authority, and control over SBA.

(2) Determines and approves all policies covering SBA's programs to aid, counsel, assist, and protect the interests of the nation's small businesses.

(3) Employs or appoints employees necessary to implement the Small Business Act, as amended, the Small Business Investment Act, as amended, and other laws and directives.

(4) Delegates certain activities, by issuing regulations or otherwise, to Headquarters and field positions.

(b) A Deputy Administrator, appointed by the President with the advice and consent of the Senate, serves

as Acting Administrator during the absence or disability of the Administrator or in the event of a vacancy in the Office of the Administrator.

§ 101.102 Where is SBA's Headquarters located?

The Headquarters of SBA is at 409 3rd Street, SW., Washington, DC 20416.

§ 101.103 Where are SBA's field offices located?

A list of SBA's field offices with addresses, phone numbers and jurisdictions served is periodically published in the FEDERAL REGISTER. You can also obtain the address and phone number of an SBA office to serve you by calling 1–800-8-ASK-SBA or 1-800-827-5722.

§ 101.104 What are the functions of SBA's field offices?

(a) *Regional offices.* Regional offices are managed by a Regional Administrator who is responsible to the Administrator and to the Associate Administrator for Field Operations. They are located in major cities and have geographical boundaries which cover multi-state areas. Regional offices exercise limited authority over field activities within their region.

(b) *District offices.* District offices are managed by a District Director and are located in cities within a region. District offices are responsible to Headquarters, the Associate Administrator for Field Operations, and to a regional office. Within their delegated authority, district offices have authority for—

(1) Conducting all program delivery activities within the district boundaries;

(2) Supervising all branch offices located within the district boundaries; and

(3) Providing subordinate branch offices with the technical capability necessary to execute assigned programs.

(c) *Branch offices.* Branch offices are managed by a Branch Manager and are located in cities within a district. Branch offices are responsible to the district office within whose boundaries it is located. Branch offices execute one or more elements of the business or disaster loan programs and have limited authority for program execution.

(d) *Disaster assistance offices.* The Office of Disaster Assistance maintains five permanent field offices which are named according to the particular functions they perform in the disaster loan making process. The office names are: Disaster Assistance Customer Service Center, Disaster Assistance Processing and Disbursement Center, Disaster Assistance Field Operations Center East, Disaster Assistance Field Operations Center West, and the Disaster Assistance Personnel and Administrative Services Center. Each office is managed by a Center Director who reports to the Deputy Associate Administrator for Disaster Assistance. The offices provide loan services to victims of declared disasters, or support the efforts of the other offices to do so. Temporary disaster offices may be established in areas where disasters have occurred.

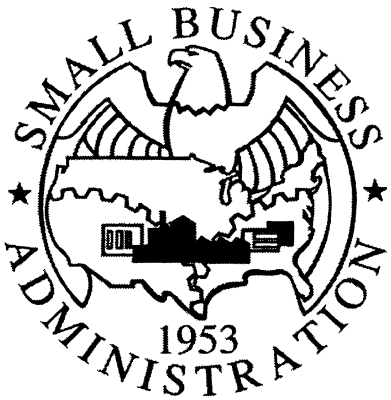
(e) *Responsibilities.* Each field office has responsibilities within a defined geographical area as periodically set forth in the FEDERAL REGISTER.

[61 FR 2394, Jan. 26, 1996, as amended at 71 FR 63676, Oct. 31, 2006]

§ 101.105 Who may use SBA's official seal and for what purpose?

(a) *General.* This section describes the official seal of the SBA and prescribes rules for its use.

(b) *Official Seal.* The official seal of the SBA is illustrated below.



(c) *Authorized Use.* The official seal and reproductions of the seal may only be used as follows:

(1) Certify and authenticate originals and copies of any books, records, papers or other documents on file within SBA or extracts taken from them or to provide certification for the purposes authorized in 28 U.S.C. 1733;

(2) SBA award certificates and medals;

(3) SBA awards for career service;

(4) Security credentials and employee identification cards;

(5) Business cards for SBA employees;

(6) Official SBA signs;

(7) Plaques; the design of the SBA seal may be incorporated in plaques for display in Agency auditoriums, presentation rooms, lobbies, offices and on buildings occupied by SBA;

(8) The SBA flag;

(9) Officially authorized reports or publications of the SBA; or

(10) For such other purposes as determined necessary by the Administrator.

(d) *Unauthorized use.* The official seal shall not be used, except as authorized by the Administrator, in connection with:

(1) Contractor operated facilities;

(2) Souvenir or novelty items;

(3) Toys or commercial gifts or premiums;

(4) Letterhead design, except on official SBA stationery;

(5) Clothing or equipment; or

(6) Any article which may disparage the seal or reflect unfavorably upon SBA.

(e) SBA's seal will not be used in any manner which implies SBA endorsement of commercial products or services or of the user's policies or activities.

(f) *Reproduction of Official Seal.* Requests for permission to reproduce the SBA seal in circumstances other than those listed in paragraph (c) of this section must be made in writing to the Administrator. The decision whether to grant permission will be made in writing on a case-by-case basis, in consultation with the General Counsel, with consideration of any relevant factors which may include the benefit or cost to the Agency of granting the request; the unintended appearance of endorsement or authentication by SBA; the potential for misuse; the reputability of the use; the extent of control by SBA over the use; and the extent of control by SBA over distribution of any products or publications bearing the SBA seal.

(g) *Penalties for Unauthorized Use.* Fraudulent or wrongful use of SBA's seal can lead to criminal penalties under 18 U.S.C. 506 or 18 U.S.C. 1017.

[72 FR 1963, Jan. 11, 2008]

§ 101.106 Does Federal law apply to SBA programs and activities?

(a) SBA makes loans and provides other services that are authorized and executed under Federal programs to achieve national purposes.

(b) The following are construed and enforced in accordance with Federal law—

(1) Instruments evidencing loans;

(2) Security interests in real or personal property payable to or held by SBA or the Administrator such as promissory notes, bonds, guarantee agreements, mortgages, and deeds of trust;

(3) Other evidences of debt or security;

(4) Contracts or agreements to which SBA is a party, unless expressly provided otherwise.

(c) To the extent feasible, SBA uses local or state procedures, especially for recordation and notification purposes, in implementing and facilitating SBA's loan programs. This use of local or state procedures is not a waiver by SBA of any Federal immunity from any local or state control, penalty, tax, or liability.

(d) No person, corporation, or organization that applies for and receives any benefit or assistance from SBA, or that offers any assurance or security upon which SBA relies for the granting of such benefit or assistance, is entitled to claim or assert any local or state law to defeat the obligation incurred in obtaining or assuring such Federal benefit or assistance.

§ 101.107 What SBA forms are approved for public use?

(a) SBA uses forms approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), as amended. You may obtain approved forms for use by the public when applying for or obtaining SBA assistance, or

when providing services for SBA, from any field office (see §101.103). You may also use forms which you have prepared yourself, or have obtained from another source, if those forms are identical in every respect to the forms approved by OMB for the same purpose.

(b) Any member of the public who has reason to believe any SBA office or agent is in violation of the Public Protection Clause of the Paperwork Reduction Act (44 U.S.C. 3512 and see 5 CFR 1320.6) should notify SBA. Direct such comments to the Director, Office of Business Operations at 409 3rd Street, SW., Washington, DC 20416.

[61 FR 2394, Jan. 26, 1996, as amended at 72 FR 50038, Aug. 30, 2007]

§ 101.108 Has SBA waived any of the public participation exemptions of the Administrative Procedure Act?

Yes. Despite these exemptions, SBA will follow the public participation requirements of the Administrative Procedure Act, 5 U.S.C. 553, in rulemakings relating to public property, loans, grants, benefits, or contracts.

§ 101.109 Do SBA regulations include the section headings?

Yes. All SBA regulations must be interpreted as including the section headings.

Subpart B—Employment of Private Counsel

§ 101.200 When does SBA hire private counsel?

(a) *Business loans.* SBA may hire private counsel to represent it in regard to business loans when the volume of activity in an area is not sufficient to require a full-time SBA employee, or the area is too remote for economical use of a full-time SBA employee.

(b) *Disaster loans.* SBA may hire private counsel in regard to disaster loans when the disaster presents an emergency and a volume of activity that cannot be promptly and economically serviced by available SBA employees.

§ 101.201 What are the minimum terms of private counsel's employment?

(a) Private counsel must perform all requested work in compliance with SBA's regulations, policies, and instructions, and take such action as is legally required under the Small Business Act, the Small Business Investment Act, and other laws applicable to SBA.

(b) Private counsel must adhere to the highest standards of professional conduct and maintain confidentiality appropriate to the attorney-client relationship.

(c) Private counsel acts under the supervision of the SBA General Counsel (and designees).

(d) Private counsel usually is compensated at an hourly rate as approved by SBA. Contingency fee agreements may be used if approved by the General Counsel.

(e) Either party may terminate the employment upon written notice.

Subpart C—Inspector General

§ 101.300 What is the Inspector General's authority to conduct audits, investigations, and inspections?

The Inspector General Act of 1978, as amended (5 U.S.C. App. 3) authorizes SBA's Inspector General to provide policy direction for, and to conduct, supervise, and coordinate such audits, investigations, and inspections relating to the programs and operations of SBA as appears necessary or desirable.

§ 101.301 Who should receive information or allegations of waste, fraud, and abuse?

The Office of Inspector General should receive all information or allegations of waste, fraud, or abuse regarding SBA programs and operations.

§ 101.302 What is the scope of the Inspector General's authority?

To obtain the necessary information and evidence, the Inspector General (and designees) have the right to:

(a) Have access to all records, reports, audits, reviews, documents, papers, recommendations, and other materials available to SBA and relating to SBA's programs and operations;

(b) Require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence;

(c) Administer oaths and affirmations or take affidavits; and

(d) Request information or assistance from any Federal, state, or local government agency or unit.

§ 101.303 How are Inspector General subpoenas served?

(a) Service of subpoenas may be effected by any of the following means—

(1) If by mail, a copy of the subpoena must be addressed to the person, partnership, corporation, or unincorporated association to be served at a residence or usual dwelling place, or a principal office or place of business, and mailed first class by registered or certified mail (postage prepaid, return receipt requested), or by a commercial or U.S. Postal Service overnight or express delivery service.

(2) If by personal delivery, a copy of the subpoena must be delivered to the person to be served, or to a member of the partnership to be served, or to an executive officer or a director of the corporation or unincorporated association to be served, or to a person authorized by appointment or by law to receive process for the person or entity named in the subpoena.

(3) If by delivery to an address, a copy of the subpoena must be left at the principal office or place of business of the person, partnership, corporation, or unincorporated association to be served, or at the residence or usual dwelling place of the person, member of the partnership, or officer or director of the corporation or unincorporated association to be served, with someone of suitable age and discretion.

(b) Proof of service—

(1) When service is by registered, certified, overnight, or express mail, it is complete upon delivery of the document by the Postal Service or commercial service.

(2) The return Postal Service receipt for a document that was registered or certified and mailed, the signed receipt for a document delivered by an overnight or express delivery service, or the Return of Service completed by the individual serving the subpoena by personal delivery shall be proof of service.

Subpart D—Intergovernmental Partnership

§ 101.400 What is the purpose of this subpart?

(a) This subpart implements section 401 of the Intergovernmental Cooperation Act (31 U.S.C. 6506 *et seq.*) which promotes intergovernmental partnership and strengthens Federalism by relying on state processes and state, area-wide, regional, and local coordination for the review of proposed Federal financial assistance and direct Federal development.

(b) While guiding SBA's management, this subpart does not create any right or benefit enforceable at law.

§ 101.401 What programs and activities of SBA are subject to this subpart?

SBA publishes in the FEDERAL REGISTER a list of programs and activities subject to this subpart.

§ 101.402 What procedures apply to the selection of SBA programs and activities?

(a) A state may—

(1) Select any program or activity published in the FEDERAL REGISTER under § 101.401 for intergovernmental review (providing it consults with local elected officials before doing so) and then notify the Administrator of the programs and activities selected; and

(2) Notify the Administrator of changes in its selections at any time. For each change, the state submits to the Administrator an assurance that it consulted with local elected officials regarding the change.

(b) SBA may establish deadlines by which states must inform the Administrator of changes in their program selections.

(c) After receiving notice of a state's selections, the Administrator uses a state's process as soon as feasible depending on individual programs and activities.

(d) ''State'' means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

§ 101.403 What are the notice and comment procedures?

(a) The Administrator provides notice to directly affected state, area-wide, regional, and local entities in a state of proposed SBA financial assistance or direct SBA development if—

(1) The state has not adopted a process under Executive Order 12372 (3 CFR, 1982 Comp., p. 197), as amended by Executive Order 12416 (3 CFR, 1983 Comp., p. 186); or

(2) The assistance or development involves a program or activity not selected for the state process.

(b) Notice may be made by publication in the FEDERAL REGISTER or other means as SBA deems appropriate.

(c) Except in unusual circumstances the Administrator gives state processes or directly affected state, area-wide, regional, and local officials and entities at least 60 days to comment on proposed SBA financial assistance or direct SBA development.

(d) In cases where SBA delegates the review, coordination, and communication authority under this subpart, this section also applies.

§ 101.404 How does the Administrator receive comments?

(a) The Administrator follows the procedures of § 101.405 if—

(1) A state office or official is designated to act as a single point of contact between a state process and all Federal agencies; and

(2) That office or official transmits a state process recommendation for a program selected under § 101.402(a).

(b)(1) The single point of contact is not obligated to transmit comments from state, area-wide, regional, or local officials and entities where there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from state, area-wide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, area-wide, regional, and local officials and entities may submit comments to SBA.

(d) If a program or activity is not selected for a state process, state, area-wide, regional, and local officials and entities may submit comments to SBA. In addition, if a state process recommendation for a non-selected program or activity is transmitted to SBA by the single point of contact, the Administrator follows the procedures of § 101.405.

(e) The Administrator considers comments which do not constitute a state process recommendation submitted under this subpart and for which the Administrator is not required to apply the procedures of § 101.405 when such comments are provided by a single point of contact directly to SBA by a commenting party.

§ 101.405 How does the Administrator respond to comments?

(a) If a state process provides a recommendation to SBA through its single point of contact, the Administrator:

(1) Accepts the recommendation; or

(2) Reaches a mutually agreeable solution with the state process; or

(3) Provides the single point of contact with a written explanation of the decision in a form the Administrator deems appropriate. The Administrator may also supplement the written explanation by telephone or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Administrator informs the single point of contact that—

(1) SBA will not implement its decision for at least 10 days after the single point of contact receives the explanation; or

(2) Because of unusual circumstances the waiting period of at least 10 days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing.

§ 101.406 What are the Administrator's responsibilities in interstate situations?

The Administrator is responsible for—

(a) Identifying proposed SBA financial assistance and direct SBA development that have an impact on interstate areas;

(b) Notifying appropriate officials and entities in states which have adopted a process and selected an SBA program or activity;

(c) Making efforts to identify and notify the affected state, area-wide, regional, and local officials and entities in states that have not adopted a process or selected an SBA program or activity;

(d) Using the procedures of §101.405 if a recommendation of a designated area-wide agency is transmitted by a single point of contact in cases in which the review, coordination, and communication with SBA has been delegated; and

(e) Using the procedures of §101.405 if a state process provides a state recommendation to SBA through a single point of contact.

§101.407 May the Administrator waive these regulations?

The Administrator may waive any provision of §§101.400 through and including 101.406 in an emergency.

Subpart E—Small Business Energy Efficiency

§101.500 Small Business Energy Efficiency Program.

(a) The Administration has developed and coordinated a Government-wide program, which is located at *http://www.sba.gov/energy*, building on the Energy Star for Small Business Program, to assist small business concerns in becoming more energy efficient, understanding the cost savings from improved energy efficiency, and identifying financing options for energy efficiency upgrades.

(b) The Program has been developed and coordinated in consultation with the Secretary of the Department of Energy and the Administrator of the Environmental Protection Agency, and in cooperation with entities the Administrator has considered appropriate, for example, such as industry trade associations, industry members, and energy efficiency organizations. SBA's Office of Policy and Strategic Planning will be responsible for overseeing the program but will coordinate with the Department of Energy and EPA.

(c) The Administration is distributing and making available online, the information and materials developed under the program to small business concerns, including smaller design, engineering, and construction firms, and other Federal programs for energy efficiency, such as the Energy Star for Small Business Program.

(d) The Administration will develop a strategy to educate, encourage, and assist small business concerns in adopting energy efficient building fixtures and equipment.

[73 FR 61666, Oct. 17, 2008]

PART 102—RECORD DISCLOSURE AND PRIVACY

Subpart A—Disclosure of Information

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102.2 Proactive disclosure of records.
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102.4 Responsibility for responding to requests.
102.5 Timing of responses to requests.
102.6 Responses to requests.
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102.9 Administrative appeals.
102.10 Preservation of records.
102.11 Subpoenas.

APPENDIX A TO SUBPART A OF PART 102—RECORDS MAINTAINED BY SBA

Subpart B—Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974

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AUTHORITY: 5 U.S.C. 301, 552, 552a; 31 U.S.C. 3717, 9701; 44 U.S.C. 3501.

SOURCE: 61 FR 2673, Jan. 29, 1996, unless otherwise noted.

Subpart A—Disclosure of Information

SOURCE: 82 FR 46371, Oct. 5, 2017, unless otherwise noted.

§ 102.1 General provisions.

(a) This subpart contains the rules that SBA follows in processing requests for records under the Freedom of Information Act (''FOIA''), 5 U.S.C. 552. The rules in this subpart should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (''OMB Guidelines''). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed under subpart B of this part as well as under this subpart.

(b) As referenced in this subpart, ''component'' means each separate bureau, office, division, district office, regional office, area office, service center, loan processing center or central office duty location within the SBA that is responsible for processing FOIA requests. See appendix A to this subpart for a list of information generally exempt from disclosure. For contact information for each office visit *https://www.sba.gov/foia* and for a detailed description of the function of each office to help ascertain the types of records maintained by each component, please visit *https://www.sba.gov/about-sba*. The rules described in this regulation that apply to SBA also apply to its components.

(c) The SBA has a decentralized system for processing requests, with each component handling requests for its records.

(d) The term record means:

(1) Any information that would be an agency record subject to the requirements of this section when maintained by SBA in any format, including written or electronic format; and

(2) Any information described under paragraph (d)(1) of this section that is maintained for SBA by an entity under Government contract, for purposes of records management.

§ 102.2 Proactive disclosure of records.

Records that are required by the FOIA to be made available for public inspection in an electronic format may be accessed through the SBA's Web site at *https://www.sba.gov/foia*. Each component of SBA is responsible for determining which of its records are required to be made publicly available, as well as for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. Each component shall ensure that its Web site of posted records and indices is reviewed and updated on an ongoing basis. Each component has a FOIA Public Liaison who can assist individuals in locating records particular to a component. A list of the SBA's FOIA Public Liaisons is available at *https://www.sba.gov/foia*.

§ 102.3 Requirements pertaining to the submission of requests.

(a) *General information.* (1) The SBA has a decentralized system for responding to FOIA requests, with each component handling requests for its records. All components have the capability to receive requests electronically either through email or a web portal. To make a request for records, a requester should write directly to the Freedom of Information/Privacy Acts (FOI/PA) Office by mail to 409 3rd St SW., Washington, DC 20416 or submit a fax to 202–205–7059 or email to *foia@sba.gov*. Requesters may also submit their request through the FOIA online portal at

https://foiaonline.regulations.gov/foia/action/public/home. Additional information for submitting a request to SBA is listed at *https://www.sba.gov/foia*. However, a request will receive the quickest possible response if it is addressed to the component that maintains the records sought.

(2) A requester who is making a request for records about himself or herself must comply with the verification of identity provision set forth in subpart B of this part. The Certification of Identity form, available at *http://www.justice.gov/oip/forms/cert_ind.pdf*, may be used by individuals who are making requests for records pertaining to themselves.

(3) Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). As an exercise of administrative discretion, each component can require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

(b) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable agency personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help the component in identifying the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, reference number, the timeframe for which the records are sought, the office that created the records, or any other information that will assist the component in locating documents responsive to the request. Before submitting their requests, requesters may contact the component's FOIA Contact or FOIA Public Liaison to discuss the records they are seeking and to receive assistance in describing the records. If, after receiving a request, a component determines that the request does not adequately describe the records sought, the component will inform the requester what additional information is needed or why the request is otherwise insufficient. The component will also notify the requester that it will not be able to comply with their request unless the additional information it has requested is received from them in writing within 20 working days after the component has requested it. If this type of notification is received, a requester may wish to discuss it with the FOIA Public Liaison. If the component does not receive a written response containing the additional information within 20 working days after it has been requested, the SBA will presume that the requester is no longer interested in the records and will close the file on the request. Requesters who are attempting to reformulate or modify such a request may discuss their request with the component's designated FOIA Contact or its FOIA Public Liaison, or a representative of the FOI/PA Office, each of whom is available to assist the requester in reasonably describing the records sought. If a request does not reasonably describe the records sought, the SBA's response to the request may be delayed.

(c) *Form or format.* Requests may specify the preferred form or format (including electronic formats) for the records sought. The SBA will accommodate the request if the record is readily reproducible in that form or format.

(d) *Contact information.* Requesters must provide contact information, such as their phone number, email address, and mailing address, to assist the SBA in communicating with the requester and providing the released records.

§ 102.4 Responsibility for responding to requests.

(a) *In general.* Except in the instances described in paragraphs (c) and (d) of this section, the component that first receives a request for a record and maintains that record is the component responsible for responding to the request. In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date

that it begins its search. If any other date is used, the component shall inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c) is not considered responsive to a request.

(b) *Authority to grant or deny requests.* The head of a component, or designee, is authorized to grant or to deny any requests for records that are maintained by that component.

(c) *Re-routing of misdirected requests.* Where a component determines that a request was misdirected within the SBA, the receiving component shall route the request to the proper component(s).

(d) *Consultation, referral, and coordination.* When reviewing records located by a component in response to a request, the component shall determine whether another component of SBA or another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the component shall proceed in one of the following ways:

(1) *Consultation.* When records originated with the component processing the request, but contain within them information of interest to another component, agency, or other Federal Government office, the component processing the request should typically consult with that other component or agency prior to making a release determination.

(2) *Referral.* (i) When the component processing the request believes that a different component, agency, or other Federal Government office is best able to determine whether to disclose the record, the component typically should refer the responsibility for responding to the request regarding that record, as long as the referral is to a component or agency that is subject to the FOIA. Ordinarily, the component or agency that originated the record will be presumed to be best able to make the disclosure determination. However, if the component processing the request and the originating component or agency jointly agrees that the former is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever a component refers any part of the responsibility for responding to a request to another component or agency, it shall document the referral, maintain a copy of the record that it refers, and notify the requester of the referral and inform the requester of the name(s) of the component or agency to which the record was referred, including that component's or agency's FOIA Contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the component or agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement component responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if a component locates within its files material originating with an Intelligence Community agency and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the component that received the request should coordinate with the originating component or agency to seek its views on the disclosure of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the component that originally received the request.

(e) *Classified information.* On receipt of any request involving classified information, the component shall determine whether the information is currently and properly classified and take appropriate action to ensure compliance. Whenever a request involves a record containing information that has been classified or may be appropriate

for classification by another component or agency under any applicable executive order concerning the classification of records, the receiving component shall refer the responsibility for responding to the request regarding that information to the component or agency that classified the information, or that should consider the information for classification. Whenever a component's record contains information that has been derivatively classified (for example, when it contains information classified by another component or agency), the component shall refer the responsibility for responding to that portion of the request to the component or agency that classified the underlying information.

(f) *Agreements regarding consultations and referrals.* Components of SBA may establish agreements with other components of SBA or other Federal agencies to eliminate the need for consultations or referrals with respect to particular types of records.

(g) *Timing of responses to consultations and referrals.* All consultations and referrals received by the SBA will be handled according to the date that the FOIA request initially was received by the first component or agency.

§ 102.5 Timing of responses to requests.

(a) *In general.* Components ordinarily will respond to requests according to their order of receipt. In instances involving misdirected requests that are re-routed pursuant to §102.4(c), the response time will commence on the date that the request is received by the proper component's office that is designated to receive requests, but in any event not later than 10 working days after the request is first received by any component's office that is designated by these regulations to receive requests.

(b) *Multitrack processing.* All components will designate a specific track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (e) of this section. A component may also designate additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. Among the factors that may be considered are the number of records requested, the number of pages involved in processing the request and the need for consultations or referrals. Components shall advise requesters of the track into which their request falls and, when appropriate, should offer the requester an opportunity to narrow or modify the request so that it can be placed in a different processing track.

(c) *Unusual circumstances.* Whenever the statutory time limit for processing a request cannot be met because of ''unusual circumstances,'' as defined in the FOIA, and the component extends the time limit on that basis, the component shall, before expiration of the 20-working day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which the component estimates processing of the request will be completed. Where the extension exceeds 10 working days, the component shall, as prescribed by the FOIA, provide the requester with an opportunity to modify the request or to arrange an alternative time period for processing the original or modified request. The component shall make available its designated FOIA Contact or its FOIA Public Liaison for this purpose. The component must also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(d) *Aggregating requests.* For the purposes of determining unusual circumstances under the FOIA, components may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. Components shall not aggregate multiple requests that involve unrelated matters.

(e) *Expedited processing.* (1) Requests and appeals shall be processed on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information.

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (e)(1)(i) through (iii) of this section must be submitted to the component that maintains the records requested. When making a request for expedited processing of an administrative appeal, the request should be submitted to the FOI/PA Office. Requests for expedited processing that are based on paragraph (e)(1)(iv) of this section must be submitted to the component processing the request. A component that receives a misdirected request for expedited processing under the standard set forth in paragraph (e)(1)(iv) of this section shall forward it immediately to the FOI/PA Office for its determination. The time period for making the determination on the request for expedited processing under paragraph (e)(1)(iv) of this section shall commence on the date that the FOI/PA Office receives the request, provided that it is routed within 10 working days.

(3) A requester who seeks expedited processing must submit a notarized statement, such as an affidavit or declaration, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an ''urgency to inform'' the public on the topic. As a matter of administrative discretion, the SBA may waive the formal certification requirement.

(4) A component shall notify the requester within 10 working days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request must be given priority, placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.

§ 102.6 Responses to requests.

(a) *In general.* Components should, to the extent practicable, communicate with requesters having access to the Internet using electronic means, such as email or web portal.

(b) *Acknowledgments of requests.* A component shall acknowledge the request in writing and assign it an individualized tracking number. Components shall include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) *Estimated dates of completion and interim responses.* Upon request, components shall provide an estimated date by which they expect to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the SBA or component may provide interim responses, releasing the records on a rolling basis.

(d) *Grants of requests.* Once a component determines it will grant a request in full or in part, it will notify the requester in writing. The component shall inform the requester of any fees charged under §102.8 and shall disclose the requested records to the requester promptly upon payment of any applicable fees. The component must inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(e) *Adverse determinations of requests.* A component making an adverse determination denying a request in any respect shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, include denials involving fees or fee waiver matters, denials of requests for expedited processing, and decisions where:

(1) The requested record is exempt, in whole or in part;

(2) The request does not reasonably describe the records sought;

(3) The information requested is not a record subject to the FOIA;

(4) The requested record does not exist, cannot be located, or has been destroyed; or

(5) The requested record is not readily reproducible in the form or format sought by the requester.

(f) *Content of denial.* The denial must be signed by the head of the component or designee and must include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the component in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;

(4) A statement that the denial may be appealed under §102.9, and a description of the appeal requirements; and

(5) A statement notifying the requester of the assistance available from the component's FOIA Public Liaison or designee, and the dispute resolution services offered by OGIS.

(g) *Markings on released documents.* Records disclosed in part must be marked clearly to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption.

§102.7 Confidential commercial information.

(a) *Definitions.* For purposes of this section:

Confidential commercial information means commercial or financial information obtained by the SBA from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

Submitter means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, either at the time of submission or within a reasonable time thereafter, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations shall expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) A component shall promptly provide written notice to a submitter of confidential commercial information whenever records containing such information are requested under the FOIA if, after reviewing the request, the responsive records, and any appeal by the requester, the component determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The component has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure under that exemption or any other applicable exemption.

(2) The notice shall either describe the commercial information requested or include a copy of the requested

records or portions of records containing the information. In cases involving a voluminous number of submitters, notice may be made by posting or publishing the notice in a place or manner reasonably likely to accomplish it.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section shall not apply if:

(1) The component determines that the information is exempt under the FOIA;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous, except that, in such a case, the component shall give the submitter written notice of any final decision to disclose the information and must provide that notice within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) A component shall specify a reasonable time period within which the submitter must respond to the notice referenced above. If the submitter has any objections to disclosure, it should provide the component a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as the basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential.

(2) A submitter who fails to respond within the time period specified in the notice shall be considered to have no objection to disclosure of the information. Information received by the component after the date of any disclosure decision shall not be considered by the component. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* A component shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever a component decides to disclose information over the objection of a submitter, the component shall provide the submitter written notice, which shall include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

§ 102.8 Fees.

(a) *In general.* Components shall charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. In order to resolve any fee issues that arise under this section, a component may contact a requester for additional information. Components shall ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. A component ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Small Business Administration, addressed to the component assessing the fee.

(b) *Categories of requesters.* Different fees are assessed depending on the requester category. Requesters may seek a fee waiver. Requests for fee waivers will be considered in accordance with the requirements in paragraph (l) of this section. For purposes of assessing fees, the FOIA establishes four categories of requesters:

(1) Commercial use requesters;

(2) Non-commercial scientific/educational institutions requesters;

(3) News media requesters, and;

(4) All other requesters.

(c) *Definitions.* For purposes of this section:

(1) *Commercial use request* is a request that asks for information for a use or a purpose that furthers a commercial,

trade, or profit interest, which can include furthering those interests through litigation. A component's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information.

(2) *Direct costs* are those expenses that the SBA incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (*i.e.*, the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility. This will be in addition to search, review, and duplication fees, and shall be paid by requesters categorized as commercial and other.

(3) *Duplication* is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

(4) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. Components may seek verification from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this category.

Example 1 to paragraph (c)(4). A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

Example 2 to paragraph (c)(4). A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

Example 3 to paragraph (c)(4). A student, who makes a request in furtherance of their coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

(5) *Noncommercial scientific institution* is an institution that is not operated on a ''commercial'' basis, as defined in paragraph (c)(1) of this section and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

(6) *Representative of the news media* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast ''news'' to the public at large and publishers of periodicals that disseminate ''news'' and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. ''Freelance'' journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, a requester's past publication record will be considered in making a determination.

(7) *Review* is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of

redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under §102.7, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(d) *Charging fees.* In responding to FOIA requests, components will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (l) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, components will not add any additional costs to charges calculated under this section.

(1) *Search.* (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. Search fees shall be charged for all other requesters, subject to the restrictions of paragraph (e) of this section. Components may properly charge for time spent searching even if they do not locate any responsive records or if they determine that the records are entirely exempt from disclosure.

(ii) For each hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be charged as follows: Professional (GS 9–14)—$46; and managerial (GS 15 and above)—$83.

(iii) Requesters shall be charged the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. Requesters shall be notified of the costs associated with creating such a program and must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored by SBA at a Federal Records Center operated by the National Archives and Records Administration (NARA), additional costs shall be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication.* Duplication fees will be assessed to all requesters, subject to the restrictions of paragraph (e) of this section. A component shall honor a requester's preference for receiving a record in a particular form or format where it can be readily reproduced in the form or format requested. Where photocopies are supplied, SBA will provide one copy per request at the cost of $.10 per page. For copies of records produced on tapes, disks, or other media, SBA will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester must also pay the direct costs associated with scanning those materials. For other forms of duplication, components shall charge the direct costs.

(3) *Review.* (i) Review fees will be assessed to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, *i.e.,* the review conducted by a component to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with SBA's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (d)(1)(ii) of this section.

(ii) The following table summarizes the fees for each type of requester.

TABLE 1 TO § 102.8—SUMMARY OF FEES

Requester category	Search	Review	Duplication fees	Direct costs
Commercial Use	Yes	Yes	Yes	Yes.
Educational/Noncommercial Scientific Institutions.	No	No	Yes (first 100 pages, or equivalent volume free).	No.
News Media	No	No	Yes (first 100 pages, or equivalent volume free).	No.
All Others	Yes (first 2 hours free)	No	Yes (first 100 pages, or equivalent volume free).	Yes.

(e) *Restrictions on charging fees.* (1) When a component determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, it will not charge search fees.

(i) If a component fails to comply with the time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (c)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(1)(ii) through (iv) of this section.

(ii) If a component has determined that unusual circumstances as defined by the FOIA apply and SBA provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 working days.

(iii) If a component has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, the component may charge search fees, or, in the case of requesters described in paragraph (c)(1) of this section, may charge duplication fees, if the following steps are taken. The component shall provide a timely written notice of unusual circumstances to the requester in accordance with the FOIA and SBA must have discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the component may charge all applicable fees incurred in the processing of the request.

(iv) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(2) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(3) Except for requesters seeking records for a commercial use, components shall provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(4) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than $46.00.

(f) *Notice of anticipated fees in excess of $46.00.* (1) When a component determines or estimates that the fees to be assessed in accordance with this section will exceed $46.00, the component shall notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review, or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the component shall advise the requester accordingly. If the request is not for noncommercial use, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) In cases in which a requester has been notified that the actual or estimated fees are in excess of $46.00, the

request shall not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. Components are not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the component estimates that the total fee will exceed that amount, the component will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The component shall inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) Components shall make available their FOIA Public Liaison or other designee to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(g) *Charges for other services.* Although not required to provide special services, if a component chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(h) *Charging interest.* Components may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the component. Components shall follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(i) *Aggregating requests.* When a component reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the component may aggregate those requests and charge accordingly. Components may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, components shall aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters cannot be aggregated.

(j) *Advance payments.* (1) For requests other than those described in paragraphs (j)(2) or (j)(3) of this section, components cannot require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (*i.e.*, payment before copies are sent to a requester) is not an advance payment.

(2) When a component determines or estimates that a total fee to be charged under this section will exceed $250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. Components may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to any component or SBA within 30 working days of the billing date, a component may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the component may require that the requester make an advance payment of the full amount of any anticipated fee before SBA begins

to process a new request or continues to process a pending request or any pending appeal. When a component has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which advanced payment is required, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 working days after the date of the fee determination, the request will be closed.

(k) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires SBA to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the requester will be informed of the contact information for that program.

(l) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting written correspondence demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Records responsive to a request shall be furnished without charge or at a reduced rate below the rate established under paragraph (d) of this section, where a component determines, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) Components shall furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (l)(2)(i) through (iii) of this section are satisfied:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. Components shall presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, the following criteria will be considered:

(A) Identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, a determination will be made whether the primary interest is furthered by the request. A waiver or

reduction of fees is justified when the requirements of paragraphs (l)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. Ordinarily there will be a presumption, that when a news media requester has satisfied factors (l)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver must be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

§ 102.9 Administrative appeals.

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations to the FOI/PA Office. The contact information is contained in § 102.3(a)(1). Examples of adverse determinations are provided in § 102.6(e). The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 working days after the date of the response. The appeal should clearly identify the component's determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, ''Freedom of Information Act Appeal.''

(b) *Adjudication of appeals.* (1) The Chief, FOI/PA or designee will act on behalf of the SBA on all appeals under this section.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(3) On receipt of any appeal involving classified information, the FOI/PA Office shall take appropriate action to ensure compliance with Executive Orders 13467 and 13526.

(c) *Decisions on appeals.* A decision on an appeal will be made in writing. A decision that upholds a component's determination will contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the mediation services offered by OGIS as a non-exclusive alternative to litigation. If a component's decision is remanded or modified on appeal, the requester will be notified of that determination in writing. The component will thereafter, further process the request in accordance with that appeal determination and respond directly to the requester.

(d) Time limit for issuing appeal decision. The statutory time limit for responding to appeals is generally 20 working days after receipt. However, the Appeals Officer may extend the time limit for responding to an appeal provided the circumstances set forth in 5 U.S.C. 552(a)(6)(B)(i) are met.

(e) *Engaging in dispute resolution services provided by OGIS.* Mediation is a voluntary process. If a component agrees to participate in the mediation services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(f) *When an appeal is required.* Before seeking review by a court of a component's adverse determination, a requester generally must first submit a timely administrative appeal.

§ 102.10 Preservation of records.

Each component shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44

of the United States Code or the General Records Schedule 14 of the National Archives and Records Administration. Records shall not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 102.11 Subpoenas.

(a) The person to whom the subpoena is directed must consult with SBA counsel in the relevant SBA office, who will seek approval for compliance from the Associate General Counsel for Litigation. Except where the subpoena requires the testimony of an employee of the Inspector General's office, or records within the possession of the Inspector General, the Associate General Counsel may delegate the authorization for appropriate production of documents or testimony to local SBA counsel.

(b) If SBA counsel approves compliance with the subpoena, SBA will comply.

(c) If SBA counsel disapproves compliance with the subpoena, SBA will not comply, and will base such noncompliance on an appropriate legal basis such as privilege or a statute.

(d) SBA counsel must provide a copy of any subpoena relating to a criminal matter to SBA's Inspector General prior to its return date.

Appendix A to Subpart A of Part 102—Records Maintained by SBA

I. Information Generally Exempt From Disclosure

a. Non-statistical information on pending, declined, withdrawn, or canceled applications.

b. Non-statistical information on defaults, delinquencies, losses etc.

c. Loan status, other than charged-off or paid-in-full.

d. Home disaster loan status and interest rate.

e. Financial statements, credit reports, business plans, plant lay-outs, marketing strategy, advertising plans, fiscal projections, pricing information, payroll information, private sector experience and contracts, IRS forms, purchase information, banking information, corporate structure, research plans and client list of applicant/recipient.

f. Portions of: Certificate of Competency records, Requests for Size Determinations, 8(a) Business Development Plans, loan applications, SBIC applications, loan officer's reports.

g. Internal documents not incorporated into final Agency action, pending internal recommendations on applications for assistance, SBA/attorney-client communications, pending litigation documents and investigatory documents. Discretionary disclosure policy must be utilized.

h. Personal history and financial statements, tax forms, resumes, all non-government career experience, communications regarding applicant's character, home addresses and telephone numbers, social security numbers, birth dates and medical records. Portions of Inspector General (IG) reports, audit reports, program investigation records and any other records which, if released, would interfere with the Government's law enforcement proceedings and/or would reveal the identity of a confidential source and documents relating to pending litigation and investigations. Requests for IG documents must be referred to the Office of the Inspector General, Counsel Division.

i. Financial information on portfolio companies.

j. Information originating from other agencies should be referred to those agencies for disclosure determinations.

II. Information Generally Disclosed

a. Names and business addresses of recipients of approved loans, SBIC licenses, Certificates of Competency, lease guarantees, surety bond guarantees and requests for counseling.

b. Names of officers, directors, stockholders or partners of recipient firms.

c. Kinds and amounts of loans, loan terms, interest rates (except on home disaster loans), maturity dates, general purpose, etc.

d. Statistical data on assistance, loans, defaults, contracts, counseling, etc.

e. Decisions, rulings and records showing final Agency actions in specific factual situations if identifying details exempt from disclosure are first deleted.

f. Awarded contracts: names, amounts, dates, contracting agencies.

g. Identity of participating banks.

h. List of 8(a) participants, date of entry, FPPT dates and NAICS codes.

i. OHA opinions and decisions.

j. Names of SBA employees, grades, titles, and duty stations.

Subpart B—Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974

Source: 72 FR 17369, Apr. 9, 2007, unless otherwise noted.

§ 102.20 General provisions.

(a) *Purpose and scope.* This subpart implements the provisions of the Privacy Act of 1974, 5 U.S.C. 552a. These regulations apply to all records which are contained in systems of records maintained by the U.S. Small Business Administration (SBA) and that are retrieved by an individual's name or personal identifier. These regulations set forth the procedures by which individuals may request access to records about themselves, request amendment or correction of those records, and request an accounting of disclosures of those records by the SBA. These regulations also set forth the requirements applicable to SBA employees maintaining, collecting, using or disseminating records pertaining to individuals. This subpart applies to SBA and all of its offices and is mandatory for use by all SBA employees.

(b) *Definitions.* As used in this subpart:

(1) *Agency* means the U.S. Small Business Administration (SBA) and includes all of its offices wherever located;

(2) *Employee* means any employee of the SBA, regardless of grade, status, category or place of employment;

(3) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence. This term shall not encompass entrepreneurial enterprises (e.g. sole proprietors, partnerships, corporations, or other forms of business entities);

(4) *Maintain* includes maintain, collect, use, or disseminate;

(5) *Record* means any item, collection, or grouping of information about an individual that is maintained by the SBA, including, but not limited to education, financial transactions, medical history, and criminal or employment history and that contains the individual's name, or an identifying number, symbol, or other identifying particular assigned to the individual such as a finger or voice print or photograph;

(6) *System of records* means a group of any records under the control of SBA from which information is retrieved by the name of the individual or by an identifying number, symbol, or other identifying particular assigned to the individual;

(7) *Statistical record* means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual;

(8) *Routine use* means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(9) *Request for access* to a record means a request made under Privacy Act subsection (d)(1) allowing an individual to gain access to his or her record or to any information pertaining to him or her which is contained in a system of records;

(10) *Request for amendment or correction* of a record means a request made under Privacy Act subsection (d)(2), permitting an individual to request amendment or correction of a record that he or she believes is not accurate, relevant, timely, or complete;

(11) *Request for an accounting* means a request made under Privacy Act subsection (c)(3) allowing an individual to request an accounting of any disclosure to any SBA officers and employees who have a need for the record in the performance of their duties;

(12) *Requester* is an individual who makes a request for access, a request for amendment or correction, or a request for an accounting under the Privacy Act; and

(13) *Authority to request records for a law enforcement purpose* means that the head of an Agency or a United States Attorney, or either's designee, is authorized to make written requests under subsection (b)(7) of the Privacy Act for records maintained by other agencies that are necessary to carry out an authorized law enforcement activity.

§ 102.21 Agency employees responsible for the Privacy Act of 1974.

(a) *Program/Support Office Head* is the SBA employee in each field office and major program and support area responsible for implementing and overseeing this regulation in that office.

(b) *Privacy Act Systems Manager* (PASM) is the designated SBA employee in each office responsible for the development and management of any

Privacy Act systems of records in that office.

(c) *Senior Agency Official for Privacy* is SBA's Chief Information Officer (CIO) who has overall responsibility and accountability for ensuring the SBA's implementation of information privacy protections, including the SBA's full compliance with Federal laws, regulations, and policies relating to information privacy such as the Privacy Act and the E-Government Act of 2002.

(d) *Chief, Freedom of Information/Privacy Acts (FOI/PA) Office* oversees and implements the record access, amendment, and correction provisions of the Privacy Act.

§ 102.22 Requirements relating to systems of records.

(a) *In general.* Each SBA office shall, in accordance with the Privacy Act:

(1) Maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the Agency required to be accomplished by a statute or by Executive Order of the President;

(2) Collect information to the greatest extent practicable directly from the subject individual when the information may affect an individual's rights, benefits, and privileges under Federal programs;

(b) *Requests for information from individuals.* If a form is being used to collect information from individuals, either the form used to collect the information, or a separate form that can be retained by the individual, must state the following:

(1) The authority (whether granted by statute, or by Executive Order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(2) The principal purpose or purposes for which the information is intended to be used;

(3) The routine uses which may be made of the information; and

(4) The effects on such individual, if any, of not providing all or any part of the requested information.

(c) *Report on new systems.* Each SBA office shall provide adequate advance notice to Congress and OMB through the FOI/PA Office of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals.

(d) *Accurate and secure maintenance of records.* Each SBA office shall:

(1) Maintain all records which are used in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(2) Prior to disseminating any record from a system of records about an individual to any requestor, including an agency, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for SBA purposes; and

(3) Establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.

(i) PASMs, with the approval of the head of their offices, shall establish administrative and physical controls, consistent with SBA regulations, to insure the protection of records systems from unauthorized access or disclosure and from physical damage or destruction. The controls instituted shall be proportional to the degree of sensitivity of the records but at a minimum must ensure that records other than those available to the general public under the FOIA, are protected from public view, that the area in which the records are stored is supervised during all business hours and physically secured during non-business hours to prevent unauthorized personnel from obtaining access to the records.

(ii) PASMs, with the approval of the head of their offices, shall adopt access restrictions to insure that only those individuals within the agency who have a need to have access to the records for the performance of their duties have access to them. Procedures shall also

be adopted to prevent accidental access to, or dissemination of, records.

(e) *Prohibition against maintenance of records concerning First Amendment rights.* No SBA office shall maintain a record describing how any individual exercises rights guaranteed by the First Amendment (e.g. speech), unless the maintenance of such record is:

(1) Expressly authorized by statute, or

(2) Expressly authorized by the individual about whom the record is maintained, or

(3) Pertinent to and within the scope of an authorized law enforcement activity.

§ 102.23 Publication in the Federal Register—Notices of systems of records.

(a) *Notices of systems of records to be published in the* FEDERAL REGISTER. (1) The SBA shall publish in the FEDERAL REGISTER upon establishment or revision a notice of the existence and character of any new or revised systems of records. Unless otherwise instructed, each notice shall include:

(i) The name and location of the system;

(ii) The categories of individuals on who records are maintained in the system;

(iii) The categories of records maintained in the system;

(iv) Each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(v) The policies and practices of the office regarding storage, retrievability, access controls, retention, and disposal of the records;

(vi) The title and business address of the SBA official who is responsible for the system of records;

(vii) A statement that SBA procedures allow an individual, at his or her request, to determine whether a system of records contains a record pertaining to him or her, to review such records and to contest or amend such records, located in sections 102.25 through 102.29 of these regulations.

(viii) A statement that such requests may be directed to the SBA's FOI/PA Office, 409 3rd St., SW., Washington, DC 20416 or faxed to 202–205–7059; and

(ix) The categories of sources of records in the system.

(2) Minor changes to systems of records shall be published annually.

(b) *Notice of new or modified routine uses to be published in the* FEDERAL REGISTER. At least 30 days prior to disclosing records pursuant to a new use or modification of a routine use, as published under paragraph (a)(1)(iv) of this section, each SBA office shall publish in the FEDERAL REGISTER notice of such new or modified use of the information in the system and provide an opportunity for any individual or persons to submit written comments.

§ 102.24 Requests for access to records.

(a) *How made and addressed.* An individual, or his or her legal guardian, may make a request for access to an SBA record about himself or herself by appearing in person or by writing directly to the SBA office that maintains the record or to the FOI/PA Office by mail to 409 3rd St., SW., Washington, DC 20416 or fax to 202–205–7059. A request received by the FOI/PA Office will be forwarded to the appropriate SBA Office where the records are located.

(b) *Description of records sought.* A request for access to records must describe the records sought in sufficient detail to enable SBA personnel to locate the system of records containing them with a reasonable amount of effort. A request should also state the date of the record or time period in which the record was compiled, and the name or identifying number of each system of records in which the requester believes the record is kept. The SBA publishes notices in the FEDERAL REGISTER that describe its systems of records. A description of the SBA's systems of records also may be found at *http://www.sba.gov/foia/systemrecords.doc.*

(c) *Verification of identity.* Any individual who submits a request for access to records must verify his or her identity. No specific form is required; however, the requester must state his or her full name, current address, and date and place of birth. The request must be signed and the requester's signature must either be notarized or submitted under 28 U.S.C. 1746. This law

permits statements to be made under penalty of perjury as a substitute for notarization, the language states:

(1) If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). Signature''; or

(2) If executed within the Untied States, its territories, possessions or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). Signature''.

(d) *Verification of guardianship.* When making a request as a legal agent or the parent or guardian of a minor or as the guardian of someone determined by a court to be incompetent, for access to records about that individual, the requester must establish:

(1) The identity of the individual who is the subject of the record, by stating the name, current address, date and place of birth, and, at the requester's option, the social security number of the individual;

(2) The requester's own identity, as required in paragraph (c) of this section;

(3) That the requester is the legal agent or parent or guardian of that individual, which may be proven by providing a copy of the individual's birth certificate showing his parentage or by providing a court order establishing guardianship; and

(4) That the requester is acting on behalf of that individual in making the request.

§ 102.25 Responsibility for responding to requests for access to records.

(a) *In general.* Except as stated in paragraphs (c), (d), and (e) of this section and in §102.24(a), the office that first receives a request for access to a record, and has possession of that record, is the office responsible for responding to the request. That office shall acknowledge receipt of the request not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of the request in writing. In determining which records are responsive to a request, an office ordinarily shall include only those records in its possession as of the date the office begins its search for them. If any other date is used, the office shall inform the requester of that date.

(b) *Authority to grant or deny requests.* The Program/Support Office Head, or designee, is authorized to grant or deny any request for access to a record of that office.

(c) *Consultations and referrals.* When an office receives a request for access to a record in its possession, it shall determine whether another office, or another agency of the Federal Government, is better able to determine whether the record is exempt from access under the Privacy Act. If the receiving office determines that it is best able to process the record in response to the request, then it shall do so. If the receiving office determines that it is not best able to process the record, then it shall either:

(1) Respond to the request regarding that record, after consulting with the office or agency best able to determine whether the record is exempt from access and with any other office or agency that has a substantial interest in it; or

(2) Refer the responsibility for responding to the request to the office best able to determine whether the record is exempt from access or to another agency that originated the record (but only if that agency is subject to the Privacy Act). Ordinarily the office or agency that originated a record will be presumed to be best able to determine whether it is exempt from access.

(d) *Law enforcement information.* Whenever a request is made for access to a record containing information that relates to an investigation of a possible violation of law and that was originated by SBA's Office of the Inspector General (OIG) or another agency, the receiving office shall refer the responsibility for responding to the request regarding that information to either SBA's OIG or the other agency ''depending on where the investigation originated.''

(e) *Classified information.* Whenever a request is made for access to a record containing information that has been classified by or may be appropriate for

classification by another office or agency under Executive Order 12958 or any other executive order concerning the classification of records, the receiving office shall refer the responsibility for responding to the request regarding that information to the office or agency that classified the information, should consider the information for classification, or has the primary interest in it, as appropriate. Whenever a record contains information that has been derivatively classified by an office because it contains information classified by another office or agency, the office shall refer the responsibility for responding to the request regarding that information to the office or agency that classified the underlying information. Information determined to no longer require classification shall not be withheld from a requester on the basis of Exemption (k)(1) of the Privacy Act.

(f) *Notice of referral.* Whenever an office refers all or any part of the responsibility for responding to a request to another office or agency, it shall notify the requester of the referral and inform the requester of the name of each office or agency to which the request has been referred and of the part of the request that has been referred.

(g) *Responses to consultations and referrals.* All consultations and referrals shall be processed according to the date the access request was initially received by the first office or agency, not any later date.

(h) *Agreements regarding consultations and referrals.* Offices may make agreements with other offices or agencies to eliminate the need for consultations or referrals for particular types of records.

§ 102.26 Responses to requests for access to records.

(a) *Acknowledgements of requests.* On receipt of a request, an office shall send an acknowledgement letter to the requester.

(b) *Grants of requests for access.* Once an office makes a determination to grant a request for access in whole or in part, it shall notify the requester in writing. The Program/Support Office Head or designee shall inform the requester in the notice of any fee charged under §102.31 and shall disclose records to the requester promptly on payment of any applicable fee. If a request is made in person, the office may disclose records to the requester directly, in a manner not unreasonably disruptive of its operations, on payment of any applicable fee and with a written record made of the grant of the request. If a requester is accompanied by another person, he or she shall be required to authorize in writing any discussion of the records in the presence of the other person.

(c) *Adverse determinations of requests for access.* A Program/Support Office Head or designee making an adverse determination denying a request for access in any respect shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, consist of: a determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that the requested information is not a record subject to the Privacy Act; a determination on any disputed fee matter; and a denial of a request for expedited treatment. The notification letter shall be signed by the Program/Support Office Head or designee, and shall include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reason(s) for the denial, including any FOIA or Privacy Act exemption(s) applied in denying the request; and

(3) A statement that the denial may be appealed under §102.27(a) and a description of the requirements of §102.27(a).

§ 102.27 Appeals from denials of requests for access to records.

(a) *Appeals.* If the requester is dissatisfied with an office's response to his or her request for access to records, the requester may make a written appeal of the adverse determination denying the request in any respect to the SBA's FOI/PA Office, 409 3rd St., SW., Washington, DC 20416. The appeal must be received by the FOI/PA Office within 60 days of the date of the letter denying the request. The requester's appeal letter should include as much information

as possible, including the identity of the office whose adverse determination is being appealed. Unless otherwise directed, the Chief, FOI/PA will decide all appeals under this subpart.

(b) *Responses to appeals.* The decision on a requester's appeal will be made in writing not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such appeal. A decision affirming an adverse determination in whole or in part will include a brief statement of the reason(s) for the affirmation, including any Privacy Act exemption applied, and will inform the requester of the Privacy Act provisions for court review of the decision. If the adverse determination is reversed or modified on appeal in whole or in part, the requester will be notified in a written decision and his request will be reprocessed in accordance with that appeal decision.

(c) *Judicial review.* In order to seek judicial review by a court of any adverse determination or denial of a request, a requester must first appeal it to the FOI/PA Office under this section.

§ 102.28 Requests for amendment or correction of records.

(a) *How made and addressed.* Unless the record is not subject to amendment or correction as stated in paragraph (f) of this section, an individual may make a request for amendment or correction of an SBA record about himself or herself by writing directly to the office that maintains the record, following the procedures in § 102.24. The request should identify each particular record in question, state the amendment or correction sought, and state why the record is not accurate, relevant, timely, or complete. The requester may submit any documentation that he or she thinks would be helpful. If the requester believes that the same record is in more than one system of records, that should be stated and the request should be sent to each office that maintains a system of records containing the record.

(b) *Office responses.* Within ten (10) days (excluding Saturdays, Sundays, and legal public holidays) of receiving a request for amendment or correction of records, an office shall send the requester a written acknowledgment of receipt, and the office shall notify the requester within 30 days (excluding Saturdays, Sundays, and legal public holidays) of receipt of the request whether it is granted or denied. If the Program/Support Office Head or designee grants the request in whole or in part, the amendment or correction must be made, and the requester advised of his or her right to obtain a copy of the corrected or amended record. If the office denies a request in whole or in part, it shall send the requester a letter signed by the Program/Support Office Head or designee that shall state:

(1) The reason(s) for the denial; and

(2) The procedure for appeal of the denial under paragraph (c) of this section, including the name and business address of the official who will act on your appeal.

(c) *Appeals.* An individual may appeal a denial of a request for amendment or correction to the FOI/PA Office in the same manner as a denial of a request for access to records (see § 102.27), and the same procedures shall be followed. If the appeal is denied, the requester shall be advised of his or her right to file a Statement of Disagreement as described in paragraph (d) of this section and of his or her right under the Privacy Act for court review of the decision.

(d) *Statement of Disagreement.* If an appeal under this section is denied in whole or in part, the requester has the right to file a Statement of Disagreement that states the reason(s) for disagreeing with the SBA's denial of his or her request for amendment or correction. A Statement of Disagreement must be concise, must clearly identify each part of any record that is disputed, and should be no longer than one typed page for each fact disputed. An individual's Statement of Disagreement must be sent to the office that maintains the record involved, which shall place it in the system of records in which the disputed record is maintained and shall mark the disputed record to indicate that a Statement of Disagreement has been filed and where in the system of records it may be found.

(e) *Notification of amendment/correction or disagreement.* Within 30 days (excluding Saturdays, Sundays, and legal public holidays) of the amendment or correction of a record, the office that maintains the record shall notify all persons, organizations, or agencies to which it previously disclosed the record, if an accounting of that disclosure was made, that the record has been amended or corrected. If an individual has filed a Statement of Disagreement, the office shall append a copy of it to the disputed record whenever the record is disclosed and may also append a concise statement of its reason(s) for denying the request to amend or correct the record.

(f) *Records not subject to amendment or correction.* The following records are not subject to amendment or correction:

(1) Transcripts of testimony given under oath or written statements made under oath;

(2) Transcripts of grand jury proceedings, judicial proceedings, or quasi-judicial proceedings, which are the official record of those proceedings;

(3) Pre-sentence records that originated with the courts; and

(4) Records in systems of records that have been exempted from amendment and correction under Privacy Act, 5 U.S.C. 552a (j) or (*k*) by notice published in the FEDERAL REGISTER.

§ 102.29 Requests for an accounting of record disclosures.

(a) *How made and addressed.* Except where accountings of disclosures are not required to be kept (as stated in paragraph (b) of this section), an individual may make a request for an accounting of any disclosure that has been made by the SBA to another person, organization, or agency of any record in a system of records about him or her. This accounting contains the date, nature, and purpose of each disclosure, as well as the name and address of the person, organization, or agency to which the disclosure was made. The request for an accounting should identify each particular record in question and should be made by writing directly to the SBA office that maintains the record, following the procedures in § 102.24.

(b) *Where accountings are not required.* Offices are not required to provide accountings where they relate to:

(1) Disclosures for which accountings are not required to be kept; disclosures that are made to employees within the SBA and disclosures that are made under the FOIA;

(2) Disclosures made to law enforcement agencies for authorized law enforcement activities in response to written requests from those law enforcement agencies specifying the civil or criminal law enforcement activities for which the disclosures are sought; or

(3) Disclosures made from law enforcement systems of records that have been exempted from accounting requirements under Privacy Act, 5 U.S.C. 552a(j) or (k) by notice published in the FEDERAL REGISTER.

(c) *Appeals.* An individual may appeal a denial of a request for an accounting to the FOI/PA Office in the same manner as a denial of a request for access to records (see § 102.27), and the same procedures will be followed.

§ 102.30 Preservation of records.

Each office will preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the Privacy Act.

§ 102.31 Fees.

SBA offices shall charge fees for duplication of records under the Privacy Act in the same way in which they charge duplication fees under § 102.6(b)(3). No search or review fee may be charged for any record unless the record has been exempted from access under Exemptions (j)(2) or (k)(2) of the Privacy Act. SBA will waive fees under $25.00.

§ 102.32 Notice of court-ordered and emergency disclosures.

(a) *Court-ordered disclosures.* When a record pertaining to an individual is required to be disclosed by order of a

court of competent jurisdiction, the office that maintains the record shall make reasonable efforts to provide notice of this to the individual. Notice shall be given within a reasonable time after the office's receipt of the order, except that in a case in which the order is not a matter of public record, the notice shall be given only after the order becomes public. This notice shall be mailed to the individual's last known address and shall contain a copy of the order and a description of the information disclosed. Notice shall not be given if disclosure is made from a criminal law enforcement system of records that has been exempted from the notice requirement.

(b) *Emergency disclosures.* Upon disclosing a record pertaining to an individual made under compelling circumstances affecting health or safety, the office shall notify that individual of the disclosure. This notice shall be mailed to the individual's last known address and shall state the nature of the information disclosed; the person, organization, or agency to which it was disclosed; the date of disclosure; and the compelling circumstances justifying the disclosure.

§ 102.33 Security of systems of records.

(a) Each Program/Support Office Head or designee shall establish administrative and physical controls to prevent unauthorized access to its systems of records, to prevent unauthorized disclosure of records, and to prevent physical damage to or destruction of records. The stringency of these controls shall correspond to the sensitivity of the records that the controls protect. At a minimum, each office's administrative and physical controls shall ensure that:

(1) Records are protected from public view;

(2) The area in which records are kept is supervised during business hours to prevent unauthorized persons from having access to them;

(3) Records are inaccessible to unauthorized persons outside of business hours; and

(4) Records are not disclosed to unauthorized persons or under unauthorized circumstances in either oral or written form.

(b) Each Program/Support Office Head or designee shall establish procedures that restrict access to records to only those individuals within the SBA who must have access to those records in order to perform their duties and that prevent inadvertent disclosure of records.

(c) The OCIO shall provide SBA offices with guidance and assistance for privacy and security of electronic systems and compliance with pertinent laws and requirements.

§ 102.34 Contracts for the operation of record systems.

When SBA contracts for the operation or maintenance of a system of records or a portion of a system of records by a contractor, the record system or the portion of the record affected, are considered to be maintained by the SBA, and subject to this subpart. The SBA is responsible for applying the requirements of this subpart to the contractor. The contractor and its employees are to be considered employees of the SBA for purposes of the sanction provisions of the Privacy Act during performance of the contract.

§ 102.35 Use and collection of Social Security Numbers.

Each Program/Support Office Head or designee shall ensure that collection and use of SSN is performed only when the functionality of the system is dependant on use of the SSN as an identifier. Employees authorized to collect information must be aware:

(a) That individuals may not be denied any right, benefit, or privilege as a result of refusing to provide their social security numbers, unless:

(1) The collection is authorized either by a statute; or

(2) The social security numbers are required under statute or regulation adopted prior to 1975 to verify the identity of an individual; and

(b) That individuals requested to provide their social security numbers must be informed of:

(1) Whether providing social security numbers is mandatory or voluntary;

(2) Any statutory or regulatory authority that authorizes the collection of social security numbers; and

(3) The uses that will be made of the numbers.

§ 102.36 Privacy Act standards of conduct.

Each Program/Support Office Head or designee shall inform its employees of the provisions of the Privacy Act, including its civil liability and criminal penalty provisions. Unless otherwise permitted by law, an employee of the SBA shall:

(a) Collect from individuals only the information that is relevant and necessary to discharge the responsibilities of the SBA;

(b) Collect information about an individual directly from that individual whenever practicable;

(c) Inform each individual from whom information is collected of:

(1) The legal authority to collect the information and whether providing it is mandatory or voluntary;

(2) The principal purpose for which the SBA intends to use the information;

(3) The routine uses the SBA may make of the information; and

(4) The effects on the individual, if any, of not providing the information;

(d) Ensure that the office maintains no system of records without public notice and that it notifies appropriate SBA officials of the existence or development of any system of records that is not the subject of a current or planned public notice;

(e) Maintain all records that are used by the SBA in making any determination about an individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to ensure fairness to the individual in the determination;

(f) Except as to disclosures made to an agency or made under the FOIA, make reasonable efforts, prior to disseminating any record about an individual, to ensure that the record is accurate, relevant, timely, and complete;

(g) Maintain no record describing how an individual exercises his or her First Amendment rights, unless it is expressly authorized by statute or by the individual about whom the record is maintained, or is pertinent to and within the scope of an authorized law enforcement activity;

(h) When required by the Privacy Act, maintain an accounting in the specified form of all disclosures of records by the SBA to persons, organizations, or agencies;

(i) Maintain and use records with care to prevent the unauthorized or inadvertent disclosure of a record to anyone; and

(j) Notify the appropriate SBA official of any record that contains information that the Privacy Act does not permit the SBA to maintain.

§ 102.37 Training requirements.

All employees should attend privacy training within one year of employment with SBA. All employees with Privacy Act responsibilities must attend Privacy Act training, whenever needed, that is offered by the SBA.

§ 102.38 Other rights and services.

Nothing in this subpart shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is not entitled under the Privacy Act.

§ 102.39 SBA's exempt Privacy Act systems of records.

(a) Systems of records subject to investigatory material exemption under 5 U.S.C. 552a(k)(2), or 5 U.S.C. 552a(k)(5) or both:

(1) Office of Inspector General Records Other Than Investigation Records—SBA 4, contains records pertaining to audits, evaluations, and other non-audit services performed by the OIG;

(2) Equal Employment Opportunity Complaint Cases—SBA 13, contains complaint files, Equal Employment Opportunity counselor's reports, investigation materials, notes, reports, and recommendations;

(3) Investigative Files—SBA 16, contains records gathered by the OIG in the investigation of allegations that are within the jurisdiction of the OIG;

(4) Investigations Division Management Information System—SBA 17, contains records gathered or created during preparation for, conduct of, and follow-up on investigations conducted by the OIG, the Federal Bureau of Investigation (FBI), and other Federal,

State, local, or foreign regulatory or law enforcement agency;

(5) Litigation and Claims Files—SBA 19, contains records relating to recipients classified as ''in litigation'' and all individuals involved in claims by or against the Agency;

(6) Personnel Security Files—SBA 24, contains records on active and inactive personnel security files, employee or former employee's name, background information, personnel actions, OPM, and/or authorized contracting firm background investigations;

(7) Security and Investigations Files—SBA 27, contains records gathered or created during preparation for, conduct of, and follow-up on investigations conducted by OIG, the FBI, and other Federal, State, local, or foreign regulatory or law enforcement agencies as well as other material submitted to or gathered by OIG in furtherance of its investigative function; and

(8) Standards of Conduct Files—SBA 29, contains records on confidential employment and financial statements of employees Grade 13 and above.

(b) These systems of records are exempt from the following provisions of the Privacy Act and all regulations in this part promulgated under these provisions:

(1) 552a(c)(3) (Accounting of Certain Disclosures);

(2) 552a(d) (Access to Records);

(3) 552a(e)(1), 4G, H, and I (Agency Requirements); and

(4) 552a(f) (Agency Rules).

(c) The systems of records described in paragraph (a) of this section are exempt from the provisions of the Privacy Act described in paragraph (b) of this section in order to:

(1) Prevent the subject of investigations from frustrating the investigatory process;

(2) Protect investigatory material compiled for law enforcement purposes;

(3) Fulfill commitments made to protect the confidentiality of sources and to maintain access to necessary sources of information; or

(4) Prevent interference with law enforcement proceedings.

(d) In addition to the foregoing exemptions in paragraphs (a) through (c) of this section, the systems of records described in paragraph (a) of this section numbered SBA 4, 16, 17, 24, and 27 are exempt from the Privacy Act except for subsections (b), (c)(1) and (2), (e)(4)(A) through F, (e)(6), (7), (9), (10) and (11) and (i) to the extent that they contain:

(1) Information compiled to identify individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, confinement, release, and parole and probation status;

(2) Information, including reports of informants and investigators, associated with an identifiable individual compiled to investigate criminal activity; or

(3) Reports compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision associated with an identifiable individual.

(e) The systems of records described in paragraph (d) of this section are exempt from the Privacy Act to the extent described in that paragraph because they are records maintained by the Investigations Division of the OIG, which is a component of SBA which performs as its principal function activities pertaining to the enforcement of criminal laws within the meaning of 5 U.S.C. 552a(j)(2). They are exempt in order to:

(1) Prevent the subjects of OIG investigations from using the Privacy Act to frustrate the investigative process;

(2) Protect the identity of Federal employees who furnish a complaint or information to the OIG, consistent with section 7(b) of the Inspector General Act of 1978, 5 U.S.C. app. 3;

(3) Protect the confidentiality of other sources of information;

(4) Avoid endangering confidential sources and law enforcement personnel;

(5) Prevent interference with law enforcement proceedings;

(6) Assure access to sources of confidential information, including that contained in Federal, State, and local criminal law enforcement information systems;

(7) Prevent the disclosure of investigative techniques; or

(8) Prevent the disclosure of classified information.

§ 102.40 Computer matching.

The OCIO will enforce the computer matching provisions of the Privacy Act. The FOI/PA Office will review and concur on all computer matching agreements prior to their activation and/or renewal.

(a) *Matching agreements.* SBA will comply with the Computer Matching and Privacy Protection Act of 1988 (5 U.S.C. 552a(o), 552a notes) . The Privacy Protection Act establishes procedures Federal agencies must use if they want to match their computer lists. SBA shall not disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between SBA and the recipient agency or non-Federal agency specifying:

(1) The purpose and legal authority for conducting the program;

(2) The justification for the purpose and the anticipated results, including a specific estimate of any savings;

(3) A description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(4) Procedures for providing individualized notice at the time of application, and periodically thereafter as directed by the Data Integrity Board, that any information provided by any of the above may be subject to verification through matching programs to:

(i) Applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) Applicants for and holders of positions as Federal personnel.

(5) Procedures for verifying information produced in such matching program as required by paragraph (c) of this section.

(6) Procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(7) Procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(8) Prohibitions on duplication and redisclosure of records provided by SBA within or outside the recipient agency or non-Federal agency, except where required by law or essential to the conduct of the matching program;

(9) Procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by SBA, including procedures governing return of the records to SBA or destruction of records used in such programs;

(10) Information on assessments that have been made on the accuracy of the records that will be used in such matching programs; and

(11) That the Comptroller General may have access to all records of a recipient agency or non-Federal agency that the Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(b) *Agreement specifications.* A copy of each agreement entered into pursuant to paragraph (a) of this section shall be transmitted to OMB, the Committee on Governmental Affairs of the Senate and the Committee on Governmental Operations of the House of Representatives and be available upon request to the public.

(1) No such agreement shall be effective until 30 days after the date on which a copy is transmitted.

(2) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(3) Within three (3) months prior to the expiration of such an agreement, the Data Integrity Board may without additional review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if:

(i) Such program will be conducted without any change; and

(ii) Each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(c) *Verification.* In order to protect any individual whose records are used

in matching programs, SBA and any recipient agency or non-Federal agency may not suspend, terminate, reduce, or make a final denial of any financial assistance or payment under the Federal benefit program to such individual, or take other adverse action against such individual as a result of information produced by such matching programs until such information has been independently verified.

(1) Independent verification requires independent investigation and confirmation of any information used as a basis for an adverse action against an individual including, where applicable:

(i) The amount of the asset or income involved,

(ii) Whether such individual actually has or had access to such asset or income or such individual's own use, and

(iii) The period or periods when the individual actually had such asset or income.

(2) SBA and any recipient agency or non-Federal agency may not suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program, or take other adverse action as a result of information produced by a matching program,

(i) Unless such individual has received notice from such agency containing a statement of its findings and information of the opportunity to contest such findings, and

(ii) Until the subsequent expiration of any notice period provided by the program's governing statute or regulations, or 30 days. Such opportunity to contest may be satisfied by notice, hearing, and appeal rights governing such Federal benefit program. The exercise of any such rights shall not affect rights available under the Privacy Act.

(3) SBA may take any appropriate action otherwise prohibited by the above if SBA determines that the public health or safety may be adversely affected or significantly threatened during the notice period required by paragraph (c)(2)(ii) of this section.

(d) *Sanctions.* Notwithstanding any other provision of law, SBA may not disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if SBA has reason to believe that the requirements of paragraph (c) of this section, or any matching agreement entered into pursuant to paragraph (b) of this section or both, are not being met by such recipient agency.

(1) SBA shall not renew a matching agreement unless,

(i) The recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(ii) SBA has no reason to believe that the certification is inaccurate.

(e) Review annually each ongoing matching program in which the Agency has participated during the year, either as a source or as a matching agency in order to assure that the requirements of the Privacy Act, OMB guidance, and any Agency regulations and standard operating procedures, operating instructions, or guidelines have been met.

(f) *Data Integrity Board.* SBA shall establish a Data Integrity Board (Board) to oversee and coordinate the implementation of the matching program. The Board shall consist of the senior officials designated by the Administrator, to include the Inspector General (who shall not serve as chairman), and the Senior Agency Official for Privacy. The Board shall:

(1) Review, approve and maintain all written agreements for receipt or disclosure of Agency records for matching programs to ensure compliance with paragraph (a) of this section and with all relevant statutes, regulations, and guidance;

(2) Review all matching programs in which SBA has participated during the year, determine compliance with applicable laws, regulations, guidelines, and Agency agreements, and assess the costs and benefits of such programs;

(3) Review all recurring matching programs in which SBA has participated during the year, for continued justification for such disclosures;

(4) At the instruction of OMB, compile a report to be submitted to the Administrator and OMB, and made available to the public on request, describing the matching activities of SBA, including,

(i) Matching programs in which SBA has participated;

(ii) Matching agreements proposed that were disapproved by the Board;

(iii) Any changes in membership or structure of the Board in the preceding year;

(iv) The reasons for any waiver of the requirement described below for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) Any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) Any other information required by OMB to be included in such report;

(5) Serve as clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(6) Provide interpretation and guidance to SBA offices and personnel on the requirements for matching programs;

(7) Review Agency recordkeeping and disposal policies and practices for matching programs to assure compliance with the Privacy Act; and

(8) May review and report on any SBA matching activities that are not matching programs.

(g) *Cost-benefit analysis.* Except as provided in paragraphs (e)(2) and (3) of this section, the Data Integrity Board shall not approve any written agreement for a matching program unless SBA has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective. The Board may waive these requirements if it determines, in writing, and in accordance with OMB guidelines, that a cost-benefit analysis is not required. Such an analysis also shall not be required prior to the initial approval of a written agreement for a matching program that is specifically required by statute.

(h) *Disapproval of matching agreements.* If a matching agreement is disapproved by the Data Integrity Board, any party to such agreement may appeal to OMB. Timely notice of the filing of such an appeal shall be provided by OMB to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(1) OMB may approve a matching agreement despite the disapproval of the Data Integrity Board if OMB determines that:

(i) The matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) There is adequate evidence that the matching agreement will be cost-effective; and

(iii) The matching program is in the public interest.

(2) The decision of OMB to approve a matching agreement shall not take effect until 30 days after it is reported to the committees described in paragraph (h) of this section.

(3) If the Data Integrity Board and the OMB disapprove a matching program proposed by the Inspector General, the Inspector General may report the disapproval to the Administrator and to the Congress.

§ 102.41 Other provisions.

(a) *Personnel records.* All SBA personnel records and files, as prescribed by OPM, shall be maintained in such a way that the privacy of all individuals concerned is protected in accordance with regulations of OPM (5 CFR parts 293 and 297).

(b) *Mailing lists.* The SBA will not sell or rent an individual's name or address. This provision shall not be construed to require the withholding of names or addresses otherwise permitted to be made public.

(c) *Changes in systems.* The SBA shall provide adequate advance notice to Congress and OMB of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(d) *Medical records.* Medical records shall be disclosed to the individual to whom they pertain. SBA may, however, transmit such information to a medical doctor named by the requesting individual. In regard to medical

records in personnel files, see also 5 CFR 297.205.

PART 103—STANDARDS FOR CONDUCTING BUSINESS WITH SBA

Sec.

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AUTHORITY: 15 U.S.C. 634, 642.

SOURCE: 61 FR 2681, Jan. 29, 1996, unless otherwise noted.

§ 103.1 Key definitions.

(a) *Agent* means an authorized representative, including an attorney, accountant, consultant, packager, lender service provider, or any other person representing an Applicant or Participant by conducting business with SBA.

(b) The term *conduct business with SBA* means:

(1) Preparing or submitting on behalf of an applicant an application for financial assistance of any kind, assistance from the Investment Division of SBA, or assistance in procurement and technical matters;

(2) Preparing or processing on behalf of a lender or a participant in any of SBA's programs an application for federal financial assistance;

(3) Participating with or communicating in any way with officers or employees of SBA on an applicant's, participant's, or lender's behalf;

(4) Acting as a lender service provider; and

(5) Such other activity as SBA reasonably shall determine.

(c) *Applicant* means any person, firm, concern, corporation, partnership, cooperative or other business enterprise applying for any type of assistance from SBA.

(d) *Lender Service Provider* means an Agent who carries out lender functions in originating, disbursing, servicing, or liquidating a specific SBA business loan or loan portfolio for compensation from the lender. SBA determines whether or not one is a ''Lender Service Provider'' on a loan-by-loan basis.

(e) *Packager* means an Agent who is employed and compensated by an Applicant or lender to prepare the Applicant's application for financial assistance from SBA. SBA determines whether or not one is a ''Packager'' on a loan-by-loan basis.

(f) *Referral Agent* means a person or entity who identifies and refers an Applicant to a lender or a lender to an Applicant. The Referral Agent may be employed and compensated by either an Applicant or a lender.

(g) *Participant* means a person or entity that is participating in any of the financial, investment, or business development programs authorized by the Small Business Act or Small Business Investment Act of 1958.

[61 FR 2681, Jan. 29, 1996, as amended at 85 FR 7647, Feb. 10, 2020; 85 FR 80587, Dec. 14, 2020]

§ 103.2 Who may conduct business with SBA?

(a) If you are an Applicant, a Participant, a partner of an Applicant or Participant partnership, or serve as an officer of an Applicant, Participant corporation, or limited liability company, you may conduct business with SBA without a representative.

(b) If you are an Agent, you may conduct business with SBA on behalf of an Applicant, Participant or lender, unless representation is otherwise prohibited by law or the regulations in this part or any other part in this chapter. For example, persons debarred under the SBA or Government-wide debarment regulations may not conduct business with SBA. SBA may request that any Agent supply written evidence of his or her authority to act on behalf of an Applicant, Participant, or lender as a condition of revealing any information about the Applicant's, Participant's, or lender's current or prior dealings with SBA.

§ 103.3 May SBA suspend or revoke an Agent's privilege?

The Administrator of SBA or designee may, for good cause, suspend or revoke the privilege of any Agent to conduct business with SBA. Part 134 of this chapter states the procedures for appealing the decision to suspend or revoke the privilege. The suspension or

revocation remains in effect during the pendency of any administrative proceedings under part 134 of this chapter.

§ 103.4 What is "good cause" for suspension or revocation?

Any unlawful or unethical activity is good cause for suspension or revocation of the privilege to conduct business. This includes:

(a) Attempting to influence any employee of SBA or a lender, by gifts, bribes or other unlawful or unethical activity, with respect to any matter involving SBA assistance.

(b) Soliciting for the provision of services to an Applicant by another entity when there is an undisclosed business relationship between the two parties.

(c) Violating ethical guidelines which govern the profession or business of the Agent or which are published at any time by SBA.

(d) Implying or stating that the work to be performed for an Applicant will include use of political or other special influence with SBA. Examples include indicating that the entity is affiliated with or paid, endorsed or employed by SBA, advertising using the words *Small Business Administration* or *SBA* in a manner that implies SBA's endorsement or sponsorship, use of SBA's seal or symbol, and giving a ''guaranty'' to an Applicant that the application will be approved.

(e) Charging or proposing to charge any fee that does not bear a necessary and reasonable relationship to the services actually rendered or expenses actually incurred in connection with a matter before SBA or which is materially inconsistent with the provisions of an applicable compensation agreement or Lender Service Provider agreement. A fee based solely on a percentage of a loan or guarantee amount can be reasonable, depending on the circumstances of a case and the services actually rendered.

(f) Engaging in any conduct indicating a lack of business integrity or business honesty, including debarment, criminal conviction, or civil judgment within the last seven years for fraud, embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, conspiracy, receiving stolen property, false claims, or obstruction of justice.

(g) Acting as both a Lender Service Provider or Referral Agent and a Packager for an Applicant on the same SBA business loan and receiving compensation for such activity from both the Applicant and lender. A limited exception to the ''two master'' prohibition in this paragraph (g) exists when an Agent acts as a Packager and is compensated by the Applicant for packaging services; also acts as a Referral Agent and is compensated by the lender for those activities; discloses the referral activities to the Applicant; and discloses the packaging activities to the lender.

(h) Violating materially the terms of any compensation agreement or Lender Service Provider agreement provided for in § 103.5.

(i) Violating or assisting in the violation of any SBA regulations, policies, or procedures of which the Applicant has been made aware.

[61 FR 2681, Jan. 29, 1996, as amended at 85 FR 7647, Feb. 10, 2020; 85 FR 80587, Dec. 14, 2020]

§ 103.5 How does SBA regulate an Agent's fees and provision of service?

(a) Any Applicant, Agent, or Packager must execute and provide to SBA a compensation agreement, and any Lender Service Provider must execute and provide to SBA a Lender Service Provider agreement. Each agreement governs the compensation charged for services rendered or to be rendered to the Applicant or lender in any matter involving SBA assistance. SBA provides the form of compensation agreement and a suggested form of Lender Service Provider agreement to be used by Agents.

(b) Compensation agreements must provide that in cases where SBA deems the compensation unreasonable, the Agent or Packager must: Reduce the charge to an amount SBA deems reasonable, refund any sum in excess of the amount SBA deems reasonable to the Applicant, and refrain from charging or collecting, directly or indirectly, from the Applicant an amount in excess of the amount SBA deems reasonable.

(c) Each Lender Service Provider must enter into a written agreement with each lender for whom it acts in that capacity. SBA will review all such agreements. Such agreements need not contain each and every provision found in the SBA's suggested form of agreement. However, each agreement must indicate that both parties agree not to engage in any sharing of secondary market premiums, that the services to be provided are accurately described, and that the agreement is otherwise consistent with SBA requirements. Subject to the prohibition on splitting premiums, lenders have reasonable discretion in setting compensation for Lender Service Providers. However, such compensation may not be directly charged to an Applicant or Borrower.

[61 FR 2681, Jan. 29, 1996, as amended at 85 FR 7647, Feb. 10, 2020; 85 FR 80587, Dec. 14, 2020]

PART 105—STANDARDS OF CONDUCT AND EMPLOYEE RESTRICTIONS AND RESPONSIBILITIES

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AUTHORITY: 5 U.S.C. 7301; 15 U.S.C. 634, 637(a)(18) and (a)(19), 642, and 645(a).

SOURCE: 61 FR 2399, Jan. 26, 1996, unless otherwise noted.

STANDARDS OF CONDUCT

§ 105.101 Cross-reference to employee ethical conduct standards and financial disclosure regulations.

In addition to this part, Small Business Administration (SBA) employees should refer to the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635 and the regulations at 5 CFR part 2634 entitled, Executive Branch Financial Disclosure, Qualified Trusts and Certificates of Divestiture.

[69 FR 63922, Nov. 3, 2004]

RESTRICTIONS AND RESPONSIBILITIES RELATED TO SBA EMPLOYEES AND FORMER EMPLOYEES

§ 105.201 Definitions.

(a) *Employee* means an officer or employee of the SBA regardless of grade, status or place of employment, including employees on leave with pay or on leave without pay other than those on extended military leave. Unless stated otherwise. Employee shall include those within the category of Special Government Employee.

(b) *Special Government Employee* means an officer or employee of SBA, who is retained, appointed or employed to perform temporary duties on a full-time or intermittent basis, with or without compensation, for not to exceed 130 days during any period of 365 consecutive days.

(c) *Person* means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

(d) *Household member* means spouse and minor children of an employee, all blood relations of the employee and any spouse who resides in the same place of abode with the employee.

(e) *SBA Assistance* means financial, contractual, grant, managerial or other aid, including size determinations, section 8(a) participation, licensing, certification, and other eligibility

determinations made by SBA. The term also includes an express decision to compromise or defer possible litigation or other adverse action.

§ 105.202 Employment of former employee by person previously the recipient of SBA Assistance.

(a) No former employee, who occupied a position involving discretion over, or who exercised discretion with respect to, the granting or administration of SBA Assistance may occupy a position as employee, partner, agent, attorney or other representative of a concern which has received this SBA Assistance for a period of two years following the date of granting or administering such SBA Assistance if—

(1) The date of granting or administering such SBA Assistance was within the period of the employee's term of employment; or

(2) The date of granting or administering such SBA Assistance was within one year following the termination of such employment.

(b) Failure of a recipient of SBA Assistance to comply with these provisions may result, in the discretion of SBA, in the requirement for immediate repayment of SBA financial Assistance, the immediate termination of other SBA Assistance involved or other appropriate action.

§ 105.203 SBA Assistance to person employing former SBA employee.

(a) SBA will not provide SBA Assistance to any person who has, as an employee, owner, partner, attorney, agent, owner of stock, officer, director, creditor or debtor, any individual who, within one year prior to the request for such SBA Assistance was an SBA employee, without the prior approval of the SBA Standards of Conduct Counselor. The Standards of Conduct Counselor will refer matters of a controversial nature to the Standards of Conduct Committee for final decision; otherwise, his or her decision is final.

(b) In reviewing requests for approval, the Standards of Conduct Counselor will consider:

(1) The relationship of the former employee with the applicant concern;

(2) The nature of the SBA Assistance requested;

(3) The position held by the former employee with SBA and its relationship to the SBA Assistance requested; and

(4) Whether an apparent conflict of interest might exist if the SBA Assistance were granted.

§ 105.204 Assistance to SBA employees or members of their household.

Without the prior written approval of the Standards of Conduct Committee, no SBA Assistance, other than Disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, shall be furnished to a person when the sole proprietor, partner, officer, director or significant stockholder of the person is an SBA employee or a household member.

§ 105.205 Duty to report irregularities.

Every employee shall immediately report to the SBA Inspector General any acts of malfeasance or misfeasance or other irregularities, either actual or suspected, arising in connection with the performance by SBA of any of its official functions.

§ 105.206 Applicable rules and directions.

Every employee shall follow all agency rules, regulations, operating procedures, instructions and other proper directions in the performance of his official functions.

§ 105.207 Politically motivated activities with respect to the Minority Small Business Program.

(a) Any employee who has authority to take, direct others to take, recommend, or approve any action with respect to any program or activity conducted pursuant to section 8(a) or section 7(j) of the Small Business Act, shall not, with respect to any such action, exercise or threaten to exercise such authority on the basis of the political activity or affiliation of any party. Employees shall expeditiously report to the SBA Inspector General any such action for which such employee's participation has been solicited or directed.

(b) Any employee who willfully and knowingly violates this section shall be subject to disciplinary action, which

may consist of separation from service, reduction in grade, suspension, or reprimand.

(c) This section shall not apply to any action taken as a penalty or other enforcement of a violation of any law, rule, or regulation prohibiting or restricting political activity.

(d) The prohibitions in and remedial measures provided for under this section with regard to such prohibitions, shall be in addition to, and not in lieu of, any other prohibitions, measures or liabilities that may arise under any other provision of law.

§ 105.208 Penalties.

Any employee guilty of violating any of the provisions in this part may be disciplined, including removal or suspension from SBA employment.

RESTRICTIONS ON SBA ASSISTANCE TO OTHER INDIVIDUALS

§ 105.301 Assistance to officers or employees of other Government organizations.

(a) SBA must receive a written statement of no objection by the pertinent Department or military service before it gives any SBA Assistance, other than Disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, to a person when its sole proprietor, partner, officer, director or stockholder with a 10 percent or more interest, or a household member, is an employee of another Government Department or Agency having a grade of at least GS–13 or its equivalent.

(b) The Standards of Conduct Committee must approve an SBA contract with an entity if a sole proprietor, general partner, officer, director, or stockholder with a 10 or more percent interest (or a household member of such individuals) is an employee of a Government Department or Agency. See also 48 CFR part 35, subpart 3.6.

(c) The Standards of Conduct Committee must approve SBA Assistance, other than disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, to a person if its sole proprietor, general partner, officer, director or stockholder with a 10 percent or more interest (or a household member of such individual) is a member of Congress or an appointed official or employee of the legislative or judicial branch of the Government.

§ 105.302 Assistance to employees or members of quasi-Government organizations.

(a) The Standards of Conduct Committee must approve SBA Assistance, other than Disaster loans under subparagraphs (1) and (2) of section 7(b) of the Small Business Act, to a person if its sole proprietor, general partner, officer, director or stockholder with a 10 percent or more interest (or a household member) is a member or employee of a Small Business Advisory Council or is a SCORE volunteer.

(b) In reviewing requests for approval, factors the Standards of Conduct Committee may consider include whether the granting of the SBA Assistance might result in or create the appearance of giving preferential treatment, the loss of complete independence or impartiality, or adversely affect the confidence of the public in the integrity of the Government.

ADMINISTRATIVE PROVISIONS

§ 105.401 Standards of Conduct Committee.

(a) The Standards of Conduct Committee will:

(1) Advise and give direction to SBA management officials concerning the administration of this part and any other rules, regulations or directives dealing with conflicts of interest and ethical standards of SBA employees; and

(2) Make decisions on specific requests when its approval is required.

(b) The Standards of Conduct Committee will consist of:

(1) The General Counsel or, in his or her absence, the Deputy General Counsel or, in his or her absence, the Acting General Counsel who shall act as Chairman of the Committee;

(2) The Associate Administrator, Office of Management and Administration, or in his or her absence, the Director, Office of Business Operations; and

(3) The Chief Human Capital Officer, or in his or her absence, the Deputy Chief Human Capital Officer.

[61 FR 2399, Jan. 26, 1996, as amended at 72 FR 50038, Aug. 30, 2007]

§ 105.402 Standards of Conduct Counselors.

(a) The SBA Standards of Conduct Counselor is the Designated Agency Ethics Official, as appointed by the Administrator. Assistant Standards of Conduct Counselors may be designated by the Standards of Conduct Counselor.

(b) The Standards of Conduct Counselors and Assistants:

(1) Provide general advice, assistance and guidance to employees concerning this part and the regulations referred to in §105.101;

(2) Monitor the Standards of Conduct Program within their assigned areas and provide required reports thereon; and

(3) Review Confidential Financial Disclosure reports as required under 5 CFR part 2634, subpart I, and provide an annual report on compliance with filing requirements to the SBA Standards of Conduct Counselor as of February 1 of each year.

(c) Each employee will be periodically informed of the name, address and telephone number of the Assistant Standards of Conduct Counselor to contact for advice and assistance.

(d) Employee requests for advice or rulings should be directed to the appropriate Standards of Conduct Counselor for appropriate action.

[61 FR 2399, Jan. 26, 1996, as amended at 62 FR 48477, Sept. 16, 1997; 69 FR 63922, Nov. 3, 2004]

§ 105.403 Designated Agency Ethics Officials.

The Designated Agency Ethics Official and Alternates administer the program for Financial Disclosure Statements under 5 CFR 2634.201, receive and evaluate these statements, and provide advice and counsel regarding matters relating to the Ethics in Government Act of 1978 and its implementing regulations. The duties and responsibilities of the Designated Agency Ethics Official and Alternates are set forth in more detail in 5 CFR 2638.203, which is promulgated and amended by the Office of Government Ethics.

[62 FR 2399, Jan. 26, 1996, as amended at 62 FR 48477, Sept. 16, 1997]

PART 106—COSPONSORSHIPS, FEE AND NON-FEE BASED SBA-SPONSORED ACTIVITIES AND GIFTS

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AUTHORITY: 15 U.S.C. 633 (g) and (h); 15 U.S.C. 637(b)(1)(A); 15 U.S.C. 637(b)(G).

SOURCE: 70 FR 70704, Nov. 23, 2005, unless otherwise noted.

Subpart A—Scope and Definitions

§ 106.100 Scope.

The regulations in this part apply to SBA-provided assistance for the benefit of small business through Fee Based SBA-Sponsored Activities or through Cosponsored Activities with Eligible Entities authorized under section 4(h) of the Small Business Act, and to SBA assistance provided directly to small business concerns through Non-Fee Based SBA-Sponsored Activities authorized under section 8(b)(1)(A) of the Small Business Act. The regulations in this part also apply to SBA's solicitation and acceptance of Gifts under certain sections (sections 4(g), 8(b)(1)(G), 5(b)(9) and 7(k)(2)) of the Small Business Act (15 U.S.C. 631 *et seq.*), including Gifts of cash, property, services and subsistence. Under section 4(g) of the Small Business Act, Gifts may be solicited and accepted for marketing and outreach purposes including the cost of promotional items and wearing apparel.

§ 106.101 Definitions.

The following definitions apply to this part. Defined terms are capitalized wherever they appear.

(a) *Cosponsor* means an entity or individual designated in § 106.201 that has signed a written Cosponsorship Agreement with SBA and who actively and substantially participates in planning and conducting an agreed upon Cosponsored Activity.

(b) *Cosponsored Activity* means an activity, event, project or initiative, designed to provide assistance for the benefit of small business as authorized by section 4(h) of the Small Business Act, which has been set forth in an approved written Cosponsorship Agreement. The Cosponsored Activity must be planned and conducted by SBA and one or more Cosponsors. Assistance for purposes of Cosponsored Activity does not include grant or any other form of financial assistance. A Participant Fee may be charged by SBA or another Cosponsor at any Cosponsored Activity.

(c) *Cosponsorship Agreement* means an approved written document (as outlined in §§ 106.203 and 106.204 which has been duly executed by SBA and one or more Cosponsors. The Cosponsorship Agreement shall contain the parties' respective rights, duties and responsibilities regarding implementation of the Cosponsored Activity.

(d) *Donor* means an individual or entity that provides a Gift, bequest or devise (in cash or in-kind) to SBA.

(e) An *Eligible Entity* is a potential Cosponsor. An Eligible Entity must be a for-profit or not-for-profit entity, or a Federal, State or local government official or entity.

(f) *Fee Based SBA-Sponsored Activity Record* (Fee Based Record) means a written document, as outlined in § 106.302, describing a Fee Based SBA-Sponsored Activity and approved in writing pursuant to § 106.303.

(g) *Fee Based SBA-Sponsored Activity* means an activity, event, project or initiative designed to provide assistance for the benefit of small business, as authorized by section 4(h) of the Small Business Act, at which SBA may charge a Participant Fee. Assistance for purposes of Fee Based SBA-Sponsored Activity does not include grant or any other form of financial assistance. A Fee Based SBA-Sponsored Activity must be planned, conducted, controlled and sponsored solely by SBA.

(h) *Gift* (including a bequest or a device) is the voluntary transfer to SBA of something of value without the Donor receiving legal consideration.

(i) *Non-Fee Based SBA-Sponsored Activity Record* (Non-Fee Based Record) means a written document describing a Non-Fee Based SBA-Sponsored Activity which has been approved pursuant to § 106.403.

(j) *Non-Fee Based SBA-Sponsored Activity* means an activity, event, project or initiative designed to provide assistance directly to small business concerns as authorized by section 8(b)(1)(A) of the Small Business Act. Assistance for purposes of a Non-Fee Based SBA-Sponsored Activity does not include grant or any other form of financial assistance. A Non-Fee Based SBA-Sponsored Activity must be planned, conducted, controlled and sponsored solely by SBA. No fees including Participant Fees may be

charged for a Non-Fee Based SBA-Sponsored Activity.

(k) *Participant Fee* means a minimal fee assessed against a person or entity that participates in a Cosponsored Activity or Fee Based SBA-Sponsored Activity and is used to cover the direct costs of such activity.

(l) *Responsible Program Official* is an SBA senior management official from the originating office who is accountable for the solicitation and/or acceptance of a Gift to the SBA; a Cosponsored Activity; a Fee Based SBA-Sponsored Activity; or a Non-Fee Based SBA-Sponsored Activity. If the originating office is a district or branch office, the Responsible Program Official is the district director or their deputy. In headquarters, the Responsible Program Official is the management board member or their deputy with responsibility for the relevant program area.

Subpart B—Cosponsored Activities

§ 106.200 Cosponsored Activity.

The Administrator (or designee), after consultation with the General Counsel (or designee), may provide assistance for the benefit of small business through Cosponsored Activities pursuant to section 4(h) of the Small Business Act.

§ 106.201 Who may be a Cosponsor?

(a) Except as specified in paragraph (b) of this section, SBA may enter into a Cosponsorship Agreement with an Eligible Entity as defined in § 106.101(e).

(b) SBA may not enter into a Cosponsorship Agreement with an Eligible Entity if the Administrator (or designee), after consultation with the General Counsel (or designee), determines that such agreement would create a conflict of interest.

§ 106.202 What are the minimum requirements applicable to Cosponsored Activities?

While SBA may subject a Cosponsored Activity to additional requirements through internal policy, procedure and the Cosponsorship Agreement, the following requirements apply to all Cosponsored Activities:

(a) Cosponsored Activities must be set forth in a written Cosponsorship Agreement signed by the Administrator (or designee) and each Cosponsor;

(b) Appropriate recognition must be given to SBA and each Cosponsor but shall not constitute or imply an endorsement by SBA of any Cosponsor or any Cosponsor's products or services;

(c) Any printed or electronically generated material used to publicize or conduct the Cosponsored Activity, including any material which has been developed, prepared or acquired by a Cosponsor, must be approved in advance by the Responsible Program Official and must include a prominent disclaimer stating that the Cosponsored Activity does not constitute or imply an endorsement by SBA of any Cosponsor or the Cosponsor's products or services;

(d) No Cosponsor shall make a profit on any Cosponsored Activity. SBA grantees who earn program income on Cosponsored Activities must use that program income for the Cosponsored Activity;

(e) Participant Fee(s) charged for a Cosponsored Activity may not exceed the minimal amount needed to cover the anticipated direct costs of the Cosponsored Activity and must be liquidated prior to other sources of funding for the Cosponsored Activity. If SBA charges a Participant Fee, the collection of the Participant Fees is subject to internal SBA policies and procedures as well as applicable U.S. Treasury rules and guidelines;

(f) SBA may not provide a Cosponsor with lists of names and addresses of small business concerns compiled by SBA which are otherwise protected by law or policy from disclosure; and

(g) Written approval must be obtained as outlined in § 106.204.

§ 106.203 What provisions must be set forth in a Cosponsorship Agreement?

While SBA may require additional provisions in the Cosponsorship Agreement through internal policy and procedure, the following provisions must be in all Cosponsorship Agreements:

(a) A written statement agreed to by each Cosponsor that they will abide by all of the provisions of the Cosponsorship Agreement, the requirements of

this subpart as well the applicable definitions in §106.100;

(b) A narrative description of the Cosponsored Activity;

(c) A listing of SBA's and each Cosponsor's rights, duties and responsibilities with regard to the Cosponsored Activity;

(d) A proposed budget demonstrating:

(1) The type and source of financial contribution(s) (including but not limited to cash, in-kind, Gifts, and Participant Fees) that the SBA and each Cosponsor will make to the Cosponsored Activity; and

(2) A reasonable estimation of all anticipated expenses;

(e) A written statement that each Cosponsor agrees that they will not make a profit on the Cosponsored Activity; and

(f) A written statement that Participant Fees, if charged, will not exceed the minimal amount needed to cover the anticipated direct costs of the Cosponsored Activity as outlined in the budget and will be liquidated prior to other sources of funding for the Cosponsored Activity.

§106.204 Who has the authority to approve and sign a Cosponsorship Agreement?

The Administrator, or upon his/her written delegation, the Deputy Administrator, an associate or assistant administrator, after consultation with the General Counsel (or designee), has the authority to approve each Cosponsored Activity and sign each Cosponsorship Agreement. This authority cannot be re-delegated.

Subpart C—Fee Based SBA-Sponsored Activities

§106.300 Fee Based SBA-Sponsored Activity.

The Administrator (or designee), after consultation with the General Counsel (or designee), may provide assistance for the benefit of small business through Fee-Based SBA-Sponsored Activities pursuant to section 4(h) of the Small Business Act.

§106.301 What are the minimum requirements applicable to Fee Based SBA-Sponsored Activities?

While SBA may subject a Fee Based SBA-Sponsored Activity to additional requirements through internal policy and procedure, the following requirements apply to all Fee Based SBA-Sponsored Activities:

(a) A Fee Based Record must be prepared by the Responsible Program Official in advance of the activity;

(b) Any Participant Fees charged will not exceed the minimal amount needed to cover the anticipated direct costs of the activity;

(c) Gifts of cash accepted and the collection of Participant Fees for Fee Based SBA-Sponsored Activities are subject to the applicable requirements in this part, internal SBA policies and procedures as well as applicable U.S. Treasury rules and guidelines; and

(d) Written approval must be obtained as outlined in §106.303.

§106.302 What provisions must be set forth in a Fee Based Record?

A Fee Based Record must contain the following:

(a) A narrative description of the Fee Based SBA-Sponsored Activity;

(b) A certification by the Responsible Program Official that he or she will abide by the requirements contained in this part, as well as all other applicable statutes, regulations, policies and procedures for Fee Based SBA-Sponsored Activities;

(c) A proposed budget demonstrating:

(1) All sources of funding, including annual appropriations, Participant Fees and Gifts, to be used in support of the Fee Based SBA-Sponsored Activity;

(2) A reasonable estimation of all anticipated expenses, which indicates that no profit is anticipated from the Fee Based SBA-Sponsored Activity; and

(3) A provision stating that Participant Fees, if charged, will not exceed the minimal amount needed to cover the anticipated direct costs of the Fee Based SBA-Sponsored Activity as outlined in the budget;

(d) With regard to any donations made in support of the Fee Based SBA-Sponsored Activity, the Fee Based Record will reflect the following:

(1) Each Donor may receive appropriate recognition for its Gift; and

(2) Any printed or electronically generated material recognizing a Donor will include a prominent disclaimer stating that the acceptance of the Gift does not constitute or imply an endorsement by SBA of the Donor or the Donor's products or services.

§ 106.303 Who has authority to approve and sign a Fee Based Record?

The Administrator, or upon his/her written delegation, the Deputy Administrator, an associate or assistant administrator, after consultation with the General Counsel (or designee), has the authority to approve and sign each Fee Based Record. This authority may not be re-delegated.

Subpart D—Non-Fee Based SBA-Sponsored Activities

§ 106.400 Non-Fee Based SBA-Sponsored Activity.

The Administrator (or designee) may provide assistance directly to small business concerns through Non-Fee Based SBA-Sponsored Activities under section 8(b)(1)(A) of the Small Business Act.

§ 106.401 What are the minimum requirements applicable to a Non-Fee Based SBA-Sponsored Activities?

While SBA may subject Non-Fee Based SBA-Sponsored Activities to additional requirements through internal policy and procedure, the following requirements apply to all Non-Fee Based SBA-Sponsored Activity:

(a) A Non-Fee Based Record must be prepared and approved by the Responsible Program Official in advance of the activity;

(b) Gifts of cash accepted for Non-Fee Based SBA-Sponsored Activities are subject to §106.500, internal SBA policies and procedures as well as applicable U.S. Treasury rules and guidelines; and

(c) Written approval must be obtained as outlined in §106.403.

§ 106.402 What provisions must be set forth in a Non-Fee Based Record?

A Non-Fee Based Record must contain the following:

(a) A narrative description of the Non-Fee Based SBA-Sponsored Activity;

(b) A certification by the Responsible Program Official that he or she will abide by the requirements contained in this part, as well as all other applicable statutes, regulations, policies and procedures for Non-Fee Based SBA-Sponsored Activities;

(c) If applicable, a list of Donors supporting the activity; and

(d) With regard to any donations made in support of a Non-Fee Based SBA-Sponsored Activity, the Non-Fee Based Record will reflect the following:

(1) Each Donor may receive appropriate recognition for its Gift; and

(2) Any printed or electronically generated material recognizing a Donor will include a prominent disclaimer stating that the acceptance of the Gift does not constitute or imply an endorsement by SBA of the Donor, or the Donor's products or services.

§ 106.403 Who has authority to approve and sign a Non-Fee Based Record?

The appropriate Responsible Program Official, after consultation with the designated legal counsel, has authority to approve and sign each Non-Fee Based Record.

Subpart E—Gifts

§ 106.500 What is SBA's Gift authority?

This section covers SBA's Gift acceptance authority under sections 4(g), 8(b)(1)(G), 5(b)(9) and 7(k)(2) of the Small Business Act.

§ 106.501 What minimum requirements are applicable to SBA's solicitation and/or acceptance of Gifts?

While SBA may subject the solicitation and/or acceptance of Gifts to additional requirements through internal policy and procedure, the following requirements must apply to all Gift solicitations and/or acceptances under the authority of the Small Business Act sections cited in §106.500:

(a) SBA is required to use the Gift (whether cash or in-kind) in a manner consistent with the original purpose of the Gift;

(b) There must be written documentation of each Gift solicitation and/or acceptance signed by an authorized SBA official;

(c) Any Gift solicited and/or accepted must undergo a determination, prior to solicitation of the Gift or prior to acceptance of the Gift if unsolicited, of whether a conflict of interest exists between the Donor and SBA; and

(d) All cash Gifts donated to SBA under the authority cited in §106.500 must be deposited in an SBA trust account at the U.S. Department of the Treasury.

§106.502 Who has authority to perform a Gift conflict of interest determination?

(a) For Gifts solicited and/or accepted under sections 4(g), 8(b)(1)(G), and 7(k)(2) of the Small Business Act, the General Counsel, or designee, must make the final conflict of interest determination. No Gift shall be solicited and/or accepted under these sections of the Small Business Act if such solicitation and/or acceptance would, in the determination of the General Counsel (or designee), create a conflict of interest.

(b) For Gifts of services and facilities solicited and/or accepted under section 5(b)(9), the conflict of interest determination may be made by designated disaster legal counsel.

§106.503 Are there types of Gifts which SBA may not solicit and/or accept?

Yes. SBA shall not solicit and/or accept Gifts of or for (or use cash Gifts to purchase or engage in) the following:

(a) Alcohol products;

(b) Tobacco products;

(c) Pornographic or sexually explicit objects or services;

(d) Gambling (including raffles and lotteries);

(e) Parties primarily for the benefit of Government employees; and

(f) Any other product or service prohibited by law or policy.

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AUTHORITY: 15 U.S.C. 662, 681–687, 687b–h, 687k–m.

SOURCE: 61 FR 3189, Jan. 31, 1996, unless otherwise noted.

Subpart A—Introduction to Part 107

§ 107.20 Legal basis and applicability of this part 107.

(a) The regulations in this part implement Title III of the Small Business Investment Act of 1958, as amended. All Licensees must comply with all applicable regulations, accounting guidelines and valuation guidelines for Licensees.

(b) Provisions of this part which are not mandated by the Act shall not supersede existing State law. A party claiming that a conflict exists shall submit an opinion of independent counsel, citing authorities, for SBA's resolution of the issues involved.

§ 107.25 Severability.

Any provision of this part held to be invalid or unenforceable as applied to any person, entity, or circumstance shall be construed so as to continue to give the maximum effect to such provision as permitted by law, including as applied to persons or entities not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this part is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this part and shall not affect the remainder thereof.

[88 FR 46005, July 18, 2023]

§ 107.30 Amendments to Act and regulations.

A Licensee shall be subject to all existing and future provisions of the Act and parts 107 and 112 of title 13 of the Code of Federal Regulations.

§ 107.40 How to read this part 107.

(a) *Center Headings.* All references in this part to SBA forms, and instructions for their preparation, are to the current issue of such forms. Center headings are descriptive and are used for convenience only. They have no regulatory effect.

(b) *Capitalizing defined terms.* Terms defined in § 107.50 are capitalized in this part 107.

(c) The pronoun ''you'' as used in this part 107 means a Licensee or license applicant, as appropriate, unless otherwise noted.

Subpart B—Definition of Terms Used in Part 107

§ 107.50 Definition of terms.

Accrual Debenture means a Debenture issued at face value that accrues interest over its ten-year term, as to which instrument SBA guarantees both the principal and unpaid accrued interest.

Accrual Small Business Investment Company (''Accrual SBIC'') means a Section 301(c) Partnership Licensee, licensed under § 107.300 and approved by SBA to issue Accrual Debentures. Accrual SBICs shall be limited to a maximum of one and one quarter tiers of Leverage.

Accumulated Prioritized Payments has the meaning set forth in § 107.1520.

Act means the Small Business Investment Act of 1958, as amended.

Adjustments has the meaning set forth in § 107.1520.

Affiliate or *Affiliates* has the meaning set forth in § 121.103 of this chapter.

Annual Charge means an annual fee on Leverage which is payable to SBA by Licensees, subject to the terms and conditions set forth in §§ 107.585 and 107.1130(d).

Articles mean articles of incorporation or charter for a Corporate Licensee and the partnership agreement or certificate for a Partnership Licensee.

Assistance or *Assisted* means Financing of or management services rendered to a Small Business by a Licensee pursuant to the Act and these regulations.

Associate of a Licensee means any of the following:

(1)(i) An officer, director, employee or agent of a Corporate Licensee;

(ii) A Control Person, employee or agent of a Partnership Licensee;

(iii) An Investment Adviser/Manager of any Licensee, including any Person who contracts with a Control Person of a Partnership Licensee to be the Investment Adviser/Manager of such Licensee; or

(iv) Any Person regularly serving a Licensee on retainer in the capacity of attorney at law.

(2) Any Person who owns or controls, or who has entered into an agreement to own or control, directly or indirectly, at least 10 percent of any class of stock of a Corporate Licensee or a limited partner's interest of at least 10 percent of the partnership capital of a Partnership Licensee. However, an entity Institutional Investor, as a limited partner in a Partnership Licensee, is not considered an Associate solely because such Person's investment in the Partnership, including commitments, represents 10 percent or more but less than 50 percent of the Licensee's partnership capital, provided that such investment also represents no more than five percent of such Person's net worth and such limited partner also has no role in the management of the subject Licensee, with no right to control or approve any matter (other than such entity's vote as a limited partner) involving the Licensee.

(3) Any officer, director, partner (other than a limited partner), manager, agent, or employee of any Associate described in paragraph (1) or (2) of this definition.

(4) Any Person that directly or indirectly Controls, or is Controlled by, or is under Common Control with, a Licensee.

(5) Any Person that directly or indirectly Controls, or is Controlled by, or is under Common Control with, any Person described in paragraphs (1) and (2) of this definition.

(6) Any Close Relative of any Person described in paragraphs (1),(2), (4), and (5) of this definition.

(7) Any Secondary Relative of any Person described in paragraphs (1), (2), (4), and (5) of this definition.

(8) Any concern in which—

(i) Any person described in paragraphs (1) through (6) of this definition is an officer; general partner, or managing member; or

(ii) Any such Person(s) singly or collectively Control or own, directly or indirectly, an equity interest of at least 10 percent (excluding interests that such Person(s) own indirectly through ownership interests in the Licensee).

(9) Any concern in which any Person(s) described in paragraph (7) of this definition singly or collectively own (including beneficial ownership) a majority equity interest, or otherwise have Control. As used in this paragraph (9), ''collectively'' means together with any Person(s) described in paragraphs (1) though (7) of this definition.

(10) For the purposes of this definition, if any Associate relationship described in paragraphs (1) through (7) of this definition exists at any time within six months before or after the date that a Licensee provides Financing, then that Associate relationship is considered to exist on the date of the Financing.

(11) If any Licensee has any ownership interest in another Licensee, the two Licensees are Associates of each other.

Capital Call Line has the meaning set forth in § 107.550(c).

Capital Impairment has the meaning set forth in § 107.1830(c).

Central Registration Agent or *CRA* means one or more agents appointed by SBA for the purpose of issuing TCs and performing the functions enumerated in § 107.1620 and performing similar functions for Debentures and Participating Securities funded outside the pooling process.

Charge has the same meaning as Annual Charge.

Close Relative of an individual means:

(1) A current or former spouse;

(2) A father, mother, guardian, brother, sister, son, daughter; or

(3) A father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, or daughter-in-law.

Combined Capital means the sum of Regulatory Capital and outstanding Leverage.

Commitment means a written agreement between a Licensee and an eligible Small Business that obligates the Licensee to provide Financing (except a guarantee) to that Small Business in a fixed or determinable sum, by a fixed or determinable future date. In this context the term ''agreement'' means that there has been agreement on the principal economic terms of the Financing. The agreement may include reasonable conditions precedent to the Licensee's obligation to fund the commitment, but these conditions must be outside the Licensee's control.

Common Control means a condition where two or more Persons, either through ownership, management, contract, or otherwise, are under the Control of one group or Person. Two or more Licensees are presumed to be under Common Control if they are Affiliates of each other by reason of common ownership or common officers, directors, or general partners; or if they are managed or their investments are significantly directed either by a common independent investment advisor or managerial contractor, or by two or more such advisors or contractors that are Affiliates of each other. This presumption may be rebutted by evidence satisfactory to SBA.

Control means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Licensee or other concern, whether through the ownership of voting securities, by contract, or otherwise.

Control Person means any Person that controls a Licensee, either directly or through an intervening entity. A Control Person includes:

(1) A general partner of a Partnership Licensee;

(2) Any Person serving as the general partner, officer, director, or manager (in the case of a limited liability company) of any entity that controls a Licensee, either directly or through an intervening entity;

(3) Any Person that—

(i) Controls or owns, directly or through an intervening entity, at least 30 percent of a Partnership Licensee or any entity described in paragraph (1) or (2) of this definition; and

(ii) Participates in the investment decisions of the general partner of such Partnership Licensee; *provided that,* if at least 30% of Regulatory Capital is

unaffiliated and unassociated with management of the Licensee, the management company of the Licensee is a government sponsored non-profit entity, the general partners of the Licensee are bound by a fiduciary duty to the investors in the Licensee, and such members of the general partner may not be hired or removed directly or indirectly by such government sponsor, the management of the Licensee will be deemed to be free from any outside Control; and

(4) Any Person that controls or owns, directly or through an intervening entity, at least 50 percent of a Partnership Licensee or any entity described in paragraphs (1) or (2) of this definition.

Corporate Licensee. See definition of Licensee in this section.

Cost of Money has the meaning set forth in §107.855.

Debenture Rate means the interest rate, as published from time to time in the FEDERAL REGISTER by SBA, for ten year debentures issued by Licensees and funded through public sales of certificates bearing SBA's guarantee. User or guarantee fees, if any, paid by a Licensee are not considered in determining the Debenture Rate.

Debentures means debt obligations issued by Licensees pursuant to section 303(a) of the Act and held or guaranteed by SBA.

Debt Securities has the meaning set forth in §107.815.

Disadvantaged Business means a Small Business that is at least 50 percent owned, and controlled and managed, on a day to day basis, by a person or persons whose participation in the free enterprise system is hampered because of social or economic disadvantages.

Distributable Securities means equity securities that are determined by SBA (with the advice of a third party expert in the marketing of securities) to meet each of the following requirements:

(1) The securities (which may include securities that are salable pursuant to the provisions of Rule 144 (17 CFR 230.144) under the Securities Act of 1933, as amended) are salable immediately without restriction under Federal and state securities laws;

(2) The securities are of a class:

(i) Which is listed and registered on a national securities exchange, or

(ii) For which quotation information is disseminated in the National Association of Securities Dealers Automated Quotation System and as to which transaction reports and last sale data are disseminated pursuant to Rule 11Aa3–1 (17 CFR 240.11Aa3–1) under the Securities Exchange Act of 1934, as amended; and

(3) The quantity of such securities to be distributed to SBA can be sold over a reasonable period of time without having an adverse impact upon the price of the security.

Distribution means any transfer of cash or non-cash assets to SBA, its agent or Trustee, or to partners in a Partnership Licensee, or to shareholders in a Corporate Licensee. Capitalization of Retained Earnings Available for Distribution constitutes a Distribution to the Licensee's non-SBA partners or shareholders.

Early Stage SBIC means a Section 301(c) Partnership Licensee, licensed pursuant to §107.310 of this part, in which at least 50 percent of all Loans and Investments (in dollars) must be made to Small Businesses that are ''early stage'' companies at the time of the Licensee's initial Financing (see also §107.1810(f)(11)). For the purposes of this definition, an ''early stage'' company is one that has never achieved positive cash flow from operations in any fiscal year.

Earmarked Assets has the meaning set forth in §107.1510(b). (See also §107.1590.)

Earmarked Profit (Loss) has the meaning set forth in §107.1510.

Earned Prioritized Payments has the meaning set forth in §107.1520.

Energy Saving Activities means any of the following:

(1) Manufacturing or research and development of products, integral product components, integral material, or related software that meet one or more of the following:

(i) Improves residential energy efficiency as demonstrated by meeting Department of Energy or Environmental Protection Agency criteria for use of the Energy Star trademark label;

(ii) Improves commercial energy efficiency as demonstrated by being in the

upper 25% of efficiency for all similar products as designated by the Department of Energy's Federal Energy Management Program;

(iii) Improves automobile efficiency or reduces consumption of non-renewable fuels through the use of advanced batteries, power electronics, or electric motors; advanced combustion engine technology; alternative fuels; or advanced materials technologies, such as lightweighting;

(iv) Improves industrial energy efficiency through combined heat and power (CHP) prime mover or power generation technologies, heat recovery units, absorption chillers, desiccant dehumidifiers, packaged CHP systems, more efficient process heating equipment, more efficient steam generation equipment, heat recovery steam generators, or more efficient use of water recapture, purification and reuse for industrial application;

(v) Advances commercialization of technologies developed by recipients of awards from the Department of Energy under the Advanced Research Projects Agency—Energy, Small Business Innovation Research, or Small Business Technology Transfer programs;

(vi) Reduces the consumption of non-renewable energy by providing renewable energy sources, as demonstrated by meeting the standards, applicable to the year in which the investment is made, for receiving a Renewable Electricity Production Tax Credit as defined in Internal Revenue Code Section 45 or an Energy Credit as defined in Internal Revenue Code Section 48;

(vii) Reduces the consumption of non-renewable energy for electric power generation as described in Internal Revenue Code Section 48(c)(1)(A) by providing highly efficient energy conversion systems that can use renewable or non-renewable fuel through fuel cells; or

(viii) Improves electricity delivery efficiency by supporting one or more of the smart grid functions as identified in 42 U.S.C. 17386(d), by means of a product, service, or functionality that serves one or more of the following smart grid operational domains: Equipment manufacturing, customer systems, advanced metering infrastructure, electric distribution systems, electric transmission systems, storage systems, and cyber security.

(2) Installation and/or inspection services associated with the deployment of energy saving products as identified by meeting one or more of the following standards:

(i) Deploys products that qualify, in the year in which the investment is made, for installation-related Federal Tax Credits for Residential Consumer Energy Efficiency;

(ii) Deploys products related to commercial energy efficiency as demonstrated by deploying commercial equipment that is in the upper 25% of efficiency for all similar products as designated by the Department of Energy's Federal Energy Management Program;

(iii) Deploys combined heat and power products, goods, or services;

(iv) Deploys products that qualify, in the year in which the investment is made, for receiving a Renewable Electricity Production Tax Credit as defined in Internal Revenue Code Section 45 or an Energy Credit as defined in Internal Revenue Code Section 48; or

(v) Deploys a product, service, or functionality that improves electricity delivery efficiency by supporting one or more of the smart grid functions as identified in 42 U.S.C. 17386(d), and that serves one or more of the following smart grid operational domains: Equipment manufacturing, customer systems, advanced metering infrastructure, electric distribution systems, electric transmission systems, or grid cyber security.

(3) Auditing or consulting services performed with the objective of identifying potential improvements of the type described in paragraph (1) or (2) of this definition.

(4) Other manufacturing, service, or research and development activities that use less energy to provide the same level of energy service or reduce the consumption of non-renewable energy by providing renewable energy sources, as determined by SBA. A Licensee must obtain such determination in writing prior to providing Financing to a Small Business. SBA will consider factors including but not limited to:

(i) Results of energy efficiency testing performed in accordance with recognized professional standards, preferably by a qualified third-party professional, such as a certified energy assessor, energy auditor, or energy engineer;

(ii) Patents or grants awarded to or licenses held by the Small Business related to Energy Saving Activities listed in subsection (1) or (2) above;

(iii) For research and development of products or services that are anticipated to reduce the consumption of non-renewable energy, written evidence from an independent, certified third-party professional of the feasibility, commercial potential, and projected energy savings of such products or services; and

(iv) Eligibility of the product or service for a Federal tax credit cited in this definition that is not available in the year in which the investment is made, but was available in a previous year.

Energy Saving Qualified Investment means a Financing which:

(1) Is made by a Licensee licensed after September 30, 2008;

(2) Is in the form of a Loan, Debt Security, or Equity Security, each as defined in this section;

(3) Is made to a Small Business that is primarily engaged in Energy Saving Activities. A Licensee must obtain a determination from SBA prior to the provision of Financing as to whether a Small Business is primarily engaged in Energy Saving Activities. SBA will consider the distribution of revenues, employees and expenditures, intellectual property rights held, and Energy Saving Activities described in a business plan presented to investors as part of a formal solicitation in making its determination. However, a Small Business is presumed to be primarily engaged in Energy Saving Activities, and no pre-Financing determination by SBA is required, if:

(i) The Small Business derived at least 50% of its revenues during its most recently completed fiscal year from Energy Saving Activities; or

(ii) The Small Business will utilize 100% of the Financing proceeds received from a Licensee to engage in Energy Saving Activities.

Equity Capital Investments means investments in a Small Business in the form of common or preferred stock, limited partnership interests, options, warrants, or similar equity instruments, including subordinated debt with equity features if such debt provides only for interest payments contingent upon and limited to the extent of earnings. Equity Capital Investments must not require amortization. Equity Capital Investments may be guaranteed; however, neither Equity Capital Investments nor such guarantee may be collateralized or otherwise secured. Investments classified as Debt Securities (see §§ 107.800 and 107.815) are not precluded from qualifying as Equity Capital Investments.

Equity Securities has the meaning set forth in § 107.800.

Final Licensing Fee has the meaning set forth in § 107.300.

Financing or *Financed* means outstanding financial assistance provided to a Small Business by a Licensee, whether through:

(1) Loans;

(2) Debt Securities;

(3) Equity Securities;

(4) Guarantees; or

(5) Purchases of securities of a Small Business through or from an underwriter (see § 107.825).

GAAP means Generally Accepted Accounting Principles as established by the Financial Accounting Standards Board (FASB) and refers to established financial accounting and reporting standards for public and private companies and not-for-profit organizations.

Guaranty Agreement means the contract entered into by SBA which is a guarantee backed by the full faith and credit of the United States Government as to timely payment of principal and interest on Debentures or the Redemption Price of and Prioritized Payments on Participating Securities and SBA's rights in connection with such guarantee.

Includible Non-Cash Gains means those non-cash gains (as reported on SBA Form 468) that are realized in the form of Publicly Traded and Marketable securities or investment grade debt instruments. For purposes of this definition, investment grade debt instruments means those instruments

that are rated ''BBB'' or ''Baa'', or better, by Standard & Poor's Corporation or Moody's Investors Service, respectively. Non-rated debt may be considered to be investment grade if Licensee obtains a written opinion from an investment banking firm acceptable to SBA stating that the non-rated debt instrument is equivalent in risk to the issuer's investment grade debt.

Inflation Adjustment is the methodology used to increase SBIC administrative fees using the Consumer Price Index for Urban Consumers (CPI–U), calculated by the U.S. Bureau of Labor and Statistics (BLS), using the U.S. city average for all items, not seasonally adjusted, with the base period of 1982 − 84 = 100. To calculate the Inflation Adjustment, each year, SBA will divide the CPI–U from the most recent June by the CPI–U from June of the preceding year. If the result is greater than 1, SBA will increase the relevant fees as follows:

(1) Multiply the result by the current fee; and

(2) Round to the nearest $100.

Initial Licensing Fee has the meaning set forth in § 107.300.

Institutional Investor means:

(1) *Entities.* Any of the following entities if the entity has a net worth (exclusive of unfunded commitments from investors) of at least $1 million, or such higher amount as is specified in paragraph (1) of this definition. (See also § 107.230(b)(4) for limitations on the amount of an Institutional Investor's commitment that may be included in Private Capital.)

(i) A State or National bank, trust company, savings bank, or savings and loan association.

(ii) An insurance company.

(iii) A 1940 Act Investment Company or Business Development Company (each as defined in the Investment Company Act of 1940, as amended (15 U.S.C. 8a–1 *et seq.*).

(iv) A holding company of any entity described in paragraph (1)(i), (ii) or (iii) of this definition.

(v) An employee benefit or pension plan established for the benefit of employees of the Federal government, any State or political subdivision of a State, or any agency or instrumentality of such government unit.

(vi) An employee benefit or pension plan (as defined in the Employee Retirement Income Security Act of 1974, as amended (Pub. L. 93–406, 88 Stat. 829), excluding plans established under section 401(k) of the Internal Revenue Code of 1986 (26 U.S.C. 401(k)), as amended).

(vii) A trust, foundation or endowment exempt from Federal income taxation under the Internal Revenue Code of 1986, as amended.

(viii) A corporation, partnership or other entity with a net worth (exclusive of unfunded commitments from investors) of more than $10 million.

(ix) A State, a political subdivision of a State, or an agency or instrumentality of a State or its political subdivision.

(x) An entity whose primary purpose is to manage and invest non-Federal funds on behalf of at least three Institutional Investors described in paragraphs (1)(i) through (1)(ix) of this definition, each of whom must have at least a 10 percent ownership interest in the entity.

(xi) Any other entity that SBA determines to be an Institutional Investor.

(2) *Individuals.* (i) Any of the following individuals if he/she is also a permanent resident of the United States:

(A) An individual who is an Accredited Investor (as defined in the Securities Act of 1933, as amended (15 U.S.C. 77a–77aa)) and whose commitment to the Licensee is backed by a letter of credit from a State or National bank acceptable to SBA.

(B) An individual whose personal net worth is at least $2 million and at least ten times the amount of his or her commitment to the Licensee. The individual's personal net worth must not include the value of any equity in his or her most valuable residence.

(C) An individual whose personal net worth (determined in accordance with paragraph (2)(i)(B) of this definition) is at least $10 million.

(ii) Any individual who is not a permanent resident of the United States but who otherwise satisfies paragraph (2)(i) of this definition *provided* such individual has irrevocably appointed an agent within the United States for the service of process.

Investment Adviser/Manager means any Person who furnishes advice or assistance with respect to operations of a Licensee under a written contract executed in accordance with the provisions of § 107.510.

Lending Institution means a concern that is operating under regulations of a state or Federal licensing, supervising, or examining body, or whose shares are publicly traded and listed on a recognized stock exchange or NASDAQ and which has assets in excess of $500 million; and which, in either case, holds itself out to the public as engaged in the making of commercial and industrial loans and whose lending operations are not for the purpose of financing its own or an Associate's sales or business operations.

Leverage means financial assistance provided to a Licensee by SBA, either through the purchase or guaranty of a Licensee's Debentures, and any other SBA financial assistance evidenced by a security of the Licensee. For the Accrual Debenture, Leverage includes principal and accrued unpaid interest.

Leverageable Capital means Regulatory Capital, excluding unfunded commitments.

Leveraged Licensee means a Licensee which has outstanding Leverage, Leverage commitments, or intends to issue Leverage in the future.

Licensee means either a corporation (Corporate Licensee), or a limited partnership organized pursuant to § 107.160 (Partnership Licensee), to which a license has been granted pursuant to the Act. For certain purposes, the Entity General Partner of a Partnership Licensee is treated as if it were a Licensee (see § 107.160(b)(2)).

LMI Enterprise means:

(1) A Small Business that has at least 50% of its employees or tangible assets located in LMI Zone(s) or in which at least 35% of the full-time employees have primary residences in LMI Zone(s), in either case determined as of the time of application for SBIC financing; or

(2) A Small Business that does not meet the requirements of paragraph (1) of this definition as of the time of application for SBIC financing but that certifies at such time that it intends to meet the requirements within 180 days after the closing of the SBIC financing. A Small Business qualifying under this paragraph (2) will no longer be an LMI Enterprise as of the 180th day after the closing of the SBIC financing unless, on or before such date, at least 50% of its employees or tangible assets are located in LMI Zones or at least 35% of its full-time employees have primary residences in LMI Zones.

LMI Investment means a financing of an LMI Enterprise, made after September 30, 1999, in the form of equity securities or debt securities that are junior to all existing or future secured borrowings of the business. The debt securities may be guaranteed and may be secured by the assets of the LMI Enterprise, but the guarantee may not be collateralized or otherwise secured.

LMI Zone means any area located within a HUBZone (as defined in 13 CFR 126.103), an Urban Empowerment Zone or Urban Enterprise Community (as designated by the Secretary of the Department of Housing and Urban Development), a Rural Empowerment Zone or Rural Enterprise Community (as designated by the Secretary of the Department of Agriculture), an area of Low Income or Moderate Income (as recognized by the Federal Financial Institutions Examination Council), or a county with Persistent Poverty (as classified by the Economic Research Service of the Department of Agriculture).

Loan has the meaning set forth in § 107.810.

Loans and Investments means Portfolio Securities, Assets Acquired in Liquidation of Portfolio Securities, Operating Concerns Acquired, and Notes and Other Securities Received, as set forth in the Statement of Financial Position of SBA Form 468.

Management Expenses has the meaning set forth in § 107.520.

1940 Act Company means a Licensee which is registered under the Investment Company Act of 1940.

1980 Act Company means a Licensee which is registered under the Small Business Investment Incentive Act of 1980.

Non-leveraged Licensee means a Licensee which has no outstanding Leverage or Leverage commitment, no earmarked assets, and certifies to SBA

(in writing) that it will not seek Leverage in the future.

Original Issue Price means the price paid by the purchaser for securities at the time of issuance.

Participating Securities means preferred stock, preferred limited partnership interests, or similar instruments issued by Licensees, including debentures having interest payable only to the extent of earnings, all of which are subject to the terms set forth in §§ 107.1500 through 107.1590 and section 303(g) of the Act.

Partnership Licensee. See definition of Licensee in this section.

Payment Date means:

(1) For a Participating Securities issuer, each February 1, May 1, August 1, and November 1 during the term of a Participating Security, or

(2) For an Early Stage SBIC, each March 1, June 1, September 1, and December 1 during the term of a Debenture.

Person means a natural person or legal entity.

Pool means an aggregation of SBA guaranteed Debentures or SBA guaranteed Participating Securities approved by SBA.

Portfolio means the securities representing a Licensee's total outstanding Financing of Small Businesses. It does not include idle funds or assets acquired in liquidation of Portfolio securities.

Portfolio Concern means a Small Business Assisted by a Licensee.

Preferred Securities means nonvoting preferred stock or nonvoting limited partnership interests issued to SBA prior to October 1, 1996, by a Section 301(d) Licensee. Such securities were issued at par value in the case of preferred stock, or at face value in the case of preferred limited partnership interests.

Prioritized Payments has the meaning set forth in § 107.1520.

Private Capital has the meaning set forth in § 107.230.

Profit Participation has the meaning set forth in § 107.1500(c)(3).

Publicly Traded and Marketable means securities that are salable without restriction or that are salable within 12 months pursuant to Rule 144 (17 CFR 230.144) of the Securities Act of 1933, as amended, by the holder thereof (or in the case of an In-kind Distribution by the distributee thereof), and are of a class which is traded on a regulated stock exchange, or is listed in the Automated Quotation System of the National Association of Securities Dealers (NASDAQ), or has, at a minimum, at least two market makers as defined in the relevant sections of the Securities Exchange Act of 1934, as amended (15 U.S.C. 77b *et seq.*), and in all cases the quantity of which can be sold over a reasonable period of time without having an adverse impact upon the price of the stock.

Qualified Non-private Funds has the meaning set forth in § 107.230.

Redemption Price means the amount required to be paid by the issuer, or successor to the issuer, of Preferred or Participating Securities to repurchase such securities from the holder. The Redemption Price shall be the Original Issue Price less any prepayments or prior redemptions.

Regulatory Capital means:

(1) *General. Regulatory Capital* means Private Capital, excluding non-cash assets contributed to a Licensee or a license applicant and non-cash assets purchased by a license applicant, unless such assets have been converted to cash or have been approved by SBA for inclusion in Regulatory Capital. For purposes of this definition, sales of contributed non-cash assets with recourse or borrowing against such assets shall not constitute a conversion to cash. Regulatory Capital becomes Leverageable Capital when it is paid in.

(2) *Exclusion of questionable commitments.* An investor's commitment to a Licensee is excluded from Regulatory Capital if SBA determines that there is a lack of enforceable legal agreements under United States law or there is an issue of collectability for financial or any other reason, *provided, however,* that the unfunded commitment of an investor that has satisfied the applicable net worth test set forth in the definition of Institutional Investor will not be of questionable collectability (for financial reasons) if the Licensee's limited partnership agreement (or other

governing agreement) contains sufficient provisions to ensure collectability.

Reinvestor SBIC has the meaning set forth in § 107.720(a)(2).

Retained Earnings Available for Distribution (READ) means Undistributed Net Realized Earnings less any Unrealized Depreciation on Loans and Investments (as reported on SBA Form 468) and represents the amount that a Licensee may distribute to investors (including SBA) in accordance with § 107.585 as a profit Distribution, or transfer to Private Capital.

Revenue-Based Financing and *Revenue-Based Loan* have the meaning set forth in § 107.810.

SBA means the Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

SBIC means Small Business Investment Company and has the same meaning as ''Licensee'' as set forth in this section.

SBIC website means the website maintained by SBA at *www.sba.gov/sbic,* which contains information on the SBIC program, including notices, policies, procedures, and forms pertaining to the program.

Secondary Relative of an individual means:

(1) A grandparent, grandchild, or any other ancestor or lineal descendent who is not a Close Relative;

(2) An uncle, aunt, nephew, niece, or first cousin; or

(3) A spouse of any person described in paragraph (1) or (2) of this definition.

Section 301(c) Licensee has the meaning set forth in § 107.100.

Section 301(d) Licensee means a company licensed prior to October 1, 1996 under section 301(d) of the Act as in effect on the date of licensing, that may provide Assistance only to Disadvantaged Businesses. A Section 301(d) Licensee may be organized as a for-profit corporation, as a non-profit corporation, or as a limited partnership.

Short-term Financing means Financing with a term of less than one year in accordance with the regulations.

Small Business means a small business concern as defined in section 103(5) of the Act (including its Affiliates), which for purposes of size eligibility, meets the applicable criteria set forth in part 121 of this chapter.

Smaller Enterprise has the meaning set forth in § 107.710.

Start-up Financing means an Equity Capital Investment in a Small Business that—

(1) Has not had sales exceeding $3,000,000 or positive cash flow from operations in any of its last three full fiscal years; and

(2) Was not formed to acquire any existing business, unless the acquired business satisfies paragraphs (1) and (2) of this definition.

State means one of the United States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the United States Virgin Islands, the Northern Mariana Islands, and American Samoa.

Temporary Debt has the meaning set forth in § 107.570.

Total Intended Leverage Commitment means the dollar amount or ratio of SBA Leverage commitments to Private Capital commitments. The final Total Intended Leverage Commitment dollar amount applied in the Accrual Debenture SBA Share calculation will be finalized no later than 12 months after licensure or upon the Licensee's final close, whichever occurs first.

Total Private Capital Commitment has the meaning set forth in § 107.300.

Trust means the legal entity created for the purpose of holding guaranteed Debentures or Participating Securities and the guaranty agreement related thereto, receiving, holding and making any related payments, and accounting for such payments.

Trust Certificate Rate means a fixed rate determined by the Secretary of the Treasury at the time Participating Securities or Debentures are pooled, taking into consideration the current average market yield on outstanding marketable obligations of the United States with maturities comparable to the maturities of the Trust Certificates being guaranteed by SBA, adjusted to the nearest one-eighth of one percent.

Trust Certificates (TCs) means certificates issued by SBA, its agent or Trustee and representing ownership of all or a fractional part of a Trust or Pool of Debentures or Participating Securities.

Trustee means the trustee or trustees of a Trust.

Underlicensed State means a State in which the number of operating licensees per capita is less than the median number of operating licensees per capita for all States, where the per capita per State is based on the most recent resident population published by the U.S. Census as of the date of the calculation. SBA publishes a notice with the current list of Underlicensed States on the SBIC website.

Undistributed Net Realized Earnings means Undistributed Realized Earnings less Non-cash Gains/Income, each as reported on SBA Form 468.

Unrealized Appreciation means the amount by which a Licensee's valuation of each of its Loans and Investments, as determined by its Board of Directors or General Partner(s) in accordance with Licensee's valuation policies, exceeds the cost basis thereof.

Unrealized Depreciation means the amount by which a Licensee's valuation of each of its Loans and Investments, as determined by its Board of Directors or General Partner(s) in accordance with Licensee's valuation policies, is below the cost basis thereof.

Unrealized Gain (Loss) on Securities Held means the sum of the Unrealized Appreciation and Unrealized Depreciation on all of a Licensee's Loans and Investments, less estimated future income tax expense or estimated realizable future income tax benefit, as appropriate.

Venture Capital Financing has the meaning set forth in § 107.1160.

Watchlist has the meaning set forth in § 107.1850.

Wind-down Plan has the meaning set forth in § 107.590.

[61 FR 3189, Jan. 31, 1996; 61 FR 41496, Aug. 9, 1996, as amended at 62 FR 11759, Mar. 13, 1997; 63 FR 5865, Feb. 5, 1998; 64 FR 52645, Sept. 30, 1999; 64 FR 70995, Dec. 20, 1999; 69 FR 8098, Feb. 23, 2004; 77 FR 23378, Apr. 19, 2012; 77 FR 25051, Apr. 27, 2012; 79 FR 62823, Oct. 21, 2014; 82 FR 39340, Aug. 18, 2017; 82 FR 52184, Nov. 13, 2017; 88 FR 46005, July 18, 2023]

Subpart C—Qualifying for an SBIC License

ORGANIZING AN SBIC

§ 107.100 Organizing a Section 301(c) Licensee.

Section 301(c) Licensee means a company licensed under section 301(c) of the Act. It may be organized as a for-profit corporation or as a limited partnership created in accordance with the special rules of § 107.160.

§ 107.115 1940 Act and 1980 Act Companies.

A 1940 Act or 1980 Act Company is eligible to apply for an SBIC license, and an existing Licensee is eligible to apply for SBA's approval to convert to a 1940 Act or 1980 Act Company. In either case, the 1940 Act or 1980 Act Company may elect to be taxed as a regulated investment company under section 851 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 851). However, a Licensee making such election may make Distributions only as permitted under the applicable sections of this part (see the definition of Retained Earnings Available for Distribution, § 107.585, and §§ 107.1540 through 107.1580).

§ 107.120 Special rules for a Section 301(d) Licensee owned by another Licensee.

With SBA's prior written approval, a Section 301(d) Licensee may operate as the subsidiary of one or more Licensees (participant Licensees), subject to the following:

(a) Each participant Licensee must own at least 20 percent of the voting securities of the Section 301(d) Licensee.

(b) A participant Licensee must treat its entire capital contribution to the subsidiary as a reduction of its Leverageable Capital. The participant Licensee's remaining Leverageable Capital must be sufficient to support its outstanding Leverage.

(c) A participant Licensee may not transfer its Leverage to a subsidiary Section 301(d) Licensee.

[63 FR 5865, Feb. 5, 1998]

§ 107.130 Requirement for qualified management.

When applying for a license, and while you have a license, you must show, to the satisfaction of SBA, that your current or proposed management team is qualified and has the knowledge, experience and capability necessary for investing in the types of businesses contemplated by the Act, the regulations in this part 107, and your business plan. You must designate at least one individual as the official responsible for contact with SBA.

[61 FR 3189, Jan. 31, 1996, as amended at 77 FR 25051, Apr. 27, 2012]

§ 107.140 SBA approval of initial Management Expenses.

If you plan to obtain Leverage, you must have your Management Expenses approved by SBA at the time of licensing. (See § 107.520 for the definition of Management Expenses.)

§ 107.150 Management-ownership diversification requirement.

(a) *Diversification requirement.* (Also referenced in this part as the ''diversity requirement.'') You must satisfy the requirements in paragraphs (b), (c) and (d) of this section:

(1) In order to obtain an SBIC license (unless you do not plan to obtain Leverage),

(2) If at the time you were licensed you did not plan to obtain Leverage, but you now wish to be eligible for Leverage, or

(3) If SBA so requires as a condition of approval of your transfer of Control under § 107.440.

(b) *Percentage ownership requirement.* (1) *General rule.* Except as provided in paragraph (b)(2) of this section, no Person or group of Persons who are Affiliates of one another may own, directly or indirectly, more than 70 percent of your Regulatory Capital or your Leverageable Capital.

(2) *Exception.* An investor that is a Traditional Investment Company, as determined by SBA, may own more than 70% of a Licensee's Regulatory Capital and Leverageable Capital. A Traditional Investment Company may also serve as the management company of an SBIC owning and control more than 70 percent of the Licensee's Regulatory Capital and Leverageable Capital. A non-profit entity which is a Traditional Investment Company may only serve as the management company of a Licensee and, unlike other Traditional Investment Companies, is limited to no more than 70% of the Licensee's Regulatory and Leverageable Capital. A Licensee must be a for-profit entity. In determining whether a firm is a Traditional Investment Company for purposes of this section, SBA will also consider:

(i) The degree to which the managers of the firm are unrelated to and unaffiliated with the investors in the firm or non-profit entity.

(ii) Whether the managers of the firm are authorized and motivated to make investments that, in their independent judgment, are likely to produce significant returns to all investors in the firm or non-profit entity.

(iii) Whether the firm or non-profit entity serving as the management company of a for-profit SBIC benefits from the use of the SBIC through the financial performance of the SBIC.

(iv) Other related factors.

(c) *Non-affiliation requirement*—(1) *General rule.* At least 30 percent of your Regulatory Capital and Leverageable Capital must be owned and controlled by three Persons unaffiliated with your management and unaffiliated with each other, and whose investments are significant in dollar and percentage terms as determined by SBA. Such Persons must not be your Associates (except for their status as your shareholders, limited partners, or members). A single ''acceptable'' Institutional Investor may be substituted for two or three of the three Persons who are otherwise required under this paragraph. The following Institutional Investors are ''acceptable'' for this purpose:

(i) Entities whose overall activities are regulated and periodically examined by state, Federal or other governmental authorities satisfactory to SBA;

(ii) Entities listed on the New York Stock Exchange;

(iii) Entities that are publicly-traded and that meet both the minimum numerical listing standards and the corporate governance listing standards of the New York Stock Exchange;

(iv) Public or private employee pension funds;

(v) Trusts, foundations, or endowments, but only if exempt from Federal income taxation; and

(vi) Other Institutional Investors satisfactory to SBA.

(2) *Look-through for Traditional Investment Company investors.* SBA, in its sole discretion, may consider the requirement in paragraph (c)(1) of this section to be satisfied if at least 30 percent of your Regulatory Capital and Leverageable Capital is owned and controlled indirectly, through a Traditional Investment Company, by Persons unaffiliated with your management.

(d) *Voting requirement.* (1) Except as provided in paragraph (d)(2) of this section, the investors required for you to satisfy diversity may not delegate their voting rights to any Person who is your Associate, or who Controls, is Controlled by, or is under Common Control with any of your Associates, without prior SBA approval.

(2) *Exception.* Paragraph (d)(1) of this section does not apply to investors in publicly-traded Licensees, to proxies given to vote in accordance with specific instructions for single specified meetings, or to any delegation of voting rights to a Person who is neither a diversity investor in the Licensee nor affiliated with management of the Licensee.

(e) *Requirement to maintain diversity.* If you were required to have management-ownership diversity at any time, you must maintain such diversity while you have outstanding Leverage or Earmarked Assets. To maintain management-ownership diversity, you may continue to satisfy the diversity requirement as in effect at the time it was first applicable to you or you may satisfy the management-ownership diversity requirement as currently in effect. If, at any time, you no longer have the required management-ownership diversity, you must:

(1) Notify SBA within 10 days; and

(2) Re-establish diversity within six months. For the consequences of failure to re-establish diversity, see §§ 107.1810(g) and 107.1820(f).

[65 FR 71055, Nov. 29, 2000, as amended at 88 FR 46007, July 18, 2023]

§ 107.160 Special rules for Licensees formed as limited partnerships.

A limited partnership organized under State law solely for the purpose of performing the functions and conducting the activities contemplated under the Act may apply for a license under section 301(c) or section 301 (d) of the Act (''Partnership Licensee'').

(a) *Number of Licensee's General Partners.* If you are a Partnership Licensee, you must have as your general partner(s) at least two individuals, or at least one corporation, partnership, or limited liability company (LLC), or any combination of individuals, corporations, partnerships, or LLCs.

(b) *Entity General Partner of Licensee.* A general partner which is a corporation, limited liability company or partnership (an ''Entity General Partner'') shall be organized under state law solely for the purpose of serving as the general partner of one or more Licensees.

(1) SBA must approve any person who will serve as an officer, director, manager, or general partner of the Entity General Partner. This provision must be stated in an Entity General Partner's Certificate of Incorporation, member agreement, Limited Partnership Agreement or other similar governing instrument which must, in each case, accompany the license application.

(2) An Entity General Partner is subject to the same examination and reporting requirements as a Licensee under section 310(b) of the Act. The restrictions and obligations imposed upon a Licensee by §§ 107.1800 through 107.1820, and 107.30, 107.410 through 107.450, 107.470, 107.475, 107.500, 107.510, 107.585, 107.600, 107.680, 107.690 through 107.692, 107.865, and 107.1910 apply also to an Entity General Partner of a Licensee.

(3) The general partner(s) of your Entity General Partner(s) will be considered your general partner.

(4) If your Entity General Partner is a limited partnership, its limited partners may be considered your Control Person(s) if they meet the definition for Control Person in § 107.50.

(5) If your Entity General Partner is a limited partnership, it is subject to paragraph (a) of this section.

(c) *Other requirements for Partnership Licensees.* If you are a Partnership Licensee:

(1) You must have a minimum duration of ten years or two years following the maturity of your last-maturing Leverage security, whichever is longer. After 10 years, if all Leverage has been repaid or redeemed and all amounts due SBA, its agent, or Trustee have been paid, the Partnership Licensee may be terminated by a vote of your partners. (For purposes of this provision SBA is not considered a partner.);

(2) None of your general partner(s) may be removed or replaced by your limited partners without prior written approval of SBA;

(3) Any transferee of, or successor in interest to, your general partner shall have only the rights and liabilities of a limited partner pending SBA's written approval of such transfer or succession; and

(4) You must incorporate all the provisions in this paragraph (c) in your Limited Partnership Agreement.

(d) *Obligations of a Control Person.* All Control Persons are bound by the disciplinary provisions of sections 313 and 314 of the Act and by the conflict-of-interest rules under section 312 of the Act. The term Licensee, as used in §§ 107.30, 107.460, and 107.680 includes all of the Licensee's Control Persons. The term Licensee as used in § 107.670 includes only the Licensee's general partner(s). The conditions specified in §§ 107.1800 through 107.1820 and § 107.1910 apply to all general partners.

(e) *Liability of general partner for partnership debts to SBA.* Subject to section 314 of the Act, your general partner is not liable solely by reason of its status as a general partner for repayment of any Leverage or debts you owe to SBA unless SBA, in the exercise of reasonable investment prudence, and with regard to your financial soundness, determines otherwise prior to the purchase or guaranty of your Leverage.

(f) *Reorganization of Licensee.* A corporate Licensee wishing to reorganize as a Partnership Licensee, or a Partnership Licensee wishing to reorganize as a Corporate Licensee, may apply to SBA for approval under § 107.470.

(g) *Special Leverage requirement.* Before your first issuance of Leverage, you must furnish SBA with evidence that you qualify as a partnership for tax purposes, either by a ruling from the Internal Revenue Service, or by an opinion of counsel.

CAPITALIZING AN SBIC

§ 107.200 Adequate capital for Licensees.

You must meet the requirements of this § 107.200 to qualify for a license, to continue as a Licensee, and to receive Leverage.

(a) You must have enough Regulatory Capital to provide reasonable assurance that:

(1) You will operate soundly and profitably over the long term; and

(2) You will be able to operate actively in accordance with your Articles and within the context of your business plan, as approved by SBA.

(b) In SBA's sole discretion, you must be economically viable, taking into consideration actual and anticipated income and losses on your Loans and Investments, and the experience and qualifications of your owners and managers.

§ 107.210 Minimum capital requirements for Licensees.

(a) *Companies licensed on or after October 1, 1996.* A company licensed on or after October 1, 1996, must have Leverageable Capital of at least $2,500,000 and must meet the applicable minimum Regulatory Capital requirement in this paragraph (a), unless lower Leverageable Capital and Regulatory Capital amounts are approved by SBA as part of a Wind-down Plan in accordance with § 107.590(c):

(1) *Licensees other than Early Stage SBICs.* Except for Early Stage SBICs, a Licensee must have Regulatory Capital of at least $5,000,000. As an exception to the general rule in this paragraph (a)(1), SBA in its sole discretion and based on a showing of special circumstances and good cause, which includes applicants that are headquartered in an Underlicensed State, may license an applicant with Regulatory Capital of at least $3,000,000, but only if the applicant:

(i) Has satisfied all licensing standards and requirements except the minimum capital requirement, as determined solely by SBA;

(ii) Has a viable business plan reasonably projecting profitable operations; and

(iii) Has a reasonable timetable for achieving Regulatory Capital of at least $5,000,000.

(2) *Early Stage SBICs.* An Early Stage SBIC must have Regulatory Capital of at least $20 million.

(b) *Companies licensed before October 1, 1996.* A company licensed before October 1, 1996 must meet the minimum capital requirements applicable to such company, as required by the regulations in effect on September 30, 1996. See §107.1120(c)(2) for Leverage eligibility requirements.

[63 FR 5866, Feb. 5, 1998, as amended at 77 FR 25051, Apr. 27, 2012; 82 FR 39340, Aug. 18, 2017; 88 FR 46007, July 18, 2023]

§ 107.230 Permitted sources of Private Capital for Licensees.

Private Capital means the contributed capital of a Licensee, plus unfunded binding commitments by Institutional Investors (including commitments evidenced by a promissory note) to contribute capital to a Licensee.

(a) *Contributed capital.* For purposes of this section, contributed capital means the paid-in capital and paid-in surplus of a Corporate Licensee, or the partners' contributed capital of a Partnership Licensee, in either case subject to the limitations in paragraph (b) of this section.

(b) *Exclusions from Private Capital.* Private Capital does not include:

(1) Funds borrowed by a Licensee from any source.

(2) Funds obtained through the issuance of Leverage.

(3) Funds obtained directly or indirectly from any Federal, State, or local government agency or instrumentality, except for:

(i) Funds invested by a public pension fund;

(ii) Funds obtained from the business revenues (excluding any governmental appropriation) of any federally chartered or government-sponsored corporation established before October 1, 1987, to the extent that such revenues are reflected in the retained earnings of the corporation; and

(iii) ''Qualified Non-private Funds'' as defined in paragraph (d) of this section.

(4) Any portion of a commitment from an Institutional Investor with a net worth of less than $10 million that exceeds 10 percent of such Institutional Investor's net worth and is not backed by a letter of credit from a State or National bank acceptable to SBA.

(c) *Non-cash capital contributions.* Capital contributions in a form other than cash are subject to the limitations in §107.240.

(d) *Qualified Non-private Funds.* Private Capital includes ''Qualified Non-private Funds'' as defined in this paragraph (d); however, investors of Qualified Non-private Funds must not control, directly or indirectly, a Licensee's management, or its board of directors or general partner(s). Qualified Non-private Funds are:

(1) Funds directly or indirectly invested in any Licensee on or before August 16, 1982 by any Federal agency except SBA, under a statute explicitly mandating the inclusion of such funds in ''Private Capital'';

(2) Funds directly or indirectly invested in any Licensee by any Federal agency under a statute that is enacted after September 4, 1992, explicitly mandating the inclusion of such funds in ''Private Capital'';

(3) Funds invested in any Licensee or license applicant by one or more State or local government entities (including any guarantee extended by such entities) in an aggregate amount that does not exceed 33 percent of Regulatory Capital; and

(4) Funds invested in or committed in writing to any Section 301(d) Licensee prior to October 1, 1996, from the following sources:

(i) A State financing agency, or similar agency or instrumentality, if the funds invested are derived from such agency's net income and not from appropriated State or local funds; and

(ii) Grants made by a state or local government agency or instrumentality into a nonprofit corporation or institution exercising discretionary authority with respect to such funds, if SBA determines that such funds have taken

on a private character and the nonprofit corporation or institution is not a mere conduit.

(e) You may not accept any capital contribution made with funds borrowed by a Person seeking to own an equity interest (whether direct or indirect, beneficial or of record) of at least 10 percent of your Private Capital. This exclusion does not apply if:

(1) Such Person's net worth is at least twice the amount borrowed; or

(2) SBA gives its prior written approval of the capital contribution.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5866, Feb. 5, 1998; 64 FR 70995, Dec. 20, 1999]

§ 107.240 Limitations on including non-cash capital contributions in Private Capital.

Non-cash capital contributions to a Licensee or license applicant are included in Private Capital only if they fall into one of the following categories:

(a) Direct obligations of, or obligations guaranteed as to principal and interest by, the United States.

(b) Services rendered or to be rendered to you, priced at no more than their fair market value.

(c) Tangible assets used in your operations, priced at no more than their fair market value.

(d) Shares in a Disadvantaged Business received by a subsidiary Section 301(d) Licensee from its parent Licensee, valued at the lower of cost or fair value.

(e) Other non-cash assets approved by SBA.

§ 107.250 Exclusion of stock options issued by Licensee from Management Expenses.

Stock options issued by any Licensee, including a 1940 or 1980 Act Company, are not considered compensation and therefore do not count as part of a Licensee's Management Expenses.

APPLYING FOR AN SBIC LICENSE

§ 107.300 License application form and fee.

SBA evaluates license applicants, giving first priority to applicants headquartered in Underlicensed States with below median SBIC Financing dollars per State, as determined by SBA and published periodically in a notice on the SBIC website. Once priority is established, such applicants will continue to receive priority throughout the licensing process. SBA reviews and processes applications in two review phases (initial review and final licensing), as follows:

(a) *Initial review.* Except as provided in this paragraph (a), SBIC applicants must submit a Management Assessment Questionnaire (''MAQ'') c and the Initial Licensing Fee, as defined in paragraph (c) of this section. An applicant under Common Control with one or more Licensees must submit a written request to SBA, and the Initial Licensing Fee, to be considered for a license and is exempt from the requirement in this paragraph (a) to submit a MAQ, unless otherwise determined by SBA in SBA's discretion. Eligible ''Expedited Subsequent Funds'' as described in §107.305(e) are permitted to submit a streamlined ''Short-Form'' Subsequent Fund MAQ.

(b) *Final licensing.* An applicant may proceed to the final licensing phase only if notified in writing by SBA that it may do so. Following receipt of such notice, in order to proceed to the final licensing phase, the applicant must submit a complete license application with all required appendices, within the timeframe identified by SBA and the Final Licensing Fee, as defined in paragraph (c) of this section. If you are seeking to be licensed as a Leveraged Licensee and SBA approves your License, SBA will also approve your Total Intended Leverage Commitment amount and ratio as defined in §107.50 based on the target fund size stated in the MAQ, which means the total Leverage commitments available to you for the life of your SBIC, subject to the provisions of §§107.320 and 107.1150. A Licensee is permitted to hold multiple fund closings within and for up to 12 months of receiving a License to reach the target fund size. SBA will then determine the final Total Intended Leverage Commitment which is either the dollar amount or ratio to targeted Private Capital provided at the Green Light. SBA will determine the Total Private Capital Commitment (defined

as the total Private Capital committed to a Licensee within 12 months after licensure or upon the Licensee's final closing, whichever occurs first) amount for the Accrual Debenture SBA Share calculation.

(c) *Licensing Fees.* SBIC Initial and Final Licensing Fees are non-refundable fees determined as set forth in paragraphs (c)(1) and (2) of this section.

(1) *Initial Licensing Fee.* The Initial Licensing Fee is based on the applicant's fund sequence, where the fund sequence means the order of succession of private equity or private credit funds for the same fund management team and same strategy. SBA will determine the applicant's fund sequence based on the management team's composition and experience as a team. The Initial Licensing Fees are as follows:

TABLE 1 TO PARAGRAPH (c)(1)

Fund sequence	Initial licensing fee
Fund I	$5,000
Fund II	10,000
Fund III	15,000
Fund IV+	20,000

Example 1 to paragraph (c)(1): If the management team members of applicant DEF I consists primarily of the same team members of fund ABC II and ABC II represented the second fund for those team members, SBA will consider the fund sequence of DEF I as a Fund III, regardless of the number in the applicant's name.

(2) *Final Licensing Fee.* The Final Licensing Fee is calculated as the Final Licensing Base Fee plus 1.25 basis points multiplied by the Leverage dollar amount requested by the applicant, where the Final Licensing Base Fee is based on the applicant's Fund Sequence as follows:

TABLE 2 TO PARAGRAPH (c)(2)

Fund sequence	Final licensing base fee
Fund I	$10,000
Fund II	15,000
Fund III	25,000
Fund IV+	30,000

(3) *Resubmission Penalty Fee.* The Resubmission Penalty Fee means a $10,000 penalty fee assessed to an applicant that has previously withdrawn or is otherwise not approved for a license that must be paid *in addition* to the Initial and Final Licensing Fees at the time the applicant resubmits its application.

(4) *Inflation Adjustments.* SBA annually adjusts the Initial Licensing Fee, Final Licensing Base Fee, and Resubmission Penalty Fee using the Inflation Adjustment and will publish notification prior to such adjustment in the FEDERAL REGISTER identifying the amount of the fees.

[88 FR 46007, July 18, 2023]

§ 107.305 Evaluation of license applicants.

SBA will evaluate a license applicant based on the submitted application materials, any interviews with the applicant's management team, and the results of background investigations, public record searches, and other due diligence conducted by SBA and other Federal agencies. SBA's evaluation will consider factors including the following:

(a) *Management qualifications.* Management qualifications, including demonstrated investment skills and experience as a principal investor, or a combination of investment skill and relevant industry operational experience; business reputation; adherence to legal and ethical standards; record of active involvement in making and monitoring investments and assisting portfolio companies; managing a regulated business, if applicable; successful history of working as a team; and experience in developing appropriate processes for evaluating investments and implementing best practices for investment firms.

(b) *Demonstrated investment acumen.* Performance of proposed investment team's prior relevant industry investments as well as any supporting operating experience, including investment returns measured both in percentage terms and in comparison to appropriate industry benchmarks; the extent to which investments have been realized as a result of sales, repayments, or other exit mechanisms; evidence of previous investment or operational experience contributing to U.S. domestic job creation and, when applicable, demonstrated past adherence to statutory

and regulatory SBIC program requirements.

(c) *Strategy and fit.* Applicant's proposed investment strategy as presented in its business plan, including adherence to the Statement of Policy as stated in section 102 of the Act, clarity of objectives; strength of management's rationale for pursuing the selected strategy; compliance with this part and applicable provisions of part 121 of this chapter; fit with management's skills and experience; and the availability of sufficient resources to carry out the proposed strategy. As determined by SBA, a Licensee may not materially deviate from the proposed investment strategy after three years of Licensure.

(d) *Structure and economics.* Applicant's proposed organizational structure and fund economics, including compliance with this part 107; soundness of financial projections and underlying assumptions; a compensation plan that provides managers with appropriate economic incentives; a reasonable basis for allocations of profits and fees to Persons not involved in management; and governance procedures that provide appropriate checks and balances.

(e) *Subsequent fund applicants.* (1) Applicants operating an active Licensee that meet the following eligibility criteria can apply under an ''Expediated Subsequent Fund'' evaluation process. Should an applicant fulfill and formally attest to meeting all of the following eligibility criteria, the applicant can apply for an ''Expediated Subsequent Fund'' evaluation process:

(i) *Consistent strategy and fund size.* Targeted Regulatory Capital to be raised is ≤133% the size of their most recent SBIC fund (inflation adjustments will be considered). Same asset class and investment strategy as most recent license.

(ii) *Clean regulatory history.* No major findings, significant ''other matters,'' or unresolved ''other matters'' related to licensees managed by the principals of applicant in the previous ten years.

(iii) *Consistent limited partnership (LP)-general partnership (GP) dynamics.* No new limited partner will represent ≥33% of the Private Capital of the licensee upon reaching final close at target fund size or hard cap. The two largest investors in terms of committed capital have verbally committed to invest in the new fund pending receipt of license. The most recent limited partnership agreement (LPA) of the active Licensee and all side letters will have no substantive changes for the applicant fund.

(iv) *Investment performance stability.* The most recent licensee net distributions to paid-in capital (DPI) and net total value to paid-in capital (TVPI) TVPI are at or above median vintage year and strategy performance benchmarks for the prior three quarters. The principals of the applicant are not managing a licensee in default or with high Capital Impairment (CIP).

(v) *Consistent or reduced leverage management.* The applicant is requesting a leverage to Private Capital ratio ≤ the current or most recent SBIC licensee at target fund size or hard cap.

(vi) *Firm stability.* Subject to SBA's determination, no material changes to the broader firm, to include resignations, terminations, or retirements by members of the general partnership, investment committee, broader investment team, or key finance and operations personnel, subject to paragraph (e)(1)(vii) of this section.

(vii) *Promotions from within.* Demonstration of promoting internal investment team talent from within the firm/organization sponsoring the license.

(viii) *Inclusive equity.* Demonstration of appropriate/increased sharing of carry and/or management company economics with promoted talent or distribution of equitable or increasingly equitable economics among the partnership.

(ix) *Federal Bureau of Investigation (FBI) criminal and Internal Revenue Service (IRS) background check no findings.* The sponsoring entity and all principals of the Licensee do not have an FBI criminal record and do not have IRS violations from the date of their most recent SBIC fund licensure.

(x) *No outstanding or unresolved material litigation matters.* No outstanding or unresolved litigation matters involving allegations of dishonesty, fraud, or breach of fiduciary duty or otherwise requiring a report under §107.660(c) or

(d) as to a prior Licensee, the prospective Applicant's general partner, or any other person who was required by SBA to complete a personal history statement in connection with the license application.

(xi) *No outstanding tax liens.* On the principals applying to manage the licensee, on the most recent or active licensee, and on the sponsoring entity of the licensee.

(2) Should an applicant fulfill and formally attest to meeting all of the eligibility criteria in paragraph (e)(1) of this section, the applicant can submit a streamlined ''Short-Form Subsequent Fund MAQ''.

[77 FR 25052, Apr. 27, 2012, as amended at 88 FR 46008, July 18, 2023]

§ 107.310 When and how to apply for licensing as an Early Stage SBIC.

From time to time, SBA will publish a Notice in the FEDERAL REGISTER, inviting the submission of applications for licensing as an Early Stage SBIC. SBA will not consider an application from an Early Stage SBIC applicant that is under Common Control with another Early Stage SBIC applicant or an existing Early Stage SBIC (unless it has no outstanding Leverage or Leverage commitments and will not seek additional Leverage in the future). Applicants must comply with both the regulations in this part 107 and any requirements specified in the Notice, including submission deadlines. The Notice will specify procedures for a particular application period.

[77 FR 25052, Apr. 27, 2012]

§ 107.320 Leverage portfolio diversification.

To minimize ''cost'' as defined in section 502(5)(A) of the Federal Credit Reform Act of 1990, SBA reserves the right to maintain broad diversification to mitigate concentration of investment risk in approving Leverage commitments for Leveraged Licensees with respect to:

(a) The year in which they commence operations;

(b) The geographic location (giving first priority to applicants from Underlicensed States with below median SBIC Financing dollars per State); and

(c) The asset class and investment strategy.

[88 FR 46009, July 18, 2023]

Subpart D—Changes in Ownership, Control, or Structure of Licensee; Transfer of License

CHANGES IN CONTROL OR OWNERSHIP OF LICENSEE

§ 107.400 Changes in ownership of 10 percent or more of Licensee but no change of Control.

(a) *Prior approval requirements.* You must obtain SBA's prior written approval for any proposed transfer or issuance of ownership interests that results in the ownership (beneficial or of record) by any Person, or group of Persons acting in concert, of at least 10 percent of any class of your stock or partnership capital.

(b) *Fee.* A processing fee of $200 must accompany each such request for approval of a change of ownership.

§ 107.410 Changes in Control of Licensee (through change in ownership or otherwise).

(a) *Prior approval requirements.* You must obtain SBA's prior written approval for any proposed transaction or event that results in Control by any Person(s) not previously approved by SBA.

(b) *Fee.* A processing fee equal to the combined Licensing Fee (Initial Licensing Fee plus the Final Licensing Fee then in effect) defined in § 107.300 must accompany any application for approval of one or more transactions or events that will result in a transfer of Control.

[61 FR 3189, Jan. 31, 1996, as amended at 82 FR 52185, Nov. 13, 2017]

§ 107.420 Prohibition on exercise of ownership or Control rights in Licensee before SBA approval.

Without prior written SBA approval, no change of ownership or Control may take effect and no officer, director, employee or other Person acting on your behalf shall:

(a) Register on your books any transfer of ownership interest to the proposed new owner(s);

(b) Permit the proposed new owner(s) to exercise voting rights with respect to such ownership interest (including directly or indirectly procuring or voting any proxy, consent or authorization as to such voting rights at any shareholders' or partnership meeting);

(c) Permit the proposed new owner(s) to participate in any manner in the conduct of your affairs (including exercising control over your books, records, funds or other assets; participating directly or indirectly in any disposition thereof; or serving as an officer, director, partner, employee or agent); or

(d) Allow ownership or Control to pass to another Person.

§ 107.430 Notification to SBA of transactions that may change ownership or Control.

You must promptly notify SBA as soon as you have knowledge of transactions or events that may result in a transfer of Control or ownership of at least 10 percent of your capital. If there is any doubt as to whether a particular transaction or event will result in such a change, report the facts to SBA.

§ 107.440 Standards governing prior SBA approval for a proposed transfer of Control.

SBA approval is contingent upon full disclosure of the real parties in interest, the source of funds for the new owners' interest, and other data requested by SBA. As a condition of approving a proposed transfer of control, SBA may:

(a) Require an increase in your Regulatory Capital;

(b) Require the new owners or the transferee's Control Person(s) to assume, in writing, personal liability for your Leverage, effective only in the event of their direct or indirect participation in any transfer of Control not approved by SBA; or

(c) Require compliance with any other conditions set by SBA, including compliance with the requirements for minimum capital and management-ownership diversity as in effect at such time for new license applicants.

[61 FR 3189, Jan. 31, 1996]

§ 107.450 Notification to SBA of pledge of Licensee's shares.

(a) You must notify SBA in writing, within 30 calendar days, of the terms of any transaction in which:

(1) Any Person, or group of Persons acting in concert, pledges shares of your stock (or equivalent ownership interests) as collateral for indebtedness; and

(2) The shares pledged are at least 10 percent of your Regulatory Capital.

(b) If the transaction creates a change of ownership or Control, you must comply with § 107.400 or § 107.410, as appropriate.

RESTRICTIONS ON COMMON CONTROL OR OWNERSHIP OF TWO OR MORE LICENSEES

§ 107.460 Restrictions on Common Control or ownership of two (or more) Licensees.

(a) *General rule.* Without SBA's prior written approval, you must not have an officer, director, manager, Control Person, or owner (with a direct or indirect ownership interest of at least 10 percent) who is also:

(1) An officer, director, manager, Control Person, or owner (with a direct or indirect ownership interest of at least 10 percent) of another Licensee; or

(2) An officer or director of any Person that directly or indirectly controls, or is controlled by, or is under Common Control with, another Licensee.

(b) *Exceptions to general rule.* This § 107.460 does not apply to:

(1) Common officers, directors, managers, or owners of a Section 301(c) Licensee and its Section 301(d) subsidiary; or

(2) Common officers, directors, managers, Control Persons, or owners of two (or more) Licensees which have no Leverage.

CHANGE IN STRUCTURE OF LICENSEE

§ 107.470 SBA approval of merger, consolidation, or reorganization of Licensee.

(a) *Prior approval requirements.* You may not merge, consolidate, change form of organization (corporation or partnership) or reorganize without SBA's prior written approval. Any such

merger or consolidation will be subject to §107.440.

(b) *Fee.* A processing fee of $5,000 must accompany any application for approval of a change in your form of organization (from corporation to partnership or partnership to corporation).

TRANSFER OF LICENSE

§ 107.475 Transfer of license.

You may not transfer your license in any manner without SBA's prior written approval.

Subpart E—Managing the Operations of a Licensee

GENERAL REQUIREMENTS

§ 107.500 Lawful operations under the Act.

You must engage only in the activities contemplated by the Act and in no other activities.

§ 107.501 Identification.

(a) *Publication upon issuance.* SBA shall publish in the FEDERAL REGISTER the names of SBICs with date of licensure and Total Intended Leverage Commitments approved within 30 days of the end of the month of licensure.

(b) *Identification as a Licensee.* You must display your SBIC license in a prominent location. You must also have a listed telephone number. Before collecting an application fee or extending Financing to a Small Business, you must obtain a written statement from the concern acknowledging its awareness that you are ''a Federal licensee under the Small Business Investment Act of 1958, as amended.''

[88 FR 46009, July 18, 2023]

§ 107.502 Representations to the public.

You may not represent or imply to anyone that the SBA, the U.S. Government or any of its agencies or officers has approved any ownership interests you have issued or obligations you have incurred. Be certain to include a statement to this effect in any solicitation to investors. Example: You may not represent or imply that ''SBA stands behind the Licensee'' or that ''Your capital is safe because SBA's experts review proposed investments to make sure they are safe for the Licensee.''

§ 107.503 Licensee's adoption of an approved valuation policy.

(a) *Valuation guidelines.* You must prepare, document and report the valuations of your Loans and Investments in accordance with the Valuation Guidelines for SBICs issued by SBA. These guidelines may be obtained from the SBIC website.

(b) *SBA approval of valuation policy.* You must have a written valuation policy approved by SBA for use in determining the value of your Loans and Investments. You must either:

(1) Adopt without change the model valuation policy set forth in section III of the Valuation Guidelines for SBICs; or

(2) Obtain SBA's prior written approval of an alternative valuation policy. If you are or applying to be a Non-leveraged Licensee, SBA will generally approve a valuation policy that meets GAAP.

(c) *Responsibility for valuations.* Your board of directors or general partner(s) will be solely responsible for adopting your valuation policy and for using it to prepare valuations of your Loans and Investments for submission to SBA. If SBA reasonably believes that your valuations, individually or in the aggregate, are materially misstated, it reserves the right to require you to engage, at your expense, an independent third party, acceptable to SBA, to substantiate the valuations.

(d) *Frequency of valuations.* (1) If you are a Leveraged Licensee, you must value your Loans and Investments at the end of each quarter of your fiscal year, and at the end of your fiscal year.

(2) Otherwise, you must value your Loans and Investments only at your fiscal year end.

(3) On a case-by-case basis, SBA may require you to perform valuations more frequently.

(4) You must report material adverse changes in valuations at least quarterly, within forty-five days following the close of the quarter.

(e) *Review of valuations by independent public accountant.* (1) For valuations performed as of the end of your fiscal

year, your independent public accountant must review your valuation procedures and the implementation of such procedures, including adequacy of documentation.

(2) The independent public accountant's report on your audited annual financial statements (SBA Form 468) must include a statement that your valuations were prepared in accordance with your approved valuation policy established in accordance with section 310(d)(2) of the Act.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5866, Feb. 5, 1998; 82 FR 39340, Aug. 18, 2017; 88 FR 46009, July 18, 2023]

§ 107.504 Equipment and office requirements.

(a) *Technology*. You must have access to technology to securely send and receive emails, scan documents, and prepare and submit electronic information and reports required by SBA.

(b) *Accessible office*. You must maintain an office that is open to the public during normal working hours.

[88 FR 46009, July 18, 2023]

§ 107.506 Safeguarding Licensee's assets/Internal controls.

You must adopt a plan to safeguard your assets and monitor the reliability of your financial data, personnel, Portfolio, funds and equipment. You must provide your bank and custodian with a certified copy of your resolution or other formal document describing your control procedures.

§ 107.507 Violations based on false filings and nonperformance of agreements with SBA.

The following shall constitute a violation of this part:

(a) *Nonperformance*. Nonperformance of any of the requirements of any Debenture, Participating Security or Preferred Security, or of any written agreement with SBA.

(b) *False statement*. In any document submitted to SBA:

(1) Any false statement knowingly made; or

(2) Any misrepresentation of a material fact; or

(3) Any failure to state a material fact. A material fact is any fact which is necessary to make a statement not misleading in light of the circumstances under which the statement was made.

§ 107.509 Employment of SBA officials.

Without SBA's prior written approval, for a period of two years after the date of your most recent issuance of Leverage (or the receipt of any SBA Assistance as defined in part 105 of this chapter), you are not permitted to employ, offer employment to, or retain for professional services, any person who:

(a) Served as an officer, attorney, agent, or employee of SBA on or within one year before such date; and

(b) As such, occupied a position or engaged in activities which, in SBA's determination, involved discretion with respect to the granting of Assistance under the Act.

MANAGEMENT AND COMPENSATION

§ 107.510 SBA approval of Licensee's Investment Adviser/Manager.

You may employ an Investment Adviser/Manager who will be subject to the supervision of your board of directors or general partner. If you have Leverage or plan to seek Leverage, you must obtain SBA's prior written approval of the management contract. SBA's approval of an Investment Adviser/Manager for one Licensee does not indicate approval of that manager for any other Licensee.

(a) *Management contract*. The contract must:

(1) Specify the services the Investment Adviser/Manager will render to you and to the Small Businesses in your Portfolio; and

(2) Indicate the basis for computing Management Expenses.

(b) *Material change to approved management contract*. If there is a material change, both you and SBA must approve such change in advance. If you are uncertain if the change is material, submit the proposed revision to SBA.

§ 107.520 Management Expenses of a Licensee.

SBA must approve any increases in your Management Expenses if you have outstanding Leverage or Earmarked Assets.

(a) *Definition of Management Expenses.* Management Expenses include:

(1) Salaries;

(2) Office expenses;

(3) Travel;

(4) Business development;

(5) Office and equipment rental;

(6) Bookkeeping; and

(7) Expenses related to developing, investigating and monitoring investments.

(b) Management Expenses do not include services provided by specialized outside consultants, outside lawyers and independent public accountants, if they perform services not generally performed by a venture capital company.

(c) If your Management Expenses have not already been approved by SBA, you must submit such expenses for approval with your SBA Form 468 for your first fiscal year ending after January 31, 1996.

CASH MANAGEMENT BY A LICENSEE

§ 107.530 Restrictions on investments of idle funds by leveraged Licensees.

(a) *Applicability of this section.* This § 107.530 applies if you have outstanding Leverage or if you have applied for Leverage.

(b) *Permitted investments of idle funds.* Funds not invested in Small Businesses must be maintained in:

(1) Direct obligations of, or obligations guaranteed as to principal and interest by, the United States, which mature within 15 months from the date of the investment; or

(2) Repurchase agreements with federally insured institutions, with a maturity of seven days or less. The securities underlying the repurchase agreements must be direct obligations of, or obligations guaranteed as to principal and interest by, the United States. The securities must be maintained in a custodial account at a federally insured institution; or

(3) Mutual funds, securities, or other instruments that exclusively consist of, or represent pooled assets of, investments described in paragraphs (b)(1) or (b)(2) of this section; or

(4) Certificates of deposit with a maturity of one year or less, issued by a federally insured institution; or

(5) A deposit account in a federally insured institution, subject to a withdrawal restriction of one year or less; or

(6) A checking account in a federally insured institution; or

(7) A reasonable petty cash fund.

(c) *Deposit of funds in excess of the insured amount.* (1) You are permitted to deposit funds in a federally insured institution in excess of the institution's insured amount, but only if the institution is ''well capitalized'' in accordance with the definition set forth in regulations of the Federal Deposit Insurance Corporation, as amended (12 CFR 325.103).

(2) Exception: You may make a temporary deposit (not to exceed 30 days) in excess of the insured amount, in a transfer account established to facilitate the receipt and disbursement of funds or to hold funds necessary to honor Commitments issued.

(d) *Deposit of funds in Associate institution.* A deposit in, or a repurchase agreement with, a federally insured institution that is your Associate is not considered a Financing of such Associate under § 107.730, provided the terms of such deposit or repurchase agreement are no less favorable than those available to the general public.

[61 FR 3189, Jan. 31, 1996, as amended at 77 FR 20294, Apr. 4, 2012]

BORROWING BY LICENSEES FROM NON-SBA SOURCES

§ 107.550 Prior approval of secured third-party debt of Leveraged Licensees.

(a) *Definition.* In this section, *secured third-party debt* means any non-SBA debt secured by any of your assets, including secured guarantees and other contingent obligations that you voluntarily assume, and secured lines of credit.

(b) *General rule.* If you are a Leveraged Licensee, you must get SBA's written approval before you incur any secured third-party debt or refinance any debt with secured third-party debt, including any renewal of a secured line of credit, increase in the maximum amount available under a secured line of credit, or expansion of the scope of a security interest or lien. For purposes

of this paragraph (b), ''expansion of the scope of a security interest or lien'' does not include the substitution of one asset or group of assets for another, provided the asset values (as reported on your most recent annual Form 468) are comparable.

(c) *Capital Call Line.* Without obtaining SBA's written approval, a Leveraged Licensee may obtain from a federally regulated financial institution, a line of credit (''Capital Call Line'') that meets all of the following conditions:

(1) The maximum amount available under the Capital Call Line is no more than your unfunded Regulatory Capital, as reflected on your most recent Capital Certificate;

(2) Your payment obligations under the Capital Call Line may be secured, but only by your unfunded Regulatory Capital;

(3) The lender under the Capital Call Line may have a right to debit your depository account(s) at the lender's institution, so long as such lender's right to debit is limited to circumstances involving a default of your obligation to pay principal, interest, or fees due (''Payment Default'') under the Capital Call Line and only to the amount of such Payment Default;

(4) Each borrowing under the Capital Call Line must be repaid, in full, within 120 days after it is drawn;

(5) The term of the Capital Call Line may not exceed 12 months, but may be renewable, provided that each renewal does not exceed 12 months and you remain in compliance with the conditions of this paragraph (c); and

(6) Consistent with §107.410, the Capital Call Line contains no provision permitting the lender to dictate when capital calls are made or otherwise ceding to the lender any control of the Licensee or its operations; provided, however, that the Capital Call Line may include a provision authorizing the lender, in the event of a Payment Default, to endorse, on your behalf, checks and other forms of payment in the Lender's possession and to apply the proceeds of such instruments to such Payment Default, with unapplied and remaining proceeds promptly to be paid to you.

(d) *Conditions for SBA approval.* Excluding Capital Call Lines defined in paragraph (c) of this section, SBA approval is required for secured third-party debt. As a condition of granting such approval under this section, SBA may impose such restrictions or limitations as it deems appropriate, taking into account your historical performance, current financial position, proposed terms of the secured debt and amount of aggregate debt you will have outstanding (including Leverage). SBA will not favorably consider any requests for approval which include a blanket lien on all your assets, or a security interest in your investor commitments in excess of 125 percent of the proposed borrowing.

[88 FR 46009, July 18, 2023]

§ 107.560 Subordination of SBA's creditor position.

(a) *Debentures purchased or guaranteed on or before July 1, 1991.* Under the terms of any Debenture purchased or guaranteed by SBA on or before July 1, 1991, SBA's unsecured claims against you, as a Debenture-holder or as subrogee, are subordinated in favor of all your other creditors, except to the extent that such claims may be subject to equitable subordination in SBA's favor.

(b) *Debentures purchased or guaranteed after July 1, 1991, including refinancings of Debentures previously purchased or guaranteed.* (1) Under the terms of any Debenture purchased or guaranteed by SBA after July 1, 1991, SBA's unsecured claims against you, as a Debenture-holder or as subrogee, are subordinated only in favor of non-Associate lenders; and, to the extent that your indebtedness to such lenders exceeds the lesser of $10,000,000 or 200 percent of your Regulatory Capital (determined as of the date your Debentures were purchased or guaranteed), SBA's unsecured claims enjoy parity with those of other unsecured creditors, except with respect to indebtedness created on or before July 1, 1991.

(2) In order to induce others to lend you money after your Debenture has been purchased or guaranteed, SBA may agree in writing on a case-by-case basis to subordinate its unsecured claims, on such terms as it may determine, in favor of one or more of your Associates, or in favor of other lenders

in excess of the amounts mentioned in paragraph (b)(1) of this section.

(3) SBA reserves the authority to refuse to subordinate its claims if it determines, at the time you request your Debenture be purchased or guaranteed, that the exercise of reasonable investment prudence and your financial condition warrant such refusal.

§ 107.565 Restrictions on third-party debt of Early Stage SBICs.

If you are an Early Stage SBIC and you have outstanding Leverage or a Leverage commitment, you must get SBA's prior written approval to have, incur, or refinance any third-party debt other than accounts payable from routine business operations.

[77 FR 25052, Apr. 27, 2012]

§ 107.570 [Reserved]

DISTRIBUTIONS AND REDUCTIONS IN REGULATORY CAPITAL

§ 107.585 Distributions and reductions in Regulatory Capital.

(a) *Non-leveraged Licensees.* If you are a Non-leveraged Licensee, you may make distributions to your private investors without SBA prior approval. At all times, you must retain sufficient Regulatory Capital to meet the minimum capital requirements in the Act and in §107.210, unless such amounts are in accordance with your SBA approved Wind-down Plan (see §107.590). You must report any reductions of Regulatory Capital to SBA within 30 days via an updated Capital Certificate (see §107.300).

(b) *Non-Accrual Leveraged Licensees.* If you are a Standard Debenture Leveraged Licensee that is also an Early Stage SBIC, you are subject to the distributions identified in §107.1180. If you are a Standard Debenture Leveraged Licensee, you may distribute READ to your private investors without SBA approval only after considering any material adverse changes to your portfolio. You must obtain SBA's prior written approval to reduce your Regulatory Capital by more than two percent in any fiscal year. Such approved reduction amount may, for a period of five years after the reduction, be included in the sum determined under §107.740(a). In seeking SBA's prior written approval, you must disclose any material adverse changes or certify that you have no material adverse changes and provide an updated Wind-down Plan. You must retain sufficient Regulatory Capital to meet the minimum capital requirements of §107.210 and sufficient Leverageable Capital to avoid having excess Leverage in violation of section 303 of the Act and §107.1150. You must report any reductions of Regulatory Capital to SBA within 30 days via an updated Capital Certificate (see §107.300).

(c) *Accrual SBICs and Reinvestor SBICs.* If you are an Accrual SBIC or Reinvestor SBIC, unless you receive prior approval from SBA for the purposes of covering a tax distribution you may only distribute as follows:

(1) *Payment of Annual Charges and Accrued Interest.* Prior to any distributions to your private investors, you must pay to SBA any Annual Charges and all accrued interest on outstanding Leverage at the next available repayment window but no later than six months following a distribution to your private investors. Within six months of any non-tax distribution to your private investors, you must pay any Annual Charges owed to SBA and all accrued interest on your outstanding Leverage.

(2) *Calculate SBA's share of distribution.* Within six months of any non-tax distribution to your private investors, you must make payments to SBA on a pro rata basis with any distributions to your private investors based on your SBA Total Intended Leverage Commitment relative to your Total Private Capital Commitments, inclusive of Qualified Non-Private Funds, determined within 12 months of Licensure calculated as follows: SBA's Share = Total Distributions × [Total Intended Leverage Commitment/(Total Intended Leverage Commitment + Total Private Capital Commitments)] where:

(i) Total Distributions means the total amount of distributions (whether profit or return of capital) you intend to make after paying all accrued interest and Annual Charges plus any prior tax distributions.

(ii) Total Intended Leverage Commitment is as defined in §107.300.

(iii) Total Private Capital Commitments is as defined in § 107.300.

(3) *Apply SBA Share.* You must repay SBA outstanding Leverage in an amount no less than SBA's Share to the extent of Outstanding Leverage and report the SBA calculation to SBA. If SBA's Share is greater than Outstanding Leverage and you have unfunded Leverage commitments, you must submit a Leverage commitment cancellation equal to SBA's Share minus the SBA Leverage redemption up to the unfunded Leverage commitments.

(4) *Distribute to private investors.* You must report SBA's Share calculation to SBA prior to distributing READ to your private investors without SBA approval and only after considering any adverse changes to your portfolio. You must pay Annual Charges to SBA prior to distributing READ. After repaying all accrued interest, Annual Charges, and outstanding Leverage calculated as SBA's Share, you may distribute READ to your private investors without SBA approval only after considering any adverse changes to your portfolio. You must obtain SBA's prior written approval to reduce your Regulatory Capital by more than two percent in any fiscal year. Such approved reduction amount may, for a period of five years after the reduction, be included in the sum determined under § 107.740(a). In seeking SBA's prior written approval, you must disclose any material adverse changes or certify that you have no material adverse changes and provide an updated Wind-down Plan. You must retain sufficient Regulatory Capital to meet the minimum capital requirements of § 107.210 and sufficient Leverageable Capital to avoid having excess Leverage in violation of section 303 of the Act and § 107.1150. You must report any reductions of Regulatory Capital to SBA within 30 days. Prior to any reduction in Regulatory Capital, if you have made a tax distribution, you must make a distribution to SBA pursuant to the formula set forth in paragraph (c)(2) of this section, as if you had made a non-tax distribution.

(5) *Report distribution to SBA.* You must report to SBA the distribution, the calculations, and the amounts distributed to each party as part of your annual and quarterly Form 468 (see §§ 107.630 and 107.1220).

Example 1 to paragraph (c): Your Total Intended Leverage Commitment is $50 million, and your Total Private Capital Commitments are $25 million. You currently have $25 million in Outstanding Leverage, $25 million in unfunded Leverage commitments, and $15 million in Leverageable Capital. You owe $1 million in accrued interest and Annual Charges. You have $61 million to distribute.

Step 1: Payment of Annual Charges and all accrued interest. You would first pay the $1 million in accrued interest and Annual Charges.

Step 2: Calculate SBA's Share of Distribution. SBA's share is calculated as: $60 million × [$50 million/($50 million + $25 million)] = $40 million.

Step 3: Apply SBA Share. You would repay $25 million in Outstanding Leverage and cancel $15 million of your unfunded Leverage commitments.

Step 4: Distribute to Private Investors. You would distribute $35 million to Private Investors.

Step 5: Report Distribution to SBA. You would then report the distribution to SBA, detailing the amounts and calculations from steps 1 through 4 of this example 1.

[88 FR 46009, July 18, 2023]

Requirement To Conduct Active Investment Operations

§ 107.590 Licensee's requirement to maintain active operations.

(a) *Activity test.* You must conduct active operations, as determined under this § 107.590, as a condition of your license. You will be considered active if:

(1) During the eighteen months preceding your most recent fiscal year end, you made Financings totaling at least 20 percent of your Regulatory Capital; or

(2) Your idle funds did not exceed 20 percent of your total assets (at cost) at your most recent fiscal year end.

(b) *Permitted exceptions to activity requirements.* You are considered active if your failure to meet the requirements in paragraph (a) of this section is the result of one or more of the following factors:

(1) Your excess idle funds are the result of the receipt, within the previous nine months, of realized gains, repayments, additional capital contributions, or Leverage.

(2) It is necessary for you to maintain excess idle funds to conduct your operations because:

(i) Your unfunded commitments from investors are no more than 20 percent of your Regulatory Capital; and

(ii) You cannot receive additional Leverage, solely because SBA has insufficient funds available.

(3) You have not made sufficient Financings because of a lack of available funds, evidenced by Loans and Investments (at cost) equal to at least 90 percent of your Combined Capital as of your most recent fiscal year end.

(4) You have not made sufficient Financings solely because SBA has restricted your ability to make investments.

(c) *Applicability of activity requirements.* The activity requirements in paragraph (a) of this section do not apply if you have filed a Wind-down Plan approved by SBA. Wind-down Plan means a plan that you prepare when you decide that you will no longer make any Financings other than follow-on investments, and that you update annually when you file your SBA Form 468. The plan must contain your best estimates of the following:

(1) The remaining number of years you expect to operate.

(2) For each of your Loans and Investments, the expected liquidation date and anticipated proceeds.

(3) The timing of your repayment of obligations to SBA.

(4) The timing and amount of any planned reductions in your Management Expenses.

(d) *Phase-in of activity requirements*—(1) *General rule.* You must meet the activity requirements in this §107.590 as of the end of your first full fiscal year beginning after January 31, 1996. Until then, you will be considered active if you meet the activity requirements in effect on January 30, 1996.

(2) *Rule for new Licensees.* If you received your license after January 31, 1996, or if you received your license less than eighteen months before the fiscal year end determined under paragraph (d)(1) of this section, you must meet the activity requirements in this §107.590 as of the end of your second full fiscal year beginning after the date you received your license.

[61 FR 3189, Jan. 31, 1996, as amended at 88 FR 46010, July 18, 2023]

Subpart F—Recordkeeping, Reporting, and Examination Requirements for Licensees

RECORDKEEPING REQUIREMENTS FOR LICENSEES

§ 107.600 General requirement for Licensee to maintain and preserve records.

(a) *Maintaining your accounting records.* You must establish and maintain your accounting records using SBA's standard chart of accounts for Licensees, unless SBA approves otherwise.

(b) *Location of records.* You must keep the following records at your principal place of business or, in the case of paragraph (b)(3) of this section, at the branch office that is primarily responsible for the transaction:

(1) All your accounting and other financial records;

(2) All minutes of meetings of directors, stockholders, executive committees, partners, or other officials; and

(3) All documents and supporting materials related to your business transactions, except for any items held by a custodian under a written agreement between you and a Portfolio Concern or non-SBA lender, or any securities held in a safe deposit box, or by a licensed securities broker in an amount not exceeding the broker's per-account insurance coverage.

(c) *Preservation of records.* You must retain all the records that are the basis for your financial reports. Such records must be preserved for the periods specified in this paragraph (c), and must remain accessible for the first two years of the preservation period.

(1) You must preserve for at least 15 years or, in the case of a Partnership Licensee, at least two years beyond the date of liquidation:

(i) All your accounting ledgers and journals, and any other records of assets, asset valuations, liabilities, equity, income, and expenses.

(ii) Your Articles, bylaws, minute books, and license application.

(iii) All documents evidencing ownership of the Licensee including ownership ledgers, and ownership transfer registers.

(2) You must preserve for at least six years all supporting documentation (such as vouchers, bank statements, or canceled checks) for the records listed in paragraph (b)(1) of this section.

(3) After final disposition of any item in your Portfolio, you must preserve for at least six years:

(i) Financing applications and Financing instruments.

(ii) All loan, participation, and escrow agreements.

(iii) Size status declarations (SBA Form 480) and Financing Eligibility Statements (SBA Form 1941).

(iv) Any capital stock certificates and warrants of the Portfolio Concern that you did not surrender or exercise.

(v) All other documents and supporting material relating to the Portfolio Concern, including correspondence.

(4) You may substitute a computer-scanned or generated copy for the original of any record covered by this paragraph (c).

[61 FR 3189, Jan. 31, 1996, as amended at 79 FR 62823, Oct. 21, 2014]

§ 107.610 Required certifications for Loans and Investments.

For each of your Loans and Investments, you must have the documents listed in this section. Except for information and documentation prepared under paragraphs (f)(2) and (3) of this section, you must keep these documents in your files and make them available to SBA upon request.

(a) SBA Form 480, the Size Status Declaration, executed both by you and by the concern you are financing. By executing this document, both parties certify that the concern is a Small Business. For securities purchased from an underwriter in a public offering, you may substitute a prospectus showing that the concern is a Small Business.

(b) SBA Form 652, a certification by the concern you are financing that it will not illegally discriminate (see part 112 of this chapter).

(c) SBA Form 1941 (for Section 301(d) Licensees only), executed both by you and by the concern you are financing. By executing this document, both parties certify that the concern is a Disadvantaged Business.

(d) A certification by the concern you are financing of the intended use of the proceeds. For securities purchased from an underwriter in a public offering, you may substitute a prospectus indicating the intended use of proceeds.

(e) For each LMI Investment:

(1) A certification by the concern, dated as of the date of application for SBIC financing, as to the basis for its qualification as an LMI Enterprise,

(2) If the concern qualifies as an LMI Enterprise as defined in paragraph (2) of the definition of LMI Enterprise in § 107.50, an additional certification dated no later than the date 180 days after the closing of the LMI Investment, as to the location of the concern's employees or tangible assets or the principal residences of its full-time employees as of the date of such certification, and

(3) Certification(s) by the SBIC, made contemporaneously with the certification(s) of the concern, that the concern qualifies as an LMI Enterprise as of the date(s) of the concern's certification(s) and the basis for such qualification.

(f) For each Energy Saving Qualified Investment:

(1) If a pre-Financing determination of eligibility by SBA is not required under the definition of Energy Saving Activities or Energy Saving Qualified Investment:

(i) A certification by you, dated as of the closing date of the Financing, as to the basis for the qualification of the Financing as an Energy Saving Qualified Investment;

(ii) Supporting documentation of the Energy Saving Activities engaged in by the concern;

(iii) Supporting documentation of either the percentage of its revenues derived from Energy Saving Activities during the concern's most recently completed fiscal year, which must be at least 50 percent, or the concern's intended use of the Financing proceeds, all of which must be used for Energy Saving Activities; and

(iv) A certification by the concern, dated as of the closing date of the Financing, that any information it provided to you in connection with this paragraph (f)(1) is true and correct to the best of its knowledge.

(2) If, prior to providing Financing, you must obtain a determination from SBA that the activities in which a concern is engaged are Energy Saving Activities, submit to SBA in writing a description of the product or service being provided or developed, including all available documentation of the energy savings produced or anticipated, addressing the factors considered under paragraph (4) of the definition of ''Energy Saving Activities'' in §107.50 and certified by the concern to be true and correct to the best of its knowledge.

(3) If, prior to providing Financing, you must obtain a determination from SBA that the concern is ''primarily engaged'' in Energy Saving Activities, submit to SBA in writing all available information concerning the factors considered under paragraph (3) of the definition of ''Energy Saving Qualified Investment'' in §107.50, certified by the concern to be true and correct to the best of its knowledge.

(4) For each Financing closed after you obtain a determination from SBA under paragraph (f)(2) or (3) of this section, a certification by you, dated as of the closing date of the Financing, that to the best of your knowledge, you have no reason to believe that the materials submitted are incorrect.

(5) For each Financing closed based on supporting documentation of the concern's intended use of proceeds for Energy Saving Activities under paragraph (f)(1)(iii) of this section:

(i) Documentation by the concern, dated no later than six months after the closing of the Financing, of the proceeds used to date for Energy Saving Activities, with further updates provided at six month intervals until 100 percent of the Financing proceeds have been accounted for; and

(ii) Documentation that you have reviewed the information submitted by the concern under paragraph (f)(5)(i) of this section and have reasonably determined that 100 percent of the Financing proceeds were used for Energy Saving Activities.

(g) For each passive business financed under §107.720(b)(3), a certification by you, dated as of the closing date of the Financing, as to the basis for the qualification of the Financing under §107.720(b)(3) and identifying one or more limited partners for which a direct Financing would cause those investors:

(1) To incur ''unrelated business taxable income'' under section 511 of the Internal Revenue Code (26 U.S.C. 511); or

(2) To incur ''effectively connected income'' to foreign investors under sections 871 and 882 of the Internal Revenue Code (26 U.S.C. 871 and 882).

[61 FR 3189, Jan. 31, 1996, as amended at 64 FR 52646, Sept. 30, 1999; 77 FR 23379, Apr. 19, 2012; 82 FR 39340, Aug. 18, 2017]

§107.620 Requirements to obtain information from Portfolio Concerns.

All the information required by this section is subject to the requirements of §107.600 and must be in English.

(a) *Information for initial Financing decision.* Before extending any Financing, you must require the applicant to submit such financial statements, plans of operation (including intended use of financing proceeds), cash flow analyses and projections as are necessary to support your investment decision. The information submitted must be consistent with the size and type of the business and the amount of the proposed Financing.

(b) *Updated financial information.* (1) The terms of each Financing must require the Portfolio Concern to provide, at least annually, sufficient financial information to enable you to perform the following required procedures:

(i) Evaluate the financial condition of the Portfolio Concern for the purpose of valuing your investment;

(ii) Determine the continued eligibility of the Portfolio Concern; and

(iii) Verify the use of Financing proceeds.

(2) Demographic information on the Portfolio Concern's ownership is requested for reporting purposes only and is on a voluntary basis.

(3) The information submitted to you must be certified by the president, chief executive officer, treasurer, chief

financial officer, general partner, or proprietor of the Portfolio Concern.

(4) For financial and valuation purposes, you may accept a complete copy of the Federal income tax return filed by the Portfolio Concern (or its proprietor) in lieu of financial statements, but only if appropriate for the size and type of the business involved.

(5) The requirements in this paragraph (b) do not apply when you acquire securities from an underwriter in a public offering (see §107.825). In that case, you must keep copies of all reports furnished by the Portfolio Concern to the holders of its securities.

(c) *Information required for examination purposes.* You must obtain any information requested by SBA's examiners for the purpose of verifying the certifications made by a Portfolio Concern under §107.610. In this regard, your Financing documents must contain provisions requiring the Portfolio Concern to give you and/or SBA's examiners access to its books and records for such purpose.

[61 FR 3189, Jan. 31, 1996, as amended at 88 FR 46010, July 18, 2023]

REPORTING REQUIREMENTS FOR LICENSEES

§107.630 Requirement for Licensees to file financial statements with SBA (Form 468).

(a) *Annual filing of Form 468.* For each fiscal year, you must submit to SBA financial statements and supplementary information prepared on SBA Form 468. You must file Annual Form 468 within 90 calendar days of the end of your fiscal year.

(1) *Audit of Form 468.* The annual Form 468 must be audited by an independent public accountant acceptable to SBA.

(2) *Insurance requirement for public accountant.* Unless SBA approves otherwise, your independent public accountant must carry at least $1,000,000 of Errors and Omissions insurance, or be self-insured and have a net worth of at least $1,000,000.

(b) *Interim filings of Form 468.* When requested by SBA, you must file interim reports on Form 468. SBA may require you to file the entire form or only certain statements and schedules. You must file such reports on or before the last day of the month following the end of the reporting period. If you have an outstanding Leverage commitment from SBA, see the filing requirements in §107.1220.

(c) *Standards for preparation of Form 468.* You must prepare SBA Form 468 in accordance with SBA's Accounting Standards and Financial Reporting Requirements for Small Business Investment Companies.

(d) *Reporting of economic impact information on Form 468.* Your annual filing of SBA Form 468 must include an assessment of the economic impact of each Financing, specifying the full-time equivalent net jobs created and total jobs created or retained, and the impact of the Financing on the revenues and profits of the business and on taxes paid by the business and its employees.

(e) *Fund management contact and optional demographic information.* The Licensee shall provide and update management contact information. Demographic information is requested for reporting purposes only and on a voluntary basis.

[61 FR 3189, Jan. 31, 1996, as amended at 82 FR 39340, Aug. 18, 2017; 88 FR 46011, July 18, 2023]

§107.640 Requirement to file Portfolio Financing Reports (SBA Form 1031).

For each Financing of a Small Business (excluding guarantees), you must submit a Portfolio Financing Report on SBA Form 1031 within 30 calendar days of the end of the calendar year quarter (March, June, September, and December) following the closing date of the Financing. SBA also permits Form 1031s for portfolio company financings to be disaggregated and submitted individually for each portfolio company within 30 days of the closing of a Financing or otherwise submitted on a more frequent basis. If you are on the Watchlist, SBA may require more frequent reporting (see §107.1850).

[88 FR 46011, July 18, 2023]

§ 107.650 Requirement to report portfolio valuations to SBA.

You must determine the value of your Loans and Investments in accordance with §107.503. You must report such valuations to SBA within 90 calendar days of the end of the fiscal year in the case of annual valuations, and if you are a Leveraged Licensee within 45 calendar days following the close of other reporting periods. You must report material adverse changes in valuations at least quarterly, within 45 calendar days following the close of the quarter.

[88 FR 46011, July 18, 2023]

§ 107.660 Other items required to be filed by Licensee with SBA.

(a) *Reports to owners.* You must give SBA a copy of any report you furnish to your investors, including any prospectus, quarterly or annual valuation data, materials presented to investors during any meetings (including any annual meeting), fund management demographic information, letter, or other publication concerning your financial operations or those of any Portfolio Concern no later than 30 calendar days after you submit the report to your private investors.

(b) *Documents filed with SEC.* You must give SBA a copy of any report, application or document you file with the Securities and Exchange Commission.

(c) *Litigation reports.* When you become a party to litigation or other proceedings, you must give SBA a report within 30 days that describes the proceedings and identifies the other parties involved and your relationship to them.

(1) The proceedings covered by this paragraph (c) include any action by you, or by your security holder(s) in a personal or derivative capacity, against an officer, director, Investment Adviser or other Associate of yours for alleged breach of official duty.

(2) SBA may require you to submit copies of the pleadings and other documents SBA may specify.

(3) Where proceedings have been terminated by settlement or final judgment, you must promptly advise SBA of the terms.

(4) This paragraph (c) does not apply to collection actions or proceedings to enforce your ordinary creditors' rights.

(d) *Notification of criminal charges.* If any officer, director, or general partner of the Licensee, or any other person who was required by SBA to complete a personal history statement in connection with your license, is charged with or convicted of any criminal offense other than a misdemeanor involving a minor motor vehicle violation, you must report the incident to SBA within 5 calendar days. Such report must fully describe the facts which pertain to the incident.

(e) *Other reports.* You must file any other reports that SBA may require by written directive.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5866, Feb. 5, 1998; 88 FR 46011, July 18, 2023]

§ 107.665 Civil penalties.

Except as provided in §107.670, a Licensee that violates any regulation or written directive issued by SBA, requiring the filing of any regular or special report pursuant to this part, shall be fined a civil penalty of not more than $314 for each day the Licensee fails to file such report. The civil penalties provided for in this section shall accrue to the United States and may be recovered in a civil action brought by the SBA.

[81 FR 31491, May 19, 2016, as amended at 82 FR 9969, Feb. 9, 2017; 83 FR 7363, Feb. 21, 2018; 84 FR 12061, Apr. 1, 2019; 85 FR 13727, Mar. 10, 2020; 86 FR 52957, Sept. 24, 2021; 87 FR 28758, May 11, 2022; 88 FR 50004, Aug. 1, 2023]

§ 107.670 Application for exemption from civil penalty for late filing of reports.

(a) If it is impracticable to submit any required report within the time allowed, you may apply for an extension. The request for an extension must:

(1) Be filed before the reporting deadline;

(2) Certify to an extraordinary occurrence, not within your control, that makes timely filing of the report impracticable; and

(3) Be accompanied by written evidence of such occurrence, where appropriate.

(b) Upon receipt of your request, SBA may exempt you from the civil penalty stated in §107.665, in such manner and under such conditions as SBA determines.

[61 FR 3189, Jan. 31, 1996, as amended at 81 FR 31491, May 19, 2016]

§ 107.680 Reporting changes in Licensee not subject to prior SBA approval.

(a) *Changes to be reported for post approval.* (1) This section applies to any changes in your Articles, ownership, capitalization, management, operating area, or investment policies that do not require SBA's prior approval. You must report such changes to SBA within 30 days for post approval. A processing fee of $200 must accompany each request for post approval of new officers, directors, or Control Persons.

(2) *Exception for non-leveraged Licensees.* If you do not have outstanding Leverage or Earmarked Assets, you are not required to obtain post approval of new directors or new officers other than your chief operating officer; however, you must notify SBA of the new directors or officers within 30 days.

(b) *Approval by SBA.* You may consider any change submitted under this section §107.680 to be approved unless SBA notifies you to the contrary within 90 days after receiving it. SBA's approval is contingent upon your full disclosure of all relevant facts and is subject to any conditions SBA may prescribe.

Examinations of Licensees by SBA for Regulatory Compliance

§ 107.690 Examinations.

SBA will examine all Licensees for the purpose of evaluating regulatory compliance.

§ 107.691 Responsibilities of Licensee during examination.

You must make all books, records and other pertinent documents and materials available for the examination, including any information required by the examiner under §107.620(c). In addition, the agreement between you and the independent public accountant performing your audit must provide that any information in the accountant's working papers be made available to SBA upon request.

§ 107.692 Examination fees.

(a) *General.* SBA will assess fees for examinations in accordance with this §107.692. Unless SBA determines otherwise on a case by case basis, SBA will not assess fees for special examinations to obtain specific information.

(b) *Base Fee.* (1) The Base Fee will be assessed based on your total assets (at cost) as of the date of your latest certified financial statement, including if requested by SBA in connection with the examination, a more recently submitted interim statement. For purposes of this section, Base Fee means the Minimum Base Fee plus 0.024% of assets at cost, rounded to the nearest $100, not to exceed the Maximum Base Fee. The Minimum and Maximum Base Fees are adjusted annually as follows:

Time period (Based on the examination start date)	Minimum base fee	Maximum base fee for non-leveraged SBICs	Maximum base fee for leveraged SBICs
December 13, 2017 to September 30, 2018	$6,000	$22,500	$26,000
October 1, 2018 to September 30, 2019	7,000	25,000	32,000
October 1, 2019 to September 30, 2020	8,000	27,500	38,000
October 1, 2020 to September 30, 2021	9,000	30,000	44,000

(2) In the table in paragraph (b)(1) of this section, a Non-leveraged SBIC means any SBIC that, as of the date of the examination, has no outstanding Leverage or Leverage commitment, has no Earmarked Assets, and certifies to SBA that it will not seek Leverage in the future. Beginning on October 1, 2021, SBA will annually adjust the Minimum Base Fee and Maximum Base Fees using the Inflation Adjustment and will publish a Notice prior to such

adjustment in the FEDERAL REGISTER identifying the amount of the fees.

(c) *Adjustments to Base Fee.* In order to determine the amount of your examination fee, your Base Fee, as determined in paragraph (b) of this section, will be increased based on the following criteria:

(1) If you were not fully responsive to the letter of notification of examination (that is, you did not provide all requested documents and information within the time period stipulated in the notification letter in a complete and accurate manner, or you did not prepare or did not have available all information requested by the examiner for on-site review) after a written warning by the SBA, you will pay an additional charge equal to 15% of your Base Fee;

(2) If you maintain your records/files in multiple locations (as permitted under §107.600(b)), you will pay an additional charge equal to 10% of your Base Fee; and

(3) For any regulatory violation that remains unresolved 90 days from the date SBA notified you that you must take corrective action (as established by the date of the notification letter) or such later date as SBA sets forth in the notice, you will pay an additional charge equal to 5% of the Base Fee for every 30 days or portion thereof that the violation remains unresolved after the cure period, unless SBA resolves the finding in your favor.

(d) *Fee additions table.* The following table summarizes the additions noted in paragraph (c) of this section:

Examination fee additions	Amount of addition – % of base fee
Non-responsive	15%.
Records/Files at multiple locations.	10%.
Unresolved Findings.	5% of Base Fee for every 30 days or portion thereof beyond the 90 day cure period or such later date as SBA sets forth in the notice for each unresolved finding.

(e) *Delay fee.* If, in the judgment of SBA, the time required to complete your examination is delayed due to your lack of cooperation or the condition of your records, SBA may assess an additional fee of $700 per day. Beginning on October 1, 2021, SBA will annually adjust this fee using the Inflation Adjustment and will publish a Notice prior to such adjustment in the FEDERAL REGISTER identifying the amount of the fee.

[62 FR 23338, Apr. 30, 1997, as amended at 77 FR 25052, Apr. 27, 2012; 82 FR 52185, Nov. 13, 2017]

Subpart G—Financing of Small Businesses by Licensees

DETERMINING THE ELIGIBILITY OF A SMALL BUSINESS FOR SBIC FINANCING

§ 107.700 Compliance with size standards in part 121 of this chapter as a condition of Assistance.

You are permitted to provide financial assistance and management services only to a Small Business. To determine whether an applicant is a Small Business, you may use either the financial size standards in §121.301(c)(2) of this chapter or the industry standard covering the industry in which the applicant is primarily engaged, as set forth in §121.301(c)(1) of this chapter.

[61 FR 3189, Jan. 31, 1996, as amended at 74 FR 33915, July 14, 2009]

§ 107.710 Requirement to finance smaller enterprises.

Your Portfolio must include Financings to Smaller Enterprises.

(a) *Definition of Smaller Enterprise.* A Smaller Enterprise means any small business concern that:

(1) Both together with its Affiliates, and by itself, meets the size standard of §121.201 of this chapter at the time of Financing for the industry in which it is then primarily engaged; or

(2) Together with its affiliates has a net worth of not more than $6 million and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two years no greater than $2 million. If the applicant is not required by law to pay Federal income taxes at the enterprise level, but is required to pass income through to its shareholders, partners, beneficiaries, or other equitable owners, the applicant's ''net income after Federal income taxes'' will be its net income reduced by an amount computed as follows:

(i) If the applicant is not required by law to pay State (and local, if any) income taxes at the enterprise level, multiply its net income by the marginal State income tax rate (or by the combined State and local income tax rates, as applicable) that would have applied if it were a taxable corporation.

(ii) Multiply the applicant's net income, less any deduction for State and local income taxes calculated under paragraph (a)(2)(i) of this section, by the marginal Federal income tax rate that would have applied if the applicant were a taxable corporation.

(iii) Add the results obtained in paragraphs (a)(2)(i) and (a)(2)(ii) of this section.

(b) *Smaller Enterprise Financings.* At the close or each of your fiscal years, and at the time of any application to draw Leverage, you must satisfy the Smaller Enterprise financing requirement in this paragraph (b) that applies to you.

(1) If you were licensed after February 17, 2009, at least 25 percent (in dollars) of your Financings must have been invested in Smaller Enterprises.

(2) If you were licensed on or before February 17, 2009, and you have received no SBA Leverage commitment issued after February 17, 2009, at least 20 percent (in dollars) of your Financings, excluding Financings made in whole or in part with Leverage in excess of $90 million, must have been invested in Smaller Enterprises. In addition, 100 percent of all Financings made in whole or in part with Leverage in excess of $90 million (including aggregate Leverage over $90 million issued by two or more Licensees under Common Control) must have been invested in Smaller Enterprises.

(3) If you were licensed on or before February 17, 2009, and you have received an SBA Leverage commitment after February 17, 2009:

(i) For all Financings made after the date of the first Leverage commitment issued after February 17, 2009, at least 25 percent (in dollars) of your Financings must have been invested in Smaller Enterprises, and

(ii) For all Financings made before February 17, 2009, at least 20 percent (in dollars) of your Financings, excluding Financings made in whole or in part with Leverage in excess of $90 million, must have been invested in Smaller Enterprises. In addition, 100 percent of all Financings made in whole or in part with Leverage in excess of $90 million (including aggregate Leverage over $90 million issued by two or more Licensees under Common Control) must have been invested in Smaller Enterprises.

(c) *Special requirement for certain leveraged Licensees.* (1) This paragraph (c) applies if you were licensed on or before September 30, 1996, and you issued Leverage after that date, and you have Regulatory Capital of:

(i) Less than $10,000,000 if such Leverage included Participating Securities; or

(ii) Less than $5,000,000 if such Leverage was Debentures only.

(2) At the close of each of your fiscal years, at least 50 percent of the total dollar amount of the Financings you extended after September 30, 1996 must have been invested in Smaller Enterprises.

(d) Financing a change of ownership which results in the creation of a Smaller Enterprises. The Financing of a change of ownership under § 107.750 which results in the creation of a Smaller Enterprise qualifies as a Smaller Enterprise Financing.

(e) *Non-compliance with this section.* If you have not reached the required percentage of Smaller Enterprise Financings at the end of any fiscal year, then you must be in compliance by the end of the following fiscal year. However, you will not be eligible for additional Leverage until you reach the required percentage (*see* § 107.1120(c) and (g)).

[62 FR 11760, Mar. 13, 1997, as amended at 63 FR 5866, Feb. 5, 1998; 64 FR 70995, Dec. 20, 1999; 66 FR 30647, June 7, 2001; 74 FR 33915, July 14, 2009]

§ 107.720 Small Businesses that may be ineligible for financing.

(a) *Relenders or reinvestors.* You are not permitted to finance any business that is a relender or reinvestor.

(1) *Definition.* Relenders or reinvestors are businesses whose primary business activity involves, directly or indirectly, providing funds to others, purchasing debt obligations, factoring, or

long-term leasing of equipment with no provision for maintenance or repair.

(2) *Exceptions*—(i) *Reinvestor SBICs. Reinvestor SBIC* means a Section 301(c) Partnership licensed as a Reinvestor SBIC under §107.300 and approved by SBA at the time of licensing to issue Accrual Debentures and shall provide a meaningful percentage of Equity Capital Investments to underserved Small Business reinvestors (except banks, savings and loans not insured by agencies of the Federal Government, and agricultural credit companies) that make direct financings solely to Small Businesses with at least 50% of employees in the United States, Small Businesses Concerns headquartered in the United States, owned and controlled by United States citizens and/or entities, and Small Businesses eligible for investment based on SBA size standards defined in §121.301 of this chapter or SBIC alternative size standards defined in §121.301(c) of this chapter at the time of initial investment. SBA may require that each Reinvestor SBIC obtain from each such Small Business reinvestor a written agreement that such Small Business reinvestor has only provided and will only provide financing in compliance with this paragraph (a)(2)(i) and will provide to such Reinvestor SBIC information reasonably necessary to verify compliance with this paragraph (a)(2)(i).

(ii) *Equity Capital Investments to Disadvantaged Businesses.* Licensees may provide Equity Capital Investments to Disadvantaged Businesses that are relenders or reinvestors (except banks or savings and loans not insured by agencies of the Federal Government, and agricultural credit companies).

(b) *Passive Businesses.* You are not permitted to finance a passive business.

(1) *Definition.* A business is passive if:

(i) It is not engaged in a regular and continuous business operation (for purposes of this paragraph (b), the mere receipt of payments such as dividends, rents, lease payments, or royalties is not considered a regular and continuous business operation); or

(ii) Its employees are not carrying on the majority of day to day operations, and the company does not provide effective control and supervision, on a day to day basis, over persons employed under contract; or

(iii) It passes through substantially all of the proceeds of the Financing to another entity.

(2) *Exception for pass-through of proceeds to subsidiary.* You may provide Financing directly to a passive business, including a passive business that you have formed, if it is a Small Business and it passes substantially all the proceeds through to (or uses substantially all the proceeds to acquire) one or more subsidiary companies, each of which is an eligible Small Business that is not passive. For the purpose of this paragraph (b)(2), ''subsidiary company'' means a company in which the financed passive business either:

(i) Directly owns, or will own as a result of the Financing, at least 50 percent of the outstanding voting securities; or

(ii) Indirectly owns, or will own as a result of the Financing, at least 50 percent of the outstanding voting securities (by directly owning the outstanding voting securities of another passive Small Business that is the direct owner of the outstanding voting securities of the subsidiary company).

(3) *Exception for certain Partnership Licensees.* If you are a Partnership Licensee, you may form one or more blocker entities in accordance with this paragraph (b)(3). For the purposes of this paragraph, a ''blocker entity'' means a corporation or a limited liability company that elects to be taxed as a corporation for Federal income tax purposes. The sole purpose of a blocker entity must be to provide Financing to one or more eligible, unincorporated Small Businesses. You may form such blocker entities only if a direct Financing to such Small Businesses would cause any of your investors to incur ''unrelated business taxable income'' under section 511 of the Internal Revenue Code (26 U.S.C. 511) or to incur ''effectively connected income'' to foreign investors under sections 871 and 882 of the Internal Revenue Code (26 U.S.C. 871 and 882). Your ownership and investment of funds in such blocker entities will not constitute a violation of §107.730(a). For each passive business financed under this section

107.720(b)(3), you must provide a certification to SBA as required under §107.610(g). A blocker entity formed under this paragraph may provide Financing:

(i) Directly to one or more eligible non-passive Small Businesses; or

(ii) Directly to a passive Small Business that passes substantially all the proceeds directly to (or uses substantially all the proceeds to acquire) one or more eligible non-passive Small Businesses in which the passive Small Business directly owns, or will own as a result of the Financing, at least 50% of the outstanding voting securities.

(4) *Additional conditions for permitted passive business financings.* Financings permitted under paragraphs (b)(2) or (3) of this section must meet all of the following conditions:

(i) For the purposes of this paragraph (b), ''substantially all'' means at least 99 percent of the Financing proceeds after deduction of actual application fees, closing fees, and expense reimbursements, which may not exceed those permitted by §107.860.

(ii) If you and/or your Associate charge fees permitted by §107.860 and/or §107.900, the total amount of such fees charged to all passive and non-passive businesses that are part of the same Financing may not exceed the fees that would have been permitted if the Financing had been provided directly to a non-passive Small Business. Any such fees received by your Associate must be paid to you in cash within 30 days of the receipt of such fees.

(iii) For the purposes of this part 107, each passive and non-passive business included in the Financing is a Portfolio Concern. The terms of the financing must provide SBA with access to Portfolio Concern information in compliance with this part 107, including without limitation §§107.600 and 107.620.

(c) *Real Estate Businesses.* (1) You are not permitted to finance any business classified under North American Industry Classification System (NAICS) codes 531110 (lessors of residential buildings and dwellings), 531120 (lessors of nonresidential buildings except miniwarehouses), 531190 (lessors of other real estate property), 237210 (land subdivision), or 236117 (new housing for-sale builders). You are not permitted to finance any business classified under NAICS codes 236118 (residential remodelers), 236210 (industrial building construction), or 236220 (commercial and institutional building construction), if such business is primarily engaged in construction or renovation of properties on its own account rather than as a hired contractor. You are permitted to finance a business classified under NAICS codes 531210 (offices of real estate agents and brokers), 531311 (residential property managers), 531312 (nonresidential property managers), 531320 (offices of real estate appraisers), or 531390 (other activities related to real estate), only if such business derives at least 80 percent of its revenue from non-Affiliate sources.

(2) You are not permitted to finance a Small Business, regardless of NAICS classification, if the Financing is to be used to acquire or refinance real property, unless the Small Business:

(i) Is acquiring an existing property and will use at least 51 percent of the usable square footage for an eligible business purpose; or

(ii) Is building or renovating a building and will use at least 67 percent of the usable square footage for an eligible business purpose; or

(iii) Occupies the subject property and uses at least 67 percent of the usable square footage for an eligible business purpose.

(d) *Project Financing.* You are not permitted to finance a business if:

(1) The assets of the business are to be reduced or consumed, generally without replacement, as the life of the business progresses, and the nature of the business requires that a stream of cash payments be made to the business's financing sources, on a basis associated with the continuing sale of assets. Examples include real estate development projects and oil and gas wells; or

(2) The primary purpose of the Financing is to fund production of a single item or defined limited number of items, generally over a defined production period, and such production will constitute the majority of the activities of the Small Business. Examples include motion pictures and electric generating plants.

(e) *Farm land purchases.* You are not permitted to finance the acquisition of farm land. Farm land means land which is or is intended to be used for agricultural or forestry purposes, such as the production of food, fiber, or wood, or is so taxed or zoned.

(f) *Public interest.* You are not permitted to finance any business if the proceeds are to be used for purposes contrary to the public interest, including but not limited to activities which are in violation of law, or inconsistent with free competitive enterprise.

(g) *Foreign investment*—(1) *General rule.* You are not permitted to finance a business if:

(i) The funds will be used substantially for a foreign operation; or

(ii) At the time of the Financing or within one year thereafter, more than 49 percent of the employees or tangible assets of the Small Business are located outside the United States (unless you can show, to SBA's satisfaction, that the Financing was used for a specific domestic purpose).

(2) *Exception.* This paragraph (g) does not prohibit a Financing used to acquire foreign materials and equipment or foreign property rights for use or sale in the United States.

(h) *Associated supplier.* You are not permitted to finance a business that purchases, or will purchase, goods or services from a supplier who is your Associate, except under the following conditions:

(1) The amount of goods and services purchased (or to be purchased) from your Associate with the proceeds of the Financing, or with funds released as a result of the Financing, is less than 50 percent of the total amount of the Financing (75 percent for a Section 301(d) Licensee);

(2) The price of such goods and services is no higher than that charged other customers of your Associate; and

(3) The Small Business purchases no capital goods from your Associate.

(i) *Financing Licensees.* You are not permitted to provide funds, directly or indirectly, that the Small Business will use:

(1) To purchase stock in or provide capital to a Licensee, provided that a Reinvestor SBIC is permitted to make Equity Capital Investments in Non-leveraged Licensees.

(2) To repay an indebtedness incurred for the purpose of investing in a Licensee.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5867, Feb. 5, 1998; 64 FR 70995, Dec. 20, 1999; 79 FR 62823, Oct. 21, 2014; 82 FR 39340, Aug. 18, 2017; 88 FR 46011, July 18, 2023]

§ 107.730 Financings which constitute conflicts of interest.

(a) *General rule.* You must not self-deal to the prejudice of a Small Business, the Licensee, its shareholders or partners, or SBA. Unless you obtain a prior written exemption from SBA for special instances in which a Financing may further the purposes of the Act despite presenting a conflict of interest, you must not directly or indirectly:

(1) Provide Financing to any of your Associates, except for when the Small Business that receives the Financing is your Associate, pursuant to paragraph (8)(ii) of *Associate* as defined in §107.50, only because an investment fund that is your Associate holds a 10% or greater equity interest in the Small Business and either of the following conditions is met:

(i) You and the Associate investment fund previously invested in the Small Business at the same time and on the same terms and conditions; and you and the Associate investment fund are providing follow-on financing to the Small Business at the same time, on the same terms and conditions, and in the same proportionate dollar amounts as your respective investments in the previous round(s) of financing.

Example 1 to paragraph (a)(1)(i): If you invested $2 million and your Associate invested $1 million in the previous round, your respective follow-on investments would be in the same 2:1 ratio.

(ii) An independent third party is investing in the Small Business at the same time as the Licensee and on the same terms and conditions as the Licensee and represents a significant portion of the Financing; provided, that if the Licensee has a prior Financing in such Small Business, a Licensee's position in such prior Financing may not be diminished or diluted to the benefit of an Associate.

(2) Provide Financing to an Associate of another Licensee if one of your Associates has received or will receive any direct or indirect Financing or a Commitment from that Licensee or a third Licensee (including Financing or Commitments received under any understanding, agreement, or cross dealing, reciprocal or circular arrangement).

(3) Borrow money from:

(i) A Small Business Financed by you;

(ii) An officer, director, or owner of at least a 10 percent equity interest in such business; or

(iii) A Close Relative of any such officer, director, or equity owner.

(4) Provide Financing to a Small Business to discharge an obligation to your Associate or free other funds to pay such obligation. This paragraph (a)(4) does not apply if the obligation is to an Associate Lending Institution and is a line of credit or other obligation incurred in the normal course of business.

(5) Provide Financing to a Small Business for the purpose of purchasing property from your Associate, except as permitted under §107.720(h).

(b) *Rules applicable to Associates.* Without SBA' s prior written approval, your Associates must not, directly or indirectly:

(1) Borrow money from any Person described in paragraph (a)(3) of this section.

(2) Receive from a Small Business any compensation in connection with Assistance you provide (except as permitted under §§107.825(c) and 107.900), or anything of value for procuring, attempting to procure, or influencing your action with respect to such Assistance.

(c) *Applicability of other laws.* You are also bound by any restrictions in Federal or State laws governing conflicts of interest and fiduciary obligations.

(d) *Financings with Associates*—(1) *Financings with Associates requiring prior approval.* Without SBA's prior written approval, you may not Finance any business in which your Associate has either a voting equity interest, or total equity interests (including potential interests), of at least five percent.

(2) *Other Financings with Associates.* If you and an Associate provide Financing to the same Small Business, either at the same time or at different times, you must be able to demonstrate to SBA's satisfaction that the terms and conditions are (or were) fair and equitable to you, taking into account any differences in the timing of each party's financing transactions.

(3) *Exceptions to paragraphs (d)(1) and (d)(2) of this section.* A Financing that falls into one of the following categories is exempt from the prior approval requirement in paragraph (d)(1) of this section or is presumed to be fair and equitable to you for the purposes of paragraph (d)(2) of this section, as appropriate:

(i) Your Associate is a Lending Institution that is providing financing under a credit facility in order to meet the operational needs of the Small Business, and the terms of such financing are usual and customary.

(ii) Your Associate invests in the Small Business on the same terms and conditions and at the same time as you.

(iii) You are a Non-leveraged Licensee, and your Associate either is not a Licensee or is a Non-leveraged Licensee.

(e) *Use of Associates to manage Portfolio Concerns.* To protect your investment, you may designate an Associate to serve as an officer, director, or other participant in the management of a Small Business. You must identify any such Associate in your records available for SBA's review under §107.600. Without SBA's prior written approval, the Associate must not:

(1) Have any other direct or indirect financial interest in the Portfolio Concern that exceeds, or has the potential to exceed, 5 percent of the Portfolio Concern's equity.

(2) Have served for more than 30 days as an officer, director or other participant in the management of the Portfolio Concern before you provided Financing.

(3) Receive any income or anything of value from the Portfolio Concern unless it is for your benefit, with the exception of director's fees, expenses, and distributions based upon the Associate's ownership interest in the Concern.

(f) *1940 and 1980 Act Companies: SEC exemptions.* If you are a 1940 or 1980 Act Company and you receive an exemption from the Securities and Exchange Commission for a transaction described in this §107.730, you need not obtain SBA's approval of the transaction. However, you must promptly notify SBA of the transaction and satisfy the public notice requirements in paragraph (g) of this section.

(g) *Public notice.* Before granting an exemption under this §107.730, SBA will publish notice of the transaction in the FEDERAL REGISTER.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5867, Feb. 5, 1998; 64 FR 70996, Dec. 20, 1999; 77 FR 20294, Apr. 4, 2012; 88 FR 46011, July 18, 2023]

§107.740 Portfolio diversification ("overline" limitation).

(a) *General rule.* This §107.740 applies if you have outstanding Leverage or intend to issue Leverage in the future. Unless SBA approved your license application based upon a plan to issue less than two tiers of Leverage, you may provide Financing or a Commitment to a Small Business if the resulting amount of your aggregate Financings and Commitments to such Small Business and its Affiliates does not exceed 30 percent of the sum of:

(1) Your Regulatory Capital as of the date of the Financing or Commitment; plus

(2) Any Distribution(s) you made under §107.1570(b), during the five years preceding the date of the Financing or Commitment, which reduced your Regulatory Capital; plus

(3) Any Distribution(s) you made under §107.585, during the five years preceding the date of the Financing or Commitment, which reduced your Regulatory Capital by no more than two percent or which SBA approves for inclusion in the sum determined in this paragraph (a).

(b) *Lower overline limit.* If SBA approved your license application based upon a plan to issue less than two tiers of Leverage, the applicable percentage of the amount computed in paragraphs (a)(1) though (a)(3) of this section will be:

(1) 20 percent if the plan contemplates one tier of Leverage.

(2) 25 percent if the plan contemplates 1.5 tiers of Leverage.

(c) Outstanding Financings. For the purposes of paragraphs (a) and (b) of this section, you must measure each outstanding Financing at its original cost (including any amount of the Financing that was previously written off).

[74 FR 33915, July 14, 2009]

§107.750 Conditions for financing a change of ownership of a Small Business.

You may finance a change of ownership of a Small Business only under the conditions set forth in this section.

(a) The Financing must:

(1) Promote the sound development or preserve the existence of the Small Business;

(2) Help create a Small Business as a result of a corporate divestiture; or

(3) Facilitate ownership in a Disadvantaged Business.

(b) The Resulting Concern (as defined in paragraph (c) of this section) must:

(1) Be a Small Business under §107.700;

(2) Have 500 or fewer full-time equivalent employees; or meet one of the appropriate debt/equity ratio tests:

(i) If you have outstanding Leverage, the Resulting Concern's ratio of debt to equity must be no more than 5 to 1; or

(ii) If you have no outstanding Leverage, the Resulting Concern's ratio of debt to equity must be no more than 8 to 1.

(c) *Definitions.* (1) The ''Resulting Concern'' is determined by viewing the business as though the change of ownership had already occurred, giving effect to all contemplated financing, mergers, and acquisitions.

(2) For purposes of this section, ''debt'' means long-term debt, including contingent liabilities, but excluding accounts payable, operating leases, letters of credit, subordinated notes payable to the seller, any other liabilities approved for exclusion by SBA and short-term working capital loans (so long as the loans carry a zero balance for 30 consecutive days during the concern's fiscal year).

(3) For purposes of this section, ''equity'' means common and preferred

stock (corporation), contributed capital (partnership), or membership interests (limited liability company).

§ 107.760 How a change in size or activity of a Portfolio Concern affects the Licensee and the Portfolio Concern.

(a) *Effect on Licensee of a change in size of a Portfolio Concern.* If a Portfolio Concern no longer qualifies as a Small Business you may keep your investment in the concern and:

(1) Subject to the overline limitations of § 107.740, you may provide additional Financing to the concern up to the time it makes a public offering of its securities.

(2) Even after the concern makes a public offering, you may exercise any stock options, warrants, or other rights to purchase Equity Securities which you acquired before the public offering, or fund Commitments you made before the public offering.

(b) *Effect of a change in business activity occurring within one year of Licensee's initial Financing*—(1) *Retention of Investment.* Unless you receive SBA's written approval, you may not keep your investment in a Portfolio Concern, small or otherwise, which becomes ineligible by reason of a change in its business activity within one year of your initial investment.

(2) *Request for SBA's approval to retain investment.* If you request that SBA approve the retention of your investment, your request must include sufficient evidence to demonstrate that the change in business activity was caused by an unforeseen change in circumstances and was not contemplated at the time the Financing was made.

(3) *Additional Financing.* If SBA approves your request to retain an investment under paragraph (b)(2) of this section, you may provide additional Financing to the Portfolio Concern to the extent necessary to protect against the loss of the amount of your original investment, subject to the overline limitations of § 107.740.

(c) *Effect of a change in business activity occurring more than one year after the initial Financing.* If a Portfolio Concern becomes ineligible because of a change in business activity more than one year after your initial Financing you may:

(1) Retain your investment; and

(2) Provide additional Financing to the Portfolio Concern to the extent necessary to protect against the loss of the amount of your original investment, subject to the overline limitations of § 107.740.

Structuring Licensee's Financing of Eligible Small Businesses: Types of Financing

§ 107.800 Financings in the form of Equity Securities.

(a) You may purchase the Equity Securities of a Small Business. You may not, inadvertently or otherwise:

(1) Become a general partner in any unincorporated business; or

(2) Become jointly or severally liable for any obligations of an unincorporated business.

(b) *Definition.* Equity Securities means stock of any class in a corporation, stock options, warrants, limited partnership interests in a limited partnership, membership interests in a limited liability company, or joint venture interests. If the Financing agreement contains debt-type acceleration provisions or includes redemption provisions, other than those permitted under § 107.850, the security will be considered a Debt Security for purposes of § 107.855 and § 107.1150(c)(1).

[61 FR 3189, Jan. 31, 1996, as amended at 74 FR 33915, July 14, 2009]

§ 107.810 Financing in the form of Loans.

You may make Loans to Small Businesses. A Loan means a transaction evidenced by a debt instrument with no provision for you to acquire Equity Securities. Loans may include Revenue-Based Financing or Revenue-Based Loans in which you provide financing to a Small Business in exchange for a percentage of the Small Business's anticipated future revenue which shall not exceed 19% of the Small Business's annual gross revenue.

[88 FR 46011, July 18, 2023]

§ 107.815 Financings in the form of Debt Securities.

You may purchase Debt Securities from Small Businesses.

(a) *Definitions.* Debt Securities are instruments evidencing a loan with an option or any other right to acquire Equity Securities in a Small Business or its Affiliates, or a loan which by its terms is convertible into an equity position, or a loan with a right to receive royalties that are excluded from the Cost of Money pursuant to § 107.855(g)(12). Consideration must be paid for all options that you acquire.

(b) *Restriction on options obtained by Licensee's management and employees.* If you have outstanding Leverage or plan to obtain Leverage, your employees, officers, directors or general partners, or the general partners of the management company that is providing services to you or to your general partner, may obtain options in a Financed Small Business only if:

(1) They participate in the Financing on a pari passu basis with you; or

(2) SBA gives its prior written approval; or

(3) The options received are compensation for service as a member of the board of directors of the Small Business, and such compensation does not exceed that paid to other outside directors. In the absence of such directors, fees must be reasonable when compared with amounts paid to outside directors of similar companies.

[61 FR 3189, Jan. 31, 1996, as amended at 65 FR 69432, Nov. 17, 2000]

§ 107.820 Financings in the form of guarantees.

At the request of a Small Business or where necessary to protect your existing investment, you may guarantee the monetary obligation of a Small Business to any non-Associate creditor.

(a) You may not issue a guaranty if:

(1) You would become subject to State regulation as an insurance, guaranty or surety business;

(2) The amount of the guaranty plus any direct Financings to the Small Business exceed the overline limitations of § 107.740, except that a pledge of the Equity Securities of the issuer or a subordination of your lien or creditor position does not count toward your overline; or

(3) The total financing cost to the Small Business exceeds the cost of money limits of § 107.855.

(b) *Pledge of Licensee's assets as guaranty.* For purposes of this section, a guaranty with recourse only to specific asset(s) you have pledged is equal to the fair market value of such asset(s) or the amount of the debt guaranteed, whichever is less.

§ 107.825 Purchasing securities from an underwriter or other third party.

(a) *Securities purchased through or from an underwriter.* You may purchase the securities of a Small Business through or from an underwriter if:

(1) You purchase such securities within 90 days of the date the public offering is first made;

(2) Your purchase price is no more than the original public offering price; and

(3) The amount paid by you for the securities (less ordinary and reasonable underwriting charges and commissions) has been, or will be, paid to the Small Business, and the underwriter certifies in writing that this requirement has been met.

(b) *Recordkeeping requirements.* If you have outstanding Leverage or plan to obtain Leverage, you must keep records available for SBA's inspection which show the relevant details of the transaction, including, but not limited to, date, price, commissions, and the underwriter's certifications required under paragraph (c) of this section.

(c) *Underwriter's requirements.* If you have outstanding Leverage or plan to obtain Leverage, the underwriter must certify whether it is your Associate. You may pay reasonable and customary commissions and expenses to an Associate underwriter for the portion of an offering that you purchase, provided it is no more than 25 percent of the total offering. If you buy more than 25 percent of the offering, the amount you pay to the Associate underwriter must not exceed the total of the application and closing fees and reimbursable expenses permitted by § 107.860.

(d) *Securities purchased from another Licensee or from SBA.* You may purchase from, or exchange with, another Licensee, Portfolio securities (or any interest therein). Such purchase or exchange may only be made on a non-recourse basis. You may not have more than one-third of your total assets(valued at cost) invested in such securities. If you have previously sold Portfolio Securities (or any interest therein) on a recourse basis, you shall include the amount for which you may be contingently liable in your overline computation.

(e) *Purchases of securities from other non-issuers.* You may purchase securities of a Small Business from a non-issuer not previously described in this §107.825 if:

(1) Such acquisition is a reasonably necessary part of the overall sound Financing of the Small Business under the Act; or

(2) The securities are acquired to finance a change of ownership under §107.750.

STRUCTURING LICENSEE'S FINANCING OF AN ELIGIBLE SMALL BUSINESS: TERMS AND CONDITIONS OF FINANCING

§107.830 Minimum duration/term of financing.

(a) *General rule.* The duration/term of all your Financings must be for a minimum period of one year.

(b) *Restrictions on mandatory redemption of Equity Securities.* If you have acquired Equity Securities, options or warrants on terms that include redemption by the Small Business, you must not require redemption by the Small Business within the first year of your acquisition except as permitted in §107.850.

(c) *Special rules for Loans and Debt Securities*—(1) *Term.* The minimum term for Loans and Debt Securities starts with the first disbursement of the Financing.

(2) *Prepayment.* You must permit voluntary prepayment of Loans and Debt Securities by the Small Business. You must obtain SBA's prior written approval of any restrictions on the ability of the Small Business to prepay other than the imposition of a reasonable prepayment penalty under paragraph (c)(3) of this section. For purposes of evaluating prepayment restrictions under this section, requirements to apply prepayments pro rata among a group of lenders participating in such Financing that is pari passu in rights to payment will not be deemed to constitute a restriction on prepayments.

(3) *Prepayment penalties.* You may charge a reasonable prepayment penalty which must be agreed upon at the time of the Financing. If SBA determines that a prepayment penalty is unreasonable, you must refund the entire penalty to the Small Business. A prepayment penalty equal to 5 percent of the outstanding balance during the first year of any Financing, declining by one percentage point per year through the fifth year, is considered reasonable.

[61 FR 3189, Jan. 31, 1996, as amended at 69 FR 8098, Feb. 23, 2004; 88 FR 46012, July 18, 2023]

§107.835 Exceptions to minimum duration/term of Financing.

You may make a Short-term Financing for a term less than one year if the Financing is:

(a) An interim Financing in contemplation of long-term Financing. The contemplated long-term Financing must be in an amount at least equal to the short-term Financing, and must be made by you alone or in participation with other investors; or

(b) For protection of your prior investment(s); or

(c) For the purpose of Financing a change of ownership under §107.750. The total amount of such Financings may not exceed 20 percent of your Loans and Investments (at cost) at the end of any fiscal year; or

(d) For the purpose of aiding a Small Business in performing a contract awarded under a Federal, State, or local government set-aside program for ''minority'' or ''disadvantaged'' contractors.

[61 FR 3189, Jan. 31, 1996, as amended at 64 FR 52646, Sept. 30, 1999; 69 FR 8098, Feb. 23, 2004]

§ 107.840 Maximum term of Financing.

The maximum term of any Loan or Debt Security Financing must be no longer than 20 years.

§ 107.845 Maximum rate of amortization on Loans and Debt Securities.

The principal of any Loan (or the loan portion of any Debt Security) with a term of one year or less cannot be amortized faster than straight line. If the term is greater than one year, the principal cannot be amortized faster than straight line for the first year.

[69 FR 8098, Feb. 23, 2004]

§ 107.850 Restrictions on redemption of Equity Securities.

(a) A Portfolio Concern cannot be required to redeem Equity Securities earlier than one year from the date of the first closing unless:

(1) The concern makes a public offering, or has a change of management or control, or files for protection under the provisions of the Bankruptcy Code, or materially breaches your Financing agreement; or

(2) You make a follow-on investment, in which case the new securities may be redeemed in less than one year, but no earlier than the redemption date associated with your earliest Financing of the concern.

(b) The redemption price must be either:

(1) A fixed amount that is no higher than the price you paid for the securities; or

(2) An amount that cannot be fixed or determined before the time of redemption. In this case, the redemption price must be based on:

(i) A reasonable formula that reflects the performance of the concern (such as one based on earnings or book value); or

(ii) The fair market value of the concern at the time of redemption, as determined by a professional appraisal performed under an agreement acceptable to both parties.

(c) Any method for determining the redemption price must be agreed upon no later than the date of the first (or only) closing of the Financing.

[61 FR 3189, Jan. 31, 1996, as amended at 64 FR 52646, Sept. 30, 1999; 69 FR 8098, Feb. 23, 2004]

§ 107.855 Interest rate ceiling and limitations on fees charged to Small Businesses ("Cost of Money").

''Cost of Money'' means the interest and other consideration that you receive from a Small Business. Subject to lower ceilings prescribed by local law, the Cost of Money to the Small Business must not exceed the ceiling determined under this section.

(a) *Financings to which the Cost of Money rules apply.* This section applies to all Loans and Debt Securities. As required by § 107.800(b), you must include as Debt Securities any equity interests with redemption provisions that do not meet the restrictions in § 107.850.

(b) *When to determine the Cost of Money ceiling for a Financing.* You may determine your Cost of Money ceiling for a particular Financing as of the date you issue a Commitment or as of the date of the first closing of the Financing. Once determined, the Cost of Money ceiling remains fixed for the duration of the Financing.

(c) *How to determine the Cost of Money ceiling for a Financing.* At a minimum, you may use a Cost of Money ceiling of 19 percent for a Loan and 14 percent for a Debt Security. To determine whether you may charge more, do the following:

(1) Choose a base rate for your Cost of Money computation. The base rate may be either the Debenture Rate currently in effect plus the applicable Charge determined under § 107.1130(d)(1), or your own ''Cost of Capital'' as determined under paragraph (d) of this section.

(2) For a Loan, add 11 percentage points to the base rate; for a Debt Security, add 6 percentage points. In either case, round the sum down to the nearest eighth of one percent.

(3) If the result is more than 19 percent (for a Loan) or 14 percent (for a Debt Security), you may use it as your Cost of Money ceiling.

(4) If two or more Licensees participate in the same Financing of a Small Business, the base rate used in this

paragraph (c) is the highest of the following:

(i) The current Debenture Rate plus the applicable Charge determined under § 107.1130(d)(1);

(ii) The Cost of Capital of the lead Licensee; or

(iii) The weighted average of the Cost of Capital for all Licensees participating in the Financing.

(d) *How to determine your Cost of Capital.* ''Cost of Capital'' is an optional computation of the weighted average interest rate you pay on your ''qualified borrowings''. ''Qualified borrowings'' means your Debentures together with your borrowings at or below the usual interest rate charged by banks in your locality on the date your loan was made.

(1) For any fiscal year, you may compute your Cost of Capital:

(i) As of the first day of your fiscal year, to remain in effect for the entire year; or

(ii) As of the first day of every fiscal quarter during the fiscal year, to remain in effect for the duration of the quarter.

(2) For each qualified borrowing outstanding at your last fiscal year or fiscal quarter end, multiply the ending principal balance (net of related unamortized fees) by the number of days during the past four fiscal quarters that the borrowing was outstanding, and divide the result by 365.

(3) Add together the amounts computed for all borrowings under paragraph (d)(2) of this section. The result is your weighted average borrowings.

(4) For all qualified borrowings outstanding at your last fiscal year or fiscal quarter end, determine the aggregate interest expense for the past four fiscal quarters, excluding amortization of loan fees. For the purposes of this paragraph (d)(4):

(i) Interest expense on Debentures includes the 1 percent Charge paid by a Licensee under § 107.1130(d)(1); and

(ii) Section 301(d) Licensees with outstanding subsidized Debentures are presumed to have paid interest at the rate stated on the face of such Debentures, without regard to any subsidy paid by SBA.

(5) Divide the interest expense from paragraph (d)(4) of this section by the weighted average borrowings from paragraph (d)(3) of this section, and multiply by 100. The result is your Cost of Capital, which you may use to compute a Cost of Money ceiling under paragraph (c) of this section.

(e) *SBA review of Cost of Capital computation.* You must keep your Cost of Capital computations in a separate file available for SBA's review.

(1) A computation that is kept in such a file and is audited by your independent public accountant is considered correct unless SBA demonstrates otherwise.

(2) If a computation is not kept in such a file or is unaudited, you must prove its accuracy to SBA's satisfaction.

(f) *Charges included in the Cost of Money.* The Cost of Money includes all interest, points, discounts, fees, royalties, profit participation, and any other consideration you receive from a Small Business, except for the specific exclusions in paragraph (g) of this section. For equity interests subject to the Cost of Money rules (see paragraph (a) of this section), you must include:

(1) The portion of the fixed redemption price that exceeds your original cost.

(2) Any amount of a redemption that is paid out of accounts other than the Small Business's capital accounts (capital, paid-in surplus, or retained earnings of a corporation; or partners' capital of a partnership).

(g) *Charges excluded from the Cost of Money.* You may exclude from the Cost of Money:

(1) Discount on the loan portion of a Debt Security, if such discount exists solely as the result of the allocation of value to detachable stock purchase warrants in accordance with generally accepted accounting principles.

(2) Closing fees, application fees, and expense reimbursements, each as permitted under § 107.860.

(3) Reasonable prepayment penalties permitted under § 107.830(d)(3).

(4) Out-of-pocket conveyance and/or recordation fees and taxes.

(5) Reasonable closing costs.

(6) Fees for management services as permitted under § 107.900.

(7) Reasonable and necessary out-of-pocket expenses you incur to monitor the Financing.

(8) Board of director fees not in excess of those paid to other outside directors, if your board representation meets the requirements of §107.730(e).

(9) A reasonable fee for arranging financing for a Small Business from a source that is neither a Licensee nor an Associate of yours. The Small Business must agree in writing to pay such a fee before you arrange the financing.

(10) The difference between the contractual interest rate of the Financing and a default rate of interest permitted as follows:

(i) If a Small Business is in default, you may charge a default rate of interest as much as 7 percentage points higher than the contractual rate until the default is cured.

(ii) For this purpose, ''default'' means either failure to pay an amount when due or failure to provide information required under the Financing documents.

(11) Royalty payments based on improvement in the performance of the Small Business after the date of the Financing.

(12) Gains realized on the disposition of Equity Securities issued by the Small Business.

(h) *How to evaluate compliance with the Cost of Money ceiling.* You must determine whether a Financing is within the Cost of Money ceiling based on its discounted cash flows, as follows:

(1) Beginning with the date of the first disbursement (''period zero''), identify your cash inflows and cash outflows for each period of the Financing. The appropriate period to use (such as years, quarters, or months) depends on how you have structured the disbursements and payments.

(2) Discount the cash flows back to the first disbursement date using the Cost of Money ceiling from paragraph (d) of this section as the discount rate.

(3) If the result is zero or less, the Financing is within the Cost of Money ceiling; if it is greater than zero, the Financing exceeds the Cost of Money ceiling.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5867, Feb. 5, 1998; 64 FR 52646, Sept. 30, 1999; 65 FR 69432, Nov. 17, 2000; 77 FR 20294, Apr. 4, 2012]

§ 107.860 Financing fees and expense reimbursements a Licensee may receive from a Small Business.

You may collect Financing fees and receive expense reimbursements from a Small Business only as permitted under this §107.860.

(a) *Application fee.* You may collect a nonrefundable application fee from a Small Business to review its Financing application. The application fee may be collected at the same time as the closing fee under paragraph (c) or (d) of this section, or earlier. The fee must be:

(1) No more than 1 percent of the amount of Financing requested (or, if two or more Licensees participate in the Financing, their combined application fees are no more than 1 percent of the total Financing requested); and

(2) Agreed to in writing by the Financing applicant.

(b) *SBA review of application fees.* For any fiscal year, if the number of application fees you collect is more than twice the number of Financings closed, SBA in its sole discretion may determine that you are engaged in activities not contemplated by the Act, in violation of §107.500.

(c) *Closing fee—Loans.* You may charge a closing fee on a Loan if:

(1) The fee is no more than 2 percent of the Financing amount (or, if two or more Licensees participate in the Financing, their combined closing fees are no more than 2 percent of the total Financing amount); and

(2) You charge the fee no earlier than the date of the first disbursement.

(d) *Closing fee—Debt or Equity Financings.* You may charge a Closing Fee on a Debt Security or Equity Security Financing if:

(1) The fee is no more than 4 percent of the Financing amount (or, if two or more Licensees participate in the Financing, their combined closing fees are no more than 4 percent of the total Financing amount); and

(2) You charge the fee no earlier than the date of the first disbursement.

(e) *Limitation on dual fees.* If another Licensee or an Associate of yours collects a transaction fee under §107.900(e) in connection with your Financing of a Small Business, the sum of the transaction fee and your application and closing fees cannot exceed the maximum application and closing fees permitted under this §107.860.

(f) *Expense reimbursements.* You may charge a Small Business for the reasonable out-of-pocket expenses, other than Management Expenses, that you incur to process its Financing application. If SBA determines that any of your reimbursed expenses are unreasonable or are Management Expenses, SBA will require you to include such amounts in the Cost of Money or refund them to the Small Business.

(g) *Breakup fee.* If a Small Business accepts your Commitment and then fails to close the Financing because it has accepted funds from another source, you may charge a ''breakup fee'' equal to the closing fee that you would have been permitted to charge under paragraph (c) or (d) of this section.

[61 FR 3189, Jan. 31, 1996; 61 FR 41496, Aug. 9, 1996]

§107.865 Control of a Small Business by a Licensee.

(a) *In general.* You, or you and your Associates (in the latter case, the ''Investor Group''), may exercise Control over a Small Business for purposes connected to your investment, through ownership of voting securities, management agreements, voting trusts, majority representation on the board of directors, or otherwise. The period of such Control will be limited to the seventh anniversary of the date on which such Control was initially acquired, or any earlier date specified by the terms of any investment agreement.

(b) *Presumption of control.* Control over a Small Business based on ownership of voting securities will be presumed to exist whenever you or the Investor Group own or control, directly or indirectly:

(1) At least 50 percent of the outstanding voting securities, if there are fewer than 50 shareholders; or

(2) More than 25 percent of the outstanding voting securities, if there are 50 or more shareholders; or

(3) At least 20 percent of the outstanding voting securities, if there are 50 or more shareholders and no other party holds a larger block.

(c) *Rebuttals to presumption of Control.* A presumption of Control under paragraph (b) of this section is rebutted if:

(1) The management of the Small Business owns at least a 25 percent interest in the voting securities of the business; and

(2) The management of the Small Business can elect at least 40 percent of the board members of a corporation, general partners of a limited partnership, or managers of a limited liability company, as appropriate, and the Investor Group can elect no more than 40 percent. The balance of such officials may be elected through mutual agreement by management and the Investor Group.

(d) *Extension of Control.* With SBA's prior written approval you, or the Investor Group, may retain Control for such additional period as may be reasonably necessary to complete divestiture of Control or to ensure the financial stability of the portfolio company.

(e) *Additional Financing for businesses under Licensee's Control.* If you assume Control of a Small Business, you may later provide additional Financing, without an exemption under §107.730(a)(1).

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5867, Feb. 5, 1998; 64 FR 52646, Sept. 30, 1999; 67 FR 64790, Oct. 22, 2002]

§107.880 Assets acquired in liquidation of Portfolio securities.

You may acquire assets in full or partial liquidation of a Small Business's obligation to you under the conditions permitted by this §107.880. The assets may be acquired from the Small Business, a guarantor of its obligation, or another party.

(a) *Timely disposition of assets.* You must dispose of assets acquired in liquidation of a Portfolio security within a reasonable period of time.

(b) *Permitted expenditures to preserve assets.* (1) You may incur reasonably necessary expenditures to maintain and preserve assets acquired.

(2) You may incur reasonably necessary expenditures for improvements to render such assets saleable.

(3) You may make payments of mortgage principal and interest (including amounts in arrears when you acquired the asset), pay taxes when due, and pay for necessary insurance coverage.

(c) *SBA approval of expenditures.* This paragraph (c) applies if you have outstanding Leverage or are applying for Leverage. Any application for SBA approval under this paragraph must specify all expenses estimated to be necessary pending disposal of the assets. Without SBA's prior written approval:

(1) Your total expenditures under paragraphs (b)(1) and (b)(2) of this section plus your total Financing(s) to the Small Business must not exceed your overline limit under §107.740; and

(2) Your total expenditures under paragraph (b) of this section plus your total Financing(s) to the Small Business must not exceed 35 percent of your Regulatory Capital.

LIMITATIONS ON DISPOSITION OF ASSETS

§107.885 Disposition of assets to Licensee's Associates or to competitors of Portfolio Concern.

Sale of assets to Associate. Except with SBA's prior written approval, you are not permitted to dispose of assets (including assets acquired in liquidation) to any Associate if you have outstanding Leverage or Earmarked Assets. As a prerequisite to such approval, you must demonstrate that the proposed terms of disposal are at least as favorable to you as the terms obtainable elsewhere.

[61 FR 3189, Jan. 31, 1996, as amended at 67 FR 64791, Oct. 22, 2002]

MANAGEMENT SERVICES AND FEES

§107.900 Management fees for services provided to a Small Business by Licensee or its Associate.

This §107.900 applies to management services that you or your Associate provide to a Small Business during the term of a Financing or prior to Financing. It does not apply to management services that you or your Associate provide to a Small Business that you do not finance. Fees permitted under this section are not included in the Cost of Money (see §107.855).

(a) *Permitted management fees.* You or your Associate may provide management services to a Small Business financed by you if:

(1) You or your Associate have entered into a written contract with the Small Business;

(2) The fees charged are for services actually performed;

(3) Services are provided on an hourly fee, project fee, or other reasonable basis; and

(4) You can demonstrate to SBA, upon request, that the rate does not exceed the prevailing rate charged for comparable services by other organizations in the geographic area of the Small Business.

(b) *Fees for service as a board member.* You or your Associate may receive fees in the form of cash, warrants, or other payments, for services provided as members of the board of directors of a Small Businesses Financed by you. The fees must not exceed those paid to other outside board members. In the absence of such board members, fees must be reasonable when compared with amounts paid to outside directors of similar companies.

(c) *SBA approval required.* You must obtain SBA's prior written approval of any management contract that does not satisfy paragraphs (a) or (b) of this section.

(d) *Recordkeeping requirements.* You must keep a record of hours spent and amounts charged to the Small Business, including expenses charged.

(e) *Transaction fees.* (1) You may charge reasonable transaction fees for work you or your Associate perform to prepare a client for a public offering, private offering, or sale of all or part of the business, and for assisting with the transaction. Compensation may be in the form of cash, notes, stock, and/or options.

(2) Your Associate may charge market rate investment banking fees to a Small Business on that portion of a Financing that you do not provide.

Subpart H—Non-leveraged Licensees—Exceptions to Regulations

§ 107.1000 Non-leveraged Licensees—exceptions to this part.

The regulatory exceptions in this section apply to Non-leveraged Licensees.

(a) You are exempt from the following provisions (but you must come into compliance with them to become eligible for Leverage):

(1) The overline limitation in § 107.740.

(2) The restrictions in § 107.530 on investments of idle funds, provided you do not engage in activities not contemplated by the Act.

(3) The restrictions in § 107.550 on third-party debt.

(4) The restrictions in § 107.880 on expenses incurred to maintain or improve assets acquired in liquidation of Portfolio securities.

(5) The recordkeeping requirements and fee limitations in § 107.825 (b) and (c), respectively, for securities purchased through or from an underwriter.

(b) You are exempt from the requirements to obtain SBA's prior approval for:

(1) A decrease in your Regulatory Capital of more than two percent under § 107.585 (but not below the minimum required under the Act or these regulations). You must report the reduction to SBA within 30 days.

(2) Disposition of any asset to your Associate under § 107.885.

(3) A contract to employ an Investment Adviser/Manager under § 107.510. However, you must notify SBA of the Management Expenses to be incurred under such contract, or of any subsequent material changes in such Management Expenses, within 30 days of execution. In order to become eligible for Leverage, you must have the contract approved by SBA.

(4) Your initial Management Expenses under § 107.140 and increases in your Management Expenses under § 107.520. However, you must have your Management Expenses approved by SBA in order to become eligible for Leverage.

(5) Options obtained from a Small Business by your management or employees under § 107.815(b).

(c) You are exempt from the requirement in § 107.680 to obtain SBA's post approval of new directors and new officers, other than your chief operating officer. However, you must notify SBA of the new directors or officers within 30 days, and you must have all directors and officers approved by SBA in order to become eligible for Leverage.

[61 FR 3189, Jan. 31, 1996, as amended at 88 FR 46012, July 18, 2023]

Subpart I—SBA Financial Assistance for Licensees (Leverage)

GENERAL INFORMATION ABOUT OBTAINING LEVERAGE

§ 107.1100 Types of Leverage and application procedures.

(a) *Types of Leverageable available.* You may apply for Leverage from SBA in one or both of the following forms:

(1) The purchase or guarantee of your Debentures.

(2) The purchase or guarantee of your Participating Securities.

(b) *Applying for Leverage.* The Leverage application process has two parts. You must first apply for SBA's conditional commitment to reserve a specific amount of Leverage for your future use. You may then apply to draw down Leverage against the commitment. See §§ 107.1200 through 107.1240.

[63 FR 5868, Feb. 5, 1998, as amended at 64 FR 70996, Dec. 20, 1999; 82 FR 39341, Aug. 18, 2017]

§ 107.1120 General eligibility requirements for Leverage.

To be eligible for Leverage, you must:

(a) Demonstrate a need for Leverage, evidenced by your investment activity and a lack of sufficient funds for investment. For your first issuance of Leverage, if you have invested at least 50 percent of your Leverageable Capital, you are presumed to lack sufficient funds for investment.

(b) Have adequate Private Capital to satisfy the requirements for financial viability under § 107.200.

(c) Meet the minimum capital requirements of §107.210, subject to the following additional conditions:

(1) If you were licensed after September 30, 1996, under the exception in §107.210(a)(1), you will not be eligible for Leverage until you have Regulatory Capital of at least $5,000,000, unless you were licensed because you are headquartered in an Underlicensed State.

(2) If you were licensed on or before September 30, 1996, and have Regulatory Capital of less than $5,000,000 (less than $10,000,000 if you wish to issue Participating Securities):

(i) You must certify in writing that at least 50 percent of the aggregate dollar amount of your Financings extended after September 30, 1996 will be provided to Smaller Enterprises (as defined in §107.710(a)); and

(ii) You must demonstrate to SBA's satisfaction that the approval of Leverage will not create or contribute to an unreasonable risk of default or loss to the United States government, based on such measurements of profitability and financial viability as SBA deems appropriate.

(d) For any Leverage draw that would cause you and any other Licensees under Common Control to have aggregate outstanding Leverage in excess of $150 million, certify that none of the Licensees has a condition of Capital Impairment. *See* also §107.1150(b).

(e) For any Leverage request pursuant to §107.1150(d)(2)(i), certify that at least 50 percent (in dollars) of your Financings made on or after the date of such request will be invested in Small Businesses located in low-income geographic areas.

(f) For any Leverage request pursuant to §107.1150(d)(2)(ii), certify that at least 50 percent (in dollars) of the Financings made by each Licensee under Common Control on or after the date of such request will be invested in Small Businesses located in low-income geographic areas.

(g) Certify in writing that you are in compliance with the requirement to finance Smaller Enterprises in §107.710(b).

(h) Show, to the satisfaction of SBA, that your management is qualified and has the knowledge, experience, and capability necessary for investing in the types of businesses contemplated by the Act, the regulations in this part and your business plan.

(i) Be in compliance with the regulations in this part.

(j) If required by SBA, have your Control Person(s) assume, in writing, personal responsibility for your Leverage, effective only if such Control Person(s) participate (directly or indirectly) in a transfer of Control not approved by SBA.

(k) If you are an Early Stage SBIC, certify in writing that in accordance with §107.1810(f)(11), at least 50 percent of the aggregate dollar amount of your Financings will be provided to ''early stage'' companies as defined under the definition of Early Stage SBIC in §107.50 of this part.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5868, Feb. 5, 1998; 64 FR 70996, Dec. 20, 1999; 74 FR 33916, July 14, 2009; 77 FR 25053, Apr. 27, 2012; 79 FR 62824, Oct. 21, 2014; 88 FR 46012, July 18, 2023]

§107.1130 Leverage fees and Annual Charges.

(a) *Leverage fee.* You must pay a leverage fee to SBA for each issuance of a Debenture or Participating Security. The fee is 3 percent of the face amount of the Leverage issued.

(b) *Payment of leverage fee.* (1) If you issue a Debenture or Participating Security to repay or redeem existing Leverage, you must pay the leverage fee before SBA will guarantee or purchase the new Leverage security.

(2) If you issue a Debenture or Participating Security that is not used to repay or redeem existing Leverage, SBA will deduct the leverage fee from the proceeds remitted to you, unless you prepaid the fee under §107.1210.

(c) *Refundability.* The leverage fee is not refundable under any circumstances.

(d) *Additional charge for Leverage*—(1) *Debentures.* You must pay to SBA an Annual Charge, not to exceed 1.38 percent per annum, on the outstanding amount of your Debentures, payable under the same terms and conditions as the interest on the Debentures. For Leverage issued pursuant to Leverage

commitments approved on or after October 1, 2023, the Annual Charge, established and published, shall not be less than 0.10 percent per annum, subject to the following provisions:

(i) For Leverage issued pursuant to Leverage commitments approved on or after October 1, 2024, the Annual Charge, established and published, shall not be less than 0.20 percent per annum.

(ii) For Leverage issued pursuant to Leverage commitments approved on or after October 1, 2025, the Annual Charge, established and published, shall not be less than 0.25 percent per annum.

(iii) For Leverage issued pursuant to Leverage commitments approved on or after October 1, 2026, the Annual Charge, established and published, shall not be less than 0.30 percent per annum.

(iv) For Leverage issued pursuant to Leverage commitments approved on or after October 1, 2027, the Annual Charge, established and published annually, shall not be less than 0.35 percent per annum.

(v) For Leverage issued pursuant to Leverage commitments approved on or after October 1, 2028, the Annual Charge, established and published annually, shall not be less than 0.40 percent per annum.

(2) *Participating Securities.* You must pay to SBA a Charge, not to exceed 1.46 percent per annum, on the outstanding amount of your Participating Securities issued on or after October 1, 1996, payable under the same terms and conditions as the Prioritized Payments on the Participating Securities. This Charge does not apply to Participating Securities issued pursuant to a Leverage commitment obtained from SBA on or before September 30, 1996.

(e) *Other Leverage fees.* SBA may establish a fee structure for services performed by the CRA. SBA will not collect any fee for its guarantee of TCs.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5868, Feb. 5, 1998; 77 FR 25053, Apr. 27, 2012; 88 FR 46012, July 18, 2023]

§ 107.1140 Licensee's acceptance of SBA remedies under §§ 107.1800 through 107.1820.

If you issue Leverage after April 25, 1994, you automatically agree to the terms and conditions in §§ 107.1800 through 107.1820 as they exist at the time of issuance. The effect of these terms and conditions is the same as if they were fully incorporated in the terms of your Leverage.

Maximum Amount of Leverage for Which a Licensee Is Eligible

§ 107.1150 Maximum amount of Leverage.

A Leveraged Licensee, other than an Early Stage SBIC, may have maximum outstanding Leverage as set forth in paragraphs (a), (b), (d), and (e) of this section. An Early Stage SBIC may have maximum outstanding Leverage as set forth in paragraph (c) of this section. In general, SBA will approve Leverage commitment requests in excess of 200 percent of Regulatory Capital and draw requests in excess of 200 percent of Leverageable Capital only after a Licensee has demonstrated consistent, sustainable profitability based on a conservative investment strategy that limits downside risk. Any such Leverage request must be supported by an up-to-date business plan that reflects continuation of the Licensee's successful investment strategy and demonstrates the Licensee's ability to pay all SBA obligations in accordance with their terms.

(a) *Individual Licensee.* Subject to SBA's credit policies, if you are a Leveraged Licensee and not an Accrual SBIC, the maximum amount of Leverage you may have outstanding at any time is the Individual Maximum. If you are an Accrual SBIC, the maximum amount of Leverage and accrued interest you may have outstanding at any time is the Individual Maximum. The *Individual Maximum* means the lesser of:

(1) 300 percent of your Leverageable Capital;

(2) 100 percent of your Leverageable Capital if you have less than $5 Million in Regulatory Capital and you were Licensed because you are headquartered in an Underlicensed State; or

(3) The maximum Leverage available to a single Licensee under section 303(b) of the Act.

(b) *Multiple Licensees under Common Control.* Subject to SBA's credit policies, two or more Licenses under Common Control may have maximum aggregate outstanding Leverage as permitted under the Act. For any Accrual SBIC or Reinvestor SBIC under Common Control, the aggregate accrued interest associated with Accrual Debentures will be included in determining whether this maximum has been exceeded. However, for any Leverage draw(s) by one or more such Licensees that would cause the aggregate outstanding Leverage to exceed the Individual Maximum, each of the Licensees under Common Control must certify that it does not have a condition of Capital Impairment. *See* also § 107.1120(d).

Example 1 to paragraph (b): If a fund manager has both a regular Leveraged Licensee with $250 million in outstanding Leverage and an Accrual SBIC with $50 million in Accrual Debentures that could accrue interest of $25 million at maturity, SBA will apply the principal from the regular Leverage plus the $50 million from the Accrual Debenture plus the $25 million in potential accrued interest for a combined total of $325 million.

(c) *Early Stage SBICs.* Subject to SBA's credit policies, if you are an Early Stage SBIC:

(1) The total amount of any and all Leverage commitments you receive from SBA shall not exceed 100 percent of your highest Regulatory Capital or $50 million, whichever is less;

(2) On a cumulative basis, the total amount of Leverage you have issued shall not exceed the total amount of capital paid in by your investors; and

(3) The maximum amount of Leverage you may have outstanding at any time is the lesser of:

(i) 100 percent of your Leverageable Capital, or

(ii) $50 million.

(d) *Additional Leverage based on investment in low-income geographic areas.* Subject to SBA's credit policies, you may have outstanding Leverage in excess of the amounts permitted by paragraphs (a) and (b) of this section in accordance with this paragraph (d). If you were licensed before October 1, 2009, you may seek additional Leverage under paragraph (d)(1) only. If you were licensed on or after October 1, 2009, you may seek additional Leverage under paragraph (d)(1) or (2), but not both. In this paragraph (d), ''low income geographic areas'' are as defined in § 108.50 of this chapter. Any investment that you use as a basis to seek additional leverage under this paragraph (d) cannot also be used to seek additional leverage under paragraph (e) of this section.

(1) *Investment in Smaller Enterprises located in low-income geographic areas.* To determine whether you may request a draw that would cause you to have outstanding Leverage in excess of the amount determined under paragraph (a) of this section:

(i) Determine the cost basis, as reported on your most recent filing of SBA Form 468, of any investments in the Equity Securities of a Smaller Enterprise located in a low-income geographic area.

(ii) Calculate the amount that equals 50 percent of your Leverageable Capital.

(iii) Subtract from your outstanding Leverage the lesser of paragraph (d)(1)(i) or (ii).

(iv) If the amount calculated in paragraph (d)(1)(iii) is less than the maximum leverage determined under paragraph (a) of this section, the difference between the two amounts equals your additional Leverage availability.

(2) *Investment in Small Businesses located in low-income geographic areas.* This paragraph (d)(2) applies only to Licensees licensed on or after October 1, 2009. You may substitute a maximum Leverage amount of $175,000,000 for the $150,000,000 set forth in paragraph (a)(2) of this section, and a maximum Leverage amount of $250,000,000 for the $225,000,000 set forth in paragraph (b) of this section, if you satisfy the following conditions:

(i) At least 50 percent (in dollars) of your Financings preceding the date of such request must have been invested in Small Businesses located in low-income geographic areas. In addition, you must certify that at least 50 percent (in dollars) of your Financings on or after the date of such request will be

invested in Small Businesses located in low-income geographic areas.

(ii) If you are requesting a draw that would cause you and any other Licensees under Common Control to have aggregate outstanding Leverage in excess of $225,000,000, at least 50 percent (in dollars) of the Financings made by each Licensee under Common Control preceding the date of such request must have been invested in Small Businesses located in low-income geographic areas. In addition, each such Licensee must certify that at least 50 percent (in dollars) of its Financings on or after the date of such request will be invested in Small Businesses located in low-income geographic areas.

(e) *Additional Leverage based on Energy Saving Qualified Investments in Smaller Enterprises.* (1) Subject to SBA's credit policies, if you were licensed on or after October 1, 2008, you may have outstanding Leverage in excess of the amounts permitted by paragraphs (a) and (b) of this section in accordance with this paragraph (e). Any investment that you use as a basis to seek additional Leverage under this paragraph (e) cannot also be used to seek additional Leverage under paragraph (d) of this section.

(2) To determine whether you may request a draw that would cause you to have outstanding Leverage in excess of the amount determined under paragraph (a) of this section:

(i) Determine the cost basis, as reported on your most recent filing of SBA Form 468, of any Energy Saving Qualified Investments in a Smaller Enterprise that individually do not exceed 20% of your Regulatory Capital.

(ii) Calculate the amount that equals 33% of your Leverageable Capital.

(iii) Subtract from your outstanding Leverage the lesser of paragraph (e)(2)(i) or (ii).

(iv) If the amount calculated in paragraph (e)(2)(iii) is less than the maximum Leverage determined under paragraph (a) of this section, the difference between the two amounts equals your additional Leverage availability.

[74 FR 33916, July 14, 2009, as amended at 77 FR 23380, Apr. 19, 2012; 77 FR 25053, Apr. 27, 2012; 79 FR 62824, Oct. 21, 2014; 82 FR 39341, Aug. 18, 2017; 88 FR 46012, July 18, 2023]

§ 107.1160 Maximum amount of Leverage for a Section 301(d) Licensee.

This section applies to Leverage issued by a Section 301(d) Licensee on or before September 30, 1996. Effective October 1, 1996, a Section 301(d) Licensee may apply to issue new Leverage, or refinance existing Leverage, only on the same terms permitted under § 107.1150.

(a) *Maximum amount of subsidized Leverage.* (1) ''Subsidized Leverage'' means Debentures with a reduced interest rate and Preferred Securities. If you are a Section 301(d) Licensee:

(i) The maximum amount of subsidized Leverage you may have outstanding at any time is the lesser of 400 percent of your Leverageable Capital, or $35,000,000. The same limit applies to a group of Section 301(d) Licensees under Common Control.

(ii) The maximum amount of Preferred Securities you may have outstanding at any time is 200 percent of your Leverageable Capital.

(2) Certain types and amounts of subsidized Leverage have special eligibility requirements (see paragraphs (c) and (d) of this section).

(b) *Maximum amount of total Leverage.* Use § 107.1150 to determine your maximum amount of Leverage as if you were a Section 301(c) Licensee. If the result is more than your maximum subsidized Leverage, then this is your maximum total (subsidized plus nonsubsidized) Leverage. Otherwise, your maximum total Leverage is the same as your maximum subsidized Leverage. For Participating Securities, see § 107.1170.

(c) *Special eligibility requirements for fourth tier of Leverage.* A ''fourth tier of Leverage'' is any amount of outstanding Leverage in excess of 300 percent of your Leverageable Capital.

(1) To qualify for a fourth tier of Leverage, you must have invested (or have Commitments to invest) at least 30 percent of your ''Total Funds Available for Investment'' in ''Venture Capital Financings'' (see the definitions in paragraphs (e) and (f) of this section).

(2) While you have a fourth tier of Leverage, you must maintain Venture Capital Financings (at cost) that equal at least 30 percent of your Total Funds Available for Investment.

(d) *Special eligibility requirements for second tier of Preferred Securities.* A ''second tier of Preferred Securities'' is any amount of outstanding Preferred Securities in excess of 100 percent of your Leverageable Capital.

(1) To qualify for a second tier of Preferred Securities:

(i) If your license was issued after October 13, 1971, you must have at least $500,000 of Leverageable Capital.

(ii) You must have invested (or have Commitments to invest) at least the same dollar amount in Venture Capital Financings.

(2) While you have a second tier of Preferred Securities, you must maintain at least the same dollar amount of Venture Capital Financings (at cost).

(e) *Definition of ''Total Funds Available for Investment''.* Total Funds Available for Investment means the result obtained from the following formula:

$$T = .90 \times (CA + LI)$$

Where:

T = Total funds available for investment
CA = Total current assets
LI = Total Loans and Investment at cost (as reported on SBA Form 468), net of current maturities

(f) *Definition of ''Venture Capital Financing''.* Venture Capital Financing means an investment represented by common or preferred stock, a limited partnership interest, or a similar ownership interest; or by an unsecured debt instrument that is subordinated by its terms to all other borrowings of the issuer.

(1) A debt secured by any agreement with a third party is not a Venture Capital Financing, whether or not you have a security interest in any asset of the third party or have recourse against the third party.

(2) A Financing that originally qualified as a Venture Capital Financing will continue to qualify (at its original cost), even if you later must report it on SBA Form 468 under either Assets Acquired in Liquidation of Portfolio Securities or Operating Concerns Acquired.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5868, Feb. 5, 1998; 74 FR 33916, July 14, 2009]

§ 107.1170 Maximum amount of Participating Securities for any Licensee.

The maximum amount of Participating Securities you may have outstanding at any time is 200 percent of your Leverageable Capital. If you are a Section 301(d) Licensee, the maximum combined amount of Participating Securities and Preferred Securities you may have outstanding at any time is 200 percent of your Leverageable Capital.

SPECIAL RULES FOR LEVERAGE ISSUED BY AN EARLY STAGE SBIC

§ 107.1180 Required distributions to SBA by Early Stage SBICs.

(a) *Distribution requirement.* If you are an Early Stage SBIC with outstanding Leverage, you may make Distributions to your investors and to SBA only as permitted under this section. See also § 107.585. For the purposes of this section, ''Distributions'' do not include required payments to SBA of interest and Charges and payments of Leverage principal at maturity, all of which shall be paid in accordance with the terms of the Leverage. You may make a Distribution on any Payment Date. Unless SBA permits otherwise, you must notify SBA in writing of any planned distribution under this section, including computations of the amounts distributable to SBA and your investors, at least 10 business days before the distribution date.

(b) *How SBA will apply Distributions.* Any amounts you distribute to SBA, or its designated agent or Trustee, under this section will be applied to repayment of principal of outstanding Debentures in order of issue. You may prepay any Debenture in whole, but not in part, on any Payment Date without penalty.

(c) *Condition for making a Distribution.* You may make a Distribution under this section only if you have paid all interest and Charges on your outstanding Debentures that are due and payable, or will pay such interest and Charges simultaneously with your Distribution.

(d) *SBA's share of Distribution.* For each proposed Distribution, determine

SBA's share of the Distribution as follows:

(1) Determine the highest ratio of outstanding Leverage to Leverageable Capital that you have ever attained (your ''Highest Leverage Ratio''). For the purpose of determining your Highest Leverage Ratio, any deferred interest Debentures issued at a discount must be included in the computation at their face value.

(2) Determine SBA's percentage share of cumulative Distributions:

(i) If your Capital Impairment Percentage under §107.1840 is less than 50 percent as of the Distribution date or your Highest Leverage Ratio equals 0.5 or less, except as provided in paragraph (d)(2)(iii) of this section, SBA's percentage share of cumulative Distributions equals:

[Highest Leverage Ratio/(Highest Leverage Ratio + 1)] × 100

For example, if your Highest Leverage Ratio equals 1, then SBA's share of any distribution you make will be 50 percent.

(ii) If your Capital Impairment Percentage under §107.1840 is 50 percent or greater as of the Distribution date and your Highest Leverage Ratio is greater than 0.5, SBA's percentage share of cumulative Distributions equals 100 percent.

(iii) If you have a condition of Capital Impairment under §107.1830 and your Highest Leverage Ratio equals 0.5 or less as of the Distribution date, SBA's percentage share of cumulative Distributions equals 100 percent.

(3) Multiply the sum of all your prior Distributions and your current proposed Distribution (including Distributions to SBA, your limited partners and your General Partner) by SBA's percentage share of cumulative Distributions as determined in paragraph (d)(2) of this section.

(4) From the result in paragraph (d)(3) of this section, subtract the sum of all your prior Distributions to SBA under this §107.1180.

(5) The amount of your Distribution to SBA will be the least of:

(i) The result in paragraph (d)(4) of this section;

(ii) Your current proposed Distribution; or

(iii) Your outstanding Leverage.

(e) *Additional Leverage prepayment.* On any Payment Date, subject to the terms of your Leverage, you may make a payment to SBA to be applied to repayment of the principal of one or more outstanding Debentures in order of issue, without making any Distribution to your investors.

[77 FR 25053, Apr. 27, 2012]

§107.1181 Interest reserve requirements for Early Stage SBICs.

(a) *Reserve requirement.* If you are an Early Stage SBIC with outstanding Leverage, for each Debenture which requires periodic interest payments to SBA during the first five years of its term, you must maintain a reserve sufficient to pay the interest and Charges on such Debenture for the first 21 Payment Dates following the date of issuance. This reserve may consist of any combination of the following:

(1) Binding unfunded commitments from your Institutional Investors that cannot be called for any purpose other than the payment of interest and Charges to SBA, or the payment of any amounts due to SBA; and

(2) Cash maintained in a separate bank account or separate investment account permitted under §107.530 of this part and separately identified in your financial statements as ''restricted cash'' available only for the purpose of paying interest and Charges to SBA, or for the payment of any amounts due to SBA.

(b) The required reserve associated with an individual Debenture shall be reduced on each Payment Date upon payment of the required interest and Charges. If you prepay a Debenture prior to the 21st Payment Date following its date of issuance, the reserve requirement associated with that Debenture shall be correspondingly eliminated.

(c) Your limited partnership agreement must incorporate the reserve requirement in paragraph (a) of this section.

[77 FR 25053, Apr. 27, 2012]

§ 107.1182 Valuation requirements for Early Stage SBICs based on Capital Impairment Percentage.

(a) If you are an Early Stage SBIC, you must compute your Capital Impairment Percentage and determine whether you have a condition of Capital Impairment in accordance with §§ 107.1830 and 107.1840 of this part.

(b) You must promptly notify SBA in writing if your Capital Impairment Percentage is at least 50 percent, even if your maximum permitted Capital Impairment Percentage is higher.

(c) Upon receipt of your notification under paragraph (b) of this section, or upon making its own determination that your Capital Impairment Percentage is at least 50 percent, SBA has the right to require you to engage, at your expense, an independent third party, acceptable to SBA, to prepare valuations of some or all of your Loans and Investments, as designated by SBA.

[77 FR 25053, Apr. 27, 2012]

CONDITIONAL COMMITMENTS BY SBA TO RESERVE LEVERAGE FOR A LICENSEE

§ 107.1200 SBA's Leverage commitment to a Licensee—application procedure, amount, and term.

(a) *General.* Under the provisions in §§ 107.1200 through 107.1240, you may apply for SBA's conditional commitment to reserve a specific amount and type of Leverage for your future use. You may then apply to draw down Leverage against the commitment.

(b) *Applying for a Leverage commitment.* SBA will notify you when it is accepting requests for Leverage commitments. Upon receipt of your request, SBA will send you a complete application package.

(c) *Limitations on the amount of a Leverage commitment.* The amount of a Leverage commitment must be a multiple of $5,000.

(d) *Term of Leverage commitment.* SBA's Leverage commitment will automatically lapse on the expiration date stated in the commitment letter issued to you by SBA.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5868, Feb. 5, 1998]

§ 107.1210 Payment of leverage fee upon receipt of commitment.

(a) *Partial prepayment of leverage fee.* As a condition of SBA's Leverage commitment, and before you draw any Leverage under such commitment, you must pay to SBA a non-refundable fee equal to 1 percent of the face amount of the Debentures or Participating Securities reserved under the commitment. This amount represents a partial prepayment of the 3 percent leverage fee established under § 107.1130(a).

(b) *Automatic cancellation of commitment.* Unless you pay the fee required under paragraph (a) of this section by 5:00 P.M. Eastern Time on the 30th calendar day following the issuance of SBA's Leverage commitment, the commitment will be automatically canceled.

[63 FR 5868, Feb. 5, 1998]

§ 107.1220 Requirement for Licensee to file quarterly financial statements.

Leveraged Licensees must submit to SBA a Financial Statement on SBA Form 468 (Short Form) as of the close of each quarter of your fiscal year (other than the fourth quarter, which is covered by your annual filing of Form 468 under § 107.630(a)). You must file this form within 45 days after the close of the quarter. You will not be eligible for a draw if you are not in compliance with this section.

[88 FR 46012, July 18, 2023]

§ 107.1230 Draw-downs by Licensee under SBA's Leverage commitment.

(a) *Licensee's authorization of SBA to purchase or guarantee securities.* By submitting a request for a draw against SBA's Leverage commitment, you authorize SBA, or any agent or trustee SBA designates, to guarantee your Debenture or Participating Security and to sell it with SBA's guarantee.

(b) *Limitations on amount of draw.* The amount of a draw must be a multiple of $5,000. SBA, in its discretion, may determine a minimum dollar amount for draws against SBA's Leverage commitments. Any such minimum amounts will be published in Notices in the FEDERAL REGISTER from time to time.

(c) *Effect of regulatory violations on Licensee's eligibility for draws*—(1) *General*

rule. You are eligible to make a draw against SBA's Leverage commitment only if you are in compliance with all applicable provisions of the Act and SBA regulations (i.e., no unresolved statutory or regulatory violations).

(2) *Exception to general rule*. If you are not in compliance, you may still be eligible for draws if:

(i) SBA determines that your outstanding violations are of non-substantive provisions of the Act or regulations and that you have not repeatedly violated any non-substantive provisions; or

(ii) You have agreed with SBA on a course of action to resolve your violations and such agreement does not prevent you from issuing Leverage.

(d) *Procedures for funding draws*. You may request a draw at any time during the term of the commitment. With each request, submit the following documentation:

(1) A statement certifying that there has been no material adverse change in your financial condition since your last filing of SBA Form 468 (see also §107.1220 for SBA Form 468 filing requirements).

(2) If your request is submitted more than 30 days following the end of your fiscal year, but before you have submitted your annual filing of SBA Form 468 (Long Form) in accordance with §107.630(a), a preliminary unaudited annual financial statement on SBA Form 468 (Short Form).

(3) A statement certifying that to the best of your knowledge and belief, you are in compliance with all provisions of the Act and SBA regulations (i.e., no unresolved regulatory or statutory violations), or a statement listing any specific violations you are aware of. Either statement must be executed by one of the following:

(i) An officer of the Licensee;

(ii) An officer of a corporate general partner of the Licensee; or

(iii) An individual who is authorized to act as or for a general partner of the Licensee.

(4) A statement that the proceeds are needed to fund one or more particular Small Businesses or to provide liquidity for your operations. If required by SBA, the statement must include the name and address of each Small Business, and the amount and anticipated closing date of each proposed Financing.

(e) *Reporting requirements after drawing funds*. (1) Within 30 calendar days after the actual closing date of each Financing funded with the proceeds of your draw, you must file an SBA Form 1031 confirming the closing of the transaction.

(2) If SBA required you to provide information concerning a specific planned Financing under paragraph (d)(3) of this section, and such Financing has not closed within 60 calendar days after the anticipated closing date, you must give SBA a written explanation of the failure to close.

(3) If you do not comply with this paragraph (e), you will not be eligible for additional draws. SBA may also determine that you are not in compliance with the terms of your Leverage under §§107.1810 or 107.1820.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5868, Feb. 5, 1998; 64 FR 70996, Dec. 20, 1999]

§107.1240 Funding of Licensee's draw request through sale to short-term investor.

(a) *Licensee's authorization of SBA to arrange sale of securities to short-term investor*. By submitting a request for a draw of Debenture or Participating Security Leverage, you authorize SBA, or any agent or trustee SBA designates, to enter into any agreements (and to bind you to such agreements) necessary to accomplish:

(1) The sale of your Debenture or Participating Security to a short-term investor at a rate that may be different from the Trust Certificate Rate which will be established at the time of the pooling of your security;

(2) The purchase of your security from the short-term investor, either by you or on your behalf; and

(3) The pooling of your security with other securities with the same maturity date.

(b) *Sale of Debentures to a short-term investor*. If SBA sells your Debenture to a short-term investor:

(1) The sale price will be the face amount.

(2) At the next scheduled date for the sale of Debenture Trust Certificates,

whether or not the sale actually occurs, you must pay interest to the short-term investor for the short-term period. If the actual sale of Trust Certificates takes place after the scheduled date, you must pay the short-term investor interest from the scheduled sale date to the actual sale date. This additional interest is due on the actual sale date.

(3) Failure to pay the interest constitutes noncompliance with the terms of your Leverage (see §107.1810).

(c) *Sale of Participating Securities to a short-term investor.* If SBA sells your Participating Security to a short-term investor, the sale price will be the face amount.

(d) *Licensee's right to repurchase its Debentures before pooling.* You may repurchase your Debentures from the short-term investor before they are pooled. To do so, you must:

(1) Give SBA written notice at least 10 days before the cut-off date for the pool in which your Debenture is to be included; and

(2) Pay the face amount of the Debenture, plus interest, to the short-term investor.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5868, Feb. 5, 1998]

PREFERRED SECURITIES LEVERAGE—SECTION 301(d) LICENSEES

§107.1400 Dividends or partnership distributions on 4 percent Preferred Securities.

If you issued Preferred Securities to SBA on or after November 21, 1989, you must pay SBA a dividend or partnership distribution of 4 percent per year, from the date you issued Preferred Securities to the date you repay them, both inclusive. The dividend or partnership distribution is:

(a) Computed on the par value of the outstanding stock or the face value of the outstanding limited partnership interest.

(b) Cumulative. This means that if you do not pay the entire dividend or partnership distribution for a given fiscal year, the unpaid balance accumulates as a distribution in arrears. You do not have to pay interest on distributions in arrears.

(c) Preferred. This means that you must pay SBA in full (including distributions in arrears) before setting aside or paying any amount to any other equity holder.

(d) Payable at the discretion of your Board of Directors or General Partner(s), except that all distributions in arrears must be paid in full when you redeem the Preferred Securities.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5869, Feb. 5, 1998]

§107.1410 Requirement to redeem 4 percent Preferred Securities.

You must redeem 4 percent Preferred Securities not later than 15 years from the date of issuance. At the redemption date, you must pay to SBA:

(a) The par value (of preferred stock) or face value (of a preferred limited partnership interest); plus

(b) Any unpaid dividends or partnership distributions accrued to the redemption date.

§107.1420 Articles requirements for 4 percent Preferred Securities.

If you have outstanding 4 percent Preferred Securities, your Articles must contain all the provisions in §§107.1400 and 107.1410.

[63 FR 5869, Feb. 5, 1998]

§107.1430 Redeeming 4 percent Preferred Securities with proceeds of non-subsidized Debentures.

If SBA approves, a Section 301(d) Licensee may use the proceeds of a Debenture to redeem Preferred Securities at their mandatory redemption date, including any accrued unpaid dividends or partnership distributions.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5869, Feb. 5, 1998]

§107.1440 Three percent preferred stock issued before November 21, 1989.

Before November 21, 1989, Preferred Securities were available only in the form of preferred stock and had a preferred and cumulative dividend of 3 percent. If you have such preferred stock outstanding, you must follow §107.1400 (except for §107.1400(d)), substituting ''3 percent'' for ''4 percent'' throughout.) Dividends on 3 percent

preferred stock are payable at the discretion of your Board of Directors or General Partner(s), except that all dividends in arrears must be paid in full before any non-SBA investor receives any distribution. Upon your liquidation, SBA is entitled to payment of all dividends in arrears even if you have no Retained Earnings Available for Distribution at such time.

§ 107.1450 Optional redemption of Preferred Securities.

(a) *Redemption at par or face value.* A Section 301(d) Licensee may redeem Preferred Securities at any time, provided you give SBA at least 30 days written notice. You may redeem all or only part of your Preferred Securities, but the par value or face value of the securities being redeemed must be at least $50,000. At the redemption date, you must pay to SBA:

(1) The par value (of preferred stock) or face value (of a preferred limited partnership interest); plus

(2) Any unpaid dividends or partnership distributions accrued to the redemption date.

(b) *Repurchase of 3 percent preferred stock for less than par value.* If you issued 3 percent preferred stock to SBA, you may ask SBA to sell it back to you at a price less than its par value. The terms and conditions of any such transaction will be as set forth in the Notice published in the FEDERAL REGISTER on April 1, 1994 (Copies of this notice are available from SBA, 409 3rd Street, SW., Washington, DC, 20416). SBA has sole discretion to:

(1) Approve or disapprove the sale.

(2) Determine the sale price after considering any factors SBA considers appropriate.

(3) Determine the form of payment SBA will accept. SBA is not authorized to accept the proceeds of a subsidized Debenture as payment.

PARTICIPATING SECURITIES LEVERAGE

§ 107.1500 General description of Participating Securities.

(a) *Types of Participating Securities.* Participating Securities are redeemable, preferred, equity-type securities. SBA may purchase or guarantee Participating Securities issued by Licensees in the form of limited partnership interests, preferred stock, or debentures with interest payable only to the extent of earnings. The structure, terms and conditions of Participating Securities are set forth in detail in §§ 107.1500 through 107.1590.

(b) *Special eligibility requirements for Participating Securities.* In addition to the general eligibility requirements for Leverage under § 107.1120, Participating Securities issuers must also comply with special rules on:

(1) Minimum capital (see § 107.210).

(2) Liquidity (see § 107.1505).

(3) Non-SBA borrowing (see § 107.570).

(4) Equity investing, as set forth in this paragraph (b)(4). If you issue Participating Securities, you must invest an amount equal to the Original Issue Price of such securities solely in Equity Capital Investments, as defined in § 107.50.

(c) *Special features of Participating Securities—Prioritized Payments, Adjustments, and Profit Participation.* When you issue Participating Securities, you agree to make the following payments:

(1) *Prioritized Payments.* Depending upon the type of Participating Security you issue, Prioritized Payments may be preferred partnership distributions, preferred dividends, or interest. Your obligation to pay Prioritized Payments is contingent upon your profits as determined under § 107.1520.

(2) *Adjustments to Prioritized Payments.* If you have unpaid Prioritized Payments, you must compute Adjustments, which are additional contingent obligations determined under § 107.1520. The conditions for paying Adjustments are the same as for Prioritized Payments.

(3) *SBA Profit Participation.* Profit Participation is an amount payable to SBA under § 107.1530 in consideration for SBA's guarantee of your Participating Securities.

(d) *Distributions by Licensees issuing Participating Securities.* Sections 107.1540 through 107.1580 govern both required and optional Distributions by Participating Securities issuers. Distributions include both profit distributions and returns of capital, paid either to SBA or to your non-SBA investors.

(e) *Mandatory redemption of Participating Securities.* You must redeem Participating Securities at the redemption date, which is the same as the maturity date of the Trust Certificates for the Trust containing such securities. The redemption date can never be later than 15 years after the issue date. You must pay the Redemption Price plus any unpaid Earned Prioritized Payments and any earned Adjustments and earned Charges (see §107.1520).

(f) *Priority of Participating Securities in liquidation of Licensee.* In the event of your liquidation, the following are senior in priority, for all purposes, to all other equity interests you have issued at any time:

(1) The Redemption Price of Participating Securities;

(2) Any Earned Prioritized Payments and any earned Adjustments and earned Charges (see §107.1520); and

(3) Any Profit Participation allocated to SBA under §107.1530.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5869, Feb. 5, 1998]

§107.1505 Liquidity requirements for Licensees issuing Participating Securities.

If you have outstanding Participating Securities, you must maintain sufficient liquidity to avoid a condition of Liquidity Impairment. Such a condition will constitute noncompliance with the terms of your Leverage under §107.1820(e).

(a) *Definition of Liquidity Impairment.* A condition of Liquidity Impairment exists when your Liquidity Ratio, as determined in paragraph (b) of this section, is less than 1.20. You are responsible for calculating whether you have a condition of Liquidity Impairment:

(1) As of the close of your fiscal year;

(2) At the time you apply for Leverage, unless SBA permits otherwise; and

(3) At such time as you contemplate making any Distribution.

(b) *Computation of Liquidity Ratio.* Your Liquidity Ratio equals your Total Current Funds Available (A) divided by your Total Current Funds Required (B), as determined in the following table:

CALCULATION OF LIQUIDITY RATIO

Financial account	Amount reported on SBA form 468	Weight	Weighted amount
(1) Cash and invested idle funds		× 1.00	
(2) Commitments from investors		× 1.00	
(3) Current maturities		× 0.50	
(4) Other current assets		× 1.00	
(5) Publicly Traded and Marketable Securities		× 1.00	
(6) Anticipated operating revenue for next 12 months.	[1]	× 1.00	
(7) Total Current Funds Available			A
(8) Current liabilities		× 1.00	
(9) Commitments to Small Businesses		× 0.75	
(10) Anticipated operating expense for next 12 months.	[1]	× 1.00	
(11) Anticipated interest expense for next 12 months.	[1]	× 1.00	
(12) Contingent liabilities (guarantees)		× 0.25	
(13) Total Current Funds Required			B

[1] As determined by Licensee's management under its business plan.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5869, Feb. 5, 1998]

§107.1510 How a Licensee computes Earmarked Profit (Loss).

Computing your Earmarked Profit (Loss) is the first step in determining your obligations to pay Prioritized Payments, Adjustments and Charges under §107.1520 and Profit Participation under §107.1530.

(a) *Requirement to compute your Earmarked Profit (Loss).* While you have Participating Securities outstanding or have Earmarked Assets (as defined in paragraph (b) of this section), you must compute your Earmarked Profit (Loss) for:

(1) Each full fiscal year.

(2) Any interim period (consisting of one or more fiscal quarters) for which you want to make a Distribution.

(b) *How to determine your Earmarked Assets.* ''Earmarked Assets'' means all the Loans and Investments that you have when you issue Participating Securities or that you acquire while you have Participating Securities outstanding, and any non-cash assets that you receive in exchange for such Loans and Investments.

(1) An Earmarked Asset remains earmarked until you dispose of it, even if you no longer have any outstanding Participating Securities.

(2) Investments you make after redeeming all your Participating Securities are not Earmarked Assets. However, if you issue new Participating Securities, all of your Loans and Investments again become Earmarked Assets.

(3) If you were licensed before March 31, 1993, you may be permitted to exclude Loans and Investments held at that date from Earmarked Assets under § 107.1590.

(c) *How to compute your Earmarked Asset Ratio.* You must determine your Earmarked Asset Ratio each time you compute Earmarked Profit (Loss). If all your Loans and Investments are Earmarked Assets, your Earmarked Asset Ratio equals 100 percent. Otherwise, compute your Earmarked Asset Ratio using the following formula:

$$EAR = (EA \div LI) \times 100$$

where:

EAR = Earmarked Asset Ratio.
EA = Average Earmarked Assets (at cost) for the fiscal year or interim period.
LI = Average Loans and Investments (at cost) for the fiscal year or interim period.

(d) *How to compute your Earmarked Profit (Loss) if Earmarked Asset Ratio is 100 percent.* (1) (i) If your Earmarked Asset Ratio from paragraph (b) of this section is 100 percent, use the following formula to compute your Earmarked Profit (Loss):

$$EP = NI + IK + EME$$

where:

EP = Earmarked Profit (Loss)
NI = Net Income (Loss), as reported on SBA Form 468 except as otherwise provided in this paragraph (d)(1)
IK = Unrealized Appreciation (Depreciation) on Earmarked Assets that you are distributing as an In-Kind Distribution under § 107.1580
EME = Excess Management Expenses

(ii) For the purpose of determining Net Income (Loss), leverage fees paid to SBA and partnership syndication costs that you incur must be capitalized and amortized on a straight-line basis over not less than five years.

(2) ''Excess Management Expenses'' are those that exceed the following limit:

(i) For a full fiscal year, the limit is the lower of:

(A) 2.5 percent of your weighted average Combined Capital for the year, plus $125,000 if Combined Capital is below $20,000,000; or

(B) Your Management Expenses approved by SBA.

(ii) For less than a full fiscal year, you must prorate the annual amounts in paragraph (d)(2)(i) of this section to determine the limit.

(e) *How to compute your Earmarked Profit (Loss) if Earmarked Asset Ratio is less than 100 percent.* If your Earmarked Asset Ratio is less than 100 percent, compute your Earmarked Profit (Loss) as follows:

(1) Do the Earmarked Profit (Loss) computation in paragraph (d) of this section.

(2) Subtract your net realized gain (loss) (as reported on SBA Form 468) on Loans and Investments that are not Earmarked Assets.

(3) Separate the result from paragraph (e)(2) of this section into:

(i) Net realized gain (loss) (as reported on SBA Form 468) on Earmarked Assets (''EGL''); and

(ii) The remainder (''R'').

(4) Your Earmarked Profit (Loss) equals:

$$EGL + (R \times \text{Earmarked Asset Ratio})$$

(f) *How to compute your cumulative Earmarked Profit (Loss).* Sum your Earmarked Profit (Loss) for all fiscal years and for any interim period following the end of your last fiscal year. The total is your cumulative Earmarked Profit (Loss), which you must

use in the Prioritized Payment computations under § 107.1520.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5870, Feb. 5, 1998]

§ 107.1520 How a Licensee computes and allocates Prioritized Payments to SBA.

This section tells you how to compute Prioritized Payments, Adjustments and Charges on Participating Securities and determine the amounts you must pay. To distribute these amounts, see § 107.1540.

(a) *How to compute Prioritized Payments and Adjustments*—(1) *Prioritized Payments.* For a full fiscal year, the Prioritized Payment on an outstanding Participating Security equals the Redemption Price times the related Trust Certificate Rate. For an interim period, you must prorate the annual Prioritized Payment. If your Participating Security was sold to a short-term investor in accordance with § 107.1240, the Prioritized Payment for the short-term period equals the Redemption Price times the short-term rate.

(2) *Adjustments.* Compute Adjustments using paragraph (f) of this section.

(3) *Charges.* Compute Charges in accordance with § 107.1130(d)(2).

(b) *Licensee's obligation to pay Prioritized Payments, Adjustments and Charges.* You are obligated to pay Prioritized Payments, Adjustments and Charges only if you have profit as determined in paragraph (d) of this section.

(1) Prioritized Payments that you must pay (or have already paid) because you have sufficient profit are ''Earned Prioritized Payments''.

(2) Prioritized Payments that have not become payable because you lack sufficient profit are ''Accumulated Prioritized Payments''. Treat all Prioritized Payments as ''Accumulated'' until they become ''Earned'' under this section.

(3) Adjustments (computed under paragraph (f) of this section) and Charges (computed under § 107.1130(d)(2)) are ''earned'' according to the same criteria applied to Prioritized Payments.

(c) *How to keep track of Prioritized Payments.* You must establish three accounts to record your Accumulated and Earned Prioritized Payments:

(1) *Accumulation Account.* The Accumulation Account is a memorandum account. Its balance represents your Accumulated Prioritized Payments, unearned Adjustments and unearned Charges.

(2) *Distribution Account.* The Distribution Account is a liability account. Its balance represents your unpaid Earned Prioritized Payments, earned Adjustments and earned Charges.

(3) *Earned Payments Account.* The Earned Payments Account is a memorandum account. Each time you add to the Distribution Account balance, add the same amount to the Earned Payments Account. Its balance represents your total (paid and unpaid) Earned Prioritized Payments, earned Adjustments and earned Charges.

(d) *How to determine your profit for Prioritized Payment purposes.* As of the end of each fiscal year and any interim period for which you want to make a Distribution:

(1) Bring the Accumulation Account up to date by adding to it all Prioritized Payments and Charges through the end of the appropriate fiscal period.

(2) Determine whether you have profit for the purposes of this section by doing the following computation:

(i) Cumulative Earmarked Profit (Loss) under § 107.1510(f); minus

(ii) The Earned Payments Account balance; minus

(iii) All Distributions previously made under §§ 107.1550, 107.1560 and 107.1570(a); minus

(iv) Any Profit Participation previously allocated to SBA under § 107.1530, but not yet distributed.

(3) The amount computed in paragraph (d)(2) of this section, if greater than zero, is your profit. If the amount is zero or less, you have no profit.

(4) If you have a profit, continue with paragraph (e) of this section. Otherwise, continue with paragraph (f) of this section.

(e) *Allocating Prioritized Payments to the Distribution Account.* (1) If you have a profit under paragraph (d) of this section, determine the lesser of:

(i) Your profit; or

(ii) The balance in your Accumulation Account.

(2) Subtract the result in paragraph (e)(1) of this section from the Accumulation Account and add it to the Distribution Account and the Earned Payments Account.

(f) *How to compute Adjustments.* You must compute Adjustments as of the end of each fiscal year if you have a balance greater than zero in either your Accumulation Account or your Distribution Account, after giving effect to any Distribution that will be made no later than the second Payment Date following the fiscal year end.

(1) Determine the combined average Accumulation Account and Distribution Account balances for the fiscal year, assuming that Prioritized Payments accumulate on a daily basis without compounding.

(2) Multiply the average balance computed in paragraph (f)(1) of this section by the average of the Trust Certificate Rates for all the Participating Securities poolings during the fiscal year.

(3) Add the amounts computed in this paragraph (f) to your Accumulation Account.

(g) *Licensee's obligation to pay Prioritized Payments after redeeming Participating Securities.* This paragraph (g) applies if you have redeemed all your Participating Securities, but you still hold Earmarked Assets and still have a balance in your Accumulation Account.

(1) You must continue to perform all the procedures in this section as of the end of each fiscal quarter and prior to making any Distribution. You must distribute any Earned Prioritized Payments, earned Adjustments and earned Charges in accordance with § 107.1540.

(2) After you dispose of all your Earmarked Assets and make any required Distributions in accordance with § 107.1540, your obligation to pay any remaining Accumulated Prioritized Payments, unearned Adjustments and unearned Charges will be extinguished.

[63 FR 5870, Feb. 5, 1998]

§ 107.1530 How a Licensee computes SBA's Profit Participation.

This section tells you how to compute SBA's Profit Participation. Profit Participation is included in the Distributions you make to SBA under §§ 107.1550 and 107.1560.

(a) *How to compute Profit Participation.* Profit Participation equals your ''Base'' times your ''Profit Participation Rate'' (if the Base is zero or less, you do not owe SBA Profit Participation). Compute the Base using paragraph (c) of this section and the Profit Participation Rate using paragraphs (d) through (g) of this section. You must compute your Earmarked Profit (Loss) under § 107.1510 and your Prioritized Payments and Adjustments under § 107.1520 before you can compute Profit Participation.

(b) *How to keep track of Profit Participation.* You must establish a Profit Participation Account to record your computations under this section and payments under §§ 107.1550 and 107.1560. Its balance represents your unpaid Profit Participation.

(c) *How to compute the Base.* As of the end of each fiscal year and any year-to-date interim period for which you want to make a Distribution, compute your Base using the following formula:

$$B = EP - PPA - UL$$

where:

B = Base.

EP = Earmarked Profit (Loss) for the period from § 107.1510.

PPA = Prioritized Payments for the period from § 107.1520(a)(1), Adjustments (if applicable) from § 107.1520(f), and Charges (if applicable) from § 107.1130(d)(2).

UL = ''Unused Loss'' from prior periods as determined in this paragraph (c).

(1) If the Base computed as of the end of your previous fiscal year (your ''Previous Base'') was less than zero, your Unused Loss equals your Previous Base.

(2) If your Previous Base was zero or greater, your Unused Loss equals zero, with the following exception: If you made an interim Distribution of Profit Participation during your previous fiscal year, and your Previous Base was lower than the interim Base on which your Distribution was computed, then your Unused Loss equals the difference

between the interim Base and the Previous Base. For example, assume you are computing your Base as of December 31, 1997, your fiscal year end. Your Previous Base, computed as of December 31, 1996, was $3,000,000. During 1996, you made an interim Distribution which was computed on a Base of $3,500,000 as of June 30, 1996. The $500,000 difference between the 1996 interim and year-end Bases would be carried forward as Unused Loss in the computation of your Base as of December 31, 1997.

(3) If you had no Participating Securities outstanding as of the end of your last fiscal year, you may request SBA's approval to treat your Undistributed Net Realized Loss, as reported on SBA Form 468 for that year, as Unused Loss. If you did not file SBA Form 468 because you were not yet licensed as of the end of your last fiscal year, you may request SBA's approval to treat pre-licensing losses as Unused Loss.

(d) *How to compute the Profit Participation Rate.* You must determine your Profit Participation Rate each time you compute a Base that is greater than zero. Compute the Rate by following the steps in paragraphs (e) through (g) of this section.

(e) *Compute the ''PLC ratio''*—(1) *General rule.* The ''PLC ratio'' is the highest ratio of outstanding Participating Securities to Leverageable Capital that you have ever attained.

(2) *Exception.* You may reduce the ratio computed under paragraph (e)(1) of this section if you have increased your Leverageable Capital above its highest previous level. The increase must have taken place at least 120 days before the date as of which your Base is computed. In addition, the increase must have been expressly provided for in a plan of operations submitted to and approved by SBA in writing, or must be the result of the takedown of commitments or the conversion of noncash assets that were included in your Private Capital. If these conditions are satisfied, compute your reduced PLC ratio as follows:

(i) Divide the highest dollar amount of Participating Securities you have ever had outstanding by your increased Leverageable Capital.

(ii) If the result in paragraph (e)(2)(i) of this section is lower than your PLC ratio currently in effect, such result will become your new PLC ratio.

(f) *Compute the Profit Participation Rate (before indexing).* Compute the Profit Participation Rate (before indexing) using the table in this paragraph (f). Then go to paragraph (g) of this section to determine whether to index the Profit Participation Rate.

If your PLC ratio is:	Then your Profit Participation Rate is:
1 or less	9% × PLC Ratio.
More than 1	9% + [3% × (PLC ratio-1)].

(g) *Indexing the Profit Participation Rate.* The Profit Participation Rate is indexed, up or down, to the yield-to-maturity on Treasury bonds with a remaining term of ten (10) years (the ''Treasury Rate''). You must perform the indexing procedures in this paragraph (g) unless the Treasury Rate was exactly 8 percent on every date that you issued Participating Securities.

(1) *Licensees that have issued Participating Securities on only one occasion.* Determine the Treasury Rate for the date you issued your Participating Security. Adjust the Profit Participation Rate from paragraph (f) of this section by the percentage difference between the Treasury Rate and 8 percent. For example, assume that you issued Participating Securities when the Treasury Rate was 10 percent. The percentage difference between 10 percent and 8 percent is 25 percent. If you had a PLC ratio of 1, the Profit Participation Rate before indexing would be 9 percent. You would increase this rate by 25 percent, giving you a Profit Participation Rate of 11.25 percent.

(2) *Licensees that have issued Participating Securities on more than one occasion.* Determine the Treasury Rate for each of the dates you issued Participating Securities.

(i) Compute an average of all such Treasury Rates, weighted to reflect the dollar amount of each issuance (ignoring any redemptions) and the number of days from the date of each issuance to the date as of which you are computing the Profit Participation Rate.

Example to paragraph (g)(2)(i) of this section. If you issued $10 million of Participating Securities on the 60th day of Fiscal Year 1

when the Treasury Rate was 8 percent, and another $15 million on the 100th day of Fiscal Year 3 when the Treasury Rate was 10 percent, then the weighted average Treasury Rate computed as of the end of Fiscal Year 3 would be 8.55 percent. [Days elapsed since first issuance of Participating Securities = 1,035; days elapsed since second issuance of Participating Securities = 265; weighted amount of first issuance = $10,000,000 × 1,035/1,035 = $10,000,000; weighted amount of second issuance = $15,000,000 × 265/1035 = $3,840,579; weighted average amount of Participating Securities issued = $10,000,000 + $3,840,579 = $13,840,579; weighted average Treasury Rate= {(.08 × $10,000,000) + (.10 × $3,840,579)} / $13,840,579 = 8.55%]

(ii) Adjust the Profit Participation Rate from paragraph (f) of this section by the percentage difference between the weighted average Treasury Rate and 8 percent. In the example given in paragraph (g)(2)(i) of this section, if the PLC ratio were equal to 2, the Profit Participation Rate for the fiscal year would be 12.83 percent. [{((.0855 − .08) ÷ .08) + 1} × .12 × 100 = 12.83%]

(h) *Computing SBA's Profit Participation*. If the Base from paragraph (c) of this section is greater than zero, you must compute SBA's Profit Participation as follows:

(1) Multiply the Base from paragraph (c) of this section by the Profit Participation Rate from paragraph (g) of this section.

(2) If your last Profit Participation computation was for an interim period during the same fiscal year and used a higher Profit Participation Rate than the Rate you just used in paragraph (h)(1) of this section, you must adjust the amount computed in paragraph (h)(1) of this section as follows:

(i) Determine the difference between the Profit Participation Rate you just used in paragraph (h)(1) of this section and the Rate used in your previous computation;

(ii) Multiply the difference by the Base from your last Profit Participation computation; and

(iii) Add the result to the amount you computed in paragraph (h)(1) of this section.

(3) Reduce the Profit Participation computed in paragraphs (h)(1) and (h)(2) of this section by any amounts of Profit Participation that you distributed or reserved for distribution to SBA, or its designated agent or Trustee, for any previous interim period(s) during the fiscal year. The result is SBA's Profit Participation (unless it is less than zero, in which case SBA's Profit Participation is zero).

(i) *Allocation of Profit Participation*. Before any Distribution and in any case within 120 days following the end of your fiscal year, you must add the amount of Profit Participation computed under this § 107.1530 to the Profit Participation Account. You must reserve funds equal to this amount for distribution to SBA, or its designated agent or Trustee; you may not reinvest these funds or use them for any other purpose.

[61 FR 3189, Jan. 31, 1996; 61 FR 41496, Aug. 9, 1996, as amended at 63 FR 5871, Feb. 5, 1998]

§ 107.1540 Distributions by Licensee—Prioritized Payments and Adjustments.

After you compute Prioritized Payments and Adjustments under § 107.1520, you must distribute them in accordance with this § 107.1540. You must notify SBA of any planned distribution under this section 10 business days before the distribution date, unless SBA permits otherwise.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5871, Feb. 5, 1998; 88 FR 46012, July 18, 2023]

§ 107.1550 Distributions by Licensee—permitted "tax Distributions" to private investors and SBA.

If you have outstanding Participating Securities or Earmarked Assets, and you are a limited partnership, ''S Corporation,'' or equivalent pass-through entity for tax purposes, you may make ''tax Distributions'' to your investors in accordance with this § 107.1550, whether or not they have an actual tax liability. SBA receives a share of any tax Distribution you make. This section tells you when you may make a ''tax Distribution'' and how to compute it. You must notify SBA of any planned distribution under this section 10 business days before the distribution date, unless SBA permits otherwise.

(a) *Conditions for making a tax Distribution*. You may make a tax Distribution only if:

(1) You have paid all your Prioritized Payments, Adjustments, and Charges, so that the balance in both your Distribution Account and your Accumulation Account is zero (see §107.1520).

(2) You satisfy the liquidity requirement in §107.1505.

(3) The tax Distribution does not exceed your Retained Earnings Available for Distribution.

(4) The tax Distribution does not exceed the Maximum Tax Liability from paragraph (b) of this section.

(b) *How to compute the Maximum Tax Liability*. (1) You may compute your Maximum Tax Liability for a full fiscal year or for any calendar quarter. Use the following formula:

$$M = (TOI \times HRO) + (TCG \times HRC)$$

where:

M = Maximum Tax Liability

TOI = Net ordinary income allocated to your partners or other owners for Federal income tax purposes for the fiscal year or calendar quarter for which the Distribution is being made, excluding Prioritized Payments allocated to SBA.

HRO = The highest combined marginal Federal and State income tax rate for corporations or individuals on ordinary income, determined in accordance with paragraphs (b)(2) through (b)(4) of this section.

TCG = Net capital gains allocated to your partners or other owners for Federal income tax purposes for the fiscal year or calendar quarter for which the Distribution is being made, excluding Prioritized Payments allocated to SBA.

HRC = The highest combined marginal Federal and State income tax rate for corporations or individuals on capital gains, determined in accordance with paragraphs (b)(2) through (b)(4) of this section.

(2) You may compute the highest combined marginal Federal and State income tax rate on ordinary income and capital gains using either individual or corporate rates. However, you must apply the same type of rate, either individual or corporate, to both ordinary income and capital gains.

(3) In determining the combined Federal and State income tax rate, you must assume that State income taxes are deductible from Federal income taxes. For example, if the Federal tax rate was 35 percent and the State tax rate was 5 percent, the combined tax rate would be [35% × (1−.05)] + 5% = 38.25%.

(4) For purposes of this paragraph (b), the ''State income tax'' is that of the State where your principal place of business is located, and does not include any local income taxes.

(c) *SBA's share of the tax Distribution*. (1) SBA's percentage share of the tax Distribution is equal to the Profit Participation Rate computed under §107.1530.

(2) SBA may direct you to pay its share of the tax Distribution to its designated agent or Trustee.

(3) SBA will apply its share of the tax Distribution in the order set forth in §107.1560(g).

(d) *Paying a tax Distribution*. You may make an annual tax Distribution on the first or second Payment Date following the end of your fiscal year. You may make a quarterly tax Distribution on the first Payment Date following the end of the calendar quarter for which the Distribution is being made. See also §107.1575(a).

(e) *Excess tax Distributions*. (1) As of the end of your fiscal year, you must determine whether you made any excess tax Distributions for the year in accordance with paragraph (e)(2) of this section. Any tax Distributions that you make for a subsequent period must be reduced by the excess amount distributed.

(2) Determine your excess tax Distributions by adding together all your quarterly tax Distributions for the year (ignoring any required reductions for excess tax Distributions made in prior years), and subtracting the maximum tax Distribution that you would have been permitted to make based upon a single computation performed for the entire fiscal year. The result, if greater than zero, is your excess tax Distribution for the year.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5871, Feb. 5, 1998; 64 FR 70996, Dec. 20, 1999]

§107.1560 Distributions by Licensee—required Distributions to private investors and SBA.

You must make Distributions under this §107.1560 if you have outstanding Participating Securities or Earmarked Assets and you satisfy the conditions

in paragraph (a) of this section. Distributions under this section are determined as of the end of each fiscal year. You must notify SBA of any planned distribution under this section 10 business days before the distribution date, unless SBA permits otherwise.

(a) *Conditions for making Distributions.* Distributions under this section are subject to the following conditions:

(1) You must have paid all Prioritized Payments, Adjustments and Charges, so that the balance in both your Distribution Account and your Accumulation Account is zero (see §§ 107.1520 and 107.1540).

(2) You must have made any permitted tax Distribution that you choose to make under § 107.1550.

(3) You must satisfy the liquidity requirement in § 107.1505.

(4) The amount you distribute under this section must not exceed your remaining Retained Earnings Available for Distribution.

(b) *Total amount you must distribute.* Unless SBA permits otherwise, the total amount you must distribute equals the result (if greater than zero) of the following computation:

(1) Your Retained Earnings Available for Distribution as of the end of your fiscal year, after giving effect to any Distribution under §§ 107.1540 and 107.1550; minus

(2) All previous Distributions under this section and § 107.1570(a) that were applied as redemptions or repayments of Leverage; plus

(3) All previous Distributions under § 107.1570(b) that reduced your Retained Earnings Available for Distribution.

(c) *When you must make Distributions.* You must make the required Distributions on either the first or second Payment Date following the end of your fiscal year.

(d) *Effect of Distributions on Retained Earnings Available for Distribution.* Distributions under this § 107.1560 have the following effect on your Retained Earnings Available for Distribution:

(1) All Distributions to private investors reduce Retained Earnings Available for Distribution.

(2) Distributions to SBA, or its designated agent or Trustee, reduce Retained Earnings Available for Distribution if they are applied as payments of Profit Participation or distributions on Preferred Securities (see paragraph (g) of this section).

(3) Distributions to SBA, or its designated agent or Trustee, do not reduce Retained Earnings Available for Distribution if they are applied as a repayment or redemption of Leverage (see paragraph (g) of this section).

(e) *SBA's share of the total Distribution.* Use the following table to determine the percentage share of the total Distribution (from paragraph (b) of this section) that goes to SBA (or its designated agent or Trustee):

SBA'S PERCENTAGE SHARE OF TOTAL DISTRIBUTION

If your ratio of Leverage to Leverageable Capital as of the fiscal period end is:	Then SBA's percentage share of the Distribution is:
Over 200%	[Leverage / (Leverage + Leverageable Capital)] × 100.
Over 100% but not over 200%.	50%.
100% or less	Profit Participation Rate from § 107.1530.

(f) *Exceptions to the Distribution requirement.* (1) With SBA's prior written approval, you may withhold from distribution reasonable reserves necessary to protect your investments or relative position in Loans and Investments and to meet contingent liabilities.

(i) If you submit a written request for SBA approval, you may consider it approved unless SBA notifies you otherwise within 30 days from receipt.

(ii) Reserves that you withhold from distribution may not be used to make investments in additional portfolio companies.

(iii) Withholding of reserves under this paragraph (f)(1) is not a ''payment failure'' in violation of § 107.1820(e)(6).

(2) SBA may restrict Distributions under this § 107.1560 if SBA determines that the value of your assets is materially overstated. SBA must give you notice of such a determination in advance of your proposed Distribution.

(g) *How SBA will apply your Distributions.* Your Distributions to SBA (or its designated agent or Trustee) under this § 107.1560 will be applied in the following order:

(1) First, to Profit Participation;

(2) Second, to the extent there remain any Retained Earnings Available for Distribution, to distributions on Preferred Securities;

(3) Third, as a redemption of Participating Securities in order of issue;

(4) Fourth, as a redemption of Preferred Securities; and

(5) Fifth, as the repayment of principal of any outstanding Debentures, with such repayment to be made into escrow on terms and conditions SBA determines.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5872, Feb. 5, 1998]

§ 107.1570 Distributions by Licensee—optional Distribution to private investors and SBA.

If you have outstanding Participating Securities or Earmarked Assets, you may make two types of optional Distributions under this §107.1570: quarterly Distributions determined the same way as the required annual Distributions in §107.1560, and Distributions allocated between SBA and your private investors in proportion to the capital contributions of each. You must notify SBA of any planned distribution under this section 10 business days before the distribution date, unless SBA permits otherwise.

(a) *Quarterly Distributions subject to conditions in §107.1560.* (1) You may make Distributions under this paragraph (a) as of the end of any fiscal quarter, giving SBA (or its designated agent or Trustee) a percentage share determined under §107.1560(e).

(2) Such Distributions are subject to all the provisions in §107.1560 (a)(1), (a)(3), (a)(4), (d), (f)(2), and (g).

(3) You may make such Distributions only on the next Payment Date following the end of your fiscal quarter.

(4) The total amount of such Distributions may not exceed the result of the following computation:

(i) Your Retained Earnings Available for Distribution as of the end of your fiscal quarter; minus

(ii) All previous Distributions under this paragraph (a) or §107.1560 that were applied as redemptions or repayments of Leverage; plus

(iii) All previous Distributions under paragraph (b) of this section that reduced your Retained Earnings Available for Distribution.

(b) *Other optional Distributions.* On any Payment Date, you may make additional Distributions to your private investors and to SBA (or its designated agent or Trustee) under this paragraph (b).

(1) *Conditions for making a Distribution.* You may make a Distribution under this paragraph (b) only if:

(i) You have distributed all Earned Prioritized Payments, earned Adjustments, and earned Charges, so that the balance in your Distribution Account is zero (see §107.1520).

(ii) You have distributed all Profit Participation computed under §107.1530 which you are required to distribute under §107.1560 or permitted to distribute under paragraph (a) of this section, as appropriate, and you have made all required Distributions under §107.1560.

(iii) You satisfy the liquidity requirement in §107.1505 or obtain SBA's prior written approval of the Distribution.

(iv) You do not have a condition of Capital Impairment.

(v) The Distribution does not reduce your Regulatory Capital (excluding commitments from Institutional Investors) below the minimum required under §107.210, unless SBA approves the reduction as part of a plan of liquidation.

(vi) The Distribution does not cause you to have excess Leverage contrary to section 303 of the Act.

(2) *SBA's share of Distribution.* (i) If your Capital Impairment Percentage under §107.1840 is zero, SBA's percentage share of any Distribution under this paragraph (b) equals:

$$[\text{Leverage} / (\text{Leverage} + \text{Leverageable Capital})] \times 100$$

In this formula, use Leverage and Leverageable Capital as of the date of the Distribution, after giving effect to any Distribution under §107.1560 and paragraph (a) of this section.

(ii) If your Capital Impairment Percentage under §107.1840 is greater than zero, you must modify the formula in paragraph (b)(2)(i) of this section by replacing Leverageable Capital with:

$$\text{Leverageable Capital} \times (100\% - \text{CIP})$$

where ''CIP'' is your Capital Impairment Percentage or 100 percent, whichever is less.

(3) *How SBA will apply Distributions.* Any amounts you distribute to SBA, or its designated agent or Trustee, under this paragraph (b) will be applied as a repayment or redemption of Leverage in the order set forth in §107.1560(g)(3) through (g)(5).

(4) *Effect of Distributions on Retained Earnings Available for Distribution.* Any amounts you distribute to non-SBA investors under this paragraph (b) must reduce your Retained Earnings Available for Distribution to zero before reducing your Private Capital.

(5) *Permitted exception to §107.585.* You may make any Distribution permitted by this paragraph (b), even if the result is a reduction in your Regulatory Capital that would otherwise be prohibited under §107.585.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5872, Feb. 5, 1998]

§107.1575 Distributions on other than Payment Dates.

(a) *Permitted Distributions on other than Payment Dates.* Notwithstanding any provisions to the contrary in §§107.1540 through 107.1570, you may make Distributions on dates other than Payment Dates as follows:

(1) Required annual Distributions under §107.1540(a)(1), annual Distributions under §107.1550, and any Distributions under §107.1560 must be made no later than the second Payment Date following the end of your fiscal year.

(2) Required Distributions under §107.1540(b) must be made no later than the first Payment Date following the end of the applicable fiscal quarter;

(3) Optional Distributions under §107.1540(a)(2) and §107.1570 may be made on any date.

(4) Quarterly Distributions under §107.1550 must be made no earlier than the last day of the calendar quarter for which the Distribution is being made and no later than the first Payment Date following the end of such calendar quarter.

(b) *Conditions for making Distribution.* All Distributions under this section are subject to the following conditions:

(1) You must obtain SBA's written approval before the distribution date;

(2) The ending date of the period for which you compute your Earmarked Profits, Prioritized Payments, Adjustments, Charges, Profit Participation, Retained Earnings Available for Distribution, liquidity ratio, Capital Impairment, and any other applicable computations required under §§107.1500 through 107.1570, must be:

(i) The distribution date, or

(ii) If your Distribution includes annual Distributions under §§107.1540(a)(1), 107.1550 and/or 107.1560, your most recent fiscal year end;

(3) If your Distribution includes an amount which SBA will apply as a redemption of Participating Securities, the effective date of such redemption, for all purposes including future computations of Prioritized Payments, will be the next Payment Date following the distribution date.

[63 FR 5872, Feb. 5, 1998, as amended at 64 FR 70997, Dec. 20, 1999]

§107.1580 Special rules for In-Kind Distributions by Licensees.

(a) *In-Kind Distributions while Licensee has outstanding Participating Securities.* A Distribution under §§107.1540, 107.1560 or 107.1570 may consist of securities (an ''In-Kind Distribution''). Such a Distribution must satisfy the conditions in this paragraph (a).

(1) You may distribute only Distributable Securities.

(2) You must distribute each security pro-rata to all investors and to SBA or its designated agent or Trustee, based on the amounts that each party would receive if the Distribution were in cash.

(3) You must impute a gain (loss) on each security being distributed as if it were being sold, using the value of the security as of the declaration date of the Distribution (if you are a Corporate Licensee) or the distribution date (if you are a Partnership Licensee).

(4) You must deposit SBA's share of securities being distributed with a disposition agent designated by SBA. As an alternative, if you agree, SBA may direct you to dispose of its shares. In this case, you must promptly remit the proceeds to SBA.

(b) *In-Kind Distributions after Licensee has redeemed all Participating Securities.* This paragraph (b) applies from the

time you redeem all your Participating Securities until you dispose of all your Earmarked Assets.

(1) You may make an In-Kind Distribution of an Earmarked Asset only if you pay SBA the lower of:

(i) An amount equal to the Unrealized Appreciation on the asset; or

(ii) The full amount of your Accumulated Prioritized Payments and unpaid Adjustments.

(2) You must obtain SBA's prior written approval of any In-Kind Distribution of Earmarked Assets that are not Distributable Securities, specifically including approval of the valuation of the assets.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5872, Feb. 5, 1998; 64 FR 70997, Dec. 20, 1999]

§ 107.1585 Exchange of Debentures for Participating Securities.

You may, in SBA's discretion, retire a Debenture through the issuance of Participating Securities. To do so, you must:

(a) Obtain SBA's approval to issue Participating Securities;

(b) Pay all unpaid accrued interest on the Debenture, plus any applicable prepayment penalties, fees, and other charges;

(c) Have outstanding Equity Capital Investments (at cost) equal to the amount of the Debenture being refinanced; and

(d) Classify all your existing Loans and Investments as Earmarked Assets.

[63 FR 5869, Feb. 5, 1998]

§ 107.1590 Special rules for companies licensed on or before March 31, 1993.

This section applies to companies licensed on or before March 31, 1993 that apply to issue Participating Securities.

(a) *Election to exclude pre-existing portfolio.* You may choose to exclude all (but not a portion) of your Loans and Investments as of March 31, 1993, from classification as Earmarked Assets if:

(1) The proceeds of your first issuance of Participating Securities are not used to refinance outstanding Debentures (see §107.1585(a)). SBA will consider payment or prepayment of any outstanding Debenture to be a refinancing unless you demonstrate to SBA's satisfaction that you can pay the Debenture principal without relying on the proceeds of the Participating Securities.

(2) SBA, in its sole discretion, approves the exclusion.

(b) *Treatment of pre-existing portfolio if not excluded.* If you do not choose to exclude your Loans and Investments as of March 31, 1993, they will be Earmarked Assets for all purposes.

(c) *Requirements for Licensee's first issuance of Participating Securities.* When you apply for your first issuance of Participating Securities, you must comply with the following:

(1) For each of your Loans and Investments, you must submit:

(i) The most recent annual report (or fiscal year-end financial statements) and the most recent interim financial statements of the Small Business; and

(ii) Your valuation reports on the Small Business, prepared as of the end of each of your last three fiscal years. If you have applied for Participating Securities on the basis of interim financial statements, you must also submit a valuation report as of your interim financial statement date.

(2) If you have negative Undistributed Net Realized Earnings and/or a net Unrealized Loss on Securities Held, SBA may require you to undergo a quasi-reorganization in accordance with generally accepted accounting principles.

(3) If your financial statements accompanying the Participating Securities application are for an interim period, you must have your SBA-approved independent public accountant perform a limited-scope audit of the statements. For purposes of this paragraph (d)(3), ''limited scope audit'' means auditing procedures sufficient to enable the independent public accountant to express an opinion on the Statement of Financial Position and the accompanying Schedule of Loans and Investments.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5873, Feb. 5, 1998]

FUNDING LEVERAGE BY USE OF SBA-GUARANTEED TRUST CERTIFICATES (''TCs'')

§ 107.1600 SBA authority to issue and guarantee Trust Certificates.

(a) *Authorization.* Sections 319(a) and (b) of the Act authorize SBA or its CRA to issue TCs, and SBA to guarantee the timely payment of the principal and interest thereon. Any guarantee by SBA of such TC is limited to the principal and interest due on the Debentures or the Redemption Price of and Prioritized Payments on Participating Securities in any Trust or Pool backing such TC. The full faith and credit of the United States is pledged to the payment of all amounts due under the guarantee of any TC.

(b) *Periodic exercise of authority.* SBA will issue guarantees of Debentures and Participating Securities under section 303 and of TCs under section 319 of the Act at six month intervals, or at shorter intervals, taking into account the amount and number of such guarantees or TCs.

(c) *SBA authority to arrange public or private fundings of Leverage.* SBA in its discretion may arrange for public or private financing under its guarantee authority. Such financing arranged by SBA may be accomplished by the sale of individual Debentures or Participating Securities, aggregations of Debentures or Participating Securities, or Pools or Trusts of Debentures or Participating Securities.

(d) *Pass-through provisions.* TCs shall provide for a pass-through to their holders of all amounts of principal and interest paid on the Debentures, or the Redemption Price of and Prioritized Payments on the Participating Securities, in the Pool or Trust against which they are issued.

(e) *Formation of a Pool or Trust holding Leverage Securities.* SBA shall approve the formation of each Pool or Trust. SBA may, in its discretion, establish the size of the Pools and their composition, the interest rate on the TCs issued against Trusts or Pools, fees, discounts, premiums and other charges made in connection with the Pools, Trusts, and TCs, and any other characteristics of a Pool or Trust it deems appropriate.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5873, Feb. 5, 1998]

§ 107.1610 Effect of prepayment or early redemption of Leverage on a Trust Certificate.

(a) The rights, if any, of a Licensee to prepay any Debenture or make early redemption of any Participating Security are established by the terms of such securities, and no such right is created or denied by the regulations in this part.

(b) SBA's rights to purchase or prepay any Debenture without premium are established by the terms of the Guaranty Agreement relating to the Debenture. SBA's rights to redeem, at any time, any Participating Security without premium are established by the terms of the Guaranty Agreement relating to the Participating Security.

(c) Any prepayment of a Debenture or early redemption of a Participating Security pursuant to the terms of the Guaranty Agreement relating to such securities, shall reduce the SBA guarantee of timely payment of principal and interest on a TC in proportion to the amount of principal or Redemption Price that such prepaid Debenture or redeemed Participating Security represents in the Trust or Pool backing such TC.

(d) SBA shall be discharged from its guarantee obligation to the holder or holders of any TC, or any successor or transferee of such holder, to the extent of any such prepayment, whether or not such successor or transferee shall have notice of any such prepayment.

(e) Interest on prepaid Debentures and Prioritized Payments on Participating Securities shall accrue only through the date of such voluntary prepayment or SBA payment, as the case may be.

(f) In the event that all Debentures or Participating Securities constituting a Trust or Pool are prepaid, the TCs backed by such Trust or Pool shall be redeemed by payment of the unpaid principal and interest on the TCs; *Provided, however,* that in the case of the prepayment of a Debenture pursuant to the provisions of the Guaranty Agreement relating to the Debenture, the

CRA shall pass through pro rata to the holders of the TCs any such prepayments including any prepayment penalty paid by the obligor Licensee pursuant to the terms of the Debenture.

§ 107.1620 Functions of agents, including Central Registration Agent, Selling Agent and Fiscal Agent.

(a) *Agents.* SBA will appoint or cause to be appointed agent(s) to perform functions necessary to market and service Debentures, Participating Securities, or TCs pursuant to this part.

(1) *Selling Agent.* As a condition of guaranteeing a Debenture or Participating Security, SBA shall cause each Licensee to appoint a Selling Agent to perform functions which include, but are not limited to:

(i) Selecting qualified entities to become pool or Trust assemblers (''Poolers'').

(ii) Receiving guaranteed Debentures and Participating Securities as well as negotiating the terms and conditions of periodic offerings of Debentures and/or TCs with Poolers on behalf of Licensees.

(iii) Directing and coordinating periodic sales of Debentures and Participating Securities and/or TCs.

(iv) Arranging for the production of the Offering Circular, certificates, and such other documents as may be required from time to time.

(2) *Fiscal Agent.* SBA shall appoint a Fiscal Agent to:

(i) Establish performance criteria for Poolers.

(ii) Monitor and evaluate the financial markets to determine those factors that will minimize or reduce the cost of funding Debentures or Participating Securities.

(iii) Monitor the performance of the Selling Agent, Poolers, CRA, and the Trustee.

(iv) Perform such other functions as SBA, from time to time, may prescribe.

(3) *Central Registration Agent.* Pursuant to a contract entered into with SBA, the CRA, as SBA's agent, will do the following with respect to the Pools or Trust Certificates for the Debentures or Participating Securities:

(i) Form an SBA-approved Pool or Trust;

(ii) Issue the TCs in the form prescribed by SBA;

(iii) Transfer the TCs upon the sale of original issue TCs in any secondary market transaction;

(iv) Receive payments from Licensees;

(v) Make periodic payments as scheduled or required by the terms of the TCs, and pay all amounts required to be paid upon prepayment of Debentures or redemption of Participating Securities;

(vi) Hold, safeguard, and release all Debentures and Participating Securities constituting Trusts or Pools upon instructions from SBA;

(vii) Remain custodian of such other documentation as SBA shall direct by written instructions;

(viii) Provide for the registration of all pooled Debentures and Participating Securities, all Pools and Trusts, and all TCs;

(ix) Perform such other functions as SBA may deem necessary to implement the provisions of this section.

(b) *Functions.* The function of locating purchasers, and negotiating and closing the sale of Debentures, Participating Securities and TCs, may be performed either by SBA or an agent appointed by SBA. Nothing in the regulations in this part shall be interpreted to prevent the CRA from acting as SBA's agent for this purpose.

§ 107.1630 SBA regulation of Brokers and Dealers and disclosure to purchasers of Leverage or Trust Certificates.

(a) *Disclosure to purchasers.* Prior to any sale of a Debenture, Participating Security, or TC, SBA shall require the seller, or the broker or dealer as agent for the seller, to disclose to the purchaser, in a form prescribed or approved by SBA, specified information on the terms, conditions, and yield of such instrument.

(b) *Brokers and Dealers.* Each broker, dealer, and Pool or Trust assembler approved by SBA pursuant to these regulations shall either be regulated by a Federal financial regulatory agency, or be a member of the National Association of Securities Dealers (NASD), and shall be in good standing in respect to compliance with the financial, ethical,

and reporting requirements of such body. They also shall be in good standing with SBA as determined by the SBA Associate Administrator for Investment (see paragraph (d) of this section) and shall provide a fidelity bond or insurance in such amount as SBA may require.

(c) *Suspension and/or termination of Broker or Dealer*. SBA shall exclude from the sale and all other dealings in Debentures, Participating Securities or TCs any broker or dealer:

(1) If such broker's or dealer's authority to engage in the securities business has been revoked or suspended by a supervisory agency. When such authority has been suspended, such broker or dealer will be suspended by SBA for the duration of such suspension by the supervisory agency.

(2) If such broker or dealer has been indicted or otherwise formally charged with a misdemeanor or felony bearing on its fitness, such broker or dealer may be suspended while the charge is pending. Upon conviction, participation may be terminated.

(3) If such broker or dealer has suffered an adverse final civil judgment, holding that such broker or dealer has committed a breach of trust or violation of law or regulation protecting the integrity of business transactions or relationships, participation in the market for Debentures, Participating Securities or TCs may be terminated.

(4) If such broker or dealer has failed to make full disclosure of the information required by SBA in paragraph (a) of this section, such broker's or dealer's participation in the market for Debentures, Participating Securities or TCs may be terminated.

(d) *Termination/suspension proceedings*. A broker's or dealer's participation in the market for Debentures, Participating Securities or TCs will be conducted in accordance with part 134 of this chapter. SBA may, for any of the reasons stated in paragraphs (b)(1) through (b)(4) of this section, suspend the privilege of any broker or dealer to participate in this market. SBA shall give written notice at least ten (10) business days prior to the effective date of such suspension. Such notice shall inform the broker or dealer of the opportunity for a hearing pursuant to part 134 of this chapter.

§ 107.1640 SBA access to records of the CRA, Brokers, Dealers and Pool or Trust assemblers.

The CRA and any broker, dealer and Pool or Trust assembler operating under the regulations in this part shall make all books, records and related materials associated with Debentures, Participating Securities and TCs available to SBA for review and copying purposes. Such access shall be at such party's primary place of business during normal business hours.

MISCELLANEOUS

§ 107.1700 Transfer by SBA of its interest in Licensee's Leverage security.

Upon such conditions and for such consideration as it deems reasonable, SBA may sell, assign, transfer, or otherwise dispose of any Preferred Security, Debenture, Participating Security, or other security held by or on behalf of SBA in connection with Leverage. Upon notice by SBA, Licensee will make all payments of principal, dividends, interest, Prioritized Payments, and redemptions as shall be directed by SBA. Licensee will be liable for all damage or loss which SBA may sustain by reason of such disposal, up to the amount of Licensee's liability under such security, plus court costs and reasonable attorney's fees incurred by SBA.

§ 107.1710 SBA authority to collect or compromise its claims.

SBA may, upon such conditions and for such consideration as it deems reasonable, collect or compromise all claims relating to Preferred or Participating Securities or obligations held or guaranteed by SBA, and all legal or equitable rights accruing to SBA.

§ 107.1720 Characteristics of SBA's guarantee.

If SBA agrees to guarantee a Licensee's Debentures or Participating Securities, such guarantee will be unconditional, irrespective of the validity, regularity or enforceability of the Debentures or Participating Securities or any other circumstances which might

constitute a legal or equitable discharge or defense of a guarantor. Pursuant to its guarantee, SBA will make timely payments of principal and interest on the Debentures or the Redemption Price of and Prioritized Payments on the Participating Securities.

[63 FR 5873, Feb. 5, 1998]

Subpart J—Licensee's Noncompliance

§ 107.1800 Licensee's agreement to terms and conditions in §§ 107.1810 and 107.1820.

Any Licensee that violates the terms and conditions of its Leverage is subject to SBA remedies. The terms, conditions and remedies in § 107.1810 apply to outstanding Debentures issued after April 25, 1994. The terms, conditions and remedies in § 107.1820 apply to outstanding Preferred Securities and Participating Securities issued after April 25, 1994, or if you have Earmarked Assets in your portfolio.

§ 107.1810 Events of default and SBA's remedies for Licensee's noncompliance with terms of Debentures.

(a) *Applicability of this section.* This § 107.1810 applies to Debentures issued after April 25, 1994. By issuing such Debentures, you automatically agree to the terms, conditions and remedies in this section, as in effect at the time of issuance and as if fully set forth in the Debentures. Debentures issued before April 25, 1994 continue to be governed by the remedies in effect at the time of their issuance.

(b) *Automatic events of default.* The occurrence of one or more of the events in this paragraph (b) causes the remedies in paragraph (c) of this section to take effect immediately.

(1) *Insolvency.* You become equitably or legally insolvent.

(2) *Voluntary assignment.* You make a voluntary assignment for the benefit of creditors without SBA's prior written approval.

(3) *Bankruptcy.* You file a petition to begin any bankruptcy or reorganization proceeding, receivership, dissolution or other similar creditors' rights proceeding, or such action is initiated against you and is not dismissed within 60 days.

(c) *SBA remedies for automatic events of default.* Upon the occurrence of one or more of the events in paragraph (b) of this section:

(1) Without notice, presentation or demand, the entire indebtedness evidenced by your Debentures, including accrued interest, and any other amounts owed SBA with respect to your Debentures, is immediately due and payable; and

(2) You automatically consent to the appointment of SBA or its designee as your receiver under section 311(c) of the Act.

(d) *Events of default with notice.* For any occurrence (as determined by SBA) of one or more of the events in this paragraph (d), SBA may avail itself of one or more of the remedies in paragraph (e) of this section.

(1) *Fraud.* You commit a fraudulent act which causes detriment to SBA's position as a creditor or guarantor.

(2) *Fraudulent transfers.* You make any transfer or incur any obligation that is fraudulent under the terms of 11 U.S.C. 548.

(3) *Willful conflicts of interest.* You willfully violate § 107.730.

(4) *Willful non-compliance.* You willfully violate one or more of the substantive provisions of the Act, specifically including but not limited to the provisions summarized in section 310(c) of the Act, or any substantive regulation promulgated under the Act.

(5) *Repeated Events of Default.* At any time after being notified by SBA of the occurrence of an event of default under paragraph (f) of this section, you engage in similar behavior which results in another occurrence of the same event of default.

(6) *Transfer of Control.* You violate § 107.475 and/or willfully violate § 107.410, and as a result of such violation you undergo a transfer of Control.

(7) *Non-cooperation under § 107.1810(h).* You fail to take appropriate steps, satisfactory to SBA, to accomplish any action SBA may have required under paragraph (h) of this section.

(8) *Non-notification of Events of Default.* You fail to notify SBA as soon as you know or reasonably should have known that any event of default exists under this section.

(9) *Non-notification of defaults to others.* You fail to notify SBA in writing within ten days from the date of a declaration of an event of default or nonperformance under any note, debenture or indebtedness of yours, issued to or held by anyone other than SBA.

(e) *SBA remedies for events of default with notice.* Upon written notice to you of the occurrence (as determined by SBA) of one or more of the events in paragraph (d) of this section:

(1) SBA may declare the entire indebtedness evidenced by your Debentures, including accrued interest, and/or any other amounts owed SBA with respect to your Debentures, immediately due and payable; and

(2) SBA may avail itself of any remedy available under the Act, specifically including institution of proceedings for the appointment of SBA or its designee as your receiver under section 311(c) of the Act.

(f) *Events of default with opportunity to cure.* For any occurrence (as determined by SBA) of one or more of the events in this paragraph (f), SBA may avail itself of one or more of the remedies in paragraph (g) of this section.

(1) *Excessive Management Expenses.* Without the prior written consent of SBA, you incur Management Expenses in excess of those permitted under § 107.520.

(2) *Improper Distributions.* You make any Distribution to your shareholders or partners, except with the prior written consent of SBA, other than:

(i) Distributions permitted under § 107.585;

(ii) Payments from Retained Earnings Available for Distribution based on either the shareholders' pro-rata interests or the provisions for profit distributions in your partnership agreement, as appropriate;

(iii) Distributions by Participating Securities issuers as permitted under §§ 107.1540 through 107.1580; and

(iv) Distributions by Early Stage SBICs as permitted under § 107.1180.

(3) *Failure to make payment.* Unless otherwise approved by SBA, you fail to make timely payment of any amount due under any security or obligation of yours that is issued to, held or guaranteed by SBA.

(4) *Failure to maintain Regulatory Capital.* You fail to maintain the minimum Regulatory Capital required under these regulations or, without the prior written consent of SBA, you reduce your Regulatory Capital, except as permitted by §§ 107.585 and 107.1560 through 107.1580.

(5) *Capital Impairment.* You have a condition of Capital Impairment as determined under § 107.1830.

(6) *Cross-default.* An obligation of yours that is greater than $100,000 becomes due or payable (with or without notice) before its stated maturity date, for any reason including your failure to pay any amount when due. This provision does not apply if you pay the amount due within any applicable grace period or contest the payment of the obligation in good faith by appropriate proceedings.

(7) *Nonperformance.* You violate or fail to perform one or more of the terms and conditions of any security or obligation of yours that is issued to, held or guaranteed by SBA, or of any agreement with or conditions imposed by SBA in its administration of the Act and the regulations promulgated under the Act.

(8) *Noncompliance.* Except as otherwise provided in paragraph (d)(5) of this section, SBA determines that you have violated one or more of the substantive provisions of the Act, specifically including but not limited to the provisions summarized in section 310(c) of the Act, or any substantive regulation promulgated under the Act.

(9) *Failure to maintain investment ratio.* You fail to maintain the investment ratio for Leverage in excess of 300 percent of Leverageable Capital (see § 107.1160(c)), if applicable to you, as of the end of each fiscal year. In determining whether you have maintained the ratio, SBA will disregard any prepayment, sale, or disposition of Venture Capital Financing, any increase in Leverageable Capital, and any receipt of additional Leverage, within 120 days prior to the end of your fiscal year.

(10) *Failure to maintain diversity.* You fail to maintain diversity between management and ownership as required by § 107.150, if applicable to you.

(11) *Failure by an Early Stage SBIC to meet investment requirements.* You are an

Early Stage SBIC and, beginning on the first fiscal quarter end when your cumulative total Financings (in dollars) are at least equal to your Regulatory Capital, you have not made at least 50 percent of such Financings to Small Businesses that at the time of your initial Financing were ''early stage'' companies, as defined under the definition of Early Stage SBIC in §107.50 of this part.

(12) *Failure by an Early Stage SBIC to maintain required interest reserve.* You are an Early Stage SBIC and you fail to maintain a sufficient reserve to pay interest and Charges on your Debentures as required under §107.1181 of this part.

(g) *SBA remedies for events of default with opportunity to cure.* (1) Upon written notice to you of the occurrence (as determined by SBA) of one or more of the events of default in paragraph (f) of this section, and subject to the conditions in paragraph (g)(2) of this section:

(i) SBA may declare the entire indebtedness evidenced by your Debentures, including accrued interest, and/or any other amounts owed SBA with respect to your Debentures, immediately due and payable; and

(ii) SBA may avail itself of any remedy available under the Act, specifically including institution of proceedings for the appointment of SBA or its designee as your receiver under section 311(c) of the Act.

(2) SBA may invoke the remedies in paragraph (g)(1) of this section only if:

(i) It has given you at least 15 days to cure the default(s); and

(ii) You fail to cure the default(s) to SBA's satisfaction within the allotted time.

(h) *Repeated non-substantive violations.* If you repeatedly fail to comply with one or more of the non-substantive provisions of the Act or any non-substantive regulation promulgated under the Act, SBA, after written notification to you and until you cure such condition to SBA's satisfaction, may deny you additional Leverage and/or require you to take such actions as SBA may determine to be appropriate under the circumstances.

(i) *Consent to removal of officers, directors, or general partners and/or appointment of receiver.* The Articles of any Licensee issuing Debentures after April 25, 1994 must include the following provisions as a condition to the purchase or guarantee by SBA of such Leverage. Upon the occurrence of any of the events specified in paragraphs (d)(1) through (d)(6) or (f)(1) through (f)(3) of this section as determined by SBA, SBA shall have the right, and your consent to SBA's exercise of such right:

(1) With respect to a Corporate Licensee, upon written notice, to require you to replace, with individuals approved by SBA, one or more of your officers and/or such number of directors of your board of directors as is sufficient to constitute a majority of such board; or

(2) With respect to a Partnership Licensee, upon written notice, to require you to remove the person(s) responsible for such occurrence and/or to remove the general partner of Licensee, which general partner shall then be replaced in accordance with Licensee's Articles by a new general partner approved by SBA; and/or

(3) With respect to either a Corporate or Partnership Licensee, to obtain the appointment of SBA or its designee as your receiver under section 311(c) of the Act for the purpose of continuing your operations. The appointment of a receiver to liquidate a Licensee is not within such consent, but is governed instead by the relevant provisions of the Act.

(j) *Additional SBA remedies applicable to Debentures issued by Early Stage SBICs.* If you are an Early Stage SBIC, upon SBA's payment pursuant to its guarantee of any of your Debentures, SBA shall have the following additional rights and you consent to SBA's exercise of any or all of such rights:

(1) To prohibit you from making any additional investments except for investments under legally binding commitments you entered into before such payment by SBA and, subject to SBA's prior written approval, investments that are necessary to protect your investments;

(2) Until all Leverage is repaid and amounts related thereto are paid in full, to prohibit Distributions by you to any party other than SBA, its agent or Trustee;

(3) To require all your commitments from investors to be funded at the earliest time(s) permitted in accordance with your Articles;

(4) To review and re-determine your approved Management Expenses; and

(5) To the appointment of SBA or its designee as your receiver under section 311(c) of the Act for the purpose of continuing your operations.

[61 FR 3189, Jan. 31, 1996, as amended at 74 FR 33916, July 14, 2009; 77 FR 25054, Apr. 27, 2012]

§ 107.1820 Conditions affecting issuers of Preferred Securities and/or Participating Securities.

(a) *Applicability of this section.* This section applies if you have Preferred Securities issued after April 25, 1994, or if you issue Participating Securities or have Earmarked Assets in your portfolio. Your Articles must include the provisions of this §107.1820 as a condition to SBA's purchase of Preferred Securities or guarantee of Participating Securities and for as long as you own Earmarked Assets. Preferred Securities issued before April 25, 1994 continue to be governed by the remedies in effect at the time of their issuance.

(b) *Removal Conditions.* Upon the occurrence (as determined by SBA) of any of the following conditions (''Removal Conditions''), SBA may avail itself of one or more of the remedies in paragraph (d) of this section:

(1) *Insolvency or extreme Capital Impairment.* You become equitably or legally insolvent, or have a Capital Impairment Percentage of 100 percent or more (''extreme Capital Impairment'') and have not cured such Capital Impairment within the time limits set by SBA in writing. In this regard:

(i) You are not considered to have a condition of extreme Capital Impairment during the first eight years following your first issuance of Participating Securities.

(ii) This paragraph (b)(1) does not give you an additional opportunity to cure if you have already had an opportunity to cure your Capital Impairment under paragraph (e)(3) of this section.

(2) *Voluntary assignment.* You make a voluntary assignment for the benefit of creditors.

(3) *Bankruptcy.* You begin any bankruptcy or reorganization proceeding, receivership, dissolution or other similar creditors' rights proceeding, or such action is initiated against you and is not dismissed within 60 days.

(4) *Transfer of Control.* You violate §107.475 and/or willfully violate §107.410, and such violation results in a transfer of Control.

(5) *Fraud.* You commit a fraudulent act which causes serious detriment to SBA's position as a guarantor or investor.

(6) *Fraudulent transfers.* You make any transfer or incur any obligation that is fraudulent under the terms of 11 U.S.C. 548.

(c) *Contingent Removal Conditions.* Upon the occurrence (as determined by SBA) of any of the following conditions (''Contingent Removal Conditions''), SBA may avail itself of one or more of the remedies in paragraph (d) of this section, but only if you fail to remove the person(s) SBA identifies as responsible for such occurrence and/or cure such occurrence to SBA's satisfaction within a time period determined by SBA (but not less than 15 days):

(1) *Willful conflicts of interest.* You willfully violate §107.730.

(2) *Willful or repeated noncompliance.* You willfully or repeatedly violate one or more of the substantive provisions of the Act, specifically including but not limited to the provisions summarized in section 310(c) of the Act, or any substantive regulation promulgated under the Act.

(3) *Failure to comply with restrictions under paragraph (f) of this section.* You fail to comply with the restrictions imposed by SBA under paragraph (f) of this section.

(d) *SBA remedies for Removal Conditions and Contingent Removal Conditions.* Upon the occurrence (as determined by SBA) of any Removal Condition, or any Contingent Removal Condition accompanied by your failure to act as set forth in paragraph (c) of this section, SBA has the following rights, and you consent to SBA's exercise of any or all of such rights:

(1) With respect to a Corporate Licensee, upon written notice, to require

you to replace, with individuals approved by SBA, one or more of your officers and/or such number of directors as is sufficient to constitute a majority of your board of directors; or

(2) With respect to a Partnership Licensee, upon written notice, to require you to remove the person(s) responsible for such occurrence and/or to remove your general partner, who shall then be replaced in accordance with your Articles by a new general partner approved by SBA; and/or

(3) With respect to either a Corporate or Partnership Licensee, to the appointment of SBA or its designee as your receiver under section 311(c) of the Act for the purpose of continuing your operations. The appointment of a receiver to liquidate a Licensee is not within such consent, but is governed instead by the relevant provisions of the Act.

(e) *Restricted Operations Conditions.* Upon the occurrence (as determined by SBA) of any of the following conditions (''Restricted Operations Conditions''), SBA may avail itself of any of the remedies in paragraph (f) of this section.

(1) *Removal Conditions or Contingent Removal Conditions.* Any condition occurs which is listed in paragraphs (b) or (c) of this section.

(2) *Failure to maintain Regulatory Capital.* You fail to maintain the minimum Regulatory Capital required by this part.

(3) *Capital or Liquidity Impairment.* You have a condition of Capital Impairment as determined under §107.1830 or, if applicable, a condition of Liquidity Impairment as determined under §107.1505, and you fail to cure the impairment within time limits set by SBA in writing.

(4) *Improper Distributions.* You make any Distribution to your shareholders or partners other than those permitted by §§107.585 and 107.1560 through 107.1580.

(5) *Excessive Management Expenses.* Without the prior written consent of SBA, you incur Management Expenses in excess of those permitted under §107.520.

(6) *Failure to make payment.* You fail to pay any amounts due under Preferred Securities or required by §§107.1500 through 107.1590, unless otherwise permitted by SBA.

(7) *Noncompliance.* Except as otherwise provided for in paragraphs (c)(1) and (c)(2) of this section, SBA determines that you have failed to comply with one or more of the substantive provisions of the Act, specifically including but not limited to the provisions summarized in section 310(c) of the Act, or any substantive regulation promulgated under the Act.

(8) *Failure to maintain diversity.* You fail to maintain diversity between management and ownership as required by §107.150, if applicable to you.

(9) *Failure to meet investment requirements.* You fail to make the amount of Equity Capital Investments required for Participating Securities (§107.1500(b)(4)), if applicable to you; or you fail to maintain as of the end of each fiscal year the investment ratios or amounts required for Leverage in excess of 300 percent of Leverageable Capital (§107.1160(c)) or Preferred Securities in excess of 100 percent of Leverageable Capital (§107.1160(d)), if applicable to you. In determining whether you have met the maintenance requirements in §107.1160(c) or (d), SBA will disregard any prepayment, sale, or disposition of Venture Capital Financings, any increase in Leverageable Capital, and any receipt of additional Leverage, within 120 days prior to the end of your fiscal year.

(10) *Nonperformance.* You violate or fail to perform one or more of the terms and conditions of any Participating Security or Preferred Security or of any agreement with or condition imposed by SBA in its administration of the Act and the regulations promulgated thereunder.

(11) *Noncooperation under paragraph (g) of this section.* You fail to take appropriate steps, satisfactory to SBA, to accomplish such action as SBA may have required under paragraph (g) of this section.

(f) *SBA remedies for Restricted Operations Conditions.* Upon the occurrence of any Restricted Operations Condition, and until such condition(s) are cured to SBA's satisfaction within a time period determined by SBA (but not less than 15 days), upon written notice SBA shall have the following

rights, and you consent to SBA's exercise of any or all of such rights:

(1) To prohibit you from making any additional investments except for investments under legally binding commitments you entered into before such notice and, subject to SBA's prior written approval, investments that are necessary to protect your investments;

(2) Until all Leverage is redeemed and amounts due are paid, to prohibit Distributions by you to any party other than SBA, its agent or Trustee;

(3) To require all your commitments from investors to be funded at the earliest time(s) permitted in accordance with your Articles; and

(4) To review and re-determine your approved Management Expenses.

(g) *Repeated non-substantive violations.* If you repeatedly fail to comply with one or more of the non-substantive provisions of the Act or any non-substantive regulation promulgated thereunder, SBA, after written notification to you and until such condition is cured to SBA's satisfaction, will deny you additional Leverage and/or require you to take such actions as SBA may determine to be appropriate under the circumstances.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5873, Feb. 5, 1998]

COMPUTATION OF LICENSEE'S CAPITAL IMPAIRMENT

§ 107.1830 Licensee's Capital Impairment—definition and general requirements.

(a) *Applicability of this section.* This section applies to Leverage issued on or after April 25, 1994. For Leverage issued before April 25, 1994, you must comply with paragraphs (e) and (f) of this section and the Capital Impairment regulations in this part in effect when you issued your Leverage. For all Leverage issued, you must also comply with any contractual provisions to which you have agreed.

(b) *Significance of Capital Impairment condition.* If you have a condition of Capital Impairment, you are not in compliance with the terms of your Leverage. As a result, SBA has the right to impose the applicable remedies for noncompliance in §§ 107.1810(g) and 107.1820(f).

(c) *Definition of Capital Impairment condition.* You have a condition of Capital Impairment if your Capital Impairment Percentage, as computed in § 107.1840, exceeds:

(1) For Section 301(d) Licensees, 75 percent.

(2) For Section 301(c) Licensees, the appropriate percentage from the following table:

MAXIMUM PERMITTED CAPITAL IMPAIRMENT PERCENTAGES FOR SECTION 301(c) LICENSEES

If the percentage of equity capital investments (at cost) in your portfolio is:	And your ratio of outstanding leverage to leverageable capital is:	Then your maximum permitted capital impairment percentage is:
67%	100% or less	70
	Over 100% but not over 200%	60
	Over 200%	50
At least 40% but under 67%	100% or less	55
	Over 100% but not over 200%	50
	Over 200%	40
Under 40%	100% or less	45
	Over 100% but not over 200%	40
	Over 200%	35

(d) *Phase-in of maximum permitted Capital Impairment Percentages for Section 301(c) Licensees.* If you are a Section 301(c) Licensee, regardless of your maximum permitted Capital Impairment Percentage under paragraph (c) of this section, you will not have a condition of Capital Impairment if:

(1) Your Capital Impairment Percentage does not exceed 50 percent; and

(2) You have not reached your first fiscal year end occurring after April 25, 1995.

(e) *Quarterly computation requirement and procedure.* SBA will determine whether you have a condition of Capital Impairment as of the end of each

fiscal quarter. If SBA finds you capitally impaired, they will notify you.

(f) *SBA's right to determine Licensee's Capital Impairment condition.* SBA may make its own determination of your Capital Impairment condition at any time.

[61 FR 3189, Jan. 31, 1996, as amended at 63 FR 5873, Feb. 5, 1998; 88 FR 46012, July 18, 2023]

§ 107.1840 Computation of Licensee's Capital Impairment Percentage.

(a) *General.* This section contains the procedures SBA will use to determine your Capital Impairment Percentage. SBA will compare your Capital Impairment Percentage to the maximum permitted under §107.1830(c) to determine whether you have a condition of Capital Impairment.

(b) *Preliminary impairment test.* If you satisfy the preliminary impairment test, your Capital Impairment Percentage is zero and SBA will not have to perform any more procedures in this section. Otherwise, SBA will continue with paragraph (c) of this section. You satisfy the test if the following amounts are both zero or greater:

(1) The sum of Undistributed Net Realized Earnings, as reported on SBA Form 468, and Includible Non-Cash Gains.

(2) Unrealized Gain (Loss) on Securities Held.

(c) *How to compute Capital Impairment Percentage.* (1) If you have an Unrealized Gain on Securities Held, SBA will compute your Adjusted Unrealized Gain using paragraph (d) of this section. If you have an Unrealized Loss on Securities Held, SBA will continue with paragraph (c)(2) of this section.

(2) Add together your Undistributed Net Realized Earnings, your Includible Non-cash Gains, and either your Unrealized Loss on Securities Held or your Adjusted Unrealized Gain.

(3) If the sum in paragraph (c)(2) of this section is zero or greater, your Capital Impairment Percentage is zero.

(4) If the sum in paragraph (c)(2) of this section is less than zero, drop the negative sign, divide by your Regulatory Capital (excluding Treasury Stock), and multiply by 100. The result is your Capital Impairment Percentage.

(d) *How to compute your Adjusted Unrealized Gain.* (1) Subtract Unrealized Depreciation from Unrealized Appreciation. This is your ''Net Appreciation''.

(2) Determine your Unrealized Appreciation on Publicly Traded and Marketable securities. This is your ''Class 1 Appreciation''.

(3) Determine your Unrealized Appreciation on securities that are not Publicly Traded and Marketable and meet the following criteria, which must be substantiated to the satisfaction of SBA (this is your ''Class 2 Appreciation''):

(i) The Small Business that issued the security received a significant subsequent equity financing by an investor whose objectives were not primarily strategic and at a price that conclusively supports the Unrealized Appreciation;

(ii) Such financing represents a substantial investment in the form of an arm's length transaction by a sophisticated new investor in the issuer's securities; and

(iii) Except as provided for Early Stage SBICs in §107.1845, such financing occurred within 24 months of the date of the Capital Impairment computation, or the Small Business's pretax cash flow from operations for its most recent fiscal year was at least 10 percent of the Small Business's average contributed capital for such fiscal year.

(4) Except as provided for Early Stage SBICs in §107.1845, perform the appropriate computation from the following table:

ADJUSTED UNREALIZED GAIN BEFORE ESTIMATED TAX EFFECTS

If:	And:	Then adjusted unrealized gain before taxes is:
Class 1 Appreciation ≤Net Appreciation	Class 1 Appreciation + Class 2 Appreciation ≤Net Appreciation.	(80% × Class 1 Appreciation) + (50% × Class 2 Appreciation).
Class 1 Appreciation ≤Net Appreciation	Class 1 Appreciation + Class 2 Appreciation >Net Appreciation.	(80% × Class 1 Appreciation) + [(50% × (Net Appreciation − Class 1 Appreciation)].

ADJUSTED UNREALIZED GAIN BEFORE ESTIMATED TAX EFFECTS—Continued

If:	And:	Then adjusted unrealized gain before taxes is:
Class 1 Appreciation >Net Appreciation	.....	80% × Net Appreciation.

(5) Reduce the gain computed in paragraph (d)(4) of this section by your estimate of related future income tax expense. Subject to any adjustment required by paragraph (d)(6) of this section, the result is your Adjusted Unrealized Gain for use in paragraph (c)(2) of this section.

(6) If any securities that are the source of either Class 1 or Class 2 Appreciation are pledged or encumbered in any way, SBA will reduce the Adjusted Unrealized Gain computed in paragraph (d)(5) of this section by the amount of the related borrowing or other obligation, up to the amount of the Unrealized Appreciation on the securities.

[61 FR 3189, Jan. 31, 1996, as amended at 77 FR 25054, Apr. 27, 2012; 88 FR 46013, July 18, 2023]

§ 107.1845 Determination of Capital Impairment Percentage for Early Stage SBICs.

This section applies to Early Stage SBICs only. Except as modified by this section, all provisions of § 107.1840 apply to an Early Stage SBIC.

(a) To determine your Class 2 Appreciation under § 107.1840(d)(3), SBA will use the following provisions instead of § 107.1840(d)(3)(iii):

(1) Such financing occurred within 24 months of the date of the Capital Impairment computation. At the end of the 24 month period following the financing, you may request SBA's written approval to retain the use of the original Class 2 Appreciation on the investment for up to 24 additional months.

(2) In considering your request, SBA may obtain its own valuation of the investment, require you to obtain a valuation performed by an independent third party acceptable to SBA, and may consider any other information that it deems relevant. To the extent that the valuation and any other relevant information conclusively support the original Class 2 appreciation, SBA may approve an extension to use all or part of the original Class 2 Appreciation for up to an additional 24 months (the ''extension period'').

(3) At the end of any extension period, you may submit a new request to retain the use of the original Class 2 Appreciation, repeating the steps in paragraphs (a)(1) and (2) of this section.

(4) SBA may reconsider its approval to retain the use of the original Class 2 Appreciation at any time based on information that may affect the value of an investment.

(b) Any time you submit a request for SBA approval to retain the use of the original Class 2 Appreciation under paragraph (a) of this section, you may also request SBA's written approval to modify your computation of Adjusted Unrealized Gain under § 107.1840(d)(4) as provided in paragraph (c) of this section.

(c) If SBA determines that the appreciation on an investment, based on its current fair value, is at least two times the original Class 2 Appreciation on the investment, SBA may allow you, based on relevant information, to compute your Adjusted Unrealized Gain for the duration of the extension period as follows:

(1) Compute Adjusted Unrealized Gain in accordance with § 107.1840(d)(4).

(2) If your result in paragraph (c)(1) of this section was computed using the first line of the table in § 107.1840(d)(4):

(i) Calculate 50 percent of the original Class 2 Appreciation on the individual investment that is the subject of this paragraph (c), and

(ii) Add it to the result from paragraph (c)(1) of this section to determine your Adjusted Unrealized Gain.

(3) If your result in paragraph (c)(1) of this section was computed using the second line of the table in § 107.1840(d)(4):

(i) Calculate 50 percent of the original Class 2 Appreciation on the individual investment that is the subject of this paragraph (c).

(ii) Subtract your Class 1 Appreciation from your Net Appreciation, and multiply the result by 50 percent.

(iii) Add the lesser of (c)(3)(i) and (ii) of this section to the result from paragraph (c)(1) of this section to determine your Adjusted Unrealized Gain.

[77 FR 25054, Apr. 27, 2012, as amended at 88 FR 46013, July 18, 2023]

§ 107.1850 Watchlist.

Under certain circumstances, SBA may place Licensees on a Watchlist as a process to increase proactive communication between SBA and the Licensee to help mitigate the potential for a future default or significant regulatory violation. Being on a Watchlist means that SBA has determined, based on certain triggers discussed in this section, a Licensee will provide a heightened level of reporting and communication with SBA.

(a) *Watchlist triggers.* SBA may place you on the Watchlist for any of the following:

(1) You perform an investment that is a direct violation of your fund's stated investment policy as identified in its limited partnership agreement (or other governing agreement) or as presented to SBA in its license application under § 107.300.

(2) The key person clause in your limited partnership agreement (or other governing agreement) is invoked due to a change in personnel of management team members identified as key persons.

(3) You or your General Partner has been named as a party in litigation proceedings brought by a Federal agency, involving felony charges, or allegations of dishonesty, fraud, or breach of fiduciary duty.

(4) You have violated a material provision in your limited partnership agreement (or other governing agreement) or any side letter agreement.

(5) You rank in the bottom quartile for the primary strategy benchmark, as identified by the Licensee at the time of licensure, by vintage year, defined as the year in which you were licensed as an SBIC, after three years based on the private investor's total value to paid-in capital (TVPI), where TVPI is calculated as (cumulative distributions to private investors plus net asset value minus expenses and carried interest)/cumulative private investor paid in capital.

(6) Your leverage coverage ratio (LCR) falls below 1.25, where LCR is calculated as (unfunded Regulatory Capital commitments plus net asset value minus outstanding Leverage)/outstanding Leverage or a Capital Impairment Percentage approaching your threshold set forth in § 107.1830.

(7) You default on your interest payment and fail to pay within 30 days of the date it is due. (*Note:* This event represents an event of default under § 107.1810(f) for which SBA maintains its rights under § 107.1810(g) if the Licensee does not cure to SBA's satisfaction.)

(8) Outstanding or unresolved regulatory matters.

(b) *Requirements for Licensees on the Watchlist.* If SBA places you on the Watchlist, you will be required to comply with any or all of the following:

(1) You must submit Portfolio Company Financing Reports (SBA Form 1031s), required under § 107.640, within 30 calendar days of the financing date.

(2) You must participate in monthly portfolio reviews with SBA.

(3) You must file quarterly valuation reports on specific or all of your portfolio company holdings, as requested by SBA.

(4) You must submit a letter formally requesting whether you may submit a request for a subsequent fund if you are currently on the Watchlist or have managed any Licensee on a Watchlist within the last 12 months. If you have already submitted a request or are otherwise in the Licensing process (see § 107.300), SBA may suspend processing your request until it is satisfied that SBA's concerns are resolved or otherwise disapprove your request for a subsequent fund. SBA maintains the right to deny approval of any request to submit a subsequent fund request or any subsequent fund request submitted under § 107.300.

(c) *Removal from the Watchlist.* SBA will remove you from the Watchlist if the event that triggered your addition to the Watchlist (see paragraph (a) in this section) is resolved to SBA's satisfaction. Accordingly, SBA may require any or all of the following resolutions:

(1) Successful completion of a portfolio review to confirm compliance of your adherence to your investment policy.

(2) SBA's written approval of your key person resolution.

(3) SBA's written acknowledgement of pending litigation.

(4) SBA's written consent to the resolution of the LPA or side letter violation.

(5) Two quarters of performance above a bottom quartile industry benchmark based on the TVPI by vintage year and strategy, as calculated under paragraph (a) of this section.

(6) Two quarters of consistent reporting of your LCR, as calculated under paragraph (a) of this section, exceeding 1.25.

(7) You are current on your Leverage interest payments.

(8) A completed regulatory examination acceptable to SBA.

(d) *Watchlist communications*—(1) *Notification to Licensee.* If you trigger any of the events under paragraph (a) of this section, SBA will notify you in writing that you have been placed on the Watchlist, identify the event(s) which triggered your placement on the Watchlist, the actions you must take as noted under paragraph (b) of this section, and the remedies as identified under paragraph (c) of this section.

(2) *Watchlist status disclosure.* SBA will not disclose your Watchlist status publicly.

(3) *Removal from Watchlist status notification.* SBA will provide you with written notice after SBA determines that you have resolved all matter identified in your notification letter and satisfied the applicable requirements set forth in paragraph (c) of this section.

[88 FR 46013, July 18, 2023]

Subpart K—Ending Operations as a Licensee

§ 107.1900 Surrender of license.

You may not surrender your license without SBA's prior written approval. Your request for approval must be accompanied by an offer of immediate repayment of all of your outstanding Leverage (including any prepayment penalties thereon), or by a plan satisfactory to SBA for the orderly liquidation of the Licensee.

Subpart L—Miscellaneous

§ 107.1910 Non-waiver of SBA's rights or terms of Leverage security.

SBA's failure to exercise or delay in exercising any right or remedy under the Act or the regulations in this part does not constitute a waiver of such right or remedy. SBA's failure to require you to perform any term or provision of your Leverage does not affect SBA's right to enforce such term or provision. Similarly, SBA's waiver of, or failure to enforce, any term or provision of your Leverage or of any event or condition set forth in § 107.1810 or § 107.1820 does not constitute a waiver of any succeeding breach of such term or provision or condition.

§ 107.1920 Licensee's application for exemption from a regulation in this part 107.

You may file an application in writing with SBA to have a proposed action exempted from any procedural or substantive requirement, restriction, or prohibition to which it is subject under this part, unless the provision is mandated by the Act. SBA may grant an exemption for such applicant, conditionally or unconditionally, provided the exemption would not be contrary to the purposes of the Act. Your application must be accompanied by supporting evidence which demonstrates to SBA's satisfaction that:

(a) The proposed action is fair and equitable; and

(b) The exemption requested is reasonably calculated to advance the best interests of the SBIC program in a manner consonant with the policy objectives of the Act and the regulations in this part.

§ 107.1930 Effect of changes in this part 107 on transactions previously consummated.

The legality of a transaction covered by the regulations in this part is governed by the regulations in this part in effect at the time the transaction was consummated, regardless of later changes. Nothing in this part bars SBA

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108.2007 Grant award to SSBICs.
108.2010 Restrictions on use of Operational Assistance grant funds.
108.2020 Amount of Operational Assistance grant.
108.2030 Matching requirements.
108.2040 Reporting and recordkeeping requirements.

AUTHORITY: 15 U.S.C. 689–689q.

SOURCE: 66 FR 28609, May 23, 2001, unless otherwise noted.

Subpart A—Introduction to Part 108

§ 108.10 Description of the New Markets Venture Capital Program.

The New Markets Venture Capital (''NMVC'') Program is a developmental venture capital program for the purpose of promoting economic development and the creation of wealth and job opportunities in low-income geographic areas and among individuals living in such areas. SBA selects and then enters into participation agreements with selected newly formed venture capital companies, and provides leverage in the form of debenture guarantees to such companies to allow them to make equity capital investments in smaller enterprises located in low-income geographic areas. SBA also awards grants to such companies and to Specialized Small Business Investment Companies so that they can provide operational assistance to such smaller enterprises in connection with such investments.

§ 108.20 Legal basis and applicability of this part 108.

The regulations in this part implement Part B of Title III of the Small Business Investment Act of 1958, as amended (15 U.S.C. 661 *et seq.*). All NMVC Companies must comply with all applicable SBA regulations, accounting guidelines and valuation guidelines for NMVC Companies, available from SBA.

§ 108.30 Amendments to Act and regulations.

A NMVC Company is subject to all provisions of the Act and parts 108 and 112 of title 13 of the Code of Federal Regulations.

§ 108.40 How to read this part 108.

(a) *Center headings.* All references in this part to SBA forms, and instructions for their preparation, are to the current issue of such forms (available from Investment Division, SBA). Center headings are descriptive and are used for convenience only. They have no regulatory effect.

(b) *Capitalizing defined terms.* Terms defined in §108.50 have initial capitalization in this part 108.

(c) ''*You.*'' The pronoun ''you'' as used in this part 108 means a NMVC Company unless otherwise noted.

Subpart B—Definition of Terms Used in This Part 108

§108.50 Definition of terms.

The following definitions apply to this part 108:

Act means the Small Business Investment Act of 1958, as amended (15 U.S.C. 661 *et seq.*).

Affiliate or *Affiliates* has the meaning set forth in §121.103 of this chapter.

Applicant means any entity submitting an application to SBA for designation as a NMVC Company under this part.

Articles mean articles of incorporation or charter for a Corporate NMVC Company, the partnership agreement or certificate for a Partnership NMVC Company, and the operating agreement or other organizational documents for a LLC NMVC Company.

Assistance or *Assisted* means Financing of or management services rendered to a Small Business by or through a NMVC Company pursuant to the Act and this part.

Associate of a NMVC Company means any of the following:

(1)(i) An officer, director, employee or agent of a Corporate NMVC Company;

(ii) A Control Person, employee or agent of a Partnership NMVC Company;

(iii) A managing member of a LLC NMVC Company;

(iv) An Investment Adviser/Manager of any NMVC Company, including any Person who contracts with a Control Person of a Partnership NMVC Company to be the Investment Adviser/Manager of such NMVC Company; or

(v) Any Person regularly serving a NMVC Company on retainer in the capacity of attorney at law.

(2) Any Person who owns or controls, or who has entered into an agreement to own or control, directly or indirectly, at least 10 percent of any class of stock of a Corporate NMVC Company or 10 percent of the membership interests of an LLC NMVC Company, or a limited partner's interest of at least 10 percent of the partnership capital of a Partnership NMVC Company. However, neither a limited partner in a Partnership NMVC Company nor a non-managing member in an LLC NMVC Company is considered an Associate if such Person is an entity Institutional Investor whose investment in the Partnership, including commitments, represents no more than 33 percent of the capital of the NMVC Company and no more than five percent of such Person's net worth.

(3) Any officer, director, partner (other than a limited partner), manager, agent, or employee of any Associate described in paragraph (1) or (2) of this definition.

(4) Any Person that directly or indirectly Controls, or is Controlled by, or is under Common Control with, a NMVC Company.

(5) Any Person that directly or indirectly Controls, or is Controlled by, or is under Common Control with, any Person described in paragraphs (1) and (2) of this definition.

(6) Any Close Relative of any Person described in paragraphs (1), (2), (4), and (5) of this definition.

(7) Any Secondary Relative of any Person described in paragraphs (1), (2), (4), and (5) of this definition.

(8) Any concern in which—

(i) Any person described in paragraphs (1) through (6) of this definition is an officer; general partner, or managing member; or

(ii) Any such Person(s) singly or collectively Control or own, directly or indirectly, an equity interest of at least 10 percent (excluding interests that such Person(s) own indirectly through ownership interests in the NMVC Company).

(9) Any concern in which any Person(s) described in paragraph (7) of this definition singly or collectively own (including beneficial ownership) a majority equity interest, or otherwise have Control. As used in this paragraph (9), ''collectively'' means together with any Person(s) described in paragraphs (1) though (7) of this definition.

(10) For the purposes of this definition, if any Associate relationship described in paragraphs (1) through (7) of

this definition exists at any time within six months before or after the date that a NMVC Company provides Financing, then that Associate relationship is considered to exist on the date of the Financing.

(11) If any NMVC Company has any ownership interest in another NMVC Company, the two NMVC companies are Associates of each other.

Capital Impairment has the meaning set forth in §108.1830(b).

Central Registration Agent or *CRA* means one or more agents appointed by SBA for the purpose of issuing TCs and performing the functions enumerated in §108.1620 and performing similar functions for Debentures funded outside the pooling process.

Close Relative of an individual means:

(1) A current or former spouse;

(2) A father, mother, guardian, brother, sister, son, daughter; or

(3) A father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, or daughter-in-law.

Commitment means a written agreement between a NMVC Company and an eligible Small Business that obligates the NMVC Company to provide Financing (except a guarantee) to that Small Business in a fixed or determinable sum, by a fixed or determinable future date. In this context the term ''agreement'' means that there has been agreement on the principal economic terms of the Financing. The agreement may include reasonable conditions precedent to the NMVC Company's obligation to fund the commitment, but these conditions must be outside the NMVC Company's control.

Common Control means a condition where two or more Persons, either through ownership, management, contract, or otherwise, are under the Control of one group or Person. Two or more NMVC companies are presumed to be under Common Control if they are Affiliates of each other by reason of common ownership or common officers, directors, or general partners; or if they are managed or their investments are significantly directed either by a common independent investment advisor or managerial contractor, or by two or more such advisors or contractors that are Affiliates of each other. This presumption may be rebutted by evidence satisfactory to SBA.

Community Development Finance means debt and equity-type investments in low-income communities.

Conditionally Approved NMVC Company means a company that—

(1) Has applied for participation as a NMVC Company, and

(2) SBA has conditionally approved to participate in the NMVC program for a specified period of time not to exceed two years, subject to the company fulfilling the requirements to be a NMVC Company within that specified period of time.

Control means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a NMVC Company or other concern, whether through the ownership of voting securities, by contract, or otherwise.

Control Person means any Person that controls a NMVC Company, either directly or through an intervening entity. A Control Person includes:

(1) A general partner of a Partnership NMVC Company;

(2) Any Person serving as the general partner, officer, director, or manager (in the case of a limited liability company) of any entity that controls a NMVC Company, either directly or through an intervening entity;

(3) Any Person that—

(i) Controls or owns, directly or through an intervening entity, at least 10 percent of a Partnership NMVC Company or any entity described in paragraphs (1) or (2) of this definition; and

(ii) Participates in the investment decisions of the general partner of such Partnership NMVC Company;

(4) Any Person that controls or owns, directly or through an intervening entity, at least 50 percent of a Partnership NMVC Company or any entity described in paragraphs (1) or (2) of this definition.

Corporate NMVC Company. See definition of NMVC Company in this section.

Debentures means debt obligations issued by NMVC companies pursuant to section 355 of the Act and held or guaranteed by SBA.

Debt Securities are instruments evidencing a loan with an option or any

other right to acquire Equity Securities in a Small Business or its Affiliates, or a loan which by its terms is convertible into an equity position. Consideration must be paid for all options that you acquire.

Developmental Venture Capital means capital in the form of Equity Capital Investments in Smaller Enterprises made with a primary objective of fostering economic development in Low-Income Geographic Areas.

Distribution means any transfer of cash or non-cash assets to SBA, its agent or Trustee, or to partners in a Partnership NMVC Company, or to shareholders in a Corporate NMVC Company, or to members in an LLC NMVC Company. Capitalization of Retained Earnings Available for Distribution constitutes a Distribution to the NMVC Company's non-SBA partners, shareholders, or members.

Equity Capital Investments means investments in the form of common or preferred stock, limited partnership interests, options, warrants, or similar equity instruments, including subordinated debt with equity features if such debt provides only for interest payments contingent upon and limited to the extent of earnings. Equity Capital Investments must not require amortization. Equity Capital Investments may be guaranteed by one or more third parties; however, neither Equity Capital Investments nor such guarantee may be collateralized or otherwise secured. Investments classified as Debt Securities are not precluded from qualifying as Equity Capital Investments. Equity Capital Investments may provide for royalty payments only if the royalty payments are based on the earnings of the concern.

Equity Securities means stock of any class in a corporation, stock options, warrants, limited partnership interests in a limited partnership, membership interests in a limited liability company, or joint venture interests.

Financing or *Financed* means outstanding financial assistance provided to a Small Business by a NMVC Company, whether through:

(1) Loans;

(2) Debt Securities;

(3) Equity Securities;

(4) Guarantees; or

(5) Purchases of securities of a Small Business through or from an underwriter (see §108.825).

Guaranty Agreement means the contract entered into by SBA which is a guarantee backed by the full faith and credit of the United States Government as to timely payment of principal and interest on Debentures and SBA's rights in connection with such guarantee.

Includible Non-Cash Gains means those non-cash gains (as reported on SBA Form 468) that are realized in the form of Publicly Traded and Marketable securities or investment grade debt instruments. For purposes of this definition, investment grade debt instruments means those instruments that are rated ''BBB'' or ''Baa'', or better, by Standard & Poor's Corporation or Moody's Investors Service, respectively. Non-rated debt may be considered to be investment grade if a NMVC Company obtains a written opinion from an investment banking firm acceptable to SBA stating that the non-rated debt instrument is equivalent in risk to the issuer's investment grade debt.

Institutional Investor means:

(1) *Entities.* Any of the following entities if the entity has a net worth (exclusive of unfunded commitments from investors) of at least $1 million, or such higher amount as is specified in this paragraph (1). (See also §108.230(c)(4) for limitations on the amount of an Institutional Investor's commitment that may be included in Private Capital.)

(i) A State or National bank, trust company, savings bank, or savings and loan association.

(ii) An insurance company.

(iii) A 1940 Act Investment Company or Business Development Company (each as defined in the Investment Company Act of 1940, as amended (15 U.S.C. 8a–1 *et seq.*).

(iv) A holding company of any entity described in paragraph (l)(i), (ii) or (iii) of this definition.

(v) An employee benefit or pension plan established for the benefit of employees of the Federal government, any State or political subdivision of a State, or any agency or instrumentality of such government unit.

(vi) An employee benefit or pension plan (as defined in the Employee Retirement Income Security Act of 1974, as amended (Public Law 93–406, 88 Stat. 829), excluding plans established under section 401(k) of the Internal Revenue Code of 1986 (26 U.S.C. 401(k)), as amended).

(vii) A trust, foundation or endowment exempt from Federal income taxation under the Internal Revenue Code of 1986, as amended.

(viii) A corporation, partnership or other entity with a net worth (exclusive of unfunded commitments from investors) of more than $10 million.

(ix) A State, a political subdivision of a State, or an agency or instrumentality of a State or its political subdivision.

(x) An entity whose primary purpose is to manage and invest non-Federal funds on behalf of at least three Institutional Investors described in paragraphs (l)(i) through (l)(ix) of this definition, each of whom must have at least a 10 percent ownership interest in the entity.

(xi) Any other entity that SBA determines to be an Institutional Investor.

(2) *Individuals.* (i) Any of the following individuals if he/she is also a permanent resident of the United States:

(A) An individual who is an Accredited Investor (as defined in the Securities Act of 1933, as amended (15 U.S.C. 77a-77aa)) and whose commitment to the NMVC Company is backed by a letter of credit from a State or National bank acceptable to SBA.

(B) An individual whose personal net worth is at least $2 million and at least ten times the amount of his or her commitment to the NMVC Company. The individual's personal net worth must not include the value of any equity in his or her most valuable residence.

(C) An individual whose personal net worth, not including the value of any equity in his or her most valuable residence, is at least $10 million.

(ii) Any individual who is not a permanent resident of the United States but who otherwise satisfies paragraph (2)(i) of this definition provided such individual has irrevocably appointed an agent within the United States for the service of process.

Investment Adviser/Manager means any Person who furnishes advice or assistance with respect to operations of a NMVC Company under a written contract executed in accordance with the provisions of § 108.510.

Lending Institution means a concern that is operating under regulations of a state or Federal licensing, supervising, or examining body, or whose shares are publicly traded and listed on a recognized stock exchange or NASDAQ and which has assets in excess of $500 million; and which, in either case, holds itself out to the public as engaged in the making of commercial and industrial loans and whose lending operations are not for the purpose of financing its own or an Associate's sales or business operations.

Leverage means financial assistance provided to a NMVC Company by SBA through the guaranty of a NMVC Company's Debentures, and any other SBA financial assistance evidenced by a security of the NMVC Company.

Leverageable Capital means Regulatory Capital, excluding unfunded commitments.

LLC NMVC Company. See definition of NMVC Company in this section.

Loan means a transaction evidenced by a debt instrument with no provision for you to acquire Equity Securities.

Loans and Investments means Portfolio securities, assets acquired in liquidation of Portfolio securities, operating concerns acquired, and notes and other securities received, as set forth in the Statement of Financial Position of SBA Form 468.

Low-Income Enterprise means a Smaller Enterprise that, as of the time of the initial Financing, has its Principal Office located in a Low-Income Geographic Area.

Low-Income Geographic Area (''LI Area'') means—

(1) Any population census tract (or in the case of an area that is not tracted for population census tracts, the equivalent county division, as defined by the Bureau of the Census of the United States Department of Commerce for purposes of defining poverty areas), if—

(i) The poverty rate for that census tract is not less than 20 percent;

(ii) In the case of a tract—

(A) That is located within a metropolitan area, 50 percent or more of the households in that census tract have an income equal to less than 60 percent of the area median gross income; or

(B) That is not located within a metropolitan area, the median household income for such tract does not exceed 80 percent of the statewide median household income; or

(C) As determined by the Administrator in accordance with §108.1940 of this part, a substantial population of Low-Income Individuals reside, an inadequate access to investment capital exists, or other indications of economic distress exist in that census tract; or

(2) Any area located within—

(i) A Historically Underutilized Business Zone (''HUBZone'') as defined in section 3(p) of the Small Business Act and 13 CFR 126.103;

(ii) An Urban Empowerment Zone or Urban Enterprise Community (as designated by the Secretary of the United States Department of Housing and Urban Development); or

(iii) A Rural Empowerment Zone or Rural Enterprise Community (as designated by the Secretary of the United States Department of Agriculture).

Low-Income Individual means an individual whose income (adjusted for family size) does not exceed—

(1) For metropolitan areas, 80 percent of the area median income; and

(2) For nonmetropolitan areas, the greater of—

(i) 80 percent of the area median income, or

(ii) 80 percent of the statewide nonmetropolitan area median income.

Low-Income Investment means an Equity Capital Investment in a Low-Income Enterprise.

Management Expenses has the meaning set forth in §108.520.

NAICS Manual means the latest issue of the North American Industrial Classification System Manual, prepared by the Office of Management and Budget, and available from the U.S. Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh, Pa., 15250–7954.

New Markets Tax Credit program means the tax credit created by the Consolidated Appropriations Act of 2001, Public Law 106–554 (114 Stat. 2762A), enacted December 21, 2000, to be implemented by the Internal Revenue Service, United States Department of Treasury.

New Markets Venture Capital Company or *NMVC Company* means a corporation (Corporate NMVC Company), a limited partnership organized as required by §108.160 (Partnership NMVC Company), or a limited liability company (LLC NMVC Company) that—

(1) Has been granted final approval by SBA under §108.380, and

(2) Has entered into a Participation Agreement with SBA. For certain purposes, the Entity General Partner of a Partnership NMVC Company is treated as if it were a NMVC Company (see §108.160(a)).

1940 Act Company means a NMVC Company which is registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*).

1980 Act Company means a NMVC Company which is registered under the Small Business Investment Incentive Act of 1980 (Public Law 96–447, 94 Stat. 2275).

Operational Assistance means management, marketing, and other technical assistance that assists a Small Business with its business development.

Original Issue Price means the price paid by the purchaser for securities at the time of issuance.

Participation Agreement means an agreement between SBA and a company to which SBA has granted final approval under §108.380, that—

(1) Details the company's operating plan and investment criteria; and

(2) Requires the company to make investments in Smaller Enterprises at least 80 percent of which Smaller Enterprises are located in LI Areas.

Partnership NMVC Company. See definition of NMVC Company in this section.

Person means a natural person or legal entity.

Pool means an aggregation of SBA guaranteed Debentures approved by SBA.

Portfolio means the securities representing a NMVC Company's total outstanding Financing of Smaller Enterprises. It does not include idle funds

or assets acquired in liquidation of Portfolio securities.

Portfolio Concern means a Small Business Assisted by a NMVC Company.

Principal Office means the location where the greatest number of the concern's employees at any one location perform their work. However, for those concerns whose ''primary industry'' (see 13 CFR 121.107) is service or construction (see 13 CFR 121.201), the determination of principal office excludes the concern's employees who perform the majority of their work at job-site locations to fulfill specific contract obligations.

Private Capital has the meaning set forth in §108.230.

Publicly Traded and Marketable means securities that are salable without restriction or that are salable within 12 months pursuant to Rule 144 (17 CFR 230.144) of the Securities Act of 1933, as amended, by the holder thereof, and are of a class which is traded on a regulated stock exchange, or is listed in the Automated Quotation System of the National Association of Securities Dealers (NASDAQ), or has, at a minimum, at least two market makers as defined in the relevant sections of the Securities Exchange Act of 1934, as amended (15 U.S.C. 77b *et seq.*), and in all cases the quantity of which can be sold over a reasonable period of time without having an adverse impact upon the price of the stock.

Regulatory Capital means Private Capital, excluding any portion of Private Capital that is designated as matching resources in accordance with §108.2030(b)(3).

Relevant Venture Capital Finance means Equity Capital Investments in small businesses in low-income communities or benefiting low-income communities.

Retained Earnings Available for Distribution means Undistributed Net Realized Earnings less any Unrealized Depreciation on Loans and Investments (as reported on SBA Form 468), and represents the amount that a NMVC Company may distribute to investors (including SBA) as a profit Distribution, or transfer to Private Capital.

SBA means the Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Secondary Relative of an individual means:

(1) A grandparent, grandchild, or any other ancestor or lineal descendent who is not a Close Relative;

(2) An uncle, aunt, nephew, niece, or first cousin; or

(3) A spouse of any person described in paragraph (1) or (2) of this definition.

Small Business means a small business concern as defined in section 103(5) of the Act (including its Affiliates), and which meets the criteria applicable to the Small Business Investment Company program as set forth in part 121 of this chapter.

Small Business Investment Company (SBIC) means a Licensee, as that term is defined in §107.50 of this chapter.

Smaller Enterprise means any Small Business that:

(1) Together with its Affiliates has a net worth of not more than $6.0 million and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two years no greater than $2.0 million; or

(2) Both together with its Affiliates, and by itself, meets the size standard of §121.201 of this chapter at the time of Financing for the industry in which it is then primarily engaged.

Specialized Small Business Investment Companies (SSBICs) means any Small Business Investment Company that—

(1) Invests solely in small business concerns that contribute to a well-balanced national economy by facilitating ownership in such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages; and

(2) Was licensed under section 301(d) of the Small Business Investment Act, as in effect before September 30, 1996.

Trust means the legal entity created for the purpose of holding guaranteed Debentures and the guaranty agreement related thereto, receiving, holding and making any related payments, and accounting for such payments.

Trust Certificate Rate means a fixed rate determined at the time Debentures are pooled.

Trust Certificates (TCs) means certificates issued by SBA, its agent or Trustee and representing ownership of

all or a fractional part of a Trust or Pool of Debentures.

Trustee means the trustee or trustees of a Trust.

Undistributed Net Realized Earnings means Undistributed Realized Earnings less Non-cash Gains/Income, each as reported on SBA Form 468.

Unrealized Appreciation means the amount by which a NMVC Company's valuation of each of its Loans and Investments, as determined by its Board of Directors or General Partner(s) in accordance with NMVC Company's valuation policies, exceeds the cost basis thereof.

Unrealized Depreciation means the amount by which a NMVC Company's valuation of each of its Loans and Investments, as determined by its Board of Directors or General Partner(s) in accordance with NMVC Company's valuation policies, is below the cost basis thereof.

Unrealized Gain (Loss) on Securities Held means the sum of the Unrealized Appreciation and Unrealized Depreciation on all of a NMVC Company's Loans and Investments, less estimated future income tax expense or estimated realizable future income tax benefit, as appropriate.

[66 FR 28609, May 23, 2001, as amended at 67 FR 68502, Nov. 12, 2002]

Subpart C—Qualifications for the NMVC Program

ORGANIZING A NMVC COMPANY

§ 108.100 Business form.

A NMVC Company must be a newly formed for-profit entity or, subject to § 108.150, a newly formed for-profit subsidiary of an existing entity. It must be organized under State law solely for the purpose of performing the functions and conducting the activities contemplated under the Act. It may be organized as a corporation (''Corporate NMVC Company''), a limited partnership (''Partnership NMVC Company''), or a limited liability company (''LLC NMVC Company'').

§ 108.110 Qualified management.

An Applicant must show, to the satisfaction of SBA, that its current or proposed management team is qualified and has the knowledge, experience, and capability in Community Development Finance or Relevant Venture Capital Finance, necessary for investing in the types of businesses contemplated by the Act, the regulations in this part and its business plan. In determining whether an Applicant's current or proposed management team has sufficient qualifications, SBA will consider information provided by the Applicant and third parties concerning the background, capability, education, training and reputation of its general partners, managers, officers, key personnel, and investment committee and governing board members. The Applicant must designate at least one individual as the official responsible for contact with SBA.

§ 108.120 Economic development primary mission.

The primary mission of a NMVC Company must be economic development of one or more LI Areas.

§ 108.130 Identified Low Income Geographic Areas.

A NMVC Company must identify the specific LI Areas in which it intends to make Developmental Venture Capital investments and provide Operational Assistance under the NMVC program.

§ 108.140 SBA approval of initial Management Expenses.

A NMVC Company must have its Management Expenses approved by SBA at the time of designation as a NMVC Company. (See § 108.520 for the definition of Management Expenses.)

§ 108.150 Management and ownership diversity requirement.

(a) *Diversity requirement.* You must have diversity between management and ownership in order to be a NMVC Company. To establish diversity, you must meet the requirements in paragraphs (b) and (c) of this section.

(b) *Percentage ownership requirement.* No Person or group of Persons who are Affiliates of one another may own or control, directly or indirectly, more than 70 percent of your Regulatory Capital or your Leverageable Capital.

(c) *Non-affiliation requirement.* At least 30 percent of your Regulatory

Capital and Leverageable Capital must be owned and controlled by three Persons unaffiliated with your management and unaffiliated with each other, whose investments are significant in dollar and percentage terms as determined by SBA. Such Persons must not be your Associates (except for their status as your shareholders, limited partners or members) and must not Control, be Controlled by, or be under Common Control with any of your Associates. A single ''acceptable'' Institutional Investor may be substituted for two or three of the three investors who are otherwise required. The following Institutional Investors are ''acceptable'' for this purpose:

(1) Entities whose overall activities are regulated and periodically examined by state, Federal or other governmental authorities satisfactory to SBA;

(2) Entities listed on the New York Stock Exchange;

(3) Entities that are publicly-traded and that meet both the minimum numerical listing standards and the corporate governance listing standards of the New York Stock Exchange:

(4) Public or private employee pension funds;

(5) Trusts, foundations, or endowments, but only if exempt from Federal income taxation; and

(6) Other Institutional Investors satisfactory to SBA.

(d) *Voting requirement.* The investors required for you to satisfy diversity may not delegate their voting rights to any Person who is your Associate, or who Controls, is Controlled by, or is under Common Control with any of your Associates, without prior SBA approval.

(e) *Requirement to maintain diversity.* You must maintain management-ownership diversity while you are a NMVC Company. If, at any time, you no longer have the required management-ownership diversity, you must:

(1) Notify SBA within 10 days; and

(2) Re-establish diversity within six months.

[66 FR 28609, May 23, 2001; 66 FR 32894, June 19, 2001]

§ 108.160 Special rules for NMVC Companies formed as limited partnerships.

(a) *Entity General Partner.* (1) A general partner which is a corporation, limited liability company or partnership (an ''Entity General Partner'') shall be organized under state law solely for the purpose of serving as the general partner of one or more NMVC companies.

(2) SBA must approve any person who will serve as an officer, director, manager, or general partner of the Entity General Partner. This provision must be stated in an Entity General Partner's Certificate of Incorporation, operating agreement, limited partnership agreement or other similar governing instrument.

(3) An Entity General Partner is subject to the same examination and reporting requirements as a NMVC Company under sections 361 and 362 of the Act. The restrictions and obligations imposed upon a NMVC Company by §§ 108.1810, 108.30, 108.410 through 108.450, 108.470, 108.500, 108.510, 108.585, 108.600, 108.680, 108.690 through 108.692, and 108.1910 apply also to an Entity General Partner of a NMVC Company.

(4) The general partner(s) of your Entity General Partner(s) will be considered your general partner.

(5) If your Entity General Partner is a limited partnership, its limited partners may be considered your Control Person(s) if they meet the definition for Control Person in § 108.50.

(b) *Other requirements for Partnership NMVC Companies.* If you are a Partnership NMVC Company:

(1) You must have a minimum duration of 10 years or two years following the maturity of your last-maturing Leverage security, whichever is longer. After 10 years, if all Leverage has been repaid or redeemed and all amounts due SBA, its agent, or Trustee have been paid, the Partnership NMVC Company may be terminated by a vote of your partners;

(2) None of your general partner(s) may be removed or replaced by your limited partners without prior written approval of SBA;

(3) Any transferee of, or successor in interest to, your general partner shall have only the rights and liabilities of a

limited partner pending SBA's written approval of such transfer or succession; and

(4) You must incorporate all the provisions in this paragraph (b) in your limited partnership agreement.

(c) *Obligations of a Control Person.* All Control Persons are bound by the disciplinary provisions of sections 365 and 366 of the Act and by the conflict-of-interest rules under §108.730. The term NMVC Company, as used in §§108.30, 108.460, and 108.680, includes all of the NMVC Company's Control Persons. The conditions specified in §108.1810 and §108.1910 apply to all general partners.

(d) *Liability of general partner for partnership debts to SBA.* Subject to section 365 of the Act, your general partner is not liable solely by reason of its status as a general partner for repayment of any Leverage or debts you owe to SBA unless SBA, in the exercise of reasonable investment prudence, and with regard to your financial soundness, determines otherwise prior to the purchase or guaranty of your Leverage.

(e) *Special Leverage requirement.* Before your first issuance of Leverage, you must furnish SBA with evidence that you qualify as a partnership for tax purposes, either by a ruling from the Internal Revenue Service or by an opinion of counsel.

CAPITALIZING A NMVC COMPANY

§108.200 Adequate capital for NMVC Companies.

You must meet the requirements of §§108.200–108.230 in order to qualify for designation as a NMVC Company and to receive Leverage.

§108.210 Minimum capital requirements for NMVC Companies.

You must have Regulatory Capital of at least $5,000,000 and Leverageable Capital of at least $500,000 to become a NMVC Company.

§108.230 Private Capital for NMVC Companies.

(a) *General.* Private Capital means the contributed capital of a NMVC Company, plus unfunded binding commitments by Institutional Investors (including commitments evidenced by a promissory note) to contribute capital to a NMVC Company.

(b) *Contributed capital.* For purposes of this section, contributed capital means the paid-in capital and paid-in surplus of a Corporate NMVC Company, the members' paid-in capital of a LLC NMVC Company, or the partners' paid-in capital of a Partnership NMVC Company, in each case subject to the limitations in paragraph (c) of this section.

(c) *Exclusions from Private Capital.* Private Capital does not include:

(1) Funds borrowed by a NMVC Company from any source.

(2) Funds obtained through the issuance of Leverage.

(3) Funds obtained directly from any Federal agency or department.

(4) Any portion of a commitment from an Institutional Investor with a net worth of less than $10 million that exceeds 10 percent of such Institutional Investor's net worth.

(5) A commitment from an investor if SBA determines that the collectability of the commitment is questionable.

(d) *Limitations on including non-cash capital contributions in Private Capital.* Private Capital does not include capital contributions in a form other than cash, except as provided in this paragraph (d). Subject to SBA's prior approval, Private Capital may include payments made on behalf of an Applicant or Conditionally Approved NMVC Company before the Applicant or Conditionally Approved NMVC Company becomes a NMVC Company for organizational expenses and Management Expenses incurred by the Applicant or the Conditionally Approved NMVC Company prior to its becoming a NMVC Company.

(e) *Contributions with borrowed funds.* You may not accept any capital contribution made with funds borrowed by a Person seeking to own an equity interest (whether direct or indirect, beneficial or of record) of at least 10 percent of your Private Capital. This exclusion does not apply if:

(1) Such Person's net worth is at least twice the amount borrowed; or

(2) SBA gives its prior written approval of the capital contribution.

[66 FR 28609, May 23, 2001, as amended at 67 FR 68502, Nov. 12, 2002]

Subpart D—Application and Approval Process for NMVC Company Designation

§ 108.300 When and how to apply for designation as a NMVC Company.

(a) *Notice of Funds Availability (''NOFA'').* SBA will publish a NOFA in the FEDERAL REGISTER, advising potential applicants of the availability of funds for the NMVC program. An entity may then submit an application for designation as a NMVC Company. When submitting its application, an Applicant must comply with both these regulations and any requirements specified in the NOFA, including submission deadlines. The NOFA may specify limitations, special rules, procedures, and restrictions for a particular funding round.

(b) *Application form.* An Applicant must apply for designation as a NMVC Company using the application packet provided by SBA. Upon receipt of an application, SBA may request clarifying or technical information on the materials submitted as part of the application.

§ 108.310 Contents of application.

Each Applicant must submit a complete application, including the following:

(a) *Amounts.* The Applicant must indicate—

(1) The specific amount of Regulatory Capital it proposes to raise (which amount must be at least $5,000,000); and

(2) The specific amount of binding commitments for contributions in cash or in-kind it proposes to raise, and/or an annuity it proposes to purchase, in accordance with the requirements of § 108.2030, as its matching resources for its Operational Assistance grant award (the aggregate of which must be not less than $1,500,000 or 30 percent of the Regulatory Capital it proposes to raise under paragraph (a)(1) of this section, whichever is greater).

(b) *Comprehensive business plan.* The Applicant must submit a comprehensive business plan covering at least a five-year period, addressing the specific items described in § 108.320, and which demonstrates that the Applicant has the capacity to operate successfully as a NMVC Company.

(c) *New Markets Tax Credit program.* Applicant must address if and to what extent it intends to conform its activities to the New Markets Tax Credit laws. If Applicant plans to seek a New Markets Tax Credit, Applicant also must state the amount of tax credit allocation it intends to seek.

[66 FR 28609, May 23, 2001, as amended at 67 FR 68502, Nov. 12, 2002]

§ 108.320 Contents of comprehensive business plan.

(a) *Executive summary.* The executive summary must include a description of—

(1) The Applicant;

(2) Its strategy for how it proposes to make successful Developmental Venture Capital investments in identified LI Areas;

(3) The markets in the LI Areas it proposes to serve; and

(4) How it intends to work with community organizations in and be accountable to the residents of identified LI Areas in order to facilitate its Developmental Venture Capital investments.

(b) *Capacity, skills, and experience of the management team.* An Applicant must provide information generally as to the background, capability, education, reputation and training of its general partners, managers, officers, key personnel, investment committee and governing board members. The Applicant also must provide information specifically on these individuals' qualifications and reputation in the areas of Community Development Finance and/or Relevant Venture Capital Finance, including the impact of these individuals' activities in these areas.

(c) *Market analysis.* An Applicant must provide an analysis of the LI Areas in which it intends to focus its Developmental Venture Capital investments and Operational Assistance to Smaller Enterprises, demonstrating that the Applicant understands the market and the unmet capital needs in such areas and how its activities will meet these unmet capital needs through Developmental Venture Capital investments and will have a positive economic impact on those areas.

The analysis must include a description of the extent of the economic distress in the identified LI Areas. An Applicant also must analyze the extent of the demand in such areas for Developmental Venture Capital investments and any factors or trends that may affect the Applicant's ability to make effective Developmental Venture Capital investments.

(d) *Operational capacity and investment strategies.* An Applicant must submit information concerning its policies and procedures for underwriting and approving its Developmental Venture Capital investments, monitoring its portfolio, and maintaining internal controls and operations.

(e) *Regulatory Capital.* An Applicant must include a detailed description of how it plans to raise its Regulatory Capital. An Applicant must discuss its potential sources of Regulatory Capital, the estimated timing on raising such funds, and the extent of the expressions of interest to commit such funds to the Applicant.

(f) *Plan for providing Operational Assistance.* An Applicant must describe how it plans to use its grant funds to provide Operational Assistance to Smaller Enterprises in which it will make Developmental Venture Capital investments. Its plan must address the types of Operational Assistance it proposes to provide, and how it plans to provide the Operational Assistance through the use of licensed professionals, when necessary, either from its own staff or from outside entities.

(g) *Matching resources for Operational Assistance grant.* An Applicant must include a detailed description of how it plans to obtain binding commitments for cash or in-kind contributions, and/or to purchase an annuity, to match the funds requested from SBA for the Applicant's Operational Assistance grant. If it proposes to obtain commitments for cash and in-kind contributions, it also must estimate the ratio of cash to in-kind contributions (in no event may in-kind contributions exceed 50 percent of the total contributions). Applicant must discuss its potential sources of matching resources, the estimated timing on raising such funds, and the extent of the expressions of interest to commit such funds to the Applicant. Potential sources of matching resources must satisfy the requirements in §108.2030(b)(1).

(h) *Projected amount of investment in LI Areas.* An Applicant must describe the amount of its total Regulatory Capital and Leverage that it proposes to invest in Smaller Enterprises located in LI Areas, as compared to the amount that it proposes to invest in Small Businesses located outside of LI Areas.

(i) *Projected impact.* An Applicant must describe the criteria and economic measurements to be used to evaluate whether and to what extent it has met the objectives of the NMVC program. It must include:

(1) A description of the extent to which it will concentrate its Developmental Venture Capital investments and Operational Assistance activities in identified LI Areas;

(2) An estimate of the social, economic, and community development benefits to be created within identified LI Areas over the next five years or more as a result of its activities;

(3) A description of the criteria to be used to measure the benefits created as a result of its activities;

(4) A discussion about the amount of such benefits created that it will consider to constitute successfully meeting the objectives of the NMVC program.

(j) *Affiliates and business relationships.* Applicant must submit information regarding the management and financial strength of any parent or holding entity, affiliated firm or entity, or any other firm or entity essential to the success of the Applicant's business plan.

[66 FR 28609, May 23, 2001, as amended at 67 FR 68503, Nov. 12, 2002]

§108.330 Grant issuance fee.

An Applicant must pay to SBA a grant issuance fee of $5,000. An Applicant must submit this fee in advance, at the time of application submission. If SBA does not select an Applicant as a Conditionally Approved NMVC Company or designate an Applicant as a NMVC Company, SBA will refund this fee to the Applicant.

Subpart E—Evaluation and Selection of NMVC Companies

§ 108.340 Evaluation and selection—general.

SBA will evaluate and select an Applicant to participate in the NMVC program solely at SBA's discretion, based on SBA's review of the Applicant's application materials, interviews or site visits with the Applicant (if any), and background investigations conducted by SBA and other Federal agencies. SBA's evaluation and selection process is intended to—

(a) Ensure that Applicants are evaluated on a competitive basis and in a fair and consistent manner;

(b) Take into consideration the unique proposals presented by Applicants;

(c) Ensure that each Applicant that SBA designates as a NMVC Company can fulfill successfully the goals of its comprehensive business plan; and

(d) Ensure that SBA selects Applicants in such a way as to promote Developmental Venture Capital investments nationwide and in both urban and rural areas.

§ 108.350 Eligibility and completeness.

SBA will not consider any application that is not complete or that is submitted by an Applicant that does not meet the eligibility criteria described in subpart C of this part. SBA, at its sole discretion, may request from an Applicant additional information concerning eligibility criteria or easily completed portions of the application in order to allow SBA to consider that Applicant's application.

§ 108.360 Evaluation criteria.

SBA will evaluate and select an Applicant for participation in the NMVC program by considering the following criteria—

(a) The quality of the Applicant's comprehensive business plan in terms of meeting the objectives of the NMVC program;

(b) The likelihood that the Applicant will fulfill the goals described in its comprehensive business plan;

(c) The capability of the Applicant's management team;

(d) The strength and likelihood for success of the Applicant's operations and investment strategies;

(e) The need for Developmental Venture Capital investments in the LI Areas in which the Applicant intends to invest;

(f) The extent to which the Applicant will concentrate its activities on serving the LI Areas in which it intends to invest, including the ratio of resources that it proposes to invest in such areas as compared to other areas;

(g) The Applicant's demonstrated understanding of the markets in the LI Areas in which it intends to focus its activities;

(h) The likelihood that and the time frame within which the Applicant will be able to—

(1) Raise the Regulatory Capital it proposes to raise for its investments, and

(2) Obtain the binding commitments for contributions in cash or in-kind and/or an annuity it proposes to obtain as its matching resources for its Operational Assistance grant award;

(i) The strength of the Applicant's proposal to provide Operational Assistance to Smaller Enterprises in which it plans to invest;

(j) The extent to which the activities proposed by the Applicant will promote economic development and the creation of wealth and job opportunities in the LI Areas in which it intends to invest and among individuals living in LI Areas; and

(k) The strength of the Applicant's application compared to applications submitted by other Applicants and by SSBICs intending to invest in the same or proximate LI Areas.

[66 FR 28609, May 23, 2001, as amended at 67 FR 68503, Nov. 12, 2002]

§ 108.370 Conditional approval.

From among the Applicants submitting eligible and complete applications, SBA will select a number of Applicants and will conditionally approve such selected Applicants to participate in the NMVC program. SBA will give each such Conditionally Approved NMVC Company a specific period of time, not to exceed two years, to satisfy the requirements to become a NMVC Company.

§ 108.380 Final approval as a NMVC Company.

(a) *General rule.* With respect to each Conditionally Approved NMVC Company, SBA will either:

(1) Grant final approval to participate in the NMVC program and designate such company as a NMVC Company, if such Conditionally Approved NMVC Company:

(i) Within the specific period of time SBA gave to it when SBA conditionally approved it for participation in the NMVC program, has raised:

(A) The amount of Regulatory Capital set forth in its application, pursuant to § 108.310(a)(1); and

(B) The amount of matching resources for its Operational Assistance grant award set forth in its application, pursuant to § 108.310(a)(2); and

(ii) Enters into a Participation Agreement with SBA; or

(2) Revoke SBA's conditional approval of the company, at which time it is no longer a Conditionally Approved NMVC Company and must not participate in the NMVC program or represent itself as a Conditionally Approved NMVC Company.

(b) *Exception to requirement to raise matching resources*—(1) *General.* At its discretion and based upon a showing of good cause, SBA may consider a Conditionally Approved NMVC Company to have satisfied the requirement in paragraph (a)(1)(i)(B) of this section to raise matching resources in the amount of at least 30 percent of its Regulatory Capital if the Conditionally Approved NMVC Company—

(i) Already has raised at least 20 percent of the total amount of required matching resources; and

(ii) Has a viable plan that reasonably projects its capacity to raise the remainder of the required amount of matching resources.

(2) *Request for exception.* Before the expiration of the time period given to it by SBA to meet the requirements to become a NMVC Company, a Conditionally Approved NMVC Company may submit to SBA a request that SBA grant the exception described in paragraph (b)(1) of this section. Such Conditionally Approved NMVC must present to SBA evidence of good cause for such request, as well as evidence supporting the elements of the exception described in paragraph (b)(1) of this section.

(3) *No applicability to Regulatory Capital.* The exception described in this section applies only to matching resources for the Operational Assistance grant award. Under no circumstances will SBA designate a Conditionally Approved NMVC Company as a NMVC Company if such Conditionally Approved NMVC Company does not raise the required amount of Regulatory Capital within the time period SBA gave it to do so.

[66 FR 28609, May 23, 2001, as amended at 67 FR 68503, Nov. 12, 2002]

Subpart F—Changes in Ownership, Structure, or Control

CHANGES IN CONTROL OR OWNERSHIP OF NMVC COMPANY

§ 108.400 Changes in ownership of 10 percent or more of NMVC Company but no change of Control.

You must obtain SBA's prior written approval for any proposed transfer or issuance of ownership interests that results in the ownership (beneficial or of record) by any Person, or group of Persons acting in concert, of at least 10 percent of any class of your stock, partnership capital or membership interests.

§ 108.410 Changes in Control of NMVC Company (through change in ownership or otherwise).

You must obtain SBA's prior written approval for any proposed transaction or event that results in Control by any Person(s) not previously approved by SBA.

§ 108.420 Prohibition on exercise of ownership or Control rights in NMVC Company before SBA approval.

Without prior written SBA approval, no change of ownership or Control may take effect and no officer, director, employee or other Person acting on your behalf shall:

(a) Register on your books any transfer of ownership interest to the proposed new owner(s);

(b) Permit the proposed new owner(s) to exercise voting rights with respect

to such ownership interest (including directly or indirectly procuring or voting any proxy, consent or authorization as to such voting rights at any meeting of shareholders, partners or members);

(c) Permit the proposed new owner(s) to participate in any manner in the conduct of your affairs (including exercising control over your books, records, funds or other assets; participating directly or indirectly in any disposition thereof; or serving as an officer, director, partner, manager, employee or agent); or

(d) Allow ownership or Control to pass to another Person.

§ 108.430 Notification to SBA of transactions that may change ownership or Control.

You must promptly notify SBA as soon as you have knowledge of transactions or events that may result in a transfer of Control or ownership of at least 10 percent of your capital. If there is any doubt as to whether a particular transaction or event will result in such a change, report the facts to SBA.

§ 108.440 Standards governing prior SBA approval for a proposed transfer of Control.

SBA approval is contingent upon full disclosure of the real parties in interest, the source of funds for the new owners' interest, and other data requested by SBA. As a condition of approving a proposed transfer of control, SBA may:

(a) Require an increase in your Regulatory Capital;

(b) Require the new owners or the transferee's Control Person(s) to assume, in writing, personal liability for your Leverage, effective only in the event of their direct or indirect participation in any transfer of Control not approved by SBA; or

(c) Require compliance with any other conditions set by SBA, including compliance with the requirements for minimum capital and management-ownership diversity as in effect at such time for new NMVC Companies.

§ 108.450 Notification to SBA of pledge of NMVC Company's shares.

(a) You must notify SBA in writing, within 30 calendar days, of the terms of any transaction in which:

(1) Any Person, or group of Persons acting in concert, pledges shares of your stock (or equivalent ownership interests) as collateral for indebtedness; and

(2) The shares pledged are at least 10 percent of your Regulatory Capital.

(b) If the transaction creates a change of ownership or Control, you must comply with § 108.400 or § 108.410, as appropriate.

Restrictions on Common Control or Ownership of Two or More NMVC Companies

§ 108.460 Restrictions on Common Control or ownership of two (or more) NMVC Companies.

Without SBA's prior written approval, you must not have an officer, director, manager, Control Person, or owner (with a direct or indirect ownership interest of at least 10 percent) who is also:

(a) An officer, director, manager, Control Person, or owner (with a direct or indirect ownership interest of at least 10 percent) of another NMVC Company; or

(b) An officer or director of any Person that directly or indirectly controls, or is controlled by, or is under Common Control with, another NMVC Company.

Change in Structure of NMVC Company

§ 108.470 SBA approval of merger, consolidation, or reorganization of NMVC Company.

You may not merge, consolidate, change form of organization (corporation or partnership) or reorganize without SBA's prior written approval. Any such merger or consolidation will be subject to § 108.440.

Subpart G—Managing the Operations of a NMVC Company

GENERAL REQUIREMENTS

§ 108.500 Lawful operations under the Act.

You must engage only in the activities contemplated by the Act and in no other activities.

§ 108.502 Representations to the public.

You may not represent or imply to anyone that the SBA, the U.S. Government or any of its agencies or officers has approved any ownership interests you have issued or obligations you have incurred. Be certain to include a statement to this effect in any solicitation to investors. Example: You may not represent or imply that ''SBA stands behind the NMVC Company'' or that ''Your capital is safe because SBA's experts review proposed investments to make sure they are safe for the NMVC Company.''

§ 108.503 NMVC Company's adoption of an approved valuation policy.

(a) *Valuation guidelines.* You must prepare, document and report the valuations of your Loans and Investments in accordance with the Valuation Guidelines for SBICs issued by SBA. These guidelines may be obtained from SBA's Investment Division.

(b) *SBA approval of valuation policy.* You must have a written valuation policy approved by SBA for use in determining the value of your Loans and Investments. You must either:

(1) Adopt without change the model valuation policy set forth in section III of the Valuation Guidelines for SBICs; or

(2) Obtain SBA's prior written approval of an alternative valuation policy.

(c) *Responsibility for valuations.* Your board of directors, managing members, or general partner(s) will be solely responsible for adopting your valuation policy and for using it to prepare valuations of your Loans and Investments for submission to SBA. If SBA reasonably believes that your valuations, individually or in the aggregate, are materially misstated, it reserves the right to require you to engage, at your expense, an independent third party acceptable to SBA to substantiate the valuations.

(d) *Frequency of valuations.* (1) You must value your Loans and Investments at the end of the second quarter of your fiscal year, and at the end of your fiscal year.

(2) On a case-by-case basis, SBA may require you to perform valuations more frequently.

(3) You must report material adverse changes in valuations at least quarterly, within thirty days following the close of the quarter.

(e) *Review of valuations by independent public accountant.* (1) For valuations performed as of the end of your fiscal year, your independent public accountant must review your valuation procedures and the implementation of such procedures, including adequacy of documentation.

(2) The independent public accountant's report on your audited annual financial statements (SBA Form 468) must include a statement that your valuations were prepared in accordance with your approved valuation policy.

§ 108.504 Equipment and office requirements.

(a) *Computer capability.* You must have a personal computer with a modem, and be able to use this equipment to prepare reports (using SBA provided software) and transmit them to SBA. In addition, you must have access to the Internet and the capability to send and receive electronic mail via the Internet.

(b) *Facsimile capability.* You must be able to receive facsimile messages 24 hours per day at your primary office.

(c) *Accessible office.* You must maintain an office that is convenient to the public and is open for business during normal working hours.

§ 108.506 Safeguarding the NMVC Company's assets/Internal controls.

You must adopt a plan to safeguard your assets and monitor the reliability of your financial data, personnel, Portfolio, funds and equipment. You must provide your bank and custodian with a certified copy of your resolution or

other formal document describing your control procedures.

§ 108.507 Violations based on false filings and nonperformance of agreements with SBA.

The following shall constitute a violation of this part:

(a) *Nonperformance.* Nonperformance of any of the requirements of any Debenture or of any written agreement with SBA.

(b) *False statement.* In any document submitted to SBA:

(1) Any false statement knowingly made; or

(2) Any misrepresentation of a material fact; or

(3) Any failure to state a material fact. A material fact is any fact that is necessary to make a statement not misleading in light of the circumstances under which the statement was made.

§ 108.509 Employment of SBA officials.

Without SBA's prior written approval, for a period of two years after the date of your most recent issuance of Leverage (or the receipt of any SBA Assistance as defined in part 105 of this chapter), you are not permitted to employ, offer employment to, or retain for professional services, any person who:

(a) Served as an officer, attorney, agent, or employee of SBA on or within one year before such date; and

(b) As such, occupied a position or engaged in activities which, in SBA's determination, involved discretion with respect to the granting of SBA Assistance.

MANAGEMENT AND COMPENSATION

§ 108.510 SBA approval of NMVC Company's Investment Adviser/Manager.

You may employ an Investment Adviser/Manager who will be subject to the supervision of your board of directors, managing members, or general partner. If you have Leverage or plan to seek Leverage, you must obtain SBA's prior written approval of the management contract. SBA's approval of an Investment Adviser/Manager for one NMVC Company does not indicate approval of that manager for any other NMVC Company.

(a) *Management contract.* The contract must:

(1) Specify the services the Investment Adviser/Manager will render to you and to the Small Businesses in your Portfolio; and

(2) Indicate the basis for computing Management Expenses.

(b) *Material change to approved management contract.* If there is a material change, both you and SBA must approve such change in advance. If you are uncertain if the change is material, submit the proposed revision to SBA.

§ 108.520 Management Expenses of a NMVC Company.

SBA must approve your initial Management Expenses and any increases in your Management Expenses.

(a) *Definition of Management Expenses.* Management Expenses include:

(1) Salaries;

(2) Office expenses;

(3) Travel;

(4) Business development;

(5) Office and equipment rental;

(6) Bookkeeping; and

(7) Expenses related to developing, investigating and monitoring investments.

(b) Management Expenses do not include services provided by specialized outside consultants, outside lawyers and independent public accountants, if they perform services not generally performed by a venture capital company.

CASH MANAGEMENT BY A NMVC COMPANY

§ 108.530 Restrictions on investments of idle funds by NMVC Companies.

(a) *Permitted investments of idle funds.* Funds not invested in Small Businesses must be maintained in:

(1) Direct obligations of, or obligations guaranteed as to principal and interest by, the United States, which mature within 15 months from the date of the investment; or

(2) Repurchase agreements with federally insured institutions, with a maturity of seven days or less. The securities underlying the repurchase agreements must be direct obligations of, or obligations guaranteed as to principal and interest by, the United States. The

securities must be maintained in a custodial account at a federally insured institution; or

(3) Certificates of deposit with a maturity of one year or less, issued by a federally insured institution; or

(4) A deposit account in a federally insured institution, subject to a withdrawal restriction of one year or less; or

(5) A checking account in a federally insured institution; or

(6) A reasonable petty cash fund.

(b) *Deposit of funds in excess of the insured amount.* (1) You are permitted to deposit funds in a federally insured institution in excess of the institution's insured amount, but only if the institution is ''well capitalized'' in accordance with the definition set forth in regulations of the Federal Deposit Insurance Corporation, as amended (12 CFR 325.103).

(2) Exception: You may make a temporary deposit (not to exceed 30 days) in excess of the insured amount, in a transfer account established to facilitate the receipt and disbursement of funds or to hold funds necessary to honor Commitments issued.

(c) *Deposit of funds in Associate institution.* A deposit in, or a repurchase agreement with, a federally insured institution that is your Associate is not considered a Financing of such Associate under §108.730, provided the terms of such deposit or repurchase agreement are no less favorable than those available to the general public.

BORROWING BY NMVC COMPANIES FROM NON-SBA SOURCES

§ 108.550 Prior approval of secured third-party debt of NMVC companies.

(a) *Definition.* In this section, ''secured third-party debt'' means any non-SBA debt secured by any of your assets, including secured guarantees and other contingent obligations that you voluntarily assume and secured lines of credit.

(b) *General rule.* You must get SBA's written approval before you incur any secured third-party debt or refinance any debt with secured third-party debt, including any renewal of a secured line of credit, increase in the maximum amount available under a secured line of credit, or expansion of the scope of a security interest or lien. For purposes of this paragraph (b), ''expansion of the scope of a security interest or lien'' does not include the substitution of one asset or group of assets for another, provided the asset values (as reported on your most recent annual Form 468) are comparable.

(c) *Conditions for SBA approval.* As a condition of granting its approval under this section, SBA may impose such restrictions or limitations as it deems appropriate, taking into account your historical performance, current financial position, proposed terms of the secured debt and amount of aggregate debt you will have outstanding (including Leverage). SBA will not favorably consider any requests for approval which include a blanket lien on all your assets, or a security interest in your investor commitments in excess of 125 percent of the proposed borrowing.

(d) *Thirty-day approval.* Unless SBA notifies you otherwise within 30 days after it receives your request, you may consider your request automatically approved if:

(1) You are in regulatory compliance;

(2) The security interest in your assets is limited to either those assets being acquired with the borrowed funds or an asset coverage ratio of no more than 2:1;

(3) Your request is for approval of a secured line of credit that would not cause your total outstanding borrowings (not including Leverage) to exceed 50 percent of your Leverageable Capital.

VOLUNTARY DECREASE IN REGULATORY CAPITAL

§ 108.585 Voluntary decrease in NMVC Company's Regulatory Capital.

You must obtain SBA's prior written approval to reduce your Regulatory Capital by more than two percent in any fiscal year. At all times, you must retain sufficient Regulatory Capital to meet the minimum capital requirements in the Act and §108.210, and sufficient Leverageable Capital to avoid having excess Leverage in violation of section 355(d) of the Act.

Subpart H—Recordkeeping, Reporting, and Examination Requirements for NMVC Companies

RECORDKEEPING REQUIREMENTS FOR NMVC COMPANIES

§ 108.600 General requirement for NMVC Company to maintain and preserve records.

(a) *Maintaining your accounting records.* You must establish and maintain your accounting records using SBA's standard chart of accounts for SBICs, unless SBA approves otherwise. You may obtain this chart of accounts from SBA.

(b) *Location of records.* You must keep the following records at your principal place of business or, in the case of paragraph (b)(3) of this section, at the branch office that is primarily responsible for the transaction:

(1) All your accounting and other financial records;

(2) All minutes of meetings of directors, stockholders, executive committees, partners, or other officials; and

(3) All documents and supporting materials related to your business transactions, except for any items held by a custodian under a written agreement between you and a Portfolio Concern or non-SBA lender, or any securities held in a safe deposit box, or by a licensed securities broker in an amount not exceeding the broker's per-account insurance coverage.

(c) *Preservation of records.* You must retain all the records that are the basis for your financial reports. Such records must be preserved for the periods specified in this paragraph (c), and must remain accessible for the first two years of the preservation period.

(1) You must preserve for at least 15 years or, in the case of a Partnership NMVC Company or LLC NMVC Company, at least two years beyond the date of liquidation:

(i) All your accounting ledgers and journals, and any other records of assets, asset valuations, liabilities, equity, income, and expenses.

(ii) Your Articles, bylaws, minute books, and NMVC Company application.

(iii) All documents evidencing ownership of the NMVC Company including ownership ledgers, and ownership transfer registers.

(2) You must preserve for at least six years all supporting documentation (such as vouchers, bank statements, or canceled checks) for the records listed in paragraph (b)(1) of this section.

(3) After final disposition of any item in your Portfolio, you must preserve for at least six years:

(i) Financing applications and Financing instruments.

(ii) All loan, participation, and escrow agreements.

(iii) Size status declarations (SBA Form 480).

(iv) Any capital stock certificates and warrants of the Portfolio Concern that you did not surrender or exercise.

(v) All other documents and supporting material relating to the Portfolio Concern, including correspondence.

(4) You may substitute a microfilm or computer-scanned or generated copy for the original of any record covered by this paragraph (c).

(d) *Additional requirement.* You must comply with the recordkeeping and record retention requirements set forth in Circular A–110 of the Office of Management and Budget. (OMB circulars are available from the addresses in 5 CFR 1310.3.)

§ 108.610 Required certifications for Loans and Investments.

For each of your Loans and Investments, you must have the documents listed in this section. You must keep these documents in your files and make them available to SBA upon request.

(a) SBA Form 480, the Size Status Declaration, executed both by you and by the concern you are financing. By executing this document, both parties certify that the concern is a Small Business. For securities purchased from an underwriter in a public offering, you may substitute a prospectus showing that the concern is a Small Business.

(b) SBA Form 652, a certification by the concern you are financing that it will not illegally discriminate (see part 112 of this chapter).

(c) A certification by the concern you are financing of the intended use of the proceeds. For securities purchased from an underwriter in a public offering, you may substitute a prospectus indicating the intended use of proceeds.

(d) For each Low-Income Investment, a certification by the concern you are financing as to the basis for its qualification as a Low-Income Enterprise.

§ 108.620 Requirements to obtain information from Portfolio Concerns.

All the information required by this section is subject to the requirements of § 108.600 and must be in English.

(a) *Information for initial Financing decision.* Before extending any Financing, you must require the applicant to submit such financial statements, plans of operation (including intended use of financing proceeds), cash flow analyses, projections, and such community economic development information about the company, as are necessary to support your investment decision. The information submitted must be consistent with the size and type of the business and the amount of the proposed Financing.

(b) *Updated financial and community economic development information.* (1) The terms of each Financing must require the Portfolio Concern to provide, at least annually, sufficient financial and community economic development information to enable you to perform the following required procedures:

(i) Evaluate the financial condition of the Portfolio Concern for the purpose of valuing your investment;

(ii) Determine the continued eligibility of the Portfolio Concern;

(iii) Verify the use of Financing proceeds; and

(iv) Evaluate the community economic development impact of the Financing.

(2) The president, chief executive officer, treasurer, chief financial officer, general partner, or proprietor of the Portfolio Concern must certify the information submitted to you.

(3) For financial and valuation purposes, you may accept a complete copy of the Federal income tax return filed by the Portfolio Concern (or its proprietor) in lieu of financial statements, but only if appropriate for the size and type of the business involved.

(4) The requirements in this paragraph (b) do not apply when you acquire securities from an underwriter in a public offering (see § 108.825). In that case, you must keep copies of all reports furnished by the Portfolio Concern to the holders of its securities.

(c) *Information required for examination purposes.* You must obtain any information requested by SBA's examiners for the purpose of verifying the certifications made by a Portfolio Concern under § 108.610. In this regard, your Financing documents must contain provisions requiring the Portfolio Concern to give you and/or SBA's examiners access to its books and records for such purpose.

Reporting Requirements for NMVC Companies

§ 108.630 Requirement for NMVC companies to file financial statements and supplementary information with SBA (SBA Form 468).

(a) *Annual filing of Form 468.* For each fiscal year, you must submit to SBA financial statements and supplementary information prepared on SBA Form 468. You must file Form 468 on or before the last day of the third month following the end of your fiscal year, except for the information required under paragraphs (e) and (f) of this section, which must be filed on or before the last day of the fifth month following the end of your fiscal year.

(1) *Audit of Form 468.* An independent public accountant acceptable to SBA must audit the annual Form 468.

(2) *Insurance requirement for public accountant.* Unless SBA approves otherwise, your independent public accountant must carry at least $1,000,000 of Errors and Omissions insurance, or be self-insured and have a net worth of at least $1,000,000.

(b) *Interim filings of Form 468.* When requested by SBA, you must file interim reports on Form 468. SBA may require you to file the entire form or only certain statements and schedules. You must file such reports on or before the last day of the month following the end of the reporting period. When you submit a request for a draw under an SBA Leverage commitment, you must

also comply with any applicable filing requirements set forth in § 108.1220.

(c) *Standards for preparation of Form 468.* You must prepare SBA Form 468 in accordance with SBA's Accounting Standards and Financial Reporting Requirements for Small Business Investment Companies, which you may obtain from SBA.

(d) *Where to file Form 468.* Submit all filings of Form 468 to the Office of New Markets Venture Capital in the Investment Division of SBA.

(e) *Reporting of social, economic, or community development impact information on Form 468.* Your annual filing of SBA Form 468 must include an assessment of the social, economic, or community development impact of each Financing. This assessment must specify the fulltime equivalent jobs created, the impact of the Financing on the revenues and profits of the business and on taxes paid by the business and its employees, and a listing of the number and percentage of employees who reside in LI Areas.

(f) *Reporting of community development information.* For each Financing of a Low-Income Enterprise, your Form 468 must include an assessment of such Financing with respect to:

(1) The social, economic or community development benefits achieved as a result of the Financing;

(2) How and to what extent such benefits fulfilled the goals of your comprehensive business plan and Participation Agreement;

(3) Whether you consider the Financing or the results of the Financing to have fulfilled the objectives of the NMVC program; and

(4) Whether, and if so, how you achieved accountability to the residents of the LI Area in connection with that Financing.

§ 108.640 Requirement to file portfolio financing reports (SBA Form 1031).

For each Financing you make (excluding guarantees), you must submit a Portfolio Financing Report on SBA Form 1031 within 30 days of the closing date.

§ 108.650 Requirement to report portfolio valuations to SBA.

You must determine the value of your Loans and Investments in accordance with § 108.503. You must report such valuations to SBA within 90 days of the end of the fiscal year in the case of annual valuations, and within 30 days following the close of other reporting periods. You must report material adverse changes in valuations at least quarterly, within thirty days following the close of the quarter.

§ 108.660 Other items required to be filed by NMVC Company with SBA.

(a) *Reports to owners.* You must give SBA a copy of any report you furnish to your investors, including any prospectus, letter, or other publication concerning your financial operations or those of any Portfolio Concern.

(b) *Documents filed with SEC.* You must give SBA a copy of any report, application or document you file with the Securities and Exchange Commission.

(c) *Litigation reports.* When you become a party to litigation or other proceedings, you must give SBA a report within 30 days that describes the proceedings and identifies the other parties involved and your relationship to them.

(1) The proceedings covered by this paragraph (c) include any action by you, or by your security holder(s) in a personal or derivative capacity, against an officer, director, Investment Adviser or other Associate of yours for alleged breach of official duty.

(2) SBA may require you to submit copies of the pleadings and other documents SBA may specify.

(3) Where proceedings have been terminated by settlement or final judgment, you must promptly advise SBA of the terms.

(4) This paragraph (c) does not apply to collection actions or proceedings to enforce your ordinary creditors' rights.

(d) *Notification of criminal charges.* If any officer, director, or general partner of the NMVC Company, or any other person who was required by SBA to complete a personal history statement, is charged with or convicted of any

criminal offense other than a misdemeanor involving a minor motor vehicle violation, you must report the incident to SBA within 5 calendar days. Such report must fully describe the facts that pertain to the incident.

(e) *Reports concerning Operational Assistance grant funds.* You must comply with all reporting requirements set forth in Circular A–110 of the Office of Management and Budget and any grant award document executed between you and SBA.

(f) *Other reports.* You must file any other reports SBA may require in writing.

§ 108.680 Reporting changes in NMVC Company not subject to prior SBA approval.

(a) *Changes to be reported for post-approval.* This section applies to any changes in your Articles, ownership, capitalization, management, operating area, or investment policies that do not require SBA's prior approval. You must report such changes to SBA within 30 days for post approval.

(b) *Approval by SBA.* You may consider any change submitted under this section to be approved unless SBA notifies you to the contrary within 90 days after receiving it. SBA's approval is contingent upon your full disclosure of all relevant facts and is subject to any conditions SBA may prescribe.

EXAMINATIONS OF NMVC COMPANIES BY SBA FOR REGULATORY COMPLIANCE

§ 108.690 Examinations.

All NMVC companies must submit to annual examinations by or at the direction of SBA for the purpose of evaluating regulatory compliance.

§ 108.691 Responsibilities of NMVC Company during examination.

You must make all books, records and other pertinent documents and materials available for the examination, including any information required by the examiner under § 108.620(c). In addition, the agreement between you and the independent public accountant performing your audit must provide that any information in the accountant's working papers be made available to SBA upon request.

§ 108.692 Examination fees.

(a) *General.* SBA will assess fees for examinations in accordance with this section. Unless SBA determines otherwise on a case by case basis, SBA will not assess fees for special examinations to obtain specific information.

(b) *Base fee.* A base fee of $3,500 will be assessed, subject to adjustment in accordance with paragraph (c) of this section.

(c) *Adjustments to base fee.* The base fee will be decreased based on the following criteria:

(1) If you have no outstanding regulatory violations at the time of the commencement of the examination and SBA did not identify any violations as a result of the most recent prior examination, you will receive a 15% discount on your base fee; and

(2) If you were fully responsive to the letter of notification of examination (that is, you provided all requested documents and information within the time period stipulated in the notification letter in a complete and accurate manner, and you prepared and had available all information requested by the examiner for on-site review), you will receive a 10% discount on your base fee.

(d) *Delay fee.* If, in the judgment of SBA, the time required to complete your examination is delayed due to your lack of cooperation or the condition of your records, SBA may assess an additional fee of up to $500 per day.

Subpart I—Financing of Small Businesses by NMVC Companies

DETERMINING THE ELIGIBILITY OF A SMALL BUSINESS FOR NMVC FINANCING

§ 108.700 Compliance with size standards in part 121 of this chapter as a condition of Assistance.

You are permitted to provide financial assistance and management services only to a Small Business. To determine whether an applicant meets the size standards for a Small Business, you may use either the financial size standards in § 121.301(c)(1) of this chapter or the industry standard covering the industry in which the applicant is primarily engaged, as set forth in § 121.301(c)(2) of this chapter.

§ 108.710 Requirement to finance Low-Income Enterprises.

(a) *Low-Income Enterprise Financings.* At the close of each of your fiscal years—

(1) At least 80 percent of your Portfolio Concerns must be Low-Income Enterprises in which you have an Equity Capital Investment; and

(2) For all Financings you have extended, you must have invested at least 80 percent (in total dollars) in Equity Capital Investments in Low-Income Enterprises.

(b) *Non-compliance with this section.* If you have not reached the percentages required in paragraph (a) of this section at the end of any fiscal year, then you must be in compliance by the end of the following fiscal year. However, you will not be eligible for additional Leverage until such time as you reach the required percentages (see § 108.1120).

§ 108.720 Small Businesses that may be ineligible for financing.

(a) *Relenders or reinvestors.* You are not permitted to finance any business that is a relender or reinvestor. Relenders or reinvestors are businesses whose primary business activity involves, directly or indirectly, providing funds to others, purchasing debt obligations, factoring, or long-term leasing of equipment with no provision for maintenance or repair.

(b) *Passive Businesses.* You are not permitted to finance a passive business.

(1) *Definition.* A business is passive if:

(i) It is not engaged in a regular and continuous business operation (for purposes of this paragraph (b), the mere receipt of payments such as dividends, rents, lease payments, or royalties is not considered a regular and continuous business operation); or

(ii) Its employees are not carrying on the majority of day to day operations, and the company does not provide effective control and supervision, on a day to day basis, over persons employed under contract; or

(iii) It passes through substantially all of the proceeds of the Financing to another entity.

(2) *Exception for pass-through of proceeds to subsidiary.* With the prior written approval of SBA, you may finance a passive business if it is a Small Business and it passes substantially all the proceeds through to one or more subsidiary companies, each of which is an eligible Small Business that is not passive. For the purpose of this paragraph (b) (2), ''subsidiary company'' means a company in which at least 50 percent of the outstanding voting securities are owned by the Financed passive business.

(3) *Exception for certain Partnership NMVC companies.* With the prior written approval of SBA, if you are a Partnership NMVC Company, you may form one or more wholly owned corporations in accordance with this paragraph (b) (3). The sole purpose of such corporation(s) must be to provide Financing to one or more eligible, unincorporated Small Businesses. You may form such corporation(s) only if a direct Financing to such Small Businesses would cause any of your investors to incur unrelated business taxable income under section 511 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 511). Your investment of funds in such corporation(s) will not constitute a violation of § 108.730(a).

(c) *Real Estate Businesses.* (1) You are not permitted to finance:

(i) Any business classified under subsector 5311 (Lessors of Real Estate) of the NAICS Manual; or

(ii) Any business listed under subsector 5312 (Offices of Real Estate Agents and Brokers) unless at least 80 percent of the revenue is derived from non-Affiliate sources.

(2) You are not permitted to finance a business, regardless of NAICS classification, if the Financing is to be used to acquire or refinance real property, unless the Small Business:

(i) Is acquiring an existing property and will use at least 51 percent of the usable square footage for an eligible business purpose; or

(ii) Is building or renovating a building and will use at least 67 percent of the usable square footage for an eligible business purpose; or

(iii) Occupies the subject property and uses at least 67 percent of the usable square footage for an eligible business purpose.

(d) *Project Financing.* You are not permitted to finance a business if:

(1) The assets of the business are to be reduced or consumed, generally without replacement, as the life of the business progresses, and the nature of the business requires that a stream of cash payments be made to the business's financing sources, on a basis associated with the continuing sale of assets. Examples include real estate development projects and oil and gas wells; or

(2) The primary purpose of the Financing is to fund production of a single item or defined limited number of items, generally over a defined production period, and such production will constitute the majority of the activities of the Small Business. Examples include motion pictures and electric generating plants.

(e) *Farm land purchases.* You are not permitted to finance the acquisition of farmland. Farmland means land, which is or is intended to be used for agricultural or forestry purposes, such as the production of food, fiber, or wood, or is so taxed or zoned.

(f) *Public interest.* You are not permitted to finance any business if the proceeds are to be used for purposes contrary to the public interest, including but not limited to activities which are in violation of law, or inconsistent with free competitive enterprise.

(g) *Foreign investment*—(1) *General rule.* You are not permitted to finance a business if:

(i) The funds will be used substantially for a foreign operation; or

(ii) At the time of the Financing or within one year thereafter, more than 49 percent of the employees or tangible assets of the Small Business are located outside the United States (unless you can show, to SBA's satisfaction, that the Financing was used for a specific domestic purpose).

(2) *Exception.* This paragraph (g) does not prohibit a Financing used to acquire foreign materials and equipment or foreign property rights for use or sale in the United States.

(h) *Financing NMVC companies or SBICs.* You are not permitted to provide funds, directly or indirectly, that the Small Business will use:

(1) To purchase stock in or provide capital to a NMVC Company or SBIC; or

(2) To repay an indebtedness incurred for the purpose of investing in a NMVC Company or SBIC.

§ 108.730 Financings which constitute conflicts of interest.

(a) *General rule.* You must not self-deal to the prejudice of a Small Business, the NMVC Company, its shareholders or partners, or SBA. Unless you obtain a prior written exemption from SBA for special instances in which a Financing may further the purposes of the Act despite presenting a conflict of interest, you must not directly or indirectly:

(1) Provide Financing to any of your Associates, except for a Small Business that satisfies all of the following conditions:

(i) Your Associate relationship with the Small Business is described by paragraph (8) or (9) of the definition of Associate in § 108.50;

(ii) No Person triggering the Associate relationship identified in paragraph (a)(1)(i) of this section is a Close Relative or Secondary Relative of any Person described in paragraph (1), (2), (4), or (5) of the definition of Associate in § 108.50; and

(iii) No single Associate of yours has either a voting interest or an economic interest in the Small Business exceeding 20 percent, and no two or more of your Associates have either a voting interest or an economic interest exceeding 33 percent. Economic interests shall be computed on a fully diluted basis, and both voting and economic interests shall exclude any interest owned through the NMVC Company.

(2) Provide Financing to an Associate of another NMVC Company if one of your Associates has received or will receive any direct or indirect Financing or a Commitment from that NMVC Company or a third NMVC Company (including Financing or Commitments received under any understanding, agreement, or cross dealing, reciprocal or circular arrangement).

(3) Borrow money from:

(i) A Small Business Financed by you;

(ii) An officer, director, or owner of at least a 10 percent equity interest in such business; or

(iii) A Close Relative of any such officer, director, or equity owner.

(4) Provide Financing to a Small Business to discharge an obligation to your Associate or free other funds to pay such obligation. This paragraph (a)(4) does not apply if the obligation is to an Associate Lending Institution and is a line of credit or other obligation incurred in the normal course of business.

(b) *Rules applicable to Associates.* Without SBA' s prior written approval, your Associates must not, directly or indirectly:

(1) Borrow money from any Person described in paragraph (a)(3) of this section.

(2) Receive from a Small Business any compensation in connection with Assistance you provide (except as permitted under §108.825(c)), or anything of value for procuring, attempting to procure, or influencing your action with respect to such Assistance.

(c) *Applicability of other laws.* You are also bound by any restrictions in Federal or State laws governing conflicts of interest and fiduciary obligations.

(d) *Financings with Associates*—(1) *Financings with Associates requiring prior approval.* Without SBA's prior written approval, you may not Finance any business in which your Associate has either a voting equity interest or total equity interests (including potential interests) of at least five percent, except as otherwise permitted under paragraph (a)(1) of this section.

(2) *Other Financings with Associates.* If you and an Associate provide Financing to the same Small Business, either at the same time or at different times, you must be able to demonstrate to SBA's satisfaction that the terms and conditions are (or were) fair and equitable to you, taking into account any differences in the timing of each party's financing transactions.

(3) *Exceptions to paragraphs (d)(1) and (d)(2) of this section.* A Financing that falls into one of the following categories is exempt from the prior approval requirement in paragraph (d)(1) of this section or is presumed to be fair and equitable to you for the purposes of paragraph (d)(2) of this section, as appropriate:

(i) Your Associate is a Lending Institution that is providing financing under a credit facility in order to meet the operational needs of the Small Business, and the terms of such financing are usual and customary.

(ii) Your Associate invests in the Small Business on the same terms and conditions and at the same time as you.

(iii) Both you and your Associate are NMVC companies.

(e) *Use of Associates to manage Portfolio Concerns.* To protect your investment, you may designate an Associate to serve as an officer, director, or other participant in the management of a Small Business. You must identify any such Associate in your records available for SBA's review under §108.600. Without SBA's prior written approval, the Associate must not:

(1) Have any other direct or indirect financial interest in the Portfolio Concern that exceeds, or has the potential to exceed, the percentages of the Portfolio Concern's equity set forth in paragraph (a)(1) of this section.

(2) Receive any income or anything of value from the Portfolio Concern unless it is for your benefit, with the exception of director's fees, expenses, and distributions based upon the Associate's ownership interest in the Concern.

(f) *1940 and 1980 Act Companies: SEC exemptions.* If you are a 1940 or 1980 Act Company and you receive an exemption from the Securities and Exchange Commission for a transaction described in this section, you need not obtain SBA's approval of the transaction. However, you must promptly notify SBA of the transaction.

(g) *Restriction on options obtained by NMVC Company's management and employees.* Your employees, officers, directors, managing members or general partners, or the general partners of the management company that is providing services to you or to your general partner, may obtain options in a Financed Small Business only if:

(1) They participate in the Financing on a *pari passu* basis with you; or

(2) SBA gives its prior written approval; or

(3) The options received are compensation for service as a member of

the board of directors of the Small Business, and such compensation does not exceed that paid to other outside directors. In the absence of such directors, fees must be reasonable when compared with amounts paid to outside directors of similar companies.

§ 108.740 Portfolio diversification ("overline" limitation).

(a) Without SBA's prior written approval, you may provide Financing or a Commitment to a Small Business only if the resulting amount of your aggregate outstanding Financings and Commitments to such Small Business and its Affiliates does not exceed 10 percent of the sum of:

(1) Your Regulatory Capital as of the date of the Financing or Commitment; plus

(2) The total amount of leverage projected in your participation agreement with SBA; plus

(3) Any permitted Distribution(s) you made during the five years preceding the date of the Financing or Commitment which reduced your Regulatory Capital.

(b) For the purposes of paragraph (a) of this section, you must measure each outstanding Financing at its current cost plus any amount of the Financing that was previously written off.

[66 FR 28609, May 23, 2001, as amended at 76 FR 63545, Oct. 12, 2011]

§ 108.760 How a change in size or activity of a Portfolio Concern affects the NMVC Company and the Portfolio Concern.

(a) *Effect on NMVC Company of a change in size of a Portfolio Concern.* If a Portfolio Concern no longer qualifies as a Small Business you may keep your investment in the concern and:

(1) Subject to the overline limitations of § 108.740, you may provide additional Financing to the concern up to the time it makes a public offering of its securities.

(2) Even after the concern makes a public offering, you may exercise any stock options, warrants, or other rights to purchase Equity Securities which you acquired before the public offering, or fund Commitments you made before the public offering.

(b) *Effect of a change in business activity occurring within one year of NMVC Company's initial Financing*—(1) *Retention of Investment.* Unless you receive SBA's written approval, you may not keep your investment in a Portfolio Concern, small or otherwise, which becomes ineligible by reason of a change in its business activity within one year of your initial investment.

(2) *Request for SBA 's approval to retain investment.* If you request that SBA approve the retention of your investment, your request must include sufficient evidence to demonstrate that the change in business activity was caused by an unforeseen change in circumstances and was not contemplated at the time the Financing was made.

(3) *Additional Financing.* If SBA approves your request to retain an investment under paragraph (b)(2) of this section, you may provide additional Financing to the Portfolio Concern to the extent necessary to protect against the loss of the amount of your original investment, subject to the overline limitations of § 108.740.

(c) *Effect of a change in business activity occurring more than one year after the initial Financing.* If a Portfolio Concern becomes ineligible because of a change in business activity more than one year after your initial Financing you may:

(1) Retain your investment; and

(2) Provide additional Financing to the Portfolio Concern to the extent necessary to protect against the loss of the amount of your original investment, subject to the overline limitations of § 108.740.

STRUCTURING NMVC COMPANY'S FINANCING OF ELIGIBLE SMALL BUSINESSES

§ 108.800 Financings in the form of equity interests.

You may not, inadvertently or otherwise:

(a) Become a general partner in any unincorporated business; or

(b) Become jointly or severally liable for any obligations of an unincorporated business.

§ 108.820 Financings in the form of guarantees.

(a) *General rule.* At the request of a Small Business or where necessary to protect your existing investment, you may guarantee the monetary obligation of a Small Business to any non-Associate creditor.

(b) *Exception.* You may not issue a guaranty if:

(1) You would become subject to State regulation as an insurance, guaranty or surety business; or

(2) The amount of the guaranty plus any direct Financings to the Small Business exceed the overline limitations of § 108.740, except that a pledge of the Equity Securities of the issuer or a subordination of your lien or creditor position does not count toward your overline.

(c) *Pledge of NMVC Company's assets as guaranty.* For purposes of this section, a guaranty with recourse only to specific asset(s) you have pledged is equal to the fair market value of such asset(s) or the amount of the debt guaranteed, whichever is less.

§ 108.825 Purchasing securities from an underwriter or other third party.

(a) *Securities purchased through or from an underwriter.* You may purchase the securities of a Small Business through or from an underwriter if:

(1) You purchase such securities within 90 days of the date the public offering is first made;

(2) Your purchase price is no more than the original public offering price; and

(3) The amount paid by you for the securities (less ordinary and reasonable underwriting charges and commissions) has been, or will be, paid to the Small Business, and the underwriter certifies in writing that this requirement has been met.

(b) *Recordkeeping requirements.* You must keep records available for SBA's inspection which show the relevant details of the transaction, including, but not limited to, date, price, commissions, and the underwriter's certifications required under paragraphs (a)(3) and (c) of this section.

(c) *Underwriter's requirements.* The underwriter must certify whether it is your Associate. You may pay reasonable and customary commissions and expenses to an Associate underwriter for the portion of an offering that you purchase.

(d) *Securities purchased from another NMVC Company or from SBA.* You may purchase from, or exchange with, another NMVC Company, Portfolio securities (or any interest therein). Such purchase or exchange may only be made on a non-recourse basis. You may not have more than one-third of your total assets (valued at cost) invested in such securities. If you have previously sold Portfolio securities (or any interest therein) on a recourse basis, you shall include the amount for which you may be contingently liable in your overline computation.

(e) *Purchases of securities from other non-issuers.* You may purchase securities of a Small Business from a non-issuer not previously described in this section if such acquisition is a reasonably necessary part of the overall sound Financing of the Small Business.

LIMITATIONS ON DISPOSITION OF ASSETS

§ 108.885 Disposition of assets to NMVC Company's Associates.

Except with SBA's prior written approval, you are not permitted to dispose of assets (including assets acquired in liquidation) to any Associate. As a prerequisite to such approval, you must demonstrate that the proposed terms of disposal are at least as favorable to you as the terms obtainable elsewhere.

MANAGEMENT SERVICES AND FEES

§ 108.900 Fees for management services provided to a Small Business by a NMVC Company or its Associate.

(a) *General.* This section applies to management services that you or your Associate provide to a Small Business during the term of a Financing or prior to a Financing. It does not apply to management services that your Associate provides to a Small Business that you do not finance. It also does not apply to Operational Assistance that you or your Associate provide to a Smaller Enterprise that you have Financed or in which you expect to make

a Financing, for which neither you nor your Associate may charge the Smaller Enterprise.

(b) *SBA approval.* You must obtain SBA's prior written approval of any management services fees and other fees described in this section that you or your Associate charge.

(c) *Permitted management services fees.* You or your Associate may provide management services to a Small Business financed by you if:

(1) You or your Associate have entered into a written contract with the Small Business;

(2) The fees charged are for services actually performed;

(3) Services are provided on an hourly fee, project fee, or other reasonable basis;

(4) You can demonstrate to SBA, upon request, that the rate does not exceed the prevailing rate charged for comparable services by other organizations in the geographic area of the Small Business; and

(5) At least 50 percent of any management services fees paid to your Associate by a Small Business for management services provided by the Associate is allocated back to you for your benefit.

(d) *Fees for service as a board member.* You or your Associate may charge a Small Business Financed by you for services provided as members of the Small Business' board of directors. The fees must not exceed those paid to other outside board members. In the absence of such board members, fees must be reasonable when compared with amounts paid to outside directors of similar companies. Fees may be in the form of cash, warrants, or other payments. At least 50 percent of any such fees paid to your Associate by a Small Business for service by the Associate as a board member must be allocated back to you for your benefit.

(e) *Transaction fees.* (1) You or your Associate may charge reasonable transaction fees for work performed such as preparing a Small Business for a public offering, private offering, or sale of all or part of the business, and for assisting with the transaction. Fees may be in the form of cash, notes, stock, and/or options. At least 50 percent of any such fees paid to your Associate by a Small Business for transactions work done by the Associate must be allocated back to you for your benefit.

(2) Your Associate may charge market rate investment banking fees to a Small Business on that portion of a Financing that you do not provide.

(f) *Recordkeeping requirements.* You must keep a record of hours spent and amounts charged to the Small Business, including expenses charged.

[67 FR 68503, Nov. 12, 2002]

Subpart J—SBA Financial Assistance for NMVC Companies (Leverage)

GENERAL INFORMATION ABOUT OBTAINING LEVERAGE

§ 108.1100 Type of Leverage and application procedures.

(a) *Type of Leverage available.* You may apply for Leverage from SBA in the form of a guarantee of your Debentures.

(b) *Applying for Leverage.* The Leverage application process has two parts. You must first apply for SBA's conditional commitment to reserve a specific amount of Leverage for your future use. You may then apply to draw down Leverage against the commitment. See §§ 108.1200 through 108.1240.

(c) *Where to send your application.* Send all Leverage applications to SBA, Investment Division Office of New Markets Venture Capital, 409 Third Street, SW., Washington, DC 20416.

§ 108.1120 General eligibility requirement for Leverage.

To be eligible for Leverage, you must be in compliance with the Act, the regulations in this part, and your Participation Agreement.

§ 108.1130 Leverage fees payable by NMVC Company.

There is no fee for the issuance of Debentures by a NMVC Company.

§ 108.1140 NMVC Company's acceptance of SBA remedies under § 108.1810.

If you issue Leverage, you automatically agree to the terms and conditions in § 108.1810 as it exists at the time of

issuance. The effect of these terms and conditions is the same as if they were fully incorporated in the terms of your Leverage.

MAXIMUM AMOUNT OF LEVERAGE FOR WHICH A NMVC COMPANY IS ELIGIBLE

§ 108.1150 Maximum amount of Leverage for a NMVC Company.

The face amount of a NMVC Company's outstanding Debentures may not exceed 150 percent of its Leverageable Capital.

CONDITIONAL COMMITMENTS BY SBA TO RESERVE LEVERAGE FOR A NMVC COMPANY

§ 108.1200 SBA's Leverage commitment to a NMVC Company—application procedure, amount, and term.

(a) *General.* Under the provisions in §§ 108.1200 through 108.1240, you may apply for SBA's conditional commitment to reserve a specific amount and type of Leverage for your future use. You may then apply to draw down Leverage against the commitment.

(b) *Applying for a Leverage commitment.* SBA will notify you when it is accepting requests for Leverage commitments. Upon receipt of your request, SBA will send you a complete application package.

(c) *Limitations on the amount of a Leverage commitment.* The amount of a Leverage commitment must be a multiple of $5,000. SBA, in its discretion, may determine a minimum dollar amount for Leverage commitments. Any such minimum amounts will be published in Notices in the FEDERAL REGISTER from time to time.

(d) *Term of Leverage commitment.* SBA's Leverage commitment will automatically lapse on the expiration date stated in the commitment letter issued to you by SBA.

§ 108.1220 Requirement for NMVC Company to file financial statements at the time of request for a draw.

(a) If you submit a request for a draw against SBA's Leverage commitment more than 90 days since your submission of an annual Form 468 or a Form 468 (Short Form), you must:

(1) Give SBA a financial statement on Form 468 (Short Form); and

(2) File a statement of no material adverse change in your financial condition since your last filing of Form 468.

(b) You will not be eligible for a draw if you are not in compliance with this section.

§ 108.1230 Draw-downs by NMVC Company under SBA's Leverage commitment.

(a) *NMVC Company's authorization of SBA to guarantee securities.* By submitting a request for a draw against SBA's Leverage commitment, you authorize SBA, or any agent or trustee SBA designates, to guarantee your Debenture and to sell it with SBA's guarantee.

(b) *Limitations on amount of draw.* The amount of a draw must be a multiple of $5,000. SBA, in its discretion, may determine a minimum dollar amount for draws against SBA's Leverage commitments. Any such minimum amounts will be published in Notices in the FEDERAL REGISTER from time to time.

(c) *Effect of regulatory violations on NMVC Company's eligibility for draws—*(1) *General rule.* You are eligible to make a draw against SBA's Leverage commitment only if you are in compliance with all applicable provisions of the Act and SBA regulations (i.e., no unresolved statutory or regulatory violations) and your Participation Agreement.

(2) *Exception to general rule.* If you are not in compliance, you may still be eligible for draws if:

(i) SBA determines that your outstanding violations are of non-substantive provisions of the Act or regulations or your Participation Agreement and that you have not repeatedly violated any non-substantive provisions; or

(ii) You have agreed with SBA on a course of action to resolve your violations and such agreement does not prevent you from issuing Leverage.

(d) *Procedures for funding draws.* You may request a draw at any time during the term of the commitment. With each request, submit the following documentation:

(1) A statement certifying that there has been no material adverse change in your financial condition since your last

filing of SBA Form 468 (see also §108.1220 for SBA Form 468 filing requirements).

(2) If your request is submitted more than 30 days following the end of your fiscal year, but before you have submitted your annual filing of SBA Form 468 (Long Form) in accordance with §108.630(a), a preliminary unaudited annual financial statement on SBA Form 468 (Short Form).

(3) A statement certifying that to the best of your knowledge and belief, you are in compliance with all provisions of the Act and SBA regulations (i.e., no unresolved regulatory or statutory violations) and your Participation Agreement, or a statement listing any specific violations you are aware of. Either statement must be executed by one of the following:

(i) An officer of the NMVC Company;

(ii) An officer of a corporate general partner of the NMVC Company;

(iii) An individual who is authorized to act as or for a general partner of the NMVC Company; or

(iv) An individual who is authorized to act as or for a member-manager of the NMVC Company.

(4) A statement that the proceeds are needed to fund one or more particular Small Businesses or to provide liquidity for your operations. If required by SBA, the statement must include the name and address of each Small Business, and the amount and anticipated closing date of each proposed Financing.

(e) *Reporting requirements after drawing funds.* (1) Within 30 calendar days after the actual closing date of each Financing funded with the proceeds of your draw, you must file an SBA Form 1031 confirming the closing of the transaction.

(2) If SBA required you to provide information concerning a specific planned Financing under paragraph (d)(4) of this section, and such Financing has not closed within 60 calendar days after the anticipated closing date, you must give SBA a written explanation of the failure to close.

(3) If you do not comply with this paragraph (e), you will not be eligible for additional draws. SBA may also determine that you are not in compliance with the terms of your Leverage under §108.1810.

§108.1240 Funding of NMVC Company's draw request through sale to third-party.

(a) *NMVC Company's authorization of SBA to arrange sale of securities to third-party.* By submitting a request for a draw of Debenture Leverage, you authorize SBA, or any agent or trustee SBA designates, to enter into any agreements (and to bind you to such agreements) necessary to accomplish:

(1) The sale of your Debenture to a third-party at a rate approved by SBA; and

(2) The purchase of your security from the third-party and the pooling of your security with other securities with the same maturity date.

(b) *Sale of Debentures to a third-party.* If SBA arranges for the sale of your Debenture to a third-party, the sale price may be an amount discounted from the face amount of the Debenture.

FUNDING LEVERAGE BY USE OF SBA GUARANTEED TRUST CERTIFICATES (''TCS'')

§108.1600 SBA authority to issue and guarantee Trust Certificates.

(a) *Authorization.* Section 356 of the Act authorizes SBA to issue TCs and to guarantee the timely payment of the principal and interest thereon. Any guarantee by SBA of such TC is limited to the principal and interest due on the Debentures in any Trust or Pool backing such TC. The full faith and credit of the United States is pledged to the payment of all amounts due under the guarantee of any TC.

(b) *SBA authority to arrange public or private fundings of Leverage.* SBA in its discretion may arrange for public or private financing under its guarantee authority. Such financing arranged by SBA may be accomplished by the sale of individual Debentures, aggregations of Debentures, or Pools or Trusts of Debentures.

(c) *Pass-through provisions.* TCs shall provide for a pass-through to their holders of all amounts of principal and interest paid on the Debentures in the Pool or Trust against which they are issued.

(d) *Formation of a Pool or Trust holding Leverage Securities.* SBA shall approve the formation of each Pool or Trust. SBA may, in its discretion, establish the size of the Pools and their composition, the interest rate on the TCs issued against Trusts or Pools, fees, discounts, premiums and other charges made in connection with the Pools, Trusts, and TCs, and any other characteristics of a Pool or Trust it deems appropriate.

§ 108.1610 Effect of prepayment or early redemption of Leverage on a Trust Certificate.

(a) The rights, if any, of a NMVC Company to prepay any Debenture is established by the terms of such security, and no such right is created or denied by the regulations in this part.

(b) SBA's rights to purchase or prepay any Debenture without premium are established by the terms of the Guaranty Agreement relating to the Debenture.

(c) Any prepayment of a Debenture pursuant to the terms of the Guaranty Agreement relating to such security shall reduce the SBA guarantee of timely payment of principal and interest on a TC in proportion to the amount of principal that such prepaid Debenture represents in the Trust or Pool backing such TC.

(d) SBA shall be discharged from its guarantee obligation to the holder or holders of any TC, or any successor or transferee of such holder, to the extent of any such prepayment. whether or not such successor or transferee shall have notice of any such prepayment.

(e) Interest on prepaid Debentures shall accrue only through the date of prepayment.

(f) In the event that all Debentures constituting a Trust or Pool are prepaid, the TCs backed by such Trust or Pool shall be redeemed by payment of the unpaid principal and interest on the TCs; provided, however, that in the case of the prepayment of a Debenture pursuant to the provisions of the Guaranty Agreement relating to the Debenture, the CRA shall pass through pro rata to the holders of the TCs any such prepayments including any prepayment penalty paid by the obligor NMVC Company pursuant to the terms of the Debenture.

§ 108.1620 Functions of agents, including Central Registration Agent, Selling Agent and Fiscal Agent.

(a) *Agents.* SBA may appoint or cause to be appointed agent(s) to perform functions necessary to market and service Debentures or TCs pursuant to this part.

(1) *Selling Agent.* As a condition of guaranteeing a Debenture, SBA may cause each NMVC Company to appoint a Selling Agent to perform functions that include, but are not limited to:

(i) Selecting qualified entities to become pool or Trust assemblers (''Poolers'').

(ii) Receiving guaranteed Debentures as well as negotiating the terms and conditions of sales or periodic offerings of Debentures and/or TCs on behalf of NMVC companies.

(iii) Directing and coordinating periodic sales of Debentures and/or TCs.

(iv) Arranging for the production of Offering Circulars, certificates, and such other documents as may be required from time to time.

(2) *Fiscal Agent.* SBA shall appoint a Fiscal Agent to:

(i) Establish performance criteria for Poolers.

(ii) Monitor and evaluate the financial markets to determine those factors that will minimize or reduce the cost of funding Debentures.

(iii) Monitor the performance of the Selling Agent, Poolers, CRA, and the Trustee.

(iv) Perform such other functions as SBA, from time to time, may prescribe.

(3) *Central Registration Agent.* Pursuant to a contract entered into with SBA, the CRA, as SBA's agent, will do the following with respect to the Pools or Trust Certificates for the Debentures:

(i) Form an SBA-approved Pool or Trust;

(ii) Issue the TCs in the form prescribed by SBA;

(iii) Transfer the TCs upon the sale of original issue TCs in any secondary market transaction;

(iv) Receive payments from NMVC companies;

(v) Make periodic payments as scheduled or required by the terms of the TCs, and pay all amounts required to be paid upon prepayment of Debentures;

(vi) Hold, safeguard, and release all Debentures constituting Trusts or Pools upon instructions from SBA;

(vii) Remain custodian of such other documentation as SBA shall direct by written instructions;

(viii) Provide for the registration of all pooled Debentures, all Pools and Trusts, and all TCs;

(ix) Perform such other functions as SBA may deem necessary to implement the provisions of this section.

(b) *Functions.* Either SBA or an agent appointed by SBA may perform the function of locating purchasers, and negotiating and closing the sale of Debentures and TCs. Nothing in the regulations in this part shall be interpreted to prevent the CRA from acting as SBA's agent for this purpose.

§ 108.1630 SBA regulation of Brokers and Dealers and disclosure to purchasers of Leverage or Trust Certificates.

(a) *Brokers and Dealers.* Each broker, dealer, and Pool or Trust assembler approved by SBA pursuant to these regulations shall either be regulated by a Federal financial regulatory agency, or be a member of the National Association of Securities Dealers (NASD), and shall be in good standing in respect to compliance with the financial, ethical, and reporting requirements of such body. They also shall be in good standing with SBA as determined by the SBA Associate Administrator for Investment (see paragraph (c) of this section) and shall provide a fidelity bond or insurance in such amount as SBA may require.

(b) *Suspension and/or termination of Broker or Dealer.* SBA shall exclude from the sale and all other dealings in Debentures or TCs any broker or dealer:

(1) If such broker's or dealer's authority to engage in the securities business has been revoked or suspended by a supervisory agency. When such authority has been suspended, SBA will suspend such broker or dealer for the duration of such suspension by the supervisory agency.

(2) If such broker or dealer has been indicted or otherwise formally charged with a misdemeanor or felony bearing on its fitness, such broker or dealer may be suspended while the charge is pending. Upon conviction, participation may be terminated.

(3) If such broker or dealer has suffered an adverse final civil judgment holding that such broker or dealer has committed a breach of trust or violation of law or regulation protecting the integrity of business transactions or relationships, participation in the market for Debentures or TCs may be terminated.

(c) *Termination/suspension proceedings.* A broker's or dealer's participation in the market for Debentures or TCs will be conducted in accordance with part 134 of this chapter. SBA may, for any of the reasons stated in paragraphs (b)(1) through (b)(3) of this section, suspend the privilege of any broker or dealer to participate in this market. SBA shall give written notice at least ten (10) business days prior to the effective date of such suspension. Such notice shall inform the broker or dealer of the opportunity for a hearing pursuant to part 134 of this chapter.

§ 108.1640 SBA access to records of the CRA, Brokers, Dealers and Pool or Trust assemblers.

The CRA and any broker, dealer and Pool or Trust assembler operating under the regulations in this part shall make all books, records and related materials associated with Debentures and TCs available to SBA for review and copying purposes. Such access shall be at such party's primary place of business during normal business hours.

MISCELLANEOUS

§ 108.1700 Transfer by SBA of its interest in a NMVC Company's Leverage security.

Upon such conditions and for such consideration as it deems reasonable, SBA may sell, assign, transfer, or otherwise dispose of any Debenture held by or on behalf of SBA. Upon notice by SBA, a NMVC Company will make all payments of principal and interest as

shall be directed by SBA. A NMVC Company will be liable for all damage or loss which SBA may sustain by reason of such disposal, up to the amount of the NMVC Company's liability under such security, plus court costs and reasonable attorney's fees incurred by SBA.

§ 108.1710 SBA authority to collect or compromise its claims.

SBA may, upon such conditions and for such consideration as it deems reasonable, collect or compromise all claims relating to obligations held or guaranteed by SBA, and all legal or equitable rights accruing to SBA.

§ 108.1720 Characteristics of SBA's guarantee.

If SBA agrees to guarantee a NMVC Company's Debentures, such guarantee will be unconditional, irrespective of the validity, regularity or enforceability of the Debentures or any other circumstances that might constitute a legal or equitable discharge or defense of a guarantor. Pursuant to its guarantee, SBA will make timely payments of principal and interest on the Debentures.

Subpart K—NMVC Company's Noncompliance With Terms of Leverage

§ 108.1810 Events of default and SBA's remedies for NMVC Company's noncompliance with terms of Debentures.

(a) *Applicability of this section.* By issuing Debentures, you automatically agree to the terms, conditions and remedies in this section, as in effect at the time of issuance and as if fully set forth in the Debentures.

(b) *Automatic events of default.* The occurrence of one or more of the events in this paragraph (b) causes the remedies in paragraph (c) of this section to take effect immediately.

(1) *Insolvency.* You become equitably or legally insolvent.

(2) *Voluntary assignment.* You make a voluntary assignment for the benefit of creditors without SBA's prior written approval.

(3) *Bankruptcy.* You file a petition to begin any bankruptcy or reorganization proceeding, receivership, dissolution or other similar creditors' rights proceeding, or such action is initiated against you and is not dismissed within 60 days.

(c) *SBA remedies for automatic events of default.* Upon the occurrence of one or more of the events in paragraph (b) of this section:

(1) Without notice, presentation or demand, the entire indebtedness evidenced by your Debentures, including accrued interest, and any other amounts owed SBA with respect to your Debentures, is immediately due and payable; and

(2) You automatically consent to the appointment of SBA or its designee as your receiver under section 363(c) of the Act.

(d) *Events of default with notice.* For any occurrence (as determined by SBA) of one or more of the events in this paragraph (d), SBA may avail itself of one or more of the remedies in paragraph (e) of this section.

(1) *Fraud.* You commit a fraudulent act that causes detriment to SBA's position as a creditor or guarantor.

(2) *Fraudulent transfers.* You make any transfer or incur any obligation that is fraudulent under the terms of 11 U.S.C. 548.

(3) *Willful conflicts of interest.* You willfully violate § 108.730.

(4) *Willful non-compliance.* You willfully violate one or more of the substantive provisions of the Act or any substantive regulation promulgated under the Act or any substantive provision of your Participation Agreement.

(5) *Repeated Events of Default.* At any time after being notified by SBA of the occurrence of an event of default under paragraph (f) of this section, you engage in similar behavior that results in another occurrence of the same event of default.

(6) *Transfer of Control.* You willfully violate § 108.410, and as a result of such violation you undergo a transfer of Control.

(7) *Non-cooperation under paragraph (h) of this section.* You fail to take appropriate steps, satisfactory to SBA, to accomplish any action SBA may have required under paragraph (h) of this section.

(8) *Non-notification of Events of Default*. You fail to notify SBA as soon as you know or reasonably should have known that any event of default exists under this section.

(9) *Non-notification of defaults to others*. You fail to notify SBA in writing within ten days from the date of a declaration of an event of default or nonperformance under any note, debenture or indebtedness of yours, issued to or held by anyone other than SBA.

(e) *SBA remedies for events of default with notice*. Upon written notice to you of the occurrence (as determined by SBA) of one or more of the events in paragraph (d) of this section:

(1) SBA may declare the entire indebtedness evidenced by your Debentures, including accrued interest. and/or any other amounts owed SBA with respect to your Debentures, immediately due and payable; and

(2) SBA may avail itself of any remedy available under the Act, specifically including institution of proceedings for the appointment of SBA or its designee as your receiver under section 363 (c) of the Act.

(f) *Events of default with opportunity to cure*. For any occurrence (as determined by SBA) of one or more of the events in this paragraph (f), SBA may avail itself of one or more of the remedies in paragraph (g) of this section.

(1) *Excessive Management Expenses*. Without the prior written consent of SBA, you incur Management Expenses in excess of those permitted under §§ 108.510 and 108.520.

(2) *Improper Distributions*. You make any Distribution to your shareholders or partners, except with the prior written consent of SBA, other than:

(i) Distributions permitted under § 108.585; and

(ii) Payments from Retained Earnings Available for Distribution based on either the shareholders' or members' pro-rata interests or the provisions for profit distributions in your partnership agreement, as appropriate.

(3) *Failure to make payment*. Unless otherwise approved by SBA, you fail to make timely payment of any amount due under any security or obligation of yours that is issued to, held or guaranteed by SBA.

(4) *Failure to maintain Regulatory Capital*. You fail to maintain the minimum Regulatory Capital required under these regulations or, without the prior written consent of SBA, you reduce your Regulatory Capital except as permitted by § 108.585.

(5) *Capital Impairment*. You have a condition of Capital Impairment as determined under § 108.1830.

(6) *Cross-default*. An obligation of yours that is greater than $100,000 becomes due or payable (with or without notice) before its stated maturity date, for any reason including your failure to pay any amount when due. This provision does not apply if you pay the amount due within any applicable grace period or contest the payment of the obligation in good faith by appropriate proceedings.

(7) *Nonperformance*. You violate or fail to perform one or more of the terms and conditions of any security or obligation of yours that is issued to, held or guaranteed by SBA, or of any agreement (including your Participation Agreement) with or conditions imposed by SBA in its administration of the Act and the regulations promulgated under the Act.

(8) *Noncompliance*. Except as otherwise provided in paragraph (d) (5) of this section, SBA determines that you have violated one or more of the substantive provisions of the Act or any substantive regulation promulgated under the Act.

(9) *Failure to maintain diversity*. You fail to maintain diversity between management and ownership as required by § 108.150.

(g) *SBA remedies for events of default with opportunity to cure*. (1) Upon written notice to you of the occurrence (as determined by SBA) of one or more of the events of default in paragraph (f) of this section, and subject to the conditions in paragraph (g)(2) of this section:

(i) SBA may declare the entire indebtedness evidenced by your Debentures, including accrued interest, and/or any other amounts owed SBA with respect to your Debentures, immediately due and payable; and

(ii) SBA may avail itself of any remedy available under the Act, specifically including institution of proceedings for the appointment of SBA or

its designee as your receiver under section 363(c) of the Act.

(2) SBA may invoke the remedies in paragraph (g)(1) of this section only if:

(i) It has given you at least 15 days to cure the default(s); and

(ii) You fail to cure the default(s) to SBA's satisfaction within the allotted time.

(h) *Repeated non-substantive violations.* If you repeatedly fail to comply with one or more of the non-substantive provisions of the Act or any non-substantive regulation promulgated under the Act, SBA, after written notification to you and until you cure such condition to SBA's satisfaction, may deny you additional Leverage and/or require you to take such actions as SBA may determine to be appropriate under the circumstances.

(i) *Consent to removal of officers, directors, or general partners and/or appointment of receiver.* The Articles of each NMVC Company must include the following provisions as a condition to the purchase or guarantee by SBA of Leverage. Upon the occurrence of any of the events specified in paragraphs (d)(1) through (d)(6) or (f)(1) through (f)(3) of this section as determined by SBA, SBA shall have the right, and you consent to SBA's exercise of such right:

(1) With respect to a Corporate NMVC Company, upon written notice, to require you to replace, with individuals approved by SBA, one or more of your officers and/or such number of directors of your board of directors as is sufficient to constitute a majority of such board; or

(2) With respect to a Partnership NMVC Company or an LLC NMVC Company, upon written notice, to require you to remove the person(s) responsible for such occurrence and/or to remove the general partner or manager of the NMVC Company, which general partner or manager shall then be replaced in accordance with NMVC Company's Articles by a new general partner or manager approved by SBA; and/or

(3) With respect to a Corporate or Partnership or LLC NMVC Company, to obtain the appointment of SBA or its designee as your receiver under section 363(c) of the Act for the purpose of continuing your operations. The appointment of a receiver to liquidate a NMVC Company is not within such consent, but is governed instead by the relevant provisions of the Act.

COMPUTATION OF NMVC COMPANY'S CAPITAL IMPAIRMENT

§ 108.1830 NMVC Company's Capital Impairment definition and general requirements.

(a) *Significance of Capital Impairment condition.* If you have a condition of Capital Impairment, you are not in compliance with the terms of your Leverage. As a result, SBA has the right to impose the applicable remedies for noncompliance in § 108.1810(g).

(b) *Definition of Capital Impairment condition.* You have a condition of Capital Impairment if your Capital Impairment Percentage, as computed in § 108.1840, exceeds 70 percent.

(c) *Quarterly computation requirement and procedure.* You must determine whether you have a condition of Capital Impairment as of the end of each fiscal quarter. You must notify SBA promptly if you are capitally impaired.

(d) *SBA's right to determine NMVC Company's Capital Impairment condition.* SBA may make its own determination of your Capital Impairment condition at any time.

§ 108.1840 Computation of NMVC Company's Capital Impairment Percentage.

(a) *General.* This section contains the procedures you must use to determine your Capital Impairment Percentage. You must compare your Capital Impairment Percentage to the maximum permitted under § 108.1830(b) to determine whether you have a condition of Capital Impairment.

(b) *Preliminary impairment test.* If you satisfy the preliminary impairment test, your Capital Impairment Percentage is zero and you do not have to perform any more procedures in this section. Otherwise, you must continue with paragraph (c) of this section. You satisfy the test if the following amounts are both zero or greater:

(1) The sum of Undistributed Net Realized Earnings, as reported on SBA Form 468, and Includible Non-Cash Gains.

(2) Unrealized Gain (Loss) on Securities Held.

(c) *How to compute your Capital Impairment Percentage.* (1) If you have an Unrealized Gain on Securities Held, compute your Adjusted Unrealized Gain using paragraph (d) of this section. If you have an Unrealized Loss on Securities Held, continue with paragraph (c)(2) of this section.

(2) Add together your Undistributed Net Realized Earnings, your Includible Non-cash Gains, and either your Unrealized Loss on Securities Held or your Adjusted Unrealized Gain.

(3) If the sum in paragraph (c)(2) of this section is zero or greater, your Capital Impairment Percentage is zero.

(4) If the sum in paragraph (c)(2) of this section is less than zero, drop the negative sign, divide by your Regulatory Capital (excluding Treasury Stock), and multiply by 100. The result is your Capital Impairment Percentage.

(d) *How to compute your Adjusted Unrealized Gain.* (1) Subtract Unrealized Depreciation from Unrealized Appreciation. This is your ''Net Appreciation''.

(2) Determine your Unrealized Appreciation on Publicly Traded and Marketable securities. This is your ''Class I Appreciation''.

(3) Determine your Unrealized Appreciation on securities that are not Publicly Traded and Marketable and meet the following criteria, which must be substantiated to the satisfaction of SBA (this is your ''Class 2 Appreciation''):

(i) The Small Business that issued the security received a significant subsequent equity financing by an investor whose objectives were not primarily strategic and at a price that conclusively supports the Unrealized Appreciation;

(ii) Such financing represents a substantial investment in the form of an arm's length transaction by a sophisticated new investor in the issuer's securities; and

(iii) Such financing occurred within 24 months of the date of the Capital Impairment computation, or the Small Business' pre-tax cash flow from operations for its most recent fiscal year was at least 10 percent of the Small Business' average contributed capital for such fiscal year.

(4) Perform the appropriate computation from the table in §107.1840(d)(4) of this chapter.

(5) Reduce the gain computed in paragraph (d) (4) of this section by your estimate of related future income tax expense. Subject to any adjustment required by paragraph (d)(6) of this section, the result is your Adjusted Unrealized Gain for use in paragraph (c)(2) of this section.

(6) If any securities that are the source of either Class 1 or Class 2 Appreciation are pledged or encumbered in any way, you must reduce the Adjusted Unrealized Gain computed in paragraph (d)(5) of this section by the amount of the related borrowing or other obligation, up to the amount of the Unrealized Appreciation on the securities.

Subpart L—Ending Operations as a NMVC Company

§ 108.1900 Termination of participation as a NMVC Company.

You may not terminate your participation as a NMVC Company without SBA's prior written approval. Your request for approval must be accompanied by an offer of immediate repayment of all of your outstanding Leverage (including any prepayment penalties thereon), or by a plan satisfactory to SBA for the orderly liquidation of the NMVC Company.

Subpart M—Miscellaneous

§ 108.1910 Non-waiver of SBA's rights or terms of Leverage security.

SBA's failure to exercise or delay in exercising any right or remedy under the Act or the regulations in this part does not constitute a waiver of such right or remedy. SBA's failure to require you to perform any term or provision of your Leverage does not affect SBA's right to enforce such term or provision. Similarly, SBA's waiver of, or failure to enforce, any term or provision of your Leverage or of any event or condition set forth in §108.1810 does not constitute a waiver of any succeeding breach of such term or provision or condition.

§ 108.1920 NMVC Company's application for exemption from a regulation in this part 108.

(a) *General.* You may file an application in writing with SBA to have a proposed action exempted from any procedural or substantive requirement, restriction, or prohibition to which it is subject under this part, unless the provision is mandated by the Act. SBA may grant an exemption for such applicant, conditionally or unconditionally, provided the exemption would not be contrary to the purposes of the Act.

(b) *Contents of application.* Your application must be accompanied by supporting evidence that demonstrates to SBA's satisfaction that:

(1) The proposed action is fair and equitable; and

(2) The exemption requested is reasonably calculated to advance the best interests of the NMVC program in a manner consistent with the policy objectives of the Act and the regulations in this part.

§ 108.1930 Effect of changes in this part 108 on transactions previously consummated.

The legality of a transaction covered by the regulations in this part is governed by the regulations in this part in effect at the time the transaction was consummated, regardless of later changes. Nothing in this part bars SBA enforcement action with respect to any transaction consummated in violation of provisions applicable at the time, but no longer in effect.

§ 108.1940 Procedures for designation of additional Low-Income Geographic Areas

(a) *General.* On its own initiative or upon written request by a Person which addresses the relevant factor(s) set forth in paragraph (b) of this section, SBA may consider whether to designate additional census tracts (or equivalent county divisions) as LI Areas.

(b) *Criteria.* SBA will consider one or more of the following factors in determining whether to designate a particular census tract (or equivalent county division) as an additional LI Area:

(1) A substantial number of Low-Income Individuals reside in that census tract (or equivalent county division).

(2) As adequately supported by studies or other analyses or reliable data, that census tract (or equivalent county division) has a pattern of unmet needs for investment capital.

(3) As adequately supported by studies or other analyses or reliable data, that census tract (or equivalent county division) has indications of economic distress.

(c) *Procedure for designation.* (1) If SBA decides to consider the designation of an additional LI Area, SBA will publish in the FEDERAL REGISTER a notice that it is considering such designation. SBA will advise the public that it will consider any comments supporting or opposing the designation, submitted within a specified time period.

(2) In making a final decision on whether to designate a particular census tract (or equivalent county division) as an additional LI Area, SBA will consider evidence submitted by any requester, SBA's own research, any public comments submitted, and any other information deemed relevant by SBA.

(3) If SBA designates a particular census tract (or equivalent county division) as an additional LI Area, SBA will publish a notice in the FEDERAL REGISTER and, if appropriate, will amend this part to include the additional LI Area.

Subpart N—Requirements and Procedures for Operational Assistance Grants to NMVC Companies and SSBICs

§ 108.2000 Operational Assistance Grants to NMVC Companies and SSBICs.

(a) *NMVC Companies.* Regulations governing Operational Assistance grants to NMVC Companies may be found in subparts D and E of this part 108, and in §§ 108.2010 through 108.2040.

(b) *SSBICs.* Regulations governing Operational Assistance grants to SSBICs may be found in §§ 108.2001 through 108.2040.

[67 FR 68503, Nov. 12, 2002]

§ 108.2001 When and how SSBICs may apply for Operational Assistance grants.

(a) *Notice of Funds Availability (''NOFA'').* SBA will publish a NOFA in the FEDERAL REGISTER, advising SSBICs of the availability of funds for Operational Assistance grants to SSBICs. This NOFA will be the same NOFA described in § 108.300(a), or will be published simultaneously with that NOFA. An SSBIC may submit an application for an Operational Assistance grant only during the time period specified for such purpose in the NOFA.

(b) *Application form.* An SSBIC must apply for an Operational Assistance grant using the application packet provided by SBA. Upon receipt of an application, SBA may request clarifying or technical information on the materials submitted as part of the application.

[67 FR 68503, Nov. 12, 2002]

§ 108.2002 Eligibility of SSBICs to apply for Operational Assistance grants.

An SSBIC is eligible to apply for an Operational Assistance grant if:

(a) It intends to increase its Regulatory Capital, as in effect on December 21, 2000, and to make Low-Income Investments in the amount of such increase;

(b) It intends to raise binding commitments for contributions in cash or in-kind, and/or to purchase an annuity, in an amount not less than 30 percent of the intended increase in its Regulatory Capital described in paragraph (a) of this section; and

(c) It has a plan describing how it intends to use the requested grant funds to provide Operational Assistance to Smaller Enterprises in which it has made or expects to make Low-Income Investments after December 21, 2000.

[67 FR 68503, Nov. 12, 2002]

§ 108.2003 Grant issuance fee for SSBICs.

An SSBIC must pay to SBA a grant issuance fee of $5,000. An SSBIC must submit this fee in advance, at the time of application submission. If SBA does not award a grant to the SSBIC, SBA will refund this fee to the SSBIC.

[67 FR 68503, Nov. 12, 2002]

§ 108.2004 Contents of application submitted by SSBICs.

Each application submitted by an SSBIC for an Operational Assistance grant must contain the information specified in the application packet provided by SBA, including the following information:

(a) *Amounts.* An SSBIC must specify the amount of Regulatory Capital it intends to raise after December 21, 2000, and the amount of Operational Assistance grant funds it seeks from SBA, which must be at least 30 percent of its intended increase in its Regulatory Capital since December 21, 2000.

(b) *Plan.* An SSBIC must submit a plan addressing the specific items described in § 108.2005.

[67 FR 68503, Nov. 12, 2002]

§ 108.2005 Contents of plan submitted by SSBICs.

(a) *Plan for providing Operational Assistance.* The SSBIC must describe how it plans to use its grant funds to provide Operational Assistance to Smaller Enterprises in which it will make Low-Income Investments. Its plan must address the types of Operational Assistance it proposes to provide, and how it plans to provide the Operational Assistance through the use of licensed professionals, when necessary, either from its own staff or from outside entities.

(b) *Matching resources for Operational Assistance grant.* The SSBIC must include a detailed description of how it plans to obtain binding commitments for contributions in cash or in-kind, and/or to purchase an annuity, to match the funds requested from SBA for the SSBIC's Operational Assistance grant. If it proposes to obtain commitments for cash and in-kind contributions, it also must estimate the ratio of cash to in-kind contributions (in no event may in-kind contributions exceed 50 percent of the total contributions). The SSBIC must discuss its potential sources of matching resources, the estimated timing on raising such match, and the extent of the expressions of interest to commit such match to the SSBIC.

(c) *Identification of LI Areas.* The SSBIC must identify the specific LI

Areas in which it intends to make Low-Income Investments and provide Operational Assistance under the NMVC program.

(d) *Projected allocation of investments among identified LI Areas.* The SSBIC must describe the amount of Low-Income Investments it intends to make in each of the identified LI Areas.

(e) *Track record of management team in obtaining public policy results through investments.* The SSBIC must provide information concerning the past track record of the SSBIC in making investments that have had a demonstrable impact on the socially or economically disadvantaged businesses targeted by the SSBIC program (for example, new businesses created, jobs created, or wealth created). Such information might include case studies or examples of the SSBIC's successful Financings.

(f) *Market analysis.* The SSBIC must provide an analysis of the LI Areas in which it intends to makes its Low-Income Investments and provide its Operational Assistance to Smaller Enterprises, demonstrating that the SSBIC understands the market and the unmet capital needs in such areas and how its activities will meet these unmet capital needs through Low-Income Investments and have a positive economic impact on those areas. The analysis must include a description of the extent of the economic distress in the identified LI Areas. The SSBIC also must analyze the extent of the demand in such areas for Low-Income Investments and any factors or trends that may affect the SSBIC's ability to make effective Low-Income Investments.

(g) *Regulatory Capital.* The SSBIC must include a detailed description of how it plans to raise its Regulatory Capital. The SSBIC must discuss its potential sources of Regulatory Capital, the estimated timing on raising such funds, and the extent of the expressions of interest to commit such funds to the SSBIC.

(h) *Projected impact.* The SSBIC must describe the criteria and economic measurements to be used to evaluate whether and to what extent it has met the objectives of the NMVC program. It must include:

(1) An estimate of the social, economic, and community development benefits to be created within identified LI Areas over the next five years or more as a result of its activities;

(2) A description of the criteria to be used to measure the benefits created as a result of its activities; and

(3) A discussion about the amount of such benefits created that it will consider to constitute successfully meeting the objectives of the NMVC program.

[67 FR 68503, Nov. 12, 2002]

§ 108.2006 Evaluation and selection of SSBICs.

SBA will evaluate and select an SSBIC for an Operational Assistance grant award under the NMVC program solely at SBA's discretion, based on SBA's review of the SSBIC's application materials, interviews or site visits with the SSBIC (if any), and information in SBA's records relating to the SSBIC's regulatory compliance status and track record as an SSBIC. SBA's evaluation and selection process is intended to ensure that SSBIC requests are evaluated on a competitive basis and in a fair and consistent manner. SBA will evaluate and select SSBICs for an Operational Assistance grant award by considering the following criteria:

(a) The strength of the SSBIC's application, including the strength of its proposal to provide Operational Assistance to Smaller Enterprises in which it intends to invest;

(b) The SSBIC's regulatory compliance status and past track record in being able to accomplish program goals through its investment activity;

(c) The likelihood that and the time frame within which the SSBIC will be able to raise the Regulatory Capital it intends to raise and obtain the matching resources described in §108.2005(b) and (g);

(d) The need for Low-Income Investments in the LI Areas in which the SSBIC intends to invest;

(e) The SSBIC's demonstrated understanding of the markets in the LI Areas in which it intends to invest;

(f) The extent to which the activities proposed by the SSBIC will promote economic development and the creation of wealth and job opportunities in the LI Areas in which it intends to

invest and among individuals living in LI Areas;

(g) The likelihood that the SSBIC will fulfill the goals described in its application and meet the objectives of the NMVC program; and

(h) The strength of the SSBIC's application compared to applications submitted by other SSBICs and by Applicants intending to invest in the same or proximate LI Areas.

[67 FR 68503, Nov. 12, 2002]

§ 108.2007 Grant award to SSBICs.

An SSBIC selected for an Operational Assistance grant award will receive a grant award only if, by a date established by SBA, it increases its Regulatory Capital in the specific amount set forth in its application, pursuant to § 108.2004(a), and raises matching resources for the grant in the amount required by § 108.2030(d)(2).

[67 FR 68503, Nov. 12, 2002]

§ 108.2010 Restrictions on use of Operational Assistance grant funds.

(a) *Restrictions applicable only to SSBICs.* An SSBIC that receives an Operational Assistance grant must use both grant funds awarded by SBA and its matching resources only to provide Operational Assistance in connection with a Low-Income Investment made by the SSBIC with Regulatory Capital raised after December 21, 2000.

(b) *Restrictions applicable only to NMVC Companies.* A NMVC Company must use at least 80 percent of both grant funds awarded by SBA and its matching resources to provide Operational Assistance to Smaller Enterprises whose Principal Office at the time the Operational Assistance commences is located in an LI Area.

(c) *Restrictions applicable to NMVC Companies and SSBICs.* A NMVC Company or a SSBIC that receives an Operational Assistance grant must not use either grant funds awarded by SBA or its matching resources for ''general and administrative expense,'' as defined in the Federal Acquisition Regulations, ''Definitions of Words and Terms,'' 48 CFR 2.101.

[66 FR 28609, May 23, 2001; 66 FR 32894, June 19, 2001, as amended at 67 FR 68505, Nov. 12, 2002]

§ 108.2020 Amount of Operational Assistance grant.

(a) *Amount of grant to NMVC Company.* NMVC Companies are eligible for an Operational Assistance grant award equal to the amount of matching resources raised by the NMVC Company in accordance with §§ 108.380(a)(1)(i)(B) and 108.2030.

(b) *Amount of grant to SSBIC.* SSBICs are eligible for an Operational Assistance grant award equal to the amount of matching resources raised by the SSBIC in accordance with §§ 108.2007 and 108.2030.

(c) *Pro rata reductions.* In the event that the total amount of funds available to SBA for purposes of making Operational Assistance grant awards to NMVC Companies and SSBICs is not sufficient to award grants in the amounts described in paragraphs (a) and (b) of this section, SBA will make pro rata reductions in the amounts otherwise awarded to each such NMVC Company and SSBIC.

[66 FR 28609, May 23, 2001, as amended at 67 FR 68505, Nov. 12, 2002]

§ 108.2030 Matching requirements.

(a) *General.* All Operational Assistance grant funds SBA awards to an NMVC Company or a SSBIC must be matched on a dollar for dollar basis with funds or other resources raised by the NMVC Company or SSBIC.

(b) *Allowable sources.* (1) Any source other than SBA is an allowable source of matching resources for an Operational Assistance grant award.

(2) Neither a NMVC Company nor a SSBIC may use funds or other resources that it has used to satisfy a legal requirement for obtaining funds under any other Federal program, to satisfy the matching resources requirements described in this part.

(3) A portion of Private Capital may be designated as matching resources if the designated funds are used to purchase an annuity pursuant to paragraph (c)(2)(iv) of this section or are otherwise segregated in a manner acceptable to SBA.

(c) *Type and form of matching resources.* (1) Matching resources may come from cash contributions or in-

kind contributions. In-kind contributions cannot exceed 50 percent of the total amount of match raised by the NMVC Company or SSBIC.

(2) Matching resources may be in the form of:

(i) Cash;

(ii) In-kind contributions;

(iii) Binding commitments for cash or in-kind contributions that may be payable over a multiyear period acceptable to SBA (but not to exceed the term of the Operational Assistance grant from SBA and in no event more than 10 years); and/or

(iv) An annuity, purchased with funds other than Regulatory Capital, from an insurance company acceptable to SBA and that may be payable over a multiyear period acceptable to SBA (but not to exceed the term of the Operational Assistance grant from SBA and in no event more than 10 years).

(d) *Amount of matching resources*—(1) *NMVC Companies.* The amount of matching resources required of an NMVC Company is set forth in § 108.380(a)(1)(i)(B).

(2) *SSBICs.* The amount of matching resources required of an SSBIC is equal to the amount of Operational Assistance grant funds requested by the SSBIC, as set forth in its application pursuant to § 108.2004(a).

[66 FR 28609, May 23, 2001, as amended at 67 FR 68505, Nov. 12, 2002]

§ 108.2040 Reporting and recordkeeping requirements.

(a) *NMVC Companies.* Policies governing reporting, record retention, and recordkeeping requirements applicable to NMVC Companies may be found in subpart H of this part. NMVC Companies also must comply with all reporting, record retention, and recordkeeping requirements set forth in Circular A–110 of the Office of Management and Budget (for availability, see 5 CFR 1310.3) and any grant award document executed between SBA and the NMVC Company.

(b) *SSBICs.* An SSBIC receiving an Operational Assistance grant award must comply with all reporting, record retention and recordkeeping requirements set forth in Circular A–110 of the Office of Management and Budget and any grant award document executed between SBA and the SSBIC, as well as the reporting requirements in § 108.630(f) and the filing requirement in § 108.640.

[66 FR 28609, May 23, 2001, as amended at 67 FR 68505, Nov. 12, 2002]

PART 109—INTERMEDIARY LENDING PILOT PROGRAM

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

SOURCE: 76 FR 18015, Apr. 1, 2011, unless otherwise noted.

Subpart A—Introduction

§ 109.10 Description of the Intermediary Lending Pilot program.

The Small Business Intermediary Lending Pilot program (ILP program) provides direct loans to ILP Intermediaries to make loans of up to $200,000 to 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.

§ 109.20 Definitions.

Affiliate is defined in § 121.301(f) of this chapter.

Associate. (1) An Associate of an ILP Intermediary is:

(i) An officer, director, key employee, or holder of 20 percent or more of the value of the ILP Intermediary or its debt instruments, or an agent involved in the loan process;

(ii) Any entity in which one or more individuals referred to in paragraph (1)(i) of this definition or a Close Relative of any such individual owns or controls at least 20 percent;

(2) An Associate of an Eligible Small Business Concern is:

(i) An officer director, owner of more than 20 percent of the equity, or key employee of the Eligible Small Business Concern;

(ii) Any entity in which one or more individuals referred to in paragraphs (2)(i) of this definition owns or controls at least 20 percent; and

(iii) Any individual or entity in control of or controlled by the small business (except a Small Business Investment Company (SBIC) licensed by SBA).

(3) For the purposes of this definition, the time during which an Associate relationship exists commences six months before the following dates and continues as long as the ILP Note or the loan to the Eligible Small Business Concern is outstanding:

(i) For an ILP Intermediary, the date of the ILP Note;

(ii) For an Eligible Small Business Concern, the date of the loan application to the ILP Intermediary.

Close Relative is a spouse; a parent; a child or sibling, or the spouse of any such person.

Eligible Small Business Concern is a small business that meets the requirements of § 109.400.

ILP Intermediary means a private, nonprofit entity that has received an ILP Loan.

ILP Loan means a direct loan made by SBA to an ILP Intermediary under this program.

ILP Note means the instrument that represents the obligation of the ILP Intermediary to repay the ILP Loan to SBA.

ILP Program Activities Report means the quarterly report that identifies the use and management of ILP program funds.

ILP Program Requirements are requirements imposed upon an ILP Intermediary by statute, SBA regulations, any agreement executed between SBA and the ILP Intermediary, SBA SOPs, SBA procedural guidance, official SBA notices and forms applicable to the ILP program, any NOFA applicable to the ILP program, and the ILP Note and Loan Authorization, as such requirements are issued and revised by SBA from time to time.

ILP Relending Fund means a federally insured depository account established by the ILP Intermediary at a well-capitalized financial institution which includes, at a minimum, the ILP Loan proceeds and the principal portion of repayments from Eligible Small Business Concerns.

Intermediary Lending Program Electronic Reporting System (ILPERS) means the web-based, electronic reporting system used by the ILP Intermediary to report each loan made to Eligible Small Business Concerns, to provide aging information on each loan, and to update the outstanding principal balance of each loan until all loans are either paid in full or charged off.

Native American Tribal Government means the governing body of any Native American tribe, band, nation, or other organized group or community,

including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C.A. §1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Native Americans because of their status as Native Americans.

Portfolio Identification Report means the electronic report that collects identifying information on loans made to Eligible Small Business Concerns, including demographic information, use of proceeds, payment terms, and jobs created and retained.

Portfolio Status Report means the quarterly electronic report that summarizes the payment status and outstanding principal balances of an ILP Intermediary's loans to Eligible Small Business Concerns.

[76 FR 18015, Apr. 1, 2011, as amended at 81 FR 41428, June 27, 2016; 85 FR 75834, Nov. 27, 2020]

Subpart B—ILP Intermediary Application and Selection Process

§ 109.100 ILP Intermediary eligibility and continuing participation requirements.

(a) *Organization type:* An ILP Intermediary must be a private, nonprofit entity other than an intermediary participating in the SBA Microloan program as described in subpart G of Part 120. Eligible entities include:

(1) Private, nonprofit community development corporations;

(2) Consortiums of private, nonprofit organizations or nonprofit community development corporations; and

(3) Agencies of or nonprofit entities established by Native American tribal governments.

(b) *Prior experience:* An ILP Intermediary must have at least one year of successful experience making and servicing loans to startup, newly established, or growing small businesses.

(c) *Management and operations.* (1) An ILP Intermediary must have paid staff with loan making and servicing experience acceptable to SBA.

(2) An ILP Intermediary must have a continuing ability to evaluate, process, close, disburse, service and liquidate small business loans including, but not limited to:

(i) Holding sufficient permanent capital (as determined by SBA) to support lending activities under this program; and

(ii) Maintaining satisfactory SBA performance, as determined by SBA in its discretion.

(3) An ILP Intermediary must meet and maintain the ethical requirements of 13 CFR 120.140.

(4) An ILP Intermediary (and any Affiliates) that participates in other SBA programs must be in compliance with those program requirements.

(5) An ILP Intermediary must be in good standing with its Federal and/or State regulator, as applicable.

(6) An ILP Intermediary must have the ability to comply with the ILP Program Requirements, including reporting requirements, as such requirements are revised from time to time, and maintain compliance with ILP Program Requirements for as long as the ILP Intermediary participates in the ILP program.

§§ 109.200–109.220 [Reserved]

Subpart C—ILP Program Requirements

§ 109.300 General.

An ILP Intermediary must maintain compliance with all ILP Program Requirements until the ILP Intermediary has repaid its ILP Loan to SBA. With respect to its activities in the ILP program, the ILP Intermediary is subject to the requirements of §§120.140 (What ethical requirements apply to participants?), 120.197 (Notifying SBA's Office of Inspector General of suspected fraud), 120.412 (Other services Lenders may provide Borrowers), and 120.413 (Advertisement of relationship with SBA) of this chapter, in addition to the regulations specifically set forth in this Part. The ILP Intermediary and any contractor(s) it may have are independent contractors that are responsible for their own actions with respect to small business loans made under this program. SBA has no responsibility or liability for any claim by an Eligible Small Business Concern or other party for any injury as a result of

any wrongful action taken by the ILP Intermediary or an employee, agent or contractor of an ILP Intermediary.

§ 109.310 Terms of loans to ILP Intermediaries.

(a) *Disbursement.* An ILP Intermediary must be in compliance with ILP Program Requirements in order to draw down its ILP Loan funds. SBA may place restrictions on disbursement, including the amount disbursed to an ILP Intermediary at one time or conditions on subsequent disbursements.

(b) *Term.* An ILP Loan must be repaid within 20 years from the date of the ILP Note.

(c) *Interest rate.* The interest rate for an ILP Loan to an ILP Intermediary is fixed at one percent per annum.

(d) *Repayment.* Payments of principal and interest must be made on a quarterly basis, except SBA will defer the first payment on an ILP Loan for two years from the date of the first disbursement. Interest will accrue on all disbursed funds during the deferment period. Accrued interest will be added to the outstanding principal balance at the end of the deferment period and amortized over the remaining life of the loan. An ILP Intermediary may prepay an ILP Loan at any time without penalty.

(e) *Collateral.* SBA does not require the ILP Intermediary to provide any collateral for an ILP Loan.

(f) *Fees.* SBA does not charge an ILP Intermediary any fees for an ILP Loan.

§ 109.320 ILP Loan purposes.

(a) ILP Loan funds must only be used to provide direct loans to Eligible Small Business Concerns for working capital, real estate, or the acquisition of materials, supplies, furniture, fixtures, or equipment.

(b) ILP Loan funds must not be used for any other purpose, including maintenance of loan loss reserves or payment of administrative costs or expenses of the ILP Intermediary.

§ 109.330 ILP Relending Fund.

(a) *General.* The ILP Intermediary must establish and maintain an ILP Relending Fund for as long as it has an outstanding balance owed to SBA under this program. The ILP Relending Fund must be in an account separate and distinct from the ILP Intermediary's other assets and financial activities.

(b) *Contents of the ILP Relending Fund.* All ILP Loan proceeds disbursed from SBA to the ILP Intermediary must be deposited into the ILP Relending Fund. All payments received by the ILP Intermediary on loans made to Eligible Small Business Concerns must also be deposited into the ILP Relending Fund. The ILP Intermediary must not commingle funds from any other public programs (including other SBA programs) in this account.

(c) *Interest earned.* The ILP Intermediary is not required to retain the interest portion of payments received on loans made to Eligible Small Business Concerns in the ILP Relending Fund or to retain the interest earned on the ILP Relending Fund in the ILP Relending Fund.

(d) *Allowable uses of the ILP Relending Fund.* The ILP Intermediary must use the ILP Relending Fund to disburse loans made to Eligible Small Business Concerns under this program and to make payments to SBA on its ILP Loan; it may not use the ILP Relending Fund for any other purposes.

§ 109.340 Lending requirements.

(a) *Initial lending requirement.* The ILP Intermediary must commit 100% of its ILP Loan funds to Eligible Small Business Concerns within two years of the date of the ILP Note. The Associate Administrator for Capital Access (AA/CA) or designee may approve extensions to the initial lending requirement on a case-by-case basis.

(b) *Ongoing relending requirement.* After meeting the initial lending requirement, the ILP Intermediary must relend the funds in the ILP Relending Fund so that the total principal balance of loans outstanding to Eligible Small Business Concerns does not fall below 75% of the outstanding principal balance of the ILP Loan at any time while the ILP Loan is outstanding. Exceptions to this requirement will be considered by the AA/CA or designee on a case by case basis based on the particular facts and circumstances of the ILP Intermediary.

§ 109.350 Maintenance of loan loss reserve.

The ILP Intermediary must maintain a reasonable loan loss reserve appropriate for the quality of the ILP Intermediary's portfolio in a federally insured depository account established by the ILP Intermediary at a well-capitalized financial institution. The loan loss reserve must be in an account separate and distinct from the ILP Intermediary's other assets and financial activities. This reserve must be maintained at not less than 5% of the principal balance of all outstanding loans to Eligible Small Business Concerns made from the ILP Relending Fund. The AA/CA or designee may require the ILP Intermediary to maintain a larger loss reserve if the AA/CA determines that the ILP Intermediary's loss reserve level is potentially inadequate to protect SBA from loss. ILP Relending Fund proceeds must not be used to establish or maintain the loan loss reserve.

§ 109.360 Recordkeeping and reporting requirements.

(a) *Maintenance of records.* The ILP Intermediary must maintain at its principal business office accurate and current financial records, including books of accounts, and all documents and supporting materials relating to the ILP Intermediary's activities in the ILP program, including files on loans made to Eligible Small Business Concerns. Records may be preserved electronically if the original is available for retrieval within 15 calendar days.

(b) *ILP Intermediary reporting.* The ILP Intermediary must submit the following to SBA:

(1) *Portfolio Identification Reports.* All loans made by the ILP Intermediary to an Eligible Small Business Concern under this program must be entered into the Intermediary Lending Program Electronic Reporting System (ILPERS) within seven calendar days of closing the loan.

(2) *Quarterly reports.* By the 30th calendar day following the end of each calendar quarter, each ILP Intermediary must submit a Portfolio Status Report via ILPERS to update the payment status and outstanding principal balances of its loans to Eligible Small Business Concerns. Additionally, each ILP Intermediary must submit an ILP Program Activities Report with accompanying bank statements to demonstrate the use and management of ILP program funds.

(3) *Audited financial statements.* Within four months after the close of the ILP Intermediary's fiscal year, the ILP Intermediary must submit to SBA audited financial statements as prepared by an independent certified public accountant, except that ILP Intermediaries subject to OMB Circular A–133 must submit audits prepared in accordance with that circular. The AA/CA or designee may provide extensions to the filing deadline.

(4) *Reports of changes.* An ILP Intermediary must submit to SBA a summary of any changes in the ILP Intermediary's organization or financing (within 30 calendar days of the change), such as:

(i) Any change in its name, address or telephone number;

(ii) Any change in its charter, bylaws, or its officers or directors (to be accompanied by a statement of personal history on the form approved by SBA);

(iii) Any material change in capitalization or financial condition; and

(iv) Any change affecting the ILP Intermediary's eligibility to continue to participate in the ILP program.

(5) *Other reports.* Each ILP Intermediary must submit such other reports as SBA may require from time to time.

Subpart D—Requirements for ILP Intermediary Loans to Small Businesses

§ 109.400 Eligible Small Business Concerns.

(a) To be eligible to receive loans from an ILP Intermediary under this program, a small business must:

(1) Be organized for profit;

(2) Be located in the U.S.;

(3) Be small under the size requirements applicable to 7(a) business loans (including Affiliates);

(4) Be a startup, newly established, or growing small business;

(5) Together with Affiliates and principal owners, not have credit elsewhere; and

(6) Be creditworthy and demonstrate reasonable assurance of repayment of the loan.

(b) The following types of businesses are not eligible to receive a loan from an ILP Intermediary under this program:

(1) Nonprofit businesses (for-profit subsidiaries are eligible);

(2) Financial businesses primarily engaged in the business of lending;

(3) Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds;

(4) Life insurance companies;

(5) Businesses located in a foreign country;

(6) Pyramid sale distribution plans;

(7) Businesses deriving more than one-third of gross annual revenue from legal gambling activities;

(8) Businesses engaged in any illegal activity;

(9) Private clubs and businesses which limit the number of memberships for reasons other than capacity;

(10) Government-owned entities (except for businesses owned or controlled by a Native American tribe);

(11) Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting;

(12) [Reserved]

(13) Loan packagers earning more than one third of their gross annual revenue from packaging SBA loans;

(14) Businesses in which the ILP Intermediary or any of its Associates owns an equity interest;

(15) Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude;

(16) Businesses which:

(i) Present live performances of a prurient sexual nature; or

(ii) Derive directly or indirectly more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;

(17) Businesses that have previously defaulted on a Federal loan or Federally assisted financing, resulting in the Federal government or any of its agencies or Departments sustaining a loss in any of its programs, and businesses owned or controlled by an applicant or any of its Associates which previously owned, operated, or controlled a business which defaulted on a Federal loan (or guaranteed a loan which was defaulted) and caused the Federal government or any of its agencies or Departments to sustain a loss in any of its programs. For purposes of this section, a compromise agreement shall also be considered a loss unless the agreement provides otherwise;

(18) Businesses primarily engaged in political or lobbying activities; and

(19) Speculative businesses (such as oil wildcatting);

(20) Businesses located in a Coastal Barrier Resource Area (as defined in the Coastal Barriers Resource Act);

(21) Businesses owned or controlled by an applicant or any of its Associates who are more than 60 days delinquent in child support under the terms of any administrative order, court order, or repayment agreement;

(22) Businesses in which any Associate is an undocumented (illegal) alien; or

(23) Businesses owned or controlled by an applicant or any of its Associates who are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation by any Federal department or agency.

[76 FR 18015, Apr. 1, 2011, as amended at 82 FR 39501, Aug. 21, 2017]

§ 109.410 Loan limits—loans to Eligible Small Business Concerns.

No small business (including Affiliates) may have more than $200,000 outstanding under this program at one time. The provisions of § 120.151 do not apply to loans under this program.

§ 109.420 Terms of loans from ILP Intermediaries to Eligible Small Business Concerns.

(a) *General.* The terms of a loan made by the ILP Intermediary to an Eligible Small Business Concern must be agreed

to by the ILP Intermediary and the Eligible Small Business Concern. The loan terms must be within the limits established by SBA in these regulations.

(b) *Maximum loan size*. The maximum amount of a loan by the ILP Intermediary to an Eligible Small Business Concern under this program is $200,000.

(c) *Maturity*. The term of a loan by the ILP Intermediary to an Eligible Small Business Concern under this program must be the shortest appropriate term. The maximum loan term is 10 years or less, unless the loan finances or refinances real estate or equipment with a useful life exceeding ten years, in which case the maximum loan term is 25 years.

(d) *Interest rate*. The maximum interest rate the ILP Intermediary may charge for loans less than or equal to $50,000 is 8.75 percent. The maximum interest rate the ILP Intermediary may charge for loans greater than $50,000 is 7%. SBA may adjust the maximum interest rates from time to time; SBA will publish any such change by Notice in the FEDERAL REGISTER. Changes to the maximum interest rate do not apply to loans made to Eligible Small Business Concerns prior to publication of the change in the FEDERAL REGISTER.

(e) *Fees*. The ILP Intermediary must not impose any fees or direct costs on an Eligible Small Business Concern, except for the following allowed fees or direct costs:

(1) Necessary out-of-pocket expenses, such as filing or recording fees;

(2) The reasonable direct costs of any liquidation;

(3) A late payment fee not to exceed 5 percent of the scheduled loan payment; and

(4) Reasonable application and origination fees, subject to a maximum total fee cap of 1 percent of the amount of the loan to the Eligible Small Business Concern. SBA may adjust the maximum total fee cap from time to time; SBA will publish any such change by Notice in the FEDERAL REGISTER.

§ 109.430 Loan purposes.

(a) An Eligible Small Business Concern may only use the proceeds of a loan under this program for the following purposes:

(1) Working capital;

(2) Real estate (except for real estate acquired and held primarily for sale, lease, or investment); and

(3) The acquisition of materials, supplies, furniture, fixtures, or equipment.

(b) Revolving lines of credit are permitted. However, if, at any time, SBA determines that the ILP Intermediary's operation of revolving lines of credit is causing excessive risk of loss for the intermediary or the Government, the AA/CA or designee may terminate the ILP Intermediary's authority to use the ILP Relending Fund proceeds for revolving lines of credit. Such termination will be by written notice and will prevent the ILP Intermediary from approving any new lines of credit or extending any existing revolving lines of credit beyond the effective date of termination contained in the notice.

§ 109.440 Requirements imposed under other laws and orders.

Loans made by the ILP Intermediary under this program must comply with all applicable laws, including §§ 120.170 (Flood insurance), 120.172 (Flood-plain and wetlands management), 120.173 (Earthquake hazards), and the civil rights laws (see parts 112, 113, 117, and 136 of this chapter) prohibiting discrimination on the grounds of race, color, national origin, religion, sex, marital status, disability or age.

[76 FR 18015, Apr. 1, 2011, as amended at 85 FR 75834, Nov. 27, 2020]

§ 109.450 SBA review of ILP Intermediary loans to Eligible Small Business Concerns.

(a) *Review restrictions*. SBA does not review loans made by an ILP Intermediary under this program before approval of the loan by the ILP Intermediary. The ILP Intermediary is responsible for all loan decisions regarding eligibility (including size).

(b) *Subsequent review*. SBA will periodically review loans made by an ILP Intermediary after approval of the loan by the ILP Intermediary as part of the on-site and off-site reviews described in § 109.510. If SBA discovers that an ILP Intermediary has made a loan under

this program to an ineligible business or for an ineligible purpose, SBA will require the ILP Intermediary to refinance the ineligible loan with non-ILP program funds and to deposit into its ILP Relending Fund an amount equal to the outstanding principal balance on the ineligible loan.

§ 109.460 Prohibition on sales of ILP Intermediary Loans to Eligible Small Business Concerns.

An ILP Intermediary may not sell all or any portion of a loan made to an Eligible Small Business Concern without prior written consent from the AA/CA or designee.

Subpart E—Oversight

§ 109.500 SBA access to ILP Intermediary files.

The ILP Intermediary must allow SBA's authorized representatives, including other officers of any other Federal agency and representatives authorized by the SBA Inspector General, during normal business hours, timely access to its facility and files to review, inspect, and copy all records and documents, including electronic and hard copy, relating to the operations of the ILP Intermediary, the ILP Loan, and the loans made from the ILP Relending Fund and other records and documents as requested for oversight of the ILP Intermediary.

§ 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.

[82 FR 39501, Aug. 21, 2017]

§ 109.520 Events of default and revocation of authority to participate in the ILP program.

(a) *Automatic events of default.* Upon the occurrence of one or more of the events in this paragraph (a), the ILP Loan balance, including accrued interest, is immediately due and payable to SBA without notice and the ILP Intermediary's authority to participate in the ILP program is revoked.

(1) *Insolvency.* The ILP Intermediary becomes equitably or legally insolvent.

(2) *Voluntary assignment.* The ILP Intermediary makes a voluntary assignment for the benefit of creditors without SBA's prior written approval.

(3) *Bankruptcy.* The ILP Intermediary files a petition to begin any bankruptcy or reorganization proceeding, receivership, dissolution or other similar creditors' rights proceeding, or such action is initiated against the ILP Intermediary and is not dismissed within 60 calendar days.

(b) *Events of default with notice and possible opportunity to cure.* Except as provided in paragraph (c) of this section, upon receipt of written notice to the ILP Intermediary of the occurrence (as determined by SBA) of one or more of the events in this paragraph (b), the ILP loan balance, including accrued interest, is immediately due and payable to SBA and the ILP Intermediary's authority to participate in the ILP program is revoked.

(1) *Fraud.* The ILP Intermediary commits a fraudulent act.

(2) *Violation of SBA's ethical requirements.* The ILP Intermediary violates 13 CFR § 120.140.

(3) *Non-notification of events of default.* The ILP Intermediary fails to notify SBA in writing as soon as it knows or reasonably should have known that any event of default exists under this section.

(4) *Non-notification of defaults to others.* The ILP Intermediary fails to notify SBA in writing within ten calendar days from the date of a declaration of an event of default or nonperformance under any note, debenture or indebtedness, issued to or held by anyone other than SBA.

(5) *Failure to make timely payment.* Unless otherwise approved by the AA/CA

or designee in writing, the ILP Intermediary fails to make timely payment to SBA on its ILP Loan.

(6) *Failure to take adequate corrective actions.* The ILP Intermediary fails to take adequate corrective actions, to SBA's satisfaction, as required by SBA under §109.510 within the timeframe requested by SBA.

(7) *Violation of ILP Program Requirements.* The ILP Intermediary violates one or more ILP Program Requirement.

(8) *Actions that increase risk.* The ILP Intermediary takes other action which increases the risk of loss to SBA.

(c) *Opportunity to Cure.* SBA may, in its discretion, provide the ILP Intermediary with an opportunity to cure an event of default identified in paragraph (b) of this section. If SBA provides the ILP Intermediary with such a cure opportunity, SBA will issue written notice discussing the relevant facts, and directing the ILP Intermediary to cure the default and provide SBA with documentation to show that the default has been cured within a specified period of time (generally 15 days). SBA will then provide the ILP Intermediary with a final notification advising whether the default has been satisfactorily cured. In the event SBA determines the default has not been cured, the ILP Loan balance, including accrued interest, is immediately due and payable to SBA and the ILP Intermediary's authority to participate in the ILP program is revoked upon the ILP Intermediary's receipt of this final notification.

(d) *Appeals.* Notification of default without opportunity to cure under paragraph (b) of this section and final notification of uncured default under paragraph (c) of this section are final agency decisions. An ILP Intermediary may appeal a final agency decision only in the appropriate federal district court.

§109.530 Debarment and Suspension.

In accordance with 2 CFR Parts 180 and 2700, SBA may take any necessary action to debar or suspend an ILP Intermediary or any officer, director, general partner, manager, employee, agent or other participant in the affairs of an ILP Intermediary's SBA operations.

PART 112—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OF SBA—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Sec.

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112.2 Application of this part.
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112.4 Discrimination in employment.
112.5 Discrimination in providing financial assistance.
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112.12 Effect on other regulations; forms and instructions.

APPENDIX A TO PART 112

AUTHORITY: Sec. 602, 78 Stat. 252 (42 U.S.C. 2000d–1).

SOURCE: 30 FR 298, Jan. 9, 1965, unless otherwise noted.

§112.1 Purpose.

The purpose of this part is to effectuate the provisions of Title VI of the Civil Rights Act of 1964 (hereinafter referred to as the *Act*) to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any financial assistance activities of the Small Business Administration to which the Act applies.

§112.2 Application of this part.

(a) This part applies to all recipients of Federal financial assistance administered by the Small Business Administration. (See appendix A)

(b) The term *Federal financial assistance* includes: (1) Grants and loans of Federal funds; (2) the grant or donation of Federal property and interests in property; (3) the detail of Federal personnel; (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration, or at a nominal

consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient; and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(c) This part does not apply to financial assistance extended by way of insurance or guarantee.

(d) The terms *applicant* and *recipient* mean, respectively, one who applies for and one who receives any of the financial assistance under any of the statutes referred to in paragraph (a) of this section. The term *recipient* also shall be deemed to include *subrecipients* of SBA financial assistance, i.e., concerns which secondarily receive financial assistance from the primary recipients of such financial assistance.

(e) The terms *program or activity* and *program* mean all of the operations of any entity described in paragraphs (e)(1) through (4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (e)(1),(2), or (3) of this section.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17934, July 5, 1973; 50 FR 1441 Jan. 11, 1985; 68 FR 51348, 51349, Aug. 26, 2003]

§ 112.3 Discrimination prohibited.

(a) *General.* To the extent that this part applies, no person in the United States shall, on the ground of race, color or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination by any business or other activity.

(b) *Specific discriminatory actions prohibited.* (1) To the extent that this part applies, a business or other activity may not, directly or through contractual or other arrangements, on ground of race, color or national origin:

(i) Deny an individual any services, financial aid or other benefit provided by the business or other activity;

(ii) Provide any service, financial aid or other benefit to an individual which is different or is provided in a different manner, from that provided to others by the business or other activity;

(iii) Subject an individual to segregation or separate treatment in any manner related to his receipt of any service, financial aid or other benefit from the business or other activity;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid or other benefit from the business or other activity;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid or other benefit provided by the business or other activity.

(2) The enumeration of specific forms of prohibited discrimination in this

paragraph does not limit the generality of the prohibition in paragraph (a) of this section.

(3) This regulation does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, a program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. Where previous discriminatory practice or usage tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this regulation applies, the applicant or recipient has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage, and to accomplish the purposes of the Act.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17934, July 5, 1973; 68 FR 51349, Aug. 26, 2003]

§ 112.4 Discrimination in employment.

Small business concerns and development companies which apply for or receive any financial assistance of the kind described in §112.2(a) (1) and (2), including concerns which are identifiable beneficiaries of loans made under §112.2(a)(2), may not discriminate on the grounds of race, color, or national origin in their employment practices. Such assistance is deemed to have as a primary objective the providing of employment. Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the grounds of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the provisions of §112.7(a) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity and nondiscriminatory treatment.

[38 FR 17934, July 5, 1973]

§ 112.5 Discrimination in providing financial assistance.

Development companies and small business investment companies which apply for or receive any of the financial assistance described in §112.2(a) may not discriminate, on the ground of race, color or national origin, in providing financial assistance to small business concerns.

§ 112.6 Discrimination in accommodations or services.

Small business concerns which apply for or receive any financial assistance of the kind described in §112.2(a)(1), concerns which are identifiable beneficiaries of loans made under §112.2(a)(2), and physicians, hospitals, schools, libraries, and other individuals or organizations which apply for or receive financial assistance of the kind described in §112.2(a)(5), may not discriminate in the treatment accommodations or services they provide to their patients, students, visitors, guests, members, passengers, or patrons in the conduct of such businesses or other enterprises, whether or not operated for profit.

[31 FR 2374, Feb. 4, 1966]

§ 112.7 Illustrative applications.

(a) *Employment.* The discrimination prohibited by §112.4 includes but is not limited to any action (taken directly or through contractual or other arrangements) which subjects an individual to discrimination on the ground of race, color or national origin in any employment practice, including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities.

(b) *Financial assistance.* The discrimination prohibited by §112.5 includes but is not limited to the failure or refusal, because of the race, color, or national origin of a person, to extend a loan or equity financing to him or to any business concern of which he is an owner or employee; or, in the case of financing

which has actually been extended, the failure or refusal, because of the race, color, or national origin of the borrower or of an owner or employee of the borrower, to accord the borrower fair treatment and the customary courtesies regarding such matters as default, grace periods and the like.

(c) *Accommodations or services.* The discrimination prohibited by §112.6 includes but is not limited to the failure or refusal, because of the race, color, or national origin of a person, to accept him on a nonsegregated basis as a patient, student, visitor, guest, member, customer, passenger or patron.

(d) *Affirmative action.* (1) In some situations even though past discriminatory practices have been abandoned, the consequences of such practices continue to impede the full availability of equal opportunity. If the efforts required of the applicant or recipient under §112.3(b)(3) to provide information as to the availability of equal opportunity, and the rights of individuals under this regulation, have failed to overcome these consequences, it will become necessary for such applicant or recipient to take additional steps to make equal opportunity fully available to racial and nationality groups previously subjected to discrimination.

(2) Even though an applicant or recipient has never used discriminatory policies, the opportunities in the business it operates may not in fact be equally available to some racial or nationality groups. In such circumstances a recipient may properly give special consideration to race, color, or national origin to make opportunity more widely available to such groups.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17934, July 5, 1973]

§ 112.8 Assurances required.

An application for any of the financial assistance described in §112.2(a) shall, as a condition to its approval and the extension of such assistance, contain or be accompanied by an assurance that the recipient will comply with this part. Such an assurance shall contain provisions authorizing the acceleration of the maturity of the recipient's financial obligation to the SBA in the event of a failure to comply, and provisions which give the United States a right to seek judicial enforcement of the terms of the assurance. SBA shall specify the form of the foregoing assurance, and the extent to which like assurances will be required of contractors and subcontractors, transferees, successors in interest, and other participants.

[30 FR 298, Jan. 9, 1965, as amended at 68 FR 51349, Aug. 26, 2003]

§ 112.9 Compliance information.

(a) *Cooperation and assistance.* SBA shall to the fullest extent practicable seek the cooperation of applicants and recipients in obtaining compliance with this part and shall provide assistance and guidance to applicants and recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each applicant or recipient shall keep such records and submit to SBA timely, complete and accurate compliance reports at such times, and in such form and containing such information, as SBA may determine to be necessary to enable SBA to ascertain whether the applicant or recipient has complied or is complying with this part. In the case of a small business concern which receives financial assistance from a development company or from a small business investment company, such concern shall submit to the company such information as may be necessary to enable the company to meet its reporting requirements under this part.

(c) *Access to sources of information.* Each applicant or recipient shall permit access by SBA during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of an applicant or recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information, the applicant or recipient shall so certify in its report and shall set forth what efforts it has made to obtain this information.

(d) *Information to the public.* Each recipient shall make available to persons entitled under the Act and under this

part to protection against discrimination by the recipient such information as SBA may find necessary to apprise them of their rights to such protection.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17934, July 5, 1973]

§ 112.10 Conduct of investigations.

(a) *Periodic compliance reviews.* SBA shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may, by himself or by a representative, file with SBA a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by SBA.

(c) *Investigations.* SBA will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the applicant or recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the applicant or recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, SBA will so inform the applicant or recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 112.11.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section, SBA will so inform the applicant or recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No applicant or recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or by this part or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17934, July 5, 1973]

§ 112.11 Procedure for effecting compliance.

(a) *General.* (1) If there appears to be a failure or threatened failure to comply with this part and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by suspending, terminating, or refusing any financial assistance approved but not yet disbursed to an applicant or, in the case of a loan which has been partially disbursed, by refusing to make further disbursements. In addition, compliance may be effected by any other means authorized by law.

(2) Such other means may include but are not limited to (i) legal action by SBA to enforce its right, embodied in the assurances described in § 112.8, to accelerate the maturity of the recipient's obligation; (ii) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States, including other titles of the Act; and (iii) any applicable proceedings under State or local law.

(b) *Noncompliance with § 112.8.* If an applicant fails or refuses to furnish an assurance required under § 112.8 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. SBA shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that SBA shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application

therefor approved prior to the effective date of this part. Such proceedings shall be conducted in accordance with the provisions of part 134 of this chapter by an Administrative Law Judge of the Office of Hearings and Appeals, who shall issue an initial decision in the case. The Administrator shall be the reviewing official for purposes of §134.228. The applicant's failure to file a timely motion in accordance with §§134.222 and 134.211, requesting that the matter be scheduled for an oral hearing, shall constitute waiver of the right to an oral hearing but shall not prevent the submission of written information and argument for the record in accordance with the provisions of part 134.

(c) *Conditions precedent.* No order suspending, terminating, or refusing financial assistance shall become effective until (1) SBA has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means; (2) there has been an express finding on the record after an opportunity for an oral hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part; (3) the initial decision has become final pursuant to §134.227(b); and (4) the expiration of 30 days after SBA has filed with the committee of the House and the committee of the Senate having legislative jurisdiction of the form of financial assistance involved, a full written report of the circumstances and the grounds for such action.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) SBA has determined that compliance cannot be secured by voluntary means; (2) the action has been approved by the Administrator or his designee; (3) the applicant or recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance; and (4) the expiration of at least 10 days from the mailing of such notice to the applicant or recipient or other person. During this period of at least 10 days from the mailing of such notice to the applicant or recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the applicant or recipient or other person to comply with this part and to take such corrective action as may be appropriate.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17934, July 5, 1973; 49 FR 33629, Aug. 24, 1984; 61 FR 2691, Jan. 29, 1996]

§112.12 Effect on other regulations; forms and instructions.

(a) *Effect on other regulations.* All regulations, orders or like directions heretofore issued by SBA which impose requirements designed to prohibit any discrimination against individuals on the grounds of race, color, or national origin and which authorize the suspension or termination of or refusal to grant to or to continue financial assistance to any applicant for or recipient of such assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this part. Nothing in this part, however, shall be deemed to supersede any of the following (including future amendments thereof):

(1) Executive Order 11246 and regulations issued thereunder, or (2) any other orders, regulations or instructions, insofar as such order, regulations, or instructions prohibit discrimination on the grounds of race, color, or national origin in any program or situation to which this part is inapplicable or prohibit discrimination on any other ground.

(b) *Forms and instructions.* SBA shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The Administrator may from time to time assign to officials of SBA or to officials of other agencies of the Government with the consent of such agencies, responsibilities in connection with the effectuation of the purpose of Title VI

of the Act and this part (other than responsibility for final decision as provided in §112.13), including the achievement of effective coordination and maximum uniformity within SBA and within the Executive Branch of the Government in the application of Title VI and this part to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or agency acting pursuant to an assignment of responsibility under this subsection shall have the same effect as though such action had been taken by the Administrator of SBA.

[30 FR 298, Jan. 9, 1965, as amended at 38 FR 17935, July 5, 1973. Redesignated at 49 FR 33629, Aug. 24, 1984]

APPENDIX A TO PART 112

Name of Federal financial assistance	Authority
Federal Financial Assistance Involving Grants of Funds	
Regular business loans	Small Business Act, sec. 7(a) and 7(a)(11).
Handicapped assistance loans.	Small Business Act, sec. 7(a)(10)
Small business energy loans	Small Business Act, sec. 7(a)(12).
Small general contractors	Small Business Act, sec. 7(a)(9).
Vietnam-era and Disabled Veterans Loan Program.	Pub. L. 97–72.
Debtor State development company loans (501) and their small business concerns.	Small Business Investment Act, title V, and Small Business Act, sec. 7(a)(13).
Debtor small business investment companies and their small business concerns.	Small Business Investment Act, title III.
Disaster Loans	
Physical	Small Business Act, sec. 7(b)(1).
Economic injury (EIDL)	Small Business Act, sec. 7(b)(2).
Federal action—economic injury.	Small Business Act, sec. 7(b)(3).
Currency fluctuation—economic injury.	Small Business Act, sec. 7(b)(4).
Other Federal Financial Assistance	
Women's business enterprise	Executive Order 12138.
Small business innovation and research.	Small Business Act, sec. 9.
Procurement automated source system.	Small Business Act, sec. 8 and Pub. L. 96–302.
Business Development Program.	Small Business Act, sec. 8(a) and Pub. L. 95–507, as amended by Pub. L. 96–481.
Small Business Institute Program.	Small Business Act, sec. 8(b)(1) and Pub. L. 85–536.
Certificate of competency	Small Business Act, sec. 8(b)(7) and Pub. L 95–89.
Subcontracting Assistance Program.	Small Business Act, sec. 8(d) and Pub. L. 95–507.
Technology Assistance Program.	Small Business Act, sec. 9.
Small business development centers.	Small Business Act, sec. 21 and Pub. L. 96–302.
International Trade Program	Small Business Act, sec. 22 and Pub. L. 96–481.
Service Corps of Retired Executives and Active Corps of Executives.	Small Business Act, secs. 101 and 8(b)(1) and Pub. L. 95–510.
Veterans affairs programs	Pub. L. 93–237.
Private sector initiatives	Small Business Act, sec. 8(b)(1).

NOTE: All types of Federal financial assistance listed above are also covered by part 113 of title 13 of the Code of Federal Regulations.

[50 FR 1441, Jan. 11, 1985, as amended at 68 FR 51348, 51349, Aug. 26, 2003]

PART 113—NONDISCRIMINATION IN FINANCIAL ASSISTANCE PROGRAMS OF SBA—EFFECTUATION OF POLICIES OF FEDERAL GOVERNMENT AND SBA ADMINISTRATOR

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APPENDIX A TO SUBPART A OF PART 113

Subpart B—Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

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AUTHORITY: 15 U.S.C. 633, 634, 687, 1691; 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688; 29 U.S.C. 794; Sec. 5, Pub. L. 85–536, 72 Stat. 385, as amended; Sec. 308, Pub. L. 85–699, 72 Stat. 694, as amended.

SOURCE: 44 FR 20068, Apr. 4, 1979, unless otherwise noted.

Subpart A—General Provisions

§ 113.1 Purpose.

(a) Part 112 of this chapter, issued pursuant to Title VI of the Civil Rights Act of 1964, prohibits discrimination on the basis of race, color, or national origin by some recipients of financial assistance from SBA. The purpose of this part is to reflect to the fullest extent possible the nondiscrimination policies of the Federal Government as expressed in the several statutes, Executive Orders, and messages of the President dealing with civil rights and equality of opportunity, and in the previous determination of the Administrator of the Small Business Administration that discrimination based on race, color, religion, sex, marital status, handicap or national origin shall be prohibited, to the extent that it is not prohibited by part 112 of this chapter, to all recipients of financial assistance from SBA.

(b) In accordance with Pub. L. 94–239, 15 U.S.C. 1691, cited as the Equal Credit Act Amendments of 1976, it is unlawful for any recipient creditor to discriminate against any applicant, with respect to any aspect of a credit transaction because of race, color, religion, national origin, sex, marital status, age: (*Provided*, the applicant has the capacity to contract), because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

(c) It is the intention of the Administrator that the prohibitions in this part supplement those in part 112 of this chapter, that the two parts be read in pari materia, and that the procedures established herein be harmonized to the maximum extent feasible with

those established in part 112 of this chapter.

§ 113.2 Definitions.

As used in this part:

(a) The term *Federal financial assistance* includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration, or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(b) The terms *applicant* and *recipient* mean, respectively, one who applies for and one who receives any of the financial assistance under any of the statutes referred to in paragraph (a) of this section. The term *recipient* also shall be deemed to include *subrecipients* of SBA financial assistance, i.e., concerns which secondarily receive financial assistance from the primary recipients of such financial assistance. For the purposes of this part, a paragraph (b) lender (13 CFR 120.4(b)) shall be deemed a recipient of financial assistance.

(c) The term *religion* includes all aspects of religious observance and practice, as well as belief.

(d) The term *qualified handicapped person* means (1) with respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question and (2) with respect to services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(e) The term *handicapped person,* as defined by the guideline set forth by the Department of Health, Education, and Welfare in §85.31 of title 45 of the CFR (43 FR 2137, dated January 13, 1978), means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(f) As used in paragraph (e) of this section, the phrase:

(1) *Physical or mental impairment* means (i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction and alcoholism.

(2) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means (i) has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient as constituting such a limitation; (ii) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (iii) has none of the impairments defined in paragraph (f)(1) of this section but is treated by a recipient as having such an impairment.

(g) The term *reasonable accommodation* as used in these Regulations may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons; and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices,

the provision of readers or interpreters, and other similar actions.

(h) The term *facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property.

[44 FR 20068, Apr. 4, 1979, as amended at 48 FR 14891, Apr. 6, 1983]

§ 113.3 Discrimination prohibited.

To the extent not covered or prohibited by part 112 of this chapter, recipients of financial assistance may not:

(a) Discriminate with regard to goods, services, or accommodations offered or provided by the aided business or other enterprise, whether or not operated for profit, because of race, color, religion, sex, handicap, or national origin of a person, or fail or refuse to accept a person on a nonsegregated basis as a patient, student, visitor, guest, customer, passenger, or patron.

(b) With regard to employment practices within the aided business or other enterprise, whether or not operated for profit; fail or refuse, because of race, color, religion, sex or national origin of a person, to seek or retain the person's services, or to provide the person with opportunities for advancement or promotion, or accord an employee the rank and rate of compensation, including fringe benefits, merited by the employee's services and abilities.

(c) With regard to employment practices within the aided business or other enterprise, whether or not operated for profit; discriminate against a qualified handicapped person; or because of handicap, fail or refuse to seek or retain the person's services or to provide the person with opportunities for advancement or promotion, or accord an employee the rank and rate of compensation, including fringe benefits, merited by the employee's services and abilities. All employment decisions shall be made in a manner which ensures that discrimination on the basis of handicap does not occur. Such decisions may not limit, segregate, or classify job applicants or employees in any way that adversely affects the opportunities or status of qualified handicapped individuals.

(d) Participate in a contractual or other relationship that has the effect of subjecting job applicants or employees to discrimination prohibited by this part. The relationships referred to in this paragraph include those with employment and referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeship programs. Activities covered by this part are as follows:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(e) Use employment tests or criteria that discriminate on the basis of race, color, religion, sex, marital status, handicap, or national origin. Employment tests which are used for all other job applicants shall be adapted in an appropriate mode for use by persons who have handicaps that impair sensory, manual, or speaking skills.

(f) Conduct a preemployment medical examination, unless required of all job applicants, and subsequent to a conditional offer of employment. The results of all such medical examinations shall be kept confidential.

(g) Make a preemployment inquiry as to whether a job applicant is a handicapped person or as to the nature or severity of a handicap: EXCEPT when a

recipient is taking remedial action to overcome the effects of conditions which resulted in past discrimination, or when a recipient is taking affirmative action pursuant to section 503 of the Rehabilitation Act of 1973, as amended.

(1) Such preemployment inquiry may only be made after the job applicant has been informed that such disclosure is for the purposes set forth in paragraph (g) of this section; that the disclosure is voluntary and will be kept confidential; and that refusal of the job applicant to provide such information will not subject the applicant to any adverse action.

(2) Information elicited from qualified handicapped job applicants concerning their medical history or condition shall be kept confidential EXCEPT that:

(i) Supervisors and managers may be informed about restrictions on or accommodations to be made for the qualified handicapped individual;

(ii) First aid and safety personnel may be informed, where appropriate, of the need for possible emergency treatment; and

(iii) Compliance officials shall be given relevant information, if requested.

(h) Discriminate on the basis of race, color, religion, handicap or national origin in the use of toilets or any facilities for rest or comfort. Discriminate on the basis of race, color, religion, sex, handicap or national origin in the use of cafeterias, recreational programs or other programs sponsored by the applicant or recipient.

(i) With regard to all recipients offering credit, such as Small Business Investment Companies and Community Development Companies, discriminate against debtors on the basis of race, color, religion, sex, marital status, handicap, or national origin.

(j) With regard to the granting of credit by all recipient creditors, discriminate against any credit applicant, with respect to any aspect of a credit transaction because of race, color, religion, national origin, sex, marital status, handicap, age (provided the applicant has the capacity to contract), because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

§ 113.3–1 Consideration of race, color, religion, sex, marital status, handicap, or national origin.

(a) This regulation does not prohibit the consideration of race, color, religion, sex, marital status, handicap, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, religion, sex, marital status, handicap, or national origin. Where previous discriminatory practices or usage tends, on the grounds of race, color, religion, sex, marital status, handicap, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this regulation applies, the applicant or recipient has an obligation to take reasonable action to remove or overcome the consequences of the prior discriminatory practice or usage, and to accomplish the purposes of this regulation. All programs and activities shall be administered in the most integrated setting possible.

(b) Nothing in this part shall prohibit the restriction of certain jobs to members of one sex if a bona fide occupational qualification can be demonstrated by the applicant or recipient. Custom or tradition is not a bona fide occupational qualification.

(c) Recipients shall take steps to ensure that communications with job applicants and employees who have vision and/or hearing disabilities are available in appropriate modes.

(d) Recipients shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped job applicant or employee UNLESS the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of the business. Factors to be considered in determining whether an accommodation would impose an undue

hardship on the operation of a recipient's business include:

(1) The overall size of the recipient's business with respect to number of employees, number and type of facilities, size of budget, and the financial condition of the business;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(e) Such accommodation may include making facilities used by employees readily accessible to and usable by handicapped persons, job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(f) The final decision, when making a review or investigation of a complaint, as to whether an accommodation would impose an undue hardship on the operation of a recipient business will be made by the compliance officials of the Small Business Administration.

(g) Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons, and shall not participate in a contractual relationship that has the effect of subjecting qualified handicapped job applicants or employees to discrimination prohibited by this part. The relationships referred to in this paragraph include those with referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeship programs.

(h) Nothing in this part shall apply to a religious corporation, association, educational institution or society with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its religious activities.

§ 113.3–2 Accommodations to religious observance and practice.

A recipient of financial assistance must accommodate to the religious observances and practices of an employee or prospective employee unless the recipient demonstrates that it is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. As part of this obligation, recipient must make reasonable accommodations to the religious observances and practices of an employee or prospective employee who regularly observes Friday evening and Saturday, or some other day of the week, as Sabbath and/or who observes certain religious holidays during the year and who is conscientiously opposed to performing work or engaging in similar activity on such days, when such accommodations can be made without undue hardship on the conduct of the employer's business. In determining the extent of a recipient's obligations under this section, at least the following factors should be considered: (a) Business necessity, (b) financial costs and expenses, and (c) resulting personnel problems.

§ 113.3–3 Structural accommodations for handicapped clients.

(a) *Existing facilities.* Recipients in preexisting structures shall make their goods or services accessible to and usable by handicapped clients. Where structural changes are necessary to make the recipient's goods or services accessible, such changes shall be made as soon as practicable, but in no event later than three years after the effective date of this Regulation. A plan setting forth the steps necessary to complete such structural changes shall be developed and submitted to SBA. If practical, interested persons, including handicapped persons or organizations representing handicapped persons, will be consulted.

(b) *Design, construction, and alteration.* New facilities shall be designed and constructed to be readily accessible to and usable by persons with handicaps. Alterations to existing facilities that affect usability shall, to the maximum

extent feasible, be designed and constructed to be readily accessible to and usable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[44 FR 20068, Apr. 4, 1979, as amended at 45 FR 81734, Dec. 12, 1980; 55 FR 52138, 52140, Dec. 19, 1990]

§ 113.4 Assurances required.

An application for financial assistance shall, as a condition to its approval and the extension of such assistance, contain or be accompanied by an assurance that the recipient will comply with this part. Such an assurance shall contain provisions authorizing the acceleration of the maturity of the recipient's financial obligations to SBA in the event of a failure to comply, and provisions which give the United States a right to seek judicial enforcement of the terms of the assurance. SBA shall specify the form of the foregoing assurance for each program, and the extent to which like assurances will be required of contractors and subcontractors, transferees, successors in interest, and other participants in the program.

§ 113.5 Compliance information.

(a) *Cooperation and assistance:* SBA shall to the fullest extent practicable seek the cooperation of applicants and recipients in obtaining compliance with this part and shall provide assistance and guidance to applicants and recipients to help them comply voluntarily with this part. Recipients are expected to continually evaluate their compliance status, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons.

(b) *Compliance reports:* Each applicant or recipient shall keep such records and submit to SBA timely, complete and accurate compliance reports at such times, and in such form and containing such information, as SBA may determine to be necessary to enable SBA to ascertain whether the applicant or recipient has complied or is complying with this part. In the case of a small business concern which receives financial assistance from a development company or from a small business investment company, such concern shall submit to the company such information as may be necessary to enable the company to meet its reporting requirements under this part.

(c) *Access to sources of information:* Each applicant or recipient shall permit access by SBA during normal business hours to such of its books, records, accounts and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of an applicant or recipient is in the exclusive possession of any other agency, institution or person; and such agency, institution or person shall fail or refuse to furnish this information, the applicant or recipient shall so certify in its report and shall set forth what efforts it has made to obtain this information.

(d) *Information to the Public.* Each recipient shall make available to persons entitled under this part to protection against discrimination by the recipient such information as SBA may find necessary to apprise them of their rights to such protection.

(1) In some situations even though past discriminatory practices have been abandoned, the consequences of

such practices continue to impede the full availability of equal opportunity. If the efforts required of the applicant or recipient under §113.5(b) to provide information as to the availability of equal opportunity, and the rights of individuals under this regulation, have failed to overcome these consequences, it will become necessary for such applicant or recipient to take additional steps to make equal opportunity fully available to racial, qualified handicapped, nationality groups and persons who because of their sex were previously subjected to discrimination.

(2) Even though an applicant or recipient has never used discriminatory policies, the opportunities in the business it operates may not in fact be equally available to some racial, qualified handicapped, or nationality groups. In such circumstances a recipient may properly give special consideration to race, color, religion, sex, marital status, qualified handicap or national origin to make the opportunities more widely available to such groups.

§113.6 Conduct of investigations.

(a) *Periodic compliance reviews.* SBA shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes that he, she or any class of individuals has been subjected to discrimination prohibited by this part may, personally or through a representative, file with SBA a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by SBA.

(c) *Investigations.* SBA will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the applicant or recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the applicant or recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, SBA will so inform the applicant or recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in §113.7.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section, SBA will so inform the applicant or recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No applicant or recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by this part or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

§113.7 Procedure for effecting compliance.

(a) *General.* (1) If there appears to be a failure or threatened failure to comply with this part and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by suspending, terminating, or refusing any financial assistance approved but not yet disbursed to an applicant. In the case of loans partially or fully disbursed, compliance with this part may be effected by calling, canceling, terminating, accelerating repayment, or suspending in whole or in part the financial assistance provided. In addition compliance may be effected by any other means authorized by law.

(2) Such other means may include but are not limited to (i) legal action by SBA to enforce its rights, embodied in the assurances described in §113.4; (ii) a reference to the Department of Justice with a recommendation that

appropriate proceedings be brought to enforce any rights of the United States under any law of the United States; and (iii) any applicable proceedings under State or local law.

(b) *Noncompliance with §113.4.* If an applicant fails or refuses to furnish an assurance required under §113.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. SBA shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that SBA shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part. Such proceedings shall be conducted in accordance with the provisions of part 134 of this chapter by an Administrative Law Judge of the Office of Hearings and Appeals, who shall issue an initial decision in the case. The Admininstrator shall be the reviewing official for purposes of §134.228. The applicant's failure to file a timely motion in accordance with §§134.222 and 134.211, requesting that the matter be scheduled for an oral hearing, shall constitute waiver of the right to an oral hearing but shall not prevent the submission of written information and argument for the record in accordance with the provisions of part 134.

(c) *Condition precedent.* Under this part 113, no order suspending, terminating, refusing, calling, canceling, or accelerating repayment of financial assistance in whole or in part shall become effective until (1) SBA has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means; (2) there has been an express finding on the record after an opportunity for an oral hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part; and (3) the initial decision has become final pursuant to §134.227(b).

(d) Other means authorized by law. No action to effect compliance by any other means authorized by law shall be taken until:

(1) SBA has determined that compliance cannot be secured by voluntary means.

(2) The action has been approved by the Administrator or the Administrator's designee.

(3) The applicant or recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance.

(4) The expiration of at least 10 days from the mailing of such notice to the applicant or recipient or other person. During this period of at least 10 days, additional efforts shall be made to persuade the applicant or recipient or other person to comply with this part and to take such corrective action as may be appropriate.

[44 FR 20068, Apr. 4, 1979, as amended at 49 FR 33629, Aug. 24, 1984; 61 FR 2691, Jan. 29, 1996]

§113.8 Effect on other regulations, forms and instructions.

(a) *Effect on other regulations.* All regulations, orders of like directions heretofore issued by SBA which impose requirements designed to prohibit any discrimination against individuals on the grounds of race, color, religion, sex, handicap, marital status, age, or national origin and which authorize the suspension or termination of a refusal to grant to or to continue financial assistance to any applicant for or recipient of such assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction or like direction prior to the effective date of this part.

(b) *Forms and instructions.* SBA shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The Administrator may from time-to-time assign to officials of SBA or to officials of other agencies of the Government,

with the consent of such agencies, responsibilities in connection with the effectuation of the purposes of this part (other than responsibility of first decisions as provided in §113.9) including the achievement of effective coordination and maximum uniformity within SBA and within the executive branch of the Government in the application of this part and of comparable regulations issued by other agencies of the Government to similar situations. Any action taken, determination made, or requirement imposed by an official of another department or agency acting pursuant to an assignment of responsibility under this subsection shall have the same effect as though such action had been taken by the Administrator of SBA.

[44 FR 20068, Apr. 4, 1979. Redesignated at 49 FR 33629, Aug. 24, 1984]

APPENDIX A TO SUBPART A OF PART 113

Name of program	Authority
Financial Programs	
Regular business loans	Small Business Act, sec. 7(a).
Handicapped assistance loans.	Small Business Act, sec. 7(a)(10).
Small business energy loans	Small Business Act, sec. 7(a)(12).
Small general contractors loans.	Small Business Act, sec. 7(a)(9).
Export revolving line of credit	Small Business Act, sec. 7(a)(14).
Vietnam-era and Disabled Veterans Loan Program.	Pub. L. 97–72.
Debtor State development company loans (501) and their small business concerns.	Small Business Investment Act, Title V and Small Business Act, sec. 7(a)(13).
Debtor State and local development company loans (502) and their small business concerns.	Small Business Investment Act, Title V and Small Business Act, sec. 7(a)(13).
Debtor certified development companies (503) and their small business concerns.	Small Business Investment Act, Title V and Small Business Act, sec. 7(a)(13).
Debtor small business investment companies and their small business concerns.	Small Business Investment Act, Title III.
Pollution Control	Small Business Investment Act, Title IV, Part A.
Surety bond guarantees	Small Business Investment Act, Title IV, Part B.
Lease guarantees (not funded) disaster loans.	Small Business Investment Act, Title IV.
Physical	Small Business Act, sec. 7(b)(1).
Economic injury (EIDL)	Small Business Act, sec. 7(b)(2).
Federal action—economic injury.	Small Business Act, sec. 7(b)(3).
Currency fluctuation—economic injury.	Small Business Act, sec 7(b)(4).
Nonfinancial Programs	
Women's business enterprise	Executive Order 12138.
Small business innovation and research.	Small Business Act, sec. 9.
Procurement automated source system..	Small Business Act, sec. 8 and Pub. L. 96–302.
Business Development Program.	Small Business Act, sec. 8(a) and Pub. L. 95–507, as amended by Pub. L. 96–481.
Small Business Institute	Small Business Act, sec. 8(b)(1).
Certificate of competency	Small Business Act, sec. 8(b)(7) and Pub. L. 95–89.
Subcontracting Assistance Program.	Small Business Act, sec. 8(d) and Pub. L. 95–507.
Technology Assistance Program.	Small Business Act, sec. 9.
Small business development centers.	Small Business Act, sec. 21 and Pub. L. 96–302.
International Trade Program	Small Business Act, sec. 22 and Pub. L. 96–481.
Service Corps of Retired Executives and Active Corps of Executives.	Small Business Act, secs. 101 and 8(b)(1) and Pub. L. 95–510.
Veterans Affairs Programs	Pub. L. 93–237.
Private sector initiatives	Small Business Act, sec. 8(b)(1).

[50 FR 1442, Jan. 11, 1985]

Subpart B—Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

AUTHORITY: 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688.

SOURCE: 65 FR 52865, 52876, Aug. 30, 2000, unless otherwise noted.

INTRODUCTION

§ 113.100 Purpose and effective date.

The purpose of these Title IX regulations is to effectuate Title IX of the Education Amendments of 1972, as amended (except sections 904 and 906 of those Amendments) (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688), which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in

these Title IX regulations. The effective date of these Title IX regulations shall be September 29, 2000.

§ 113.105 Definitions.

As used in these Title IX regulations, the term:

Administratively separate unit means a school, department, or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

Admission means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

Applicant means one who submits an application, request, or plan required to be approved by an official of the Federal agency that awards Federal financial assistance, or by a recipient, as a condition to becoming a recipient.

Designated agency official means Assistant Administrator for Equal Employment and Civil Rights Compliance.

Educational institution means a local educational agency (LEA) as defined by 20 U.S.C. 8801(18), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, as defined in this section.

Federal financial assistance means any of the following, when authorized or extended under a law administered by the Federal agency that awards such assistance:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

Institution of graduate higher education means an institution that:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences;

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

Institution of professional education means an institution (except any institution of undergraduate higher education) that offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary of Education.

Institution of undergraduate higher education means:

(1) An institution offering at least two but less than four years of college-level study beyond the high school

level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body that certifies credentials or offers degrees, but that may or may not offer academic study.

Institution of vocational education means a school or institution (except an institution of professional or graduate or undergraduate higher education) that has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof.

Student means a person who has gained admission.

Title IX means Title IX of the Education Amendments of 1972, Public Law 92–318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. 1681–1688) (except sections 904 and 906 thereof), as amended by section 3 of Public Law 93–568, 88 Stat. 1855, by section 412 of the Education Amendments of 1976, Public Law 94–482, 90 Stat. 2234, and by Section 3 of Public Law 100–259, 102 Stat. 28, 28–29 (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688).

Title IX regulations means the provisions set forth at §§113.100 through 113.605.

Transition plan means a plan subject to the approval of the Secretary of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, 20 U.S.C. 1681(a)(2), under which an educational institution operates in making the transition from being an educational institution that admits only students of one sex to being one that admits students of both sexes without discrimination.

§ 113.110 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex. Nothing in these Title IX regulations shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12086, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of September 29, 2000:

(1) Evaluate, in terms of the requirements of these Title IX regulations, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and nonacademic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices that do not or may not meet the requirements of these Title IX regulations; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination that resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the designated agency official upon request, a description of any modifications made pursuant to paragraph (c)(2) of this section and of any remedial steps taken pursuant to paragraph (c)(3) of this section.

§ 113.115 Assurance required.

(a) *General.* Either at the application stage or the award stage, Federal agencies must ensure that applications for Federal financial assistance or awards of Federal financial assistance contain, be accompanied by, or be covered by a specifically identified assurance from the applicant or recipient, satisfactory to the designated agency official, that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations. An assurance of compliance with these Title IX regulations shall not be satisfactory to the designated agency official if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §113.110(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the designated agency official of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* (1) The assurances required by paragraph (a) of this section, which may be included as part of a document that addresses other assurances or obligations, shall include that the applicant or recipient will comply with all applicable Federal statutes relating to nondiscrimination. These include but are not limited to: Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681–1683, 1685–1688).

(2) The designated agency official will specify the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

§ 113.120 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee that operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of §§113.205 through 113.235(a).

§ 113.125 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by these Title IX regulations are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12087, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 295m, 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act of 1963 (29 U.S.C. 206); and any other Act of Congress or Federal regulation.

(b) *Effect of State or local law or other requirements.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any State or local law or other requirement that would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association that would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and that receives Federal financial assistance.

§ 113.130 Effect of employment opportunities.

The obligation to comply with these Title IX regulations is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

§ 113.135 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations. The recipient shall notify all its students and employees of the name, office address, and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.

§ 113.140 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities that it operates, and that it is required by Title IX and these Title IX regulations not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and these Title IX regulations, but shall state at least that the requirement not to discriminate in education programs or activities extends to employment therein, and to admission thereto unless §§ 113.300 through 113.310 do not apply to the recipient, and that inquiries concerning the application of Title IX and these Title IX regulations to such recipient may be referred to the employee designated pursuant to § 113.135, or to the designated agency official.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of September 29, 2000 or of the date these Title IX regulations first apply to such recipient, whichever comes later, which notification shall include publication in:

(i) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(ii) Memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form

that it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in paragraph (b)(1) of this section that suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by these Title IX regulations.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b)(1) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and shall require such representatives to adhere to such policy.

COVERAGE

§ 113.200 Application.

Except as provided in §§ 113.205 through 113.235(a), these Title IX regulations apply to every recipient and to each education program or activity operated by such recipient that receives Federal financial assistance.

§ 113.205 Educational institutions and other entities controlled by religious organizations.

(a) *Exemption.* These Title IX regulations do not apply to any operation of an educational institution or other entity that is controlled by a religious organization to the extent that application of these Title IX regulations would not be consistent with the religious tenets of such organization.

(b) *Exemption claims.* An educational institution or other entity that wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the designated agency official a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

§ 113.210 Military and merchant marine educational institutions.

These Title IX regulations do not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

§ 113.215 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* These Title IX regulations do not apply to the membership practices of social fraternities and sororities that are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls.* These Title IX regulations do not apply to the membership practices of the Young Men's Christian Association (YMCA), the Young Women's Christian Association (YWCA), the Girl Scouts, the Boy Scouts, and Camp Fire Girls.

(c) *Voluntary youth service organizations.* These Title IX regulations do not apply to the membership practices of a voluntary youth service organization that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

§ 113.220 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by these Title IX regulations.

(b) *Administratively separate units.* For the purposes only of this section, §§ 113.225 and 113.230, and §§ 113.300 through 113.310, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of §§ 113.300 through 113.310.* Except as provided in paragraphs (d) and (e) of this section, §§ 113.300 through 113.310 apply to each recipient. A recipient to which §§ 113.300

through 113.310 apply shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 113.300 through 113.310.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§ 113.300 through 113.310 apply only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* §§ 113.300 through 113.310 do not apply to any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting students of only one sex.

§ 113.225 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which §§ 113.300 through 113.310 apply that:

(1) Admitted students of only one sex as regular students as of June 23, 1972; or

(2) Admitted students of only one sex as regular students as of June 23, 1965, but thereafter admitted, as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 113.300 through 113.310.

§ 113.230 Transition plans.

(a) *Submission of plans.* An institution to which § 113.225 applies and that is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 113.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§ 113.300 through 113.310 unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 113.225 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs that emphasize the institution's commitment to enrolling students of the sex previously excluded.

§ 113.235 Statutory amendments.

(a) This section, which applies to all provisions of these Title IX regulations, addresses statutory amendments to Title IX.

(b) These Title IX regulations shall not apply to or preclude:

(1) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference;

(2) Any program or activity of a secondary school or educational institution specifically for:

(i) The promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) The selection of students to attend any such conference;

(3) Father-son or mother-daughter activities at an educational institution or in an education program or activity, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided to students of the other sex;

(4) Any scholarship or other financial assistance awarded by an institution of higher education to an individual because such individual has received such award in a single-sex pageant based upon a combination of factors related to the individual's personal appearance, poise, and talent. The pageant, however, must comply with other nondiscrimination provisions of Federal law.

(c) *Program or activity* or *program* means:

(1) All of the operations of any entity described in paragraphs (c)(1)(i) through (iv) of this section, any part of which is extended Federal financial assistance:

(i)(A) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(ii)(A) A college, university, or other postsecondary institution, or a public system of higher education; or

(B) A local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(iii)(A) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(*1*) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(*2*) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(iv) Any other entity that is established by two or more of the entities described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2)(i) *Program or activity* does not include any operation of an entity that is controlled by a religious organization if the application of 20 U.S.C. 1681 to such operation would not be consistent with the religious tenets of such organization.

(ii) For example, all of the operations of a college, university, or other postsecondary institution, including but not limited to traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities are part of a ''program or activity'' subject to these Title IX regulations if the college, university, or other institution receives Federal financial assistance.

(d)(1) Nothing in these Title IX regulations shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Medical procedures, benefits, services, and the use of facilities, necessary to save

the life of a pregnant woman or to address complications related to an abortion are not subject to this section.

(2) Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion. Accordingly, subject to paragraph (d)(1) of this section, no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, employment, or other educational program or activity operated by a recipient that receives Federal financial assistance because such individual has sought or received, or is seeking, a legal abortion, or any benefit or service related to a legal abortion.

DISCRIMINATION ON THE BASIS OF SEX IN ADMISSION AND RECRUITMENT PROHIBITED

§ 113.300 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which §§ 113.300 through §§ 113.310 apply, except as provided in §§ 113.225 and §§ 113.230.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 113.300 through 113.310 apply shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission that has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria that do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 113.300 through 113.310 apply:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice that so discriminates or excludes;

(3) Subject to § 113.235(d), shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is ''Miss'' or ''Mrs.'' A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ 113.305 Preference in admission.

A recipient to which §§ 113.300 through 113.310 apply shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity that admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of §§ 113.300 through 113.310.

§ 113.310 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 113.300 through 113.310 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may

be required to undertake additional recruitment efforts for one sex as remedial action pursuant to §113.110(a), and may choose to undertake such efforts as affirmative action pursuant to §113.110(b).

(b) *Recruitment at certain institutions.* A recipient to which §§113.300 through 113.310 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities that admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of §§113.300 through 113.310.

DISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES PROHIBITED

§113.400 Education programs or activities.

(a) *General.* Except as provided elsewhere in these Title IX regulations, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance. Sections 113.400 through 113.455 do not apply to actions of a recipient in connection with admission of its students to an education program or activity of a recipient to which §§113.300 through 113.310 do not apply, or an entity, not a recipient, to which §§113.300 through 113.310 would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in §§113.400 through 113.455, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, that are designed to provide opportunities to study abroad, and that are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* that a recipient educational institution that administers or assists in the administration of such scholarships, fellowships, or other awards that are restricted to members of one sex provides, or otherwise makes available, reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aids, benefits or services not provided by recipient.* (1) This paragraph (d) applies to any recipient that requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or that facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient that these Title IX regulations would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

§ 113.405 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than that provided by such recipient.

(2)(i) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(A) Proportionate in quantity; and

(B) Comparable in quality and cost to the student.

(ii) A recipient may render such assistance to any agency, organization, or person that provides all or part of such housing to students of only one sex.

§ 113.410 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

§ 113.415 Access to course offerings.

(a) A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(b)(1) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from September 29, 2000. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from September 29, 2000.

(2) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(4) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such effect.

(5) Portions of classes in elementary and secondary schools, or portions of education programs or activities, that deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(6) Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

§ 113.420 Access to schools operated by LEAs.

A recipient that is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

§ 113.425 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient that uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials that permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

§ 113.430 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amounts or types of such assistance, limit eligibility for such assistance that is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities, or other services, assist any foundation, trust, agency, organization, or person that provides assistance to any of such recipient's students in a manner that discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance that treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government that require that awards be made to members of a particular sex specified therein; *Provided,* that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form

of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) A recipient may provide separate athletic scholarships or grants-in-aid for members of each sex as part of separate athletic teams for members of each sex to the extent consistent with this paragraph (c) and §113.450.

§113.435 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient that assists any agency, organization, or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person that discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient that employs any of its students shall not do so in a manner that violates §§113.500 through 113.550.

§113.440 Health and insurance benefits and services.

Subject to §113.235(d), in providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner that would violate §§113.500 through 113.550 if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service shall provide gynecological care.

§113.445 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status that treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation as long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient that operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section, shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) Subject to §113.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy that such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient that does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and

recovery therefrom as a justification for a leave of absence for as long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status that she held when the leave began.

§ 113.450 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* (1) A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the designated agency official will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice, and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

(2) For purposes of paragraph (c)(1) of this section, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the designated agency official may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from September 29, 2000. A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the secondary or postsecondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from September 29, 2000.

§ 113.455 Textbooks and curricular material.

Nothing in these Title IX regulations shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

§ 113.500 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether

full-time or part-time, under any education program or activity operated by a recipient that receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way that could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by §§ 113.500 through 113.550, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity that admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of these Title IX regulations.

(b) *Application.* The provisions of §§ 113.500 through 113.550 apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications, and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

§ 113.505 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity that has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

§ 113.510 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have so discriminated in the past, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities that furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of §§ 113.500 through 113.550.

§ 113.515 Compensation.

A recipient shall not make or enforce any policy or practice that, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.

§ 113.520 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements that classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in § 113.550.

§ 113.525 Fringe benefits.

(a) *''Fringe benefits'' defined.* For purposes of these Title IX regulations, *fringe benefits* means: Any medical, hospital, accident, life insurance, or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 113.515.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex or that otherwise discriminates in benefits on the basis of sex.

§ 113.530 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment that treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* Subject to § 113.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status that she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

§ 113.535 Effect of state or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with §§ 113.500

through 113.550 is not obviated or alleviated by the existence of any State or local law or other requirement that imposes prohibitions or limits upon employment of members of one sex that are not imposed upon members of the other sex.

(b) *Benefits.* A recipient that provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

§ 113.540 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job in question.

§ 113.545 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is ''Miss'' or ''Mrs.''

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ 113.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§113.500 through 113.550 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

PROCEDURES

§ 113.600 Notice of covered programs.

Within 60 days of September 29, 2000, each Federal agency that awards Federal financial assistance shall publish in the FEDERAL REGISTER a notice of the programs covered by these Title IX regulations. Each such Federal agency shall periodically republish the notice of covered programs to reflect changes in covered programs. Copies of this notice also shall be made available upon request to the Federal agency's office that enforces Title IX.

§ 113.605 Enforcement procedures.

The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) (''Title VI'') are hereby adopted and applied to these Title IX regulations. These procedures may be found at 13 CFR part 112.

[65 FR 52876, Aug. 30, 2000]

PART 114—ADMINISTRATIVE CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT AND REPRESENTATION AND INDEMNIFICATION OF SBA EMPLOYEES

Subpart A—Administrative Tort Claims

Sec.

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AUTHORITY: 15 U.S.C. 634 (b)(1), (b)(6); 28 U.S.C. 2672; 28 CFR 14.11.

SOURCE: 61 FR 2401, Jan. 26, 1996, unless otherwise noted.

Subpart A—Administrative Tort Claims

§ 114.100 Definitions.

As used throughout this part 114, *date of accrual* means the date you know or reasonably should have known of your injury. The date of accrual will depend on the facts of each case. *Site* means the geographic location where the incident giving rise to your claim occurred.

§ 114.101 What do these regulations cover?

This part applies only to monetary claims you assert under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, for injury to or loss of property, personal injury, or death arising from the negligent or wrongful act or omission of any SBA employee acting within the scope of his or her employment.

§ 114.102 When, where and how do I present a claim?

(a) *When.* You must present your claim within 2 years of the date of accrual.

(b) *Where.* You may present your claim at the SBA District Office nearest to the site of the action giving rise to the claim and within the same state as the site. If your claim is based on the acts or omissions of an employee of SBA's Disaster Assistance Program, you may present your claim either to the appropriate SBA District Office or to the Disaster Assistance Office nearest to the site of the action giving rise to the claim.

(c) *How.* You must use an official form which can be obtained from the SBA office where you file the claim or give other written notice of your claim, stating the specific amount of your alleged damages and providing enough information to enable SBA to investigate your claim. You may present your claim in person or by mail, but your claim will not be considered presented until SBA receives the written information.

[64 FR 40283, July 26, 1999]

§ 114.103 Who may file a claim?

(a) If a claim is based on factors listed in the first column, then it may be presented by persons listed in the second column.

Claim factors	Claim presenters
Injury to or loss of property ...	The owner of the property, his or her duly authorized agent, or legal representative.
Personal injury	The injured person, his or her duly authorized agent, or legal representative.
Death	The executor, administrator, or legal representative of the decedent's estate, or any other person entitled to assert the claim under applicable state law.
Loss wholly compensated by an insurer with rights as a subrogee.	The parties individually, as their interests appear, or jointly.

(b) An agent or legal representative may present your claim in your name, but must sign the claim, state his or her title or legal capacity, and include documentation of authority to present the claim on your behalf.

§ 114.104 What evidence and information may SBA require relating to my claim?

(a) For a claim based on injury to or loss of property:

(1) Proof you own the property.

(2) A specific statement of the damage you claim with respect to each item of property.

(3) Itemized receipts for payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price and salvage value, where repair is not economical.

(5) Full information about potential insurance coverage and any insurance claims or payments relating to your claim.

(6) Any other information that may be relevant to the government's alleged liability or the damages you claim.

(b) For a claim based on personal injury, including pain and suffering:

(1) A written report from your health care provider stating the nature and extent of your injury and treatment,

the degree of your temporary or permanent disability, your prognosis, period of hospitalization, and any diminished earning capacity.

(2) A written report following a physical, dental or mental examination of you by a physician employed by SBA or another Federal Agency. If you want a copy of this report, you must request it in writing, furnish SBA with the written report of your health care provider, if SBA requests it, and make or agree to make available to SBA any other medical reports relevant to your claim.

(3) Itemized bills for medical, dental and hospital expenses you have incurred, or itemized receipts of payment for these expenses.

(4) Your health care provider's written statement of the expected expenses related to any necessary future treatment.

(5) A statement from your employer showing actual time lost from employment, whether you are a full or part-time employee, and the wages or salary you actually lost.

(6) Documentary evidence showing the amount of earnings you actually lost if you are self-employed.

(7) Information about the existence of insurance coverage and any insurance claims or payments relating to the claim in question.

(8) Any other information that may be relevant to the government's alleged liability or the damages you claim.

(c) For a claim based on death:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) Evidence of decedent's employment or occupation at the time of death, including monthly or yearly salary or earnings, and the duration of such employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent upon the decedent for support at the time of his or her death.

(4) Evidence of the support provided by the decedent to each dependent survivor at the time of his or her death.

(5) A summary of the decedent's general physical and mental condition before death.

(6) Itemized bills or receipts for payments for medical and burial expenses.

(7) For pain and suffering damage claims, a physician's detailed statement specifying the injuries suffered, the duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition in the interval between injury and death.

(8) Any other information that may be relevant to the government's alleged liability or the damages claimed.

§ 114.105 Who investigates and considers my claim?

(a) SBA may investigate, or ask another Federal agency to investigate, your claim. SBA also may request any Federal agency to conduct a physical examination of you and provide a report to SBA. SBA will reimburse the Federal agency for the costs of that examination when authorized or required by statute or regulation.

(b) In those cases in which SBA investigates your claim, and which arise out of the acts or omissions of employees other than employees of the Disaster Assistance Program, the SBA District Counsel in the office with jurisdiction over the site where the action giving rise to the claim occurred will investigate and make recommendations or determination with respect to your claim. In those cases in which SBA investigates your claim, and which arise out of acts or omissions of Disaster Assistance Program employees, the SBA Disaster Area Counsel in the office with jurisdiction over the site where the action giving rise to the claim occurred will investigate and make recommendations or a determination with respect to your claim. The District Counsel, or Disaster Area Counsel, where appropriate, may negotiate with you, and is authorized to use alternative dispute resolution mechanisms, which are nonbinding on SBA, when they may promote the prompt, fair and efficient resolution of your claim.

(c) If your claim is for $5,000 or less, the District Counsel or Disaster Area Counsel who investigates your claim

may deny the claim, or may recommend approval, compromise, or settlement of the claim to the Associate General Counsel for Litigation, who will in such a case take final action.

[61 FR 2401, Jan. 26, 1996, as amended at 64 FR 40283, July 26, 1999]

§ 114.106 What if my claim exceeds $5,000?

The District Counsel or Disaster Area Counsel, as appropriate, must review and investigate your claim and forward it with a report and recommendation to the Associate General Counsel for Litigation, who may approve or deny an award, compromise, or settlement of claims in excess of $5,000, but not exceeding $25,000.

[64 FR 40283, July 26, 1999]

§ 114.107 What if my claim exceeds $25,000 or has other special features?

(a) The U.S. Attorney General or designee must approve in writing any award, compromise, or settlement of a claim in excess of $25,000. For this purpose, a principal claim and any derivative or subrogated claim are considered a single claim.

(b) SBA must consult with the Department of Justice before adjusting, determining, compromising, or settling a claim whenever the General Counsel or designee determines:

(1) The claim involves a new precedent or a new point of law; or

(2) The claim involves or may involve a question of policy; or

(3) The United States is or may be entitled to indemnity or contribution from a third party and SBA is unable to adjust the third party claim; or

(4) Approval of a claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed $25,000.

(c) SBA must consult with the Department of Justice before adjusting, determining, compromising, or settling a claim whenever SBA learns that the United States, or any of its employees, agents, or cost-plus contractors, is involved in litigation based on a claim arising out of the same incident or transaction.

(d) SBA, acting through its General Counsel or designee, must make any referrals to the Department of Justice for approval or consultation by transmitting them in writing to the Assistant Attorney General, Civil Division.

(1) The referral must contain a short and concise statement of the facts and the reason for the request or referral, copies of the relevant portions of the claim file, and SBA's views and recommendations.

(2) SBA may make this referral at any time after a claim is presented.

§ 114.108 What if my claim is approved?

SBA will notify you in writing if it approves your claim. The District Counsel or Disaster Area Counsel investigating your claim will forward to you, your agent or legal representative the forms necessary to indicate satisfaction of your claim and your acceptance of the payment. Acceptance by you, your agent or your legal representative of any award, compromise or settlement releases all your claims against the United States under the Federal Tort Claims Act. This means that it binds you, your agent or your legal representative, and any other person on whose behalf or for whose benefit the claim was presented. It also constitutes a complete release of your claim against the United States and its employees. If you are represented by counsel, SBA will designate you and your counsel as joint payees and will deliver the check to counsel. Payment is contingent upon the waiver of your claim and is subject to the availability of appropriated funds.

[64 FR 40283, July 26, 1999]

§ 114.109 What if my claim is denied?

SBA will notify you or your agent or legal representative in writing by certified or registered mail if it denies your claim. You have a right to file suit in an appropriate U.S. District Court not later than six months after the date the notification was mailed.

Subpart B—Representation and Indemnification of SBA Employees

§ 114.110 What is SBA's policy with respect to indemnifying and providing legal representation to SBA employees?

(a) If an SBA employee engages in conduct, within the scope of his or her employment, which gives rise to a claim, and the SBA Administrator or designee determines that any of the following actions relating to the claim are in SBA's interest, SBA may:

(1) Indemnify the employee after a verdict, judgment, or other monetary award is rendered personally against the employee in any civil suit in state or federal court or any arbitration proceeding;

(2) Settle or compromise the claim; and/or

(3) Pay for, or request that the Department of Justice provide, legal representation to the employee once personally named in such a suit.

(b) If you are an SBA employee, you may ask SBA to settle or compromise your claim, provide you with legal representation, or provide you with indemnification for a verdict, judgment or award entered against you in a suit. To do so, you must submit a timely, written request to the General Counsel, with appropriate documentation, including copies of any pleadings, verdict, judgment, award, or settlement proposal. The General Counsel will decide all requests for representation or settlement, and will forward to the Administrator, with the accompanying documentation and a recommendation, any requests for indemnification.

(c) Any payments by SBA under this section will be contingent upon the availability of appropriated funds.

§ 114.111 Does the attorney-client privilege apply when SBA employees are represented by the Government?

When attorneys employed by SBA participate in any process in which SBA seeks to determine whether SBA should request the Department of Justice to provide representation to an SBA employee sued, subpoenaed, or charged in his or her individual capacity, or whether attorneys employed by SBA should provide representational assistance for such an employee, those attorneys undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. If representation is authorized, SBA attorneys who assist in the representation of an SBA employee also undertake a full and traditional attorney-client relationship with the employee with respect to the attorney-client privilege. Unless authorized by the employee, the attorney must not disclose to anyone other than attorneys also responsible for the employee's representation information communicated to the attorney by the client-employee during the course of the attorney-client relationship. The attorney-client privilege will continue with respect to that information whether or not representation is provided, and even if the employee's representation is denied or discontinued.

PART 115—SURETY BOND GUARANTEE

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AUTHORITY: 5 U.S.C. app 3; 15 U.S.C. 636i, 687b, 687c, 694a, and 694b note.

SOURCE: 61 FR 3271, Jan. 31, 1996, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 115 appear at 72 FR 50038, Aug. 30, 2007.

§ 115.1 Overview of regulations.

The regulations in this part cover the SBA's Surety Bond Guarantee Programs under Part B of Title IV of the Small Business Investment Act of 1958, as amended. Subpart A of this part contains regulations common to both the program requiring prior SBA approval of each bond guarantee (the Prior Approval Program) and the program not requiring prior approval (the PSB Program). Subpart B of this part contains the regulations applicable only to the Prior Approval Program. Subpart C of this part contains the regulations applicable only to the PSB Program.

§ 115.2 Savings clause.

Transactions affected by this part 115 are governed by the regulations in effect at the time they occur.

Subpart A—Provisions for All Surety Bond Guarantees

§ 115.10 Definitions.

Affiliate is defined in §121.301(f) of this chapter.

Ancillary Bond means a bond incidental and essential to the performance of a Contract for which there is a guaranteed Final Bond.

Applicable Statutory Limit means the maximum amount, set forth below, of any Contract or Order for which SBA is authorized to guarantee, or commit to guarantee, a Bid Bond, Payment Bond, Performance Bond, or Ancillary Bond:

(1) $6.5 million (as adjusted for inflation in accordance with 41 U.S.C. 1908);

(2) $10 million if a contracting officer of a Federal agency certifies, in accordance with section 115.12(e)(3), that such guarantee is necessary; or

(3) if SBA is guaranteeing the bond in connection with a procurement related to a major disaster pursuant to section 12079 of Pub. L. 110–246, see section 115.12(e)(4).

Bid Bond means a bond conditioned upon the bidder on a Contract entering into the Contract, and furnishing the required Payment and Performance Bonds. The term does not include a forfeiture bond unless it is issued for a jurisdiction where statute or settled decisional law requires forfeiture bonds for public works.

Contract means a written obligation of the Principal, including an Order, requiring the furnishing of services, supplies, labor, materials, machinery, equipment or construction. A Contract:

(1) Must not prohibit a Surety from performing the Contract upon default of the Principal;

(2) Does not include a permit, subdivision contract, lease, land contract, evidence of debt, financial guarantee (*e.g.*, a contract requiring any payment by the Principal to the Obligee, except for contracts in connection with bid and performance bonds for the sale of timber and/or other forest products, such as biomass, that require the Principal to pay the Obligee), warranty of performance or efficiency, warranty of fidelity, or release of lien (other than for claims under a guaranteed bond); and

(3) May include a maintenance agreement under the following circumstances:

(i) The maintenance agreement is ancillary to a Contract for which SBA is guaranteeing a bond, is performed by the same Principal, is for a period of 2 years or less, and only covers defective workmanship or materials that are not

covered by a manufacturer's warranty. With SBA's prior written approval, the agreement may cover a period longer than 2 years, or cover something other than defective workmanship or materials, if a longer period or something other than defective workmanship or materials is customarily required in the relevant trade or industry; or

(ii) The maintenance agreement is stand-alone and is entered into in connection with a Contract for which a bond was not required and only covers defective workmanship or materials that are not covered by a manufacturer's warranty. The agreement must cover a period of 3 years or less that begins immediately after the Contract is complete and must be executed prior to the completion of the Contract. It must also be entered into with the same Principal that completed the Contract. With SBA's prior written approval, the agreement may cover a period longer than 3 years if a longer period is customarily required in the relevant trade or industry.

D/SG means SBA's Director, Office of Surety Guarantees.

Execution means signing by a representative or agent of the Surety with the authority and power to bind the Surety.

Final Bond means a Performance Bond and/or a Payment Bond.

Head of Agency means in the case of a cabinet department, the Secretary; and in the case of an independent commission, board, or agency, the Chair or Administrator; or any person to whom the Secretary, Chair, or Administrator has directly delegated the authority to request SBA to guarantee bonds on Contracts or Orders in excess of $5,000,000.

Imminent Breach means a threat to the successful completion of a bonded Contract which, unless remedied by the Surety, makes a default under the bond appear to be inevitable.

Investment Act means the Small Business Investment Act of 1958 (15 U.S.C. 661 *et seq.*), as amended.

Loss has the meaning set forth in § 115.16.

Obligee means:

(1)(i) In the case of a Bid Bond, the Person requesting bids for the performance of a Contract; or

(ii) In the case of a Final Bond, the Person who has contracted with a Principal for the completion of the Contract and to whom the primary obligation of the Surety runs in the event of a breach by the Principal.

(2) In either case, no Person (other than a Federal department or agency) may be named co-Obligee or Obligee on a bond or on a rider to the bond unless that Person is bound by the Contract to the Principal (or to the Surety, if the Surety has arranged completion of the Contract) to the same extent as the original Obligee. In no event may the addition of one or more co-Obligees increase the aggregate liability of the Surety under the bond.

Order means a task order for services or delivery order for supplies issued under an indefinite delivery Contract (definite quantity, indefinite quantity, or requirements).

OSG means SBA's Office of Surety Guarantees.

Payment Bond means a bond which is conditioned upon the payment by the Principal of money to persons who have a right of action against such bond, including those who have furnished labor, materials, equipment and supplies for use in the performance of the Contract. A Payment Bond can not require the Surety to pay an amount which exceeds the claimant's actual loss or damage.

Performance Bond means a bond conditioned upon the completion by the Principal of a Contract in accordance with its terms.

Person means a natural person or a legal entity.

Premium means the amount charged by a Surety to issue bonds. The Premium is determined by applying an approved rate (see §§ 115.32(a) and 115.60(a)(2)) to the bond or contract amount. The Premium does not include surcharges for extra services, whether or not considered part of the ''premium'' under local law.

Principal means, in the case of a Bid Bond, the Person bidding for the award of a Contract. In the case of Final Bonds and Ancillary Bonds, Principal means the Person primarily liable to complete the Contract, or to make Contract-related payments to other

persons, and is the Person whose performance or payment is bonded by the Surety. A Principal may be a prime contractor or a subcontractor.

Prior Approval Agreement means the Surety Bond Guarantee Agreement (SBA Form 990) entered into between a Prior Approval Surety and SBA under which SBA agrees to guarantee a specific bond.

Prior Approval Surety means a Surety which must obtain SBA's prior approval on each guarantee and which has entered into one or more Prior Approval Agreements with SBA.

PSB Agreement means the Preferred Surety Bond Guarantee Agreement entered into between a PSB Surety and SBA.

PSB Surety means a Surety that has been admitted to the Preferred Surety Bond (PSB) Program.

Service-Disabled Veteran means a veteran with a disability that is service-connected, as defined in Section 101(16) of Title 38, United States Code.

Small Business Owned and Controlled by Service-Disabled Veterans means:

(1) A Small Concern of which not less than 51 percent is owned by one or more Service-Disabled Veterans; or a publicly-owned Small concern of which not less than 51 percent of the stock is owned by one or more Service-Disabled Veterans; and

(2) The management and daily business operations of which are controlled by one or more Service-Disabled Veterans, or in the case of a Service-Disabled Veteran with permanent and severe disability, the spouse or permanent caregiver of such Veteran.

Small Business Owned and Controlled by Veterans means:

(1) A Small Concern of which not less than 51 percent is owned by one or more Veterans; or a publicly-owned Small Concern of which not less than 51 percent of the stock is owned by one or more Veterans; and

(2) The management and daily business operations of which are controlled by one or more Veterans.

Surety means a company which:

(1)(i) Under the terms of a Bid Bond, agrees to pay a sum of money to the Obligee if the Principal breaches the conditions of the bond;

(ii) Under the terms of a Performance Bond, agrees to pay a sum of money or to incur the cost of fulfilling the terms of a Contract if the Principal breaches the conditions of the Contract; and

(iii) Under the terms of a Payment or an Ancillary Bond, agrees to make payment to all who have a right of action against such bond, including those who have furnished labor, materials, equipment and supplies in the performance of the Contract.

(2) The term Surety includes an agent, independent agent, underwriter, or any other company or individual empowered to act on behalf of the Surety.

Veteran has the meaning given the term in Section 101(2) of Title 38, United States Code.

[61 FR 3271, Jan. 31, 1996, as amended at 61 FR 7985, Mar. 1, 1996; 72 FR 34599, June 25, 2007; 72 FR 50038, Aug. 30, 2007; 74 FR 36109, July 22, 2009; 76 FR 2572, Jan. 14, 2011; 76 FR 9963, Feb. 23, 2011; 77 FR 41665, July 16, 2012; 79 FR 2086, Jan. 13, 2014; 81 FR 41428, June 27, 2016; 87 FR 48083, Aug. 8, 2022; 88 FR 24473, Apr. 21, 2023]

§ 115.11 Applying to participate in the Surety Bond Guarantee Program.

Sureties interested in participating as Prior Approval Sureties or PSB Sureties should apply in writing to the D/SG at 409 3rd Street, SW., Washington, DC 20416. OSG will determine the eligibility of the applicant considering its standards and procedures for underwriting, administration, claims and recovery. Each applicant must be a corporation listed by the U.S. Treasury as eligible to issue bonds in connection with Federal procurement contracts. At a minimum, each applicant must have salaried staff that is employed directly (not an agent or other individual or entity under contract with the applicant) to oversee its underwriting function and perform all claims and recovery functions other than specialized services the costs of which may be reimbursable under 13 CFR 115.16(e)(1). Final settlement authority for claims and recovery must be vested only in the applicant's salaried claims staff. The applicant must continue to comply with SBA's standards and procedures for underwriting, administration,

claims, recovery, and staffing requirements while participating in SBA's Surety Bond Guarantee Programs.

[61 FR 3271, Jan. 31, 1996, as amended at 81 FR 23565, Apr. 22, 2016]

§ 115.12 General program policies and provisions.

(a) *Description of Surety Bond Guarantee Programs.* SBA guarantees Sureties participating in the Surety Bond Guarantee Programs against a portion of their Losses incurred and paid as a result of a Principal's breach of the terms of a Bid Bond, Final Bond or Ancillary Bond, on any eligible Contract. In the Prior Approval Program, the Surety must obtain SBA's approval before a guaranteed bond can be issued. In the PSB Program, selected Sureties may issue, monitor, and service SBA guaranteed bonds without further SBA approval.

(b) *Eligibility of bonds.* Bid Bonds and Final Bonds are eligible for an SBA guarantee if they are executed in connection with an eligible Contract, as defined in §115.10, Definitions. Commercial and Fidelity bonds are not eligible for SBA guarantees. Ancillary Bonds may also be eligible for SBA's guarantee. A performance bond must not prohibit a Surety from performing the Contract upon default of the Principal.

(c) *Expiration of Bid Bond Guarantee.* A Bid Bond guarantee expires 120 days after Execution of the Bid Bond, unless the Surety notifies SBA in writing before the 120th day that a later expiration date is required. The notification must include the new expiration date.

(d) *Guarantee agreement.* The terms and conditions of SBA's bond guarantee agreements, including the guarantee percentage, may vary from Surety to Surety, depending on past experience with SBA. If the guarantee percentage is not fixed by the Investment Act, it is determined by OSG after considering, among other things, the rating or ranking assigned to the Surety by recognized authority, and the Surety's Loss rate, average Contract amount, average bond penalty per guaranteed bond, and ratio of Bid Bonds to Final Bonds, all in comparison with other Sureties participating in the same SBA Surety Bond Guarantee Program (Prior Approval or PSB) to a comparable degree. Any guarantee agreement under this part is made exclusively for the benefit of SBA and the Surety, and does not confer any rights (such as a right of action against SBA) or benefits on any other party.

(e) *Amount of Contract*—(1) *Determination of Amount of Contract.* For a fixed price Contract, the amount of the Contract is the price excluding any options. For a requirements Contract, the amount of the Contract is the price of the total estimated quantity to be ordered under the Contract. For an indefinite quantity Contract, the amount of the Contract is the price of the specified minimum quantity to be ordered under the Contract and, for each Order issued under such Contract, the price of each such Order. The amount of the Contract or Order to be bonded must not exceed the Applicable Statutory Limit as of the date:

(i) SBA approves a Prior Approval Surety's request for a Bid Bond guarantee;

(ii) A Preferred Surety Executes a Bid Bond; or

(iii) The date Final Bonds (and any Ancillary Bonds) unrelated to an SBA-guaranteed Bid Bond are Executed by a Preferred Surety or by a Prior Approval Surety following SBA's approval of its request for a guarantee of Final Bonds.

(2) *Aggregation of Contract and Order amounts.* (i) The amounts of two or more formally separate Contracts for a single construction project are aggregated to determine the Contract amount unless the Contracts are to be performed in phases and the prior bond is released before the beginning of each succeeding phase. A bond may be considered released even if the warranty period it is covering has not yet expired. For purposes of this paragraph, a ''single construction project'' means one represented by two or more Contracts of one Principal or its Affiliates with one Obligee or its Affiliates for performance at the same location, regardless of job title or nature of the work to be performed.

(ii) The amounts of two or more Contracts or Orders for supplies and services awarded to the same Principal or

its Affiliates are aggregated to determine the Contract or Order amount if SBA determines, after discussion with the contracting official responsible for the award of the contract, that award of a single Contract or Order could reasonably have satisfied the supply or service requirement at the time of issuance.

(3) *Federal Contracts or Orders in excess of $6,500,000 (as adjusted for inflation in accordance with section 1908 of title 41, United States Code).* SBA is authorized to guarantee bonds on Federal Contracts or Orders greater than $6,500,000 (as adjusted for inflation in accordance with 41 U.S.C. 1908), but not exceeding $10,000,000, upon a signed certification of a Federal contracting officer that the SBA guarantee is necessary. The certification must be either express mailed to SBA, Office of Surety Guarantees, 409 Third Street SW, Washington, DC 20416 or sent by email to *suretybonds@sba.gov*, and include the following additional information:

(i) Name, address and telephone number of the small business;

(ii) Offer or Contract number and brief description of the contract; and

(iii) Estimated Contract value and date of anticipated award determination.

(4) *Alternative authority to guarantee bonds for Contracts and Orders related to a major disaster area.* Subject to the availability of funds appropriated in advance specifically for the purpose of guaranteeing bonds for any Contract or Order related to a major disaster, SBA may, as an alternative to the authority otherwise set forth in this Part, guarantee bonds on any Contract or Order under the following terms and conditions:

(i) The Contract or Order does not exceed $5,000,000 at the time of bond execution, and:

(A) For products or services procured under a Federal Contract or Order, the products will be manufactured or the services will be performed in the major disaster area identified in the Federal Emergency Management Agency (FEMA) Web site at *http://www.fema.gov*, or the products will be manufactured or the services will be performed outside the major disaster area and the products or services will directly assist in the recovery efforts in the major disaster area; or

(B) For products or services procured under any other Contract or Order, the products will be manufactured or the services will be performed in the major disaster area identified in the FEMA Web site at *http://www.fema.gov;*

(ii) At the request of the Head of the Agency involved in reconstruction efforts in response to a major disaster, SBA may guarantee bonds on Federal Contracts or Orders in excess of $5,000,000, but not more than $10,000,000;

(iii) A guarantee may be issued under this paragraph (e)(4) for any Contract or Order for which an offer is submitted or an award is made within 12 months from the date an area is designated a major disaster area in the FEDERAL REGISTER. SBA may, at its discretion, extend this time period for any particular disaster, and will publish a notice of the extension in the FEDERAL REGISTER.

(f) *Transfers or sales by Surety.* Sureties must not sell or otherwise transfer their files or accounts, whether before or after a default by the Principal has occurred, without the prior written approval of SBA. A violation of this provision is grounds for termination from participation in the program. This provision does not apply to the sale of an entire business division, subsidiary or operation of the Surety.

[61 FR 3271, Jan. 31, 1996, as amended at 66 FR 30804, June 8, 2001; 74 FR 36109, July 22, 2009; 76 FR 2572, Jan. 14, 2011; 79 FR 2086, Jan. 13, 2014; 87 FR 48083, Aug. 8, 2022]

§ 115.13 Eligibility of Principal.

(a) *General eligibility.* In order to be eligible for a bond guaranteed by SBA, the Principal must comply with the following requirements:

(1) *Size.* Together with its Affiliates, it must qualify as a small business under part 121 of this title.

(2) *Character.* It must possess good character and reputation. A Principal meets this standard if each owner of 20% or more of its equity, and each of its officers, directors, or general partners, possesses good character and reputation. A Person's good character and reputation is presumed absent when:

(i) The Person is under indictment for, or has been convicted of a felony,

or a final civil judgment has been entered stating that such Person has committed a breach of trust or has violated a law or regulation protecting the integrity of business transactions or business relationships; or

(ii) A regulatory authority has revoked, canceled, or suspended a license of the Person which is necessary to perform the Contract; or

(iii) The Person has obtained a bond guarantee by fraud or material misrepresentation (as described in §115.19(b)), or has failed to keep the Surety informed of unbonded contracts or of a contract bonded by another Surety, as required by a bonding line commitment under §115.33.

(3) *Need for bond.* It must certify that a bond is expressly required by the bid solicitation or the original Contract in order to bid on the Contract or to serve as a prime contractor or subcontractor.

(4) *Availability of bond.* It must certify that a bond is not obtainable on reasonable terms and conditions without SBA's guarantee.

(5) *Partial subcontract.* It must certify the percentage of work under the Contract to be subcontracted. SBA will not guarantee bonds for Principals who are primarily brokers. In addition, the Principal must retain full responsibility for the oversight and management of the Contract, including any work performed by any subcontractor, and may not subcontract the full scope of the statement of work.

(6) *Debarment.* It must certify that the Principal is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from transactions with any Federal department or agency, under governmentwide debarment and suspension rules.

(7) *No loss of eligibility.* Neither the Principal nor any of its Affiliates is ineligible for an SBA-guaranteed bond under §115.14.

(b) *Conflict of interest.* A Principal is not eligible for an SBA-guaranteed bond issued by a particular Surety if that Surety, or an Affiliate of that Surety, or a close relative or member of the household of that Surety or Affiliate owns, directly or indirectly, 10% or more of the Principal. This prohibition also applies to ownership interests in any of the Principal's Affiliates.

[61 FR 3271, Jan. 31, 1996, as amended at 79 FR 2087, Jan. 13, 2014; 81 FR 23565, Apr. 22, 2016]

§115.14 Loss of Principal's eligibility for future assistance and reinstatement of Principal.

(a) *Ineligibility.* A Principal and its Affiliates lose eligibility for further SBA bond guarantees if any of the following occurs under an SBA-guaranteed bond issued on behalf of the Principal:

(1) Legal action under the guaranteed bond has been initiated.

(2) The Obligee has declared the Principal to be in default under the Contract.

(3) The Surety has established a claim reserve for the bond of at least $10,000.

(4) The Principal, or any of its Affiliates, has defaulted on an SBA-guaranteed bond resulting in a Loss that has not been fully reimbursed to SBA, or SBA has not been fully reimbursed for any Imminent Breach payments.

(5) The guarantee fee has not been paid by the Principal.

(6) The Principal committed fraud or material misrepresentation in obtaining the guaranteed bond.

(b) *Reinstatement of Principal's eligibility.* At any time after a Principal becomes ineligible for further bond guarantees under paragraph (a) of this section:

(1) A Prior Approval Surety may recommend that such Principal's eligibility be reinstated, and OSG may agree to reinstate the Principal if:

(i) The Surety has settled its claim with the Principal, or any of its Affiliates, for an amount that results in no Loss to SBA or in no amount owed for Imminent Breach payments, or OSG finds good cause for reinstating the Principal notwithstanding the Loss to SBA or amount owed for Imminent Breach payments; or

(ii) OSG and the Surety determine that further bond guarantees are appropriate after the Principal was deemed ineligible for further SBA bond guarantees under paragraph (a)(1), (2), (3), (5) or (6) of this section.

(2) A PSB Surety may:

(i) Recommend that such Principal's eligibility be reinstated, and OSG may agree to reinstate the Principal, if the Surety has settled its claim with the Principal, or any of its Affiliates, for an amount that results in no Loss to SBA or in no amount owed for Imminent Breach payments, or OSG finds good cause for reinstating the Principal notwithstanding the Loss to SBA or amount owed for Imminent Breach payments; or

(ii) Reinstate a Principal's eligibility upon the Surety's determination that further bond guarantees are appropriate after the Principal was deemed ineligible for further SBA bond guarantees under paragraph (a)(1), (2), (3), (5) or (6) of this section.

(c) *Underwriting after reinstatement.* A guarantee application submitted after reinstatement of the Principal's eligibility is subject to a very stringent underwriting review.

[61 FR 3271, Jan. 31, 1996, as amended at 81 FR 23565, Apr. 22, 2016; 87 FR 48084, Aug. 8, 2022]

§ 115.15 Underwriting and servicing standards.

(a) *Underwriting.* (1) Sureties must evaluate the credit, capacity, and character of a Principal using standards generally accepted by the surety industry and in accordance with SBA's Standard Operating Procedures on underwriting and the Surety's principles and practices on unguaranteed bonds. The Principal must satisfy the eligibility requirements set forth in §115.13. The Surety must reasonably expect that the Principal will successfully perform the Contract to be bonded.

(2) The terms and conditions of the bond and the Contract must be reasonable in light of the risks involved and the extent of the Surety's participation. The bond must satisfy the eligibility requirements set forth in §115.12(b). The Surety must be satisfied as to the reasonableness of cost and the feasibility of successful completion of the Contract.

(b) *Servicing.* The Surety must ensure that the Principal remains viable and eligible for SBA's Surety Bond Guarantee Program, must monitor the Principal's progress on bonded Contracts guaranteed by SBA, and must request job status reports from Obligees of Final Bonds guaranteed by SBA. Documentation of the job status requests must be maintained by the Surety.

§ 115.16 Determination of Surety's Loss.

Loss is determined as follows:

(a) *Loss under a Bid Bond* is the lesser of the penal sum or the amount which is the difference between the bonded bid and the next higher responsive bid. In either case, the Loss is reduced by any amounts the Surety recovers by reason of the Principal's defenses against the Obligee's demand for performance by the Principal and any sums the Surety recovers from indemnitors and other salvage.

(b) *Loss under a Payment Bond* is, at the Surety's option, the sum necessary to pay all just and timely claims against the Principal for the value of labor, materials, equipment and supplies furnished for use in the performance of the bonded Contract and other covered debts, or the penal sum of the Payment Bond. In either case, the Loss includes interest (if any), but Loss is reduced by any amounts recovered (through offset or otherwise) by reason of the Principal's claims against laborers, materialmen, subcontractors, suppliers, or other rightful claimants, and by any amounts recovered from indemnitors and other salvage.

(c) *Loss under a Performance Bond* is, at the Surety's option, the sum necessary to meet the cost of fulfilling the terms of a bonded Contract or the penal sum of the bond. In either case, the Loss includes interest (if any), but Loss is reduced by any amounts recovered (through offset or otherwise) by reason of the Principal's defenses or causes of action against the Obligee, and by any amounts recovered from indemnitors and other salvage.

(d) *Loss under an Ancillary Bond* is the amount covered by such bond which is attributable to the Contract for which guaranteed Final Bonds were Executed.

(e) *Loss includes* the following expenses if they are itemized, documented and attributable solely to the Loss under the guaranteed bond:

(1) Amounts actually paid by the Surety for specialized services that are provided under contract by an outside

consultant, which is not an Affiliate of the Surety, provided that such services are beyond the capability of the Surety's salaried claims staff, and amounts actually paid by the Surety for travel expenses of the Surety's claims staff. The cost of the consultant's services and the travel expenses of the Surety's claims staff must be reasonable and necessary and must specifically concern the investigation, adjustment, negotiation, compromise, settlement of, or resistance to a claim for Loss resulting from the breach of the terms of the bonded Contract. The cost allocation method must be reasonable and must comply with generally accepted accounting principles; and

(2) Amounts actually paid by the Surety for court costs and reasonable attorney's fees incurred to mitigate any Loss under paragraphs (a) through (e)(1) of this section including suits to obtain sums due from Obligees, indemnitors, Principals and others.

(f) *Loss does not include* the following expenses:

(1) Any unallocated expenses, all direct and indirect costs incurred by the Surety's salaried claims staff (except for reasonable and necessary travel expenses of such staff), or any clear mark-up on expenses or any overhead of the Surety, its attorney, or any other consultant hired by the Surety or the attorney;

(2) Expenses paid for any suits, crossclaims, or counterclaims filed against the United States of America or any of its agencies, officers, or employees unless the Surety has received, prior to filing such suit or claim, written concurrence from SBA that the suit may be filed;

(3) Attorney's fees and court costs incurred by the Surety in a suit by or against SBA or its Administrator;

(4) Fees, costs, or other payments, including tort damages, arising from a successful tort suit or claim by a Principal or any other Person against the Surety; and

(5) Any costs that arise from the Principal's failure to secure and maintain insurance coverage required by the Contract or Order, or any costs that result from any claims or judgments that exceed the amount of any insurance coverage required by the Contract or Order, as well as any costs that arise as a result of any agreement by the Principal in the Contract or Order to indemnify the Obligee or any other Persons.

[61 FR 3271, Jan. 31, 1996, as amended at 76 FR 2572, Jan. 14, 2011; 81 FR 23566, Apr. 22, 2016]

§ 115.17 Minimization of Surety's Loss.

(a) *Indemnity agreements and collateral*—(1) *Requirements.* The Surety must take all reasonable action to minimize risk of Loss including, but not limited to, obtaining from each Principal a written indemnity agreement which covers actual Losses under the Contract and Imminent Breach payments under §115.34(a) or §115.69. The indemnity agreement must be secured by such collateral as the Surety or SBA finds appropriate. Indemnity agreements from other Persons, secured or unsecured, may also be required by the Surety or SBA.

(2) *Prohibitions.* No indemnity agreement may be obtained from the Surety, its agent or any other representative of the Surety. The Surety must not separately collateralize the portion of its bond which is not guaranteed by SBA.

(b) *Salvage and recovery*—(1) *General.* The Surety must pursue all possible sources of salvage and recovery. Salvage and recovery includes all payments made in settlement of the Surety's claim, even though the Surety has incurred other losses as a result of that Principal which are not reimbursable by SBA.

(2) *SBA's share.* SBA is entitled to its guaranteed percentage of all salvage and recovery from a defaulted Principal, its guarantors and indemnitors, and any other party, received by the Surety in connection with the guaranteed bond or any other bond issued by the Surety on behalf of the Principal unless such recovery is unquestionably identifiable as related solely to the non-guaranteed bond. The Surety must reimburse or credit SBA (in the same proportion as SBA's share of Loss) within 45 days of receipt of any recovery by the Surety.

(3) *Multiple Sureties.* In any dispute between two or more Sureties concerning recovery under SBA guaranteed bonds, the dispute must first be

brought to the attention of OSG for an attempt at mediation and settlement.

[61 FR 3271, Jan. 31, 1996, as amended at 79 FR 2087, Jan. 13, 2014]

§ 115.18 Refusal to issue further guarantees; suspension and termination of PSB status.

(a) *Improper surety bond guarantee practices*—(1) *Imprudent practices.* SBA may refuse to issue further guarantees to a Prior Approval Surety or may suspend the preferred status of a PSB Surety, by written notice stating all reasons for such decision and the effective date. Reasons for such a decision include, but are not limited to, a determination that the Surety (in its underwriting, its efforts to minimize Loss, its claims or recovery practices, or its documentation related to SBA guaranteed bonds) has failed to adhere to prudent standards or practices, including any standards or practices required by SBA, as compared to those of other Sureties participating in the same SBA Surety Bond Guarantee Program to a comparable degree.

(2) *Regulatory violations, fraud.* Acts of wrongdoing such as fraud, material misrepresentation, breach of the Prior Approval or PSB Agreement, the Surety's failure to continue to comply with the requirements set forth in §115.11, or regulatory violations (as defined in §115.19(d) and (h)) also constitute sufficient grounds for refusal to issue further guarantees, or in the case of a PSB Surety, termination of preferred status.

(3) *Audit; records.* The failure of a Surety to consent to SBA's audit or to maintain and produce records constitutes grounds for SBA to refuse to issue further guarantees for a Prior Approval Surety, to suspend a PSB Surety from participation, and to refuse to honor claims submitted by a Prior Approval or PSB Surety until the Surety consents to the audit.

(4) *Excessive Losses.* If a Surety experiences excessive Losses on SBA guaranteed bonds relative to those of other Sureties participating in the same SBA Surety Bond Guarantee Program to a comparable degree, SBA may also require the renegotiation of the guarantee percentage and/or SBA's charge to the Surety for bonds executed thereafter.

(b) *Lack of business integrity.* A Surety's participation in the Surety Bond Guarantee Programs may be denied, suspended, or terminated upon the occurrence of any event in paragraphs (b)(1) through (5) of this section involving any of the following Persons: The Surety or any of its officers, directors, partners, or other individuals holding at least 20% of the Surety's voting securities, and any agents, underwriters, or any individual empowered to act on behalf of any of the preceding Persons.

(1) If a State or other authority has revoked, canceled, or suspended the license required of such Person to engage in the surety business, the right of such Person to participate in the SBA Surety Bond Guarantee Program may be denied, terminated, or suspended, as applicable, in that jurisdiction or in other jurisdictions. Ineligibility or suspension from the Surety Bond Guarantee Programs is for at least the duration of the license suspension.

(2) If such Person has been indicted or otherwise formally charged with a misdemeanor or felony bearing on such Person's fitness to participate in the Surety Bond Guarantee Programs, the participation of such Person may be suspended pending disposition of the charge. Upon conviction, participation may be denied or terminated.

(3) If a final civil judgment is entered holding that such Person has committed a breach of trust or violation of a law or regulation protecting the integrity of business transactions or relationships, participation may be denied or terminated.

(4) If such Person has made a material misrepresentation or willfully false statement in the presentation of oral or written information to SBA in connection with an application for a surety bond guarantee or the presentation of a claim, or committed a material breach of the Prior Approval or PSB Agreement or a material violation of the regulations (all as described in §115.19), participation may be denied or terminated.

(5) If such Person is debarred, suspended, voluntarily excluded from, or declared ineligible for participation in

Federal programs, participation may be denied or terminated.

(c) *Notification requirement.* The Prior Approval or PSB Surety must promptly notify SBA of the occurrence of any event in paragraphs (b) (1) through (5) of this section, or if any of the Persons described in paragraph (b) of this section does not, or ceases to, qualify as a Surety. SBA may require submission of a Statement of Personal History (SBA Form 912) from any of these Persons.

(d) *SBA proceedings.* Decisions to suspend, terminate, deny participation in, or deny reinstatement in the Surety Bond Guarantee program are made by the D/SG. A Surety may file a petition for review of suspensions and terminations with the SBA Office of Hearings and Appeals (OHA) under part 134 of this chapter. SBA's Administrator may, pending a decision pursuant to part 134 of this chapter, suspend the participation of any Surety for any of the causes listed in paragraphs (b) (1) through (5) of this section.

(e) *Effect on guarantee.* A guarantee issued by SBA before a suspension or termination under this section remains in effect, subject to SBA's right to deny liability under the guarantee.

[61 FR 3271, Jan. 31, 1996, as amended at 81 FR 23566, Apr. 22, 2016]

§ 115.19 Denial of liability.

In addition to equitable and legal defenses and remedies under contract law, the Act, and the regulations in this Part, SBA is relieved of liability in whole or in part within its discretion if any of the circumstances in paragraphs (a) through (h) of this section exist, except that SBA shall not deny liability on Prior Approval bonds based solely upon material information that was provided to SBA as part of the Surety's guarantee application.

(a) *Excess Contract or bond amount.* The total Contract or Order amount at the time of Execution of the bond exceeds the Applicable Statutory Limit (see § 115.10) or the bond amount at any time exceeds the total Contract or Order amount.

(b) *Misrepresentation or fraud.* The Surety obtained the Prior Approval or PSB Agreement, or applied for reimbursement for losses, by fraud or material misrepresentation. Material misrepresentation includes (but is not limited to) both the making of an untrue statement of material fact and the omission of a statement of material fact necessary to make a statement not misleading in light of the circumstances in which it was made. Material misrepresentation also includes the adoption by the Surety of a material misstatement made by others which the Surety knew or under generally accepted underwriting standards should have known to be false or misleading. The Surety's failure to disclose its ownership (or the ownership by any owner of at least 20% of the Surety's equity) of an interest in a Principal or an Obligee is considered the omission of a statement of material fact.

(c) *Material breach.* The Surety has committed a material breach of one or more terms or conditions of its Prior Approval or PSB Agreement. A material breach is considered to have occurred if:

(1) Such breach (or such breaches in the aggregate) causes an increase in the Contract amount or in the bond amount of at least 25% or $500,000 of the original contract or bond amount, whichever is less; or

(2) One of the conditions under Part B of Title IV of the Investment Act is not met.

(d) *Substantial regulatory violation.* The Surety has committed a ''substantial violation'' of SBA regulations. For purposes of this paragraph, a ''substantial violation'' is a violation which causes an increase in the bond amount of at least 25% or $500,000 of the original contract or bond amount, whichever is less in the aggregate, or is contrary to the purposes of the Surety Bond Guarantee Programs.

(e) *Alteration.* Without obtaining prior written approval from SBA (which may be conditioned upon payment of additional fees), the Surety agrees to or acquiesces in any material alteration in the terms, conditions, or provisions of the bond, including but not limited to the following acts:

(1) Naming as an Obligee or co-Obligee any Person that does not qualify as an Obligee under § 115.10; or

(2) In the case of a Prior Approval Surety, acquiescing in any alteration

to the bond which would increase the bond amount by at least 25% or $500,000 of the original contract or bond amount, whichever is less.

(f) *Timeliness.* (1) Either:

(i) The bond was Executed prior to the date of SBA's guarantee; or

(ii) The bond was Executed (or approved, if the Surety is legally bound by such approval) after the work under the Contract had begun, unless SBA executes a ''Surety Bond Guarantee Agreement Addendum'' (SBA Form 991) after receiving all of the following from the Surety:

(A) Satisfactory evidence, including a certified copy of the Contract (or a sworn affidavit from the Principal), showing that the bond requirement was contained in the original Contract, or other documentation satisfactory to SBA, showing why a bond was not previously obtained and is now being required;

(B) Certification by the Principal that all taxes and labor costs are current, and listing all suppliers and subcontractors, indicating that they are all paid to date, and attaching a waiver of lien from each; or an explanation satisfactory to SBA why such documentation cannot be produced; and

(C) Certification by the Obligee that all payments due under the Contract to date have been made and that the job has been satisfactorily completed to date.

(2)(i) For purposes of paragraph (f)(1)(ii) of this section, work under a Contract is considered to have begun when a Principal takes any action related to the contract or bond that would have exposed its Surety to liability under applicable law had a bond been Executed (or approved, if the Surety is legally bound by such approval) at the time.

(ii) For purposes of this paragraph (f), the Surety must maintain a contemporaneous record of the Execution and approval of each bond.

(g) *Delinquent fees.* The Surety has not remitted to SBA the Principal's payment for the full amount of the guarantee fee within the time period required under §115.30(d) for Prior Approval Sureties or §115.66 for PSB Sureties, or has not made timely payment of the Surety's fee within the time period required by §115.32(c). SBA may reinstate the guarantee upon showing that the contract is not in default and that a valid reason exists why a timely remittance or payment was not made.

(h) *Other regulatory violations.* The occurrence of any of the following:

(1) The Principal on the bonded Contract is not a small business;

(2) The bond was not required under the bid solicitation or the original Contract;

(3) The bond was not eligible for guarantee by SBA because the bonded contract was not a Contract as defined in §115.10;

(4) The loss occurred under a bond that was not guaranteed by SBA;

(5) The loss incurred by the Surety was not a Loss as determined under §115.16; or

(6) The Surety's loss under a Performance Bond did not result from the Principal's breach or Imminent Breach of the Contract.

[61 FR 3271, Jan. 31, 1996, as amended at 66 FR 30804, June 8, 2001; 72 FR 34599, July 25, 2007; 74 FR 36110, July 22, 2009; 79 FR 2087, Jan. 13, 2014; 82 FR 39501, Aug. 21, 2017; 87 FR 48084, Aug. 8, 2022]

§115.20 Insolvency of Surety.

(a) *Successor in interest.* If a Surety becomes insolvent, all rights or benefits conferred on the Surety under a valid and binding Prior Approval or PSB Agreement will accrue only to the trustee or receiver of the Surety. SBA will not be liable to the trustee or receiver of the insolvent Surety except for the guaranteed portion of any Loss incurred and actually paid by such Surety or its trustee or receiver under the guaranteed bonds.

(b) *Filing requirement.* The trustee or receiver must submit to SBA quarterly status reports accounting for all funds received and all settlements being considered.

§115.21 Audits and investigations.

(a) *Audits*—(1) *Scope of audit.* SBA may audit in the office of a Prior Approval or PSB Surety, the Surety's attorneys or consultants, or the Principal or its subcontractors, all documents, files, books, records, tapes, disks and other material relevant to SBA's guarantee, commitments to

guarantee a surety bond, or agreements to indemnify the Prior Approval or PSB Surety. See §115.18(a)(3) for consequences of failure to comply with this section.

(2) *Frequency of PSB audits.* Each PSB Surety is subject to an audit at least once every 3 years by examiners selected and approved by SBA.

(b) *Records.* The Surety must maintain the records listed in this paragraph (b) for the term of each bond, plus any additional time required to settle any claims of the Surety for reimbursement from SBA and to attempt salvage or other recovery, plus an additional 3 years. If there are any unresolved audit findings in relation to a particular bond, the Surety must maintain the related records until the findings are resolved. The records to be maintained include the following:

(1) A copy of the bond;

(2) A copy of the bonded Contract;

(3) All documentation submitted by the Principal in applying for the bond;

(4) All information gathered by the Surety in reviewing the Principal's application;

(5) All documentation of any of the events set forth in §115.35(a) or §115.65(c)(2);

(6) All records of any transaction for which the Surety makes payment under or in connection with the bond, including but not limited to claims, bills (including lawyers' and consultants' bills), judgments, settlement agreements and court or arbitration decisions, consultants' reports, Contracts and receipts;

(7) All documentation relating to efforts to mitigate Losses, including documentation required by §115.34(a) or §115.69 concerning Imminent Breach;

(8) All records of any accounts into which fees and funds obtained in mitigation of Losses were paid and from which payments were made under the bond, and any other trust accounts, and any reconciliations of such accounts;

(9) Job status reports received from Obligees and documentation of each unanswered request for a job status report; and

(10) All documentation relating to any collateral held by or available to the Surety.

(c) *Purpose of audit.* SBA's audit will determine, but not be limited to:

(1) The adequacy and sufficiency of the Surety's underwriting and credit analysis, its documentation of claims and claims settlement procedures and activities, and its recovery procedures and practices;

(2) The Surety's minimization of Loss, including the exercise of bond options upon Contract default; and

(3) The Surety's loss ratio in comparison with other Sureties participating in the same SBA Surety Bond Guarantee Program to a comparable degree.

(d) *Investigations.* SBA may conduct investigations to inquire into the possible violation by any Person of the Small Business Act or the Investment Act, or of any rule or regulation under those Acts, or of any order issued under those Acts, or of any Federal law relating to programs and operations of SBA.

[61 FR 3271, Jan. 31, 1996, as amended at 72 FR 34599, June 25, 2007]

§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.

[82 FR 39501, Aug. 21, 2017]

Subpart B—Guarantees Subject to Prior Approval

§ 115.30 Submission of Surety's guarantee application.

(a) *Legal effect of application.* By submitting an application to SBA for a bond guarantee, the Prior Approval Surety certifies that the Principal meets the eligibility requirements set forth in § 115.13 and that the underwriting standards set forth in § 115.15 have been met.

(b) *SBA's determination.* SBA's approval or decline of a guarantee application is made in writing by an authorized SBA officer. The officer may provide telephone notice before the Prior Approval Surety receives SBA's guarantee approval form if the officer has already signed the form. In the event of a conflict between the telephone notice and the written form, the written form controls.

(c) *Reconsideration-appeal of SBA determination.* A Prior Approval Surety may request reconsideration of a decline from the SBA officer who made the decision. If the decision on reconsideration is negative, the Surety may appeal to an individual designated by the D/SG. If the decision is again adverse, the Surety may appeal to the D/SG, who will make the final decision.

(d) *Prior Approval Agreement.* To apply for a bond guarantee, a Prior Approval Surety must submit a *Surety Bond Guarantee Agreement* (SBA Form 990) and select one of the following application types:

(1) *Regular.* A Prior Approval Surety may complete and submit a *Surety Bond Guarantee Agreement* (SBA Form 990) indicating a Regular application type to SBA for each Bid Bond or Final Bond. This Form must be approved by SBA prior to the Surety's Execution of the bond. The guarantee fees owed in connection with Final Bonds must be paid in accordance with § 115.32.

(2) *Quick Bond Agreement*—(i) *General procedures.* Except as provided in paragraph (d)(2)(ii) of this section, a Prior Approval Surety may complete and submit a SBA Form 990 indicating a Quick Bond Agreement application type for each Bid Bond or Final Bond. This form must be approved by SBA prior to the Surety's Execution of the bond. The Quick Bond application type is used only for contract amounts that do not exceed $500,000 at the time of application. The guarantee fees owed in connection with Final Bonds must be paid in accordance with § 115.32.

(ii) *Exclusions.* The Quick Bond application type may not be used under the following circumstances:

(A) The Principal has previously defaulted on any contract or has had any claims or complaints filed against it with any court or administrative agency;

(B) Work on the Contract commenced before a bond was Executed;

(C) The time for completion of the Contract exceeds 12 months;

(D) The Contract includes a provision for liquidated damages that exceed $2,500 per day;

(E) The Contract involves asbestos abatement, hazardous waste removal, or timber sales; or

(F) The bond would be issued under a surety bonding line approved under § 115.33.

[61 FR 3271, Jan. 31, 1996, as amended at 77 FR 41665, July 16, 2012; 79 FR 2087, Jan. 13, 2014; 82 FR 39501, Aug. 21, 2017; 87 FR 48084, Aug. 8, 2022; 88 FR 24473, Apr. 21, 2023]

§ 115.31 Guarantee percentage.

(a) *Ninety percent.* SBA reimburses a Prior Approval Surety for 90% of the Loss incurred and paid if:

(1) The total amount of the Contract at the time of Execution of the bond is $100,000 or less; or

(2) The bond was issued on behalf of a small business owned and controlled by socially and economically disadvantaged individuals, on behalf of a certified HUBZone small business concern, or on behalf of a small business owned and controlled by veterans or a small business owned and controlled by Service-disabled veterans.

(b) *Eighty percent.* SBA reimburses a Prior Approval Surety in an amount not to exceed 80% of the Loss incurred and paid on bonds for Contracts in excess of $100,000 which are executed on behalf of non-disadvantaged concerns.

(c) *Contract increase to over $100,000.* If the Contract amount increases to more than $100,000 after Execution of the bond, the guarantee percentage decreases by one percentage point for

each $5,000 of increase or part thereof, but it does not decrease below 80%. This provision applies only to guarantees which qualify under paragraph (a)(1) of this section.

(d) *Contract or Order increases exceed Applicable Statutory Limit.* If the Contract or Order amount is increased above the Applicable Statutory Limit after Execution of the bond, SBA's share of the Loss is limited to that percentage of the increased Contract or Order amount that the Applicable Statutory Limit represents multiplied by the guarantee percentage approved by SBA. For example, if a contract amount increases to $6,800,000, SBA's share of the loss under an 80% guarantee is limited to 76.5% [6,500,000/6,800,000 = 95.6% x 80% = 76.5%].

(e) *Contract or Order decrease to $100,000 or less.* If the Contract or Order amount decreases to $100,000, or less, after Execution of the bond, SBA's guarantee percentage increases to 90% if the Surety provides SBA with evidence supporting the decrease and any other information or documents requested.

[61 FR 3271, Jan. 31, 1996, as amended at 64 FR 18324, Apr. 14, 1999; 66 FR 30804, June 8, 2001; 72 FR 34599, June 25, 2007; 74 FR 36110, July 22, 2009; 79 FR 2087, Jan. 13, 2014; 84 FR 65239, Nov. 26, 2019]

§ 115.32 Fees and Premiums.

(a) *Surety's Premium.* A Prior Approval Surety must not charge a Principal an amount greater than that authorized by the appropriate insurance department. The Surety must not require the Principal to purchase casualty or other insurance or any other services from the Surety or any Affiliate or agent of the Surety. The Surety must not charge non-Premium fees to a Principal unless the Surety performs other services for the Principal, the additional fee is permitted by State law, and the Principal agrees to the fee.

(b) *SBA charge to Principal.* SBA does not charge Principals application or Bid Bond guarantee fees. If SBA guarantees a Final Bond, the Principal must pay a guarantee fee equal to a certain percentage of the Contract amount. The percentage is determined by SBA and is published in Notices in the FEDERAL REGISTER from time to time. The Principal's fee is rounded to the nearest dollar and is to be remitted to SBA with the form submitted under § 115.30(d). See paragraph (d) of this section for additional requirements when the Contract amount changes.

(c) *SBA charge to Surety.* SBA does not charge Sureties application or Bid Bond guarantee fees. Subject to § 115.18(a)(4), the Surety must pay SBA a guarantee fee on each guaranteed bond (other than a Bid Bond) within 60 calendar days after SBA's approval of the Prior Approval Agreement. The fee is a certain percentage of the bond premium determined by SBA and published in Notices in the FEDERAL REGISTER from time to time. The fee is rounded to the nearest dollar. SBA does not receive any portion of a Surety's non-premium charges. See paragraph (d) of this section for additional requirements when the Contract or bond amount changes.

(d) *Contract or bond increases/decreases*—(1) *Notification and approval.* The Prior Approval Surety must notify SBA of any increases or decreases in the Contract or bond amount that aggregate 25% or $500,000 of the original contract or bond amount, whichever is less, as soon as the Surety acquires knowledge of the change. Whenever the original bond amount increases as a result of a single change order of at least 25% or $500,000 of the original contract or bond amount, whichever is less, the prior written approval of such increase by SBA is required on a supplemental Prior Approval Agreement and is conditioned upon payment by the Surety of the increase in the Principal's guarantee fee as set forth in paragraph (d)(2) of this section. In notifying SBA of any increase or decrease in the Contract or bond amount, the Prior Approval Surety must use SBA Form 990 and select the application type that it used in applying for the original bond guarantee.

(2) *Increases; fees.* The payment for the increase in the Principal's guarantee fee, which is computed on the increase in the Contract amount, is due upon notification of the increase in the Contract or bond amount under this paragraph (d). If the increase in the Principal's fee is less than $250, no payment is due until the total amount of

increases in the Principal's fee equals or exceeds $250. The Surety's payment of the increase in the Surety's guarantee fee, computed on the increase in the bond Premium, must be submitted to SBA within 60 calendar days of SBA's approval of the Prior Approval Agreement, unless the amount of such increased guarantee fee is less than $250. When the total amount of increase in the guarantee fee equals or exceeds $250, the Surety must remit the fee within 60 calendar days.

(3) *Decreases; refunds.* Whenever SBA is notified of a decrease in the Contract or bond amount, SBA will refund to the Principal a proportionate amount of the Principal's guarantee fee and rebate to the Surety a proportionate amount of SBA's Premium share in the ordinary course of business. If the amount to be refunded or rebated is less than $250, such refund or rebate will not be made until the amounts to be refunded or rebated, respectively, aggregate at least $250. Upon receipt of the refund, the Surety must promptly pay a proportionate amount of its Premium to the Principal.

[61 FR 3271, Jan. 31, 1996, as amended at 72 FR 34599, June 25, 2007; 77 FR 41665, July 16, 2012; 79 FR 2087, Jan. 13, 2014; 82 FR 39502, Aug. 21, 2017; 87 FR 48084, Aug. 8, 2022; 88 FR 24473, Apr. 21, 2023]

§ 115.33 Surety bonding line.

A surety bonding line is a written commitment by SBA to a Prior Approval Surety which provides for the Surety's Execution of multiple bonds for a specified small business strictly within pre-approved terms, conditions and limitations. In applying for a bonding line, the Surety must provide SBA with information on the applicant as requested. In addition to the other limitations and provisions set forth in this part 115, the following conditions apply to each surety bonding line:

(a) *Underwriting.* A bonding line may be issued by SBA for a Principal only if the underwriting evaluation is satisfactory. The Prior Approval Surety must require the Principal to keep it informed of all its contracts, whether bonded by the same or another surety or unbonded, during the term of the bonding line.

(b) *Bonding line conditions.* The bonding line contains limitations on the following:

(1) The term of the bonding line, not to exceed 1 year subject to renewal in writing;

(2) The total dollar amount of the Principal's bonded and unbonded work on hand at any time, including outstanding bids, during the term of the bonding line;

(3) The number of such bonded and unbonded contracts outstanding at any time during the term of the bonding line;

(4) The maximum dollar amount of any single guaranteed bonded Contract;

(5) The timing of Execution of bonds under the bonding line—bonds must be dated and Executed before the work on the underlying Contract has begun, or the Surety must submit to SBA the documentation required under §115.19(f)(1)(ii); and

(6) Any other limitation related to type, specialty of work, geographical area, or credit.

(c) *Excess bonding.* If, after a bonding line is issued, the Principal desires a bond and the Surety desires a guarantee exceeding a limitation of the bonding line, the Surety must submit an application to SBA under regular procedures.

(d) *Submission of forms to SBA*—(1) *Bid Bonds.* Within 15 business days after the Execution of any Bid Bonds under a bonding line, the Surety must submit a ''Surety Bond Guarantee Agreement (Form 990)'' to SBA for approval. If the Surety fails to submit the form within this time period, SBA's guarantee of the bond will be void from its inception unless SBA determines otherwise upon a showing that a valid reason exists why the timely submission was not made.

(2) *Final Bonds.* Within 15 business days after the Execution of any Final Bonds under a bonding line, the Surety must submit a Surety Bond Guarantee Agreement (SBA Form 990) to SBA for approval. If the surety fails to submit this form within the time period or the guarantee fees are not paid in accordance with §115.32, SBA's guarantee of the bond will be void from its inception unless SBA determines otherwise upon

a showing that the Contract is not in default and a valid reason exists why the timely submission was not made.

(3) *Additional information.* The Surety must submit any other data SBA requests.

(e) *Cancellation of bonding line*—(1) *Optional cancellation.* Either SBA or the Surety may cancel a bonding line at any time, with or without cause, upon written notice to the other party. Upon the receipt of any adverse information concerning the Principal, the Surety must promptly notify SBA, and SBA may cancel the bonding line.

(2) *Mandatory cancellation.* Upon the occurrence of a default by the Principal, whether under a contract bonded by the same or another surety or an unbonded contract, the Surety must immediately cancel the bonding line.

(3) *Effect of cancellation.* Cancellation of a bonding line by SBA is effective upon receipt of written notice by the Surety. Bonds issued before the effective date of cancellation remain guaranteed by SBA. Upon cancellation by SBA or the Surety, the Surety must promptly notify the Principal in writing.

[61 FR 3271, Jan. 31, 1996, as amended at 77 FR 41665, July 16, 2012; 87 FR 48084, Aug. 8, 2022]

§ 115.34 Minimization of Surety's Loss.

(a) *Imminent Breach*—(1) *Prior approval requirement.* SBA will reimburse its guaranteed share of payments made by a Surety to avoid or attempt to avoid an Imminent Breach of the terms of a Contract covered by an SBA guaranteed bond only if the payments were made with the prior approval of OSG. OSG's prior approval will be given only if the Surety demonstrates to SBA's satisfaction that a breach is imminent and that there is no other recourse to prevent such breach.

(2) *Amount of reimbursement.* The aggregate of the payments by SBA to avoid Imminent Breach cannot exceed 10% of the Contract amount, unless the Administrator finds that a greater payment (not to exceed the guaranteed share of the bond penalty) is necessary and reasonable. In no event will SBA make any duplicate payment pursuant to this or any other provision of this part 115.

(3) *Recordkeeping requirement.* The Surety must keep records of payments made to avoid Imminent Breach.

(b) *Salvage and recovery.* A Prior Approval Surety must pursue all possible sources of salvage and recovery until SBA concurs with the Surety's recommendation for a discontinuance or for a settlement. The Surety must certify that continued pursuit of salvage and recovery would be neither economically feasible nor a viable strategy in maximizing recovery. See also §115.17(b).

§ 115.35 Claims for reimbursement of Losses.

(a) *Notification requirements*—(1) *Events requiring notification.* A Prior Approval Surety must notify OSG of the occurrence of any of the following:

(i) Legal action under the bond has been initiated.

(ii) The Obligee has declared the Principal to be in default under the Contract.

(iii) The Surety has established a claim reserve for the bond.

(iv) The Surety has received any adverse information concerning the Principal's financial condition or possible inability to complete the project or to pay laborers or suppliers.

(2) *Timing of notification.* Notification must be made in writing at the earlier of the time the Surety applies for a guarantee on behalf of an affected Principal, or within 30 days of the date the Surety acquires knowledge, or should have acquired knowledge, of any of the listed events.

(b) *Surety action.* The Surety must take all necessary steps to mitigate Losses resulting from any of the events in paragraph (a) of this section, including the disposal at fair market value of any collateral held by or available to the Surety. Unless SBA notifies the Surety otherwise, the Surety must take charge of all claims or suits arising from a defaulted bond, and compromise, settle and defend such suits. The Surety must handle and process all claims under the bond and all settlements and recoveries as it does on nonguaranteed bonds.

(c) *Claim reimbursement requests.* (1) Claims for reimbursement for Losses

which the Surety has paid must be submitted (together with a copy of the bond, the bonded Contract, and any indemnity agreements) with the initial claim to OSG on a ''Default Report, Claim for Reimbursement and Report of Recoveries'' (SBA Form 994H), within 90 days from the time of each disbursement. Claims submitted after 90 days must be accompanied by substantiation satisfactory to SBA. The date of the claim for reimbursement is the date of receipt of the claim by SBA, or such later date as additional information requested by SBA is received.

(2) The Surety must also submit evidence of the disposal of all collateral at fair market value.

(3) SBA may request additional information prior to reimbursing the Surety for its Loss.

(4) Subject to the offset provisions of part 140, SBA pays its share of the Loss incurred and paid by the Surety within 45 days of receipt of the requisite information.

(5) Claims for reimbursement and any additional information submitted are subject to review and audit by SBA, including but not limited to the Surety's compliance with SBA's regulations and forms.

(d) *Status updates.* The Surety must submit semiannual status reports on each claim 6 months after the initial default notice, and then every 6 months. The Surety must notify SBA immediately of any substantial changes in the status of the claim or the amounts of Loss reserves.

(e) *Reservation of SBA rights.* The payment by SBA of a Surety's claim does not waive or invalidate any of the terms of the Prior Approval Agreement, the regulations set forth in this part 115, or any defense SBA may have against the Surety. Within 30 days of receipt of notification that a claim or any portion of a claim should not have been paid by SBA, the Surety must repay the specified amounts to SBA.

[61 FR 3271, Jan. 31, 1996, as amended at 79 FR 2087, Jan. 13, 2014]

§ 115.36 Indemnity settlements.

(a) An indemnity settlement occurs when a defaulted Principal and its Surety agree upon an amount, less than the actual loss under the bond, which will satisfy the Principal's indebtedness to the Surety. Sureties must not agree to any indemnity settlement proposal or enter into any such agreement without SBA's concurrence.

(b) Any settlement proposal submitted for SBA's consideration must include current financial information, including financial statements, tax returns, and credit reports, together with the Surety's written recommendations. It should also indicate whether the Principal is interested in further bonding.

(c) The Surety must pay SBA its *pro rata* share of the settlement amount within 45 days of receipt. Prior to closing the file on a Principal, the Surety must certify that SBA has received its *pro rata* share of all indemnity recovery.

[61 FR 3271, Jan. 31, 1996, as amended at 79 FR 2087, Jan. 13, 2014; 81 FR 23566, Apr. 22, 2016]

Subpart C—Preferred Surety Bond (PSB) Guarantees

§ 115.60 Selection and admission of PSB Sureties.

(a) *Selection of PSB Sureties.* SBA's selection of PSB Sureties will be guided by, but not limited to, these factors:

(1) An underwriting limitation of at least $6,500,000 on the U.S. Treasury Department list of acceptable sureties;

(2) An agreement that the Surety will neither charge a bond premium in excess of that authorized by the appropriate State insurance department, nor impose any non-premium fee unless such fee is permitted by applicable State law and approved by SBA.

(3) Premium income from contract bonds guaranteed by any government agency (Federal, State or local) of no more than one- quarter of the total contract bond premium income of the Surety;

(4) The vesting of underwriting authority for SBA guaranteed bonds only in employees of the Surety;

(5) The rating or ranking designations assigned to the Surety by recognized authority.

(b) *Admission of PSB Sureties.* A Surety admitted to the PSB program must execute a PSB Agreement before approving SBA guaranteed bonds. No

SBA guarantee attaches to bonds approved before the D/SG or designee has countersigned the Agreement. 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.

[61 FR 3271, Jan. 31, 1996, as amended at 66 FR 30804, June 8, 2001; 72 FR 34600, June 25, 2007; 81 FR 23566, Apr. 22, 2016; 82 FR 39502, Aug. 21, 2017]

§ 115.61 [Reserved]

§ 115.62 Prohibition on participation in Prior Approval program.

A PSB Surety is not eligible to submit applications under subpart B of this part. This prohibition does not extend to an Affiliate, as defined in 13 CFR §121.103, of a PSB Surety that is not itself a PSB Surety provided that the relationship between the PSB Surety and the Affiliate has been fully disclosed to SBA and that such Affiliate has been approved by SBA to participate as a Prior Approval Surety pursuant to §115.11.

[72 FR 34600, June 25, 2007]

§ 115.63 Allotment of guarantee authority.

(a) *General.* SBA allots to each PSB Surety a periodic maximum guarantee authority. No SBA guarantee attaches to bonds approved by a PSB Surety if the bonds exceed the allotted authority for the period in which the bonds are approved. No reliance on future authority is permitted. An allotment can be increased only by prior written permission of SBA.

(b) *Execution of Bid Bonds.* When the PSB Surety Executes a Bid Bond, SBA debits the Surety's allotment for an amount equal to the guarantee percentage of the estimated penal sum of the Final Bond SBA would guarantee if the Contract were awarded. If the Contract is then awarded for an amount other than the bid amount, or if the bid is withdrawn or the Bid Bond guarantee has expired (see §115.12(c)), SBA debits or credits the Surety's allotment accordingly.

(c) *Execution of Final Bonds.* If the PSB Surety Executes a guaranteed Final Bond, but not the related Bid Bond, SBA debits the Surety's allotment for an amount equal to the guarantee percentage of the penal sum of the Final Bond. SBA will debit the allotment for increases, and credit the allotment for decreases, in the bond amount.

(d) *Release and non-issuance of Final Bonds.* The release of Final Bonds upon completion of the Contract does not restore the corresponding allotment. If, however, a PSB Surety approves a Final Bond but never issues the bond, SBA will credit the Surety's allotment for an amount equal to the guarantee percentage of the penal sum of the bond. In that event, the Surety must notify SBA as soon as possible, but in no event later than 5 business days after the non-issuance has been determined. Until the Surety has so notified SBA, it cannot rely on such credit.

§ 115.64 Timeliness requirement.

There must be no Execution or approval of a bond by a PSB Surety after commencement of work under a Contract unless the Surety obtains written approval from the D/SG. To apply for such approval, the Surety must submit a completed ''Surety Bond Guarantee Agreement Addendum'' (SBA Form 991), together with the evidence and certifications described in §115.19(f)(1)(ii). For purposes of this section, work has commenced under a Contract when a Principal takes any action related to the contract or bond that would have exposed its Surety to liability under applicable law had a bond been Executed (or approved, if the Surety is legally bound by such approval) at the time.

[61 FR 3271, Jan. 31, 1996, as amended at 87 FR 48084, Aug. 8, 2022]

§ 115.65 General PSB procedures.

(a) *Retention of information.* A PSB Surety must comply with all applicable SBA regulations and obtain from its applicants all the information and certifications required by SBA. The

PSB Surety must document compliance with SBA regulations and retain such certifications in its files, including a contemporaneous record of the date of approval and Execution of each bond. See also §115.19(f). The certifications and other information must be made available for inspection by SBA or its agents and must be available for submission to SBA in connection with the Surety's claims for reimbursement. The PSB Surety must retain the certifications and other information for the term of the bond, plus such additional time as may be required to settle any claims of the Surety for reimbursement from SBA and to attempt salvage or other recovery, plus an additional 3 years. If there are any unresolved audit findings in relation to a particular bond, the Surety must maintain the related certifications and other information until the findings are resolved.

(b) *Usual staff and procedures.* The approval, Execution and administration by a PSB Surety of SBA guaranteed bonds must be handled in the same manner and with the same staff as the Surety's activity outside the PSB program. The Surety must request job status reports from Obligees in accordance with its own procedures.

(c) *Notification to SBA*—(1) *Approvals.* A PSB Surety must notify SBA by electronic transmission or monthly bordereau, as agreed between the Surety and SBA, of all approved Bid and Final Bonds, and of the Surety's approval of increases and decreases in the Contract or bond amount. The notice must contain the information specified from time to time in agreements between the Surety and SBA. SBA may deny liability with respect to Final Bonds for which SBA has not received timely notice.

(2) *Other events requiring notification.* The PSB Surety must notify SBA within 30 calendar days of the name and address of any Principal against whom legal action on the bond has been instituted; whenever an Obligee has declared a default; whenever the Surety has established or added to a claim reserve; of the recovery of any amounts on the guaranteed bond; and of any decision by the Surety to bond any such Principal again.

§115.66 Fees.

The PSB Surety must pay SBA a certain percentage of the Premium it charges on Final Bonds. The PSB Surety must also remit to SBA the Principal's payment for its guarantee fee, equal to a certain percentage of the Contract amount. The fee percentages are determined by SBA and are published in Notices in the FEDERAL REGISTER from time to time. Each fee is rounded to the nearest dollar. The Surety must remit SBA's Premium share and the Principal's guarantee fee with the bordereau listing the related Final Bond, as required in the PSB Agreement.

§115.67 Changes in Contract or bond amount.

(a) *Increases.* The PSB Surety must process Contract or bond amount increases within its allotment in the same manner as initial guaranteed bond issuances (see §115.65(c)(1)). 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. If the additional Principal's fee or Surety's fee is less than $250, such fee is not due until all unpaid increases in such fee aggregate at least $250.

(b) *Decreases.* If the Contract or bond amount is decreased, SBA will refund to the Principal a proportionate amount of the guarantee fee, and adjust SBA's Premium share accordingly in the ordinary course of business. No refund or adjustment will be made until the amounts to be refunded or rebated, respectively, aggregate at least $250.

[61 FR 3271, Jan. 31, 1996, as amended at 79 FR 2087, Jan. 13, 2014; 82 FR 39502, Aug. 21, 2017; 87 FR 48084, Aug. 8, 2022]

§115.68 Guarantee percentage.

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

[82 FR 39502, Aug. 21, 2017]

§ 115.69 Imminent Breach.

(a) *No prior approval requirement.* SBA will reimburse a PSB Surety for the guaranteed portion of payments the Surety makes to avoid or attempt to avoid an Imminent Breach of the terms of a Contract covered by an SBA guaranteed bond. The aggregate of the payments by SBA under this section cannot exceed 10% of the Contract amount, unless the Administrator finds that a greater payment (not to exceed the guaranteed portion of the bond penalty) is necessary and reasonable. The PSB Surety does not need to obtain prior SBA approval to make Imminent Breach payments, except that the PSB Surety may request SBA to approve payments that exceed 10% of the Contract amount prior to the Surety making the payment. In no event will SBA make any duplicate payment under any provision of these regulations in this part.

(b) *Recordkeeping requirement.* The PSB Surety must keep records of payments made to avoid Imminent Breach.

[79 FR 2087, Jan. 13, 2014]

§ 115.70 Claims for reimbursement of Losses.

(a) *How claims are submitted.* A PSB Surety must submit claims for reimbursement on a form approved by SBA no later than 90 days from the date the Surety paid the amount. Loss is determined as of the date of receipt by SBA of the claim for reimbursement, or as of such later date as additional information requested by SBA is received. Subject to the offset provisions of part 140, SBA pays its share of Loss within 45 days of receipt of the requisite information. Claims for reimbursement and any additional information submitted are subject to review and audit by SBA.

(b) *Surety responsibilities.* The PSB Surety must take all necessary steps to mitigate Losses when legal action against a bond has been instituted, when the Obligee has declared a default, and when the Surety has established a claim reserve. The Surety may dispose of collateral at fair market value only. Unless SBA notifies the Surety otherwise, the Surety must take charge of all claims or suits arising from a defaulted bond, and compromise, settle or defend the suits. The Surety must handle and process all claims under the bond and all settlements and recoveries in the same manner as it does on non-guaranteed bonds.

(c) *Reservation of SBA's rights.* The payment by SBA of a PSB Surety's claim does not waive or invalidate any of the terms of the PSB Agreement, the regulations in this part 115, or any defense SBA may have against the Surety. Within 30 days of receipt of notification that a claim or any portion of a claim should not have been paid by SBA, the Surety must repay the specified amounts to SBA.

[61 FR 3271, Jan. 31, 1996, as amended at 79 FR 2087, Jan. 13, 2014]

§ 115.71 Denial of liability.

In addition to the grounds set forth in §115.19, SBA may deny liability to a PSB Surety if:

(a) The PSB Surety's guaranteed bond was in an amount which, together with all other guaranteed bonds, exceeded the allotment for the period during which the bond was approved, and no prior SBA approval had been obtained;

(b) The PSB Surety's loss was incurred under a bond which was not listed on the bordereau for the period when it was approved; or

(c) The loss incurred by the PSB Surety is not attributable to the particular Contract for which an SBA guaranteed bond was approved.

PART 117—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OR ACTIVITIES OF SBA—EFFECTUATION OF THE AGE DISCRIMINATION ACT OF 1975, AS AMENDED

Sec.

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APPENDIX A TO PART 117

AUTHORITY: Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*

SOURCE: 50 FR 41648, Oct. 11, 1985, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 117 appear at 68 FR 51349, Aug. 26, 2003.

§ 117.1 Purpose.

The purpose of this part is to effectuate the provisions of The Age Discrimination Act of 1975, as amended (hereinafter referred to as the *Act*), to the end that no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under programs or activities receiving financial assistance or any financial activities of the Small Business Administration to which this Act applies. The Act also permits recipients of Federal funds to continue to use certain age distinctions and other factors other than age which meet the requirements of the Act and these regulations in the conduct of programs or activities and the provision of services to the public.

§ 117.2 Application of this part.

(a) This part applies to all recipients of Federal financial assistance administered by the Small Business Administration, whether or not the specific type of Federal financial assistance administered is listed in appendix A.

(b) For the purposes of this part, the prohibition against age discrimination applies to natural persons of all ages.

(c) This part does not apply to the employment practices of any recipients.

[50 FR 41648, Oct. 11, 1985, as amended at 68 FR 51349, Aug. 26, 2003]

§ 117.3 Definitions.

As used in this part:

(a) The term *act* means the Age Discrimination Act of 1975, as amended (Title III of Pub. L. 94–135).

(b) The term *action* means any act, activity, policy, rule, standard, or method of administration; or the use of any policy, rule, standard, or method of administration.

(c) The term *age* means how old a person is, or the number of years from the date of a person's birth.

(d) The term *age distinction* means any action using age or an age-related term.

(e) The term *age-related* means a word or words which necessarily imply a particular age or range of ages (for example, *children, adult, older persons,* but not *student*).

(f) The term *agency* means a Federal department or agency that is empowered to extend financial assistance.

(g) The term *applicant* means one who applies for Federal financial assistance.

(h) The term *Federal financial assistance* includes: (1) Grants and loans of Federal funds; (2) the grant or donation of Federal property and interests in property; (3) the detail of Federal personnel; (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration, or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient; and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(i) The term *normal operation* means the operation of a business or activity without significant changes that would impair its ability to meet its objectives.

(j) The term *program or activity* means all of the operations of any entity described in paragraphs (j)(1) through (4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (j)(1), (2), or (3) of this section.

(k) The term *recipient* means one who receives any Federal financial assistance administered by the Small Business Administration. (See Appendix A.) The term *recipient* also shall be deemed to include *subrecipients* of SBA financial assistance.

(l) The term *SBA* means the Small Business Administration.

(m) The term *subrecipient* means any business concern that receives Federal financial assistance from the primary recipient of such financial assistance. A subrecipient is generally regarded as a recipient of Federal financial assistance and has all the duties of a recipient in these regulations.

(n) The term *statutory objective* means the purposes of the legislation as stated in an act, statute or ordinance or can be shown in the legislative history of any Federal statute, State statute, or local statute or ordinance adopted by an elected, general purpose legislative body.

[50 FR 41648, Oct. 11, 1985, as amended at 68 FR 51349, Aug. 26, 2003]

§ 117.4 Discrimination prohibited and exceptions.

(a) *General.* To the extent that this part applies, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any business or activity receiving Federal financial assistance.

(b) *Specific discriminatory actions prohibited.* To the extent that this part applies, a recipient business or other activity may not, directly or through contractual arrangements, on the ground of age:

(1) Deny an individual any services, financial aid or other benefit provided by the business or other activity, except where sanctioned by one of the exceptions stated in §117.4 (d), (e) or (f) of this section.

(2) Provide any service, financial aid or other benefit, except as sanctioned by one of the exceptions stated below, in such a way as to deny or limit persons in their efforts to participate in federally-assisted programs or activities;

(3) Treat an individual differently from others, except as sanctioned by an exception stated below, in determining whether the person satisfied any admission, enrollment, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any service, financial aid or other benefit provided by the business or activity.

(c) The specific forms of prohibited discrimination in paragraph (b) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(d) *Exception 1.* A recipient is permitted to take an action otherwise prohibited by paragraphs (a) and (b) of this section, if the action reasonably takes into account age as a factor necessary

to the normal operation or the achievement of any statutory objective of a business or activity. An action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a business or activity, if:

(1) Age is used as a measure or approximation of one or more other characteristics; and

(2) The other characteristic(s) must be measured or approximated in order for the normal operation of the business or activity to continue, or to achieve any statutory objective of the business or activity; and

(3) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(4) The other characteristic(s) are impractical to measure directly on an individual basis.

NOTE: All of the above factors must be met in order to exclude a business activity from the provisions of this part.

(e) *Exception 2.* A recipient is permitted to take an action otherwise prohibited by paragraphs (a) and (b) of this section which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age if the factor bears a direct and substantial relationship to the normal operation of the business or activity or to the achievement of a statutory objective.

(f) *Exception 3.* A recipient is permitted to take an action otherwise prohibited by paragraphs (a) and (b) of this section if an age distinction is contained in that part of a Federal, State or local statute or ordinance adopted by an elected general purpose legislative body which provides any benefits or assistance to, establishes criteria for participation in, or describes intended beneficiaries or target groups in age-related terms.

(g) The burden of proving that an age distinction or other action falls within the exceptions outlined in paragraphs (d), (e), and (f) of this section on the recipient of Federal financial assistance.

§ 117.5 Illustrative applications.

(a) *Discrimination in providing financial assistance.* Development companies and small business investment companies, which apply for or receive any financial assistance may not discriminate on the ground of age in providing financial assistance to small business concerns. Such discrimination prohibited by § 117.4 includes but is not limited to the failure or refusal, because of the age of the applicant, or the age of the applicant's principal owner or operating official to extend a loan or equity financing to any business concern; or, in the case of financing which has actually been extended, the failure or refusal because of the age of the recipient, or the age of recipient's principal owner or operating official to accord the recipient fair treatment and the customary courtesies regarding such matters as default, grace periods and the like.

(b) *Discrimination in accommodations or services.* Small Business Concerns and others who or which apply for or receive any financial assistance administered by the Small Business Administration, such as but not limited to physicians, dentists, hospitals, schools, libraries, and other individuals or organizations may not discriminate in the treatment, accommodations or services they provide to their patients, students, members, passengers, or members of the public, except when the normal operation or statutory objective of the business or activity of the intended beneficiary is designated in age-related terms, whether or not operated for profit. Action by such business or activity to be excluded from compliance with this regulation must fall within the exceptions enumerated in § 117.4 (d), (e), and (f) of this part.

(c) The discrimination prohibited by § 117.5(b) includes, but is not limited to the failure or refusal, because of age, to accept a patient, student, member, customer, client, or passenger, except when the imposition of this prohibition would interfere with the normal operation of the business, e.g., pediatricians, nursery schools, geriatric clinics.

§ 117.6 Remedial and affirmative action by recipients.

(a) Where a recipient is found to have discriminated on the basis of age, the recipient shall take any remedial action which the Agency may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated, both recipients may be required to take remedial action.

(b) Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

(c) If a recipient operating a program or activity which serves the elderly or children in addition to persons of other ages, provides special benefits to the elderly or to children, the provision of those benefits shall be presumed to be voluntary affirmative action provided that it does not have the effect of excluding otherwise eligible persons from participation in the program or activity.

§ 117.7 Assurances required.

An application for financial assistance administered by the Small Business Administration shall, as a condition of its approval and the extension of such assistance, contain or be accompanied by an assurance that the recipient will comply with this part. SBA shall specify the form of the foregoing assurance, and the extent to which like assurances will be required of contractors and subcontractors, transferees, successors, and other participants.

§ 117.8 Responsibilities of SBA recipients.

(a) Each SBA recipient has the primary responsibility to ensure that its programs or activities are in compliance with the Act and these regulations, and shall take steps to eliminate violations of the Act. A recipient also has responsibility to maintain records, provide information, and to afford SBA access to its records to the extent SBA finds necessary to determine whether the recipient is in compliance with the Act and these regulations. (OMB No. 3245 0076)

(b) Where a recipient passes on Federal financial assistance from SBA to subrecipients, the recipient shall provide the subrecipients written notice of their obligations under the Act and these regulations.

(c) Each recipient shall make necessary information about the Act and these regulations available to the beneficiaries of its programs or activities in order to inform them about the protections against discrimination provided by the Act and these regulations.

(d) Whenever an assessment indicates a violation of the Act and the SBA regulations, the recipient shall take corrective action.

§ 117.9 Compliance information.

(a) *Cooperation and assistance.* SBA shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Record Keeping.* Each recipient shall keep records in such form, and containing such information which SBA determines may be necessary to ascertain whether the recipient has complied or is complying with this part (OMB No. 3245 0076). In the case of a small business concern which receives financial assistance from a development company or from a small business investment company, the small business concern shall also keep such records and information as may be necessary to enable SBA to determine if the small business concern is complying with this part.

(c) Each recipient shall provide to SBA, upon request, information and reports which SBA determines are necessary to ascertain whether the recipient is complying with the Act and these regulations.

(d) *Access to sources of information.* Each recipient shall permit reasonable access by SBA during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of an applicant or recipient is in the

exclusive possession of any other agency, institution or person and that agency, institution or person shall fail or refuse to furnish the information, the recipient shall so certify and shall set forth what efforts it has made to obtain the required information. The recipient will be held responsible for submitting the information. Failure to submit information or permit access to sources of information required by SBA will subject the recipient to enforcement procedure as provided in §117.15 of this part.

(Information collection requirements in paragraph (c) were approved by the Office of Management and Budget under control number 3245–0076)

§117.10 Review procedures.

(a) SBA shall from time to time review the practices of recipients to determine whether they are complying with this part. As part of a compliance review or complaint investigation, SBA may require a recipient employing 15 or more full-time employees to complete a written self-evaluation, in a manner specified by the Agency, of any age distinction imposed in its program or activity receiving Federal financial assistance.

(b) If a compliance review or preaward review indicates a violation of the Act or these regulations, SBA will attempt to achieve voluntary compliance with the Act. If voluntary compliance with the recipient cannot be achieved, such recipient will be subject to the enforcement procedure contained in §117.15 of these regulations. A refusal to permit an on-site compliance review during normal working hours may constitute noncompliance with this part.

§117.11 Complaint procedures.

(a) Any person who believes that he/she or any specific class of individuals is being or has been subjected to discrimination by SBA, a recipient, or an applicant for assistance, prohibited by this part may, by himself/herself or by a representative, file with SBA a written complaint. The complainant has the right to have a representative at all stages of the complaint procedure.

(b) A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time filing is extended by SBA. The Adminstrator, the Assistant Administrator, Office of Equal Employment Opportunity & Civil Rights Compliance, are the only officials who may waive the 180-day time limit for filing complaints under this part. SBA will consider the date a complaint is filed to be the date upon which the complaint is sufficient to be processed.

(c) Each complaint will be reviewed to ensure that it falls within the coverage of the Act and contains all information necessary for further processing.

(d) SBA will attempt to facilitate the filing of complaints wherever possible, including taking the following actions:

(1) Accepting as a sufficient complaint, any written statement which identifies the parties involved and the date the complainant first had knowledge of the alleged violation, describes generally the action or practice complained of, and is signed by the complainant.

(2) Freely permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint.

(3) Notifying the complainant and the recipient of their rights and obligations under the complaint procedure, including the right to have a representative at all stages of the complaint procedure.

(4) Notifying the complainant and the recipient (or their representatives) of their right to contact the Assistant Administrator, Office of Equal Employment Opportunity & Civil Rights Compliance, for information and assistance regarding the complaint resolution process.

(e) SBA will return to the complainant any complaint filed under the jurisdiction of this regulation, but found to be outside the jurisdiction of this regulation, and will state the reason(s) why it is outside the jurisdiction of this regulation.

[50 FR 41648, Oct. 11, 1985, as amended at 72 FR 50038, Aug. 30, 2007]

§117.12 Mediation.

(a) SBA shall, after ensuring that the complaint falls within the coverage of this Act and all information necessary

for further processing is contained therein, unless the age distinction complained of is clearly within an exception, promptly refer the complaint to the Federal Mediation and Conciliation Service (FMCS).

(b) SBA shall, to the extent possible, require the participation of the recipient and the complainant in the mediation process in an effort to reach a mutually satisfactory settlement of the complaint or make an informed judgment that an agreement is not possible. Both parties need not meet with the mediator at the same time.

(c) If the complainant and the recipient reach a mutually satisfactory resolution of the complaint during the mediation period, the mediator shall prepare a written statement of the agreement and have the complainant and recipient sign it.

(d) A copy of the written mediation agreement will be referred to SBA, and no further action will be taken unless it appears that either the complainant or the recipient (or other alleged discriminator subject to this part) fails to comply with the agreement.

(e) If at the end of 60 days after the receipt of a complaint by SBA, or at any time prior thereto, an agreement is reached or the mediator determines an agreement cannot be reached through mediation, the agreement or complaint will be returned to SBA.

(f) This 60-day period may be extended by the mediator, with the concurrence of SBA for not more than 30 days if the mediator determines that an agreement will likely be reached during the extended period.

(g) The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained during the course of the mediation process without prior approval of the head of the agency appointing the mediator.

§ 117.13 Investigation and resolution of matters.

(a) SBA will make a prompt investigation whenever a compliance review indicates a possible failure to comply with this part by the recipient and additional information is needed by SBA to assure compliance with this part, or when an unresolved complaint has been returned by the FMCS, or when it appears that the complainant or the recipient is failing to comply with a mediation agreement. The investigation shall include a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient is complying, is not complying, or has failed to comply with this part.

(b) *Resolution of matters.* If an investigation indicates a failure to comply with this part, SBA will so inform the complainant, if applicable, and the recipient that the matter will be resolved by informal means that are mutually agreeable to the parties, whenever possible.

(1) If, during the course of an investigation, the matter is resolved by informal means, SBA will put any agreement in writing and have it signed by the parties and an authorized official of SBA.

(2) If investigation indicates a violation of the Act or these regulations, SBA will attempt to achieve voluntary compliance. If SBA cannot achieve voluntary compliance, it will begin enforcement as described in § 117.15.

(3) If an investigation does not warrant action, SBA will so inform the complainant, if applicable, and the recipient in writing.

§ 117.14 Intimidating or retaliatory acts prohibited.

No complainant, recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by this part or because an individual or group has made a complaint, testified, assisted, or participated in any manner in an investigation, review, enforcement process, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, mediation, or judicial proceeding.

§ 117.15 Procedure for effecting compliance.

(a) *General.* (1) If there appears to be a failure or threatened failure to comply with this part by an applicant or recipient and if the noncompliance or threatened noncompliance cannot be resolved by informal means, compliance with this part may be effected by suspending, terminating, or refusing any financial assistance approved but not yet disbursed to an applicant. In the case of loans partially or fully disbursed, compliance with this part may be effected by calling, canceling, terminating, accelerating repayment, or suspending in whole or in part the Federal financial assistance provided. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before an administrative law judge.

(2) In addition, compliance may be effected by any other means authorized by law. Such other means may include, but are not limited to:

(i) Action by SBA to accelerate the maturity of the recipient's obligation;

(ii) Referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States or obligations of the recipient created by the Act or this part; and

(iii) Use of any requirement of or referral to any Federal, State or local government agency that will have the effect of correcting a violation of the Act or these regulations.

(3) If there appears to be a failure or threatened failure to comply with this part by an SBA office or official, the Assistant Administrator, Office of Equal Employment Opportunity & Civil Rights Compliance, will recommend appropriate corrective action to the Administrator. Any resulting adverse action against an SBA employee shall follow Office of Personnel Management and SBA procedures for such action.

(b) *Noncompliance with §§ 117.7 and 117.9.* If an applicant fails or refuses to furnish an assurance required under § 117.7, or fails to provide information or allow SBA access to information under § 117.9 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to those sections, Federal financial assistance may be deferred for a period not to exceed 60 days after the applicant has received a notice for an opportunity for hearing under § 117.16, or unless a hearing has begun within that time, or the time for beginning the hearing has been extended by mutual consent of the recipient and the Agency, for purposes of determining what constitutes mutual consent, the Agency shall be deemed to have consented to any extension requested by the recipient and granted by the administrative law judge (hearing officer), whether or not the Agency initially approved the extension. A deferral may not continue for more than 30 days after the close of the hearing, unless the hearing results in a finding against the applicant or recipient.

(c) SBA will not take action toward accelerating repayment, suspending, terminating, or refusing financial assistance until:

(1) SBA has advised the applicant or recipient of the failure to comply and has determined that compliance cannot be secured by voluntary means;

(2) There has been an express finding on the record, after an opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part;

(3) The action has been approved by the Administrator of SBA pursuant to § 117.17; and

(4) The expiration of 30 days after SBA has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the form of financial assistance involved, a full written report of the circumstances and the grounds for such action.

(d) Other means authorized by law. No action to effect compliance by any other means authorized by law shall be taken until:

(1) SBA has determined that compliance cannot be secured by voluntary means;

(2) The action has been approved by the Administrator or designee;

(3) The expiration of 30 days after SBA has filed with the committee of the House and the committee of the Senate having legislative jurisdiction

over the form of financial assistance involved, a full written report of the circumstances and the grounds for such action;

(4) The applicant or recipient has been notified of the failure to comply, and of the action to be taken to effect compliance; and

(5) The expiration of at least 10 days from the mailing of such notice to the applicant or recipient or other person. During this period of at least 10 days from the mailing of such notice to the applicant or recipient or other person, additional efforts shall be made to persuade the applicant or recipient to comply with this part and to take such corrective action as may be appropriate.

[50 FR 41648, Oct. 11, 1985, as amended at 72 FR 50038, Aug. 30, 2007]

§ 117.16 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by §117.15, reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either.

(1) Fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request the Office of Hearings and Appeals (OHA) that the matter be scheduled for hearing; or

(2) Advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing and as consent to the making of a decision on the basis of such information as is available.

(b) *Time and place of hearing.* Hearings shall be held at OHA in Washington, DC, at a time fixed by OHA unless that office determines that the convenience of the complainant, applicant, recipient or SBA requires that another place be selected. Hearings shall be held before an administrative law judge designated in accordance with the Administrative Procedure Act.

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and SBA shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearings, decisions, and any administrative review shall be conducted in conformity with the Administrative Procedure Act and 13 CFR part 134. Such rules of procedure should be consistent with this section, relate to the conduct of the hearing, provide for giving of notices to those referred to in paragraph (a) of this section, taking of testimony, exhibits, arguments, and briefs, request for findings and other related matters. SBA, the complainant, if any, and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing, or as determined by the administrative law judge conducting the hearing at the outset of or during the hearing.

(2) Technical rules of evidence may be waived by the administrative law judge conducting a hearing pursuant to this part, but rules or principles designed to assure production of the most credible evidence available, and subject testimony to test by cross-examination shall be applied where reasonably necessary. The administrative law judge may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related

facts are asserted to constitute noncompliance or threatened noncompliance with this part, with respect to two or more forms of financial assistance to which this part applies, or noncompliance with this part and the regulations of one or more other Federal agencies issued under the Act, the Administrator may, by agreement with such other agencies, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules and procedures not inconsistent with this part. Final decisions in such cases, insofar as this part is concerned, shall be made in accordance with §117.17.

§117.17 Decisions and notices.

(a) *Decision by an administrative law judge.* If the hearing is held by an administrative law judge, such administrative law judge shall either make an initial decision, if so authorized, or certify the entire record, including recommended findings and proposed decision, to the Administrator for a final decision and a copy of such initial decision or certification shall be mailed to the applicant or recipient and the complainant. Where the initial decision is made by the administrative law judge, the applicant or recipient may, within 30 days of the mailing of such notice of initial decision, file with the Administrator exceptions to the initial decision, with the reasons therefor. In the absence of exceptions, the Administrator may, by motion within 45 days after the initial decision, serve on the applicant or recipient a notice that he/she will review the decision. Upon the filing of such exceptions or of such notice of review, the Administrator shall review the initial decision and issue his/her decision thereon, including the reasons therefor. The decision of the Administrator shall be mailed promptly to the applicant or recipient, and the complainant, if any. In the absence of either exceptions or a notice of review, the initial decision shall constitute the final decision of the Administrator.

(b) *Decisions on record or review by the Administrator.* Whenever a record is certified to the Administrator for decision or the Administrator reviews the decision of an administrative law judge pursuant to paragraph (a) of this section, or whenever the Secretary of the Department of Health and Human Services or the Department of Justice conducts the hearing, the applicant or recipient shall be given reasonable opportunity to file briefs or other written statements of its contentions and a copy of the final decision of the Administrator shall be given in writing to the applicant or recipient and the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to §117.16, a decision shall be made by the Administrator on the record and a copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of an administrative law judge or the Administrator shall set forth the ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Decision by the Administrator.* The Administrator shall make any final decision which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, acceleration repayment or the imposition of any other sanction available under the regulations or taken under other means authorized by law.

(f) *Content of orders.* The final decision may provide for accelerating of repayment, suspension or termination of, or refusal to approve, disburse, or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this part, including provisions designed to assure that no Federal financial assistance to which this regulation applies will, thereafter, be extended to the applicant or recipient determined by such decision to have failed to comply with this part, unless and until it corrects its noncompliance and satisfies the Administrator that it will fully comply with this part.

(g) *Post termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (e) of this section shall be restored to full eligibility to receive Federal financial assistance only if it satisfies the terms and conditions of that order for such eligibility and it brings itself into compliance with this regulation and provides reasonable assurance that it will fully comply with this regulation.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the Administrator to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the Administrator determines that those requirements have been satisfied, he/she shall restore such eligibility.

(3) If the Administrator denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes the denial to have been in error. It shall there upon be given an expeditious hearing, with a decision on the record, in accordance with rules and procedures issued by the Administrator. The applicant or recipient shall be restored to such eligibility if it proves at such hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

§ 117.18 Judicial review.

(a) The complainant may file a civil action following the exhaustion of administrative remedies under the Act. Administrative remedies are exhausted if:

(1) 180 days have elapsed since the complainant filed the complaint and the Agency has made no finding with regard to the complaint; or

(2) The Agency has issued a finding in favor of the recipient.

(b) If the Agency fails to make a finding within 180 days or issues a finding in favor of the recipient, the Agency shall:

(1) Advise the complainant of this fact;

(2) Advise the complainant of the right to file a civil action for injunctive relief; and

(3) Inform the complainant:

(i) That the complainant may bring a civil action only in a United States district court for the district in which the recipient is found or transacts business;

(ii) That a complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but that the complainant must demand these costs in the complaint;

(iii) That before commencing the action the complainant shall give 30 days notice by registered mail to the Secretary of the Department of Health and Human Services, the Attorney General of the United States and the recipient;

(iv) That the notice must state: The alleged violation of the Act; the relief requested; the court in which the complainant is bringing the action; and whether or not attorney's fees are demanded in the event the complainant prevails; and

(v) That the complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

§ 117.19 Effect on other regulations.

(a) All regulations, orders or like directions heretofore issued by SBA which impose requirements designed to prohibit any discrimination against individuals on the grounds of age and which authorize the suspension or termination of or refusal to grant or to continue financial assistance to any applicant for or recipient of such assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this part. Nothing in this part, however, shall be deemed to

supersede any of the following (including future amendments thereof):

(1) Executive Order 11246, as amended, and regulations issued thereunder;

(2) Title VI of the Civil Rights Act of 1964, as amended;

(3) The Equal Credit Opportunity Act, as amended and Regulation B of the Board of Governors of the Federal Reserve System, (12 CFR part 202);

(4) Section 504 of the Rehabilitation Act of 1973, as amended;

(5) Title VIII of the Civil Rights Act of 1968;

(6) Title IX of the Educational Amendments of 1972;

(7) Section 633(b) of the Small Business Act;

(8) Part 113 of title 13 of the Code of Federal Regulations (13 CFR part 113); or

(9) Any other statute, order, regulation or instruction, insofar as such order, regulations, or instruction prohibits discrimination on the grounds of age in any program or activity or situation to which this part is inapplicable on any other ground.

§ 117.20 Supervision and coordination.

The Administrator may from time to time assign to officials of SBA or to officials of other agencies of the Government with the consent of such agencies, responsibilities in connection with the effectuation of the purpose of the Act and this part (other than responsibility for final decision as provided in § 117.17), including the achievement of effective coordination and maximum uniformity within SBA and within the Executive Branch of the Government in the application of the Act and this part to similar programs or activities and in similar situations. Responsibility for administering and enforcing this part is assigned by the Administrator, to the Office of Civil Rights Compliance, Office of Equal Employment Opportunity and Compliance of the Small Business Administration.

APPENDIX A TO PART 11 [1]

Type of Federal financial assistance	Authority
Business Loans	Small Business Act, section 7(a).
Debtor State Development companies (501) and their small business concerns.	Small Business Investment Act, Title V.
Debtor State Development companies (502) and their small business concerns.	Small Business Investment Act, Title V.
Debtor certified development companies (503) and their small business concerns.	Small Business Investment Act, Title V.
Debtor small business investment companies and their small business concerns.	Small Business Investment Act, Title III.
Pollution Control	Small Business Investment Act, Title IV, Part A.
Disaster Loans:	
Physical, including riot	Small Business Act, section 7(b)(1).
Economic Injury (EIDL)	Small Business Act, section 7(b)(2).
Federal Action Loan Program.	Small Business Act, section 7(b)(3).
Small Business Institute	Small Business Act, section 8(b)(1).
Small Business Development Centers.	Small Business Act, section 21.
International Trade Program.	Small Business Act, section 22.
Technical and Management Assistance.	Small Business Act, section 7(j).

[1] None of the programs administered have any age distinctions except as statutorily required.

PART 119—PROGRAM FOR INVESTMENT IN MICROENTREPRENEURS (''PRIME'' OR ''THE ACT'')

Sec.

119.1 What is the Program for Investment in Microentrepreneurs (''PRIME'')?

119.2–119.20 [Reserved]

AUTHORITY: 15 U.S.C. 634(b)(6), 6901–6910.

SOURCE: 66 FR 29013, May 29, 2001, unless otherwise noted.

§ 119.1 What is the Program for Investment in Microentrepreneurs (PRIME)?

(a) The PRIME program authorizes SBA to award grants to qualified organizations to fund training and technical assistance for disadvantaged microentrepreneurs; training and capacity-building services for microenterprise development organizations; research and development of the best practices in the fields of microenterprise development and the provision of technical assistance to disadvantaged microentrepreneurs; and such other activities as the Agency deems appropriate.

(b) Dependent upon the availability of funds and continuing program authority, SBA will issue, via *Grants.gov* or any successor platform, funding announcements specifying the terms, conditions, and evaluation criteria for each potential round of PRIME awards. These funding announcements will identify who is eligible to apply for PRIME awards; summarize the purposes for which the available funds may be used; advise potential applicants regarding the process for obtaining, completing, and submitting an application packet; and provide information regarding application deadlines and any additional limitations, special rules, procedures, and restrictions which SBA may deem advisable.

(c) SBA will evaluate applications for PRIME awards in accordance with the stated statutory goals of the program and the specific criteria described in the relevant funding announcement.

(d) In administering the PRIME program, SBA will require recipients to provide reports in accordance with the subject matter areas and schedule identified in the terms and conditions of their awards. In addition, SBA may, as it deems appropriate, make site visits to recipients' premises and review all applicable documentation and records.

[85 FR 62951, Oct. 6, 2020]

§§ 119.2–119.20 [Reserved]

PART 120—BUSINESS LOANS

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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 (7), and 697(a) and (e); sec. 521, Pub. L. 114–113, 129 Stat. 2242; sec. 328(a), Pub. L. 116–260, 134 Stat. 1182.

SOURCE: 61 FR 3235, Jan. 31, 1996, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 120 appear at 72 FR 50039, Aug. 30, 2007.

GENERAL DESCRIPTIONS OF SBA'S BUSINESS LOAN PROGRAMS

§ 120.1 Which loan programs does this part cover?

This part regulates SBA's financial assistance to small businesses under its general business loan programs (''7(a) loans'') authorized by section 7(a) of the Small Business Act (''the Act''), 15 U.S.C. 636(a), its microloan demonstration loan program (''Microloans'') authorized by section 7(m) of the Act, 15 U.S.C. 636(m), and its development company program (''504 loans'') authorized by Title V of the Small Business Investment Act, 15 U.S.C. 695 to 697f (''Title V''). These three programs constitute the business loan programs of the SBA.

§ 120.2 Descriptions of the business loan programs.

(a) *7(a) loans.* (1) 7(a) loans provide financing for general business purposes and may be:

(i) A direct loan by SBA;

(ii) An immediate participation loan by a Lender and SBA; or

(iii) A guaranteed loan (deferred participation) by which SBA guarantees a portion of a loan made by a Lender.

(2) A guaranteed loan is initiated by a Lender agreeing to make an SBA guaranteed loan to a small business and applying to SBA for SBA's guarantee under a blanket guarantee agreement (participation agreement) between SBA and the Lender. If SBA agrees to guarantee (authorizes) a portion of the loan, the Lender funds and services the loan. If the small business defaults on the loan, SBA's guarantee requires SBA to purchase its portion of the outstanding balance, upon demand by the Lender and subject to specific conditions. Regulations specific to 7(a) loans are found in subpart B of this part.

(b) *Microloans.* SBA makes loans and loan guarantees to non-profit Intermediaries that make short-term loans up to $50,000 to eligible small businesses for general business purposes, except payment of personal debts. SBA also makes grants to Intermediaries for use in providing management assistance and counseling to small businesses. Regulations specific to these loans are found in subpart G of this part.

(c) *504 loans.* Projects involving 504 loans require long-term fixed-asset financing for small businesses. A Certified Development Company (CDC) provides the final portion of this financing with a 504 loan made from the

proceeds of a Debenture issued by the CDC, guaranteed 100 percent by SBA (with the full faith and credit of the United States), and sold to investors. The regulations specific to these loans are found in subpart H of this part.

[61 FR 3235, Jan. 31, 1996, as amended at 76 FR 63545, Oct. 12, 2011]

§ 120.3 Pilot programs.

The Administrator of SBA may from time to time suspend, modify, or waive rules for a limited period of time to test new programs or ideas. The Administrator shall publish a document in the FEDERAL REGISTER explaining the reasons for these actions.

DEFINITIONS

§ 120.10 Definitions.

The following terms have the same meaning wherever they are used in this part. Defined terms are capitalized wherever they appear.

Acceptable Risk Rating is an SBA-assigned Risk Rating, currently defined by SBA as ''1'', ''2'' or ''3'' on a scale of 1 to 5, which represents an acceptable level of risk as determined by SBA, and which may be revised by SBA from time to time as published in the FEDERAL REGISTER through notice and comment.

Associate. (1) An Associate of a Lender or CDC is:

(i) An officer, director, key employee, or holder of 20 percent or more of the value of the Lender's or CDC's stock or debt instruments, or an agent involved in the loan process; or

(ii) Any entity in which one or more individuals referred to in paragraphs (1)(i) of this definition or a Close Relative of any such individual owns or controls at least 20 percent.

(2) An Associate of a small business is:

(i) An officer, director, owner of more than 20 percent of the equity, or key employee of the small business;

(ii) Any entity in which one or more individuals referred to in paragraphs (2)(i) of this definition owns or controls at least 20 percent; and

(iii) Any individual or entity in control of or controlled by the small business (except a Small Business Investment Company (''SBIC'') licensed by SBA).

(3) For purposes of this definition, the time during which an Associate relationship exists commences six months before the following dates and continues as long as the certification, participation agreement, or loan is outstanding:

(i) For a CDC, the date of certification by SBA;

(ii) For a Lender, the date of application for a loan guarantee on behalf of an applicant; or

(iii) For a small business, the date of the loan application to SBA, the CDC, the Intermediary, or the Lender.

Authorized CDC Liquidator is a CDC in good standing with authority under the Act and SBA regulations to conduct liquidation and certain debt collection litigation in connection with 504 loans, as authorized by § 120.975.

Borrower is the obligor of an SBA business loan.

Certified Development Company (''CDC'') is an entity authorized by SBA to deliver 504 financing to small businesses.

Close Relative is a spouse; a parent; or a child or sibling, or the spouse of any such person.

Community Advantage Small Business Lending Company (Community Advantage SBLC) is a type of SBLC that is a nonprofit lending institution licensed and authorized by SBA to make loans pursuant to section 7(a) of the Small Business Act. Note: This includes former Community Advantage Pilot Lenders that were grandfathered in at the time Community Advantage SBLC licenses were authorized regardless of their profit or nonprofit status. SBA accepts applications for Community Advantage SBLCs from time to time as published in the FEDERAL REGISTER.

Eligible Passive Company is a small entity or trust which does not engage in regular and continuous business activity, which leases real or personal property to an Operating Company for use in the Operating Company's business, and which complies with the conditions set forth in § 120.111.

Federal Financial Institution Regulator is the Federal banking regulator of a 7(a) Lender and may include the Federal Deposit Insurance Corporation,

the Federal Reserve Board, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Farm Credit Administration.

Intermediary is the entity in the Microloan program that receives SBA financial assistance and makes loans to small businesses in amounts up to $50,000.

Lender or 7(a) Lender is an institution that has executed a participation agreement with SBA under the guaranteed loan program.

Lender Oversight Committee (LOC) is a committee established within SBA by legislation, which meets at least quarterly, and which has the membership and duties set forth in section 48 of the Small Business Act as further outlined in Delegations of Authority published in the FEDERAL REGISTER. The LOC's duties include, but are not limited to, reviewing (in an advisory capacity) any lender oversight, portfolio risk management, or program integrity matters brought by the Director of the Office of Credit Risk Management (D/OCRM), and voting on formal enforcement action recommendations.

Less Than Acceptable Risk Rating is an SBA-assigned Risk Rating, currently defined by SBA as ''4'' or ''5'' on a scale of 1 to 5, which represents a higher level of risk as determined by SBA, and which may be revised by SBA from time to time as published in the FEDERAL REGISTER through notice and comment.

Loan Instruments are the note, instruments of hypothecation, and all other agreements and documents related to a loan.

Loan Program Requirements or SBA Loan Program Requirements are requirements imposed upon Lenders, CDCs, or Intermediaries by statute; SBA and applicable government-wide regulations; any agreement the Lender, CDC, or Intermediary has executed with SBA or to which the Lender or CDC is subject; SBA Standard Operating Procedures (SOPs); FEDERAL REGISTER notices; and official SBA notices and forms applicable to the 7(a) Loan Program, 504 Loan Program or Microloan Program, as such requirements are issued and revised by SBA from time to time. For CDCs, this term also includes requirements imposed by Debentures, as that term is defined in §120.802. For Intermediaries, this term also includes requirements imposed by promissory notes, collateral documents, and grant agreements.

Management Official is an officer, director, general partner, manager, employee participating in management, agent or other participant in the management of the affairs of the SBA Supervised Lender's activities under the 7(a) program.

Non-Federally Regulated Lender (NFRL) is a business concern that is authorized by the SBA to make loans under section 7(a) and is subject to regulation by a state but whose lending activities are not regulated by a Federal Financial Institution Regulator.

Operating Company is an eligible small business actively involved in conducting business operations now or about to be located on real property owned by an Eligible Passive Company, or using or about to use in its business operations personal property owned by an Eligible Passive Company.

Other Regulated SBLC is a Small Business Lending Company whose SBA operations receive regular safety and soundness examinations by a state banking regulator or a Federal Financial Institution Regulator, and which meets the requirements set forth in §120.1511.

Person is any individual, corporation, partnership, association, unit of government, or legal entity, however organized.

Preference is any arrangement giving a Lender or a CDC a preferred position compared to SBA relating to the making, servicing, or liquidation of a business loan with respect to such things as repayment, collateral, guarantees, control, maintenance of a compensating balance, purchase of a Certificate of deposit or acceptance of a separate or companion loan, without SBA's consent.

Rentable Property is the total square footage of all buildings or facilities used for business operations.

Risk Rating is an SBA internal composite rating assigned to individual SBA Lenders and Intermediaries that reflects the risk associated with the

SBA Lender's or Intermediary's portfolio of SBA loans. Risk Ratings currently range from one to five, with one representing the least risk and five representing the most risk, and may be revised by SBA from time to time as published in the FEDERAL REGISTER through notice and comment.

Rural Area is a political subdivision or unincorporated area in a non-metropolitan county (as defined by the Department of Agriculture), or, if in a metropolitan county, any such subdivision or area with a resident population under 20,000 which is designated by SBA as rural.

SBA Lender is a 7(a) Lender or a CDC. This term includes SBA Supervised Lenders.

SBA Supervised Lender is a 7(a) Lender that is either a Small Business Lending Company or a NFRL.

Service Provider is an entity that contracts with a Lender or CDC to perform management, marketing, legal or other services.

Small Business Lending Company (SBLC) is a non-depository lending institution that is SBA-licensed and is authorized by SBA to make loans pursuant to section 7(a) of the Small Business Act and loans to Intermediaries in SBA's Microloan program. SBA accepts applications for SBLCs from time to time as published in the FEDERAL REGISTER.

SOPs are SBA Standard Operating Procedures, as issued and revised by SBA from time to time. SOPs are publicly available on SBA's Web site at *http://www.sba.gov* in the online library.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2117, Jan. 13, 1999; 68 FR 57980, Oct. 7, 2003; 72 FR 18360, Apr. 12, 2007; 73 FR 75510, Dec. 11, 2008; 76 FR 63545, Oct. 12, 2011; 85 FR 7647, Feb. 10, 2020; 85 FR 14780, Mar. 16, 2020; 85 FR 80588, Dec. 14, 2020; 87 FR 38908, June 30, 2022; 88 FR 21899, Apr. 12, 2023]

Subpart A—Policies Applying to All Business Loans

ELIGIBILITY REQUIREMENTS

§ 120.100 What are the basic eligibility requirements for all applicants for SBA business loans?

To be eligible for an SBA business loan, a small business applicant must:

(a) Be an operating business (except for loans to Eligible Passive Companies);

(b) Be organized for profit;

(c) Be located in the United States;

(d) Be small under the size requirements of part 121 of this chapter (including affiliates). See subpart H of this part for the size standards of part 121 of this chapter which apply only to 504 loans; and

(e) Be able to demonstrate a need for the desired credit.

§ 120.101 Credit not available elsewhere.

SBA provides business loan assistance only to applicants for whom the desired credit is not otherwise available on reasonable terms from non-Federal, non-State, and non-local government sources. Accordingly, SBA requires the Lender or CDC to certify or otherwise show that the desired credit is unavailable to the applicant on reasonable terms and conditions from non-Federal, non-State, and non-local government sources without SBA assistance, taking into consideration factors associated with conventional lending practices, including: The business industry of the loan applicant; whether the loan applicant has been in operation two years or less; the adequacy of collateral available to secure the loan; the loan term necessary to reasonably assure repayment of the loan from actual or projected business cash flow; and any other factor relating to the particular loan application that cannot be overcome except through obtaining a Federal loan guarantee under prudent lending standards. Submission of an application to SBA by a Lender or CDC constitutes certification by the Lender or CDC that it has examined the availability of credit to the applicant, has based its certification upon that examination, and has substantiation in its file to support the certification.

[61 FR 3235, Jan. 31, 1996, as amended at 85 FR 14780, Mar. 16, 2020]

§ 120.102 [Reserved]

§ 120.104 Are businesses financed by SBICs eligible?

SBA may make or guarantee loans to a business financed by an SBIC if SBA's collateral position will be superior to that of the SBIC. SBA may also make or guarantee a loan to an otherwise eligible small business which temporarily is owned or controlled by an SBIC under the regulations in part 107 of this chapter. SBA neither guarantees SBIC loans nor makes loans jointly with SBICs.

§ 120.105 Special consideration for veterans.

SBA will give special consideration to a small business owned by a veteran or, if the veteran chooses not to apply, to a business owned or controlled by one of the veteran's dependents. If the veteran is deceased or permanently disabled, SBA will give special consideration to one survivor or dependent. SBA will process the application of a business owned or controlled by a veteran or dependent promptly, resolve close questions in the applicant's favor, and pay particular attention to maximum loan maturity. For SBA loans, a veteran is a person honorably discharged from active military service.

INELIGIBLE BUSINESSES AND ELIGIBLE PASSIVE COMPANIES

§ 120.110 What businesses are ineligible for SBA business loans?

The following types of businesses are ineligible:

(a) Non-profit businesses (for-profit subsidiaries are eligible);

(b) Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances);

(c) Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (except Eligible Passive Companies under § 120.111);

(d) Life insurance companies;

(e) Businesses located in a foreign country (businesses in the U.S. owned by aliens may qualify);

(f) Pyramid sale distribution plans;

(g) Businesses deriving more than one-third of gross annual revenue from legal gambling activities;

(h) Businesses engaged in any activity that is illegal under Federal, State, or local law;

(i) Private clubs and businesses which limit the number of memberships for reasons other than capacity;

(j) Government-owned entities (except for businesses owned or controlled by a Native American tribe);

(k)–(l) [Reserved]

(m) Loan packagers earning more than one third of their gross annual revenue from packaging SBA loans;

(n) Businesses with an Associate who is incarcerated, on probation, on parole, or is under indictment for a felony or any crime involving or relating to financial misconduct or a false statement;

(o) Businesses in which the Lender or CDC, or any of its Associates owns an equity interest;

(p) Businesses which:

(1) Present live performances of a prurient sexual nature; or

(2) Derive directly or indirectly more than *de minimis* gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;

(q) Unless waived by SBA for good cause, businesses that have previously defaulted on a Federal loan or Federally assisted financing, resulting in the Federal government or any of its agencies or Departments sustaining a loss in any of its programs, and businesses owned or controlled by an applicant or any of its Associates which previously owned, operated, or controlled a business which defaulted on a Federal loan (or guaranteed a loan which was defaulted) and caused the Federal government or any of its agencies or Departments to sustain a loss in any of its programs. For purposes of this section, a compromise agreement shall also be considered a loss;

(r) Businesses primarily engaged in political or lobbying activities; and

(s) Speculative businesses (such as oil wildcatting).

[61 FR 3235, Jan. 31, 1996, as amended at 82 FR 39502, Aug. 21, 2017; 87 FR 38908, June 30, 2022]

§ 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.

(a) Conditions that apply to all legal forms:

(1) The Operating Company must be an eligible small business, and the proposed use of the proceeds must be an eligible use if the Operating Company were obtaining the financing directly;

(2) The Eligible Passive Company (with the exception of a trust) and the Operating Company each must be small under the appropriate size standards in part 121 of this chapter;

(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;

(4) The lease between the Eligible Passive Company and the Operating Company, including options to renew exercisable solely by the Operating Company, must have a remaining term at least equal to the term of the loan;

(5) The Operating Company must be a guarantor or co-borrower with the Eligible Passive Company. In a 7(a) loan that includes working capital and/or the purchase of other assets, including intangible assets, for the Operating Company's use, the Operating Company must be a co-borrower.

(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.

(b) *Additional conditions that apply to trusts.* The eligibility status of the trustor will determine trust eligibility. All donors to the trust will be deemed to have trustor status for eligibility purposes. A trust qualifying as an Eligible Passive Company may engage in other activities as authorized by its trust agreement. The trustee must warrant and certify that the trust will not be revoked or substantially amended for the term of the loan without the consent of SBA. The trustor must guarantee the loan. For purposes of this section, the trustee shall certify to SBA that:

(1) The trustee has authority to act;
(2) The trust has the authority to borrow funds, pledge trust assets, and lease the property to the Operating Company;
(3) The trustee has provided accurate, pertinent language from the trust agreement confirming the above; and
(4) The trustee has provided and will continue to provide SBA with a true and complete list of all trustors and donors.

[61 FR 3235, Jan. 31, 1996; 61 FR 7986, Mar. 1, 1996, as amended at 64 FR 2117, Jan. 13, 1999; 77 FR 19533, Apr. 2, 2012; 82 FR 39502, Aug. 21, 2017; 87 FR 38908, June 30, 2022]

USES OF PROCEEDS

§ 120.120 What are eligible uses of proceeds?

A small business must use an SBA business loan for sound business purposes.
(a) A Borrower may use loan proceeds from any SBA loan to:
(1) Acquire land (by purchase or lease);
(2) Improve a site (e.g., grading, streets, parking lots, landscaping), including up to 5 percent for community improvements such as curbs and sidewalks;
(3) Purchase one or more existing buildings;
(4) Convert, expand or renovate one or more existing buildings;
(5) Construct one or more new buildings; and/or
(6) Acquire (by purchase or lease) and install fixed assets (for a 504 loan, these assets must have a useful life of at least 10 years and be at a fixed location, although short-term financing for equipment, furniture, and furnishings may be permitted where essential to and a minor portion of the 504 Project).
(b) A Borrower may also use 7(a) and microloan proceeds for:
(1) Inventory;
(2) Supplies;
(3) Raw materials; and
(4) Working capital (if the Operating Company is a co-borrower with the Eligible Passive Company, part of the loan proceeds may be applied for working capital and/or the purchase of other assets, including intangible assets, for use by the Operating Company).
(c) A Borrower may use 7(a) loan proceeds for refinancing certain outstanding debts.

[61 FR 3235, Jan. 31, 1996, as amended at 77 FR 19533, Apr. 2, 2012; 88 FR 21899, Apr. 12, 2023]

§ 120.130 Restrictions on uses of proceeds.

SBA will not authorize nor may a Borrower use loan proceeds for the following purposes (including the replacement of funds used for any such purpose):
(a) Payments, distributions, or loans to Associates of the applicant (except for ordinary compensation for services rendered or to facilitate changes of ownership in accordance with § 120.202);
(b) Refinancing a debt owed to a Small Business Investment Company (''SBIC'') or a New Markets Venture Capital Company (''NMVCC'');
(c) Floor plan financing or other revolving line of credit, except under § 120.340 or § 120.390;
(d) Investments in real or personal property acquired and held primarily for sale, lease, or investment (except for a loan to an Eligible Passive Company or to a small contractor under § 120.310);
(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.
(f) A purpose which does not benefit the small business; or
(g) Any use restricted by §§ 120.201 and 120.884 (specific to 7(a) loans and 504 loans respectively).

[61 FR 3235, Jan. 31, 1996, as amended at 76 FR 9218, Feb. 17, 2011; 76 FR 63545, Oct. 12, 2011; 82 FR 39502, Aug. 21, 2017; 85 FR 7648, Feb. 10, 2020; 85 FR 80588, Dec. 14, 2020; 88 FR 21085, Apr. 10, 2023]

§ 120.131 Leasing part of new construction or existing building to another business.

(a) If the SBA financing (whether 7(a) or 504) is for the construction of a new building, a Borrower may permanently lease up to 20 percent of the Rentable Property to one or more tenants if the

Borrower permanently occupies and uses no less than 60 percent of the Rentable Property, and plans to permanently occupy and use within three years some of the remaining space not immediately occupied and not permanently leased and plans to permanently occupy and use within ten years all of the remaining space not permanently leased. If the Borrower is an Eligible Passive Company which leases 100 percent of the new building's space to one or more Operating Companies, the Operating Company, or Operating Companies together, must follow the same rules set forth in this paragraph.

(b) If the SBA financing (whether 7(a) or 504) is for the acquisition, renovation, or reconstruction of an existing building, the Borrower may permanently lease up to 49 percent of the Rentable Property if the Borrower permanently occupies and uses no less than 51 percent of the Rentable Property. If the Borrower is an Eligible Passive Company which leases 100 percent of the space of the existing building to one or more Operating Companies, the Operating Company, or Operating Companies together, must follow the same rules set forth in this paragraph.

[68 FR 51679, Aug. 28, 2003]

ETHICAL REQUIREMENTS

§ 120.140 What ethical requirements apply to participants?

Lenders, Intermediaries, and CDCs (in this section, collectively referred to as ''Participants''), must act ethically and exhibit good character. Ethical indiscretion of an Associate of a Participant or a member of a CDC will be attributed to the Participant. A Participant must promptly notify SBA if it obtains information concerning the unethical behavior of an Associate. The following are examples of such unethical behavior. A Participant may not:

(a) Self-deal;

(b) Have a real or apparent conflict of interest with a small business with which it is dealing (including any of its Associates or an Associate's Close Relatives) or SBA;

(c) Own an equity interest in a business that has received or is applying to receive SBA financing (during the term of the loan or within 6 months prior to the loan application);

(d) Be incarcerated, on parole, or on probation;

(e) Knowingly misrepresent or make a false statement to SBA;

(f) Engage in conduct reflecting a lack of business integrity or honesty;

(g) Be a convicted felon, or have an adverse final civil judgment (in a case involving fraud, breach of trust, or other conduct) that would cause the public to question the Participant's business integrity, taking into consideration such factors as the magnitude, repetition, harm caused, and remoteness in time of the activity or activities in question;

(h) Accept funding from any source that restricts, prioritizes, or conditions the types of small businesses that the Participant may assist under an SBA program or that imposes any conditions or requirements upon recipients of SBA assistance inconsistent with SBA's loan programs or regulations;

(i) Fail to disclose to SBA all relationships between the small business and its Associates (including Close Relatives of Associates), the Participant, and/or the lenders financing the Project of which it is aware or should be aware;

(j) Fail to disclose to SBA whether the loan will:

(1) Reduce the exposure of a Participant or an Associate of a Participant in a position to sustain a loss;

(2) Directly or indirectly finance the purchase of real estate, personal property or services (including insurance) from the Participant or an Associate of the Participant;

(3) Repay or refinance a debt due a Participant or an Associate of a Participant; or

(4) Require the small business, or an Associate (including Close Relatives of Associates), to invest in the Participant (except for institutions which require an investment from all members as a condition of membership, such as a Production Credit Association);

(k) Issue a real estate forward commitment to a builder or developer; or

(l) Engage in any activity which taints its objective judgment in evaluating the loan.

[61 FR 3235, Jan. 31, 1996, as amended at 68 FR 57980, Oct. 7, 2003]

CREDIT CRITERIA FOR SBA LOANS

§ 120.150 What are SBA's lending criteria?

The applicant (including an Operating Company) must be creditworthy. Loans must be so sound as to reasonably assure repayment. Lenders and CDCs must use appropriate and prudent generally acceptable commercial credit analysis processes and procedures consistent with those used for their similarly-sized, non-SBA guaranteed commercial loans. Lenders, CDCs, and SBA may use a business credit scoring model. When approving direct or guaranteed loans, Lenders, CDCs, and SBA may consider (as applicable) the following criteria: credit score or credit history of the applicant (and the Operating Company, if applicable), its Associates and any guarantors; the earnings or cashflow of applicant; or where applicable any equity or collateral of the applicant.

[88 FR 21085, Apr. 10, 2023]

§ 120.151 What is the statutory limit for total loans to a Borrower?

The aggregate amount of the SBA portions of all loans to a single Borrower, including the Borrower's affiliates as defined in §121.301(f) of this chapter, must not exceed a guaranty amount of $3,750,000, except as otherwise authorized by statute for a specific program. The maximum loan amount for any one 7(a) loan is $5,000,000. The amount of any loan received by an Eligible Passive Company applies to the loan limit of both the Eligible Passive Company and the Operating Company.

[61 FR 3235, Jan. 31, 1996, as amended at 68 FR 51680, Aug. 28, 2003; 76 FR 63546, Oct. 12, 2011; 81 FR 41428, June 27, 2016]

§ 120.160 Loan conditions.

The following requirements are normally required by SBA for all business loans:

(a) *Personal guarantees.* Holders of at least a 20 percent ownership interest generally must guarantee the loan. 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.

(b) *Appraisals.* SBA may require professional appraisals of the applicant's and principals' assets, a survey, or a feasibility study.

(c) *Hazard Insurance.* SBA requires hazard insurance for 7(a) loans greater than $500,000 and for 504 projects greater than $500,000, on all collateral.

[61 FR 3235, Jan. 31, 1996, as amended at 82 FR 39502, Aug. 21, 2017; 88 FR 21085, Apr. 10, 2023]

REQUIREMENTS IMPOSED UNDER OTHER LAWS AND ORDERS

§ 120.170 Flood insurance.

Under the Flood Disaster Protection Act of 1973 (Sec. 205(b) of Pub. L. 93–234; 87 Stat. 983 (42 U.S.C. 4000 *et seq.*)), a loan recipient must obtain flood insurance if any building (including mobile homes), machinery, or equipment acquired, installed, improved, constructed, or renovated with the proceeds of SBA financial assistance is located in a special flood hazard area. The requirement applies also to any inventory (business loan program), fixtures or furnishings contained or to be contained in the building. Mobile homes on a foundation are buildings. SBA, Lenders, CDCs, and Intermediaries must notify Borrowers that flood insurance must be maintained.

§ 120.171 Compliance with child support obligations.

Any holder of 50% or more of the ownership interest in the recipient of an SBA loan must certify that he or she is not more than 60 days delinquent on any obligation to pay child support arising under:

(a) An administrative order;

(b) A court order;

(c) A repayment agreement between the holder and a custodial parent; or

(d) A repayment agreement between the holder and a State agency providing child support enforcement services.

§ 120.172 Flood-plain and wetlands management.

(a) All loans must conform to requirements of Executive Orders 11988, ''Flood Plain Management'' (3 CFR, 1977 Comp., p. 117) and 11990, ''Protection of Wetlands'' (3 CFR, 1977 Comp., p. 121). Lenders, Intermediaries, CDCs, and SBA must comply with requirements applicable to them. Applicants must show:

(1) Whether the location for which financial assistance is proposed is in a floodplain or wetland;

(2) If it is in a floodplain, that the assistance is in compliance with local land use plans; and

(3) That any necessary construction or use permits will be issued.

(b) Generally, there is an 8-step decision making process with respect to:

(1) Construction or acquisition of anything, other than a building;

(2) Repair and restoration equal to more than 50% of the market value of a building; or

(3) Replacement of destroyed structures.

(c) SBA may determine for the following types of actions, on a case-by-case basis, that the full 8-step process is not warranted and that only the first step (determining if a proposed action is in the base floodplain) need be completed:

(1) Actions located outside the base floodplain;

(2) Repairs, other than to buildings, that are less than 50% of the market value;

(3) Replacement of building contents, materials, and equipment;

(4) Hazard mitigation measures;

(5) Working capital loans; or

(6) SBA loan assistance of $1,500,000 or less.

§ 120.174 Earthquake hazards.

When loan proceeds are used to construct a new building or an addition to an existing building, the construction must conform with the ''National Earthquake Hazards Reduction Program (''NEHRP'') Recommended Provisions for the Development of Seismic Regulations for New Buildings'' (which can be obtained from the Federal Emergency Management Agency, Publications Office, Washington, DC) or a code identified by SBA as being substantially equivalent.

§ 120.175 Coastal barrier islands.

SBA and Intermediaries may not make or guarantee any loan within the Coastal Barrier Resource System.

§ 120.176 Compliance with other laws.

All SBA loans are subject to all applicable laws, including (without limitation) the civil rights laws (*see* parts 112, 113, 117 and 136 of this chapter), prohibiting discrimination on the grounds of race, color, national origin, religion, sex, marital status, disability or age. SBA requests agreements or evidence to support or document compliance with these laws, including reports required by applicable statutes or the regulations in this chapter.

Applicability and Enforceability of Loan Program Requirements

§ 120.180 Compliance with Loan Program Requirements.

SBA Lenders and Intermediaries must comply and maintain familiarity with Loan Program Requirements for the 7(a) Loan Program, 504 Loan Program, and the Microloan Program, as applicable, and as such requirements are revised from time to time. Loan Program Requirements in effect at the time that an SBA Lender or Intermediary takes an action in connection with a particular loan govern that specific action. For example, although loan closing requirements in effect when an SBA Lender closes a loan will govern the closing actions, an SBA Lender's liquidation actions on the same loan are subject to the liquidation requirements in effect at the time that a liquidation action is taken. An SBA Lender or Intermediary must maintain sufficient documentation to demonstrate that Loan Program Requirements have been satisfied.

[85 FR 14781, Mar. 16, 2020]

§ 120.181 Status of Lenders and CDCs.

Lenders, CDCs and their contractors are independent contractors that are responsible for their own actions with respect to a 7(a) or 504 loan. SBA has no responsibility or liability for any claim by a borrower, guarantor or other party alleging injury as a result of any allegedly wrongful action taken by a Lender, CDC or an employee, agent, or contractor of a Lender or CDC.

[72 FR 18360, Apr. 12, 2007]

LOAN APPLICATIONS

§ 120.190 Where does an applicant apply for a loan?

An applicant for a business loan should apply to:

(a) A Lender for a guaranteed or immediate participation loan;

(b) A CDC for a 504 loan;

(c) An Intermediary for a Microloan; or

(d) SBA for a direct loan.

§ 120.191 The contents of a business loan application.

For most business loans, SBA requires that an application for a business loan contain, among other things, a description of the history and nature of the business, the amount and purpose of the loan, the collateral offered for the loan, current financial statements, historical financial statements (or tax returns if appropriate) for the past three years, IRS tax verification, and a business plan, when applicable. Personal histories and financial statements will be required from principals of the applicant (and the Operating Company, if applicable).

§ 120.192 Approval or denial.

Applicants receive notice of approval or denial by the Lender, CDC, Intermediary, or SBA, as appropriate. Notice of denial will include the reasons.

[61 FR 3235, Jan. 31, 1996, as amended at 88 FR 21899, Apr. 12, 2023]

§ 120.193 Reconsideration after denial.

An applicant or recipient of a business loan may request reconsideration of a denied loan or loan modification request within 6 months of denial. Applicants denied due to a size determination can appeal that determination under part 121 of this chapter. All others must be submitted to the office that denied the original request. To prevail, the applicant must demonstrate that it has overcome all legitimate reasons for denial. Six months after denial, a new application is required. If the reconsideration is denied, a second and final reconsideration may be considered by the Director, Office of Financial Assistance (D/FA) or designee(s), whose decision is final. The SBA Administrator, solely within the Administrator's discretion, may choose to review the matter and make the final decision. Such discretionary authority of the Administrator does not create additional rights of appeal on the part of an applicant not otherwise specified in SBA regulations.

[61 FR 3235, Jan. 31, 1996, as amended at 88 FR 21085, Apr. 10, 2023]

COMPUTERIZED SBA FORMS

§ 120.194 [Reserved]

REPORTING

§ 120.195 Disclosure of fees.

An Applicant for a business loan must identify to SBA the name of each Agent as defined in part 103 of this chapter that helped the applicant obtain the loan, describing the services performed, and disclosing the amount of each fee paid or to be paid by the applicant to the Agent in conjunction with the performance of those services.

§ 120.197 Notifying SBA's Office of Inspector General of suspected fraud.

Lenders, CDCs, Borrowers, and others must notify the SBA Office of Inspector General of any information which indicates that fraud may have occurred in connection with a 7(a) or 504 loan. Send the notification to the Assistant Inspector General for Investigations, Office of Inspector General, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

[72 FR 18360, Apr. 12, 2007]

Subpart B—Policies Specific to 7(a) Loans

BONDING REQUIREMENTS

§ 120.200 What bonding requirements exist during construction?

On 7(a) loans which finance construction, the Borrower must supply a 100 percent payment and performance bond and builder's risk insurance, unless waived by SBA.

LIMITATIONS ON USE OF PROCEEDS

§ 120.201 Refinancing unsecured or undersecured loans.

A Borrower may not use 7(a) loan proceeds to pay any creditor in a position to sustain a loss causing a shift to SBA of all or part of a potential loss from an existing debt.

§ 120.202 Loans for changes of ownership.

A Borrower may use 7(a) loan proceeds to purchase a portion of or the entirety of an owner's interest in a business, or a portion of or the entirety of a business itself.

[88 FR 21086, Apr. 10, 2023]

MATURITIES; INTEREST RATES; LOAN AND GUARANTEE AMOUNTS

§ 120.210 What percentage of a loan may SBA guarantee?

SBA's guarantee percentage must not exceed the applicable percentage established in section 7(a) of the Act. The maximum allowable guarantee percentage on a loan will be determined by the loan amount. Loans of $150,000 or less may receive a maximum guaranty of 85 percent. Loans more than $150,000 may receive a maximum guaranty of 75 percent, except as otherwise authorized by law.

[61 FR 3235, Jan. 31, 1996, as amended at 68 FR 51680, Aug. 28, 2003; 76 FR 63546, Oct. 12, 2011]

§ 120.211 What limits are there on the amounts of direct loans?

(a) The statutory limit for direct loans made under the authority of section 7(a)(1)-(19) of the Small Business Act is $350,000. SBA has established an administrative limit of $150,000 for direct loans. The D/FA may authorize acceptance of an application up to the statutory limit.

(b) The statutory limit for direct loans made under the authority of section 7(a)(20) is $750,000. SBA has established an administrative limit of $150,000. The Associate Administrator for Business Development may authorize the acceptance of an application that exceeds the administrative limit.

(c) The statutory limit on SBA's portion of an immediate participation loan is $350,000. The administrative limit is the lesser of 75 percent of the loan or $150,000. The D/FA may authorize exceptions to the administrative limit up to $350,000.

[61 FR 3235, Jan. 31, 1996, as amended at 74 FR 45753, Sept. 4, 2009]

§ 120.212 What limits are there on loan maturities?

The term of a loan shall be:

(a) The shortest appropriate term, depending upon the Borrower's ability to repay;

(b) Ten years or less, unless it finances or refinances real estate or equipment with a useful life exceeding ten years. The term for a loan to finance equipment and/or leasehold improvements may include an additional reasonable period, not to exceed 12 months, when necessary to complete the installation of the equipment and/or complete the leasehold improvements.

(c) A maximum of 25 years, including extensions. (A portion of a loan used to acquire or improve real property may have a term of 25 years plus an additional period needed to complete the construction or improvements.)

[61 FR 3235, Jan. 31, 1996, as amended at 87 FR 38908, June 30, 2022]

§ 120.213 What fixed interest rates may a Lender charge?

(a) *Fixed Rates for Guaranteed Loans.* A loan may have a reasonable fixed interest rate. SBA periodically publishes the maximum allowable rate in the FEDERAL REGISTER.

(b) *Direct loans.* A statutory formula based on the cost of money to the Federal government determines the interest rate on direct loans. SBA publishes

the rate periodically in the FEDERAL REGISTER.

§ 120.214 What conditions apply for variable interest rates?

A Lender may use a variable rate of interest for guaranteed loans under the following conditions:

(a) *Frequency*. The first change may occur on the first calendar day of the month following initial disbursement, using the base rate (see paragraph (c) of this section) in effect on the first business day of the month. After that, changes may occur no more often than monthly.

(b) *Range of fluctuation*. The amount of fluctuation shall be equal to the movement in the base rate. The difference between the initial rate and the ceiling rate may be no greater than the difference between the initial rate and the floor rate.

(c) *Base rate*. The base rate will be one of the following: the prime rate or the Optional Peg Rate. The prime rate will be that which is in effect on the first business day of the month, as printed in a national financial newspaper published each business day. SBA may from time to time permit the use of alternative base rate options that are widely adopted for small business commercial lending and will publish notice of such alternative options in the FEDERAL REGISTER. SBA publishes the Optional Peg Rate quarterly in the FEDERAL REGISTER.

(d) *Maximum Allowable Variable Interest Rates*. The maximum allowable variable interest rates are set forth below, with the initial maximum allowable rate for the loan determined as of the date SBA receives the loan application:

(1) For all 7(a) loans of $50,000 and less, the interest rate shall not exceed six and a half (6.5) percentage points over the base rate;

(2) For all 7(a) loans of more than $50,000 and up to and including $250,000, the maximum interest rate shall not exceed six (6.0) percentage points over the base rate;

(3) For all 7(a) loans of more than $250,000 and up to and including $350,000, the maximum interest rate shall not exceed four and a half (4.5) percentage points over the base rate; and

(4) For all 7(a) loans of more than $350,000, the maximum interest rate shall not exceed three (3.0) percentage points over the base rate.

(e) *Amortization*. Initial amortization of principal and interest may be recomputed and reassessed as interest rates fluctuate, as directed by SBA. With prior approval of SBA, the Lender may use certain other amortization methods, except that SBA does not allow balloon payments.

[61 FR 3235, Jan. 31, 1996, as amended at 73 FR 67101, Nov. 13, 2008; 87 FR 38908, June 30, 2022]

FEES FOR GUARANTEED LOANS

§ 120.220 Fees that Lender pays SBA.

A Lender must pay a guaranty fee to SBA for each loan it makes. If the guarantee fee is not paid, SBA may terminate the guarantee. Acceptance of the guaranty fee by SBA does not waive any right of SBA arising from a Lender's negligence, misconduct or violation of any provision of these regulations or the guaranty agreement or other loan documents.

(a) *Amount of guaranty fee*—(1) *In general*. Except to the extent paragraph (a)(2) of this section applies, for a loan with a maturity of twelve (12) months or less, the guarantee fee which the Lender must pay to SBA is one-quarter (¼) of one percent of the guaranteed portion of the loan. For a loan with a maturity of more than twelve (12) months, the guarantee fee is payable as follows:

(i) Not more than 2 percent of the guaranteed portion of a loan if the total amount of the loan is not more than $150,000;

(ii) Not more than 3 percent of the guaranteed portion of a loan if the total amount of the loan is more than $150,000 but not more than $700,000;

(iii) Except as provided in paragraph (a)(1)(iv) of this section, not more than 3.5 percent of the guaranteed portion of a loan if the total amount of the loan is more than $700,000; and

(iv) An additional 0.25 percent of the guaranteed portion of a loan if the total amount of the loan is more than $1,000,000.

(2) *For loans approved October 1, 2002, through September 30, 2004*. For a loan

with a maturity of twelve (12) months or less, the guarantee fee which the Lender must pay to SBA is one-quarter (¼) of one percent of the guaranteed portion of the loan. For a loan with a maturity of more than twelve (12) months, the guarantee fee is:

(i) 1 percent of the guaranteed portion of the loan if the total loan amount is not more than $150,000,

(ii) 2.5 percent of the guaranteed portion of a loan if the total loan amount is more than $150,000, but not more than $700,000, and

(iii) 3.5 percent of the guaranteed portion if the total loan amount is more than $700,000.

(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.* 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) *When the guaranty fee is payable.* 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. The Lender may charge the Borrower the fee after the Lender has made the first disbursement of the loan. The Borrower may use the loan proceeds to pay the guaranty fee. However, the first disbursement must not be made solely or primarily to pay the guaranty fee.

(c) *Refund of guaranty fee.* For a loan with a maturity of more than twelve (12) months, SBA will refund the guaranty fee if the Lender has not made any disbursement and the lender requests in writing the refund and cancellation of the SBA guaranty.

(d) *Lender's retention of portion of guaranty fee.* With respect to a loan with a maturity of more than twelve (12) months, where the total loan amount is no more than $150,000 Lender may retain not more than 25 percent of the guaranty fee.

(e) If the guarantee fee is not paid, SBA may terminate the guarantee. The Borrower may use working capital loan proceeds to reimburse the Lender for the guarantee fee. Acceptance of the guarantee fee by SBA shall not waive any right of SBA arising from the Lender's misconduct or violation of any provision of this part, the guarantee agreement or other loan documents.

(f) *Lender's annual service fee payable to SBA*—(1) *In general.* Except to the extent paragraph (f)(2) of this section applies, the lender shall pay SBA an annual service fee in an amount not to exceed 0.55 percent of the outstanding balance of the guaranteed portion of each loan. The service fee cannot be charged to the Borrower. SBA may institute a late fee charge for delinquent payments of the annual service fee to cover administrative costs associated with collecting delinquent fees.

(2) *For loans approved from October 1, 2002, through September 30, 2004.* The lender shall pay SBA an annual service fee equal to 0.25 percent of the outstanding balance of the guaranteed portion of each loan. The service fee cannot be charged to the Borrower. SBA may institute a late fee charge for delinquent payments of the annual service fee to cover administrative costs associated with collecting delinquent fees.

[61 FR 3235, Jan. 31, 1996; 61 FR 11471, Mar. 20, 1996, as amended at 68 FR 51680, Aug. 28, 2003; 68 FR 56554, Oct. 1, 2003; 76 FR 63546, Oct. 12, 2011; 82 FR 39502, Aug. 21, 2017; 87 FR 38908, June 30, 2022; 88 FR 21899, Apr. 12, 2023]

§ 120.221 Fees and expenses that 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:

(a) *Service and packaging fees.* The Lender may charge an applicant reasonable fees (customary for similar Lenders in the geographic area where the loan is being made) for packaging and other services. The Lender must advise the applicant in writing that the

applicant is not required to obtain or pay for unwanted services. The applicant is responsible for deciding whether fees are reasonable. SBA may review these fees at any time. Lender must refund any such fee considered unreasonable by SBA.

(b) *Extraordinary servicing.* Subject to prior written SBA approval, if all or part of a loan will have extraordinary servicing needs, the Lender may charge the applicant a service fee not to exceed 2 percent per year on the outstanding balance of the part requiring special servicing.

(c) *Out-of-pocket expenses.* The Lender may collect from the applicant necessary out-of-pocket expenses such as filing or recording fees.

(d) *Late payment fee.* The Lender may charge the Borrower a late payment fee not to exceed 5 percent of the regular loan payment.

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

[61 FR 3235, Jan. 31, 1996, as amended at 82 FR 39503, Aug. 21, 2017; 85 FR 7648, Feb. 10, 2020; 85 FR 80588, Dec. 14, 2020]

§ 120.222 Prohibition on sharing premiums for secondary market sales.

The Lender or its Associates 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.

[82 FR 39503, Aug. 21, 2017, as amended at 85 FR 7648, Feb. 10, 2020; 85 FR 80588, Dec. 14, 2020; 87 FR 38908, June 30, 2022]

§ 120.223 Subsidy recoupment fee payable to SBA by Borrower.

(a) The subsidy recoupment fee is payable to SBA when:

(1) Loan has a maturity of 15 years or more.

(2) Borrower makes a voluntary prepayment (or several prepayments in the aggregate) during any one of the first three successive 12 month periods following the first disbursement of the loan. Prepayment is defined as a payment of principal in excess of the amount due according to the amortization schedule.

(3) The prepayment (or several prepayments in the aggregate) is more than 25 percent of the highest outstanding principal balance of the loan in any one of the first three successive 12 month periods following the first disbursement.

(b) When all the conditions above exist, the following subsidy recoupment fees apply:

(1) If the prepayment is made during the first 12 month period after first disbursement, the charge is 5 percent of the total amount of all prepayments made during such period;

(2) If the prepayment is made during the second 12 month period after first disbursement, the charge is 3 percent of the total amount of all prepayments made during that period; and

(3) If the prepayment is made during the third 12 month period after first disbursement, the charge is 1 percent of the total amount of all prepayments made during that period.

[68 FR 51680, Aug. 28, 2003]

Subpart C—Special Purpose Loans

§ 120.300 Statutory authority.

Congress has authorized several special purpose programs in various subsections of section 7(a) of the Act. Generally, 7(a) loan policies, eligibility requirements and credit criteria enumerated in subpart B of this part apply to these programs. The sections of this subpart prescribe the special conditions applying to each special purpose program. As with other business loans, special purpose loans are available only to the extent funded by annual appropriations.

DISABLED ASSISTANCE LOAN PROGRAM (DAL)

§ 120.310 What assistance is available for the disabled?

Section 7(a)(10) of the Act authorizes SBA to guarantee or make direct loans to the disabled. SBA distinguishes two kinds of assistance:

(a) *DAL–1.* DAL–1 Financial Assistance is available to non-profit public or private organizations for disabled individuals that employ such individuals; or

(b) *DAL–2.* DAL–2 Financial Assistance is available to:

(1) Small businesses wholly owned by disabled individuals; and
(2) Disabled individuals to establish, acquire, or operate a small business.

§ 120.311 Definitions.

(a) *Organization for the disabled* means one which:
(1) Is organized under federal or state law to operate in the interest of disabled individuals;
(2) Is non-profit;
(3) Employs disabled individuals for seventy-five percent of the time needed to produce commodities or services for sale; and
(4) Complies with occupational and safety standards prescribed by the Department of Labor.
(b) *Disabled individual* means a person who has a permanent physical, mental or emotional impairment, defect, ailment, disease or disability which limits the type of employment for which the person would otherwise be qualified.

§ 120.312 DAL–1 use of proceeds and other program conditions.

(a) DAL–1 applicants must submit appropriate documents to establish program eligibility.
(b) Generally, applicants may use loan proceeds for any 7(a) loan purposes. Loan proceeds may not be used:
(1) To purchase or construct facilities if construction grants and mortgage assistance are available from another Federal source; or
(2) For supportive services (expenses incurred by a DAL–1 organization to subsidize wages of low producers, health and rehabilitation services, management, training, education, and housing of disabled workers).
(c) SBA does not consider a DAL–1 organization to have a conflict of interest if one or more of its Associates is an Associate of the Lender.

§ 120.313 DAL–2 use of proceeds and other program conditions.

(a) The DAL–2 loan proceeds may be used for any 7(a) loan purposes.
(b) An applicant may use DAL–2 loan proceeds to acquire an eligible small business without complying with the change of ownership conditions in § 120.202.
(c) A DAL–2 applicant must submit evidence from a physician, psychiatrist, or other qualified professional as to the permanent nature of the disability and the limitation it places on the applicant.

§ 120.314 Resolving doubts about creditworthiness.

For the purpose of the DAL Program, SBA shall resolve doubts concerning the creditworthiness of an applicant in favor of the applicant. However, the applicant must present satisfactory evidence of repayment ability. Personal guarantees of Associates are not required for purposes of DAL–1 financial assistance.

§ 120.315 Interest rate and loan limit.

The interest rate on direct DAL loans is three percent. There is an administrative limit of $150,000 on a direct DAL loan.

Businesses Owned by Low Income Individuals

§ 120.320 Policy.

Section 7(a)(11) of the Act authorizes SBA to guarantee or make direct loans to establish, preserve or strengthen small business concerns:
(a) Located in an area having high unemployment according to the Department of Labor;
(b) Located in an area in which a high percentage of individuals have a low income inadequate to satisfy basic family needs; and
(c) More than 50 percent owned by low income individuals.

Energy Conservation

§ 120.330 Who is eligible for an energy conservation loan?

SBA may make or guarantee loans to assist a small business to design, engineer, manufacture, distribute, market, install, or service energy devices or techniques designed to conserve the Nation's energy resources.

§ 120.331 What devices or techniques are eligible for a loan?

Eligible energy conservation devices or techniques include:
(a) Solar thermal equipment;

(b) Photovoltaic cells and related equipment;

(c) A product or service which increases the energy efficiency of existing equipment, methods of operation or systems which use fossil fuels, and which is on the Energy Conservation Measures list of the Secretary of Energy;

(d) Equipment producing energy from wood, biological waste, grain or other biomass energy sources;

(e) Equipment for cogeneration of energy, district heating or production of energy from industrial waste;

(f) Hydroelectric power equipment;

(g) Wind energy conversion equipment; and

(h) Engineering, architectural, consulting, or other professional services necessary or appropriate for any of the devices or techniques in paragraphs (a) through (g) of this section.

§ 120.332 What are the eligible uses of proceeds?

(a) *Acquire property*. The Borrower may use the loan proceeds to acquire land necessary for imminent plant construction, buildings, machinery, equipment, furniture, fixtures, facilities, supplies, and material needed to accomplish any of the eligible program purposes in § 120.330.

(b) *Research and development*. Up to 30% of loan proceeds may be used for research and development:

(1) Of an existing product or service; or

(2) A new product or service.

(c) *Working capital*. The Borrower may use proceeds for working capital for entering or expanding in the energy conservation market.

§ 120.333 Are there any special credit criteria?

In addition to regular credit evaluation criteria, SBA shall weigh the greater risk associated with energy projects. SBA shall consider such factors as quality of the product or service, technical qualifications of the applicant's management, sales projections, and financial status.

EXPORT WORKING CAPITAL PROGRAM (EWCP)

§ 120.340 What is the Export Working Capital Program?

Under the EWCP, SBA guarantees short-term working capital loans made by participating lenders to exporters (section 7(a)(14) of the Act). Loan maturities may be for up to three years with annual renewals. Proceeds can be used only to finance export transactions. Loans can be for single or multiple export transactions. An export transaction is the production and payment associated with a sale of goods or services to a foreign buyer. The maximum loan amount for any one EWCP loan is $5,000,000. EWCP loans shall receive a guaranty of 90 percent, not to exceed $4,500,000.

[61 FR 3235, Jan. 31, 1996, as amended at 76 FR 63546, Oct. 12, 2011]

§ 120.341 Who is eligible?

In addition to the eligibility criteria applicable to all 7(a) loans, an applicant must be in business for one full year at the time of application, but not necessarily in the exporting business. SBA may waive this requirement if the applicant has sufficient export trade experience or other managerial experience.

§ 120.342 What are eligible uses of proceeds?

Loan proceeds may be used:

(a) To acquire inventory;

(b) To pay the manufacturing costs of goods for export;

(c) To purchase goods or services for export;

(d) To support standby letters of credit;

(e) For pre-shipment working capital; and

(f) For post-shipment foreign accounts receivable financing.

§ 120.343 Collateral.

A Borrower must give SBA a first security interest sufficient to cover 100 percent of the EWCP loan amount (such as insured accounts receivable or letters of credit). Collateral must be located in the United States, its territories or possessions.

§ 120.344 Unique requirements of the EWCP.

(a) An applicant must submit cash flow projections to support the need for the loan and the ability to repay. After the loan is made, the loan recipient must submit continual progress reports.

(b) SBA does not limit the amount of extraordinary servicing fees, as referenced in § 120.221(b), under the EWCP.

(c) SBA does not prescribe the interest rates for the EWCP, but will monitor these rates for reasonableness.

[61 FR 3235, Jan. 31, 1996, as amended at 85 FR 7648, Feb. 10, 2020; 85 FR 80588, Dec. 14, 2020]

INTERNATIONAL TRADE LOANS

§ 120.345 Policy.

Section 7(a)(16) of the Act authorizes SBA to guarantee loans to small businesses that are:

(a) Engaged or preparing to engage in international trade; or

(b) Adversely affected by import competition.

§ 120.346 Eligibility.

(a) An applicant must establish that:

(1) The loan proceeds will significantly expand an existing export market or develop new export markets; or

(2) The applicant business is adversely affected by import competition; and

(3) The loan will improve the applicant's competitive position.

(b) The applicant must have a business plan reasonably supporting its projected export sales.

[61 FR 3235, Jan. 31, 1996, as amended at 76 FR 63546, Oct. 12, 2011]

§ 120.347 Use of proceeds.

The Borrower may use loan proceeds to acquire, construct, renovate, modernize, improve, or expand facilities and equipment to be used in the United States to produce goods or services involved in international trade, and to develop and penetrate foreign markets. The Borrower may also use proceeds in the refinancing of existing indebtedness that is not structured with reasonable terms and conditions, including any debt that qualifies for refinancing under 7(a) Loan Program Requirements, and to provide working capital.

[61 FR 3235, Jan. 31, 1996, as amended at 76 FR 63546, Oct. 12, 2011]

§ 120.348 Amount of guarantee.

The maximum loan amount for any one International Trade (IT) loan is $5,000,000. IT loans may receive a maximum guaranty of 90 percent or $4,500,000, except that the maximum guaranty amount for any working capital component of an IT loan is limited to $4,000,000. To the extent that the Borrower has a separate EWCP loan or any other 7(a) loan for working capital, the guaranty amount for the other loan is counted against the $4,000,000 guaranty limit for the IT loan.

[76 FR 63546, Oct. 12, 2011]

§ 120.349 Collateral.

Each IT loan must be secured either by a first lien position or first mortgage on the property or equipment financed by the IT loan or on other assets of the Borrower, except that an IT loan may be secured by a second lien position on the property or equipment financed by the IT loan or on other assets of the Borrower, if the SBA determines the second lien position provides adequate assurance of the payment of the IT loan.

[76 FR 63546, Oct. 12, 2011]

QUALIFIED EMPLOYEE TRUSTS (ESOP)

§ 120.350 Policy.

Section 7(a)(15) of the Act authorizes SBA to guarantee a loan to a:

(a) Qualified employee trust (''ESOP'') to:

(1) Help finance the growth of its employer's small business; or

(2) Purchase ownership or voting control of the employer; and a

(b) Small business concern, if the proceeds from the loan are only used to make a loan to a qualified employee trust that results in the qualified employee trust owning at least 51 percent of the small business concern.

[87 FR 38908, June 30, 2022]

§ 120.351 Definitions.

All terms specific to ESOPs have the same definition for purposes of this section as in the Internal Revenue Service (IRS) Code (title 26 of the United States Code) or regulations (26 CFR chapter I).

§ 120.352 Use of proceeds.

Loan proceeds may be used for:

(a) *Qualified employee trust.* A qualified employee trust may use loan proceeds for two purposes:

(1) *Qualified employer securities.* A qualified employee trust may relend loan proceeds to the employer by purchasing qualified employer securities. The small business concern may use these funds for any general 7(a) purpose.

(2) *Control of employer.* A qualified employee trust may use loan proceeds to purchase a controlling interest (51 percent) in the employer. Ownership and control must vest in the trust by the time the loan is repaid.

(b) *Small business concern.* A small business concern may only use loan proceeds to make a loan to a qualified employee trust that results in the qualified employee trust owning at least 51 percent of the small business concern.

[87 FR 38908, June 30, 2022]

§ 120.353 Eligibility.

SBA may assist a qualified employee trust (or equivalent trust) that meets the requirements and conditions for an ESOP prescribed in all applicable IRS, Treasury and Department of Labor (DOL) regulations. In addition, the following conditions apply:

(a) The small business must provide the funds needed by the trust to repay the loan; and

(b) The small business must provide adequate collateral.

§ 120.354 Creditworthiness.

In determining repayment ability, SBA shall not consider the personal assets of the employee-owners of the trust. SBA shall consider the earnings history and projected future earnings of the employer small business. SBA may consider the business and management experience of the employee-owners.

VETERANS LOAN PROGRAM

§ 120.360 Which veterans are eligible?

SBA may guarantee or make direct loans to a small business 51 percent owned by one or more of the following eligible veterans:

(a) Vietnam-era veterans who served for a period of more than 180 days between August 5, 1964, and May 7, 1975, and were discharged other than dishonorably;

(b) Disabled veterans of any era with a minimum compensable disability of 30 percent; or

(c) A veteran of any era who was discharged for disability.

§ 120.361 Other conditions of eligibility.

(a) Management and daily operations of the business must be directed by one or more of the veteran owners whose veteran status was used to qualify for the loan.

(b) This direct loan program is available only if private sector financing and guaranteed loans are not available.

(c) A veteran may qualify only once for this program on a direct loan basis.

LOANS TO PARTICIPANTS IN THE 8(a) PROGRAM

§ 120.375 Policy.

Section 7(a)(20) of the Act authorizes SBA to provide direct (unilaterally or together with Lenders) or guaranteed loans to firms participating in the 8(a) Program.

§ 120.376 Special requirements.

The following special conditions apply (otherwise, 7(a) loan eligibility criteria apply):

(a) The Associate Administrator for Business Development may waive the direct loan administrative ceiling of $150,000, and raise it to $750,000.

(b) The SBA portion of a guaranteed loan must not exceed $750,000.

(c) The interest rate on a guaranteed loan shall be the same as on 7(a) guaranteed business loans. The interest rate on a direct loan shall be one percent less than on a regular direct loan.

(d) For a direct loan or SBA's portion of an immediate participation loan, SBA shall subordinate its security interest on all collateral to other debt of the applicant.

[61 FR 3235, Jan. 31, 1996, as amended at 74 FR 45753, Sept. 4, 2009]

§ 120.377 Use of proceeds.

The loan proceeds shall not be used for debt refinancing. Only a manufacturing concern may use loan proceeds for working capital.

CAPLINES PROGRAM

§ 120.390 Revolving credit.

(a) CapLines finances eligible small businesses' short-term, revolving and non-revolving working-capital needs. SBA regulations governing the 7(a) loan program govern business loans made under this program. The maximum guaranteed amount and the maximum loan amount are the same under CapLines as other 7(a) loans, as stated in § 120.151.

(b) CapLines proceeds can be used to finance the cyclical, recurring, or other identifiable short-term operating capital needs of small businesses. Proceeds can be used to create current assets or used to provide financing against the current assets that already exist.

[61 FR 3235, Jan. 31, 1996, as amended at 76 FR 63546, Oct. 12, 2011]

BUILDERS LOAN PROGRAM

§ 120.391 What is the Builders Loan Program?

Under section 7(a)(9) of the Act, SBA may make or guarantee loans to finance small general contractors to construct or rehabilitate residential or commercial property for resale. This program provides an exception under specified conditions to the general rule against financing investment property. ''Construct'' and ''rehabilitate'' mean only work done on-site to the structure, utility connections and landscaping.

§ 120.392 Who may apply?

A construction contractor or homebuilder with a past history of profitable construction or rehabilitation projects of comparable type and size may apply. An applicant may subcontract the work. Subcontracts in excess of $25,000 may require 100 percent payment and performance bonds.

§ 120.393 Are there special application requirements?

(a) An applicant must submit documentation from:

(1) A mortgage lender indicating that permanent mortgage money is available to qualified purchasers to buy such properties;

(2) A real estate broker indicating that a market exists for the proposed building and that it will be compatible with its neighborhood; and

(3) An architect, appraiser or engineer agreeing to make inspections and certifications to support interim disbursements.

(b) The Borrower may substitute a letter from a qualified Lender for one or more of the letters.

§ 120.394 What are the eligible uses of proceeds?

A Borrower must use the loan proceeds solely to acquire, construct or substantially rehabilitate an individual residential or commercial building for sale. ''Substantial'' means rehabilitation expenses of more than one-third of the purchase price or fair market value at the time of the application. A Borrower may use up to 33 percent of the proceeds to acquire land, and up to 5 percent for community improvements such as curbs and sidewalks.

[61 FR 3235, Jan. 31, 1996, as amended at 82 FR 39503, Aug. 21, 2017]

§ 120.395 What is SBA's collateral position?

SBA will require a lien on the building which must be in no less than a second position.

§ 120.396 What is the term of the loan?

The loan must not exceed sixty (60) months plus the estimated time to complete construction or rehabilitation.

§ 120.397 Are there any special restrictions?

The borrower must not use loan proceeds to purchase vacant land for possible future construction or to operate or hold rental property for future rehabilitation. SBA may allow rental of the property only if the rental will improve the ability to sell the property. The sale must be a legitimate change of ownership.

AMERICA'S RECOVERY CAPITAL (BUSINESS STABILIZATION) LOAN PROGRAM—ARC LOAN PROGRAM

§ 120.398 America's Recovery Capital (ARC) Loan Program.

(a) *Purpose.* The purpose of the ARC Loan Program is to enable SBA to guarantee certain loans to viable small businesses that are experiencing immediate financial hardship. Loans made under this loan program are referred to as ARC Loans and are subject to the requirements set forth in this Part for 7(a) loans except as noted in this section.

(b) *Definitions.* (1) (i) *Eligible Borrower* is a small business concern as defined in Section 3 of the Small Business Act and § 120.100. Eligible Borrower does not include:

(A) Ineligible small businesses as listed in § 120.110; and

(B) Small business concerns with the following primary industry North American Industry Classification System (NAICS) codes:

(*1*) 713210 (Casinos (Except Casino Hotels));

(*2*) 721120 (Casino Hotels);

(*3*) 713290 (Other Gambling Industries);

(*4*) 713910 (Golf Courses and Country Clubs); and

(*5*) 712130 (Zoos and Botanical Gardens).

(ii) Applications submitted by small business concerns with a primary industry NAICS code of 713940 (Fitness and Recreational Sports Centers) will be identified and reviewed by SBA to determine eligibility in accordance with the statutory restriction on assistance to swimming pools.

(2) *Going Concern* is a small business concern actively engaging in business with the expectation of indefinite continuance.

(3) *Qualifying Small Business Loan* is a loan previously made to an Eligible Borrower for any of the purposes set forth in § 120.120 and not for any of the purposes set forth in § 120.130 or 120.160(d). Qualifying Small Business Loans may include credit card obligations, capital leases for major equipment and vehicles, notes payable to vendors or suppliers, loans in the first lien position made by commercial lenders in connection with the Development Company Loan Program (504), home equity loans used to finance business operations, other loans to small businesses made without an SBA guaranty, and loans made by or with an SBA guaranty on or after February 17, 2009. Loans made or guaranteed by SBA before February 17, 2009 are not Qualifying Small Business Loans for the purposes of the ARC Loan Program. A Qualifying Small Business Loan may not be used as the basis for more than one ARC Loan but ARC Loans may be used to pay multiple Qualifying Small Business Loans.

(4) *Viable small business* is a small business that is a Going Concern but which is having difficulty making periodic payments of principal and interest on Qualifying Small Business Loan(s) and/or meeting operating expenses of the business although it can reasonably demonstrate its projected continued operation for a reasonable period beyond the six month period of payment assistance with an ARC Loan.

(c) *Period of program.* The ARC Loan Program is authorized through September 30, 2010, or until appropriated funds are exhausted, whichever is sooner.

(d) *Use of proceeds.* Loans made under the ARC Loan Program are for the sole purpose of making periodic payments of principal and interest (including default interest), in full or in part, for up to six (6) months, on one or more existing Qualifying Small Business Loans. ARC Loan proceeds cannot be used to make payments on loans made or guaranteed by SBA prior to February 17, 2009.

(e) *Loan terms.* (1) *Guaranty percentage.* ARC Loans are 100% guaranteed by SBA.

(2) *Maximum loan size.* An ARC Loan may not exceed $35,000.

(3) *Interest rate.* The interest rate for ARC Loans will be published by SBA in the FEDERAL REGISTER.

(4) *Loan maturity.* An ARC Loan may be made with a maturity of up to six and one-half years.

(5) *Disbursement period.* The disbursement period for an ARC Loan is up to six consecutive months.

(6) *Loan payments.*

(i) *Borrower's payments.* The borrower will be responsible for all principal payments.

(ii) *Payment of interest by SBA.* SBA will make periodic interest payments to the lender on ARC Loans. Interest will accrue only until the date 120 days after the earliest uncured payment default on the ARC Loan. However, the amount paid by SBA on a defaulted ARC Loan, when it honors its guarantee, will be adjusted to reconcile for any overpayments or underpayments of interest previously paid to the Lender. Interim adjustments to interest paid by SBA to lenders may be made during the term of the ARC Loan and interest payments due the Lender will be adjusted to accommodate the interim interest adjustments.

(iii) *Deferral period.* No principal repayment is required during the disbursement period or for 12 months following the final loan disbursement.

(iv) *Repayment period.* The borrower will be required to pay the loan principal over five years beginning in the 13th month following the final loan disbursement. The ARC Loan balance will be fully amortized over the five year repayment period. Balloon payments may not be required by lenders. The borrower may prepay all or a portion of the principal during the life of the loan without penalty.

(f) *Number of ARC Loans per small business.* No small business may obtain more than one ARC Loan, but the proceeds of the ARC loan may be used to pay more than one Qualifying Small Business Loan.

(g) *Personal guarantees.* Holders of at least a 20 percent ownership interest in the borrower generally must guarantee the ARC Loan.

(h) *Collateral.* SBA requires each lender to follow the collateral policies and procedures that it has established and implemented for similarly-sized non-SBA guaranteed commercial loans. The lender's collateral policies must be commercially reasonable and prudent. Lenders will certify that the collateral policies applied to the ARC Loan meet this standard. Lenders may charge borrowers the direct cost of securing and liquidating collateral for ARC Loans. SBA will reimburse Lenders for the direct cost of liquidating collateral that are not reimbursed by the borrower in the event of default. Reimbursement of the direct costs of liquidation by SBA to the Lender is limited to the amount of the recovery received on the ARC Loan.

(i) *Credit criteria.* To be approved for an ARC Loan, the applicant must be a creditworthy small business with a reasonable expectation of repayment, taking into consideration the following:

(1) Character, reputation, and credit history of the applicant (and the Operating Company, if applicable) and its Associates;

(2) Experience and depth of management;

(3) Strength of the business;

(4) Past earnings, current earnings, and projected cash flow; and

(5) Ability to repay the loan with earnings from the business.

(j) *Statement of hardship.* In addition to the certifications required for 7(a) loans generally, ARC Loan recipients must submit a statement certifying that they are experiencing immediate financial hardship and provide documentation to support the certification.

(k) *Loan application.* The provisions of §120.191 do not apply for ARC Loans. A lender making an ARC Loan will provide an application with information on the small business that includes the nature and history of the business, current and historical financial statements (or tax returns), and other information that SBA may require.

(l) *Preferences and refinancing.* A lender may make an ARC Loan to an Eligible Borrower that intends to use the proceeds of the ARC Loan to make periodic payments of principal and interest on a Qualifying Small Business Loan that is owned or serviced by that same lender. The provisions of §§120.10, 120.536(a)(2) and 120.925 with regard to

Preference for repayments without prior SBA approval do not apply to ARC Loans. The provisions of §120.201 restricting refinancing also do not apply to ARC Loans.

(m) *Loan fees.* Neither the lender nor SBA shall impose any fees or direct costs on a borrower of an ARC Loan, except that lenders may charge borrowers for the direct costs of securing and liquidating collateral for the ARC Loan. Fees include, but are not limited to, points, bonus points, prepayment penalties, brokerage fees, fees for processing, origination, or application, and out of pocket expenses (other than the direct costs of securing and liquidating collateral). SBA will not impose any fees on a lender making an ARC Loan.

(n) *Lender reporting.* Lenders shall report on its ARC Loans in accordance with requirements established by SBA from time to time for 7a loans and loans made under the American Recovery and Reinvestment Act of 2009.

(o) *Loan servicing.* Each originating lender shall service all of its ARC Loans in accordance with the existing practices and procedures that the Lender uses for its non-SBA guaranteed commercial loans. In all circumstances, such practices and procedures must be commercially reasonable and consistent with prudent lending standards and in accordance with SBA Loan Program Requirements as defined in §120.10. SBA's prior written consent is required for servicing actions that may have significant exposure implications for SBA. SBA may require written notice of other servicing actions it considers necessary for portfolio management purposes.

(p) *Liquidations.* Each Lender shall be responsible for liquidating any defaulted ARC Loan originated by the Lender. ARC Loans will be liquidated in accordance with the existing practices and procedures that the Lender uses for its non-SBA guaranteed commercial loans. In all circumstances, such practices and procedures must be commercially reasonable and consistent with prudent lending standards and in accordance with SBA Loan Program Requirements as defined in Section 120.10. Loans with de minimis value may, at the Lender's request and with SBA's approval, be liquidated by SBA or its agent(s). Significant liquidation actions taken on ARC Loans must be documented. The reimbursement of liquidation related fees by SBA to the Lender is limited to the amount of the recovery on the ARC Loan.

(q) *Purchase requests.* Any purchase request to SBA to honor its guaranty on a defaulted ARC Loan shall be made by the originating lender. Lenders may request SBA to purchase an ARC Loan when there has been an uncured payment default exceeding 60 days or when the borrower has declared bankruptcy. SBA requires Lenders to submit loans for purchase no later than 120 days after the earliest uncured payment default on the ARC Loan. Additionally, SBA may honor its guarantee and require a Lender to submit an ARC Loan for purchase at any time. Except as noted above, the Lender is required to complete all recovery actions on the ARC Loan after purchase.

(r) *Prohibition on secondary market sales and loan participations.* A lender may not sell an ARC loan into the secondary market nor may a lender participate a portion of an ARC loan with another lender.

(s) *Loan volume.* SBA reserves the right to allocate loan volume under the ARC Loan Program among Lenders (as defined in §120.10).

(t) *Delegated authority.* SBA may allow lenders to use their delegated authority to process ARC Loans.

(u) *Personal resources test.* The personal resources test provisions of §120.102 do not apply to ARC Loans.

(v) *Statutory loan limit.* The provisions of §120.151 do not apply to ARC Loans.

[74 FR 27247, June 9, 2009]

Subpart D—Lenders

§120.400 Loan Guarantee Agreements.

SBA may enter into a Loan Guarantee Agreement with a Lender to make deferred participation (guaranteed) loans. Such an agreement does not obligate SBA to participate in any specific proposed loan that a Lender may submit. The existence of a Loan Guarantee Agreement does not limit SBA's rights to deny a specific loan or establish general policies. *See also*

§ 120.440(c) concerning Supplemental Guarantee Agreements.

[61 FR 3235, Jan. 31, 1996, as amended at 82 FR 39503, Aug. 21, 2017]

PARTICIPATION CRITERIA

§ 120.410 Requirements for all participating Lenders.

A Lender must:

(a) Have a continuing ability to evaluate, process, close, disburse, service, liquidate and litigate small business loans including, but not limited to:

(1) Holding sufficient permanent capital to support SBA lending activities (for SBA Lenders with a Federal Financial Institution Regulator, meeting capital requirements for an adequately capitalized financial institution is considered sufficient permanent capital to support SBA lending activities; and for SBLCs and NFRLs, meeting their respective minimum capital requirement); and

(2) Maintaining satisfactory SBA performance, as determined by SBA in its discretion. The 7(a) Lender'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 (like default rate, purchase rate and loss rate), loan volume to the extent that it impacts performance measures, and other performance related measurements and information (such as contribution toward SBA mission);

(b) Be open to the public for the making of such loans (not be a financing subsidiary, engaged primarily in financing the operations of an affiliate);

(c) Have continuing good character and reputation, and otherwise meet and maintain the ethical requirements of § 120.140

(d) Be supervised and examined by either:

(1) A Federal Financial Institution Regulator,

(2) A state banking regulator satisfactory to SBA, or

(3) SBA;

(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

(f) Operate in a safe and sound condition using commercially reasonable lending policies, procedures, and standards employed by prudent Lenders.

[61 FR 3235, Jan. 31, 1996, as amended at 62 FR 302, Jan. 3, 1997; 73 FR 75510, Dec. 11, 2008; 82 FR 39503, Aug. 21, 2017; 85 FR 78213, Dec. 4, 2020]

§ 120.411 Preferences.

An agreement to participate under the Act may not establish any Preferences in favor of the Lender.

§ 120.412 Other services Lenders may provide Borrowers.

Subject to § 120.140 Lenders, their Associates or the designees of either may provide services to and contract for goods with a Borrower only after full disbursement of the loan to the small business or to an account not controlled by the Lender, its Associate, or the designee. A Lender, an Associate, or a designee providing such services must do so under a written contract with the small business, based on time and hourly charges, and must maintain time and billing records for examination by SBA. Fees cannot exceed those charged by established professional consultants providing similar services. *See also* § 120.195.

§ 120.413 Advertisement of relationship with SBA.

A Lender may refer in its advertising to its participation with SBA. The advertising may not:

(a) State or imply that the Lender, or any of its Borrowers, has or will receive preferential treatment from SBA;

(b) Be false or misleading; or

(c) Make use of SBA's seal.

PARTICIPATING LENDER FINANCINGS

SOURCE: Sections 120.420 through 120.428 appear at 64 FR 6507, Feb. 10, 1999, unless otherwise noted.

§ 120.420 Definitions.

(a) *7(a) Loans*—All references to 7(a) loans under this subpart include loans made under section 7(a) of the Small Business Act (15 U.S.C. 631 *et seq.*) and loans made under section 502 of the Small Business Investment Act (15 U.S.C. 661 *et seq.*), both of which may be securitized under this subpart.

(b) *Benchmark Number*—The maximum number of percentage points that a securitizer's Currency Rate can decrease without triggering the PLP suspension provision set forth in §120.425. SBA will publish the Benchmark Number in the FEDERAL REGISTER.

(c) *Currency Rate*—A securitizer's ''Currency Rate'' is the dollar balance of its 7(a) guaranteed loans that are less than 30 days past due divided by the dollar balance of its portfolio of 7(a) guaranteed loans outstanding, as calculated quarterly by SBA, excluding loans approved in SBA's current fiscal year.

(d) *Currency Rate Percentage*—The relationship between the securitizer's Currency Rate and the SBA 7(a) loan portfolio Currency Rate as calculated by dividing the securitizer's Currency Rate by the SBA 7(a) loan portfolio Currency Rate.

(e) *Good Standing*—In general, a Lender is in ''good standing'' with SBA if it:

(1) Is in compliance with all applicable:

(i) Laws and regulations;

(ii) Policies; and

(iii) Procedures;

(2) Is in good financial condition as determined by SBA;

(3) Is not under investigation or indictment for, or has not been convicted of, or had a judgment entered against it for felony or fraud, or charges relating to a breach of trust or violation of a law or regulation protecting the integrity of business transactions or relationships, unless the Lender Oversight Committee has determined that good standing exists despite the existence of such factors.

(4) Does not have any officer or employee who has been under investigation or indictment for, or has been convicted of or had a judgment entered against him for, a felony or fraud, or charges relating to a breach of trust or violation of a law or regulation protecting the integrity of business transactions or relationships, unless the Lender Oversight Committee has determined that good standing exists despite the existence of such person.

(f) *Initial Currency Rate*—The Initial Currency Rate (ICR) is the securitizer's benchmark Currency Rate. SBA will calculate the securitizer's ICR as of the end of the calendar quarter immediately prior to the first securitization completed after April 12, 1999. This calculation will include all 7(a) loans which are outstanding and were approved in any fiscal year prior to SBA's current fiscal year. Each quarter, SBA will compare each securitizer's Currency Rate to its ICR.

(g) *Initial Currency Rate Percentage*—The Initial Currency Rate Percentage (ICRP) measures the relationship between a securitizer's Initial Currency Rate and the SBA 7(a) loan portfolio Currency Rate at the time of the first securitization after April 12, 1999. The ICRP is calculated by dividing the securitizer's Currency Rate by the SBA 7(a) loan portfolio Currency Rate. SBA will calculate the securitizer's ICRP as of the end of the calendar quarter immediately prior to the first securitization completed after April 12, 1999.

(h) *Loss Rate*—A securitizer's ''loss rate,'' as calculated by SBA, is the aggregate principal amount of the securitizer's 7(a) loans determined uncollectible by SBA for the most recent 10-year period, excluding SBA's current fiscal year activity, divided by the aggregate original principal amount of 7(a) loans disbursed by the securitizer during that period.

(i) *Nondepository Institution*—A ''nondepository institution'' is a Small Business Lending Company (''SBLC'') regulated by SBA or a Business and Industrial Development Company (''BIDCO'') or other nondepository institution participating in SBA's 7(a) program.

(j) *Securitization*—A ''securitization'' is the pooling and sale of the unguaranteed portion of SBA guaranteed loans to a trust, special purpose vehicle, or other mechanism, and the issuance of securities backed by those

loans to investors in either a private placement or public offering.

[64 FR 6507, Feb. 10, 1999, as amended at 73 FR 75511, Dec. 11, 2008; 87 FR 38909, June 30, 2022]

§ 120.421 Which Lenders may securitize?

All SBA participating Lenders may securitize subject to SBA's approval.

§ 120.422 Are all securitizations subject to this subpart?

All securitizations are subject to this subpart. Until additional regulations are promulgated, SBA will consider securitizations involving multiple Lenders on a case by case basis, using the conditions in § 120.425 as a starting point. SBA will consider securitizations by affiliates as single Lender securitizations for purposes of this subpart.

§ 120.423 Which 7(a) loans may a Lender securitize?

A Lender may only securitize 7(a) loans that will be fully disbursed within 90 days of the securitization's closing date. If the amount of a fully disbursed loan increases after a securitization settles, the Lender must retain the increased amount.

§ 120.424 What are the basic conditions a Lender must meet to securitize?

To securitize, a Lender must:

(a) Be in good standing with SBA as defined in § 120.420(f) of this chapter and determined by SBA in its discretion;

(b) Have satisfactory SBA performance, as determined by SBA in its discretion. The Lender'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 (like default rate, purchase rate and loss rate), loan volume to the extent that it impacts performance measures, and other performance related measurements and information (such as contribution toward SBA mission);

(c) Use a securitization structure which is satisfactory to SBA;

(d) Use documents acceptable to SBA, including SBA's model multi-party agreement, as amended from time to time;

(e) Obtain SBA's written consent, which it may withhold in its sole discretion, prior to executing a commitment to securitize; and

(f) Cause the original notes to be stored at the FTA, as defined in § 120.600, and other loan documents to be stored with a party approved by SBA.

[64 FR 6507, Feb. 10, 1999, as amended at 73 FR 75511, Dec. 11, 2008; 82 FR 39503, Aug. 21, 2017]

§ 120.425 What are the minimum elements that SBA will require before consenting to a securitization?

A securitizer must comply with the following three conditions:

(a) Capital Requirement—All securitizers must be considered to be ''well capitalized'' by their regulator. SBA will consider a depository institution to be in compliance with this section if it meets the definition of ''well capitalized'' used by its bank regulator. SBA's capital requirement does not change the requirements that banks already meet. For nondepository institutions, SBA, as the regulator, will consider a non-depository institution to be ''well capitalized'' if it maintains a minimum unencumbered paid in capital and paid in surplus equal to at least 10 percent of its assets, excluding the guaranteed portion of 7(a) loans. The capital charge applies to the remaining balance outstanding on the unguaranteed portion of the securitizer's 7(a) loans in its portfolio and in any securitization pools. Each nondepository institution must submit annual audited financial statements demonstrating that it has met SBA's capital requirement.

(b) Subordinated Tranche—A securitizer or its wholly owned subsidiary must retain a tranche of the securities issued in the securitization (subordinated tranche) equal to the greater of two times the securitizer's Loss Rate or 2 percent of the principal balance outstanding at the time of securitization of the unguaranteed portion of the loans in the securitization. This tranche must be subordinate to all other securities issued in the

securitization including other subordinated tranches. The securitizer or its wholly owned subsidiary may not sell, pledge, transfer, assign, sell participations in, or otherwise convey the subordinated tranche during the first 6 years after the closing date of the securitization. The securities evidencing the subordinated tranche must bear a legend stating that the securities may not be sold until 6 years after the issue date. SBA's Securitization Committee may modify the formula for determining the tranche size for a securitizer creating a securitization from a pool of loans located in a region affected by a severe economic downturn if the Securitization Committee concludes that enforcing this section might exacerbate the adverse economic conditions in the region. SBA will work with the securitizer to verify the accuracy of the data used to make the Loss Rate calculation.

(c) PLP Privilege Suspension.

(1) *Suspension:* If a securitizer's Currency Rate declines, SBA may suspend the securitizer's PLP unilateral loan approval privileges (PLP approval privileges) if the decline from the securitizer's ICR is more than the Benchmark Number as published in the FEDERAL REGISTER from time to time and the securitizer's Currency Rate Percentage is less than its ICRP. The securitizer will first be placed on probation for one quarter. If, at the end of the probationary quarter the securitizer has not met either of the following conditions in paragraph (c)(1)(i) or (c)(1)(ii) of this section, SBA will suspend the securitizer's PLP approval privileges and will not approve additional securitization requests from that securitizer. SBA will provide written notice at least 10 days prior to the effective date of suspension. The suspension will last a minimum of 3 months. During the suspension period, the securitizer must use Certified Lender or Regular Procedures to process 7(a) loan applications. The prohibition will end if, at the end of the probationary quarter: (i) the securitizer has improved its Currency Rate to above its ICR less the Benchmark Number; or (ii) its Currency Rate Percentage is either the same or greater than its ICRP.

(2) *Reinstatement:* The suspension will remain in effect until the securitizer meets either the condition in paragraph (c)(1)(i) or (c)(1)(ii) of this section. If the securitizer meets either condition by the end of the 3-month period, notifies SBA with acceptable documentation, and SBA agrees, SBA will reinstate the securitizer. If the securitizer cannot meet either condition, the suspension will remain in effect. The securitizer may then petition the Lender Oversight Committee (Committee) for reinstatement. The Committee will review the reinstatement petition and determine if the securitizer's PLP approval privilege and securitization status should be reinstated. The Committee may consider the economic conditions in the securitizer's market area, the securitizer's efforts to improve its Currency Rate, and the quality of the securitizer's 7(a) loan packages and servicing. The Committee will consider only one petition by a securitizer per quarter.

(3) *The Benchmark Number*. SBA will monitor the Benchmark Number. If economic conditions or policy considerations warrant, SBA may modify the Benchmark Number to protect the safety and soundness of the 7(a) program.

(4) *Data*. SBA will calculate Currency Rate and Currency Rate Percentages quarterly from financial information that securitizers provide. SBA will work with a securitizer to verify the accuracy of the data used to make the Currency Rate calculation.

[64 FR 6508, Feb. 10, 1999, as amended at 65 FR 49481, Aug. 14, 2000; 73 FR 75511, Dec. 11, 2008]

§ 120.426 What action will SBA take if a securitizer transfers the subordinated tranche prior to the termination of the holding period?

If a securitizer transfers the subordinated tranche prior to the termination of the holding period, SBA will suspend immediately the securitizer's ability to make new 7(a) loans. The securitizer will have 30 calendar days to submit an explanation to Lender Oversight Committee (''Committee''). The Committee will have 30 calendar days to review the explanation and determine whether

to lift the suspension. If an explanation is not received within 30 calendar days or the explanation is not satisfactory to the Committee, SBA may transfer the servicing of the applicable securitized loans, including the securitizers' servicing fee on the guaranteed and unguaranteed portions and the premium protection fee on the guaranteed portion, to another SBA participating Lender.

[64 FR 6507, Feb. 10, 1999, as amended at 73 FR 75511, Dec. 11, 2008]

§ 120.427 Will SBA approve a securitization application from a capital impaired Securitizer?

If a securitizer does not maintain the level of capital required by this subpart, SBA will not approve a securitization application from that securitizer.

§ 120.428 What happens to a securitizer's other PLP responsibilities if SBA suspends its PLP approval privilege?

The securitizer must continue to service and liquidate loans according to its PLP Supplemental Agreement.

OTHER CONVEYANCES

SOURCE: Sections 120.430 through 120.435 appear at 64 FR 6509, 6510, Feb. 10, 1999, unless otherwise noted.

§ 120.430 What conveyances are covered by §§ 120.430 through 120.435?

Sections 120.430 through 120.435 cover all other transactions in which a Lender sells, sells a participating interest in, or pledges an SBA guaranteed loan other than for the purpose of securitizing and other than conveyances covered under Subpart F, Secondary Market, of this part.

§ 120.431 Which Lenders may sell, sell participations in, or pledge 7(a) loans?

All Lenders may sell, sell participations in, or pledge 7(a) loans in accordance with this subpart.

§ 120.432 Under what circumstances does this subpart permit sales of, or sales of participating interests in, 7(a) loans?

(a) A Lender may sell all of its interest in a 7(a) loan to another Lender operating under a current Loan Guarantee Agreement (SBA Form 750) (''participating Lender''), with SBA's prior written consent, which SBA may withhold in its sole discretion. A Lender may not sell any of its interest in a 7(a) loan to a nonparticipating Lender. The purchasing Lender must take possession of the promissory note and other loan documents, and service the sold 7(a) loan. The purchasing Lender purchases the loan subject to SBA's existing rights including its right to deny liability on its guarantee as provided in §120.524. After purchase, the purchased loan will be subject to the purchasing Lender's Loan Guarantee Agreement. This paragraph (a) applies to all 7(a) loans purchased from any Federal or state banking regulator, any receiver, or any conservator, unless SBA agrees otherwise in writing. This paragraph (a) applies to all 7(a) loans purchased from any Federal or state banking regulator, any receiver, or any conservator, unless SBA agrees otherwise in writing.

(b) A Lender may sell, or sell a participating interest in, a part of a 7(a) loan to another participating Lender. If the Lender retains ownership of a part of the unguaranteed portion of the loan equal to at least 10 percent of the outstanding principal balance of the loan, the Lender must give SBA prior written notice of the transaction, and the Lender must continue to hold the note and service the loan. If a Lender retains ownership of a part of the unguaranteed portion of the loan equal to less than 10 percent of the outstanding principal balance of the loan, the Lender must obtain SBA's prior written consent to the transaction, which consent SBA may withhold in its sole discretion. The Lender must continue to hold the note and other loan documents, and service the loan unless SBA otherwise agrees in its sole discretion.

(c) For purposes of determining the percentage of ownership a Lender has

retained, SBA will not consider a Lender to be the owner of the part of a loan in which it has sold a participating interest.

[64 FR 6509, 6510, Feb. 10, 1999, as amended at 85 FR 7648, Feb. 10, 2020; 85 FR 80588, Dec. 14, 2020; 87 FR 38909, June 30, 2022]

§ 120.433 What are SBA's other requirements for sales and sales of participating interests?

SBA requires the following:

(a) The Lender must be in good standing with SBA as defined in §120.420(f) and determined by SBA in its discretion;

(b) The Lender has satisfactory SBA performance, as determined by SBA in its discretion. The Lender'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 (like default rate, purchase rate and loss rate), loan volume to the extent that it impacts performance measures, and other performance related measurements and information (such as contribution toward SBA mission); and

(c) In transactions requiring SBA's consent, all documentation must be satisfactory to SBA, including, if SBA determines it to be necessary, a multiparty agreement.

[64 FR 6507, Feb. 10, 1999, as amended at 73 FR 75511, Dec. 11, 2008; 82 FR 39503, Aug. 21, 2017]

§ 120.434 What are SBA's requirements for loan pledges?

(a) Except as set forth in §120.435, SBA must give its prior written consent to all pledges of any portion of a 7(a) loan, which consent SBA may withhold in its sole discretion;

(b) The Lender must be in good standing with SBA as defined in §120.420(f) and determined by SBA in its discretion;

(c) The Lender has satisfactory SBA performance, as determined by SBA in its discretion. The Lender'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 (like default rate, purchase rate and loss rate), loan volume to the extent that it impacts performance measures, and other performance related measurements and information (such as contribution toward SBA mission);

(d) All loan documents must be satisfactory to SBA and must include a multi-party agreement among SBA, Lender, the pledgee, FTA and such other parties as SBA determines are necessary;

(e) The Lender must use the proceeds of the loan secured by the 7(a) loans only for financing 7(a) loans and for costs and expenses directly connected with the borrowing for which the loans are pledged;

(f) The Lender must remain the servicer of the loans and retain possession of all loan documents other than the original promissory notes;

(g) The Lender must deposit the original promissory notes at the FTA; and

(h) The Lender must retain an economic interest in and the ultimate risk of loss on the unguaranteed portion of the loans.

[64 FR 6507, Feb. 10, 1999, as amended at 73 FR 75511, Dec. 11, 2008; 82 FR 39503, Aug. 21, 2017]

§ 120.435 Which loan pledges do not require notice to or consent by SBA?

(a) Notwithstanding the provisions of §120.434(e), 7(a) loans may be pledged for the following purposes without notice to or consent by SBA:

(1) Treasury tax and loan accounts;

(2) The deposit of public funds;

(3) Uninvested trust funds;

(4) Borrowings from a Federal Reserve Bank; or

(5) Advances by a Federal Home Loan Bank.

(b) For purposes of the Paycheck Protection Program (PPP), the other provisions of §120.434 shall also not apply to PPP loans pledged under paragraph (a)(4) or (5) of this section.

[85 FR 21752, Apr. 20, 2020]

DELEGATED AUTHORITY CRITERIA

§ 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 to a term of 1 year or less.

[82 FR 39503, Aug. 21, 2017, as amended at 85 FR 7648, Feb. 10, 2020; 85 FR 80588, Dec. 14, 2020]

§ 120.441–§ 120.447 [Reserved]

PREFERRED LENDERS PROGRAM (PLP)

§ 120.450 What is the Preferred Lenders Program?

Under the Preferred Lenders Program (PLP), designated Lenders process, close, service, and liquidate SBA guaranteed loans with reduced requirements for documentation to and prior approval by SBA.

§ 120.451 [Reserved]

§ 120.452 What are the requirements of PLP loan processing?

(a) Subparts A and B of this part govern the making of PLP loans, except for the following:

(1) Certain types of businesses, loans, and loan programs are not eligible for PLP, as detailed in published SBA policy and procedures.

(2) A Lender may not make a PLP business loan which reduces its existing credit exposure for any Borrower, except in cases where an interim loan(s) has been made for other than real estate construction purposes to the Borrower which was approved by the Lender within 90 days of receipt of the issuance fo a subsequent PLP loan number.

(3) SBA will not guarantee more than the specified statutory percentage of any PLP loan.

(b) A PLP Lender notifies SBA of its approval of a PLP loan by submitting to SBA's loan processing center appropriate documentation signed by two of the PLP's authorized representatives. SBA will attach the SBA guarantee and notify the PLP Lender of the SBA loan number (if it does not identify a problem with eligibility, and funds are available).

(c) The PLP Lender is responsible for all PLP loan decisions regarding eligibility (including size) and creditworthiness. The PLP Lender is also responsible for confirming that all PLP loan closing decisions are correct, and that it has complied with all requirements of law and SBA regulations.

SBA SUPERVISED LENDERS

§ 120.460 What are SBA's additional requirements for SBA Supervised Lenders?

(a) In general. In addition to complying with SBA's requirements for SBA Lenders, an SBA Supervised Lender must meet the additional requirements set forth in this regulation and the SBA Supervised Lender regulations that follow.

(b) Operations and internal controls. Each SBA Supervised Lender's board of directors (or management, if the SBA Supervised Lender is a division of another company and does not have its own board of directors) must adopt an internal control policy which provides adequate direction to the institution in establishing effective control over and accountability for operations, programs, and resources. The internal control policy must, at a minimum:

(1) Direct management to assign responsibility for the internal control function (covering financial, credit, credit review, collateral, and administrative matters) to an officer or officers of the SBA Supervised Lender;

(2) Adopt and set forth procedures for maintenance and periodic review of the internal control function; and

(3) Direct the operation of a program to review and assess the SBA Supervised Lender's assets. The asset review program policies must specify the following:

(i) Loan, loan-related asset, and appraisal review standards, including standards for scope of selection for review (of any such loan, loan-related asset or appraisal) and standards for work papers and supporting documentation;

(ii) Asset quality classification standards consistent with the standardized classification systems used by the Federal Financial Institution Regulators;

(iii) Specific internal control requirements for the SBA Supervised Lender's major asset categories (cash and investment securities), lending, and the issuance of debt;

(iv) Specific internal control requirements for the SBA Supervised Lender's oversight of Lender Service Providers; and

(v) Standards for training to implement the asset review program.

(c) An SBA Supervised Lender must have qualified full-time professional management including, but not limited to, a chief executive officer or the equivalent to manage daily operations, and a chief credit/risk officer. An SBA Supervised Lender must also have at least one other part-time professional employee (which may be a shared employee of the lender's affiliates) qualified by training and experience to carry out its business plan. An SBA Supervised Lender is expected to sustain a sufficient level of lending activity in its lending area, which means obtaining at least four 7(a) loan approvals during two consecutive fiscal years. This paragraph only applies to SBA Supervised Lenders that make or acquire a 7(a) loan after January 4, 2021, or to any SBA Supervised Lender approved after such date, including in the event of a change of ownership or control of an SBA Supervised Lender.

(d) An NFRL may only make or acquire 7(a) loans in the state in which its primary state regulator is located, except that an NFRL's lending area may include a local trade area that is contiguous to such state (e.g., a city or metropolitan statistical area that is bisected by a state line) if the NFRL receives SBA's prior written approval. This paragraph applies to all NFRLs on or after January 4, 2021, including in the event of approval of a new NFRL or a change of ownership or control of an NFRL; provided however, that if SBA has approved any NFRL to make 7(a) loans out of their state, then this paragraph will apply on or after January 4, 2022.

[73 FR 75512, Dec. 11, 2008, as amended at 85 FR 78213, Dec. 4, 2020]

§ 120.461 What are SBA's additional requirements for SBA Supervised Lenders concerning records?

(a) *Report filing.* All SBA Supervised Lender-specific reports (including all SBLC-only reports) must be filed with the appropriate Office of Capital Access official in accordance with Delegations of Authority.

(b) *Maintenance of records.* An SBA Supervised Lender must maintain at its principal business office accurate and current financial records, including books of accounts, minutes of stockholder, directors, and executive committee meetings, and all documents and supporting materials relating to the SBA Supervised Lender's transactions. However, securities held by a custodian pursuant to a written agreement are exempt from this requirement.

(c) *Permanent preservation of records.* An SBA Supervised Lender must permanently preserve in a manner permitting immediate (one business day) retrieval the following documentation for the financial statements and other reports required by §120.464 (and the accompanying certified public accountant's opinion):

(1) All general and subsidiary ledgers (or other records) reflecting asset, liability, capital stock and additional paid-in capital, income, and expense accounts;

(2) All general and special journals (or other records forming the basis for entries in such ledgers); and

(3) The corporate charter, bylaws, application for determination of eligibility to participate with SBA, and all minutes books, capital stock certificates or stubs, stock ledgers, and stock transfer registers.

(d) *Other preservation of records.* An SBA Supervised Lender must preserve for at least 6 years following final disposition of each individual SBA loan:

(1) All applications for financing;

(2) Lending, participation, and escrow agreements;

(3) Financing instruments; and

(4) All other documents and supporting material relating to such loans, including correspondence.

(e) *Electronic preservation.* Records and other documents referred to in this section may be preserved electronically if the original is available for retrieval within 15 working days.

[73 FR 75512, Dec. 11, 2008]

§120.462 What are SBA's additional requirements on capital maintenance for SBA Supervised Lenders?

(a) *Minimum capital requirements*—(1) *For NFRLs.* (i) Beginning on January 4, 2024, each NFRL that makes or acquires a 7(a) loan must maintain the minimum capital required by its state regulator, or $2,500,000, whichever is greater.

(ii) Any NFRL approved on or after January 4, 2021, including in the event of a change of ownership or control, must maintain the minimum capital requirement set forth in paragraph (a)(1)(i) of this section.

(iii) Unless subject to paragraph (a)(1)(i) or (ii) of this section, an NFRL must comply with the minimum capital requirements for NFRLs that were in effect on January 3, 2021.

(2) *For SBLCs.* For information on minimum capital requirements for SBLCs, see §120.471.

(b) *Capital adequacy.* The board of directors (or management, if the SBA Supervised Lender is a division of another company and does not have its own board of directors) of each SBA Supervised Lender must determine capital adequacy goals; that is, the total amount of capital needed to assure the SBA Supervised Lender's continued financial viability and provide for any necessary growth. The minimum standards set in §120.471 for SBLCs and those established in §120.462(a)(1) for NFRLs are not to be adopted as the ideal capital level for a given SBA Supervised Lender. Rather, the minimum standards are to serve as minimum levels of capital that each SBA Supervised Lender must maintain to protect against the credit risk and other general risks inherent in its operation.

(c) *Capital plan.* (1) The board of directors of each SBA Supervised Lender must establish, adopt, and maintain a formal written capital plan. The plan must include any interim capital targets that are necessary to achieve the SBA Supervised Lender's capital adequacy goals as well as the minimum capital standards. The plan must address any projected dividend goals, equity retirements, or any other anticipated action that may decrease the SBA Supervised Lender's capital. The plan must set forth the circumstances in which capital retirements (e.g., dividends, distributions of capital or purchase of treasury stock) can occur. In addition to factors described above that must be considered in meeting the minimum standards, the board of directors must also address the following factors in developing the SBA Supervised Lender's capital adequacy plan:

(i) Management capability;

(ii) Quality of operating policies, procedures, and internal controls;

(iii) Quality and quantity of earnings;

(iv) Asset quality and the adequacy of the allowance for loan losses within the loan portfolio;

(v) Sufficiency of liquidity; and

(vi) Any other risk-oriented activities or conditions that warrant additional capital (e.g., portfolio growth rate).

(2) An SBA Supervised Lender must keep its capital plan current, updating it at least annually or more often as operating conditions may warrant.

(d) *Certification of compliance.* Within 45 days of the end of each fiscal quarter, each SBA Supervised Lender must furnish the SBA with a calculation of capital and certification of compliance with its minimum capital requirement as set forth in §§ 120.471, 120.472, or 120.474, as applicable, for SBLCs and as established in § 120.462(a)(1) for NFRLs. The SBA Supervised Lender's chief financial officer must certify the calculation to be correct. The quarterly calculation and certification of compliance may be included in the SBA Supervised Lender's Quarterly Condition Report.

(e) *Capital impairment.* An SBA Supervised Lender must meet its minimum regulatory capital requirement and avoid capital impairment. Capital impairment exists if an SBA Supervised Lender fails to meet its minimum regulatory capital requirement under §§ 120.471, 120.472, and 120.474 for SBLCs or as established in § 120.462(a)(1) for NFRLs. An SBA Supervised Lender must provide the appropriate Office of Capital Access official in accordance with Delegations of Authority written notice of any failure to meet its minimum capital requirement within 30 calendar days of the month-end in which the impairment occurred. Unless otherwise waived by the appropriate Office of Capital Access official in accordance with Delegations of Authority in writing, an SBA Supervised Lender may not present any loans to SBA for guaranty until the impairment is cured. SBA may waive the presentment prohibition for good cause as determined by SBA in its discretion. In the case of differences in calculating capital or capital requirements between the SBA Supervised Lender and SBA, SBA's calculations will prevail until differences between the two calculations are resolved.

(f) *Capital restoration plan*— (1) *Filing requirement.* An SBA Supervised Lender must file a written capital restoration plan with SBA within 45 days of the date that the SBA Supervised Lender provides notice to SBA under paragraph (d) of this section or receives notice from SBA (whichever is earlier) that the SBA Supervised Lender has not met its minimum capital requirement, unless SBA notifies the SBA Supervised Lender in writing that the plan is to be filed within a different time period.

(2) *Plan content.* An SBA Supervised Lender must detail the steps it will take to meet its minimum capital requirement; the time within which each step will be taken; the timeframe for accomplishing the entire capital restoration; and the person or department at the SBA Supervised Lender charged with carrying out the capital restoration plan.

(3) *SBA response.* SBA will provide written notice of whether the capital restoration plan is approved or not or whether SBA will seek additional information. If the capital restoration plan is not approved by SBA, the SBA Supervised Lender will submit a revised capital restoration plan within the timeframe specified by SBA.

(4) *Amendment of capital restoration plan.* An SBA Supervised Lender that has submitted an approved capital restoration plan may, after prior written notice to and approval by SBA, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the SBA Supervised Lender must implement the capital restoration plan as approved prior to the proposed amendment.

(5) *Failure.* If an SBA Supervised Lender fails to submit a capital restoration plan that is acceptable to SBA within its discretion within the required timeframe, or fails to implement, in any material respect as determined by SBA in its discretion, its SBA approved capital restoration plan within the plan timeframe, SBA may undertake enforcement actions under § 120.1500.

[73 FR 75512, Dec. 11, 2008, as amended at 85 FR 78213, Dec. 4, 2020]

§ 120.463 Regulatory accounting—What are SBA's regulatory accounting requirements for SBA Supervised Lenders?

(a) *Books and records.* The books and records of an SBA Supervised Lender must be kept on an accrual basis in accordance with Generally Accepted Accounting Principles (GAAP) as promulgated by the Financial Accounting Standards Board (FASB), supplemented by Regulatory Accounting Principles (RAP) as identified by SBA in Policy, Procedural or Information Notices, from time to time.

(b) *Annual audit.* Each SBA Supervised Lender must have its financial statements audited annually by a certified public accountant experienced in auditing financial institutions. The audit must be performed in accordance with generally accepted auditing standards as adopted by the Auditing Standards Board of the American Institute of Certified Public Accountants (AICPA) for non-public companies and by the Public Company Accounting Oversight Board (PCAOB) for public companies. Annually, the auditor must issue an audit report with an opinion as to the fairness of the SBA Supervised Lender's financial statements and their compliance with GAAP.

(c) *Auditor qualifications.* The audit shall be conducted by an independent certified public accountant who:

(1) Is registered or licensed to practice as a certified public accountant, and is in good standing, under the laws of the state or other political subdivision of the United States in which the SBA Supervised Lender's principal office is located;

(2) Agrees in the engagement letter with the SBA Supervised Lender to provide the SBA with access to and copies of any work papers, policies, and procedures relating to the services performed;

(3)(i) Is in compliance with the AICPA Code of Professional Conduct; and

(ii) Meets the independence requirements and interpretations of the Securities and Exchange Commission and its staff;

(4) Has received a peer review or is enrolled in a peer review program, that meets AICPA guidelines; and

(5) Is otherwise acceptable to SBA.

(d) *Change of auditor.* If an SBA Supervised Lender discharges or changes its auditor, it must notify SBA in writing within ten days of the occurrence. Such notification must provide:

(1) The name, address, and telephone number of the discharged auditor; and

(2) If the discharge/change involved a dispute over the financial statements, a reasonably detailed statement of all the reasons for the discharge or change. This statement must set out the issue in dispute, the position of the auditor, the position of the SBA Supervised Lender, and the effect of each position on the balance sheet and income statement of the SBA Supervised Lender.

(e) *Specific accounting requirements.* (1) Each SBA Supervised Lender must maintain an allowance for losses on loans and other assets that is sufficient to absorb all probable and estimated losses that may reasonably be expected based on the SBA Supervised Lender's historical performance and reasonably-anticipated events. Each SBA Supervised Lender must maintain documentation of its loan loss allowance calculations and analysis in sufficient detail to permit the SBA to understand the assumptions used and the application of those assumptions to the assets of the SBA Supervised Lender.

(2) The unguaranteed portions of loans determined to be uncollectible must be charged-off promptly. If the portion determined to be uncollectible by the SBA Supervised Lender is different from the amount determined by its auditors or the SBA, the SBA Supervised Lender must charge-off such amount as the SBA may direct.

(3) Each SBA Supervised Lender must classify loans as:

(i) ''Nonaccrual,'' if any portion of the principal or interest is determined to be uncollectible and

(ii) ''Formally restructured,'' if the loan meets the ''troubled debt restructuring'' definition set forth in FASB Statement of Financial Accounting Standards No. 15, Accounting by Debtors and Creditors for Troubled Debt Restructurings.

(4) When one loan to a borrower is classified as nonaccrual or formally restructured, all loans to that borrower

must be so classified unless the SBA Supervised Lender can document that the loans have independent sources of repayment.

(f) *Valuing loan servicing rights and residual interests.* Each SBA Supervised Lender must account for loan sales transactions and the valuation of loan servicing rights in accordance with GAAP. At the end of each quarter, the SBA Supervised Lender must review for reasonableness the existing environmental assumptions used in the valuation. Particular attention must be given to interest rate and repayment rate assumptions. Assumptions considered no longer reasonable must be modified and modifications must be reflected in the valuation and must be documented and supported by a market analysis. Work papers reflecting the analysis of assumptions and any resulting adjustment in the valuation must be maintained for SBA review in accordance with §120.461. SBA may require an SBA Supervised Lender to use industry averages for the valuation of servicing rights.

[73 FR 75513, Dec. 11, 2008]

§120.464 Reports to SBA.

(a) An SBA Supervised Lender must submit the following to SBA:

(1) *Annual Report.* Within three months after the close of each fiscal year, each SBA Supervised Lender must submit to SBA two copies of an annual report including audited financial statements as prepared by a certified public accountant in accordance with §120.463. Specifically, the annual report must, at a minimum, include the following:

(i) Audited balance sheet;

(ii) Audited statement of income and expense;

(iii) Audited reconciliation of capital accounts;

(iv) Audited source and application of funds;

(v) Such footnotes as are necessary to an understanding of the report;

(vi) Auditor's letter to management on internal control weaknesses; and

(vii) The auditor's report.

(2) *Quarterly Condition Reports.* By the 45th calendar day following the end of each calendar quarter, each SBA Supervised Lender must submit a Quarterly Condition Report in a form and content as the SBA may prescribe from time to time. At a minimum, the Quarterly Condition Report must include the SBA Supervised Lender's quarterly financial statements, which may be internally prepared. The SBA Supervised Lender must apply uniform definitions to categories of nonperforming loans and include recovery amounts on liquidated loans. SBA may, on a case-by-case basis, depending on an SBA Supervised Lender's size and the quality of its assets, adjust the requirements for content and frequency of filing Quarterly Condition Reports.

(3) *Legal and Administrative Proceeding Report.* Each SBA Supervised Lender must report any legal or administrative proceeding by or against the SBA Supervised Lender, or against any officer, director or employee of the SBA Supervised Lender for an alleged breach of official duty, within ten business days after initiating or learning of the proceeding, and also must notify the SBA of the terms of any settlement or final judgment. The SBA Supervised Lender must include such information in any reporting required under other provisions of SBA regulations.

(4) *Stockholder Reports.* Each SBA Supervised Lender must submit to SBA a copy of any report furnished to its stockholders in any manner, within 30 calendar days after submission to stockholders, including any prospectus, letter, or other document, concerning the financial operations or condition of the SBA Supervised Lender.

(5) *Reports of Changes.* Each SBA Supervised Lender must submit to SBA a summary of any changes in the SBA Supervised Lender's organization or financing (within 30 calendar days of the change), such as:

(i) Any change in its name, address or telephone number;

(ii) Any change in its charter, bylaws, or its officers or directors (to be accompanied by a statement of personal history on the form approved by SBA);

(iii) Any change in capitalization, including such types of change as are identified in this part 120;

(iv) Any changes affecting an SBA Supervised Lender's eligibility to continue to participate as an SBA Supervised Lender; and

(v) Notice of any pledge of stock (within 30 calendar days of the transaction) if 10 percent or more of the stock is pledged by any person (or group of persons acting in concert) as collateral for indebtedness.

(6) *Report of Changes in Financial Condition*. In addition to other reports required under this part 120, each SBA Supervised Lender must submit a report to SBA on any material change in financial condition. The SBA Supervised Lender must submit such report promptly, but no later than ten days after its management becomes aware of such change (except as provided for in §120.462(d)). Failure to promptly notify SBA concerning a material change in financial condition may lead to enforcement action.

(7) *Other Reports*. Each SBA Supervised Lender must submit such other reports as SBA from time to time may in writing require.

(b) *Preparing financial reports for filing*. Each SBA Supervised Lender must prepare financial reports:

(1) In accordance with all applicable laws, regulations, procedures, standards, and such instructions and specifications and in such form and media format as may be prescribed by SBA from time to time;

(2) On an accrual basis, in accordance with GAAP principles and such other accounting requirements, standards, and procedures as may be prescribed by the SBA from time to time;

(3) That contain all applicable footnotes in accordance with GAAP principals, one of which includes a brief analysis of how the SBA Supervised Lender complies with SBA's capital regulations, as applicable; and

(4) In such manner as to facilitate the reconciliation of these reports with the books and records of the SBA Supervised Lender.

(c) *Responsibility for assuring the accuracy of filed financial reports*. Each financial report filed with SBA must be certified as having been prepared in accordance with all applicable regulations, SOPs, notices, and instructions and to be a true, accurate, and complete representation of the financial condition and financial performance of the SBA Supervised Lender to which it applies. The reports must be certified by the officer of the reporting SBA Supervised Lender named for that purpose by action of the institution's board of directors. If the institution's board of directors has not acted to name an officer to certify the correctness of its reports of financial condition and financial performance, then the reports must be certified by the president or chief executive officer of the reporting SBA Supervised Lender.

(d) *Waiver*. The appropriate Office of Capital Access official in accordance with Delegations of Authority may in his/her discretion waive any §120.464 reporting requirement for SBA Supervised Lenders for good cause (including, but not limited to, where an SBA Supervised Lender has a relatively small SBA loan portfolio), as determined by SBA. SBA Supervised Lenders must request the waiver in writing and include all supporting reasons and documentation. The waiver decision of the appropriate Office of Capital Access official in accordance with Delegations of Authority is final.

[73 FR 75514, Dec. 11, 2008]

§120.465 Civil penalty for late submission of required reports.

(a) *Obligation to submit required reports by applicable due dates*. SBA Supervised Lenders must submit complete reports by the due dates described in the regulations or as directed in writing by SBA. SBA considers any report that an SBA Supervised Lender sends to SBA by the applicable due date but that is submitted only in part, to have not been submitted by the applicable due date. SBA also considers any report that is postmarked by the due date to be submitted by the due date.

(b) *Amount of civil penalty*. For each day past the due date for such report, the SBA Supervised Lender must pay to SBA a civil penalty of not more than $7,805 per day per report. Such civil penalty continues to accrue until and including the date upon which SBA Supervised Lender submits the complete report. In determining the amount of the civil penalty to be assessed, SBA may consider the financial

resources and good faith of the SBA Supervised Lender, the gravity of the violation, the history of previous violations and any such other matters as justice may require.

(c) *Notification of amount of civil penalty.* SBA will notify the SBA Supervised Lender in writing of the amount of civil penalties imposed either upon receiving the required complete report or at such other time as SBA determines. The SBA Supervised Lender must pay this amount to SBA within 30 days of the date of SBA's written demand.

(d) *Identification during examination.* SBA may also impose on an SBA Supervised Lender a civil penalty as described in this section if SBA discovers, during an examination pursuant to subpart I of this Part 120 or otherwise, that the SBA Supervised Lender did not submit a required report by the due date.

(e) *Extensions of submission due dates.* (1) An SBA Supervised Lender may request in writing to SBA that SBA extend its report due date. The request must reference the report and its due date, state the reasonable cause for extension, and assert how much additional time is needed in order to submit a complete report. SBA will advise SBA Supervised Lender in writing as to whether it approved or denied the extension request. If SBA determines that there is reasonable cause to grant an extension and it is not due to willful neglect, SBA will establish a new due date. Such determination as to willful neglect and reasonable cause is in SBA's discretion. SBA will consider the following factors in determining willful neglect:

(i) Whether the SBA Supervised Lender failed to file required reports for more than two reporting periods and

(ii) If SBA provided the SBA Supervised Lender notice of the failure to file and the SBA Supervised Lender failed to respond or failed to provide a reasonable explanation for the filing failure in its response.

(2) If SBA disapproves the extension, the due date remains the same. The civil penalty accrues regardless of whether the SBA Supervised Lender files an extension request. If SBA approves the extension, SBA will waive the civil penalty that has accrued so far for that particular report. However, a new civil penalty will accrue if the SBA Supervised Lender does not submit a complete report by the new due date established by SBA.

(f) *Requests for reduction or exemption.* (1) An SBA Supervised Lender may request a reduction or exemption from the civil penalty in writing to SBA. The request must reference the required report, its due date and the amount sought for reduction, and state in detail the reasons for the reduction. SBA will consider the following factors:

(i) Whether there is reasonable cause for failure to file timely and it was not due to willful neglect;

(ii) Whether the SBA Supervised Lender has demonstrated to SBA's satisfaction that it has modified its internal procedures to comply with reporting requirements in the future; and

(iii) Whether the SBA Supervised Lender has demonstrated to SBA's satisfaction, based on financial information fully disclosed together with its request, that it would have difficulty paying the civil penalty assessed.

(2) SBA must also determine that a reduction or exemption is not inconsistent with the public interest or the protection of SBA.

(3) SBA may in writing approve the exemption, reduce the civil penalty, or deny the exemption.

(4) If SBA grants the reduction request or denies the reduction or exemption, the SBA Supervised Lender must pay the amount owed within 30 days of the letter date. Civil penalties will accrue while the request is pending.

(g) *Reconsideration of decisions.* An SBA Supervised Lender may request in writing to the Associate Administrator for Capital Access (AA/CA) to reconsider its request for extension, reduction, or exemption. The reconsideration request must be received by SBA within 30 days of the date of the letter denying the SBA Supervised Lender's original request. SBA will not consider untimely requests. The SBA Supervised Lender must include any additional information or documentation to support its reconsideration request. SBA will issue a written decision on

the reconsideration request. The decision is a final agency decision. If on reconsideration, a civil penalty remains due, the SBA Supervised Lender must pay to SBA the civil penalty within 30 days of the written decision or as otherwise directed. Civil penalties will continue to accrue while the reconsideration request is pending.

(h) *Other enforcement actions.* SBA may seek additional remedies for failure to timely file reports as authorized by law.

(i) *Exception for affiliate of SBLC.* Civil penalties under this section do not apply to any affiliate of an SBLC that procures at least 10% of its annual purchasing requirements from small manufacturers.

[73 FR 75515, Dec. 11, 2008, as amended at 81 FR 31491, May 19, 2016; 82 FR 9969, Feb. 9, 2017; 83 FR 7363, Feb. 21, 2018; 84 FR 12061, Apr. 1, 2019; 85 FR 13727, Mar. 10, 2020; 86 FR 52957, Sept. 24, 2021; 87 FR 28758, May 11, 2022; 88 FR 50005, Aug. 1, 2023]

§ 120.466 SBA Supervised Lender application.

An entity seeking to participate as an SBA Supervised Lender must apply to SBA. SBA evaluates SBA Supervised Lender applicants through an initial review and final review, as follows:

(a) *Initial review.* SBA Supervised Lender applicants must submit a written plan containing information about the organization and its current and proposed lending activities (''Lender Assessment Plan''). After SBA's review of the Lender Assessment Plan, the Office of Capital Access may require an interview with the applicant and its management team. SBA will determine, in its sole discretion, whether an applicant may proceed to the final review. If SBA determines that an applicant may not proceed to the final review, the applicant must wait at least 6 months before it may submit a new Lender Assessment Plan. Each applicant must demonstrate to SBA's satisfaction that it meets the ethical requirements and the participation criteria set forth in 13 CFR 120.140 and 120.410. The Lender Assessment Plan must include the following items:

(1) The legal name, address, telephone number and email address of the applicant;

(2) Business plan, detailing the applicant's proposed lending area and the volume of loan activity projected over the next 3 years (supported by current and projected balance sheets, income statements and statements of cash flows);

(3) Capitalization (current and proposed), including the form of organization and the identification of all debt and classes of equity capital and proposed funding amounts, including any rights or preferences accorded to such interests (*e.g.*, voting rights, redemption rights and rights of convertibility) and any conditions for the transfer, sale or assignment of such interests;

(4) A list of all members of the applicant's management team, including the applicant's officers, directors, managers and key employees, as well as the applicant's owners, Associates (as defined in § 120.10) and Affiliates (as defined in § 121.103 of this chapter);

(5) A written summary of the professional experience (including any prior experience with any SBA program) of the applicant's management team (including key employees);

(6) In connection with any application to acquire an existing SBLC License, the applicant must include a letter agreement signed by an authorized official of the SBLC whose License is to be acquired certifying that the SBLC is seeking to transfer its SBA lending authority to the applicant;

(7) If approval of any state or Federal chartering, licensing or other regulatory authority is required, copies of any licenses issued by or documents filed with such authority.

(b) *Final review.* Each applicant that receives notice from SBA in writing that it may proceed to the final review must submit a complete application to SBA within 90 calendar days. The application requirements for SBA Supervised Lenders are set forth in official SBA policy and procedures. An incomplete application submitted to SBA will not be processed and will be returned to the applicant. SBA may, in its sole discretion, approve or deny any SBA Supervised Lender application. The decision to approve or deny an SBA Supervised Lender application is a final agency decision. If an SBA Supervised Lender application is denied by

SBA or if a complete application is not timely submitted, the applicant may not submit a new Lender Assessment Plan and restart the application process until 12 months from the date of denial or the date a complete application was due to SBA, as applicable.

(c) *NFRL operating and lending experience requirement.* For an entity seeking to become an NFRL, evidence of at least 1 year of current operating and relevant commercial lending experience by the entity must be provided.

[85 FR 78213, Dec. 4, 2020, as amended at 88 FR 21899, Apr. 12, 2023]

§ 120.467 Evaluation of SBA Supervised Lender applicants.

(a) SBA will evaluate an SBA Supervised Lender applicant based on information from, among other sources, the Lender Assessment Plan, an interview with the applicant's management team (if required), the application and any other documentation submitted by the applicant, the results of background investigations, public record searches and due diligence conducted by SBA or other Federal or state agencies. SBA's evaluation will consider factors such as the following:

(1) Professional qualifications of its management team (including key employees), including demonstrated commercial lending experience, business reputation, adherence to legal and ethical standards, track record in making and monitoring business loans, and prior history, if any, working as an officer, manager, director or key employee of a lender involved in any SBA program or any other Federal or state lending program.

(2) Historical performance measures of loans originated by the applicant or attributable to its management team (including key employees), including loan default rates, purchase rates and loss rates, measured in both percentage terms and in comparison to appropriate industry benchmarks, review/examination assessments and other performance measures.

(3) The applicant's capitalization, organizational structure, business plan (including any risk factors), projected financial performance, financial strength, liquidity, the soundness of its financial projections and underlying assumptions, loan underwriting process, operations plan and the history of compliance of the applicant and its management team (including key employees) with SBA Loan Program Requirements.

(4) Whether the NFRL's state regulator and the state statute or regulations governing the NFRL's operations, including but not limited to those pertaining to audit, examination, supervision, enforcement and information sharing, are satisfactory to SBA in its sole discretion.

(5) For changes of ownership or control, in addition to the factors listed in paragraphs (a)(1) through (4) of this section, SBA will consider whether the applicant's plan for the resolution of any outstanding monetary liabilities to SBA, including repairs and denials and civil monetary penalties, is acceptable to SBA in its sole discretion.

(b) SBA may prohibit any individual or entity from participating as an officer, director, manager, owner or key employee of the applicant if such individual or entity:

(1) Has a previous record of failing to materially comply with SBA Loan Program Requirements;

(2) Previously participated in a material way with any past or present SBA Lender or Intermediary that failed to maintain satisfactory SBA performance;

(3) Previously defaulted on any Federal loan or Federally assisted financing that resulted in the Federal Government or any of its agencies or departments sustaining a loss in any of its programs; or

(4) Ever failed to pay when due any debt or obligation, including any amounts in dispute, to the Federal Government or guaranteed by the Federal Government (including but not limited to taxes or business or student loans).

[85 FR 78214, Dec. 4, 2020]

§ 120.468 Change of ownership or control requirements for SBA Supervised Lenders.

(a) *SBA prior approval required.* Any change of ownership or control of an SBA Supervised Lender without SBA's prior written approval is prohibited. Prior to entering into any agreement,

other than a non-binding letter of intent, for a change of ownership or control, SBA Supervised Lenders must receive SBA's prior written approval from the appropriate SBA official in accordance with the prevailing Delegations of Authority. An SBA Supervised Lender may not register proposed new owners on its books and records or permit them to participate in any manner in the conduct of the SBA Supervised Lender's affairs unless approved in writing by SBA. Any type of non-binding letter of intent regarding a prospective change of ownership or control must be reported to SBA within 30 calendar days. A change of ownership or control includes the following:

(1) Any transfer(s) (direct or indirect) of 10 percent or more of any class of the SBA Supervised Lender's stock or ownership interests (or series of transfers which, in the aggregate over an 18 month period, equals 10 percent or more), or any agreement providing for such transfer;

(2) Any transfer(s) (direct or indirect) that could result in the beneficial ownership by any person or group of persons acting in concert of 10 percent or more of any class of the SBA Supervised Lender's stock or ownership interests, or any agreement providing for such transfer(s);

(3) Any merger, consolidation, or reorganization;

(4) Any other transaction or agreement that transfers control of an SBA Supervised Lender; or

(5) Any other transaction or event that results in any change in the possession (direct or indirect) of the right to control, or the power to direct or cause the direction of, the management or policies of an SBA Supervised Lender, whether through the ownership of voting securities, by contract or otherwise.

(b) *Approval required by other regulatory authorities.* If a change of ownership or control of an SBA Supervised Lender is subject to the approval of any state or Federal chartering, licensing or other regulatory authority, copies of any documents filed with such authority must, at the same time, be transmitted to the appropriate SBA official in accordance with the prevailing Delegations of Authority. The approval of any state or Federal authority will be required in addition to SBA's prior written approval.

(c) *Application requirements for changes of ownership or control.* An applicant must submit a Lender Assessment Plan and a new application in accordance with § 120.466 for any change of ownership or control. If a proposed change of ownership is for less than 50 percent of the ownership interests in an SBA Supervised Lender, SBA may, in its sole discretion, limit the requirements of the Lender Assessment Plan or the complete application as set forth in official SBA policy and procedures.

(d) *Voluntary surrender of SBA lending authority.* An SBA Supervised Lender may voluntarily surrender its SBA lending authority (including its SBLC license or NFRL lending authority, as applicable) and withdraw as a participating Lender with SBA's prior written approval. The SBA Supervised Lender must agree to transfer its entire 7(a) loan portfolio to one or more Lenders acceptable to SBA in accordance with § 120.432(a), and enter into a withdrawal agreement to resolve any outstanding issues, including any outstanding monetary liabilities, to SBA's satisfaction. SBA may, in its sole discretion, take over the servicing of an SBA Supervised Lender's 7(a) loan portfolio in accordance with § 120.535(d) upon the voluntary surrender of its SBA lending authority.

[85 FR 78214, Dec. 4, 2020]

Small Business Lending Companies (SBLC)

§ 120.470 What are SBA's additional requirements for SBLCs?

In addition to complying with SBA's requirements for SBA Lenders and SBA Supervised Lenders, an SBLC (including a Community Advantage SBLC) must meet the requirements contained in this regulation and the SBLC regulations that follow.

(a) *Lending.* An SBLC or Community Advantage SBLC may make:

(1) Loans under section 7(a) (except section 7(a)(13) of the Act in participation with SBA); and/or

(2) SBA guaranteed loans to Intermediaries (see subpart G of this part).

Such loans are subject to the same conditions as guaranteed loans made to Intermediaries by 7(a) Lenders.

(b) *Business structure.* An SBLC must be a corporation (profit or nonprofit) or a limited liability company or limited partnership, except for a Community Advantage SBLC, which must either be a nonprofit corporation or have been a Community Advantage Pilot Program participant.

(c) *Written agreement.* An SBLC must sign a written agreement with SBA.

(d) *Dual control.* An SBLC must maintain dual control over disbursement of funds and withdrawal of securities.

(1) An SBLC may disburse funds only by checks or wire transfers authorized by signatures of two or more officers covered by the SBLC's fidelity bond, except that checks in an amount of $10,000 or less may be signed by one bonded officer, provided that such action is permitted under the SBLC's fidelity bond.

(2) There must be two or more bonded officers, or one bonded officer and a bonded employee to open safe deposit boxes or withdraw securities from safekeeping. The SBLC must furnish to each depository bank, custodian, or entity providing safe deposit boxes a certified copy of the resolution implementing control procedures.

(e) *Fidelity insurance.* An SBLC, except for a Community Advantage SBLC, must maintain a Brokers Blanket Bond, Standard Form 14, or Finance Companies Blanket Bond, Standard Form 15, or such other form of coverage as SBA may approve, in a minimum amount of $2,000,000 executed by a surety holding a certificate of authority from the Secretary of the Treasury pursuant to 31 U.S.C. 9304–9308. SBA's Administrator, in consultation with SBA's Associate Administrator for the Office of Capital Access (AA/OCA), or their designee(s), at their discretion, will determine the appropriate bond coverage levels for Community Advantage SBLCs as published in Loan Program Requirements.

(f) *Common control.* (1) An SBLC must not control, be controlled by, or be under common control with another SBLC.

(2) In the case of a purchase of an SBLC by an organization that already owns an SBLC, the purchasing entity will have six months to submit a plan to SBA for the divestiture of one of the SBLCs. All divestiture plans must be approved by SBA and SBA may withhold approval in its discretion. Divestiture of the SBLC must occur within one year of purchase date.

(3) Without prior written SBA approval, an Associate of one SBLC must not be an Associate of another SBLC or of any entity which directly or indirectly controls, or is under common control with, another SBLC.

(4) For purposes of paragraph (f) of this section, common control means a condition where two or more SBLCs, either through ownership, management, contract, or otherwise, are under the Control of one group or Person (as defined in §120.10 of this chapter). Two or more SBLCs are presumed to be under common control if they are Affiliates of each other by reason of common ownership or common officers, directors, or general partners.

(5) ''Affiliate'' has the meaning set forth in §121.103 of this chapter.

(6) ''Control'' means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an SBLC or other concern, whether through the ownership of voting securities, by contract, or otherwise. The common control presumption may be rebutted by evidence satisfactory to SBA.

(g) *Borrowed funds.* In general, an SBLC may not be capitalized with borrowed funds. Shareholders owning 10 percent or more of any class of its stock must not use personally-borrowed funds to purchase the stock unless the net worth of the shareholder is at least twice the amount borrowed or unless the shareholder receives SBA's prior written approval for a lower ratio.

[73 FR 75515, Dec. 11, 2008, as amended at 85 FR 78215, Dec. 4, 2020; 87 FR 38909, June 30, 2022; 88 FR 21899, Apr. 12, 2023]

§120.471 What are the minimum capital requirements for SBLCs?

(a) *Minimum capital requirements.* (1) Beginning on January 4, 2024, each SBLC that makes or acquires a 7(a) loan must maintain, at a minimum, unencumbered paid-in capital and paid-

in surplus of at least $5,000,000, or 10 percent of the aggregate of its share of all outstanding loans, whichever is greater.

(2) Any SBLC approved on or after January 4, 2021, including in the event of a change of ownership or control, must maintain the minimum capital requirement set forth in paragraph (a)(1) of this section.

(3) Unless subject to paragraph (a)(1) or (2) of this section, an SBLC must comply with the minimum capital requirements that were in effect on January 3, 2021.

(4) A Community Advantage SBLC must maintain a minimum amount of capital as determined at the discretion of the Administrator in consultation with SBA's Associate Administrator for the Office of Capital Access (AA/OCA), or their designee(s). The minimum capital amount as published in Loan Program Requirements will ensure sufficient risk protection for SBA and lenders while not burdening smaller lenders with large capital requirements.

(5) Community Advantage SBLCs must maintain a loan loss reserve account as determined at the discretion of the Administrator in consultation with SBA's Associate Administrator for the Office of Capital Access (AA/OCA), or their designee(s) as published in Loan Program Requirements.

(b) *Composition of capital.* For purposes of complying with paragraph (a) of this section, capital consists only of one or more of the following:

(1) Common stock;

(2) Preferred stock that is noncumulative as to dividends and does not have a maturity date;

(3) Unrestricted net assets (for nonprofit corporations);

(4) Additional paid-in capital representing amounts paid for stock in excess of the par value;

(5) Retained earnings of the business; and/or

(6) For limited liability companies and limited partnerships, capital contributions must not be subject to repayment at any specific time, must not be subject to withdrawal and must have no cumulative priority return.

(c) *Voluntary capital reduction.* Without prior written SBA approval, an SBLC must not voluntarily reduce its capital, or repurchase and hold more than 2 percent of any class or combination of classes of its stock.

(d) *Issuance of securities.* Without prior written SBA approval, an SBLC must not issue any securities (including stock options and debt securities) except stock dividends.

[73 FR 75516, Dec. 11, 2008, as amended at 85 FR 78215, Dec. 4, 2020; 88 FR 21899, Apr. 12, 2023]

§ 120.472 Higher individual minimum capital requirement.

The Associate Administrator for Capital Access (AA/CA) may require, under § 120.473(d), an SBLC to maintain a higher level of capital, if the AA/CA determines, in his/her discretion, that the SBLC's level of capital is potentially inadequate to protect the SBA from loss due to the financial failure of the SBLC. The factors to be considered in the determination will vary in each case and may include, for example:

(a) Specific conditions or circumstances pertaining to the SBLC;

(b) Exigency of those circumstances or potential problems;

(c) Overall condition, management strength, and future prospects of the SBLC and, if applicable, its parent or affiliates;

(d) The SBLC's liquidity and existing capital level, and the performance of its SBA loan portfolio;

(e) The management views of the SBLC's directors and senior management; and

(f) Other risk-related factors, as determined by SBA.

[73 FR 75516, Dec. 11, 2008]

§ 120.473 Procedures for determining individual minimum capital requirement.

(a) *Notice.* When SBA determines that an individual minimum capital requirement above that set forth in this subpart or other legal authority is necessary or appropriate for a particular SBLC, SBA will notify the SBLC in writing of the proposed individual minimum capital requirement, the date by which it should be reached and will provide an explanation of why the requirement proposed is considered necessary or appropriate.

(b) *SBLC response.* The SBLC may respond to the notice. The response should include any matters which the SBLC would have SBA consider in deciding whether individual minimum capital requirements should be established for the SBLC, what those capital requirements should be, and, if applicable, when they should be achieved. The response must be in writing and delivered to the AA/CA within 30 days after the date on which the SBLC received the notice. SBA may shorten the time for response when, in the opinion of SBA, the condition of the SBLC so warrants, provided that the SBLC is informed promptly of the new time period, or the SBLC consents to the shortening of its response time. In its discretion, SBA may extend the time period for good cause.

(c) *Failure to respond.* An SBLC that does not respond within 30 days or such other time period as may be specified by SBA will have waived any objections to the proposed minimum capital requirement and the deadline for its achievement. Failure to respond will also constitute consent to the individual minimum capital requirement.

(d) *Decision.* After the close of the SBLC's response period, the AA/CA will decide, based on a review of SBA reasons for proposing the individual minimum capital requirement, the SBLC's response, and other information concerning the SBLC, whether the individual minimum capital requirement should be established for the SBLC and, if so, the requirement and the date it will become effective. The SBLC will be notified of the decision in writing. The notice will include an explanation of the decision; except for a decision not to establish an individual minimum capital requirement for the SBLC.

(e) *Submission of plan.* The decision may require the SBLC to develop and submit to SBA, within a time period specified, an acceptable plan to reach the individual minimum capital requirement by the date required.

(f) *Change in circumstances.* If, after SBA's decision in paragraph (d) of this section, there is a change in the circumstances affecting the SBLC's capital adequacy or its ability to reach the required individual minimum capital requirement by the specified date, either the SBLC or the AA/CA may propose to the other a change in the individual minimum capital requirement for the SBLC, the date when the individual minimum must be achieved, and/or the SBLC's plan (if applicable). The AA/CA may decline to consider proposals that are not based on a significant change in circumstances or are repetitive or frivolous. Pending a decision by the AA/CA on reconsideration, SBA's original decision and any plan required under that decision will continue in full force and effect.

[73 FR 75516, Dec. 11, 2008]

§ 120.474 Relation to other actions.

In lieu of, or in addition to, the procedures in this subpart, the individual minimum capital requirement for an SBLC may be established or revised through a written agreement or cease and desist proceedings under subpart I of this part.

[73 FR 75517, Dec. 11, 2008]

§ 120.475 [Reserved]

§ 120.476 Prohibited financing.

An SBLC may not make a loan to a small business that has received financing (or a commitment for financing) from an SBIC that is an Associate of the SBLC.

[61 FR 3235, Jan. 31, 1996. Redesignated at 73 FR 75516, Dec. 11, 2008]

§ 120.490 Audits.

Every SBLC is subject to periodic audits by SBA's Office of Inspector General, Auditing Division, and the cost of such audits will be assessed against the SBLC, except for the first audit. Fees are structured based on the SBLC's assets as of the date of the latest audited financial statement submitted to SBA before the audit. The fee schedule is set forth in SBA's Standard Operating Procedures manual.

[61 FR 3235, Jan. 31, 1996. Redesignated at 73 FR 75516, Dec. 11, 2008]

Subpart E—Servicing, Liquidation and Debt Collection Litigation of 7(a) and 504 Loans

SBA'S PURCHASE OF A GUARANTEED PORTION

§ 120.520 Purchase of 7(a) loan guarantees.

(a) *When SBA will purchase*—(1) *For loans approved on or after May 14, 2007.* A Lender may demand in writing that SBA honor its guarantee if the Borrower is in default on any installment for more than 60 calendar days (or less if SBA agrees) and the default has not been cured, provided all business personal property securing the defaulted SBA loan has been liquidated. A Lender may also submit a request for purchase of a defaulted 7(a) loan when a Borrower files for federal bankruptcy once a period of at least 60 days has elapsed since the last full installment payment. If a Borrower cures a default before a Lender requests purchase by SBA, the Lender's right to request purchase on that default lapses. SBA considers liquidation of business personal property collateral to be completed when a Lender has exhausted all prudent and commercially reasonable efforts to collect upon these assets. In addition, SBA, in its sole discretion, may purchase the guaranteed portion of a loan at any time whether in default or not, with or without the request from a Lender.

(2) *For loans approved before May 14, 2007.* The regulations applicable to the time that a Lender may make demand for purchase that were in effect immediately prior to this date will govern such loans.

(b) *Documentation for purchase.* SBA will not purchase its guaranteed portion of a loan from a Lender unless the Lender has submitted to SBA documentation that SBA deems sufficient to allow SBA to determine whether purchase of the guarantee is warranted under § 120.524.

(c) *Purchase of loans sold in Secondary Market.* When the Lender has sold the guaranteed portion of a loan in the Secondary Market, under subpart F of this part, Lenders must perform all necessary servicing and liquidation actions for such loan even after SBA has purchased the guaranteed portion of such loan from a Registered Holder (as that term is defined in § 120.600(i)). In the event that SBA purchases its guaranteed portion of such a loan from the Registered Holder, Lenders must provide SBA with a loan status report within 15 business days of such purchase. This report should include but not be limited to, a status report on the borrower and current condition of the collateral, plans for any type of loan workout or loan restructuring, existing liquidation activities including the sale of loan collateral, or the status of ongoing foreclosure proceedings. The report should accompany requested documentation that SBA deems sufficient to be able to review the Lender's administration of the loan under § 120.524. A Lender's failure to provide sufficient documentation may constitute a material failure to comply with SBA requirements under § 120.524(a)(1), and may lead to initiation of an action for recovery from the Lender of all or some of the moneys SBA paid to a Registered Holder on a guarantee. SBA will also evaluate the Lender's continued participation in the Secondary Market and may restrict further sale of guaranteed portions into the Secondary Market until SBA determines that the Lender has provided sufficient documentation for purchases.

(d) *No waiver of SBA's rights.* Purchase by SBA of the guaranteed portion of a loan, or of a portion of SBA's guarantee of a loan, either through a negotiated agreement with a Lender or otherwise, does not waive any of SBA's rights to recover from the responsible Lender any money paid on the guarantee based upon the occurrence of any of the events set forth in § 120.524(a) in connection with that loan.

[72 FR 18360, Apr. 12, 2007]

§ 120.521 What interest rate applies after SBA purchases its guaranteed portion?

When SBA purchases the guaranteed portion of a fixed interest rate loan, the rate of interest remains as stated in the note. On loans with a fluctuating interest rate, the interest rate that the Borrower owes will be at the rate in effect at the time of the earliest

uncured payment default, or the rate in effect at the time of purchase (where no default has occurred).

§ 120.522 Payment of accrued interest to the Lender or Registered Holder when SBA purchases the guaranteed portion.

(a) *Rate of interest*. If SBA purchases the guaranteed portion from a Lender or from a Registered Holder (if sold in the Secondary Market), it will pay accrued interest at:

(1) The rate in the note if it is a fixed rate loan; or

(2) The rate in effect on the date of the earliest uncured payment default, or of SBA's purchase (if there has been no default).

(b) *Payment to Lender*—(1) *For loans approved on or after May 14, 2007*. SBA will pay up to a maximum of 120 days interest to a Lender at the time of guarantee purchase.

(2) *For loans approved before May 14, 2007*. The regulations applicable to the amount of interest that SBA will pay to a Lender upon loan default that were in effect immediately prior to this date will govern such loans.

(c) *Payment to Registered Holder*. SBA will pay a Registered Holder all accrued interest up to the date of payment.

[61 FR 3235, Jan. 31, 1996, as amended at 72 FR 18361, Apr. 12, 2007]

§ 120.523 What is the "earliest uncured payment default"?

The earliest uncured payment default is the date of the earliest failure by a Borrower to pay a regular installment of principal and/or interest when due. Payments made by the Borrower before a Lender makes its request to SBA to purchase are applied to the earliest uncured payment default. If the installment is paid in full, the earliest uncured payment default date will advance to the next unpaid installment date. If a Borrower makes any payment after the Lender makes its request to SBA to purchase, the earliest uncured payment default date does not change because the Lender has already exercised its right to request purchase.

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

(a) SBA is released from liability on a loan guarantee (in whole or in part, within SBA's exclusive discretion), if any of the events below occur:

(1) The Lender has failed to comply materially with any Loan Program Requirement for 7(a) loans.

(2) The Lender has failed to make, close, service, or liquidate a loan in a prudent manner;

(3) The Lender's improper action or inaction has placed SBA at risk;

(4) The Lender has failed to disclose a material fact to SBA regarding a guaranteed loan in a timely manner;

(5) The Lender has misrepresented a material fact to SBA regarding a guaranteed loan;

(6) SBA has received a written request from the Lender to terminate the guarantee;

(7) The Lender has not paid the guarantee fee within the period required under SBA rules and regulations;

(8) The Lender has failed to request that SBA purchase a guarantee within 180 days after maturity of the loan. However, if the Lender is conducting liquidation or debt collection litigation in connection with a loan that has matured, SBA will be released from its guarantee only if the Lender fails to request that SBA purchase the guarantee within 180 days after the completion of the liquidation or debt collection litigation;

(9) The Lender has failed to use required SBA forms or exact electronic copies; or

(10) The Borrower has paid the loan in full.

(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.

(c) If the Lender's loan documentation or other information indicates that one or more of the events in paragraph (a) of this section occurred, SBA may undertake such investigation as it deems necessary to determine whether

to honor or deny the guarantee, and may withhold a decision on whether to honor the guarantee until the completion of such investigation.

(d) Any information provided to SBA by a Lender or other party will not prejudice, or be construed as effecting any waiver of, SBA's right to deny liability for a guarantee if one or more of the events listed in paragraph (a) of this section occur.

(e) Unless SBA provides written notice to the contrary, the Lender remains responsible for all loan servicing ad liquidation actions until SBA honors its guarantee in full.

[61 FR 3235, Jan. 31, 1996, as amended at 72 FR 18361, Apr. 12, 2007; 82 FR 39503, Aug. 21, 2017]

§ 120.530 Deferment of payment.

SBA may agree to defer payments on a business loan for a stated period of time, and use such other methods as it considers necessary and appropriate to help in the successful operation of the Borrower. This policy applies to all business loan programs, including 504 loans.

§ 120.531 Extension of maturity.

SBA may agree to extend the maturity of a loan for up to 10 years beyond its original maturity if the extension will aid in the orderly repayment of the loan.

§ 120.535 Standards for Lender and CDC loan servicing, loan liquidation and debt collection litigation.

(a) *Service using prudent lending standards.* Lenders and CDCs must service 7(a) and 504 loans in their portfolio no less diligently than their non-SBA portfolio, and in a commercially reasonable manner, consistent with prudent lending standards, and in accordance with Loan Program Requirements. Those Lenders and CDCs that do not maintain a non-SBA loan portfolio must adhere to the same prudent lending standards for loan servicing followed by commercial lenders on loans without a government guarantee.

(b) *Liquidate using prudent lending standards.* Lenders and Authorized CDC Liquidators must liquidate and conduct debt collection litigation for 7(a) and 504 loans in their portfolio no less diligently than for their non-SBA portfolio, and in a prompt, cost-effective and commercially reasonable manner, consistent with prudent lending standards, and in accordance with Loan Program Requirements and with any SBA approval of either a liquidation or litigation plan or any amendment of such a plan. Lenders and CDCs that do not maintain a non-SBA loan portfolio must adhere to the same prudent lending standards followed by commercial lenders that liquidate loans without a government guarantee. They are also to operate in accordance with Loan Program Requirements and with any SBA approval of either a liquidation or litigation plan or any amendment of such a plan.

(c) *Absence of actual or apparent conflict of interest.* A CDC must not take any action in the liquidation or debt collection litigation of a 504 loan that would result in an actual or apparent conflict of interest between the CDC (or any employee of the CDC) and any Third Party Lender, associate of a Third Party Lender, or any person participating in a liquidation, foreclosure or loss mitigation action.

(d) *SBA rights to take over servicing or liquidation.* SBA may, in its sole discretion, undertake the servicing, liquidation and/or litigation of any 7(a) or 504 loan. If SBA elects to service, liquidate and/or litigate a loan, it will notify the relevant Lender or CDC in writing, and, upon receiving such notice, the Lender or CDC must assign the Loan Instruments to SBA and provide any needed assistance to allow SBA to service, liquidate and/or litigate the loan. SBA will notify the Borrower of the change in servicing. SBA may use contractors to perform these actions.

[72 FR 18361, Apr. 12, 2007]

§ 120.536 Servicing and liquidation actions that require the prior written consent of SBA.

(a) *Actions by Lenders and CDCs.* Except as otherwise provided in a Supplemental Guarantee Agreement with a Lender or an Agreement with a CDC, SBA must give its prior written consent before a Lender or CDC takes any of the following actions:

(1) Increases the principal amount of a loan above that authorized by SBA at loan origination.

(2) Confers a Preference on the Lender or CDC or engages in an activity that creates a conflict of interest.

(3) Compromises the principal balance of a loan.

(4) Takes title to any property in the name of SBA.

(5) Takes title to environmentally contaminated property, or takes over operation and control of a business that handles hazardous substances or hazardous wastes.

(6) Transfers, sells or pledges more than 90% of a loan.

(7) Takes any action for which prior written consent is required by a Loan Program Requirement.

(b) *Actions by CDCs only (other than PCLP CDCs).* SBA must give its prior written consent before a CDC, other than a PCLP CDC, takes any of the following actions with respect to a 504 loan:

(1) Alters substantially the terms or conditions of any Loan Instrument.

(2) Releases collateral having a cumulative market value in excess of 10 percent of the Debenture amount or $10,000, whichever is less.

(3) Accelerates the maturity of the note.

(4) Compromises or releases any claim against any Borrower or obligor, or against any guarantor, standby creditor, or any other person that is contingently liable for moneys owed on the loan.

(5) Purchases or pays off any indebtedness secured by the property that serves as collateral for a defaulted 504 loan, such as payment of the debt(s) owed to a lien holder or lien holders with priority over the lien securing the loan.

(6) Accepts a workout plan to restructure the material terms and conditions of a loan that is in default or liquidation.

(7) Takes any action for which prior written consent is required by a Loan Program Requirement.

(c) *Documentation requirements.* For all servicing/liquidation actions not requiring SBA's prior written consent, Lenders and CDCs must document the justifications for their decisions and retain these and supporting documents in their file for future SBA review to determine if the actions taken by the Lender or CDC were prudent, commercially reasonable, and complied with all Loan Program Requirements.

[72 FR 18361, Apr. 12, 2007]

§ 120.540 Liquidation and litigation plans.

(a) *SBA oversight.* SBA may monitor or review liquidation through the review of liquidation plans which all Authorized CDC Liquidators and certain Lenders must submit to SBA for approval prior to undertaking liquidation, and through liquidation wrap-up reports which Lenders must submit to SBA at the completion of liquidation. SBA will monitor debt collection litigation, such as judicial foreclosures, bankruptcy proceedings and other state and federal insolvency proceedings, through the review of litigation plans, as set forth in this section.

(b) *Liquidation plan.* An Authorized CDC Liquidator and a Lender for a loan made under its authority as a CLP Lender must, prior to undertaking any liquidation, submit a written proposed liquidation plan to SBA and receive SBA's written approval of that plan.

(c) *Litigation plan.* An Authorized CDC Liquidator and a Lender must obtain SBA's prior approval of a litigation plan before proceeding with any Non-Routine Litigation, as defined in paragraph (c)(1) of this section. SBA's prior approval is not required for Routine Litigation, as defined in paragraph (c)(2) of this section.

(1) Non-Routine Litigation includes:

(i) All litigation where factual or legal issues are in dispute and require resolution through adjudication;

(ii) Any litigation where legal fees are estimated to exceed $10,000;

(iii) Any litigation involving a loan where a Lender or Authorized CDC Liquidator has an actual or potential conflict of interest with SBA; and

(iv) Any litigation involving a 7(a) or 504 loan where the Lender or CDC has made a separate loan to the same borrower which is not a 7(a) or 504 loan.

(2) Routine Litigation means uncontested litigation, such as non-adversarial matters in bankruptcy and undisputed foreclosure actions, having

estimated legal fees not exceeding $10,000.

(d) *Decision by SBA to take over litigation.* If a Lender or Authorized CDC Liquidator is conducting, or proposes to conduct, debt collection litigation on a 7(a) loan or 504 loan, SBA may take over the litigation if SBA determines that the outcome of the litigation could adversely affect SBA's administration of the loan program or that the Government is entitled to legal remedies that are not available to the Lender or Authorized CDC Liquidator. Examples of cases that could adversely affect SBA's administration of a loan program include, but are not limited to, situations where SBA determines that:

(1) The litigation involves important governmental policy or program issues.

(2) The case is potentially of great precedential value or there is a risk of adverse precedent to the Government.

(3) The Lender or Authorized CDC Liquidator has an actual or potential conflict of interest with SBA.

(4) The legal fees of the Lender or Authorized CDC Liquidator's outside counsel are unnecessary, unreasonable or not customary in the locality.

(e) *Amendments to a liquidation or litigation plan.* Lenders and Authorized CDC Liquidators must submit an amended liquidation or litigation plan to address any material changes arising during the course of the liquidation or litigation that were not addressed in the original plan or an amended plan. Lenders and Authorized CDC Liquidators must obtain SBA's written approval of the amended plan prior to taking any further liquidation or litigation action. Examples of such material changes that would require the approval of an amended plan include, but are not limited to:

(1) Changes arising during the course of Routine Litigation that transform the litigation into Non-Routine Litigation, such as when the debtor contests a foreclosure or when the actual legal fees incurred exceed $10,000.

(2) If SBA has approved a litigation plan where anticipated legal fees exceed $10,000, or has approved an amended plan, and thereafter the anticipated or actual legal fees increase by more than 15 percent.

(3) If SBA has approved a liquidation plan, or an amended plan, and thereafter the anticipated or actual costs of conducting the liquidation increase by more than 15 percent.

(f) *Limited waiver of need for a written liquidation or litigation plan.* SBA may, in its discretion, and upon request by a Lender or Authorized CDC Liquidator, waive the requirements of paragraphs (b), (c) or (e) of this section, if one of the following extraordinary circumstances warrant such a waiver: the need for expeditious action to avoid the potential risk of loss on the loan or dissipation of collateral exists; an immediate response is required to litigation by a borrower, guarantor or third party; or another urgent reason arises. The Lender or Authorized CDC Liquidator must obtain SBA's written consent to such waiver before undertaking the Emergency action, if at all practicable. SBA's waiver will apply only to the specific action(s) which the Lender or Authorized CDC Liquidator has identified to SBA as being necessary to address the Emergency. The Lender or Authorized CDC Liquidator must, as soon after the Emergency as is practicable, submit a written liquidation or litigation plan to SBA or, if appropriate, a written amended plan, and may not take further liquidation or litigation action without written approval of such plan or amendment by SBA.

(g) *Appeals.* A Lender for loans made under its authority as a CLP Lender or an Authorized CDC Liquidator that disagrees with an SBA office's decision pertaining to an original or amended liquidation plan, other than such portions of the plan that address litigation matters, may submit a written appeal to the Director/Office of Financial Program Operations (D/OFPO) within 30 days of the decision. The D/OFPO or designee will make the final Agency decision in consultation with the Associate General Counsel for Litigation. A Lender or Authorized CDC Liquidator that disagrees with an SBA office's decision pertaining to an original or amended litigation plan, or the portion of a liquidation plan addressing litigation matters, may submit a written appeal to the Associate General Counsel

for Litigation within 30 days of the decision. The Associate General Counsel for Litigation will make the final Agency decision in consultation with the D/OFPO.

[72 FR 18362, Apr. 12, 2007, as amended at 74 FR 45753, Sept. 4, 2009; 87 FR 38909, June 30, 2022]

§ 120.541 Time for approval by SBA.

(a) Except as set forth in paragraph (c) of this section, in responding to a request for approval under §§ 120.540(b), 120.540(c), 120.536(b)(5) or 120.536(b)(6), SBA will approve or deny the request within 15 business days of the date when SBA receives the request. If SBA is unable to approve or deny the request within this 15-day period, SBA will provide a written notice of no decision to the Lender or Authorized CDC Liquidator, stating the reason for SBA's inability to act; an estimate of the additional time required to act on the plan or request; and, if SBA deems appropriate, requesting additional information.

(b) Except as set forth in paragraph (c) of this section, unless SBA gives its written consent to a proposed liquidation or litigation plan, or a proposed amendment of a plan, or any of the actions set forth in § 120.536(b)(5) or § 120.536(b)(6), SBA will not be deemed to have approved the proposed action.

(c) If a Lender seeks to perform liquidation on a loan made under its authority as a CLP Lender by submitting a liquidation plan to SBA for approval, SBA will approve or deny such plan within ten business days. If SBA fails to approve or deny the plan within ten business days, SBA will be deemed to have approved such plan.

[72 FR 18362, Apr. 12, 2007]

§ 120.542 Payment by SBA of legal fees and other expenses.

(a) *Legal fees SBA will not pay.* (1) SBA will not pay legal fees or other costs that a Lender or Authorized CDC Liquidator incurs:

(i) In asserting a claim, cross claim, counterclaim, or third-party claim against SBA or in defense of an action brought by SBA, unless payment of such fees or costs is otherwise required by federal law.

(ii) In connection with actions of a Lender or Authorized CDC Liquidator's outside counsel for performing non-legal liquidation services, unless authorized by SBA prior to the action.

(iii) In taking actions which solely benefit a Lender or Authorized CDC Liquidator and which do not benefit SBA, as determined by SBA.

(2) SBA will not pay legal fees or other costs a Lender or CDC incurs in the defense of, or pay for any settlement or adverse judgment resulting from, a suit, counterclaim or other claim by a borrower, guarantor, or other party that seeks damages based upon a claim that the Lender or CDC breached any duty or engaged in any wrongful actions, unless SBA expressly directed the Lender or CDC to undertake the allegedly wrongful action that is the subject of the suit, counterclaim or other claim.

(b) *Legal fees SBA may decline to pay.* In addition to any right or authority SBA may have under law or contract, SBA may, in its discretion, decline to pay a Lender or Authorized CDC Liquidator for all, or a portion, of legal fees and/or other costs incurred in connection with the liquidation and/or litigation of a 7(a) loan or 504 loan under any of the following circumstances:

(1) SBA determines that the Lender or Authorized CDC Liquidator failed to perform liquidation or litigation promptly and in accordance with commercially reasonable standards, in a prudent manner, or in accordance with any Loan Program Requirement or SBA approvals of either a liquidation or litigation plan or any amendment of such a plan.

(2) A Lender or Authorized CDC Liquidator fails to obtain prior written approval from SBA for any liquidation or litigation plan, or for any amended liquidation or litigation plan, or for any action set forth in § 120.536, when such approval is required by these regulations or a Loan Program Requirement.

(3) If SBA has not specifically approved fees or costs identified in an original or amended liquidation or litigation plan under § 120.540, and SBA determines that such fees or costs are not reasonable, customary or necessary in the locality in question. In such cases, SBA will pay only such fees as it deems

are necessary, customary and reasonable in the locality in question.

(c) *Fees for liquidation actions performed by Authorized CDC Liquidators.* Subject to paragraph (d) of this section, SBA will compensate Authorized CDC Liquidators for their liquidation actions on 504 loans, whether such actions are performed by the CDC or the CDC's contractor retained in accordance with §120.975(a)(2) or (b)(2)(ii). The compensation fee will be a percentage (to be published in the FEDERAL REGISTER from time to time, but not to exceed 10%) of the net recovery proceeds realized from the sale of collateral or other liquidation actions on an individual loan, up to a fee of $25,000 for such loan, and a lower percentage (also to be published in the FEDERAL REGISTER from time to time, but not to exceed 5%) of the realized net recovery proceeds above such amounts. The compensation fee limits set forth in this paragraph (c) do not include reasonable, customary and necessary administrative costs related to liquidation activities on such loan that are incurred in accordance with the liquidation plan, or amendments thereto, approved by SBA pursuant to §120.540(b). The Authorized CDC Liquidator may compensate its contractor up to the amount it receives from SBA. All requests for compensation fees must be received by SBA within nine months from the date of SBA's purchase of the defaulted debenture. Fee requests not received within such timeframe will be automatically rejected.

(d) *Appeals—liquidation costs.* A Lender or Authorized CDC Liquidator that disagrees with a decision by an SBA office to decline to reimburse all, or a portion, of the fees and/or costs incurred in conducting liquidation may appeal this decision in writing to the D/OFPO within 30 days of the decision. The decision of the D/OFPO or designee will be made in consultation with the Associate General Counsel for Litigation, and will be the final Agency decision.

(e) *Appeals—litigation costs.* A Lender or Authorized CDC Liquidator that disagrees with a decision by SBA to decline to reimburse all, or a portion, of the legal fees and/or costs incurred in conducting debt collection litigation may appeal this decision in writing to the Associate General Counsel for Litigation within 30 days of the decision. The decision of the Associate General Counsel for Litigation will be made in consultation with the D/OFPO, and will be the final Agency decision.

[72 FR 18362, Apr. 12, 2007, as amended at 74 FR 45753, Sept. 4, 2009; 87 FR 38909, June 30, 2022]

§120.545 What are SBA's policies concerning the liquidation of collateral and the sale of business loans and physical disaster assistance loans, physical disaster business loans and economic injury disaster loans?

(a) *Liquidation policy.* SBA or the Lender may liquidate collateral securing a loan if the loan is in default or there is no reasonable prospect that the loan can be repaid within a reasonable period.

(b) *Sale and conversion of loans.* Without the consent of the Borrower, SBA may:

(1) Sell a direct loan;

(2) Convert a guaranteed or immediate participation loan to a direct loan; or

(3) Convert an immediate participation loan to a guaranteed loan or a loan owned solely by the Lender.

(4) Sell direct and purchased 7(a) and 501, 502, 503 and 504 loans and physical disaster home loans, physical disaster business loans and economic injury disaster loans in asset sales. SBA will offer these loans for sale to qualified bidders by means of competitive procedures at publicly advertised sales. Bidder qualifications will be set for each sale in accordance with the terms and conditions of each sale.

(c) *Disposal of collateral and assets acquired through foreclosure or conveyance.* SBA or the Lender may sell real and personal property (including contracts and claims) pledged to secure a loan that is in default in accordance with the provisions of the related security instrument (*see* §120.550 for Homestead Protection for Farmers).

(1) *Competitive bids or negotiated sales.* Generally, SBA will offer loan collateral and acquired assets for public sale through competitive bids at auctions or sealed bid sales. The Lender may use negotiated sales if consistent with its

usual practice for similar non-SBA assets.

(2) *Lease of acquired property.* Normally, neither SBA nor a Lender will rent or lease acquired property or grant options to purchase. SBA and the Lender will consider proposals for a lease if it appears a property cannot be sold advantageously and the lease may be terminated on reasonable notice upon receipt of a favorable purchase offer.

(d) *Recoveries and security interests shared.* SBA and the Lender will share pro rata (in accordance with their respective interests in a loan) all loan payments or recoveries, including proceeds from asset sales, all reasonable expenses (including advances for the care, preservation, and maintenance of collateral securing the loan and the payment of senior lienholders), and any security interest or guarantee (excluding SBA's guarantee) which the Lender or SBA may hold or receive in connection with a loan.

(e) *Guarantors.* Guarantors of financial assistance have no rights of contribution against SBA on an SBA guaranteed or direct loan. SBA is not deemed to be a co-guarantor with any other guarantors.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 44110, Aug. 13, 1999; 65 FR 17133, Mar. 31, 2000; 68 FR 51680, Aug. 28, 2003. Redesignated and amended at 72 FR 18362, Apr. 12, 2007]

§ 120.546 Loan asset sales.

(a) *General.* Loan asset sales are governed by § 120.545(b)(4) and by this section.

(b) *7(a) loans*—(1) *For loans approved on or after May 14, 2007.* The Lender will be deemed to have consented to SBA's sale of the loan (guaranteed and unguaranteed portions) in an asset sale conducted or overseen by SBA upon the occurrence any of the following:

(i) SBA's purchase of the guaranteed portion of the loan from the Registered Holder for a loan where the guaranteed portion has been sold in the Secondary Market pursuant to subpart F of this part and after default, the Lender has not exercised its option to purchase such guaranteed portion; or

(ii) SBA's purchase of the guaranteed portion from the Lender, provided however, that if SBA purchased the guaranteed portion pursuant to § 120.520(a)(1) prior to the Lender's completion of liquidation for the loan, then SBA will not sell such loan in an asset sale until nine months from the date of SBA's purchase; or

(iii) SBA receives written consent from the Lender.

(2) For loans identified in paragraph (b)(1)(i) of this section, the Lender may request that SBA withhold the loan from an asset sale if the Lender submits a written request to SBA within 15 business days of SBA's purchase of the guaranteed portion of the loan from the Registered Holder and if such request addresses the issues described in this subparagraph. The Lender's written request must advise SBA of the status of the loan, the Lender's plans for workout and/or liquidation, including and pending sale of loan collateral or foreclosure proceedings arranged prior to SBA's purchase that already are underway, and the Lender's estimated schedule for restructuring the loan or liquidating the collateral. SBA will consider the Lender's request and, based on the circumstances, SBA in its sole discretion may elect to defer including the loan in an asset sale in order to provide the Lender additional time to complete the planned restructuring and/or liquidation actions.

(3) *For loans approved before May 14, 2007.* SBA must obtain written consent from the Lender for the sale of such loans in an asset sale.

(4) After SBA has purchased the guaranteed portion of a loan from the Registered Holder or from the Lender, the Lender must continue to perform all necessary servicing and liquidation actions for the loan up to the point the loan is transferred to the purchaser in an asset sale. The Lender also must cooperate and take all necessary actions to effectuate both the asset sale and the transfer of the loan to the purchaser in the asset sale.

(c) *504 loans*—(1) *PCLP Loans.* After SBA's purchase of a Debenture, SBA may at its sole discretion sell a defaulted PCLP Loan in an asset sale conducted or overseen by SBA, after providing to the PCLP CDC that made the loan advance notice of not less than 90 days before the date upon

which SBA first makes its records concerning such loan available to prospective purchasers for examination.

(2) *All other 504 loans.* After SBA's purchase of a Debenture, SBA may at its sole discretion sell a defaulted 504 loan in an asset sale conducted or overseen by SBA.

[72 FR 18364, Apr. 12, 2007]

HOMESTEAD PROTECTION FOR FARMERS

§ 120.550 What is homestead protection for farmers?

SBA may lease to a farmer-Borrower the farm residence occupied by the Borrower and a reasonable amount of adjoining property (no more than 10 acres and seven farm buildings), if they were acquired by SBA as a result of a defaulted farm loan made or guaranteed by SBA (*see* the Consolidated Farm and Rural Development Act, 7 U.S.C. 1921, for qualifying loan purposes).

§ 120.551 Who is eligible for homestead protection?

SBA must notify the Borrower in possession of the availability of these homestead protection rights within 30 days after SBA acquires the property. A farmer-Borrower must:

(a) Apply for the homestead occupancy to the SBA field office which serviced the loan within 90 days after SBA acquires the property;

(b) Provide evidence that the farm produces farm income reasonable for the area and economic conditions;

(c) Show that at least 60 percent of the Borrower and spouse's gross annual income came from farm or ranch operations in at least any two out of the last six calendar years;

(d) Have resided on the property during the previous six years; and

(e) Be personally liable for the debt.

§ 120.552 Lease.

If approved, the applicant must personally occupy the residence during the term of the lease and pay a reasonable rent to SBA. The lease will be for a period of at least 3 years, but no more than 5 years. A lease of less than 5 years may be renewed, but not beyond 5 years from the original lease date. During or at the end of the lease period, the lessee has a right of first refusal to reacquire the homestead property under terms and conditions no less favorable than those offered to any other purchaser.

§ 120.553 Appeal.

If the application is denied, the Borrower may appeal the decision to the D/FA. Until the conclusion of any appeal, the Borrower may retain possession of the homestead property.

§ 120.554 Conflict of laws.

In the event of a conflict between the homestead provisions at §§ 120.550 through 120.553 of this part, and any state law relating to the right of a Borrower to designate for separate sale or to redeem part or all of the real property securing a loan foreclosed by the Lender, state law shall prevail.

Subpart F—Secondary Market

FISCAL AND TRANSFER AGENT (FTA)

§ 120.600 Definitions.

(a) *Certificate* is the document the FTA issues representing either a beneficial fractional undivided interest in a Pool (Pool Certificate), or a fractional undivided interest in some or all of the guaranteed portion of an individual 7(a) guaranteed loan (Individual Certificate).

(b) *Current* means that no repayment from a Borrower to a Lender is over 29 days late measured from the due date of the payment on the records of the FTA's central registry (Pools) or the entity servicing the loan (individual guaranteed portion).

(c) *Dollar-Weighted Average Net Rate* of a Pool is calculated by multiplying the interest rate of each loan in the Pool by the ratio of that loan's current outstanding guaranteed principal to the current outstanding guaranteed principal of all loans in the Pool, and adding the sum of the resulting products. The Dollar-Weighted Average Net Rate of a Pool will fluctuate over the life of the Pool as loan defaults, prepayments and normal loan repayments occur.

(d) *FTA* is the SBA's fiscal and transfer agent.

(e) *Note Rate* is the interest rate on the Borrower's note.

(f) *Net Rate* is the interest rate on an individual guaranteed portion of a loan in a Pool.

(g) *Pool* is an aggregation of SBA guaranteed portions of loans made by Lenders.

(h) *Pool Assembler* is a financial institution that:

(1) Organizes and packages a Pool by acquiring the SBA guaranteed portions of loans from Lenders;

(2) Resells fractional interests in the Pool to Registered Holders; and

(3) Directs the FTA to issue Certificates.

(i) *Pool Rate* is the interest rate on a Pool Certificate.

(j) *Registered Holder* is the Certificate owner listed in FTA's records.

(k) *SBA's Secondary Market Program Guide* is an issuance from SBA which describes the characteristics of Secondary Market transactions.

(l) *Weighted Average Coupon (WAC) Pool* is a Pool where the interest rate payable to the investor is equal to the Dollar-Weighted Average Net Rate of the Pool.

[61 FR 3235, Jan. 31, 1996, as amended at 73 FR 67102, Nov. 13, 2008; 76 FR 63546, Oct. 12, 2011]

§ 120.601 SBA Secondary Market.

The SBA secondary market (''Secondary Market'') consists of the sale of Certificates, representing either a fractional undivided interest in some or all of the guaranteed portion of an individual 7(a) guaranteed loan or a fractional undivided interest in a Pool consisting of the SBA guaranteed portions of a number of 7(a) guaranteed loans. Transactions involving interests in Pools or the sale of individual guaranteed portions of loans are governed by the contracts entered into by the parties, SBA's Secondary Market Program Guide, and this subpart. See sections 5(f), (g), and (h) of the Small Business Act (15 U.S.C. 634(f), (g), and (h)).

[76 FR 63546, Oct. 12, 2011]

CERTIFICATES

§ 120.610 Form and terms of Certificates.

(a) *General form and content.* Each Certificate must be registered with the FTA. SBA must approve the terms of the Certificate.

(b) *Face amount of Pool Certificate.* The face amount of a Pool Certificate cannot be less than a minimum amount as specified in the Program Guide, and the dollar amount of Certificates must be in increments which SBA will specify in the Program Guide (except for one Certificate in each Pool). SBA may change these requirements based upon an analysis of market conditions and program experience, and will publish any such change in the FEDERAL REGISTER.

(c) *Basis of payment for Pool Certificates.* Principal installments and interest payments are based on the unpaid principal balance of the portion of the Pool represented by a Pool Certificate. All prepayments on loans in the Pool must be passed through to the appropriate Registered Holders with the regularly scheduled payments to such Holders.

(d) *Basis of payment for Individual Certificates.* Principal installments and interest payments are based on the unpaid principal balance of the SBA guaranteed portion of the loan supporting an Individual Certificate. The Certificate must provide for a pass through to the Registered Holder of payments which the FTA receives from a Lender or any entity servicing the loan, less applicable fees.

(e) *Interest rate on Pool Certificate.* The interest rate on a Pool Certificate will be either the lowest Net Rate of any individual guaranteed portion of a loan in the Pool or the Dollar-Weighted Average Net Rate of the Pool.

[61 FR 3235, Jan. 31, 1996, as amended at 73 FR 67102, Nov. 13, 2008]

§ 120.611 Pools backing Pool Certificates.

(a) *Pool characteristics.* As set forth in the Program Guide, each Pool must have:

(1) A minimum number of guaranteed portions of loans;

(2) A minimum aggregate principal balance of the guaranteed portions;

(3) A maximum percentage of the Pool which an individual guaranteed portion may constitute;

(4) A maximum allowable difference between the highest and lowest note interest rates;

(5) A maximum allowable difference between the remaining terms to maturity of the loans in the Pool;

(6) A minimum weighted average maturity at Pool formation; and

(7) A maximum allowable difference between the highest and lowest Net Rate on the guaranteed portions that are placed in a WAC Pool.

(b) *Adjustment of Pool characteristics.* SBA may adjust the Pool characteristics periodically based upon program experience and market conditions.

(c) *Increments of guaranteed portion.* If the amount of the guaranteed portion of an individual 7(a) guaranteed loan is more than $500,000, a Pool Assembler may elect to divide the guaranteed portion into increments of $500,000 and one increment of any remaining amount less than $500,000, in order to permit the maximum amount of any guaranteed portion in a Pool to be not more than $500,000. Only one increment from a loan to a specific borrower may be included in a Pool.

[61 FR 3235, Jan. 31, 1996, as amended at 73 FR 67102, Nov. 13, 2008; 76 FR 63546, Oct. 12, 2011]

§ 120.612 Loans eligible to back Certificates.

(a) Pool Certificates are backed by the SBA guaranteed portions of loans comprising the Pool. An Individual Certificate is backed by the SBA guaranteed portion of a single loan. Any such loan must:

(1) Be current as of the date the Pool is formed or the individual guaranteed portion of a loan is initially sold in the Secondary Market;

(2) Be guaranteed under the Act; and

(3) Meet such other standards as SBA may determine to be necessary for the successful operation of the Secondary Market program.

(b) The loans that back a Pool must meet the SBA requirements in effect at the time the Pool is formed.

§ 120.613 Secondary Participation Guarantee Agreement.

When a Lender wants to sell the guaranteed portion of a loan, it enters into a Secondary Participation Guarantee Agreement (''SPGA'') with SBA and the prospective purchaser. The terms of sale between the Lender and the purchaser cannot require the Lender or SBA to repurchase the guaranteed portion of the loan except in accordance with the terms of the SPGA. Before execution of the SPGA, the Lender must:

(a) Submit to FTA a copy of the proposed SPGA, the note, and such other documents as SBA may require;

(b) Except for export working capital loans, disburse to the Borrower the full amount of the loan; and

(c) Pay SBA all guarantee fees relevant to the loan in full.

[61 FR 3235, Jan. 31, 1996, as amended at 68 FR 51680, Aug. 28, 2003]

THE SBA GUARANTEE OF A CERTIFICATE

§ 120.620 SBA guarantee of a Pool Certificate.

(a) *Extent of Guarantee.* SBA guarantees to a Registered Holder the timely payment of principal and interest installments and any prepayment or other recovery of principal to which the Registered Holder is entitled. If the Borrower of a loan in a Pool backing the Certificates does not make a required installment payment, SBA, through the FTA, will make advances to maintain the schedule of interest and principal payments to the Registered Holders.

(b) *SBA guarantee backed by full faith and credit.* SBA's guarantee of the Pool Certificate is backed by the full faith and credit of the United States.

§ 120.621 SBA guarantee of an Individual Certificate.

(a) *Extent of SBA guarantee.* With respect to Individual Certificates, SBA guarantees to purchase from the Registered Holder the guaranteed portion of the loan for an amount equal to the unpaid principal and accrued interest due as of the date of SBA's purchase, less deductions for applicable fees. Unlike the SBA guarantee with respect to pooled loans, SBA does not guarantee

timely payment on Individual Certificates.

(b) *What triggers the SBA guarantee.* SBA's guarantee to the Registered Holder may be called upon when:

(1) The Borrower remains in uncured default for 60 days on payments of principal or interest due on the note;

(2) The Lender fails to send to the FTA on a timely basis payments it received from the Borrower; or

(3) The FTA fails to send to the Registered Holder on a timely basis any payments it has received from the Lender.

(c) *Full faith and credit.* SBA's guarantee to the Registered Holder is backed by the full faith and credit of the United States.

POOL ASSEMBLERS

§ 120.630 Qualifications to be a Pool Assembler.

(a) *Application to become Pool Assembler.* The application to become a Pool Assembler is available from the D/FA. In order to qualify as a Pool Assembler, an entity must send the application to the D/FA, with an application fee, and certify that it:

(1) Is regulated by the appropriate agency as defined in section 3(a)(34)(G) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(34)(G));

(2) Meets all financial and other applicable requirements of its regulatory authority and the Government Securities Act of 1986, as amended (Pub. L. 99–571, 100 Stat. 3208);

(3) Has the financial capability to assemble acceptable and eligible guaranteed loan portions in sufficient quantity to support the issuance of Pool Certificates; and

(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.

(5) For any pool assembler that is an SBA Lender, that the SBA Lender has satisfactory SBA performance, as determined by SBA in its discretion. The Lender'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 (like default rate, purchase rate and loss rate), loan volume to the extent that it impacts performance measures, and other performance related measurements and information (such as contribution toward SBA mission).

(b) *Approval by SBA.* An entity may not submit Pool applications to the FTA until SBA has approved the application to become a Pool Assembler.

(c) *Conduct of business by Pool Assembler.* An entity continues to qualify as a Pool Assembler so long as it:

(1) Meets the eligibility standards in paragraph (a) of this section;

(2) Conducts its business in accordance with SBA regulations and accepted securities or banking industry practices, ethics, and standards; and

(3) Maintains its books and records in accordance with generally accepted accounting principles or in accordance with the guidelines of the regulatory body governing its activities.

[61 FR 3235, Jan. 31, 1996, as amended at 73 FR 75517, Dec. 11, 2008; 82 FR 39503, Aug. 21, 2017]

§ 120.631 Suspension or termination of Pool Assembler.

(a) *Suspension or termination.* The D/FA may suspend a Pool Assembler from operating in the Secondary Market for up to 18 months or terminate its status as a Pool Assembler, if the Pool Assembler (and/or its Associates):

(1) Does not comply with any of the requirements in § 120.630 (a) and (c);

(2) Has been indicted or otherwise formally charged with, or convicted of, a misdemeanor or felony;

(3) Has received an adverse civil judgment that it has committed a breach of trust or a violation of a law or regulation protecting the integrity of business transactions or relationships;

(4) Has not formed a Pool for at least three years; or

(5) Is under investigation by its regulating authority for activities which may affect its fitness to participate in the Secondary Market.

(b) *Suspension procedures.* The D/FA shall notify a Pool Assembler by certified mail, return receipt requested, of the decision to suspend and the reasons therefore at least 10 business days prior to the effective date of the suspension. The Pool Assembler may appeal the suspension made under this section pursuant to the procedures set forth in part 134 of this chapter. The action of the D/FA shall remain in effect pending resolution of the appeal.

(c) *Notice of termination.* In order to terminate a Pool Assembler, the D/FA must issue an order to show cause why the SBA should not terminate the Pool Assembler's participation in the Secondary Market. The Pool Assembler may appeal the termination made under this section pursuant to procedures set forth in part 134 of this chapter. The action of the D/FA shall remain in effect pending resolution of the appeal.

MISCELLANEOUS PROVISIONS

§ 120.640 Administration of the Pool and Individual Certificates.

(a) *FTA responsibility.* The FTA has the responsibility to administer each Pool or Individual Certificate. It shall maintain a registry of Registered Holders and other information as SBA requires.

(b) *Self-liquidating.* Each Pool or individual guaranteed portion of a loan in the Secondary Market is self-liquidating because of Borrower payments or prepayments, redemption by SBA, and/or payments by SBA or the Lender after default by the Borrower. Substitution of the guaranteed portions of existing loans for defaulted loans is not permitted.

(c) *SBA's right to subrogation.* If SBA pays a claim under a guarantee with respect to a Certificate issued under this subpart, it must be subrogated fully to the rights satisfied by such payment.

(d) *SBA ownership rights not limited.* No Federal, State or local law can preclude or limit the exercise by SBA of its ownership rights in the portions of loans constituting the Pool against which the Certificates are issued.

§ 120.641 Disclosure to purchasers.

(a) *Information to purchaser.* Prior to any sale, the Pool Assembler, Registered Holder of an Individual Certificate, or any subsequent seller must disclose to the purchaser, verbally or in writing, information on the terms, conditions, and yield as described in the SBA Secondary Market Program Guide.

(b) *Information on transfer document.* The seller must provide the same information described in paragraph (a) of this section in writing on the transfer document when the seller submits it to the FTA. After the sale of an Individual Certificate, the FTA will provide the disclosure information in writing to the purchaser.

(c) *Information in prospectus.* If the Registered Holder is a trust, investment Pool, mutual fund or other security, it must disclose the information in paragraph (a) of this section to investors through a prospectus and other promotional material if an Individual Certificate or Pool Certificate is placed into or used as the backing for the investment vehicle.

§ 120.642 Requirements before the FTA issues Pool Certificates.

Before the FTA issues any Pool Certificate, the Pool Assembler must deliver to it the following documents:

(a) A properly completed Pool application form;

(b) Either:

(1) Individual Certificates evidencing the guaranteed portions comprising the Pool; or

(2) An executed SPGA and related documentation for the loans whose guaranteed portions are to be part of the Pool; and

(c) Any other documentation which SBA may require.

§ 120.643 Requirements before the FTA issues Individual Certificates.

(a) *FTA issuance of initial Certificate.* Before the FTA can issue the Individual Certificate for a guaranteed portion of a loan, the original seller must provide the following documents to the FTA:

(1) An executed SPGA;

(2) A copy of the note representing the guaranteed loan; and

(3) Any other documentation which SBA may require.

(b) Review of documentation. SBA may review or require the FTA to review any documentation before the FTA issues a Certificate.

§ 120.644 Transfers of Certificates.

(a) *General rule.* Certificates are transferable. Transfers in the Secondary Market must comply with Article 8 of the Uniform Commercial Code of the State of New York. The seller must use the detached form of assignment (SBA Form 1088), unless the seller and purchaser choose to use another form which the SBA approves. The FTA may refuse to issue a Certificate until it is satisfied that the documents of transfer are complete.

(b) *Transfer on FTA records.* In order for the transfer of a Certificate to be effective the FTA must reflect it on its records.

(c) *Contents of letter of transmittal accompanying the transfer of Certificates.* (1) A letter of transmittal must accompany each Certificate which a Registered Holder submits to the FTA for transfer. The Registered Holder must supply the following information in the letter:

(i) Pool number, if applicable;

(ii) Certificate number;

(iii) Name of purchaser of Certificate;

(iv) Address and tax identification number of the purchaser;

(v) Name and telephone number of the person handling or facilitating the transfer;

(vi) Instructions for the delivery of the new Certificate.

(2) The Registered Holder must also send the fee which the FTA charges for this service. The FTA will supply fee information to the Registered Holder.

(d) *Lender cannot purchase guaranteed portion of loan it made.* The Lender (or its Associate) that made a 7(a) guaranteed loan cannot purchase the guaranteed portion of that loan in the Secondary Market. If a Lender does purchase the guaranteed portion of one of its own loans, it shall not have the unconditional guarantee of SBA.

§ 120.645 Redemption of Certificates.

(a) *Redemption of Individual Certificate.* The prepayment of the underlying loan or a default on such loan will trigger the redemption of the Certificate by FTA/SBA in accordance with the procedures prescribed in the SPGA.

(b) *Redemption of Pool Certificate.* The FTA and SBA may redeem a Pool Certificate because of prepayment or default of all loans in a Pool.

§ 120.650 Registration duties of FTA in Secondary Market.

The FTA registers all Certificates. This means it issues, transfers title to, and redeems them. All financial transactions relating to a guaranteed portion of a loan flow through the FTA. In fulfilling its obligation to keep the central registry current, the FTA may, with SBA's approval, obtain any necessary information from the parties involved in the Secondary Market.

§ 120.651 Claim to FTA by Registered Holder to replace Certificate.

(a) To replace a Certificate because of loss, theft, destruction, mutilation, or defacement, the Registered Holder must:

(1) Give the FTA information about the Certificate and the facts relating to the claim;

(2) File an indemnity bond acceptable to SBA and the FTA with a surety to protect the interests of SBA and the FTA;

(3) Pay the FTA its fee to replace a Certificate; and

(4) Use an affidavit of loss (form available from the FTA) to report:

(i) The name and address of the Registered Holder (and the name and capacity of any representative actually filing the claim);

(ii) The Certificate by Pool number, if applicable;

(iii) The Certificate number;

(iv) The original principal amount;

(v) The name in which the Certificate was registered;

(vi) Any assignment, endorsement or other writing on the Certificate; and

(vii) A statement of the circumstances of the theft or loss.

(b) When the FTA receives notice of the theft or loss, it will stop any transfer of the Certificate. The Registered Holder must send to the FTA all available portions of a mutilated or defaced

Certificate. When the Registered Holder completes these steps, the FTA will replace the Certificate.

§ 120.652 FTA fees.

The FTA may charge reasonable servicing fees, transfer fees, and other fees as the SBA and FTA may negotiate under contract.

SUSPENSION OR REVOCATION OF PARTICIPANT IN SECONDARY MARKET

§ 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) Committing a serious violation, in SBA's discretion, of:

(i) The regulations governing the Secondary Market; or

(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.

(b) *Additional rules for suspension or revocation of broker or dealer.* In addition to acting under paragraph (a) of this section, the D/FA may suspend or revoke the privilege of any broker or dealer to sell or otherwise deal in Certificates in the Secondary Market if:

(1) Its supervisory agency has revoked or suspended the broker or dealer from engaging in the securities business, or is investigating the firm or broker for a practice which SBA considers, in its sole discretion, to be relevant to the broker's or dealer's fitness to participate in the Secondary Market;

(2) The broker or dealer has been indicted or otherwise formally charged with a misdemeanor or felony which bears on its fitness to participate in the Secondary Market; or

(3) A civil judgment is entered holding that the broker or dealer has committed a breach of trust or a violation of any law or regulation protecting the integrity of business transactions or relationships.

(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.

[61 FR 3235, Jan. 31, 1996, as amended at 82 FR 39503, Aug. 21, 2017]

Subpart G—Microloan Program

§ 120.700 What is the Microloan Program?

The Microloan Program assists women, low income individuals, minority entrepreneurs, and other small businesses which need small amounts

of financial assistance. Under this program, SBA makes direct and guaranteed loans to Intermediaries (as defined below) who use the proceeds to make loans to eligible borrowers. SBA may also make grants under the program to Intermediaries and other qualified nonprofit entities to be used for marketing, management, and technical assistance to the program's target population.

[61 FR 3235, Jan. 31, 1996, as amended at 66 FR 47073, Sept. 11, 2001]

§ 120.701 Definitions.

(a) *Deposit account* is a demand, time, savings, passbook, or similar account maintained with an insured depository institution (not including an account evidenced by a Certificate of Deposit).

(b) *Grant* is a Federal award of money, or property in lieu of money (including cooperative agreements) to an eligible grantee that must account for its use. The term does not include the provision of technical assistance, revenue sharing, loans, loan guarantees, interest subsidies, insurance, direct appropriations, or any fellowship or other lump sum award.

(c) *Insured depository institution* means any Federally insured bank, savings association, or credit union.

(d) *Intermediary* is an entity participating in the Microloan Program which makes and services Microloans to eligible small businesses and which provides marketing, management, and technical assistance to its borrowers. It may be:

(1) A private, nonprofit community development corporation or other entity;

(2) A consortium of private, nonprofit community development corporations or other entities;

(3) A quasi-governmental economic development entity, other than a state, county, municipal government or any agency thereof; or

(4) An agency of or a nonprofit entity established by a Native American Tribal Government.

(e) *Microloan* is a short-term, fixed interest rate loan of not more than $50,000 made by an Intermediary to an eligible small business.

(f) *Non-Federal sources* are sources of funds other than the Federal Government and may include indirect costs or in-kind contributions paid for under non-Federal programs. Community Block Development Grants are considered non-Federal sources.

(g) *Specialized Intermediary* is an Intermediary which maintains a portfolio of Microloans averaging $10,000 or less.

[61 FR 3235, Jan. 31, 1996, as amended at 66 FR 47073, Sept. 11, 2001; 66 FR 47878, Sept. 14, 2001; 76 FR 63546, Oct. 12, 2011; 80 FR 34046, June 15, 2015; 87 FR 38909, June 30, 2022]

§ 120.702 Are there limitations on who can be an Intermediary or on where an Intermediary may operate?

(a) *Prior experience requirement.* To be eligible to be an Intermediary, an organization must:

(1) Have made and serviced short-term fixed rate loans of not more than $50,000 to newly established or growing small businesses for at least one year: and

(2) Have at least one year of experience providing technical assistance to its borrowers.

(b) *Limitation to one state.* An Intermediary may not operate in more than one state unless the appropriate Office of Capital Access official in accordance with Delegations of Authority determines that it would be in the best interests of the small business community for it to operate across state lines.

[61 FR 3235, Jan. 31, 1996, as amended at 66 FR 47878, Sept. 14, 2001; 73 FR 75517, Dec. 11, 2008; 76 FR 63546, Oct. 12, 2011]

§ 120.703 How does an organization apply to become an Intermediary?

(a) *Application Process.* Organizations interested in becoming Intermediaries should contact SBA for information on the application process.

(b) *Documentation in support of application.* The application must include a detailed narrative statement describing:

(1) The types of businesses assisted in the past and those the applicant intends to assist with Microloans;

(2) The average size of the loans made in the past and the average size of intended Microloans;

(3) The extent to which the applicant will make Microloans to small businesses in rural areas;

(4) The geographic area in which the applicant intends to operate, including a description of the economic and demographic conditions existing in the intended area of operations;

(5) The availability and cost of obtaining credit for small businesses in the area;

(6) The applicant's experience and qualifications in providing marketing, management, and technical assistance to small businesses; and

(7) Any plan to use other technical assistance resources (such as counselors from the Service Corps of Retired Executives) to help Microloan borrowers.

§ 120.704 How are applications evaluated?

(a) *Evaluation criteria.* In selecting Intermediaries, SBA will attempt to insure that Microloans are available to small businesses in all industries and particularly to small businesses located in urban and rural areas.

(b) *Preference for organizations which make very small loans.* In selecting Intermediaries, SBA will give priority to applicants which maintain a portfolio of loans averaging $10,000 or less.

(c) *Consideration of quasi-governmental organizations.* Generally, SBA will consider applications by quasi-governmental organizations only when it determines that program services for a particular geographic area would be best provided by such organization.

[61 FR 3235, Jan. 31, 1996, as amended at 66 FR 47878, Sept. 14, 2001]

§ 120.705 What is a Specialized Intermediary?

At the end of an Intermediary's first year of participation in the program, SBA will determine whether it qualifies as a Specialized Intermediary. An Intermediary qualifies as a Specialized Intermediary if it maintains a portfolio of Microloans averaging $10,000 or less. Specialized Intermediaries qualify for more favorable interest rates on SBA loans. If, after the first year, an Intermediary qualifies as a Specialized Intermediary, the special interest rate is applied retroactively to SBA loans made to the Intermediary. After the first year SBA will determine an Intermediary's qualifications as a Specialized Intermediary annually, based on its lending practices during the term of its participation in the program. Specialized Intermediaries also qualify for a greater amount of technical assistance grant funding.

[61 FR 3235, Jan. 31, 1996, as amended at 66 FR 47878, Sept. 14, 2001]

§ 120.706 What are the terms and conditions of an SBA loan to an Intermediary?

(a) *Loan Amount.* An Intermediary may not borrow more than $750,000 in the first year of participation in the program. In later years, the Intermediary's obligation to SBA may not exceed an aggregate of $6 million, subject to statutory limitations on the total amount of funds available per state.

(b) *Repayment terms.* During the first year of the loan, an Intermediary is not required to make any payments, but interest accrues from the date that SBA disburses the loan proceeds to the Intermediary. After that, SBA will determine the periodic payments. The loan must be repaid within 10 years.

(c) *Interest rate.* The interest rate is equal to the rate applicable to five-year obligations of the United States Treasury, adjusted to the nearest one-eighth percent, less 1.25 percent. However, the interest rate for Specialized Intermediaries is equal to the rate applicable to five-year obligations of the United States Treasury, adjusted to the nearest one-eighth percent, less two percent.

(d) *Collateral.* As security for repayment of the SBA loan, an Intermediary must pledge to SBA a first lien position in the MRF (described below), LLRF (described below), and all notes receivable from Microloans.

(e) *Default.* If for any reason an Intermediary is unable to make payment to SBA when due, SBA may accelerate maturity of the loan and demand payment in full. In this event, or if an Intermediary violates this part or the terms of its loan agreement, it must surrender possession of all collateral described in paragraph (d) of this section to SBA. The Intermediary is not obligated to pay SBA any loss or deficiency which may remain after liquidation of the collateral unless the loss

was caused by fraud, negligence, violation of any of the ethical requirements of §120.140, or violation of any other provision of this part.

(f) *Fees.* SBA does not charge Intermediaries any fees for loans under this Program. An Intermediary may, however, pay minimal closing costs to third parties, such as filing and recording fees.

[61 FR 3235, Jan. 31, 1996, as amended at 66 FR 47073, Sept. 11, 2001; 76 FR 63546, Oct. 12, 2011; 87 FR 38909, June 30, 2022]

§ 120.707 What conditions apply to loans by Intermediaries to Microloan borrowers?

(a) Except as otherwise provided in this paragraph, an Intermediary may only make Microloans to small businesses eligible to receive financial assistance under this part. A borrower may also use Microloan proceeds to establish a nonprofit child care business. An Intermediary may also make Microloans to businesses with an Associate who is currently on probation or parole; provided, however, that the Associate is not on probation or parole for an offense involving fraud or dishonesty or, in the case of a child care business, is not on probation or parole for an offense against children. Proceeds from Microloans may be used only for working capital and acquisition of materials, supplies, furniture, fixtures, and equipment. SBA does not review Microloans for creditworthiness.

(b) *Amount and maturity.* Generally, Intermediaries should not make a Microloan of more than $10,000 to any borrower. An Intermediary may not make a Microloan of more than $20,000 unless the borrower demonstrates that it is unable to obtain credit elsewhere at comparable interest rates and that it has good prospects for success. An Intermediary may not make a Microloan of more than $50,000, and no borrower may owe an Intermediary more than $50,000 at any one time. Each Microloan must be repaid within seven years.

(c) *Interest rate.* The maximum interest rate that can be charged a Microloan borrower is:

(1) On loans of more than $10,000, the interest rate charged on the SBA loan to the Intermediary, plus 7.75 percentage points; and

(2) On loans of $10,000 or less, the interest rate charged on the SBA loan to the Intermediary, plus 8.5 percentage points.

[61 FR 3235, Jan. 31, 1996, as amended at 66 FR 47073, Sept. 11, 2001; 66 FR 47878, Sept. 14, 2001; 76 FR 63547, Oct. 12, 2011; 80 FR 34046, June 15, 2015; 85 FR 7651, Feb. 10, 2020; 85 FR 80588, Dec. 14, 2020; 87 FR 38909, June 30, 2022]

§ 120.708 What is the Intermediary's financial contribution?

The Intermediary must contribute from non-Federal sources an amount equal to 15 percent of any loan that it receives from SBA. The contribution may not be borrowed. For purposes of this program, Community Development Block Grants are considered non-Federal sources.

§ 120.709 What is the Microloan Revolving Fund?

The Microloan Revolving Fund (''MRF'') is a Deposit Account into which an Intermediary must deposit the proceeds from SBA loans, its contributions from non-Federal sources, and payments from its Microloan borrowers. An Intermediary may only withdraw from this account the money needed to establish the Loan Loss Reserve Fund (§120.710), proceeds for each Microloan it makes, and any payments to be made to SBA.

[61 FR 3235, Jan. 31, 1996, as amended at 80 FR 34046, June 15, 2015]

§ 120.710 What is the Loan Loss Reserve Fund?

(a) *General.* The Loan Loss Reserve Fund (''LLRF'') is a Deposit Account which an Intermediary must establish to pay any shortage in the MRF caused by delinquencies or losses on Microloans.

(b) *Level of Loan Loss Reserve Fund.* Until it is in the Microloan program for at least five years, an Intermediary must maintain a balance on deposit in its LLRF equal to 15 percent of the outstanding balance of the notes receivable owed to it by its Microloan borrowers (''Portfolio'').

(c) *SBA review of Loan Loss Reserve Fund.* After an Intermediary has been in the Microloan program for five

years, it may request SBA's appropriate Office of Capital Access official in accordance with Delegations of Authority to reduce the percentage of its Portfolio which it must maintain in its LLRF to an amount equal to the actual average loan loss rate during the preceding five-year period. Upon receipt of such request, he/she will review the Intermediary's annual loss rate for the most recent five-year period preceding the request.

(d) *Reduction of Loan Loss Reserve Fund.* The appropriate Office of Capital Access official in accordance with Delegations of Authority has the authority to reduce the percentage of an Intermediary's Portfolio that it must maintain in its LLRF to an amount equal to the actual average loan loss rate during the preceding five-year period. The appropriate Office of Capital Access official in accordance with Delegations of Authority cannot reduce the LLRF to less than ten percent of the Portfolio.

(e) *What must an intermediary demonstrate to get a reduction in Loan Loss Reserve Fund?* To receive a reduction in its LLRF, an Intermediary must:

(1) Have satisfactory SBA performance, as determined by SBA in its discretion. The Intermediary'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 (like default rate, purchase rate and loss rate), loan volume to the extent that it impacts performance measures, and other performance related measurements and information (such as contribution toward SBA mission); and

(2) No other factors exist that may impair the Intermediary's ability to repay all obligations which it owes to the SBA under the Microloan program.

[61 FR 3235, Jan. 31, 1996, as amended at 65 FR 17439, Apr. 3, 2000; 73 FR 75517, Dec. 11, 2008; 80 FR 34046, June 15, 2015; 82 FR 39504, Aug. 21, 2017]

§ 120.711 What rules govern Intermediaries?

Intermediaries must operate in accordance with applicable statutes, regulations, policy notices, SBA's Standard Operating Procedures (SOPs), and the information in the application.

§ 120.712 How does an Intermediary get a grant to assist Microloan borrowers?

(a) *General.* An Intermediary is eligible to receive grant funding from SBA of not more than 25 percent of the outstanding balance of all SBA loans to the Intermediary. The Intermediary must contribute, solely from non-Federal sources, an amount equal to 25 percent of the grant. Contributions may be made in cash or in kind.

(b) *Limitations on grant funds.* An Intermediary may not borrow its contribution. It may only use grant funds to provide Microloan borrowers with marketing, management, and technical assistance, except that:

(1) Up to 50 percent of the grant funds may be used to provide information and technical assistance to prospective Microloan borrowers; provided, however, that no more than 5 percent of the grant funds may be used to market or advertise the products and services of the Microloan Intermediary directly related to the Microloan Program; and

(2) Grant monies may be used to attend training required by SBA.

(c) *Intermediaries eligible to receive additional grant monies.* An Intermediary may receive an additional SBA grant equal to five percent of the outstanding balance of all loans received from SBA (with no obligation to contribute additional matching funds) if the Intermediary is a Specialized Intermediary.

(d) *Third party contracts for technical assistance.* An Intermediary may use no more than 50 percent of the grant funds it receives from SBA for contracts with third parties for the latter to provide technical assistance to Microloan borrowers.

[61 FR 3235, Jan. 31, 1996, as amended at 66 FR 47073, Sept. 11, 2001; 76 FR 63547, Oct. 12, 2011; 80 FR 34047, June 15, 2015; 85 FR 7651, Feb. 10, 2020; 85 FR 80588, Dec. 14, 2020; 87 FR 38909, June 30, 2022]

§ 120.713 Does SBA provide technical assistance to Intermediaries?

SBA may procure technical assistance for an Intermediary to improve its knowledge, skill, and understanding of microlending by awarding a grant to

a more experienced Intermediary. SBA may also obtain such assistance for prospective Intermediaries in areas of the country that are either not served or underserved by an existing Intermediary.

§§ 120.714–120.715 [Reserved]

§ 120.716 What is the minimum number of loans an Intermediary must make each Federal fiscal year?

(a) *Minimum loan requirement.* Intermediaries must close and fund the required number of microloans per year (October 1–September 30) as follows, except that an Intermediary entering the program will not be required to meet the minimum in that year:

(1) For fiscal year 2015, four microloans,

(2) For fiscal year 2016, six microloans,

(3) For fiscal year 2017, eight microloans, and

(4) For fiscal years 2018 and thereafter, ten microloans per year.

(b) Intermediaries that do not meet the minimum loan requirement are not eligible to receive new grant funding unless they submit a corrective action plan acceptable to SBA, in its discretion. Intermediaries that have submitted acceptable corrective action plans may receive a reduced grant at SBA's discretion.

[80 FR 34047, June 15, 2015]

Subpart H—Development Company Loan Program (504)

§ 120.800 [Reserved]

§ 120.801 How a 504 Project is financed.

(a) One or more small businesses may apply for 504 financing through a CDC serving the area where the 504 Project is located. SBA issues a loan number if it agrees to guarantee part of the funding for a Project.

(b) Usually, a Project requires interim financing from an interim lender (often the same lender that later provides a portion of the permanent financing).

(c) Generally, permanent financing of the Project consists of:

(1) A contribution by the small business in an amount of at least 10 percent of the Project costs;

(2) A loan made with the proceeds of a CDC Debenture for up to 40 percent of the Project costs and certain administrative costs, collateralized by a second lien on the Project Property; and

(3) A *Third Party Loan* comprising the balance of the financing, collateralized by a first lien on the Project property (see § 120.920).

(d) The Debenture is guaranteed 100 percent by SBA (with the full faith and credit of the United States), and sold to Underwriters who form Debenture Pools. Investors purchase interests in Debenture Pools and receive Certificates representing ownership of all or part of a Debenture Pool. SBA and CDCs use various agents to facilitate the sale and service of the Certificates and the orderly flow of funds among the parties.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2118, Jan. 13, 1999; 88 FR 21899, Apr. 12, 2023]

§ 120.802 Definitions.

The following terms have the same meaning wherever they are used in this subpart. Defined terms are capitalized wherever they appear.

Area of Operations is the geographic area where SBA has approved a CDC's request to provide 504 program services to small businesses on a permanent basis. The minimum Area of Operations is the State in which the CDC is incorporated.

Central Servicing Agent (CSA) is an entity that receives and disburses funds among the various parties involved in 504 financing under a master servicing agent agreement with SBA.

Certificate is a document issued by SBA or its agent representing ownership of all or part of a Debenture Pool.

Debenture is an obligation issued by a CDC and guaranteed 100 percent by SBA, the proceeds of which are used to fund a 504 loan.

Debenture Pool is an aggregation of Debentures.

Designated Attorney is the CDC closing attorney that SBA has approved to close loans under an expedited closing process for a Priority CDC.

Investor is an owner of a beneficial interest in a Debenture Pool.

Job Opportunity is a full time (or equivalent) permanent job created within two years of receipt of 504 funds, or retained in the community because of a 504 loan.

Lead SBA Office is the SBA District Office designated by SBA as the primary liaison between SBA and a CDC and with responsibility for managing SBA's relationship with that CDC.

Local Economic Area is an area, as determined by SBA, that is in a State other than the State in which an existing CDC (or an applicant applying to become a CDC) is incorporated, is contiguous to the CDC's existing Area of Operations (or the applicant's proposed Area of Operations) of its State of incorporation, and is a part of a local trade area that is contiguous to the CDC's Area of Operations (or applicant's proposed Area of Operations) of its State of incorporation. Examples of a local trade area would be a city that is bisected by a State line or a metropolitan statistical area that is bisected by a State line.

Multi-State CDC is a CDC that is incorporated in one State and is authorized by SBA to operate as a CDC in a State contiguous to its State of incorporation beyond any contiguous Local Economic Areas.

Net Debenture Proceeds are the portion of Debenture proceeds that finance eligible Project costs (excluding administrative costs).

Priority CDC is a CDC certified to participate on a permanent basis in the 504 program (see §120.812) that SBA has approved to participate in an expedited 504 loan and Debenture closing process.

Project is the purchase or lease, and/or improvement or renovation of long-term fixed assets by a small business, with 504 financing, for use in its business operations.

Project Property is one or more long-term fixed assets, such as land, buildings, machinery, and equipment, acquired or improved by a small business, with 504 financing, for use in its business operations.

Third Party Loan is a loan from a commercial or private lender, investor, or Federal (non-SBA), State or local government source that is part of the Project financing.

Underwriter is an entity approved by SBA to form Debenture Pools and arrange for the sale of Certificates.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2118, Jan. 13, 1999; 65 FR 42632, July 11, 2000; 68 FR 57980, Oct. 7, 2003]

CERTIFICATION PROCEDURES TO BECOME A CDC

§ 120.810 Applications for certification as a CDC.

(a) An applicant for certification as a CDC must apply to the SBA District Office serving the jurisdiction in which the applicant has or proposes to locate its headquarters (see §101.103 of this chapter).

(b) The applicant must apply for an Area of Operations. The applicant's proposed Area of Operations must include the entire State in which the applicant is incorporated, and may include Local Economic Areas. An applicant may not apply to cover an area as a Multi-State CDC.

(c) The applicant must demonstrate that it satisfies the CDC certification and operational requirements in §§120.820, and 120.822 through 120.824. The applicant also must include an operating budget, approved by the applicant's Board of Directors, which demonstrates the required financial ability (as described in §120.825), and a plan to meet CDC operational requirements (without specializing in a particular industry) in §§120.821, and 120.826 through 120.830.

(d) The District Office will forward the application and its recommendation to the D/FA, who will make the final decision. SBA will notify the CDC in writing of its decision, and, if the petition is declined, the reasons for the decision.

[68 FR 57980, Oct. 7, 2003]

§ 120.812 Probationary period for newly certified CDCs.

(a) Newly certified CDCs will be on probation for a period of two years from the date of certification, at the end of which the CDC must petition the Lead SBA Office for:

(1) Permanent CDC status; or

(2) A one-year extension of probation. If a one-year extension of probation is granted, at the end of this extension period, the CDC must petition the Lead SBA Office for permanent CDC status or an additional one-year extension of probation.

(b) SBA will consider the failure to file a petition before the end of the probationary period as a withdrawal from the 504 program. If the CDC elects withdrawal, SBA will direct the CDC to transfer all funded and/or approved loans to another CDC, SBA, or another servicer approved by SBA.

(c) The Lead SBA Office will send the petition and its recommendation to the D/FA, who will make the final decision. SBA will determine permanent CDC status or an extension of probation, in part, based upon the CDC's compliance with the certification and operational requirements in §§120.820 through 120.830. To be considered for permanent CDC status or an extension of probation, 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).

(d) SBA will notify the CDC in writing of its decision, and, if the petition is declined, the reasons for the decision. If SBA declines the petition, the CDC will no longer have authority to participate in the 504 Loan Program and SBA will direct the CDC to transfer all funded and/or approved loans to another CDC, SBA, or another servicer approved by SBA.

[68 FR 57980, Oct. 7, 2003, as amended at 73 FR 75517, Dec. 11, 2008; 82 FR 39504, Aug. 21, 2017; 87 FR 38909, June 30, 2022]

REQUIREMENTS FOR CDC CERTIFICATION AND OPERATION

§ 120.816 CDC non-profit status and good standing.

A CDC must be a non-profit corporation, except that for-profit CDCs certified by SBA prior to January 1, 1987 may retain their certifications. An SBIC may not become a CDC. A CDC must be in good standing based upon the following criteria:

(a) In good standing in the State in which the CDC is incorporated and any other State in which the CDC conducts business.

(b) In compliance with all laws, including taxation requirements, in the State in which the CDC is incorporated and any other State in which the CDC conducts business.

(c) 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).

(d) If a non-profit CDC has a membership and the members are responsible for electing or appointing voting directors to the CDC's Board of Directors, no person or entity can control more than 25 percent of the CDC's voting membership.

[68 FR 57980, Oct. 7, 2003, as amended at 73 FR 75518, Dec. 11, 2008. Redesignated at 79 FR 15649, Mar. 21, 2014; 82 FR 39504, Aug. 21, 2017; 84 FR 66294, Dec. 4, 2019]

§ 120.818 Applicability to existing for-profit CDCs.

(a) Unless expressly provided otherwise in the regulations, any Loan Program Requirement that applies to non-profit CDCs also applies to for-profit CDCs.

(b) No person or entity can own or control more than 25 percent of a for-profit CDC's stock.

[79 FR 15649, Mar. 21, 2014, as amended at 84 FR 66294, Dec. 4, 2019]

§ 120.820 CDC Affiliation.

(a) A CDC must be independent and must not be affiliated (as determined in accordance with § 121.103 of this chapter) with any Person (as defined in § 120.10) except as permitted under this section.

(b) A CDC may be affiliated with an entity (other than a 7(a) Lender or another CDC) whose function is economic development in the same Area of Operations and that is either a non-profit entity or a State or local government or political subdivision (e.g., council of governments).

(c) A CDC must not be affiliated (as determined in accordance with § 121.103) with or invest, directly or indirectly, in a 7(a) Lender. A CDC that was affiliated with a 7(a) Lender as of November 6, 2003 may continue such affiliation.

(d) A CDC must not be affiliated (as determined in accordance with § 121.103 of this chapter) with another CDC. In addition, a CDC must not directly or indirectly invest in or finance another CDC, except with the prior written approval of D/FA or designee and D/OCRM or designee if they determine in their discretion that such approval is in the best interests of the 504 Loan Program.

(e) A CDC may remain affiliated with a for-profit entity (other than a 7(a) Lender) if such affiliation existed prior to March 21, 2014. A CDC may also be affiliated with a for-profit entity (other than a 7(a) Lender) whose function is economic development in the same Area of Operations with the prior written approval of the D/FA or designee if he or she determines in his or her discretion that such approval is in the best interests of the 504 Loan Program.

(f) A CDC must not directly or indirectly invest in a Licensee (as defined in § 107.50 of this chapter) licensed by SBA under the SBIC program authorized in Part A of Title III of the Small Business Investment Act, 15 U.S.C. 681 et seq. A CDC that has an SBA-approved investment in a Licensee as of November 6, 2003 may retain such investment.

(g) Notwithstanding paragraphs (b), (c), and (e) of this section, a CDC may be affiliated with a Community Advantage SBLC. Additionally, CDCs that are also Community Advantage Pilot Program Lenders as of May 11, 2023 may be licensed as Community Advantage SBLCs.

[79 FR 15649, Mar. 21, 2014, as amended at 88 FR 21900, Apr. 12, 2023]

§ 120.821 CDC Area of Operations.

A CDC must operate only within its designated Area of Operations approved by SBA except as provided in § 120.839.

[68 FR 57980, Oct. 7, 2003]

§ 120.823 CDC Board of Directors.

(a) The CDC, whether for-profit or non-profit, must have a Board of Directors with at least seven (7) voting directors who live or work in the CDC's State of incorporation or in an area that is contiguous to that State that meets the definition of a Local Economic Area for the CDC. The Board must be actively involved in encouraging economic development in the Area of Operations. The initial Board may be created by any method permitted by applicable State law. At a minimum, the Board must have directors with background and expertise in internal controls, financial risk management, commercial lending, legal issues relating to commercial lending, corporate governance, and economic, community or workforce development. Directors may be either currently employed or retired.

(b) At least two voting members of the Board of Directors, other than the CDC manager, must possess commercial lending experience satisfactory to SBA. When the Board votes on SBA loan approval or servicing actions, at least two voting Board members, with such commercial lending experience, other than the CDC manager, must be present and vote.

(c) The Board of Directors must meet at least quarterly and shall be responsible for the actions of the CDC and any committees established by the Board of Directors. In addition, the Board of Directors is subject to the following requirements:

(1) Except for the CDC manager, no person on the CDC's staff may be a voting director of the Board;

(2) A quorum must be present to transact business. The quorum shall be

set by the CDC but shall be no less than 50% of the voting members of the Board of Directors;

(3) Attendance at meetings may be through any format permitted by State law;

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

(d) The Board shall have and exercise all corporate powers and authority and be responsible for all corporate actions and business. There must be no actual or appearance of a conflict of interest with respect to any actions of the Board. The Board is responsible for ensuring that the structure and operation of the CDC, as set forth in the Bylaws, comply with SBA's Loan Program Requirements. The responsibilities of the Board include, but are not limited, to the following:

(1) Approving the mission and the policies for the CDC;

(2) Hiring, firing, supervising and annually evaluating the CDC manager;

(3) Setting the salary for the CDC manager and reviewing all salaries;

(4) Establishing committees, at its discretion, including the following:

(i) *Executive Committee.* To the extent authorized in the Bylaws, the Board of Directors may establish an Executive Committee. The Executive Committee may exercise the authority of the Board; however, the delegation of its authority does not relieve the Board of its responsibility imposed by law or Loan Program Requirements. No further delegation or redelegation of this authority is permitted. If the Board establishes an Executive Committee and delegates any of its authority to the Executive Committee as set forth in the Bylaws of the CDC, the Executive Committee must:

(A) Be chosen by and from the Board of Directors from the Board; and

(B) Meet the same organizational and representational requirements as the Board of Directors, except that the Executive Committee must have a minimum of four voting members who must be present to conduct business.

(ii) *Loan Committee.* The Board of Directors may establish a Loan Committee. The Loan Committee may exercise the authority of the Board only as set forth below; however, the delegation of its authority does not relieve the Board of its responsibility imposed by law or Loan Program Requirements. If the Board of Directors chooses to establish a Loan Committee, no CDC staff or manager may serve on the Loan Committee. The Loan Committee must:

(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 four Loan Committee members authorized to vote;

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

(D) Have no actual or appearance of a conflict of interest, including for example, a Loan Committee member participating in deliberations on a loan for which the Third Party Lender is the member's employer or the member is otherwise associated with the Third Party Lender; and

(E) Consist only of Loan Committee members who live or work in the CDC's State of incorporation or in an area that meets the definition of a Local Economic Area for the CDC, except that, for Projects that are financed under a CDC's Multi-State authority, the CDC must satisfy the requirements of either §120.835(c)(1) or (2) when voting on that Project.

(5) Ensuring that the CDC's expenses are reasonable and customary;

(6) Hiring directly an independent auditor to provide the financial statements in accordance with Loan Program Requirements;

(7) Monitoring the CDC's portfolio performance on a regular basis;

(8) Reviewing a semiannual report on portfolio performance from the CDC manager, which would include, but not be limited to, asset quality and industry concentration;

(9) Ensuring that the CDC establishes and maintains adequate reserves for operations;

(10) Ensuring that the CDC invests in economic development in each of the States in its Area of Operations in which it has a portfolio, and approving each investment. If the investment is

included in the CDC's budget, the Board's approval of the budget may be deemed approval of the investment. If the investment is not included in the budget, the Board must separately approve the investment;

(11) Establishing a policy in the Bylaws of the CDC prohibiting an actual conflict of interest or the appearance of same, and enforcing such policy (see § 120.140 and § 120.851);

(12) Retaining accountability for all of the actions of the CDC;

(13) Establishing written internal control policies, in accordance with § 120.826;

(14) Establishing commercially reasonable loan approval policies, procedures, and standards. The Bylaws must include any delegations of authority to the Loan Committee and Executive Committee, if either Committee has been established. In addition, the CDC must establish and set forth in detail in a policy manual its credit approval process. All 504 loan applications must have credit approval prior to submission to the Agency. The Loan Committee, if established, may be delegated the authority to provide credit approval for loans up to $2,000,000 but, for loans of $1,000,000 to $2,000,000, the Loan Committee's action must be ratified by the Board or Executive Committee prior to Debenture closing. Only the Board or Executive Committee, if authorized by the Board, may provide credit approval for loans greater than $2,000,000.

(15) All members of the Board of Directors must annually certify in writing that they have read and understand this section, and copies of the certification must be included in the Annual Report to SBA.

(e) The Board of Directors shall maintain Directors' and Officers' Liability and Errors and Omissions insurance in amounts established by SBA that are based on the size of the CDC's portfolio and other relevant factors.

[79 FR 15649, Mar. 21, 2014, as amended at 82 FR 39504, Aug. 21, 2017; 84 FR 66294, Dec. 4, 2019]

§ 120.824 Professional management and staff, and contracts for services.

(a) *Management.* A CDC must have full-time professional management, including an executive director or the equivalent (CDC manager) to manage daily operations. This requirement is met if the CDC has at least one salaried professional employee that is employed directly (not a contractor or an officer, director, 20 percent or more equity owner, or key employee of a contractor) on a full-time basis to manage the CDC. The CDC manager must be hired by the CDC's Board of Directors and subject to termination only by the Board. A CDC may obtain, under a written contract, management services provided by a qualified individual under the following circumstances:

(1) The CDC must submit a request for the D/FA (or designee) to approve, in consultation with the D/OCRM (or designee), a waiver of the requirement that the manager be employed directly by the CDC. In its request, the CDC must demonstrate that:

(i) Another non-profit entity (that is not a CDC) that has the economic development of the CDC's Area of Operations as one of its principal activities will provide management services to the CDC and, if the manager is also performing services for the non-profit entity, the manager will be available to small businesses interested in the 504 program and to 504 loan borrowers during regular business hours; or

(ii) The CDC submitting the request for the waiver is rural, has insufficient loan volume to justify having management employed directly by the CDC, and is requesting to contract with another CDC located in the same general area to provide the management.

(2) The CDC must submit a request for the D/FA (or designee), in consultation with the D/OCRM (or designee), to pre-approve the contract for management services. This contract must comply with paragraphs (c)(2) through (4) and, if applicable, paragraph (d) of this section.

(b) *Professional staff.* The CDC must have a full-time professional staff qualified by training and experience to market the 504 Loan Program, package and process loan applications, close

loans, service, and, if authorized by SBA, liquidate the loan portfolio, and to sustain a sufficient level of service and activity in the Area of Operations.

(c) *Professional services contracts.* Through a written contract with qualified individuals or entities, a CDC may obtain services for marketing, packaging, processing, closing, servicing, or liquidation functions, or for other services (*e.g.*, legal, accounting, information technology, independent loan reviews, and payroll and employee benefits), provided that:

(1) The contract must be pre-approved by the D/FA (or designee), subject to the following exceptions:

(i) CDCs may contract for legal, accounting, and information technology services without SBA approval, except for legal services in connection with loan liquidation or litigation.

(ii) CDCs may contract for independent loan review services with non-CDC entities without SBA approval. Contracts between CDCs for independent loan reviews must be pre-approved by SBA in accordance with paragraph (d) of this section.

(2) If the contract requires SBA's prior approval under paragraph (c)(1) of this section, the CDC's Board must explain to SBA why it is in the best interest of the CDC to obtain services through a contract and must demonstrate that:

(i) The compensation under the contract is paid only by the CDC obtaining the services, is reasonable and customary for similar services in the Area of Operations, and is only for actual services performed;

(ii) The full term of the contract (including options) is necessary and appropriate and the contract permits the CDC procuring the services to terminate the contract prior to its expiration date with or without cause; and

(iii) There is no actual or apparent conflict of interest or self-dealing on the part of any of the CDC's officers, management, or staff, including members of the Board and Loan Committee, in the negotiation, approval or implementation of the contract.

(3) Neither the contractor nor any officer, director, 20 percent or more equity owner, or key employee of a contractor may be a voting or non-voting member of the CDC's Board.

(4) The CDC procuring the services must provide a copy of all executed contracts requiring SBA prior approval to SBA as part of the CDC's Annual Report submitted under §120.830(a) unless the CDC certifies that it has previously submitted an identical copy of the executed contract to SBA.

(5) With respect to any contract under which the CDC's staff are deemed co-employees of both the CDC and the contractor (*e.g.*, contracts with professional employer organizations to obtain employee benefits, such as retirement and health benefits, for the CDC's staff), the contract must provide that the CDC retains the final authority to hire and fire the CDC's employees.

(6) If the contract is between CDCs, the CDCs and the contract must also comply with paragraph (d) of this section.

(d) *Professional Services Contracts between CDCs.* Notwithstanding the prohibition in 13 CFR 120.820(d) against a CDC affiliating with another CDC, a CDC may obtain services through a written contract with another CDC for managing, marketing, packaging, processing, closing, servicing, independent loan review, or liquidation functions, provided that:

(1) The contract between the CDCs must be pre-approved by the D/FA (or designee), in consultation with the D/OCRM (or designee), who determines in his or her discretion that such approval is in the best interests of the 504 Loan Program and that the terms and conditions of the contract are satisfactory to SBA. For management services, a CDC may contract with another CDC only in accordance with paragraph (a)(1)(ii) of this section.

(2) Except for contracts for liquidation services and independent loan reviews:

(i) The CDCs entering into the contract must be located in the same SBA Region or, if not located in the same SBA Region, must be located in contiguous States. For purposes of this provision, the location of a CDC is the CDC's State of incorporation;

(ii) A CDC may provide assistance to only one CDC per State; and

(iii) No CDC may provide assistance to another CDC in its State of incorporation or in any State in which it has Multi-State authority.

(3) The Board of Directors for each CDC entering into the contract must be separate and independent and may not include any common directors. In addition, if either of the CDCs is for-profit, neither CDC may own any stock in the other CDC. The CDCs are also prohibited from comingling any funds.

(4) With respect to contracts for independent loan reviews, CDCs may not review each other's portfolios or exchange any other services, nor may they enter into any other arrangement with each other that could appear to bias the outcome or integrity of the independent loan review.

(5) The contract must satisfy the requirements set forth in paragraphs (c)(2) through (4) of this section.

[84 FR 66294, Dec. 4, 2019]

§ 120.825 Financial ability to operate.

A CDC must be able to sustain its operations continuously, with reliable sources of funds (such as income from services rendered and contributions from government or other sponsors). Any funds generated from 503 and 504 loan activity by a CDC remaining after payment of staff and overhead expenses must be retained by the CDC as a reserve for future operations or for investment in other local economic development activity in its Area of Operations. If a CDC is operating as a Multi-State CDC, it must maintain a separate accounting for each State of all 504 fee income and expenses and provide, upon SBA's request, evidence that the funds resulting from its Multi-State CDC operations are being invested in economic development activities in each State in which they were generated.

[65 FR 42633, July 11, 2000]

§ 120.826 Basic requirements for operating a CDC.

A CDC must operate in accordance with the following requirements:

(a) *In general.* CDCs must meet all 504 Loan Program Requirements. In its Area of Operations, a CDC must market the 504 program, package and process 504 loan applications, close and service 504 loans, and if authorized by SBA, liquidate and litigate 504 loans. It must supply to SBA current and accurate information about all certification and operational requirements, and maintain the records and submit all reports required by SBA.

(b) *Operations and internal controls.* Each CDC's board of directors must adopt an internal control policy which provides adequate direction to the institution for effective control over and accountability for operations, programs, and resources. The board adopted internal control policy must, at a minimum:

(1) Direct management to assign the responsibility for the internal control function (covering financial, credit, credit review, collateral, and administrative matters) to an officer or officers of the CDC;

(2) Adopt and set forth procedures for maintenance and periodic review of the internal control function;

(3) Direct the operation of a program to review and assess the CDC's 504-related loans. For the 504 review program, the internal control policies must specify the following:

(i) Loan, loan-related collateral, and appraisal review standards, including standards for scope of selection (for review of any such loan, loan-related collateral or appraisal) and standards for work papers and supporting documentation;

(ii) Loan quality classification standards consistent with the standardized classification systems used by the Federal Financial Institution Regulators;

(iii) Specific control requirements for the CDC's oversight of Lender Service Providers; and

(iv) Standards for training to implement the loan review program; and

(4) Address other control requirements as may be established by SBA.

(c) *Annual Audited/Reviewed Financial Statements.* Each CDC with a 504 loan portfolio balance of $30 million or more (as calculated by SBA) must have its financial statements audited annually by a certified public accountant that is independent and experienced in auditing financial institutions. The audit must be performed in accordance with generally accepted auditing standards

as adopted by the Auditing Standards Board of the American Institute of Certified Public Accountants (AICPA). The auditor must be independent, as defined by the AICPA, of the CDC. Annually, the auditor must issue an opinion as to the fairness of the CDC's financial statements and their compliance with GAAP. For CDCs with a 504 portfolio balance of less than $30 million (as calculated by SBA), the CDC's annual financial statements submitted to SBA must be reviewed by an independent CPA in accordance with GAAP, except that the D/OCRM may require a CDC with a portfolio balance of less than $30 million to submit an audited financial statement in the event the D/OCRM determines, in his or her discretion, that such audit is necessary or appropriate when the CDC is in material noncompliance with Loan Program Requirements.

(d) *Auditor qualifications.* The audit or review must be conducted by an independent certified public accountant who:

(1) Is registered or licensed to practice as a public accountant, and is in good standing, under the laws of the state or other political subdivision of the United States in which the CDC's principal office is located;

(2) Agrees in the engagement letter with the CDC to provide the SBA with access to and copies of any work papers, policies, and procedures relating to the services performed;

(3)(i) Is in compliance with the AICPA Code of Professional Conduct; and

(ii) Meets the independence requirements and interpretations of the Securities and Exchange Commission and its staff;

(4) Has received a peer review or is enrolled in a peer review program that meets AICPA guidelines; and

(5) Is otherwise acceptable to SBA.

[73 FR 75518, Dec. 11, 2008, as amended at 84 FR 66295, Dec. 4, 2019]

§ 120.827 Other services a CDC may provide to small businesses.

A CDC may provide a small business with assistance unrelated to the 504 loan program as long as the CDC does not make such assistance a condition of the CDC accepting from that small business an application for a 504 loan. An example of other services a CDC may provide is assisting a small business in applying for a 7(a) loan (as described in §120.2). A CDC is subject to part 103 of this chapter when providing such assistance.

[68 FR 57981, Oct. 7, 2003]

§ 120.828 Minimum level of 504 loan activity and restrictions on portfolio concentrations.

(a) A CDC is required to receive SBA approval of at least four 504 loan approvals during two consecutive fiscal years.

(b) A CDC's 504 loan portfolio must be diversified by business sector.

[68 FR 57981, Oct. 7, 2003]

§ 120.829 Job Opportunity average a CDC must maintain.

(a) A CDC's portfolio must maintain a minimum average of one Job Opportunity per an amount of 504 loan funding that will be specified by SBA from time to time in a FEDERAL REGISTER notice. Such Job Opportunity average remains in effect until changed by subsequent FEDERAL REGISTER publication. A CDC is permitted two years from its certification date to meet this average.

(b) A CDC must indicate in its annual report the Job Opportunities actually or estimated to be provided by each Project.

(c) If a CDC does not maintain the required average, it may retain its certification if it justifies to SBA's satisfaction its failure to do so in its annual report and shows how it intends to attain the required average.

[61 FR 3235, Jan. 31, 1996, as amended at 68 FR 57981, Oct. 7, 2003]

§ 120.830 Reports a CDC must submit.

A CDC must submit the following reports to SBA:

(a) An Annual Report within one hundred-eighty days after the end of the CDC's fiscal year (to include Federal tax returns for that year). A CDC that is certified by SBA within 6 months of the CDC's fiscal year-end is not required to submit an Annual Report for that year. The Annual Report

must include, but is not limited to, the following:

(1) Audited or Reviewed Financial Statements as required in §120.826(c) and (d) for the CDC and any affiliates or subsidiaries of the CDC.

(i) Audited financial statements must, at a minimum, include the following:

(A) Audited balance sheet;

(B) Audited statement of income (or receipts) and expenses;

(C) Audited statement of source and application of funds;

(D) Such footnotes as are necessary to an understanding of the financial statements;

(E) Auditor's letter to management on internal control weaknesses; and

(F) The auditor's report; and

(ii) Reviewed financial statements must, at a minimum, include the following:

(A) Balance sheet;

(B) Statement of income (or receipts) and expenses;

(C) Statement of source and application of funds;

(D) Such footnotes as are necessary to an understanding of the financial statements;

(E) The accountant's review report; and

(2) Report on compensation: CDCs are required to provide detailed information on total compensation (including salary, bonuses and expenses) paid within the CDC's most recent tax year for current and former officers and directors, and for current and former employees and independent contractors with total compensation of more than $100,000 during that period.

(3) Certification of members of the Board of Directors. Written annual certification by each Board member that he or she has read and understands the requirements set forth in §120.823.

(4) Report on investment in economic development. Written report on investments in economic development in each State in which the CDC has an outstanding 504 loan.

(b) For each new associate and staff, a Statement of Personal History (for use by non-bank lenders and CDCs) and other information required by SBA;

(c) Reports of involvement in any legal proceeding;

(d) Changes in organizational status;

(e) Changes in any condition that affects its eligibility to continue to participate in the 504 program; and

(f) Quarterly service reports on each loan in its portfolio which is 60 days or more past due (and interim reports upon request by SBA).

(g) Other reports as required by SBA.

[61 FR 3235, Jan. 31, 1996, as amended at 68 FR 57981, Oct. 7, 2003; 73 FR 75518, Dec. 11, 2008; 79 FR 15650, Mar. 21, 2014]

Extending a CDC's Area of Operations

§ 120.835 Application to expand an Area of Operations.

(a) *General.* A CDC that has been certified to participate in the 504 program may apply to expand its Area of Operations if it meets all requirements to be an Accredited Lender Program (ALP) CDC, as set forth in §120.840(c), and demonstrates that it can competently fulfill its 504 program responsibilities in the proposed area.

(b) *Local Economic Area Expansion.* A CDC seeking to expand its Area of Operations into a Local Economic Area must apply in writing to the Lead SBA Office.

(c) *Multi-State expansion.* A CDC seeking to become a Multi-State CDC must apply to the SBA District Office that services the area within each State where the CDC intends to locate its principal office for that State. A CDC may apply to be a Multi-State CDC only if the State the CDC seeks to expand into is contiguous to the State of the CDC's incorporation and either:

(1) The CDC establishes a Loan Committee in the additional State consisting only of members who live or work in that State and that satisfies the other requirements in §120.823(d)(4)(ii)(A) through (D); or

(2) For any Project located in the additional State, the CDC's Board or Loan Committee (if established in the CDC's State of incorporation) includes at least two members who live or work in that State when voting on that Project. These two members may vote only on Projects located in the additional State.

[68 FR 57981, Oct. 7, 2003, as amended at 79 FR 15650, Mar. 21, 2014; 84 FR 66295, Dec. 4, 2019]

§ 120.837 SBA decision on application for a new CDC or for an existing CDC to expand Area of Operations.

The processing District Office must solicit the comments of any other District Office in which the CDC operates or proposes to operate. The processing District Office must determine that the CDC is in compliance with SBA's regulations, policies, and performance benchmarks, including pre-approval and annual review by SBA of any management or staff contracts, and the timely submission of all annual reports. In making its recommendation on the application, the District Office may consider any information presented to it regarding the requesting CDC, the existing CDC, or CDCs that may be affected by the application, and the proposed Area of Operations.

(a) The SBA District office will submit the application, recommendation, and supporting materials within 60 days of the receipt of a complete application from the CDC to the D/FA, who will make the final decision. The D/FA may consider any information submitted or available related to the applicant and the application.

(b) SBA will notify the CDC of its decision in writing, and if the application is denied, the reasons for its decision.

(c) If a CDC is approved to operate as a Multi-State CDC, the CDC's ALP, PCLP, or Priority CDC authority will carry over into every additional State in which it is approved to operate as a Multi-State CDC.

[65 FR 42633, July 11, 2000, as amended at 68 FR 57981, Oct. 7, 2003]

§ 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:

(a) The applicant CDC has previously assisted the business or its affiliate(s) to obtain a 504 loan; or

(b) The existing CDC or CDCs serving the area agree to permit the applicant CDC to make the 504 loan; or

(c) There is no CDC within the Area of Operations.

[68 FR 57982, Oct. 7, 2003, as amended at 73 FR 75518, Dec. 11, 2008; 82 FR 39504, Aug. 21, 2017; 84 FR 66296, Dec. 4, 2019]

ACCREDITED LENDERS PROGRAM (ALP)

§ 120.840 Accredited Lenders Program (ALP).

(a) *General.* Under the ALP program, SBA designates qualified CDCs as ALP CDCs, gives them increased authority to process, close, and service 504 loans, and provides expedited processing of loan approval and servicing actions.

(b) *Application.* A CDC must apply for ALP status by submitting an application in accordance with SBA's Standard Operating Procedure 50 10, available at *http://www.sba.gov.* A final decision will be made by the appropriate SBA official in accordance with Delegations of Authority.

(c) *Eligibility.* In order for a CDC to be eligible to receive ALP status, its application must show that it meets the criteria set forth in § 120.841.

(d) *Additional application requirements.* The CDC's application must include the following:

(1) Certified copy of the CDC's Board of Directors' resolution authorizing the application for ALP status.

(2) Summary of the experience of each of the CDC's loan processing, closing, and servicing staff members with significant authority.

(3) Name, address, and summary of experience of Designated Attorney.

(4) Documentation of any SBA required insurance.

(5) Any other documentation required by SBA.

(e) *Term of ALP designation.* SBA generally will designate a CDC as an ALP CDC for a two-year period. SBA may renew the designation for additional two-year periods if the CDC continues to meet the ALP program eligibility requirements.

(f) *SBA approval or decline decision.* SBA will notify the CDC in writing of an approval or decline of either an ALP application or of an ALP renewal. If the SBA approves the CDC's application, the ALP CDC may exercise its ALP authority in its entire Area of Operations. If an application or renewal is declined, SBA will notify the CDC of the reasons for the decision.

[68 FR 57982, Oct. 7, 2003, as amended at 85 FR 7651, Feb. 10, 2020; 85 FR 80588, Dec. 14, 2020; 87 FR 38909, June 30, 2022]

§ 120.841 Qualifications for the ALP.

An applicant for ALP status must show that it substantially meets the following criteria:

(a) *CDC staff experience.* The CDC's staff must have well-trained, qualified loan officers who are knowledgeable concerning SBA's lending policies and procedures for the 504 program. The CDC must have at least one loan officer with three years of 504 loan processing experience and at least one loan officer with three years of 504 servicing experience or two years experience plus satisfactory completion of SBA-approved processing and servicing training. The same loan officer may meet these qualifications. In addition, the CDC's staff must have demonstrated satisfactorily to SBA the ability to process and service 504 loans.

(b) *Number of 504 loans approved and size of portfolio.* SBA must have approved at least 20 504 loan applications by the CDC in the most recent three years, and the CDC must have a portfolio of at least 30 active 504 loans. (An ''active'' 504 loan is a loan that was approved and closed by the CDC and has a status of either current, delinquent, or in liquidation.)

(c) *CDC reviews.* CDC reviews conducted by SBA must be current (within the last 24 months, if applicable) for applicants for ALP status. The CDC must have received a review assessment of either ''Acceptable'' or ''Acceptable With Corrective Actions Required.'' 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);

(d) *Record of compliance with 504 program requirements.* The CDC must have a record of conforming to SBA's policies and procedures and of satisfactorily underwriting, closing and servicing 504 loans. SBA will consider all relevant material information, which will include but is not limited to whether the CDC meets all SBA's CDC portfolio benchmarks, when determining the CDC's record of compliance, including:

(1) Submission of satisfactory 504 loan analyses and applications, and all required, and properly completed, loan documents.

(2) Careful and thorough analysis and screening of all 504 loan applications for conformance with SBA credit and eligibility standards;

(3) Proper completion of required 504 loan closing documents and compliance with SBA 504 loan closing policies and procedures.

(4) Compliance with SBA loan servicing policies and procedures.

(5) Compliance with the certification and operational requirements as set forth in §§ 120.820 through 120.830.

(6) Submission of timely, complete and acceptable annual reports.

(7) Compliance with CDC ethical requirements (see § 120.851).

(e) *Priority CDC.* The CDC must be a Priority CDC with a Designated Attorney and SBA required insurance.

(f) *Record of Cooperation.* The CDC must have a record of effective communication and a cooperative relationship with all SBA offices including district offices and SBA's loan processing and servicing centers.

[68 FR 57982, Oct. 7, 2003, as amended at 72 FR 18364, Apr. 12, 2007; 73 FR 75519, Dec. 11, 2008; 82 FR 39504, Aug. 21, 2017]

§ 120.842 ALP Express Loans.

(a) *Definition.* For the purposes of this section, an *ALP Express Loan:*

(1) Means a 504 loan in an amount that is not more than $500,000; and

(2) Does not include a loan made to a borrower that is in an industry that has a high rate of default, as annually determined by SBA. SBA will publish an annual list of the industries with a high rate of default in a notice in the FEDERAL REGISTER.

(b) *Requirements for the underwriting, approving, closing, and servicing of ALP Express Loans*—(1) *General.* When underwriting, approving, closing, and servicing 504 loans under this section, the ALP CDC must comply with Loan Program Requirements and conduct such activities in accordance with prudent and commercially reasonable lending standards.

(2) *Documentation of decision making.* For each ALP Express Loan, the ALP CDC must document in its files the basis for its decisions with respect to underwriting, approving, closing, and servicing the loan.

(3) *Processing requirements*—(i) *Eligibility.* An ALP Express Loan is subject to SBA's final approval as to eligibility and, for each loan, an ALP CDC must submit the documents required by SBA to complete the eligibility review. ALP CDCs must submit to SBA for review and approval any servicing action that the ALP CDC proposes prior to closing that may affect the eligibility of the borrower or the ALP Express Loan.

(ii) *Credit decisions.* The ALP CDC is responsible for properly determining the applicant's creditworthiness and establishing the terms and conditions under which the ALP Express Loan will be made in accordance with SBA's Loan Program Requirements and prudent lending standards. The ALP CDC's determination regarding creditworthiness will not be subject to SBA review.

(4) *Submission of loan documents.* An ALP CDC must notify SBA of its credit decision on an ALP Express Loan by submitting to SBA all required documentation. SBA will review these documents to determine whether the applicant and the ALP Express Loan are eligible and whether SBA funds are available for the ALP Express Loan. If approved, SBA will notify the ALP CDC of the loan number assigned to the loan.

(5) *Loan and Debenture closing.* After receiving notification of the loan number from SBA, the ALP CDC is responsible for properly undertaking all actions necessary to close the ALP Express Loan and Debenture in accordance with the expedited loan closing procedures applicable to a Priority CDC and with § 120.960, and in compliance with all applicable Loan Program Requirements.

(6) *Servicing.* The ALP CDC is responsible for servicing its ALP Express Loans in accordance with § 120.970. SBA may in certain circumstances, in its discretion, elect to handle such duties with respect to a particular ALP Express Loan or Loans. Additional servicing requirements are set forth in subpart E of this part. The CDC must promptly notify SBA when it approves any servicing action delegated to the CDC under Loan Program Requirements.

(c) *Prohibition against making a 504 loan previously submitted to the SBA.* An ALP CDC may not process a 504 loan application under paragraph (b)(3) of this section from an applicant whose application was previously submitted to SBA and was withdrawn by the CDC or was declined or otherwise not approved by SBA.

(d) *Applicability.* The authority to make ALP Express Loans is available for applications submitted to the ALP CDC on or after June 27, 2022 and approved through September 30, 2023.

[87 FR 37982, June 27, 2022, as amended at 88 FR 21900, Apr. 12, 2023]

PREMIER CERTIFIED LENDERS PROGRAM

§ 120.845 Premier Certified Lenders Program (PCLP).

(a) *General.* Under the PCLP, SBA designates qualified CDCs as PCLP CDCs and delegates to them increased authority to process, close, service, and liquidate 504 loans. SBA also may give PCLP CDCs increased authority to litigate 504 loans.

(b) *Application.* A CDC must apply for PCLP status to the Lead SBA Office. The Lead SBA Office will send its written recommendation and the application to SBA's PCLP Loan Processing

Center. The PCLP Loan Processing Center will review these materials and forward them to the appropriate Office of Capital Access official in accordance with Delegations of Authority for final determination.

(c) *Eligibility*. In order for a CDC to be eligible to receive PCLP status, its application must show that it meets the following criteria:

(1) The CDC must be an ALP CDC in substantial compliance with Loan Program Requirements or meet the criteria to be an ALP CDC set forth in § 120.841(a) through (f).

(2) The CDC can adequately comply with SBA liquidation and litigation requirements.

(d) *Additional application requirements*. The application must include the following:

(1) Certified copy of the CDC's Board of Directors' resolution authorizing the application for PCLP status.

(2) Summary of the experience of each of the CDC's loan processing, closing, servicing and liquidation staff members with significant authority.

(3) Name, address and summary of experience of Designated Attorney.

(4) Documentation of any SBA required insurance.

(5) Any other documentation required by SBA.

(e) *Term of designation*. If approved, SBA generally will confer PCLP status for a period of two years. However, if SBA deems it appropriate, it may confer PCLP status for a period of less than two years.

(f) *Area of Operations for PCLP CDCs*. If the SBA approves the CDC's application, the PCLP CDC may exercise its PCLP authority in its entire Area of Operations.

(g) *SBA approval or decline decision*. SBA will notify the CDC in writing of an approval or decline of a PCLP application. If an application is declined, SBA will notify the CDC of the reasons for the decision.

[68 FR 57982, Oct. 7, 2003, as amended at 72 FR 18364, Apr. 12, 2007; 73 FR 75519, Dec. 11, 2008; 87 FR 38909, June 30, 2022]

§ 120.846 Requirements for maintaining and renewing PCLP status.

(a) To maintain its status as a PCLP CDC, a CDC must continue to:

(1) Meet the PCLP eligibility requirements in § 120.845.

(2) Timely conform with all requirements and deadlines set forth in SBA's regulations and policy and procedural guidance concerning properly establishing, funding and reporting a PCLP Loan Loss Reserve Fund (LLRF).

(3) Substantially comply with all Loan Program Requirements.

(4) Remain an active CDC.

(5) In accordance with statutory requirements set forth in section 508(i) of Title V, 15 U.S.C. 697e(i), establish a goal of processing at least 50 percent of its 504 loans using PCLP procedures.

(b) SBA will notify the PCLP CDC in writing of a renewal or non-renewal of PCLP status. If PCLP status is not renewed, SBA will notify the CDC of the reasons for the decision.

[68 FR 57983, Oct. 7, 2003, as amended at 72 FR 18364, Apr. 12, 2007]

§ 120.847 Requirements for the Loan Loss Reserve Fund (LLRF).

(a) *General*. PCLP CDCs must establish and maintain a LLRF (or multiple accounts which together constitute one LLRF) which complies with paragraphs (b) through (g) of this section. A PCLP CDC must use the LLRF or other funds to reimburse the SBA for 10 percent of any loss sustained by SBA as a result of a default in the payment of principal or interest on a Debenture it issued under the PCLP (''PCLP Debenture''). A CDC that is participating in the PCLP as of January 1, 2004, and a CDC that has participated in the PCLP in the past but which does not have PCLP status as of that date, must establish a LLRF within 30 days of that date to cover potential losses for all 504 loans made in connection with PCLP Debentures that remain outstanding as of that date. A CDC that receives PCLP status after that date must establish and maintain a LLRF prior to closing any 504 loans processed under its PCLP status. The LLRF is the accumulation of deposits that a PCLP CDC must establish and maintain for each PCLP Debenture that it issues. PCLP CDCs must coordinate with their Lead SBA Office to ensure that the LLRF is properly established, that all necessary documentation is executed and delivered by all parties in a timely fashion,

and that all required deposits are made.

(b) *PCLP CDC Exposure and LLRF deposit requirements.* A PCLP CDC's ''Exposure'' is defined as its reimbursement obligation to SBA with respect to default in the payment of any PCLP Debenture. The amount of a PCLP CDC's Exposure is 10 percent of any loss (including attorney's fees; litigation costs; and care of collateral, appraisal and other liquidation costs and expenses) sustained by SBA as a result of a default in the payment of principal or interest on a PCLP Debenture. For each PCLP Debenture a PCLP CDC issues, it must establish and maintain an LLRF equal to one percent of the original principal amount of the PCLP Debenture. The amount the PCLP CDC must maintain in the LLRF for each PCLP Debenture remains the same even as the principal balance of the PCLP Debenture is paid down over time except that, after the first 10 years of the term of the Debenture, the amount maintained in the LLRF may be based on one percent of the current principal amount of the PCLP Debenture (the declining balance methodology), as determined by SBA. All withdrawals must be made in accordance with the requirements of paragraph (g) of this section. A CDC may not use the declining balance methodology:

(1) With respect to any Debenture that has been purchased. Within 30 days after purchase, the CDC must restore the balance maintained in the LLRF for the Debenture that was purchased to one percent of the original principal amount of that Debenture; or

(2) With respect to any other Debenture if SBA notifies the CDC in writing that it has failed to satisfy the requirements in paragraph (e), (f), (h), (i), or (j) of this section. In such case, the CDC will not be required to restore the balance maintained in the LLRF to one percent of the original principal amount of the Debenture but must base the amount maintained in the LLRF on one percent of the principal amount of the Debenture as of the date of notification. The CDC may not begin to use the declining balance methodology again until SBA notifies the CDC in writing that SBA has determined, in its discretion, that the CDC has corrected the noncompliance and has demonstrated its ability to comply with these requirements.

(c) *Establishing a LLRF.* The LLRF must be a deposit account (or accounts) with a federally insured depository institution selected by the PCLP CDC. A ''deposit account'' is a demand, time, savings, or passbook account, including a certificate of deposit (CD) which is either uncertificated or, if certificated, non-transferable. A ''deposit account'' is not an investment account and must not contain securities or other investment properties. A deposit account may contain only cash and CDs credited to that account. A PCLP CDC may pool its deposits for multiple PCLP Debentures in a single account in one institution. The LLRF must be segregated from the PCLP CDC's other operating accounts. The PCLP CDC is responsible for all fees, costs and expenses incurred in connection with establishing, managing and maintaining the LLRF, including fees associated with transferring funds or early withdrawal of CDs, and related income tax expenses.

(d) *Creating and perfecting a security interest in a LLRF.* A PCLP CDC must give SBA a first priority, perfected security interest in the LLRF to secure the PCLP CDC's obligation to reimburse SBA for the PCLP CDC's Exposure under all of its outstanding PCLP Debentures. (If a PCLP CDC's LLRF is comprised of multiple deposit accounts, it must give SBA this security interest with respect to each such account.) The PCLP CDC must grant to SBA the security interest in the LLRF pursuant to a security agreement between the PCLP CDC and SBA, and a control agreement between the PCLP CDC, SBA, and the applicable depository institution. The control agreement must include provisions requiring the depository institution to follow SBA instructions regarding withdrawal from the account without a requirement for obtaining further consent from the PCLP CDC, and must restrict the PCLP CDC's ability to make withdrawals from the account without SBA consent. When establishing the LLRF, a PCLP CDC must coordinate with its Lead SBA Office to execute and deliver

the required documentation. The PCLP CDC must provide to the Lead SBA Office a fully executed original of the security and control agreements. All documents must be satisfactory to SBA in both form and substance.

(e) *Schedule for contributions to a LLRF.* The PCLP CDC must contribute to the LLRF the required deposits for each PCLP Debenture in accordance with the following schedule:

(1) At least 50 percent of the required deposits to the LLRF on or about the date that it issues the PCLP Debenture.

(2) At least an additional 25 percent of the required deposits to the LLRF no later than one year after it issues the PCLP Debenture.

(3) Any remainder of the required deposits to the LLRF no later than two years after it issues the PCLP Debenture.

(f) *LLRF reporting requirements.* Each PCLP CDC must periodically report to SBA the amount in the LLRF in a form that will readily facilitate reconciliation of the amount maintained in the LLRF with the amount required to meet a PCLP CDC's Exposure for its entire portfolio of PCLP Debentures.

(g) *Withdrawal of excess funds.* Interest and other funds in the LLRF that exceed the required minimums as set forth in paragraph (b) of this section, within the time frames set forth in paragraph (e) of this section, accrue to the benefit of the PCLP CDC. PCLP CDCs are authorized to withdraw excess funds, including interest, from the LLRF if such funds exceed the required minimums set forth in paragraph (b) of this section. The PCLP CDC must forward requests for withdrawals to the Lead SBA Office, which will verify the existence and amount of excess funds and notify the financial institution to transfer the excess funds to the PCLP CDC.

(h) *Determining SBA loss.* When a PCLP CDC has concluded the liquidation of a defaulted 504 loan made with the proceeds of a PCLP Debenture and has submitted a liquidation wrap-up report to SBA, or when SBA otherwise determines that the PCLP CDC has exhausted all reasonable collection efforts with respect to that 504 loan, SBA will determine the amount of the loss to SBA. SBA will notify the PCLP CDC of the amount of its reimbursement obligation to SBA (if any) and will explain how SBA calculated the loss.

(1) If the PCLP CDC agrees with SBA's calculations of the loss, it must reimburse SBA for ten percent of the amount of that loss no later than 30 days after SBA's notification to the PCLP CDC of the CDC's reimbursement obligation.

(2) If the PCLP CDC disputes SBA's calculations, it must reimburse SBA for ten percent of any loss amount that is not in dispute no later than 30 days after SBA's notification to the PCLP CDC of the CDC's reimbursement obligation. No later than 30 days after SBA's notification, the PCLP CDC may submit to the D/FA or his or her delegate a written appeal of any disagreement regarding the calculation of SBA's loss. The PCLP CDC must include with that appeal an explanation of its reasons for the disagreement. Upon the D/FA's final decision as to the disputed amount of the loss, the PCLP CDC must promptly reimburse SBA for ten percent of that amount.

(i) *Reimbursing SBA for loss.* A PCLP CDC may use funds in the LLRF or other funds to reimburse SBA for the PCLP CDC's Exposure on a defaulted PCLP Debenture. If a PCLP CDC does not satisfy the entire reimbursement obligation within 30 days after SBA's notification to the PCLP CDC's of its reimbursement obligation, SBA may cause funds in the LLRF to be transferred to SBA in order to cover the PCLP CDC's Exposure, unless the PCLP CDC has filed an appeal under paragraph (h)(2) of this section. If the PCLP CDC has filed such an appeal, SBA may cause such a transfer of funds to SBA 30 days after the D/FA's or his or her delegate's decision. If the LLRF does not contain sufficient funds to reimburse SBA for any unpaid Exposure with respect to any PCLP Debenture, the PCLP CDC must pay SBA the difference within 30 days after demand for payment by SBA.

(j) *Insufficient funding of LLRF.* A PCLP CDC must diligently monitor the LLRF to ensure that it contains sufficient funds to cover its Exposure for its entire portfolio of PCLP Debentures.

If, at any time, the LLRF does not contain sufficient funds, the PCLP CDC must, within 30 days of the earlier of the date it becomes aware of this deficiency or the date it receives notification from SBA of this deficiency, make additional contributions to the LLRF to make up this difference.

[68 FR 57983, Oct. 7, 2003, as amended at 84 FR 66296, Dec. 4, 2019]

§ 120.848 Requirements for 504 loan processing, closing, servicing, liquidating, and litigating by PCLP CDCs.

(a) *General.* In processing closing, servicing, liquidating and litigating 504 loans under the PCLP (''PCLP Loans''), the PCLP CDC must comply with Loan Program Requirements and conduct such activities in accordance with prudent and commercially reasonable lending standards.

(b) *Documentation of decision making.* For each PCLP Loan, the PCLP CDC must document in its files the basis for its decisions with respect to loan processing, closing, servicing, liquidating, and litigating.

(c) *Processing requirements.* SBA expects PCLP CDCs to handle most 504 loan processing situations, although SBA may require that the PCLP CDC process 504 loans involving complex or problematic eligibility issues through the SBA using standard 504 loan processing procedures. The PCLP CDC is responsible for properly determining borrower creditworthiness and establishing the terms and conditions under which the PCLP Loan will be made. The PCLP CDC also is responsible for properly undertaking such other processing actions as SBA may delegate to the PCLP CDC.

(d) *Submission of loan documents.* A PCLP CDC must notify SBA of its approval of a 504 loan by submitting to SBA's PCLP Loan Processing Center all documentation required by SBA, including SBA's PCLP eligibility checklist, signed by an authorized representative of the PCLP CDC. The PCLP Loan Processing Center will review these documents to determine whether the PCLP CDC has identified any problems with the PCLP Loan approval, and whether SBA funds are available for the PCLP Loan. If appropriate, the PCLP Processing Center will notify the PCLP CDC of the loan number assigned to the loan.

(e) *Loan and Debenture closing.* After receiving notification from SBA PCLP Loan Processing Center, the PCLP CDC is responsible for properly undertaking all actions necessary to close the PCLP Loan and Debenture in accordance with the expedited loan closing procedures applicable to a Priority CDC and with § 120.960.

(f) *Servicing, liquidation and litigation responsibilities.* The PCLP CDC generally must service, liquidate and litigate its entire portfolio of PCLP Loans, although SBA may in certain circumstances elect to handle such duties with respect to a particular PCLP Loan or Loans. Additional servicing and liquidation requirements are set forth in subpart E of this part.

(g) *Making a 504 loan previously considered by another CDC.* A PCLP CDC also may utilize its PCLP status to process a 504 loan application from an applicant whose application was declined or rejected by another CDC operating in that same Area of Operations, if the applicant is located within that area and as long as SBA has not previously declined that applicant's 504 loan application. This may include the processing of a 504 loan application from an applicant that has withdrawn its application from another CDC.

[68 FR 57984, Oct. 7, 2003, as amended at 72 FR 18364, Apr. 12, 2007]

OTHER CDC REQUIREMENTS

§ 120.851 CDC ethical requirements.

CDCs and their Associates must act ethically and exhibit good character. They must meet all of the ethical requirements of § 120.140. In addition, they are subject to the following:

(a) Any benefit flowing to a CDC's Associate or his or her employer from activities as an Associate must be merely incidental (this requirement does not prevent an Associate or an Associate's employer from providing interim financing as described in § 120.890 or Third Party Loans as described in § 120.920, as long as such activity does not violate § 120.140); and

(b) A CDC's Associate may not be an officer, director, or manager of more than one CDC.

[68 FR 57984, Oct. 7, 2003]

§ 120.852 [Reserved]

§ 120.853 Inspector General audits of CDCs.

The SBA Office of Inspector General may also conduct, supervise or coordinate audits pursuant to the Inspector General Act. The CDC must cooperate and make its staff, records, and facilities available.

[68 FR 57985, Oct. 7, 2003, as amended at 73 FR 75519, Dec. 11, 2008]

§ 120.857 Voluntary transfer and surrender of CDC certification.

A CDC may not transfer its certification or withdraw from the 504 program without SBA's consent. The CDC must provide a plan to SBA to transfer its portfolio. The portfolio may only be transferred with SBA's written consent. If a CDC desires to withdraw from the 504 program, it must forfeit its portfolio to SBA. SBA may conduct an audit of the transferring or withdrawing CDC.

[61 FR 3235, Jan. 31, 1996. Redesignated at 68 FR 57987, Oct. 7, 2003]

PROJECT ECONOMIC DEVELOPMENT GOALS

§ 120.860 Required objectives.

A Project must achieve at least one of the economic development objectives set forth in § 120.861 or § 120.862.

§ 120.861 Job creation or retention.

A Project must create or retain one Job Opportunity per an amount of 504 loan funding that will be specified by SBA from time to time in a FEDERAL REGISTER notice. Such Job Opportunity average remains in effect until changed by subsequent FEDERAL REGISTER publication.

[68 FR 57987, Oct. 7, 2003]

§ 120.862 Other economic development objectives.

A Project that achieves any of the following community development or public policy goals is eligible if the CDC's overall portfolio of 504 loans, including the subject loan, meets or exceeds the CDC's required Job Opportunity average. Loan applications must indicate how the Project will meet the specified economic development objective.

(a) Community Development goals:

(1) Improving, diversifying or stabilizing the economy of the locality;

(2) Stimulating other business development;

(3) Bringing new income into the community;

(4) Assisting manufacturing firms (North American Industry Classification System (NAICS), Sectors 31 '' 33); or

(5) Assisting businesses in Labor Surplus Areas as defined by the Department of Labor.

(b) Public Policy goals:

(1) Revitalizing a business district of a community with a written revitalization or redevelopment plan;

(2) Expansion of exports;

(3) Expansion of small businesses owned and controlled by women as defined in section 29(a)(3) of the Act, 15 U.S.C. 656(a)(3);

(4) Expansion of small businesses owned and controlled by veterans (especially service-disabled veterans) as defined in section 3(q) of the Act, 15 U.S.C. 632(q);

(5) Expansion of minority enterprise development (see § 124.103(b) of this chapter for minority groups who qualify for this description);

(6) Aiding rural development;

(7) Increasing productivity and competitiveness (retooling, robotics, modernization, competition with imports);

(8) Modernizing or upgrading facilities to meet health, safety, and environmental requirements;

(9) Assisting businesses in or moving to areas affected by Federal budget reductions, including base closings, either because of the loss of Federal contracts or the reduction in revenues in the area due to a decreased Federal presence;

(10) Reduction of rates of unemployment in labor surplus areas, as such areas are determined by the Secretary of Labor;

(11) Reduction of energy consumption by at least 10 percent;

(12) Increased use of sustainable design, including designs that reduce the use of greenhouse gas emitting fossil fuels, or low-impact design to produce buildings that reduce the use of non-renewable resources and minimize environmental impact; or

(13) Plant, equipment and process upgrades of renewable energy sources such as the small-scale production of energy for individual buildings' or communities' consumption, commonly known as micropower, or renewable fuels producers including biodiesel and ethanol producers.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2118, Jan. 13, 1999; 68 FR 57987, Oct. 7, 2003; 76 FR 63547, Oct. 12, 2011; 87 FR 38909, June 30, 2022]

LEASING POLICIES SPECIFIC TO 504 LOANS

§ 120.870 Leasing Project Property.

(a) A Borrower may use the proceeds of a 504 loan to acquire, construct, or modify buildings and improvements, and/or to purchase and install machinery and equipment located on land leased to the Borrower by an unrelated lessor if:

(1) The remaining term of the lease, including options to renew, exercisable only by the lessee, equals or exceeds the term of the Debenture;

(2) The Borrower assigns its interest in the lease to the CDC with right of reassignment to SBA; and

(3) The 504 loan is secured by a recorded lien against the leasehold estate and other collateral as necessary.

(b) If the Project is for new construction, the Borrower may lease long term up to 20 percent of the Rentable Property in the Project to one or more tenants if the Borrower immediately occupies at least 60 percent of the Rentable Property, plans to occupy within three years some of the remaining space not immediately occupied and not leased long term, and plans to occupy all of the remaining space not leased long term within ten years.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2118, Jan. 13, 1999; 68 FR 57987, Oct. 7, 2003]

§ 120.871 Leasing part of Project Property to another business.

(a) The costs of interior finishing of space to be leased out to another business are not eligible Project costs.

(b) Third-party loan proceeds used to renovate the leased space do not count towards the 504 first mortgage requirement or the Borrower's contribution.

LOAN-MAKING POLICIES SPECIFIC TO 504 LOANS

§ 120.880 Basic eligibility requirements.

In addition to the eligibility requirements specified in subpart A, to be an eligible Borrower for a 504 loan, a small business must:

(a) Use the Project Property (except that an Eligible Passive Company may lease to an Operating Company); and

(b) Together with its Affiliates, meet one of the size standards set forth in §121.301(b) of this chapter.

[61 FR 3235, Jan. 31, 1996, as amended at 68 FR 57987, Oct. 7, 2003]

§ 120.881 Ineligible Projects for 504 loans.

In addition to the ineligible businesses and uses of proceeds specified in subpart A of this part, the following Projects are ineligible for 504 financing:

(a) Relocation of any of the operations of a small business which will cause a net reduction of one-third or more in the workforce of a relocating small business or a substantial increase in unemployment in any area of the country, unless the CDC can justify the loan because:

(1) The relocation is for key economic reasons and crucial to the continued existence, economic wellbeing, and/or competitiveness of the applicant; and

(2) The economic development benefits to the applicant and the receiving community outweigh the negative impact on the community from which the applicant is moving; and

(b) Projects in foreign countries (loans financing real or personal property located outside the United States or its possessions).

§ 120.882 Eligible Project costs for 504 loans.

Eligible Project costs which may be paid with the proceeds of 504 loans are:

(a) Costs directly attributable to the Project including expenditures incurred by the Borrower (with its own funds or from a loan) to acquire land used in the Project, or for any other expense directly attributable to the Project, prior to applying to SBA for the 504 loan;

(b) In Projects involving construction, a contingency reserve for cost overruns not to exceed 10 percent of construction cost;

(c) Professional fees directly attributable and essential to the Project, such as title insurance, opinion of title, architectural and engineering costs, appraisals, environmental studies, and legal fees related to zoning, permits, or platting; and

(d) Repayment of interim financing including points, fees and interest.

(e) If the project involves expansion of a small business concern, any amount of existing indebtedness that does not exceed 100 percent of the project cost of the expansion may be refinanced and added to the expansion cost if:

(1) Substantially all (85% or more) of the proceeds of the indebtedness were used to acquire land, including a building situated thereon, to construct a building thereon, or to purchase equipment. The assets acquired must be eligible for financing under the 504 loan program. If the acquisition, construction or purchase of the asset was originally financed through a commercial loan that would have satisfied the ''substantially all'' requirement and that was subsequently refinanced one or more times, with the current commercial loan being the most recent refinancing, the current commercial loan will be deemed to satisfy this paragraph (e)(1).

(2) The existing indebtedness is collateralized by fixed assets. The 504 eligible fixed assets collateralizing any debt to be refinanced or relating to the portion of debt being refinanced in the case of a partial refinance must also collateralize the 504 Loan unless SBA approves a waiver due to extraordinary circumstances. PCLP CDCs may not use their delegated authority to approve a loan requiring this waiver;

(3) The existing indebtedness was incurred for the benefit of the small business concern for which any new Project costs are incurred. Existing 7(a) and 504 loans may be refinanced under this section in accordance with SBA policies or procedures;

(4) The financing will be used only for refinancing existing indebtedness or costs relating to the project financed;

(5) The financing will provide a substantial benefit to the borrower when prepayment penalties, financing fees, and other financing costs are accounted for. For purposes of this paragraph, ''substantial benefit'' means that the portion of the new installment amount attributable to the debt being refinanced must be at least 10 percent less than the existing installment amount(s). Prepayment penalties, financing fees, and other financing costs must also be added to the amount being refinanced in calculating the percentage reduction in the new installment payment. Exceptions to the 10% reduction requirement may be approved by the D/FA or designee for good cause. PCLP CDCs may not use their delegated authority to approve a loan requiring this exception;

(6) The borrower has been current on all payments due on the existing debt for not less than 1 year preceding the date of refinancing. For purposes of this section, ''date of refinancing'' refers to the date the 504 loan is approved by SBA. Any unremedied delinquency after approval must be reported to SBA as an adverse change;

(7) The financing under section 504 will provide better terms or rate of interest than the existing indebtedness on the date of refinancing. For purposes of this paragraph, ''better terms or rate of interest'' may include longer maturity (but always commensurate with the assets' useful life), a lower interest rate committed on the Third Party Lender Loan or projected on the 504 loan, improved collateral conditions, or less restrictive loan covenants.

(8) The authority to approve the refinancing of same institution debt must

be approved by SBA and is not delegated to the PCLP CDCs. For the purposes of this paragraph, ''same institution debt'' means any debt of the CDC or the Third Party Lender financing the new project, or of affiliates of either.

(f) For the purposes of paragraph (e), the phrase ''project involves expansion of a small business concern'' includes any project that involves the acquisition, construction or improvement of land, building or equipment for use by the small business concern.

(g) SBA may approve a Refinancing Project of a qualified debt subject to the following conditions and requirements:

(1) The Refinancing Project does not involve the expansion of a small business;

(2) The applicant for the refinancing available under this paragraph (g) has been in operation for all of the 2 year period ending on the date of application;

(3) A loan that is subject to a guarantee by a Federal agency or department may be refinanced under the following conditions and requirements:

(i) An existing 504 loan may be refinanced if both the Third Party Loan and the 504 Loan are being refinanced or the Third Party Loan has been paid in full. If the 504 Loan being refinanced received approval through another CDC, the CDC working on the current refinancing must provide advance notice to the other CDC in writing (by email or letter).

(ii) An existing 7(a) loan may be refinanced if the CDC notifies the 7(a) lender in advance in writing (by email or letter).

(iii) The refinancing will provide a substantial benefit to the borrower. For purposes of this paragraph (g)(3)(iii), ''substantial benefit'' means that the portion of the new installment amount attributable to the debt being refinanced must be at least 10 percent less than the existing installment amount(s). Prepayment penalties (including subsidy recoupment fees), financing fees, and other financing costs must be added to the amount being refinanced in calculating the percentage reduction in the new installment payment, but the portion of the new installment amount attributable to Eligible Business Expenses (as described in paragraph (g)(6)(ii) of this section) is not included in this calculation. Exceptions to the 10 percent reduction requirement may be approved by the Director, Office of Financial Assistance (D/FA) or designee for good cause. PCLP CDCs may not use their delegated authority to approve a loan requiring the exception in this paragraph (g)(3)(iii).

(4) In addition to the annual guarantee fee assessed under §120.971(d)(2), Borrower must pay SBA a supplemental annual guarantee fee to cover the additional cost attributable to the refinancing in an amount established by SBA each fiscal year.

(5) The funding for the Refinancing Project must come from three sources based on the current fair market value of the fixed assets serving as collateral for the Refinancing Project, including a Third Party Loan that is at least as much as the 504 loan, not less than 10% from the Borrower (excluding administrative costs), and not more than 40% from the 504 loan. If the Refinancing Project involves a limited or single purpose building or structure, the Borrower must contribute not less than 15% (excluding administrative costs), unless SBA determines, in its discretion, and publishes a notice in the FEDERAL REGISTER, that due to an economic recession, as determined by the National Bureau of Economic Research or its equivalent, Borrowers may contribute not less than 10% for Refinancing Projects involving a limited or single purpose property during the recession. The lower required contribution by the Borrower will be in effect until the first day of the calendar quarter following the end of the economic recession as determined by the National Bureau of Economic Research or its equivalent. SBA will publish a notice in the FEDERAL REGISTER announcing the date on which the requirement of the lower Borrower contribution ended. In addition to a cash contribution, the Borrower's contribution may be satisfied as set forth in §120.910 or by the equity in any other fixed assets

that are acceptable to SBA as collateral for the Refinancing Project, provided that there is an independent appraisal of the fair market value of the asset;

(6)(i) The portion of the Refinancing Project provided by the 504 loan and the Third Party Loan may be no more than 90% of the fair market value of the fixed assets that will serve as collateral, except that if the Borrower's application includes a request to finance the Eligible Business Expenses described in paragraph (g)(6)(ii) of this section, the portion of the Refinancing Project provided by the 504 loan and the Third Party Loan may be no more than 85% of the fair market value of the fixed assets that will serve as collateral and the Borrower may receive no more than 20% of the fair market value of the Eligible Fixed Asset(s) securing the Qualified Debt for Eligible Business Expenses;

(ii) The Borrower's application may include a request to finance eligible business expenses as part of the Refinancing Project if the amount of cash funds that will be provided for the Refinancing Project exceeds the amount to be paid to the lender of the Qualified Debt. The Borrower's application must include a specific description of the business expenses for which the financing is requested and an itemization of the amount of each expense. For the purposes of this paragraph (g), ''Eligible Business Expenses'' are limited to the operating expenses of the business that were incurred but not paid prior to the date of application or that will become due for payment within 18 months after the date of application. These expenses may include salaries, rent, utilities, inventory, and other expenses of the business that are not capital expenditures. Debt is not included as an Eligible Business Expense, except debt that was incurred with a credit card or a business line of credit may be included if the credit card or business line of credit is issued in the name of the small business and the Applicant certifies that the debt being refinanced was incurred exclusively for business related purposes. Loan proceeds must not be used to refinance any personal expenses. Both the CDC and the Borrower must certify in the application that the funds will be used to cover Eligible Business Expenses. Borrower must, upon request, substantiate the use of the funds provided for business expenses through, for example, bank statements, invoices marked ''paid,'' cleared checks, or any other documents that demonstrate that a business obligation was satisfied with the funds provided.

(7) If the qualified debt is not fully satisfied by the funding provided by the Refinancing Project, the lender of the qualified debt must take one of the following actions, or some combination thereof, to address the deficiency:

(i) Forgiveness of all or part of the deficiency;

(ii) Acceptance of payment by the Borrower, or

(iii) Acceptance of a Note executed by the Borrower for the balance, or any portion of the balance. Such Note must be subordinate to the 504 loan if the Note and the 504 loan are secured by any of the same collateral. The Note is subject to any other restrictions that SBA may establish to protect its creditor position, including standby requirements;

(8) The Third Party Lender must have a first lien position, and the 504 loan must have a second lien position, on all Eligible Fixed Assets securing the Refinancing Project. Any other lien must be junior in priority to these lien positions. For other fixed assets serving as collateral for the Refinancing Project, the lien positions of the Third Party Lender and the 504 loan may be junior to any existing liens acceptable to SBA;

(9) Eligible Project costs which may be paid with the proceeds of the 504 loan are the amount used to refinance the qualified debt and other costs under §120.882(c) and (d) and eligible administrative costs under §120.883;

(10) A CDC must limit the amount of its loans under this paragraph (g) so that, during any Federal fiscal year, the amount of the new loans approved under this paragraph (g) does not exceed 50% of the total dollar amount of the CDC's 504 loans approved (including the loans approved under this paragraph (g)) during the previous fiscal year. This limitation may be waived upon application by the CDC and upon

a determination by SBA that the 504 loan is needed for good cause.

(11) PCLP CDCs may not approve the refinancing of same institution debt under their delegated authority and must submit the application to SBA for approval.

(12) The 504 loans approved under this paragraph (g) must be disbursed within 9 months after loan approval. The Director, Office of Financial Assistance, or his or her designee, may approve a request for extension of the disbursement period for an additional 6 months for good cause.

(13) The Third Party Loan may not be sold on the secondary market as a part of a pool guaranteed under subpart J of this part, or any successor to this program, when the debt being refinanced is same institution debt;

(14) The Third Party Lender must certify that it would not refinance the qualified debt except for the assistance provided under this paragraph (g);

(15) Notwithstanding §120.860, a debt may be refinanced under this paragraph (g) if it does not meet the job creation or other economic development objectives set forth in §120.861 or §120.862. In such case, the 504 loan may not exceed the product obtained by multiplying the number of employees of the Borrower by $90,000. The number of employees of the Borrower is equal to the sum of:

(i) The number of full-time employees of the Borrower on the date of the application; and

(ii) The product obtained by multiplying:

(A) The number of part-time employees of the Borrower on the date of the application; by

(B) The quotient obtained by dividing the average number of hours each part-time employee of the Borrower works each week by 40.

Example 1 to paragraph (g)(15): 30 full-time employees and 35 part-time employees working 20 hours per week is calculated as follows: $30 + (35 \times (20/40)) = 47.5$. The maximum amount of the 504 loan would be 47.5 multiplied by $90,000, or $4,275,000.

(16) For the purposes of this paragraph (g), the terms below are defined as follows:

Date of application refers to the date the 504 loan application is received by SBA.

Eligible Fixed Assets are one or more long-term fixed assets, such as land, buildings, machinery, and equipment, acquired, constructed or improved by a small business for use in its business operations.

Fair market value refers to the current appraised value of an asset that is established by an independent appraiser in accordance with the standards established by SBA in its SOPs.

Qualified debt is a commercial loan:

(A) That was incurred not less than 6 months before the date of the application for refinancing available under this paragraph (g).

(B) Substantially all (75% or more) of which was for an Eligible Fixed Asset. If the Eligible Fixed Asset was originally financed through a commercial loan that would have satisfied the ''substantially all'' standard (the ''original loan'') and that was subsequently refinanced one or more times, with the current commercial loan being the most recent refinancing, the current commercial loan will be deemed to satisfy this paragraph (B). If the original loan was for the construction of a new building, or the acquisition, renovation, or reconstruction of an existing building, and such loan would not have satisfied the leasing policies set forth in §§120.131 and 120.870(b), the current commercial loan will be deemed to satisfy these policies, provided that Borrower demonstrates compliance with §120.131(b) for existing buildings as of the date of application.

(C) That was for the benefit of the small business concern;

(D) That is collateralized by Eligible Fixed Assets; and

(E) That is not a Third Party Loan that is part of an existing 504 Project, except as allowed under paragraph (g)(3) of this section.

Refinancing Project means the fair market value of the Eligible Fixed Asset(s) securing the qualified debt and any other fixed assets acceptable to SBA, except that if the Refinancing Project includes the financing of Eligible Business Expenses, SBA will not accept as collateral any fixed assets

other than the Eligible Fixed Asset(s) securing the Qualified Debt.

Same institution debt means any debt of the CDC or the Third Party Lender, or an affiliate of either, that is providing funds for the refinancing.

[61 FR 3235, Jan. 31, 1996, as amended at 68 FR 57987, Oct. 7, 2003; 74 FR 29591, June 23, 2009; 76 FR 9218, Feb. 17, 2011; 76 FR 63155, Oct. 12, 2011; 79 FR 15650, Mar. 21, 2014; 81 FR 33125, May 25, 2016; 83 FR 19920, May 7, 2018; 86 FR 40779, July 29, 2021; 88 FR 70585, Oct. 12, 2023]

§ 120.883 Eligible administrative costs for 504 loans.

The following administrative costs are not part of Project costs, but may be paid with the proceeds of the 504 loan and the Debenture (see § 120.971):

(a) SBA guarantee fee;

(b) Funding fee (to cover the cost of a public issuance of securities and the Trustee);

(c) CDC processing fee;

(d) Borrower's out-of-pocket costs associated with 504 loan and Debenture closing other than legal fees (for example, certifications and the copying costs associated with them, overnight delivery, postage, and messenger services) but not to include fees and costs described in § 120.882;

(e) CDC Closing Fee (see § 120.971(a)(2)) up to a maximum of $10,000; and

(f) Underwriters' fee.

[64 FR 2118, Jan. 13, 1999, as amended at 68 FR 57987, Oct. 7, 2003; 88 FR 70586, Oct. 12, 2023]

§ 120.884 Ineligible costs for 504 loans.

Costs not directly attributable and necessary for the Project may not be paid with proceeds of the 504 loan. These include, but are not limited to, the following:

(a) Debt refinancing (other than interim financing), except as provided in § 120.882(e) and (g).

(b) A CDC may not use 504 loan proceeds to pay any creditor in a position to sustain a loss causing a shift to SBA of all or part of a potential loss from an existing debt.

(c) Third-Party Loan fees (commitment, broker, finders, origination, processing fees of permanent financing).

(d) Ancillary business expenses, such as:

(1) Working capital;

(2) Counseling or management services fees;

(3) Incorporation/organization costs;

(4) Franchise fees; and

(5) Advertising.

(e) Fixed-asset Project components, such as:

(1) Short-term equipment, furniture, and furnishings (unless essential to and a minor portion of the Project);

(2) Automobiles, trucks, and airplanes; and

(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).

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2118, Jan. 13, 1999; 74 FR 29591, June 23, 2009; 76 FR 9219, Feb. 17, 2011; 82 FR 39504, Aug. 21, 2017]

INTERIM FINANCING

§ 120.890 Source of interim financing.

A Project may use interim financing for all Project costs except the Borrower's contribution. Any source (including a CDC) may supply interim financing provided:

(a) The financing is not derived from any SBA program, directly or indirectly;

(b) The terms and conditions of the financing are acceptable to SBA;

(c) The source is not the Borrower or an Associate of the Borrower; and

(d) The source has the experience and qualifications to monitor properly all Project construction and progress payments. (If the source lacks such experience or qualifications, SBA may require the interim loan to be managed by a third party such as a bank or professional construction manager.)

§ 120.891 Certifications of disbursement and completion.

Before the Debenture is issued, the interim lender must certify the amount disbursed. The CDC must certify that the Project was completed in accordance with the final plans and specifications (except as provided in § 120.961).

§ 120.892 Certifications of no adverse change.

Following completion of the Project, the following certifications must be made before the 504 loan closing:

(a) The interim lender must certify to the CDC that it has no knowledge of any unremedied substantial adverse change in the condition of the small business since the application to the interim lender;

(b) The Borrower (or Operating Company) must certify to the CDC that there has been no unremedied substantial adverse change in its financial condition or its ability to repay the 504 loan since the date of application, and must furnish interim financial statements, current within 120 days of closing; and

(c) The CDC must issue an opinion to the best of its knowledge that there has been no unremedied substantial adverse change in the Borrower's (or Operating Company's) ability to repay the 504 loan since its submission of the loan application to SBA.

[61 FR 3235, Jan. 31, 1996, as amended at 68 FR 57987, Oct. 7, 2003]

PERMANENT FINANCING

§ 120.900 Sources of permanent financing.

Permanent financing for each Project must come from three sources: the Borrower's contribution, Third-Party Loans, and the 504 loan. Typically, the Borrower contributes 10 percent of the permanent financing, Third-Party Loans 50 percent and the 504 loan 40 percent.

THE BORROWER'S CONTRIBUTION

§ 120.910 Borrower contributions.

(a) The Borrower must contribute to the Project cash (or property acceptable to SBA obtained with the cash) or land (that is part of the Project Property), in an amount equal to the following percentage of the Project cost, excluding administrative costs:

(1) At least 15 percent, if the Borrower (or Operating Company if the Borrower is an Eligible Passive Company) has operated for two years or less;

(2) At least 15 percent, if the Project involves the acquisition, construction, conversion, or expansion of a limited or single purpose building or structure;

(3) At least 20 percent, if the Project involves conditions described in paragraphs (a)(1) and (2) of this section; or

(4) At least 10 percent, in all other circumstances.

(b) The source of the contribution may be a CDC or any other source except an SBA business loan program (see § 120.913 for SBIC exception).

[64 FR 2118, Jan. 13, 1999]

§ 120.911 Land contributions.

The Borrower's contribution may be land (including buildings, structures and other site improvements which will be part of the Project Property) previously acquired by the Borrower.

[68 FR 57987, Oct. 7, 2003]

§ 120.912 Borrowed contributions.

The Borrower may borrow its cash contribution from the CDC or a third party. If any of the contribution is borrowed, the interest rate must be reasonable. If the loan is secured by any of the Project assets, the loan must be subordinate to the liens securing the 504 Loan, and the loan may not be repaid at a faster rate than the 504 Loan unless SBA gives prior written approval. A third party lender may not receive voting rights, stock options, or any other actual or potential voting interest in the small business.

§ 120.913 Limitations on any contributions by a Licensee.

Subject to part 107 of this chapter, a Licensee may provide financing for all or part of the Borrower's contribution to the Project. SBA will consider Licensee funds to be derived from federal sources if the Licensee has Leverage (as defined in § 107.50 of this chapter). If the Licensee does not have Leverage, SBA will consider the investment to be from private funds. Licensee financing must be subordinated to the 504 loan and must not be repaid at a faster rate than the Debenture. (Refer to § 120.930(a) for additional limitations.)

[68 FR 57987, Oct. 7, 2003]

THIRD PARTY LOANS

§ 120.920 Required participation by the Third Party Lender.

(a) *Amount of Third Party Loans.* A Project financing must include one or more Third Party Loans totaling at least as much as the 504 loan. However, the Third Party Loans must total at least 50 percent of the total cost of the Project if:

(1) The Borrower (or Operating Company, if the Borrower is an Eligible Passive Company) has operated for two years or less, or

(2) The Project is for the acquisition, construction, conversion or expansion of a limited or single purpose asset.

(b) *Third party loan collateral.* The 504 loan is usually collateralized by a second lien on Project Property. The Third Party Lender may obtain additional collateral or other security for the Third Party Loan (''Additional Collateral'') only if in the event of liquidation and unless otherwise approved in writing by SBA:

(1) The Third Party Lender liquidates or otherwise exhausts all reasonable avenues of collection with respect to the Additional Collateral no later than the disposition of the Project Property, and

(2) The Third Party Lender applies any proceeds received as a result of the Additional Collateral to the balance outstanding on the Third Party Loan prior to the application of proceeds from the disposition of the Project Property to the Third Party Loan.

[64 FR 2118, Jan. 13, 1999, as amended at 79 FR 15650, Mar. 21, 2014]

§ 120.921 Terms of Third Party loans.

(a) *Maturity.* A Third Party Loan must have a term of at least 7 years when the 504 loan is for a term of 10 years and 10 years when the 504 loan is for 20 years. If there is more than one Third Party Loan, an overall loan maturity must be calculated, taking into account the maturities and amounts of each loan.

(b) *Interest rates.* Interest rates must be reasonable. SBA must establish and publish in the FEDERAL REGISTER a maximum interest rate for any Third Party Loan from commercial financial institutions. The rate shall remain in effect until changed.

(c) *Other terms.* The Third Party Loan must not have any early call feature or contain any demand provisions unless the loan is in default. By participating, a Third Party Loan lender waives, as to the CDC/SBA financing, any provision in its deed of trust, or mortgage, or other documents prohibiting further encumbrances or subordinate debt. In the event of default, the Third Party Lender must give the CDC and SBA written notice of default within 30 days of the event of default and at least 60 days prior to foreclosure.

(d) *Future advances.* The Third Party Loan must not be open-ended. After completion of the Project, the Third Party Lender may not make future advances under the Third Party Loan except expenditures to collect amounts due the Third Party Loan notes, maintain collateral and protect the Third Party Lender's lien position on the Third Party Loan.

(e) *Subordination.* The Third Party Lender's lien will be subordinate to the CDC/SBA lien regarding any prepayment penalties, late fees, other default charges, and escalated interest after default due under the Third Party Loan.

(f) *Escalation upon default.* A Third-Party Lender may not escalate the rate of interest upon default to a rate greater than the maximum rate set forth in paragraph (b) of this section. Regarding any Project that SBA approved after September 30, 1996, SBA will only pay the interest rate on the note in effect before the date of the Borrower's default.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2118, Jan. 13, 1999; 88 FR 21900, Apr. 12, 2023]

§ 120.922 Pre-existing debt on the Project Property.

In addition to its share of Project cost, a Third-Party Loan may include consolidation of existing debt on the Project Property. The consolidation must not improve the lien position of the Lender on the pre-existing debt, unless the debt is a previous Third-Party Loan.

§ 120.923 Policies on subordination.

(a) Financing provided by the seller of Project Property must be subordinate to the 504 loan. SBA may waive the subordination requirement if the property is classified as ''other real estate owned'' by a national bank or other Federally regulated lender and SBA considers the property to be of sufficient value to support the 504 loan.

(b) A Borrower is eligible for a 504 loan even if part of the Project financing is tax-exempt. SBA's lien position must not be subordinate to loans made from the proceeds of the tax-exempt obligation.

(c) The Borrower must not prepay any Project financing subordinate to the 504 loan without SBA's prior written consent.

[61 FR 3235, Jan. 31, 1996, as amended at 68 FR 57988, Oct. 7, 2003]

§ 120.925 [Reserved]

§ 120.926 Referral fee.

The CDC can receive a reasonable referral fee from the Third Party Lender if the CDC secured the Third Party Lender for the Borrower under a written contract between the CDC and the Third Party Lender. Both the CDC and the Third Party Lender are prohibited from charging this fee to the Borrower. If a CDC charges a referral fee, the CDC will be construed as a Referral Agent under part 103 of this chapter.

[68 FR 57988, Oct. 7, 2003]

504 LOANS AND DEBENTURES

§ 120.930 Amount.

(a) Generally, a 504 loan may not exceed 40 percent of total Project cost plus 100 percent of eligible administrative costs. For good cause shown, SBA may authorize an increase in the percentage of Project costs covered up to 50 percent. No more than 50 percent of eligible Project costs can be from Federal sources, whether received directly or indirectly through an intermediary.

(b) A 504 loan must not be less than $25,000.

(c) Upon completion of the Project, the Debenture amount will be reduced by the amount that the unused contingency reserve exceeds 2 percent of the anticipated Debenture.

[61 FR 3235, Jan. 31, 1996, as amended at 68 FR 57988, Oct. 7, 2003]

§ 120.931 504 Lending limits.

504 loan amounts shall be limited to:

(a) An outstanding balance of $5,000,000 for each Borrower and its affiliates if the loan proceeds will not be directed towards a Project in paragraph (c) of this section,

(b) An outstanding balance of $5,000,000 for each Borrower and its affiliates if one or more of the public policy goals enumerated in § 120.862(b) applies to the Project; and

(c) $5,500,000 for each Project for:

(1) Small Manufacturers (NAICS Codes 31–33) with all production facilities located in the United States;

(2) Reduction of the Borrower's, or if the Borrower is an Eligible Passive Company, the Operating Company's energy consumption by at least 10%; or

(3) Plant, equipment and process upgrades of renewable energy sources such as the small-scale production of energy for individual buildings' or communities' consumption, commonly known as micropower, or renewable fuel producers including biodiesel and ethanol producers.

[76 FR 63547, Oct. 12, 2011]

§ 120.932 Interest rate.

The interest rate of the 504 Loan and the Debenture which funds it is set by the SBA and approved by the Secretary of the Treasury.

§ 120.933 Maturity.

From time to time, SBA will publish in the FEDERAL REGISTER the available maturities for a 504 loan and the Debenture that funds it. Such available maturities remain in effect until changed by subsequent FEDERAL REGISTER publication.

[68 FR 57988, Oct. 7, 2003]

§ 120.934 Collateral.

The CDC usually takes a second lien position on the Project Property to secure the 504 loan. Sometimes additional collateral is required. (In rare circumstances, SBA may permit other

collateral substituted for Project Property.) All collateral must be insured against such hazards and risks as SBA may require, with provisions for notice to SBA and the CDC in the event of impending lapse of coverage.

[68 FR 57988, Oct. 7, 2003]

§ 120.935 Deposit from the Borrower that a CDC may require.

At the time of application for a 504 loan, the CDC may require a deposit from the Borrower of $2,500 or 1 percent of the Net Debenture Proceeds, whichever is less. The deposit may be applied to the loan processing fee if the application is accepted, but must be refunded if the application is denied. If the small business withdraws its application, the CDC may deduct from the deposit reasonable costs incurred in packaging and processing the application.

§ 120.937 Assumption.

A 504 loan may be assumed with SBA's prior written approval.

§ 120.938 Default.

(a) Upon occurrence of an event of default specified in the 504 note which requires automatic acceleration, the note becomes due and payable. Upon occurrence of an event of default which does not require automatic acceleration, SBA may forbear acceleration of the note and attempt to resolve the default. If the default is not cured subsequently, the note shall be accelerated. In either case, upon acceleration of the note, the Debenture which funded it is also due immediately, and SBA must honor its guarantee of the Debenture. SBA shall not reimburse the investor for any premium paid.

(b) If a CDC defaults on a Debenture, SBA generally shall limit its recovery to the payments made by the small business to the CDC on the loan made from the Debenture proceeds, and the collateral securing the defaulted loan. However, SBA will look to the CDC for the entire amount of the Debenture in the case of fraud, negligence, or misrepresentation by the CDC.

§ 120.939 Borrower prohibition.

Neither a Borrower nor an Associate of the Borrower may purchase an interest in a Debenture Pool in which the Debenture that funded its 504 loan has been placed.

§ 120.940 Prepayment of the 504 loan or Debenture.

The Borrower may prepay its 504 loan, if it pays the entire principal balance, unpaid interest, any unpaid fees, and any prepayment premium established in the note. If the Borrower prepays, the CDC must prepay the corresponding Debenture with interest and premium. If one of the Debentures in a Debenture Pool is prepaid, the Investors in that Debenture Pool must be paid pro rata, and SBA's guarantee on the entire Debenture Pool must be proportionately reduced. If the entire Debenture Pool is paid off, SBA may call all Certificates backed by the Pool for redemption.

§ 120.941 Certificates.

(a) The face value of a Certificate must be at least $25,000. Certificates are issued in registered form and transferred only by entry on the central registry maintained by the Trustee. SBA guarantees the timely payment of principal and interest on the Certificates.

(b) Before the sale of a Certificate, the seller, or the broker or dealer acting as the seller's agent, must disclose to the purchaser the terms, conditions, yield, and premium and other characteristics not guaranteed by SBA.

Debenture Sales and Service Agents

§ 120.950 SBA and CDC must appoint agents.

SBA and the CDC must appoint the following agents to facilitate the sale and service of the Certificates and disbursement of the proceeds.

§ 120.951 Selling agent.

The CDC, with SBA approval, shall appoint a Selling Agent to select underwriters, negotiate the terms and conditions of Debenture offerings with the underwriters, and direct and coordinate Debenture sales.

§ 120.952 Fiscal agent.

SBA shall appoint a Fiscal Agent to assess the financial markets, minimize the cost of sales, arrange for the production of the Offering Circular, Debenture Certificates, and other required documents, and monitor the performance of the Trustee and the underwriters.

§ 120.953 Trustee.

SBA must appoint a Trustee to:

(a) Issue Certificates;

(b) Transfer the Certificates upon resale in the secondary market;

(c) Maintain physical possession of the Debentures for SBA and the Certificate holders;

(d) Establish and maintain a central registry of:

(1) Debenture Pools, including the CDC obligors and the interest rate payable on the Debentures in each Pool;

(2) Certificates issued or transferred, including the Debenture Pool backing the Certificate, name and address of the purchaser, price paid, the interest rate on the Certificate, and fees or charges assessed by the transferror; and

(3) Brokers and dealers in Certificates, and the commissions, fees or discounts granted to the brokers and dealers;

(e) Receive semi-annual Debenture payments and prepayments;

(f) Make regularly scheduled and prepayment payments to Investors; and

(g) Assure before any resale of a Debenture or Certificate is recorded in the registry that the seller has provided the purchaser a written disclosure statement approved by SBA.

§ 120.954 Central Servicing Agent.

(a) SBA has entered into a Master Servicing Agreement designating a Central Servicing Agent (CSA) to support the orderly flow of funds among Borrowers, CDCs, and SBA. The CDC and Borrower must enter into an individual Servicing Agent Agreement with the CSA for each 504 loan, constituting acceptance by the CDC and the Borrower of the terms of the Master Servicing Agreement.

(b) The CSA has established a master reserve account. All funds related to the 504 loans and Debentures flow through the master reserve account under the provisions of the Master Servicing Agreement. The master reserve account will be funded by a guarantee fee, a funding fee to be published from time to time in the FEDERAL REGISTER, and by principal and interest payments of 504 loans. At SBA's direction, the CSA may use funds in the master reserve account to defray program expenses. In the event a Borrower defaults and its 504 note is accelerated, SBA shall add funds under its guarantee to ensure the full and timely payment of the Debenture which funded the 504 loan. At SBA's direction, the CSA must pay to the CDC servicing each loan the interest accruing in the master reserve account on loan payments made by each Borrower between the date of receipt of each monthly payment and the date of disbursement to investors. The CSA may disburse such interest periodically to CDCs on a pro rata basis. SBA may use interest accruals in the master reserve account earned prior to October 1991 (not previously distributed to the CDCs) for the costs of 504 program administration.

§ 120.955 Agent bonds and records.

(a) Each agent (in §§ 120.951 through 120.954) must provide a fidelity bond or insurance in such amount as necessary to fully protect the interest of the government.

(b) SBA must have access at the agent's place of business to all books, records and other documents relating to Debenture activities.

§ 120.956 Suspension or revocation of brokers and dealers.

The appropriate Office of Capital Access official in accordance with Delegations of Authority may suspend or revoke the privilege of any broker or dealer to participate in the sale or marketing of Debentures and Certificates for actions or conduct bearing negatively on the broker's fitness to participate in the securities market. SBA must give the broker or dealer written notice, stating the reasons, at least 10 business days prior to the effective date of the suspension or revocation. A broker or dealer may appeal the suspension or revocation made

under this section pursuant to the procedures set forth in part 134 of this chapter. The action of this official will remain in effect pending resolution of the appeal.

[73 FR 75519, Dec. 11, 2008]

CLOSINGS

§ 120.960 Responsibility for closing.

(a) The CDC is responsible for the 504 loan closing.

(b) The Debenture closing is the joint responsibility of the CDC and SBA.

(c) SBA may, within its sole discretion, decline to close the Debenture; direct the transfer of the 504 loan to another CDC; or cancel its guarantee of the Debenture, prior to sale, if any of the following occur:

(1) The CDC has failed to comply materially with any Loan Program Requirement as defined in § 120.10;

(2) The CDC has failed to make or close the 504 loan or prepare the Debenture closing in a prudent or commercially reasonable manner;

(3) The CDC's improper action or inaction places SBA at risk;

(4) The CDC has failed to use required SBA forms or electronic versions of those forms;

(5) The CDC, Third Party Lender or Borrower has failed to timely disclose to SBA a material fact regarding the Project or 504 loan;

(6) The CDC, Third Party Lender or Borrower has misrepresented a material fact to SBA regarding the Project or 504 loan; or

(7) SBA determines that there has been an unremedied material adverse change, such as deterioration in the Borrower's financial condition, since the 504 loan was approved, or that approving the closing of the Debenture will put SBA at unacceptable financial risk.

[68 FR 57988, Oct. 7, 2003, as amended at 88 FR 21900, Apr. 12, 2023]

§ 120.961 Construction escrow accounts.

The CSA, title company, CDC attorney, or bank may hold Debenture proceeds in escrow to complete Project components such as landscaping and parking lots, and acquire machinery and equipment if the component or acquisition is a minor portion of the total Project and has been contracted for completion or delivery at a specified price and specific future date. The escrow agent must disburse funds upon approval by the CDC and the SBA, supported by invoices and payable jointly to the small business and the designated contractor.

SERVICING

§ 120.970 Servicing of 504 loans and Debentures.

(a) In servicing 504 loans, CDCs must comply with Loan Program Requirements and in accordance with prudent and commercially reasonable lending standards.

(b) The CDC is responsible for routine servicing including receipt and review of the Borrower's or Operating Company's financial statements on an annual or more frequent basis and monitoring the status of the Borrower and 504 loan collateral.

(c) The CDC is responsible for assuring that the Borrower makes all required insurance premium payments and has paid all taxes when due.

(d) The CDC is responsible for filing renewals and extensions of security interests on collateral for the 504 loan, as required.

(e) The CDC must timely respond to Borrower requests for loan modifications.

(f) For any 504 loan that is more than three months past due, the CDC must promptly request that SBA purchase the Debenture unless the 504 loan has an SBA-approved deferment or is in compliance with an SBA-approved plan to allow the Borrower to catch up on delinquent loan payments.

(g) The CDC must cooperate with SBA to cure defaults and initiate workouts.

(h) Additional servicing requirements are set forth in subpart E of this part.

[68 FR 57988, Oct. 7, 2003, as amended at 72 FR 18364, Apr. 12, 2007]

FEES

§ 120.971 Allowable fees paid by Borrower.

(a) *CDC fees.* The fees a CDC may charge the Borrower in connection

with a 504 loan and Debenture are limited to the following:

(1) *Processing fee.* The CDC may charge up to 1.5 percent of the net Debenture proceeds to process the financing. Two-thirds of this fee will be considered earned and may be collected by the CDC when the loan number is issued by SBA. The portion of the processing fee paid by the Borrower may be reimbursed from the Debenture proceeds;

(2) *Closing fee.* The CDC may charge a reasonable closing fee sufficient to reimburse it for the expenses of its in-house or outside legal counsel, and other miscellaneous closing costs (CDC Closing Fee). Some closing costs may be funded out of the Debenture proceeds (see §120.883 for limitations);

(3) *Servicing fee.* The CDC will charge a monthly servicing fee of at least 0.625 percent per annum and no more than 2 percent per annum on the unpaid balance of the loan as determined at five-year anniversary intervals. A servicing fee greater than 1.5 percent in a rural area and 1 percent everywhere else requires SBA's prior written approval, based on evidence of substantial need. The servicing fee may be paid only from loan payments received. The fees may be accrued without interest and collected from the CSA when the payments are made.

(4) *Late fees.* Loan payments received after the 15th of each month may be subject to a late payment fee of 5 percent of the late payment or $100, whichever is greater. These fees will be collected by the CSA on behalf of the CDC; and

(5) *Assumption fee.* Upon SBA's written approval, a CDC may charge an assumption fee not to exceed 1 percent of the outstanding principal balance of the loan being assumed.

(b) *CSA fees.* The CSA may charge an initiation fee on each loan and a monthly servicing fee under the terms of the Master Servicing Agreement.

(c) *Other agent fees.* Agent fees and charges necessary to market and service Debentures and Certificates may be assessed to the Borrower or the investor. The fees must be approved by SBA and published periodically in the FEDERAL REGISTER.

(d) *SBA fees.* (1) SBA charges a 0.5 percent guarantee fee on the Debenture.

(2) For loans approved by SBA after September 30, 1996, SBA charges a fee of not more than 0.9375 percent annually on the unpaid principal balance of the loan as determined at five-year anniversary intervals.

(e) *Miscellaneous fees.* A funding fee not to exceed 0.25 percent of the Debenture may be charged to cover costs incurred by the trustee, fiscal agent, transfer agent.

[61 FR 3235, Jan. 31, 1996, as amended at 64 FR 2119, Jan. 13, 1999; 68 FR 57988, Oct. 7, 2003; 88 FR 21900, Apr. 12, 2023]

§120.972 Third Party Lender participation fee and CDC fee.

(a) *Participation fee.* For loans approved by SBA after September 30, 1996, SBA must collect a one-time fee equal to 50 basis points on the Third Party Lender's participation in a Project when the Third Party Lender occupies a senior credit position to SBA in the Project.

(b) *CDC fee.* For loans approved by SBA after September 30, 1996, SBA must collect an annual fee from the CDC equal to 0.125 percent of the outstanding principal balance of the Debenture. The fee must be paid from the servicing fees collected by the CDC and cannot be paid from any additional fees imposed on the Borrower.

[68 FR 57988, Oct. 7, 2003]

AUTHORITY OF CDCS TO PERFORM LIQUIDATION AND DEBT COLLECTION LITIGATION

§120.975 CDC Liquidation of loans and debt collection litigation.

(a) *PCLP CDCs.* If a CDC is designated as a PCLP CDC under §120.845, the CDC must liquidate and handle debt collection litigation with respect to all PCLP Loans in its portfolio on behalf of SBA as required by §120.848(f), in accordance with subpart E of this part. With respect to all other 504 loans that a PCLP CDC makes, the PCLP CDC is an Authorized CDC Liquidator and must exercise its delegated authority to liquidate and handle debt-collection litigation in accordance with subpart E of this part for such loans, if the PCLP

CDC is notified by SBA that it meets either of the following requirements to be an Authorized CDC Liquidator, as determined by SBA:

(1) The PCLP CDC has one or more employees who have not less than two years of substantive, decision-making experience in administering the liquidation and workout of defaulted or problem loans secured in a manner substantially similar to loans funded with 504 loan program debentures, and who have completed a training program on loan liquidation developed by the Agency in conjunction with qualified CDCs that meet the requirements of this section; or

(2) The PCLP CDC has entered into a contract with a qualified third party for the performance of its liquidation responsibilities and obtains the approval of SBA with respect to the qualifications of the contractor and the terms and conditions of the contract.

(b) *All other CDCs.* A CDC that is not authorized under paragraph (a) of this section may apply to become an Authorized CDC Liquidator with authority to liquidate and handle debt collection litigation with respect to 504 loans on behalf of SBA, in accordance with subpart E of this part, if the CDC meets the following requirements:

(1) The CDC meets either of the following criteria:

(i) The CDC participated in the loan liquidation pilot program established by the Small Business Programs Improvement Act of 1996 prior to October 1, 2006; or

(ii) During the three fiscal years immediately prior to seeking such authority, the CDC made an average of not less than ten 504 loans per year; and

(2) The CDC meets either of the following requirements:

(i) The CDC has one or more employees who have not less than two years of substantive, decision-making experience in administering the liquidation and workout of defaulted or problem loans secured in a manner substantially similar to loans funded with 504 loan program debentures, and who have completed a training program on loan liquidation developed by the Agency in conjunction with qualified CDCs that meet the requirements of this section; or

(ii) The CDC has entered into a contract with a qualified third party for the performance of its liquidation responsibilities and obtains the approval of SBA with respect to the qualifications of the contractor and the terms and conditions of the contract.

(c) *CDC counsel.* To perform debt collection litigation under paragraphs (a) or (b) of this section, a CDC must also have either in-house counsel with adequate experience as approved by SBA or entered into a contract for the performance of debt collection litigation with an experienced attorney or law firm as approved by SBA.

(d) *Application for authority to liquidate and litigate.* To seek authority to perform liquidation and debt collection litigation under paragraphs (b) and (c) of this section, a CDC other than a PCLP CDC must submit a written application to SBA and include documentation demonstrating that the CDC meets the requirements of paragraph (b) and (c) of this section. If a CDC intends to use a contractor to perform liquidation, it must obtain approval from SBA of both the qualifications of the contractor and the terms and conditions in the contract covering the CDC's retention of the contractor. SBA will notify a CDC in writing when the CDC can begin to perform liquidation and/or debt collection litigation under this section.

[72 FR 18365, Apr. 12, 2007]

Enforceability of 501, 502 and 503 Loans and Other Laws

§ 120.990 501, 502 and 503 loans.

SBA has discontinued loan programs for 501, 502, and 503 loans. Outstanding loans remain under these programs, and Borrowers, CDCs, and SBA must comply with the terms and conditions of the corresponding notes and Debentures, and the regulations in this part in effect when the obligations were undertaken or last in effect, if applicable.

§ 120.991 Effect of other laws.

No State or local law may preclude or limit SBA's exercise of its rights with respect to notes, guarantees, Debentures and Debenture Pools, or of its

enforcement rights to foreclose on collateral.

Subpart I—Risk-Based Lender Oversight

SOURCE: 72 FR 25194, May 4, 2007, unless otherwise noted.

SUPERVISION

§ 120.1000 Risk-Based Lender Oversight.

(a) *Risk-Based Lender Oversight*. SBA monitors, supervises, examines, regulates, and enforces laws against SBA Supervised Lenders and the SBA operations of SBA Lenders and Intermediaries.

(b) *Scope*. Most rules and standards set forth in this subpart apply to SBA Lenders as well as Intermediaries; however, SBA has separate regulations for enforcement grounds and formal enforcement actions for Intermediaries at §§ 120.1425 and 120.1540.

[85 FR 14781, Mar. 16, 2020]

§ 120.1005 Bureau of PCLP Oversight.

SBA's Bureau of PCLP Oversight within OCRM, monitors the capitalization of PCLP CDC pilot participants' LLRFs and performs other related functions.

[73 FR 75519, Dec. 11, 2008]

§ 120.1010 SBA access to SBA Lender and Intermediary files.

An SBA Lender and Intermediary must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to review, inspect, and copy all records and documents, relating to SBA guaranteed loans or as requested for SBA oversight.

[73 FR 75519, Dec. 11, 2008, as amended at 85 FR 14781, Mar. 16, 2020]

§ 120.1015 Risk Rating System.

(a) *Risk Rating*. SBA may assign a Risk Rating to all SBA Lenders and Intermediaries on a periodic basis. Risk Ratings are based on certain risk-related portfolio performance factors as set forth in notices or SBA's SOPs and as published from time to time.

(b) *Rating categories*. Risk Ratings fall into one of two broad categories: Acceptable Risk Ratings or Less Than Acceptable Risk Ratings.

[73 FR 75519, Dec. 11, 2008, as amended at 85 FR 14781, Mar. 16, 2020]

§ 120.1025 Monitoring.

SBA may conduct monitoring of SBA Lenders and Intermediaries including, but not limited to, SBA Lenders' or Intermediaries' self-assessments.

[85 FR 14781, Mar. 16, 2020]

§ 120.1050 Reviews and examinations.

(a) *Reviews*. SBA may conduct reviews of the SBA loan operations of SBA Lenders. The review may include, but is not limited to, an evaluation of the following:

(1) Portfolio performance;

(2) SBA operations management;

(3) Credit administration; and

(4) Compliance with Loan Program Requirements.

(b) *Examinations*. SBA may conduct safety and soundness examinations of SBA Supervised Lenders, except SBA will not conduct safety and soundness examinations of Other Regulated SBLCs under §§ 120.1510 and 1511. The safety and soundness examination may include, but is not limited to, an evaluation of:

(1) Capital adequacy;

(2) Asset quality (including credit administration and allowance for loan losses);

(3) Management quality (including internal controls, loan portfolio management, and asset/liability management);

(4) Earnings;

(5) Liquidity; and

(6) Compliance with Loan Program Requirements.

(c) *Reviews/examinations of Intermediaries*. SBA may perform reviews or examinations of Intermediaries.

(d) *Other reviews or examinations*. SBA may perform other reviews/examinations as needed as determined by SBA in its discretion.

[73 FR 75519, Dec. 11, 2008, as amended at 82 FR 39504, Aug. 21, 2017; 85 FR 14781, Mar. 16, 2020]

§ 120.1051 Frequency of reviews and examinations.

SBA may conduct reviews and examinations of SBA Lenders and Intermediaries on a periodic basis. SBA may consider, but is not limited to, the following factors in determining frequency:

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

(b) SBA loan portfolio size;

(c) Previous review or examination findings;

(d) Responsiveness in correcting deficiencies noted in prior reviews or examinations; and

(e) Such other risk-related information as SBA, in its discretion, determines to be appropriate.

[73 FR 75519, Dec. 11, 2008, as amended at 82 FR 39504, Aug. 21, 2017; 85 FR 14781, Mar. 16, 2020]

§ 120.1055 Review and examination results.

(a) *Written Reports.* SBA will provide an SBA Lender and Intermediary a copy of SBA's written report prepared as a result of the SBA Lender or Intermediary review or examination (''Report''). SBA will provide the Report generally within 60 business days following SBA's conclusion of the review/examination unless SBA notifies the SBA Lender or Intermediary of a later date and the reason for the delay. The Report may contain findings, conclusions, corrective actions, and recommendations. Each director (or manager, in the absence of a Board of Directors) of the SBA Lender or Intermediary, in keeping with his or her responsibilities, must become fully informed regarding the contents of the Report.

(b) *Response to review and examination Reports.* SBA Lenders and Intermediaries must respond to Report findings, recommendations, and corrective actions, if any, in writing to SBA and, if requested, submit proposed corrective actions and/or a capital restoration plan. An SBA Lender or Intermediary must respond within 45 business days from the date the Report is received unless SBA notifies the SBA Lender or Intermediary in writing that the response, proposed corrective actions or capital restoration plan is to be filed within a different time period (either shortened or extended in SBA's discretion). The SBA Lender or Intermediary response must address each finding, recommendation, and corrective action. In proposing a corrective action or capital restoration plan, the SBA Lender or Intermediary must detail the steps it will take to correct the finding(s); the time within which each step will be taken; the timeframe for accomplishing the entire corrective action plan; and the person(s) or department at the SBA Lender or Intermediary charged with carrying out the corrective action or capital restoration plan, as applicable. In addition, SBA Lenders and Intermediaries must implement corrective actions within 90 calendar days from the date the Report or SBA's letter requiring corrective action is received, unless SBA provides written notice of another timeframe. For purposes of this paragraph (b), a Report will be deemed to have been received on the date it was emailed to the last known email address of the SBA Lender or Intermediary unless the SBA Lender or Intermediary can provide compelling evidence to the contrary.

(c) *SBA response.* SBA will provide written notice of whether the response and, if applicable, any corrective action or capital restoration plan, is approved, or whether SBA will seek additional information or require other action.

(d) *Failure to respond or to submit or implement an acceptable plan.* If an SBA Lender or Intermediary fails to respond in writing to SBA, respond timely to SBA, or provide a response acceptable to SBA within SBA's discretion, or respond to all findings and required corrective actions in a Report, then SBA may take enforcement action under this subpart. If an SBA Lender or Intermediary that is requested to submit a corrective action plan or capital restoration plan to SBA fails to do so in writing; fails to submit timely such plan to SBA; or fails to submit a plan acceptable to SBA within SBA's discretion, then SBA may take enforcement action under this subpart. If an SBA

Lender or Intermediary fails to implement in any material respect a corrective action or capital restoration plan within the required timeframe, then SBA may undertake enforcement action under this subpart.

[73 FR 75519, Dec. 11, 2008, as amended at 85 FR 14781, Mar. 16, 2020]

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

(a) *In general.* Reports and other SBA prepared review or examination related documents are the property of SBA and are loaned to an SBA Lender or Intermediary for its confidential use only. The Reports, Risk Ratings, and related Confidential Information are privileged and confidential as more fully explained in paragraph (b) of this section. The Report, Risk Rating, and Confidential Information must not be relied upon for any purpose other than SBA's Lender oversight and SBA's portfolio management purposes. An SBA Lender or Intermediary must not make any representations concerning the Report (including its findings, conclusions, and recommendations), the Risk Rating, or the Confidential Information. For purposes of this regulation, Report means the review or examination report and related documents. For purposes of this regulation, Confidential Information is defined in the SBA Lender information portal and by notice issued from time to time. Access to the Lender information portal may be obtained by contacting the OCRM.

(b) *Disclosure prohibition.* Each SBA Lender and Intermediary 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 and Intermediary may use the Report, Risk Rating, and Confidential Information for confidential use within its own immediate corporate organization. SBA Lender's and Intermediary's 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 or Intermediary'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 or Intermediaryto disclose the Report, Risk Rating, or Confidential Information to any person other than a permitted party, SBA Lender or Intermediary 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 or Intermediary 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 and Intermediary 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 and Intermediary 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.

[73 FR 75519, Dec. 11, 2008, as amended at 82 FR 39504, Aug. 21, 2017; 85 FR 14781, Mar. 16, 2020]

§ 120.1070 SBA Lender oversight fees.

Lenders are required to pay to SBA fees to cover costs of examinations and reviews and, if assessed by SBA, other Lender oversight activities.

(a) *Fee components:* The fees may cover the following:

(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) *Billing process.* 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. SBA will state in the bill the date by which payment is due SBA and the approved payment method(s). The payment due date will be no less than 30 calendar days from the bill date.

(d) *Delinquent payment and late-payment charges.* Payments that are not received by the due date specified in the bill shall be considered delinquent. SBA will charge interest, and other applicable charges and penalties, on delinquent payments, as authorized by 31 U.S.C. 3717. SBA may waive or abate the collection of interest, charges and/or penalties if circumstances warrant. 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.

[61 FR 3235, Jan. 31, 1996, as amended at 82 FR 39505, Aug. 21, 2017]

Enforcement Actions

§ 120.1300 Informal enforcement actions—7(a) Lenders.

(a) Upon a determination that the grounds in § 120.1400 exist, the D/OCRM may undertake, in his/her discretion,

one or more of the informal enforcement actions listed in this section and is not restricted from delegating as appropriate. SBA will consider the severity or frequency of the violation or action triggering the ground and the circumstances in determining whether and what type of informal action to take. Circumstances that may lead to SBA taking informal enforcement action rather than formal enforcement action include, for example, when problems are narrow in scope and are correctible and SBA is confident of a 7(a) Lender's Board of Directors (''Board'') and management commitment and ability to correct; where violations are less frequent or less severe but warrant enforcement; or while more fully assessing risk.

(b) Informal enforcement actions include, but are not limited to:

(1) *An SBA supervisory letter*. The letter may discuss serious or persistent supervisory concerns, as determined by SBA, and expected corrective action by the 7(a) Lender. Supervisory letters include, for example, Notices of Material Non-Compliance;

(2) *Mandatory training*. SBA may require a 7(a) Lender to complete training to address certain findings, weaknesses, and deficiencies;

(3) *A commitment letter or Board resolution*. SBA may require a 7(a) Lender to submit a commitment letter or Board resolution, satisfactory to SBA, signed by the 7(a) Lender's Board on behalf of the entity that may:

(i) Include specific written commitments to take corrective actions in response to the 7(a) Lender's acknowledged deficiencies;

(ii) Identify the person(s) responsible for taking the corrective action; and

(iii) Set forth the timeframe for taking the corrective action. The document may be drafted by SBA or the 7(a) Lender;

(4) *Agreements*. SBA may request that a 7(a) Lender enter into a written agreement with, and drafted by, SBA to address and correct identified weaknesses and/or limit or mitigate risk. The agreement may provide, for example, that a 7(a) Lender take certain actions or refrain from certain actions; and

(5) *Other informal enforcement actions*. Others as SBA determines appropriate on a case by case basis.

(c) A 7(a) Lender may appeal informal enforcement actions to the appropriate Federal district court or SBA's Office of Hearings and Appeals (OHA) within 20 calendar days of the date of the decision, and in the event of an OHA appeal, OHA will issue its decision in accordance with part 134 of this title. The enforcement action will remain in effect pending resolution of the appeal, if any. SBA is not precluded from taking one or more formal enforcement actions under § 120.1500, or as otherwise authorized by law, while an appeal of an informal enforcement action is pending.

[85 FR 14781, Mar. 16, 2020]

§ 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 January 1, 2018, 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. The CDC's consent does not preclude the CDC from contesting whether or not SBA has established the grounds for seeking the remedy of a receivership. A CDC's consent

to receivership as a remedy does not require SBA to seek appointment of a receiver in any particular SBA enforcement action.

(2) *Additional agreements by SBA Supervised Lenders (except Other Regulated SBLCs).* By making SBA 7(a) guaranteed loans after January 1, 2018, 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. The SBA Supervised Lender's consent does not preclude such Lender from contesting whether or not SBA has established the grounds for seeking the remedy of a receivership. The SBA Supervised Lender's consent to receivership as a remedy does not require SBA to seek appointment of a receiver in any particular SBA enforcement action.

(b) *Scope.* SBA may undertake one or more of the enforcement actions listed in §§ 120.1300 and 120.1500, or as otherwise authorized by law, if SBA determines that the grounds applicable to the enforcement action exist. Paragraphs (c) through (e) of this section list the grounds that trigger enforcement actions against each type of SBA Lender. In general, the grounds listed in paragraph (c) apply to all SBA Lenders. However, certain enforcement actions against SBA Supervised Lenders require the existence of certain grounds, as set forth in paragraphs (d) and (e). In addition, paragraph (f) of this section lists two additional grounds for taking enforcement action against CDCs that do not apply to other SBA Lenders. SBA considers the severity or frequency of a violation in determining whether to take an enforcement action and the type of enforcement action to take.

(c) *Grounds in general.* Except as provided in paragraphs (d) and (e) of this section, the grounds that may trigger an enforcement action against any SBA Lender (regardless of its Risk Rating) include:

(1) Failure to maintain eligibility requirements for specific SBA programs and delegated authorities, including but not limited to: 7(a), PLP, SBAExpress, 504, ALP, PCLP, the alternative loss reserve pilot program and any pilot loan program;

(2) Failure to comply materially with any requirement imposed by Loan Program Requirements;

(3) Making a material false statement or failure to disclose a material fact to SBA. (A material fact is any fact which is necessary to make a statement not misleading in light of the circumstances under which the statement was made.);

(4) Not performing underwriting, closing, disbursing, servicing, liquidation, litigation or other actions in a commercially reasonable and prudent manner for 7(a) or 504 loans, respectively, as applicable. Evidence of such performance or actions may include, but is not limited to, the SBA Lender having a repeated Less Than Acceptable Risk Rating (generally in conjunction with other evidence) or an on-site review/examination assessment which is Less Than Acceptable;

(5) Failure within the time period specified to correct an underwriting, closing, disbursing, servicing, liquidation, litigation, or reporting deficiency, or failure in any material respect to take other corrective action, after receiving notice from SBA of a deficiency and the need to take corrective action;

(6) Engaging in a pattern of uncooperative behavior or taking an action that SBA determines is detrimental to the integrity or reputation of an SBA program, that undermines management or administration of a program, or that is not consistent with standards of good conduct. Prior to issuing a notice of a proposed enforcement action or immediate suspension under § 120.1500 based upon this paragraph, SBA must send prior written notice to the SBA Lender explaining why the SBA Lender's actions were uncooperative, detrimental to the program, undermined SBA's management of the

program, or were not consistent with standards of good conduct. The prior notice must also state that the SBA Lender's actions could give rise to a specified enforcement action, and provide the SBA Lender with a reasonable time to cure the deficiency before any further action is taken;

(7) Repeated failure to correct continuing deficiencies;

(8) Unauthorized disclosure of Reports, Risk Rating, or Confidential Information;

(9) Any other reason that SBA determines may increase SBA's financial risk (for example, repeated Less Than Acceptable Risk Ratings (generally in conjunction with other indicators of increased financial risk); failure to properly oversee Agent activity (''Agent'' as defined in part 103 of this title); or, indictment on felony or fraud charges of an officer, key employee, or loan agent involved with SBA loans for the SBA Lender);

(10) As otherwise authorized by law;

(11) For immediate suspension of all SBA Lenders from delegated authorities—upon a determination by SBA that:

(i) One or more of the grounds in paragraph (c) or (f) of this section, as applicable, exists; and

(ii) Immediate action is needed to protect the interests of the Federal Government (such as where there is risk of immediate harm or loss, a significant program integrity concern, or clear evidence of conduct indicating a lack of business integrity); and

(12) For immediate suspension of all SBA Lenders (except SBA Supervised Lenders, which are covered under paragraph (d)(2) of this section) from the authority to participate in the SBA loan program, including the authority to make, service, liquidate, or litigate 7(a) or 504 loans—upon a determination by SBA that:

(i) One or more of the grounds in paragraph (c) or (f) of this section, as applicable, exists; and

(ii) Immediate action is needed to protect the interests of the Federal Government (such as where there is risk of immediate harm or loss, a significant program integrity concern, or clear evidence of conduct indicating a lack of business integrity).

(d) *Grounds required for certain enforcement actions against SBA Supervised Lenders (except Other Regulated SBLCs) or, as applicable, Other Persons.* For purposes of Subpart I, Other Person means a Management Official, attorney, accountant, appraiser, Lender Service Provider or other individual involved in the SBA Supervised Lender's operations. For the below listed SBA Supervised Lender enforcement actions, the grounds that are required to take the enforcement action are:

(1) *For SBA program suspensions and revocations—*

(i) False statements knowingly made in any required written submission to SBA; or

(ii) An omission of a material fact from any written submission required by SBA; or

(iii) A willful or repeated violation of SBA Loan Program Requirements; or

(iv) A willful or repeated violation of any condition imposed by SBA with respect to any application or request with SBA; or

(v) A violation of any cease and desist order of SBA.

(2) *For SBA program immediate suspension*—SBA may suspend an SBA Supervised Lender, effective immediately, if in addition to meeting the grounds set forth in paragraph (d)(1) of this section, the Administrator (or the Deputy Administrator, only if the Administrator is unavailable to take such action) finds extraordinary circumstances and takes such action in order to protect the financial or legal position of the United States.

(3) *For cease and desist orders—*

(i) A violation of SBA Loan Program Requirements; or

(ii) Where an SBA Supervised Lender or Other Person engages in or is about to engage in any acts or practices that will violate SBA Loan Program Requirements.

(4) *For an emergency cease and desist order—*

(i) Where grounds for cease and desist order are met,

(ii) The Administrator (or the Deputy Administrator, only if the Administrator is unavailable to take such action) finds extraordinary circumstances, and

(iii) In order to protect the financial or legal position of the United States.

(5) *For transfer of Loan portfolio*—

(i) Where a court has appointed a receiver; or

(ii) The SBA Supervised Lender is either not in compliance with capital requirements or is insolvent. An SBA Supervised Lender is insolvent within the meaning of this provision when all of its capital, surplus, and undivided profits are absorbed in funding losses and the remaining assets are not sufficient to pay and discharge its contracts, debts, and other obligations as they come due.

(6) *For transfer of servicing activity*—

(i) Where grounds for transfer of Loan portfolio are met; or

(ii) Where the SBA Supervised Lender is otherwise operating in an unsafe and unsound condition.

(7) *For order to remove Management Official*—where, in the opinion of the Administrator or his/her delegatee, the Management Official—

(i) Willfully and knowingly committed a substantial violation of the Act, SBA regulation, a final cease and desist order, or any agreement by the Management Official or the SBA Supervised Lender under the Act or SBA regulations, or

(ii) Willfully and knowingly committed a substantial breach of a fiduciary duty of that person as a Management Official and the violation or breach of fiduciary duty is one involving personal dishonesty on the part of such Management Official, or

(iii) The Management Official is convicted of a felony involving dishonesty or breach of trust and the conviction is no longer subject to further judicial review (excludes writ of habeas corpus).

(8) *For order to suspend or prohibit participation of Management Official* (interim measure pending removal)—where SBA is undertaking enforcement action of removal of a Management Official.

(9) *For order to suspend or prohibit participation of Management Official due to criminal charges*—where the Management Official is charged in any information, indictment or complaint authorized by a United States attorney with a felony involving dishonesty or breach of trust.

(e) *Grounds required for certain enforcement actions against SBLCs and Other Regulated SBLCs*—(1) *Capital directive.* If the AA/CA determines that an SBLC is capitally impaired or is otherwise being operated in an imprudent manner, the AA/CA may, in addition to any other action authorized by law, issue a directive to the SBLC to increase capital consistent with § 120.1500(d)(1).

(2) *Civil action for termination.* If an SBLC violates the Act or SBA regulations, SBA may institute a civil action to terminate SBLC rights, privileges, and the franchise under § 120.1500(d)(2).

(f) *Additional grounds specific to CDCs.* In addition to the grounds set forth in paragraphs (b) and (c) of this section, SBA may take enforcement action against a CDC for:

(1) Failure to receive SBA approval for at least four 504 loans during the last two consecutive fiscal years, or

(2) For PCLP CDCs, failure to establish or maintain a LLRF as required by the PCLP.

[73 FR 75521, Dec. 11, 2008, as amended at 82 FR 39505, Aug. 21, 2017; 85 FR 14782, Mar. 16, 2020; 87 FR 38909, June 30, 2022]

§ 120.1425 Grounds for formal enforcement actions—Intermediaries participating in the Microloan Program.

(a) *Agreement.* By participating in the SBA Microloan Program, Intermediaries automatically agree to the terms, conditions, and remedies in this part as if fully set forth in their participation agreement and all other agreements jointly executed by the Intermediary and SBA.

(b) *Scope.* SBA may undertake one or more of the formal enforcement actions listed in § 120.1540, or as otherwise authorized by law, if SBA determines that any of the grounds listed in paragraph (c) of this section exist.

(c) *Grounds in general.* For any Intermediary, grounds that may trigger enforcement action against the Intermediary (regardless of its Risk Rating) include:

(1) Failure to comply materially with any requirement imposed by Loan Program Requirements;

(2) Failure to meet any one of the following performance standards:

(i) Coverage of the service territory assigned by SBA, including honoring SBA's determined boundaries of neighboring intermediaries;

(ii) Fulfill reporting requirements;

(iii) Manage program funds and matching funds in a satisfactory and financially sound manner;

(iv) Communicate and file reports within six months after beginning participation in program;

(v) Maintain a currency rate of 85% or more for the Intermediary's SBA Microloan portfolio (that is, loans that are no more than 30 days late in scheduled payments);

(vi) Maintain a default rate in the Intermediary's Microloan portfolio of 15% or less of the cumulative dollars loaned under the program;

(vii) Maintain a staff trained in Microloan Program issues and Loan Program Requirements;

(viii) Maintain the financial ability to sustain the Intermediary's operations (including, but not limited to, adequate capital), as determined by SBA;

(ix) Satisfactorily provide in-house technical assistance to Microloan borrowers and prospective Microloan borrowers; or

(x) Close and fund the required number of microloans per year under §120.716;

(3) Failure within the time period specified to correct an underwriting, closing, disbursing, servicing, liquidation, litigation, or reporting deficiency, or failure in any material respect to take other corrective action, after receiving notice from SBA of a deficiency and the need to take corrective action;

(4) Engaging in a pattern of uncooperative behavior or taking an action that SBA determines is detrimental to the integrity or reputation of the Microloan Program, that undermines management or administration of the program, or that is not consistent with standards of good conduct. Prior to issuing a notice of a proposed formal enforcement action or immediate suspension under §120.1540 based upon the grounds discussed in this paragraph (c)(4), SBA must send prior written notice to the Intermediary explaining why the Intermediary's actions were uncooperative, detrimental to the program, undermined SBA's management of the program, or were not consistent with standards of good conduct. The prior notice must also state that the Intermediary's actions could give rise to a specified formal enforcement action, and provide the Intermediary with a reasonable time to cure the deficiency before any further action is taken;

(5) Any other reason that SBA determines may increase SBA's financial or program risk (for example, repeated Less Than Acceptable Risk Ratings (generally in conjunction with other indicators of increased risk) or indictment on felony or fraud charges of an officer, key employee, or loan agent involved with SBA programs for the Intermediary);

(6) For immediate suspension of an Intermediary—upon a determination by SBA that:

(i) One or more of the grounds in paragraph (c) of this section exists; and

(ii) Immediate action is needed to protect the interests of the Federal Government (such as where there is risk of immediate harm or loss, a significant program integrity concern, or clear evidence of conduct indicating a lack of business integrity); and

(7) As otherwise authorized by law.

[73 FR 75521, Dec. 11, 2008, as amended at 80 FR 34047, June 15, 2015; 85 FR 14782, Mar. 16, 2020]

§120.1500 Types of formal enforcement actions—SBA Lenders.

Upon a determination that the grounds set forth in §120.1400 exist, the D/OCRM may undertake, in his/her discretion (and with the involvement of the LOC as appropriate and consistent with its assigned responsibilities), one or more of the following formal enforcement actions for each of the types of SBA Lender listed, and is not restricted from delegating as appropriate. SBA will consider the severity or frequency of the violation or action and the circumstances triggering the ground in determining whether and what type of enforcement action to take. SBA will take formal enforcement action in accordance with procedures set forth in §120.1600. If formal enforcement action is taken under this

section and the SBA Lender fails to implement required corrective action in any material respect within the required timeframe in response to the formal enforcement action, the D/OCRM may take further enforcement action, as authorized by law. SBA's decision to take a formal enforcement action will not, by itself, invalidate a guaranty previously provided by SBA.

(a) *Formal enforcement actions for all SBA Lenders*—(1) *Imposition of portfolio guaranty dollar limit.* SBA may limit the maximum dollar amount that SBA will guarantee on the SBA Lender's SBA loans or debentures.

(2) *Suspension or revocation of delegated authority.* SBA may suspend or revoke an SBA Lender's delegated authority (including, but not limited to, PLP, SBA Express, or PCLP delegated authorities).

(3) *Suspension or revocation from SBA program.* SBA may suspend or revoke an SBA Lender's authority to participate in the SBA loan program, including the authority to make, service, liquidate, or litigate 7(a) or 504 loans. Section 120.1400(d)(1) sets forth the grounds for SBA program suspension or revocation of an SBA Supervised Lender (except Other Regulated SBLCs). The grounds for SBA program suspension or revocation for all other SBA Lenders are set forth in §120.1400(c) and, as applicable, paragraph (f) of §120.1400.

(4) *Immediate suspension.* SBA may suspend, effective immediately, an SBA Lender's delegated authority or authority to participate in the SBA loan program, or the authority to make, service, liquidate, or litigate 7(a) or 504 loans. Section 120.1400(d)(2) sets forth the grounds for SBA program immediate suspension of an SBA Supervised Lender (except Other Regulated SBLCs). The grounds for SBA program immediate suspension for all other SBA Lenders and the grounds for immediate suspension of delegated authority for all SBA Lenders are set forth in §120.1400(c)(11) and §120.1400(c)(12).

(5) *Debarment.* In accordance with 2 CFR Parts 180 and 2700, SBA may take any necessary action to debar a Person, as defined in §120.10, including but not limited to an officer, a director, a general partner, a manager, an employee, an agent or other participant in the affairs of an SBA Lender's SBA operations.

(6) *Other actions available under law.* SBA may take all other enforcement actions against SBA Lenders available under law.

(b) *Formal enforcement actions specific to 7(a) Lenders.* In addition to those formal enforcement actions applicable to all SBA Lenders, SBA may take the following actions:

(1) Secondary market suspension or revocation (other than temporary suspension and revocation under §120.660). SBA may suspend or revoke a 7(a) Lender's authority to sell or purchase loans or certificates in the Secondary Market; or

(2) Civil monetary penalty (other than SBA Supervised Lender civil monetary penalty under §120.465). SBA may assess a civil monetary penalty against a 7(a) Lender. The civil monetary penalty will be in an amount not to exceed the maximum published in the FEDERAL REGISTER from time to time, which will be 289,504 plus any increases required under law. In determining whether to assess a civil monetary penalty and, if so, in what amount, SBA may consider, for example, the following: The gravity (*e.g.*, severity and frequency) of the violation; the history of previous violations; the financial resources and good faith of the 7(a) Lender; and any other matters as justice may require.

(c) *Formal enforcement actions specific to SBA Supervised Lenders and Other Persons (except Other Regulated SBLCs).* In addition to those enforcement actions listed in paragraphs (a) and (b) of this section, SBA may take any one or more of the following enforcement actions specific to SBA Supervised Lenders and as applicable, Other Persons:

(1) *Cease and desist order.* SBA may issue a cease and desist order against the SBA Supervised Lender or Other Person. The Cease and Desist order may either require the SBA Supervised Lender or the Other Person to take a specific action, or to refrain from a specific action. The Cease and Desist Order may be issued as effective immediately (or as a proposal for Order).

SBA may include in the cease and desist order the suspension of authority to lend.

(2) *Remove Management Official.* SBA may issue an order to remove a Management Official from office. SBA may suspend a Management Official from office or prohibit a Management Official from participating in management of the SBA Supervised Lender or in reviewing, approving, closing, servicing, liquidating or litigating any 7(a) loan, or any other activities of the SBA Supervised Lender while the removal proceeding is pending in order to protect an SBA Supervised Lender or the interests of SBA or the United States.

(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. In deciding whether to seek the appointment of a receiver and in determining the scope of a receivership, SBA will consider the following factors, in its discretion:

(i) for NFRLs:

(A) the existence of fraud or false statements;

(B) the NFRL's refusal to cooperate with SBA enforcement action instructions or orders;

(C) the NFRL's insolvency (legal or equitable);

(D) the size of the NFRL's SBA loan portfolio(s) in relation to other activities of the NFRL;

(E) the dollar amount of any claims SBA may have against the NFRL;

(F) the NFRL's failure to comply materially with any requirement imposed by Loan Program Requirements; and/or

(G) the existence of other non-SBA enforcement actions against the NFRL;

(ii) for SBLCs:

(A) the existence of fraud or false statements;

(B) the SBLC's refusal to cooperate with SBA enforcement action instructions or orders;

(C) the SBLC's insolvency (legal or equitable);

(D) the dollar amount of any claims SBA may have against the SBLC; and/or

(E) the SBLC's failure to comply materially with any requirement imposed by Loan Program Requirements.

(4) *Civil monetary penalties for report filing failure under §120.465.* SBA may seek civil penalties, in accordance with §120.465, against an SBA Supervised Lender that fails to file any regular or special report by its due date as specified by regulation or SBA written directive.

(d) *Formal enforcement actions specific to SBLCs.* In addition to those supervisory actions listed in paragraphs (a), (b), and (c) of this section, SBA may take the following enforcement actions specific to SBLCs.

(1) *Capital directive.* The AA/CA may issue a capital directive upon a determination that the grounds in §120.1400(e)(1) exist. A directive may order the SBLC to:

(i) Achieve its minimum capital requirement applicable to it by a specified date;

(ii) Adhere to a previously submitted capital restoration plan (provided under §120.462 or §120.1055) to achieve the applicable capital requirement;

(iii) Submit and adhere to a capital restoration plan acceptable to SBA describing the means and time schedule by which the SBLC will achieve the applicable capital requirement (The SBLC must provide its capital restoration plan within 30 days from the date of the SBA order unless SBA notifies the SBLC that the plan is to be filed within a different time period. SBA may perform an on-site examination (generally within 90 days after the restoration plan is submitted) to verify the implementation of the plan and verify that the SBLC meets minimum capital requirements.);

(iv) Refrain from taking certain actions without obtaining SBA's prior

written approval (Such actions may include but are not limited to: paying any dividend; retiring any equity; maintaining a rate of growth that causes further deterioration in the capital percentage; securitizing any unguaranteed portion of its 7(a) loans; or selling participations in any of its 7(a) loans); or

(v) Undertake a combination of any of these or similar actions.

(2) *Civil action for termination.* SBA may institute a civil action to terminate the rights, privileges, and franchises of an SBLC.

(e) *Formal enforcement actions specific to CDCs.* In addition to those enforcement actions listed in paragraph (a) of this section, SBA may take any one or more of the following enforcement actions specific to CDCs:

(1) Require the CDC to transfer part or all of its existing 504 loan portfolio and/or part or all of its pending 504 loan applications to SBA, another CDC, or any other entity designated by SBA. Any such transfer may be on a temporary or permanent basis, in SBA's discretion; or

(2) Instruct the Central Servicing Agent to withhold payment of servicing, late and/or other fee(s) to the CDC.

(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. SBA will limit the scope of the receivership to the CDC's assets related to the SBA loan program(s) except where the CDC's business is almost exclusively SBA-related. SBA will only seek a receivership if there is either the existence of fraud or false statements, or if the CDC has refused to cooperate with SBA enforcement action instructions or orders. 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.

[73 FR 75521, Dec. 11, 2008, as amended at 82 FR 39506, Aug. 21, 2017; 84 FR 12061, Apr. 1, 2019; 85 FR 14783, Mar. 16, 2020; 86 FR 52957, Sept. 24, 2021; 87 FR 28758, May 11, 2022; 87 FR 38910, June 30, 2022; 88 FR 50005, Aug. 1, 2023]

§ 120.1510 Other Regulated SBLCs.

Other Regulated SBLCs are exempt from §§ 120.465, 120.1050(b), 120.1400(d), 120.1500(c), and 120.1600(b). This exemption is not intended to preclude SBA from seeking any other remedy authorized by law or equity.

[73 FR 75521, Dec. 11, 2008]

§ 120.1511 Certification and other reporting and notification requirements for Other Regulated SBLCs.

(a) *Certification.* An SBLC seeking Other Regulated SBLC status must certify to SBA in writing that its lending activities are subject to regulation by a Federal Financial Institution Regulator or state banking regulator. This certification must be executed by the chair of the board of directors of the SBLC and submitted to SBA either:

(1) Within 60 calendar days of the effective date of this section or

(2) If the SBLC becomes subject to regulation by a Federal Financial Institution Regulator or state banking regulator after the effective date of this section for any reason (e.g. license transfers), within 60 days of the date that the SBLC becomes directly examined and directly regulated by such regulator.

(b) *Contents of Certification:* This certification must include:

(1) The identity of the Federal Financial Institution Regulator or state banking regulator that regulates the lending activities of the SBLC;

(2) A statement that the Federal Financial Institution Regulator or state banking regulator identified in paragraph (b)(1) of this section regularly conducts safety and soundness examinations on the SBLC itself and not only on the SBLC's parent company or affiliate, if any; and

(3) The date of the most recent safety and soundness examination conducted on the SBLC by the Federal Financial Institution Regulator or state banking

regulator. To qualify as an Other Regulated SBLC, the SBLC must have received this examination within the past 3 years of the date of certification.

(c) *Notification of examination.* An Other Regulated SBLC must notify SBA in writing each time a Federal Financial Institution Regulator or state banking regulator conducts a safety and soundness examination, and this notification must be submitted to SBA within 30 calendar days of the SBLC receiving the results of the examination. To retain its status as an Other Regulated SBLC, the Other Regulated SBLC must receive such examination, and provide the written notification to SBA, at least once every two years following initial certification.

(d) *Report.* An Other Regulated SBLC must report in writing to SBA on its interactions with other Federal Financial Institution Regulators or state banking regulator (e.g., the results of the safety and soundness examinations and any order issued against the Other Regulated SBLC), to the extent allowed by law.

(e) *Notification of change in status.* If, for any reason, an Other Regulated SBLC becomes no longer subject to regulation by a Federal Financial Institution Regulator or state banking regulator, the Other Regulated SBLC must immediately notify SBA in writing, and the exemption provided in §120.1510 will immediately no longer apply.

(f) *Extension of timeframes.* SBA may in its discretion extend any timeframe imposed on the SBLC under this section if the SBLC can show good cause for any delay in meeting the time requirement. The SBLC may appeal this decision to the AA/CA.

(g) *Failure to satisfy requirements.* In the event that an SBLC fails to satisfy the requirements set forth in paragraphs (a), (b), and (c) of this section, then the exemption provided in §120.1510 will not apply to the SBLC.

[73 FR 75521, Dec. 11, 2008]

§120.1540 Types of formal enforcement actions—Intermediaries participating in the Microloan Program.

Upon a determination that any ground set out in §120.1425 exists, the D/OCRM may undertake, in his/her discretion (and with the involvement of the LOC as appropriate and consistent with its assigned responsibilities), one or more of the following formal enforcement actions against an Intermediary, and is not restricted from delegating as appropriate:

(a) S*uspension.* SBA may suspend an Intermediary's authority to participate in the Microloan Program, which may include, but is not limited to, the authority to make, service, liquidate, and/or litigate SBA microloans, and the imposition of a freeze on the Intermediary's MRF and LLRF accounts.

(b) *Immediate suspension.* SBA may suspend, effective immediately, an Intermediary's authority to participate in the Microloan Program, which may include, but is not limited to, the authority to make, service, liquidate, and/or litigate SBA microloans, and the imposition of an immediate freeze on the Intermediary's MRF and LLRF accounts. Section 120.1425(c)(6) sets forth the grounds for SBA Microloan Program immediate suspension of an Intermediary.

(c) *Revocation.* SBA may revoke an Intermediary's authority to participate in the Microloan Program which may include, but is not limited to:

(1) Removal from the program;

(2) Liquidation of the Intermediary's MRF and LLRF accounts by SBA, and application of the liquidated funds to any outstanding balance owed to SBA;

(3) Payment of outstanding debt to SBA by the Intermediary;

(4) Forfeiture or repayment of any unused grant funds by the Intermediary;

(5) Debarment of the organization from receipt of Federal funds until loan and grant repayments are met; and

(6) Surrender of possession of Intermediary's SBA microloan portfolio to SBA, with the microloan portfolio and all associated rights transferred on a permanent basis to SBA, in accordance with SBA's rights as a secured creditor.

(d) *Other actions.* Such other actions available under law.

[85 FR 14783, Mar. 16, 2020]

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

(a) *In general.* Except as otherwise set forth for the formal enforcement actions listed in paragraphs (a)(6), (b), and (c) of this section and in § 120.465, SBA will follow the procedures listed in this section.

(1) *SBA's notice of formal enforcement action.* (i) When undertaking an immediate suspension under § 120.1500(a)(4), or prior to undertaking a formal enforcement action set forth in § 120.1500(a), (b), and (e) and § 120.1540, SBA will issue a written notice to the affected SBA Lender or Intermediary identifying the proposed formal enforcement action or notifying it of an immediate suspension. The notice will set forth in reasonable detail the underlying facts and reasons for the proposed action or immediate suspension. If the notice is for a proposed or immediate suspension, SBA will also state the scope and term of the proposed or immediate suspension.

(ii) If a proposed formal enforcement action or immediate suspension is based upon information obtained from a third party other than the SBA Lender, Intermediary, or SBA, SBA's notice of proposed action or immediate suspension will provide copies of documentation received from such third party, or the name of the third party in case of oral information, unless SBA determines that there are compelling reasons not to provide such information. If compelling reasons exist, SBA will provide a summary of the information it received to the SBA Lender or Intermediary.

(2) *SBA Lender's or Intermediary's opportunity to object.* (i) An SBA Lender or Intermediary that desires to contest a proposed formal enforcement action or an immediate suspension must file, within 30 calendar days of its receipt of the notice or within some other term established by SBA in its notice, a written objection with the appropriate Office of Capital Access official in accordance with Delegations of Authority or other SBA official identified in the notice. Notice will be presumed to have been received within five days of the date of the notice unless the SBA Lender or Intermediary can provide compelling evidence to the contrary.

(ii) The objection must set forth in detail all grounds known to the SBA Lender or Intermediary to contest the proposed action or immediate suspension and all mitigating factors, and must include documentation that the SBA Lender or Intermediary believes is most supportive of its objection. An SBA Lender or Intermediary must exhaust this administrative remedy in order to preserve its objection to a proposed formal enforcement action or an immediate suspension.

(iii) If an SBA Lender or Intermediary can show legitimate reasons as determined by SBA in SBA's discretion why it does not understand the reasons given by SBA in its notice of the action, the Agency will provide clarification. SBA will provide the requested clarification in writing to the SBA Lender or Intermediary or notify the SBA Lender or Intermediary in writing that SBA has determined that such clarification is not necessary. SBA, in its discretion, will further advise in writing whether the SBA Lender or Intermediary may have additional time to present its objection to the notice. Requests for clarification must be made to the appropriate Office of Capital Access official in accordance with Delegations of Authority in writing and received by SBA within the 30 day timeframe or the timeframe given by the notice for response.

(iv) An SBA Lender or Intermediary may request additional time to respond to SBA's notice if it can show that there are compelling reasons why it is not able to respond within the 30 day timeframe or the response timeframe given by the notice. If such requests are submitted to the Agency, SBA may, in its discretion, provide the SBA Lender or Intermediary with additional time to respond to the notice of proposed action or immediate suspension. Requests for additional time to respond must be made in writing to the appropriate Office of Capital Access official in accordance with Delegations of Authority or other official identified in the notice and received by SBA within

the 30 day timeframe or the response timeframe given by the notice.

(v) Prior to the issuance of a final agency decision by SBA, if an SBA Lender or Intermediary can show that there is newly discovered material evidence which, despite the SBA Lender's or Intermediary's exercise of due diligence, could not have been discovered within the timeframe given by SBA to respond to a notice, or that there are compelling reasons beyond the SBA Lender's or Intermediary's control as to why it was not able to present a material fact or argument to SBA, and that the SBA Lender or Intermediary has been prejudiced by not being able to present such information, the SBA Lender or Intermediary may submit such information to SBA and request that the Agency consider such information in its final agency decision.

(3) *SBA's notice of final agency decision on a formal enforcement action where an SBA Lender or Intermediary filed objection to the proposed action or immediate suspension.* (i) If the affected SBA Lender or Intermediary files a timely written objection to a proposed formal enforcement action other than an immediate suspension in accordance with this section, SBA must issue a written notice of final agency decision to the affected SBA Lender or Intermediary advising whether SBA is undertaking the proposed formal enforcement action and setting forth the grounds for the decision. SBA will issue such a notice of decision within 90 days of either receiving the objection or from when additional information is provided under paragraph (a)(2)(v) or (a)(3)(iii) of this section, whichever is later, unless SBA provides notice that it requires additional time.

(ii) If the affected SBA Lender or Intermediary files a timely written objection to a notice of immediate suspension, SBA must issue a written notice of final agency decision to the affected SBA Lender or Intermediary within 30 days of receiving the objection advising whether SBA is continuing with the immediate suspension, unless SBA provides notice that it requires additional time. If the SBA Lender or Intermediary submits additional information to SBA (under paragraph (a)(2)(v) or (a)(3)(iii) of this section) after submitting its objection but before SBA issues its final agency decision, SBA must issue its final agency decision within 30 days of receiving such information, unless SBA provides notice that it requires additional time.

(iii) Prior to issuing a notice of decision, SBA in its discretion can request additional information from the affected SBA Lender or Intermediary or other partiesand conduct any other investigation it deems appropriate. If SBA determines, in its discretion, to consider an untimely objection, it must issue a notice of final agency decision pursuant to this paragraph (a)(3).

(4) *SBA's notice of final agency decision on a formal enforcement action where no filed objection or untimely objection not considered.* If SBA chooses not to consider an untimely objection or if the affected SBA Lender or Intermediary fails to file a written objection to a proposed formal enforcement action or an immediate suspension, and if SBA continues to believe that such proposed formal enforcement action or immediate suspension is appropriate, SBA must issue a written notice of final agency decision to the affected SBA Lender or Intermediary that SBA is undertaking one or more of the proposed formal enforcement actions against the SBA Lender or Intermediary or that an immediate suspension of the SBA Lender or Intermediary will continue. Such a notice of final agency decision need not state any grounds for the action other than to reference the SBA Lender's or Intermediary's failure to file a timely objection, and represents the final agency decision.

(5) *Appeals.* An SBA Lender or Intermediary may appeal the final agency decision to the appropriate Federal district court. Alternatively, 7(a) Lenders may appeal such decisions (except for decisions against SBA Supervised Lenders that are covered by procedures in §120.1600(b) or (c) or §120.465) to SBA's Office of Hearings and Appeals (''OHA'') within 30 calendar days of the date of the decision, and in the event of such an appeal, OHA will issue its decision in accordance with part 134 of this

title. The enforcement action will remain in effect pending resolution of the appeal, if any.

(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) *Procedures for certain formal enforcement actions against SBA Supervised Lenders (except Other Regulated SBLCs) and, where applicable, Management Officials and Other Persons*—(1) *Suspension and revocation actions and cease and desist orders.* If SBA seeks to suspend or revoke loan program authority (including, the authority to make, service, liquidate, or litigate SBA loans), or issue a cease and desist order to an SBA Supervised Lender or, as applicable, Other Person, SBA will follow the procedures below in lieu of those in paragraph (a) of this section.

(i) *Show cause order and hearing.* The Administrator will serve upon the SBA Supervised Lender or Other Person an order to show cause why an order suspending or revoking the authority or why a cease and desist order should not be issued. The show cause order will contain a statement of the matters of fact and law asserted by SBA, as well as the legal authority and jurisdiction under which an administrative hearing will be held, and will set forth the place and time of the administrative hearing. The hearing will be conducted by an administrative law judge in accordance with 5 U.S.C. 554–557, 15 U.S.C. 650, and applicable sections of part 134 of this chapter. The Administrative Law Judge will issue a recommended decision based on the record.

(ii) *Witnesses.* The party calling witnesses will pay the witness the same fees and mileage paid witnesses for their appearance in U.S. courts.

(iii) *Administrator finding and order issuance.* If after the administrative hearing, or the SBA Supervised Lender's or Other Person's waiver of the administrative hearing, the Administrator determines that the order should be issued, the Administrator will issue an order to suspend or revoke authority or a cease and desist order, as applicable. The order will include a statement of findings, the grounds and reasons, and will specify the order's effective date. SBA will serve the order on the SBA Supervised Lender or Other Person. The Administrator may delegate the power to issue a cease and desist order or to suspend or revoke loan program authority only if the Administrator is unavailable and only to the Deputy Administrator.

(iv) *Judicial review.* The order constitutes a final agency action. The SBA Supervised Lender or Other Person will have 20 days from the order issuance date to file an appeal in the appropriate federal district court.

(2) *Immediate suspension or immediate cease and desist order.* If SBA undertakes an immediate suspension of authority to participate in the 7(a) loan program or immediate cease and desist order against an SBA Supervised Lender or, as applicable, Other Person, SBA will within two business days follow the procedures set forth in paragraph (b)(1) of this section.

(3) *Removal of Management Official.* If SBA undertakes the removal of a Management Official of an SBA Supervised Lender, SBA will follow the procedures below in lieu of those in paragraph (a) of this section.

(i) *Notice and hearing.* SBA will serve upon the Management Official and the SBA Supervised Lender written notice of intention to remove that includes a statement of the facts constituting the grounds and the date, time, and place for an administrative hearing. The administrative hearing will be held between 30 and 60 days from the date notice is served, unless an earlier or later date is set at the request of the Management Official for good cause shown or at the request of the Attorney General. The hearing will be conducted in accordance with 5 U.S.C. 554–557, 15 U.S.C. 650 and applicable sections of part 134 of this chapter. Failure of the Management Official to appear at the administrative hearing will constitute consent to the removal order. SBA will serve on the SBA Supervised Lender a

copy of each notice that is served on a Management Official.

(ii) *Suspension from office or prohibition in participation, pending removal.* The suspension or prohibition will take effect upon service of intention to remove the Management Official or such subsequent time as the Administrator or his/her delegate deems appropriate and serves notice. It will remain in effect pending the completion of the administrative proceedings to remove and until such time as either SBA dismisses the charges in the removal notice or, if an order to remove or prohibit participation is issued, until the effective date of an order to remove or prohibit. In the case of suspension or prohibition following criminal charges, it may remain in effect until the information, indictment, or complaint is finally disposed of, or until the suspension is terminated by SBA or by order of a district court. A Management Official may appeal to the appropriate federal district court for a stay of the suspension or prohibition pending completion of the administrative hearing not later than 10 days from the suspension or prohibition's effective date.

(iii) *Decision.* SBA may issue the order of removal if the Management Official consents or is convicted of the criminal charges and the judgment is not subject to further judicial review (not including writ of habeas corpus), or if upon a record of a hearing, SBA finds that any of the notice grounds have been established. After the hearing, in the latter case, and within 30 days after SBA has notified the parties that the case has been submitted for final decision, SBA will render a decision (which includes findings of fact upon which the decision is predicated) and issue and serve an order upon each party to the proceeding. The decision will constitute final agency action.

(iv) *Effective date and judicial review.* The removal order will take effect 30 days after date of service upon the SBA Supervised Lender and the Management Official except in case of consent which will be effective at the time specified in the order or in case of removal for conviction on criminal charges the order will be effective upon removal order service on the SBA Supervised Lender and the Management Official. The order will remain effective and enforceable, except to the extent it is stayed, modified, terminated, or set aside by Administrator or a reviewing court. The adversely affected party will have 20 days from the order issuance date to seek judicial review in the appropriate federal district court.

(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.

(5) *Civil penalties for report filing failure.* If SBA seeks to impose civil penalties against an SBA Supervised Lender for failure to file a report in accordance with SBA regulations or written directive, SBA will follow the procedures set forth for enforcement actions in § 120.465.

(c) *Additional procedures for certain formal enforcement actions against SBLCs. Capital directive*—(1) *Notice of intent to issue capital directive.* SBA will notify an SBLC in writing of its intention to issue a directive. The notice will state:

(i) Reasons for issuance of the directive and

(ii) The proposed contents of the directive.

(2) *Response to notice.* (i) An SBLC may respond to the notice by stating why a capital directive should not be issued and/or by proposing alternative contents for the capital directive or seeking other appropriate relief. The response must include any information, mitigating circumstances, documentation, or other relevant evidence that supports its position. The response may include a plan for achieving the minimum capital requirement applicable to the SBLC. The response must be in writing and delivered to the SBA within 30 days after the date on which the SBLC received the notice. In its discretion, SBA may extend the time period for good cause. SBA may shorten the 30-day time period:

(A) When, in the opinion of SBA, the condition of the SBLC so requires, provided that the SBLC will be informed promptly of the new time period;

(B) With the consent of the SBLC; or

(C) When the SBLC already has advised SBA that it cannot or will not achieve its applicable minimum capital requirement.

(ii) Failure to respond within 30 days or such other time period as may be specified by SBA will constitute a waiver of any objections to the proposed capital directive.

(3) *Decision.* After the closing date of the SBLC's response period, or receipt of the SBLC's response, if earlier, SBA may seek additional information or clarification of the response. Thereafter, SBA will determine whether or not to issue a capital directive, and if one is to be issued, whether it should be as originally proposed or in modified form.

(4) *Issuance of a capital directive.* (i) A capital directive will be served by delivery to the SBLC. It will include, or be accompanied by, a statement of reasons for its issuance.

(ii) A capital directive is effective immediately upon its receipt by the SBLC, or upon such later date as may be specified therein, and will remain effective and enforceable until it is stayed, modified, or terminated by SBA.

(5) *Reconsideration based on change in circumstances.* Upon a change in circumstances, an SBLC may request SBA to reconsider the terms of its capital directive or may propose changes in the plan to achieve the SBLC's applicable minimum capital requirement. SBA also may take such action on its own initiative. SBA may decline to consider requests or proposals that are not based on a significant change in circumstances or are repetitive or frivolous. Pending a decision on reconsideration, the capital directive and plan will continue in full force and effect.

(6) *Relation to other administrative actions.* A capital directive may be issued in addition to, or in lieu of, any other action authorized by law, including cease and desist proceedings. SBA also may, in its discretion, take any action authorized by law, in lieu of a capital directive, in response to an SBLC's failure to achieve or maintain the applicable minimum capital requirement.

(7) *Appeals.* The capital directive constitutes a final agency action. An SBLC may appeal the final agency decision only in the appropriate federal district court.

[73 FR 75521, Dec. 11, 2008, as amended at 82 FR 39506, Aug. 21, 2017; 85 FR 14784, Mar. 16, 2020]

Subpart J—Establishment of SBA Secondary Market Guarantee Program for First Lien Position 504 Loan Pools

SOURCE: 74 FR 56093, Oct. 30, 2009, unless otherwise noted.

§ 120.1700 Definitions used in subpart J.

504 financing. The loans made to a small business to fund a Project under the SBA's development company loan program authorized by Title V of the Small Business Investment Act of 1958.

Affiliate. A person or entity SBA determines to be an affiliate of a Program Participant pursuant to the application of the principles and guidelines set forth in §121.103 of this Title.

Central Servicing Agent or CSA. The entity serving as SBA's central servicing agent for the Program.

Certified Development Company or CDC. An entity that meets the definition of a Certified Development Company as defined in §120.10 of this Part.

Current. That no scheduled payment owed by an Obligor pursuant to a Pool Note is over 29 days past due.

First Lien Position 504 Loan. The financing provided by the First Lien Position 504 lender that is part of the 504 project financing.

First Lien Position 504 Loan Pool Guarantee Agreement. The agreement, in the form approved by SBA, wherein entities agree to participate in the forming of a Pool under the Program, available at *http://www.sba.gov/aboutsba/sbaprograms/elending/index.html/.*

Guide. The First Lien Position 504 Loan Pooling Program Guide published by SBA which provides information applicable to the Program including, among other things, requirements relating to the formation of a Pool,

available at *http://www.sba.gov/aboutsba/sbaprograms/elending/index.html/*.

Liquidation Proceeds. Cash, including insurance proceeds, proceeds of any foreclosed-on property disposition, revenues received with respect to the conservation and disposition of a foreclosed-on property or repossessed collateral, including any real property securing the Pool Loan, consisting of a commercial property or residential property and any improvements thereon, and any other amounts received in connection with the liquidation of the Pool Loan, whether through Seller's sale, foreclosure sale, any offset or workout, or otherwise.

Loan Interest. The right to receive the owned portion of the principal balance of the Pool Loan together with interest thereon at a per annum rate in effect from time to time in accordance with the First Lien Position 504 Loan Pool Guarantee Agreement.

Maturity. The maturity of the Loan Interest in the Pool that has the longest remaining term of any Loan Interest in the Pool. The maturity will change from time to time due to prepayment or default on Loan Interests in the Pool.

Ongoing Guarantee Fee. An annual fee collected monthly and based on the percentage of the Pool Loan amount, pursuant to section 503(C)(3)(B)(ii) of the Recovery Act, to result in a cost of the loan guarantee of zero as determined under the Federal Credit Reform Act of 1990, as amended. The funds generated by the fee serve as a reserve to pay for program losses.

Obligor. The obligor(s) under a Pool Note.

Pool. The aggregate of Loan Interests formed into a single pool by the Pool Originator in accordance with the Program. The Pool is comprised of an unguaranteed portion and an SBA-guaranteed portion. The unguaranteed portion of the Pool backs the Pool Originator Receipt, and cannot be sold to Pool Investors. The SBA-guaranteed portion of the Pool backs the Pool Certificates sold to Pool Investors. The Seller's Loan Interest is not included in the Pool.

Pool Assembler. An entity that meets the qualifications of a Pool Assembler as set forth in section 120.630 of this Part and has been approved as such by SBA.

Pool Certificate. The document representing a beneficial fractional interest in the SBA-guaranteed portion of a Pool.

Pooled. When one or more Loan Interests in a Pool Loan has been put into a Pool.

Pooling. The transfer of one or more Loan Interests in a Pool Loan into a Pool.

Pool Investor. An entity which holds a Pool Certificate in accordance with Program Rules and Regulations.

Pool Loan. A loan that meets the Program eligibility requirements as set forth in §120.1704 of this subpart J and has been pooled.

Pool Loan Receivables. Pool Loan payments, prepayments, or collections made in connection with the Pool Loan by the Obligor pursuant to Pool Note or any other Pool Loan documents or agreements, or by another person or entity made on behalf of any such Pool Loan obligor, and Liquidation Proceeds.

Pool Note. The document evidencing a Pool Loan.

Pool Originator. An entity approved by SBA to pool Loan Interests under the Program.

Pool Originator Receipt. The document evidencing the Pool Originator's retained ownership in a Pool it has formed under the Program.

Premier Certified Lenders Program. The program defined in §120.845 of this Part.

Program. The program authorized by section 503 of the American Recovery and Reinvestment Act of 2009.

Program Participant. An entity that executes the First Lien Position 504 Loan Pool Guarantee Agreement as Seller, Pool Originator, or Pool Investor, and any successors or assignees thereof.

Program Participant Associate. (1) An officer, director, key employee, or holder of 20 percent or more of the value of a Program Participant's stock or debt instruments, or (2) Any individual in which one or more individuals referred to in paragraph (1) of this definition, or a spouse, or child, or sibling,

or the spouse of any such individual, owns or controls at least 20 percent.

Program Preference. Any arrangement giving the Seller, Pool Originator, or a Program Associate or Affiliate of Seller or Pool Originator, a preference or benefit of proportion greater than its Loan Interest as compared to Pool Originator, Pool Investor, or SBA relating to the making, servicing, or liquidation of the Loan with respect to such things as repayment, collateral, guarantees, control, maintenance of a compensating balance, purchase of a certificate of deposit or acceptance of a separate or companion loan, without SBA's consent. Seller's agreement to grant a Pool Loan's Obligor a deferment in return for receiving more collateral on a different loan owned by Seller is an example of a preference.

Program Rules and Regulations. This subpart J, as may be amended from time to time by SBA (the Program Regulations), the First Lien Position 504 Loan Pool Guarantee Agreement, any other Program agreements signed by a Program Participant, if applicable, the Guide, the Recovery Act, and the provisions of subpart H governing Third Party Loans and Third Party Lenders.

Project. A project as defined by § 120.802 of the Part.

SBA. The United States Small Business Administration, an agency of the United States Government.

Seller. An entity that has sold a Pool Loan to a Pool Originator to be Pooled and any successor entity that has executed the First Lien Position 504 Loan Pool Guaranty Agreement pursuant to § 120.1707.

Seller's Pool Loan. The Pool Loan sold to a Pool Originator pursuant to the First Lien Position 504 Loan Pool Guarantee Agreement.

Seller Receipt. The document that evidences a Seller's Loan Interest.

Servicing Retention Amount. The amount of a Pool Loan interest payment retained by Seller for servicing the Pool Loan that is payable and calculated pursuant to the First Lien Position 504 Loan Pool Guarantee Agreement.

Weighted Average Interest Rate. The dollar-weighted average interest rate of a Pool Certificate calculated by multiplying the interest rate of each Loan Interest in the Pool by the ratio of that Loan Interest's current outstanding principal in the SBA-guaranteed portion of the Pool (that is, the portion of the Pool Loan backing the Pool Certificates) to the current aggregate or outstanding principal of each Loan Interest in the SBA-guaranteed portion of the Pool, and adding the sum of the resulting products. The Pool Certificate interest rate will fluctuate over the life of the Pool as defaults, prepayments and normal repayments applicable to Loan Interests in the Pool occur.

Weighted Average Maturity. The weighted average maturity of a Pool Certificate is a dollar weighted average maturity that is calculated by multiplying the remaining term, in months, of each Loan Interest in a Pool by the ratio of that Loan Interest's current outstanding pooled principal to the current aggregate outstanding pooled principal of all Loan Interests in the Pool, and adding the sum of the resulting products. The weighted average maturity of a Pool Certificate will fluctuate over the life of the Pool as Loan Interest defaults, prepayments and normal Loan Interest repayments occur.

§ 120.1701 Program purpose.

As authorized by the American Recovery and Reinvestment Act of 2009 (Recovery Act), SBA establishes the Program to authorize an entity to apply for SBA's guarantee of Pools comprised of portions of First Lien Position 504 Loans backing Pool Certificates to be sold to Pool Investors. The purpose of the Program is to temporarily provide a federal guarantee for Pools of First Lien Position 504 Loans to facilitate the sale of such loans and increase the liquidity of the lenders holding the loans so that the lenders can use the sale proceeds to fund more such loans. The Program's authorization expires on September 23, 2012 and the Administrator may guarantee not more than $3,000,000,000 of pools under this authority pursuant to section 503(c)(B)(iii) of the Recovery Act, as

amended by section 1119 of the Small Business Jobs Act of 2010.

[61 FR 3235, Jan. 31, 1996, as amended at 76 FR 63547, Oct. 12, 2011]

§ 120.1702 Program fee.

Ongoing Guarantee Fee. The Ongoing Guarantee Fee is payable to SBA, and it is calculated and payable monthly from the amounts received in respect of interest on Loan Interests in the SBA-guaranteed portion of a Pool. This amount is set forth in the First Lien Position 504 Loan Pool Guarantee Agreement. This fee is used to pay program losses.

§ 120.1703 Qualifications to be a Pool Originator.

(a) *Application to become Pool Originator.* The application to become a Pool Originator is available from the SBA and can be found on SBA's website. In order to qualify as a Pool Originator, an entity must send the application to the SBA and certify that it is a Pool Assembler or it:

(1) Is regulated by the appropriate agency as defined in section 3(a)(34)(G) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(34)(G));

(2) Meets all financial and other applicable requirements of its regulatory authority and the Government Securities Act of 1986, as amended (Pub. L. 99–571, 100 Stat. 3208);

(3) Has the financial capability to originate acceptable pools consisting of eligible First Lien Position 504 Loans in sufficient quantity to support the issuance of Pool Certificates;

(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

(5) for any Pool Originator that is an SBA Lender, that the SBA Lender has satisfactory SBA performance, as determined by SBA in its sole discretion.

(b) *Approval by SBA.* An entity may not submit applications to form Pools to the CSA until SBA has approved its application to become a Pool Originator.

(c) *Conduct of business by Pool Originator.* An entity continues to qualify as a Pool Originator so long as it:

(1) Meets the eligibility standards in paragraph (a) of this section;

(2) Conducts its business in accordance with SBA regulations and accepted securities or banking industry practices, ethics, and standards;

(3) Maintains its books and records in accordance with generally accepted accounting principles or in accordance with the guidelines of the regulatory body governing its activities; and

(4) Has not been suspended or terminated from the Program by SBA.

[74 FR 56093, Oct. 30, 2009, as amended at 82 FR 39506, Aug. 21, 2017]

§ 120.1704 Pool Loans eligible for Pooling.

(a) *General Pool Loan eligibility requirements.* For a First Lien Position 504 Loan to be eligible for Pooling it must:

(1) Be a loan that is:

(i) A Third Party Loan as defined in § 120.801(c)(3);

(ii) Made by a private sector lender acceptable to SBA in its sole discretion; and

(iii) Secured by a first lien on the Project Property as defined in § 120.801 of this chapter;

(2) Be part of a 504 financing that is comprised of only one Third Party Loan and one CDC 504 loan; the CDC 504 loan must be funded by a Debenture that was been sold on or after February 17, 2009;

(3) Be Current and have been Current for the six-month-period immediately prior to the date the Pool is formed or for the life of the Pool Loan, whichever time period is shorter;

(4) Have been made and closed in a commercially reasonable manner, consistent with prudent lending standards;

(5) Be part of a completed 504 financing, funded by a 504 debenture, which means that the Pool Loan must be fully disbursed and the debenture funding the related loan by a CDC must have been sold on or after February 17, 2009; and

(6) Not be:

(i) To a business deriving more than one-third of its gross annual revenue from legal gambling activities;

(ii) To a casino, gambling establishment, or casino hotel;

(iii) For financing the acquisition, construction or renovation of an aquarium, zoo, golf course, or swimming pool; or

(iv) To a business covered by a six-digit North American Industry Classification System (NAICS) code for casinos—713210 (''Casinos (Except Casino Hotels)''); casino hotels—721120 (''Casino Hotels''); other gambling institutions—713290 (''Other Gambling Industries''); golf courses—713910 (''Golf Courses and Country Clubs''); or aquariums and zoos—712130 (''Zoos and Botanical Gardens'').

(b) *SBA review of a Pool Loan prior to pool formation.* SBA has the right to review any Pool Loan before a Loan Interest in it is added to a Pool, and SBA may prohibit the Pool's formation as proposed based on SBA's review in SBA's sole discretion. In the event SBA decides to review Pool Loan documents related to a Loan Interest prior to the requested Pool formation, that Loan Interest may not be added to the Pool until SBA reviews and approves the Pool Loan for such purpose. Copies of Pool Loan documents related to underwriting and origination, and any other Pool Loan-related documents SBA may, in its sole discretion, request to review in writing, must be sent to SBA's Sacramento Pool Loan Processing Center. The Pool Originator must identify and SBA must review Pool Loan documents before a Loan Interest is added to a Pool if:

(1) The Pool Loan is to a business within NAICS code 713940 covering Fitness and Recreational Sports Centers; (If SBA determines that a Pool Loan has had any of its proceeds used for any of the restricted purposes listed above, the Pool Loan will be prohibited from being part of a Pool.)

(2) The Pool Loan was part of a 504 financing involving a 504 loan that was processed under SBA's Premier Certified Lenders Program; or

(3) The Project the Pool Loan financed included the refinancing of existing debt owed to the Seller or Third Party Lender (not including interim financing associated with the Project).

§ 120.1705 Pool formation requirements.

(a) *Initiation of Pool formation.* Only an entity approved by SBA to be a Pool Originator under the Program that continues to qualify to be a Pool Originator pursuant to this subpart may initiate the formation of a Pool. The Pool Originator creates the Pool subject to Program Rules and Regulations, including the parameters set forth in the Guide, and SBA approval.

(b) *Adjustment of Pool requirements.* SBA may adjust the Pool characteristics periodically based on program experience and market conditions and will publish a revised version of the Guide in the FEDERAL REGISTER to implement such adjustments. Any such adjustments shall not affect Pools formed prior to the adjustment.

(c) *When the Pool Originator is the Seller.* When a Pool Originator proposes to form a Pool involving a Pool Loan it owns, it must execute the First Lien Position 504 Loan Pool Guarantee Agreement as Pool Originator and as Seller and, consequently, will be subject to all applicable Program Rules and Regulations pertaining to both roles.

(d) *When the Pool Originator does not own the Pool Loan.* When a Pool Originator proposes to form a Pool involving a Pool Loan it does not own, it must purchase the Loan Interest it proposes to pool from a Seller that owns the whole Pool Loan and that has the servicing rights. The Pool Originator must purchase the Loan Interest and take it into inventory or settle the purchase of the Loan Interest through the CSA concurrently with the formation of the Pool. The entity selling the Loan Interest to the Pool Originator must execute the First Lien Position 504 Loan Pool Guarantee Agreement as Seller and, consequently, will be subject to all applicable Program Rules and Regulations pertaining to a Seller. The Pool Originator must also execute the First Lien Position 504 Loan Pool Guaranty Agreement.

(e) *What CSA must receive prior to Pool formation.* Before the CSA may carry

out its responsibilities relating to the formation of a Pool, it must receive:

(1) From the Pool Originator: A properly completed First Lien Position 504 Loan Pool application form, First Lien Position 504 Loan Guarantee Agreement, and any other documentation which SBA may require, if applicable; and

(2) All cost reimbursement due and payable to the CSA prior to Pool formation owed by the Participants participating in the formation of the Pool.

§ 120.1706 Pool Originator's retained interest in Pool.

The Pool Originator must retain an ownership interest in any Pool it has formed that is equal to at least 5% of the aggregate of the total outstanding principal balance of each Pool Loan with a Loan Interest in the Pool as calculated at the time of Pool formation. Such interest will decline with Loan Interest payments, prepayments, defaults and any other early termination. At Pool formation, the CSA will issue the Pool Originator a Pool Originator Receipt evidencing the Pool Originator's retained interest in the Pool. The Pool Originator may not sell, pledge, participate, or otherwise transfer its Pool Originator Receipt or any interest therein for the life of the Pool.

§ 120.1707 Seller's retained Loan Interest.

The Seller must retain a 15% or greater Loan Interest in each of its loans included in a Pool. At Pool formation, the CSA will issue the Seller a Seller Receipt evidencing the Seller's retained ownership in the Pool Loan. With SBA's written permission, the Seller may sell the Seller Receipt and Servicing Retention Amount in whole, but not in part, to a single entity at one time. The Seller may not sell less than 100% of the Seller Receipt and Servicing Retention Amount, and may not sell a participation interest in any portion of any of its Pooled loans. 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.

[74 FR 56093, Oct. 30, 2009, as amended at 82 FR 39506, Aug. 21, 2017]

§ 120.1708 Pool Certificates.

(a) *SBA Guarantee of Pool Certificates.* SBA guarantees to a Pool Investor the timely payment of principal and interest installments and any prepayment or other recovery of principal to which the Pool Investor is entitled. If an Obligor misses a scheduled payment pursuant to the terms of the Pool Note underlying a Loan Interest backing a Pool Certificate, SBA, through the CSA, will make advances to maintain the schedule of interest and principal payments to the Pool Investor. If SBA makes such payments, it is subrogated fully to the rights satisfied by such payment.

(b) *SBA guarantee backed by full faith and credit.* SBA's guarantee of the Pool Certificate is backed by the full faith and credit of the United States.

(c) *SBA purchase of a Loan Interest.* SBA will determine whether to purchase a Loan Interest backing a Pool Certificate with an underlying Pool Note that is 60 days or more in arrears. SBA reserves the right to purchase a Loan Interest from a Pool at any time.

(d) *Self-liquidating.* A Pool Certificate represents a fractional beneficial interest in a Pool that is self-liquidating by Pool Loan Receivables and/or SBA Loan Interest payment or redemption.

(e) *Pool Certificate form.* The CSA prepares the Pool Certificate. SBA must approve the form and terms of the Pool Certificate.

(f) *Pool Certificate registration.* A Pool Certificate must be registered with the CSA.

(g) *Face amount of Pool Certificate.* The face amount of a Pool Certificate cannot be less than a minimum amount as specified in the Guide, and

the dollar amount of Pool Certificates must be in increments which SBA will specify in the Guide (except for one Pool Certificate for each Pool). SBA may change these requirements based upon an analysis of market conditions and program experience, and will publish any such change in the FEDERAL REGISTER.

(h) *Basis of payment for Pool Certificates.* All payments on a Pool Certificate are due pursuant to terms, conditions, and percentages set forth or referenced therein and are based on the unpaid principal balance of the Pool represented by the Pool Certificate. Any Pool Loan Receivables applicable to a Loan Interest in the SBA-guaranteed portion of a Pool will be passed through to the appropriate Pool Investors with the regularly scheduled payments to such Pool Investors.

(i) *Pool Certificate interest rate.* A Pool Certificate must have a Weighted Average Interest Rate.

(j) *Pool Certificate maturity.* A Pool Certificate must have a Maturity and a Weighted Average Maturity.

(k) *Early Pool Certificate redemption.* SBA, or the CSA on behalf of SBA, may redeem a Pool Certificate prior to its Maturity because of Obligor prepayment and/or SBA purchase of all Loan Interests in the Pool backing the Pool Certificate.

§ 120.1709 Transfers of Pool Certificates.

(a) *Transfer of Pool Certificates.* A Pool Certificate is transferable. A transfer of a Pool Certificate must comply with Article 8 of the Uniform Commercial Code of the State of New York. The seller may use any form of assignment acceptable to SBA and the CSA. The CSA may refuse to issue a Pool Certificate until it is satisfied that the documents of transfer are complete.

(b) *Transfer on CSA records.* In order for the transfer of a Pool Certificate to be effective, the CSA must reflect the transfer on its records.

(c) *Contents of letter of transmittal for Pool Certificate.* A letter of transmittal must accompany each Pool Certificate which a Pool Investor submits to the CSA for transfer. The Pool Investor must supply the following information in the letter:

(1) Pool number;

(2) Pool Certificate number;

(3) Name of purchaser of Pool Certificate;

(4) Address and tax identification number of the purchaser;

(5) Name, e-mail address and telephone number of the person handling or facilitating the transfer; and

(6) Instructions for the delivery of the new Pool Certificate.

(d) *CSA transfer cost recovery.* At the same time a Pool Investor submits a letter of transmittal for a Pool Certificate pursuant to this section, it must send to the CSA sufficient funds to cover its cost for this service. The CSA will supply the transfer information to the Pool Investor.

§ 120.1710 Central servicing of the Program.

(a) *Pool Certificates and Receipts issued at Pool formation.* As part of its role as Central Servicing Agent for the Pool, at Pool formation, CSA issues a Seller Receipt to the Seller, a Pool Originator Receipt to the Pool Originator, and a Pool Certificate to each Pool Investor.

(b) *CSA fiscal transfer responsibilities.* All Pool Loan Receivables on a Pool Loan received by the CSA must be forwarded by it to pay the Servicing Retention Amount, Ongoing Guarantee Fee, Seller Receipt, Pool Originator Receipt, Pool Certificates, any SBA-purchased Loan Interest, and any other payment applicable to the Pooling of such Pooled Loan, in accordance with Program Rules and Regulations.

(c) *Administration of the Pool Certificates.* CSA must administer each Pool Certificate. It shall maintain a registry of Pool Investors and other information as SBA requires. CSA registers all Pool Certificates. This means it issues, transfers title to, and redeems them. It shall maintain a registry of Pool Investors and other information as SBA requires. In fulfilling its obligation to keep the central registry current, the CSA may, with SBA's approval, obtain any necessary information from the parties involved in the Program.

(d) *CSA Monthly Report.* CSA must provide SBA with a list, by Pool, of each Loan Interest with an underlying Pool Note that is 60 days or more in arrears on a monthly basis.

§ 120.1711 Suspension or termination of Program participation privileges.

(a) *Participant suspension or termination*. The SBA may suspend or terminate the privilege of a Participant, and/or any Associate or Affiliate of the Participant, to sell, purchase, broker, or deal in Pool Loans, Loan Interests, or Pool Certificates under the Program if any such Participant or its Associate or Affiliate has:

(1) Failed to comply materially with any requirement imposed by the Program Rules and Regulations or other SBA rules and regulations; or

(2) Made a material false statement or failed to disclose a material fact to SBA.

(b) *Additional rules for suspension or termination of Pool Originator*. In addition to the conditions set forth in paragraph (a) above, SBA may also suspend or terminate the Program participation privileges of a Pool Originator if the Pool Originator (and/or its Associates):

(1) Does not comply with any of the requirements in 120.1703(a) or (c);

(2) Has been revoked or suspended it from engaging in the securities business by its supervisory agency, or is under investigation for a practice which SBA considers, in its sole discretion, to be relevant to its fitness to participate in the Program;

(3) Has been indicted or otherwise formally charged with, or convicted of, a felony, or a misdemeanor which, in SBA's sole discretion, bears on its fitness to participate in the Program;

(4) Has received an adverse civil judgment that it has committed a breach of trust or a violation of a law or regulation protecting the integrity of business transactions or relationships; or

(5) Has been suspended or terminated as a Pool Assembler under 120.631.

(c) *Suspension procedures*. SBA may undertake suspension or enforcement actions under this section using the procedures set forth in § 120.1600(a).

§ 120.1712 Seller responsibilities with respect to Seller's Pool Loan.

Seller shall remain obligated for servicing and liquidating Seller's Pool Loan until the Pool Loan is repaid in full unless SBA provides written approval or notice to the contrary.

§ 120.1713 Seller's Pool Loan origination.

SBA is entitled to recover from the Seller losses incurred by SBA on its guarantee of a Pool if such losses resulted because Seller's Pool Loan was not made and closed in a commercially reasonable manner, consistent with prudent lending standards, and in accordance with any applicable Program Rules and Regulations.

§ 120.1714 Seller's Pool Loan servicing.

Subject to § 120.1718 of this subpart J, the Seller must service Seller's Pool Loan in a commercially reasonable manner, consistent with prudent lending standards, and in accordance with applicable Program Rules and Regulations. The Seller receives the Servicing Retention Amount for servicing the Seller's Pool Loan.

§ 120.1715 Seller's Pool Loan liquidation.

Subject to § 120.1718 of this subpart J, the Seller must liquidate and conduct debt collection litigation for Seller's Pool Loan in a prompt, cost-effective and commercially reasonable manner, consistent with prudent lending standards, in accordance with applicable Program Rules and Regulations, and with SBA approval of a liquidation plan and any litigation plan, and any amendment of either such a plan, if applicable.

§ 120.1716 Required SBA approval of servicing actions.

Seller shall not, without prior written consent of SBA, take the following actions with respect to Seller's Pool Loan:

(a) Make or consent to any substantial alteration in the terms (''substantial'' includes, but is not limited to, any changes to the principal amount or interest rate);

(b) Accelerate the maturity;

(c) Sue; or

(d) Waive or release any claim. Guidance on other servicing actions, some of which may need prior SBA approval, is provided in the Guide.

§ 120.1717 Seller's Pool Loan deferments.

Without the prior written consent of SBA, Seller, at the request of Obligor, may grant one deferment of Obligor's scheduled payments for a continuous period not to exceed three months of past or future installments. Seller shall immediately notify CSA of any payment deferment and that notification shall include:

(a) The SBA Pool Loan number;

(b) The Obligor's name;

(c) The terms of such deferment;

(d) The date Obligor is to resume payment; and

(e) Reconfirmation of the basis of interest calculation (e.g. 30/360 or Actual Days/365).

§ 120.1718 SBA's right to assume Seller's responsibilities.

SBA may, in its sole discretion, undertake the servicing, liquidation and/or litigation of Seller's Pool Loan at any time and, in such event, Seller must take any steps necessary to facilitate the assumption by SBA of such responsibilities, which can be transferred by SBA at its discretion to a contractor, agent or other entity, and such steps shall include, among other things, providing or assigning to SBA any documents requested by SBA within 15 calendar days of Seller's receipt of such request. SBA will notify the Obligor of the change in servicing.

§ 120.1719 SBA's right to recover from Seller.

SBA is entitled to recover from Seller any monies paid on SBA's guarantee of a Pool Certificate backed in part by Seller's Pool Loan, plus interest, if SBA in its sole discretion determines that any of the following events has occurred:

(a) Seller's improper action or inaction has put SBA at risk;

(b) Seller has failed to disclose a material fact to SBA regarding a Seller's Pool Loan in a timely manner;

(c) Seller has misrepresented a material fact to SBA regarding Seller's Pool Loan;

(d) Seller has failed to comply materially with § 120.1720 of this subpart;

(e) SBA has received a written request from Seller to terminate the SBA's guarantee on the Loan Interest in Seller's Pool Loan;

(f) Seller has failed to comply materially with Program Rules and Regulations; or

(g) Seller has failed to make, close, service or liquidate Seller's Pool Loan in a prudent manner.

§ 120.1720 SBA's right to review Pool Loan documents.

In the event that SBA purchases a Loan Interest in Seller's Pool Loan, Seller must provide to SBA copies of the Pool Loan collateral documents, Pool Loan underwriting documents, and any other documents SBA may require in writing within 15 calendar days of a written request from SBA (which SBA will review in connection with its efforts to determine if Seller is obligated to reimburse SBA pursuant to this subpart). A Seller's failure to provide the requested documentation may constitute a material failure to comply with the Program Rules and Regulations and may lead to an action for recovery under § 120.1719. SBA will also evaluate a Seller's continued participation in the Program and may restrict further sales under the Program until SBA determines that the Seller has provided sufficient documentation.

§ 120.1721 SBA's right to investigate.

SBA may undertake such investigation as it deems necessary to determine whether it is entitled to seek recovery from the Seller and Seller agrees to take whatever actions are necessary to facilitate such investigation.

§ 120.1722 SBA's offset rights.

SBA shall have the right to offset any amount owed by Lender to SBA, including, without limitation, an offset against CSA's obligation to pay Lender pursuant to any Section 504 First Mortgage Loan Pool Guarantee Agreement.

§ 120.1723 Pool Loan receivables received by Seller.

Any Pool Loan Receivables received by Seller in connection with obligations under Seller's Pool Loan must be forwarded by Seller to CSA within two business days of receipt of collected funds.

§ 120.1724 Servicing and liquidation expenses.

All ordinary and reasonable expenses of servicing and liquidating Seller's Pool Loan shall be paid by, or be recoverable from, Obligor, and all such ordinary and reasonable expenses incurred by Seller or SBA which are not recoverable from Obligor shall be shared ratably by Seller, SBA, and the Pool Originator pursuant to the applicable percentages set forth in the First Lien Position 504 Loan Pool Guarantee Agreement.

§ 120.1725 No Program Preference by Seller or Pool Originator.

The Seller and the Pool Originator must not establish a Program Preference, which is defined in 13 CFR 120.10.

§ 120.1726 Pool Certificates a Seller cannot purchase.

Neither a Seller, nor any of its Program Associates or Affiliates, may purchase a Pool Certificate that is backed by a Loan Interest in a Pool Loan that the Seller, or any of its Program Associates or Affiliates, originated or owned, and, in the event such purchase occurs, SBA's guarantee shall not be in effect with respect to any such Pool Certificate.

PART 121—SMALL BUSINESS SIZE REGULATIONS

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AUTHORITY: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9).

SOURCE: 61 FR 3286, Jan. 31, 1996, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 121 appear at 72 FR 50039 and 50040, Aug. 30, 2007.

Subpart A—Size Eligibility Provisions and Standards

PROVISIONS OF GENERAL APPLICABILITY

§ 121.101 What are SBA size standards?

(a) SBA's size standards define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for ''small business'' concerns. Size standards have been established for types of economic activity, or industry, generally under the North American Industry Classification System (NAICS).

(b) NAICS is described in the North American Industry Classification Manual–United States, which is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161; by calling 1(800) 553–6847 or 1(703) 605–6000; or via the Internet at *http://www.ntis.gov/products/naics.aspx*. The manual includes definitions for each industry, tables showing relationships between 1997 NAICS and 1987 SICs, and a comprehensive index. NAICS assigns codes to all economic activity within twenty broad sectors. Section 121.201 provides a full table of small business size standards matched to the U.S. NAICS industry codes. A full table matching a size standard with each NAICS Industry or U.S. Industry code is also published annually by SBA in the FEDERAL REGISTER.

[65 FR 30840, May 15, 2000, as amended at 67 FR 52602, Aug. 13, 2002; 74 FR 46313, Sept. 9, 2009]

§ 121.102 How does SBA establish size standards?

(a) SBA considers economic characteristics comprising the structure of an industry, including degree of competition, average firm size, start-up costs and entry barriers, and distribution of firms by size. It also considers technological changes, competition from other industries, growth trends, historical activity within an industry, unique factors occurring in the industry which may distinguish small firms from other firms, and the objectives of its programs and the impact on those programs of different size standard levels.

(b) As part of its review of a size standard, SBA will investigate if any concern at or below a particular standard would be dominant in the industry. SBA will take into consideration market share of a concern and other appropriate factors which may allow a concern to exercise a major controlling influence on a national basis in which a number of business concerns are engaged. Size standards seek to ensure that a concern that meets a specific size standard is not dominant in its field of operation.

(c) As part of its review of size standards, SBA's Office of Size Standards will examine the impact of inflation on monetary-based size standards (e.g., receipts, net income, assets) at least once every five years and submit a report to the Administrator or designee. If SBA finds that inflation has significantly eroded the value of the monetary-based size standards, it will issue a proposed rule to increase size standards.

(d) Please address any requests to change existing size standards or establish new ones for emerging industries to the Division Chief, Office of Size Standards, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

(e) When SBA publishes a final rule in the FEDERAL REGISTER revising,

modifying, or establishing a size standard, SBA will include in the final rule, an instruction that interested persons may file a petition for reconsideration of a revised, modified, or established size standard at SBA's Office of Hearings and Appeals (OHA) within 30 calendar days after publication of the final rule in accordance with 15 U.S.C. 632(a)(9) and part 134, subpart I of this chapter. The instruction will provide the mailing address, facsimile number, and email address of OHA.

(f) Within 14 calendar days after a petition for reconsideration of a size standard is filed, unless it appears OHA will dismiss the petition for reconsideration, SBA will publish a document in the FEDERAL REGISTER announcing the size standard or standards that have been challenged, the FEDERAL REGISTER citation of the final rule, the assigned OHA docket number, and the date of the close of record. The document will further state that interested parties may contact OHA to intervene in the dispute pursuant to §134.906 of this chapter.

(g) Where OHA grants a petition for reconsideration of a size standard that had been revised or modified, OHA will remand the case to SBA's Office of Size Standards for further action in accordance with §134.916(a) of this chapter.

[61 FR 3286, Jan. 31, 1996, as amended at 67 FR 3045, Jan. 23, 2002; 82 FR 25506, June 2, 2017]

§ 121.103 How does SBA determine affiliation?

(a) *General Principles of Affiliation.* (1) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

(2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

(3) Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

(4) Affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party.

(5) In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

(6) In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.

(7) For SBA's Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs, the bases for affiliation are set forth in §121.702.

(8) For applicants in SBA's Business Loan, Disaster Loan, and Surety Bond Guarantee Programs, the size standards and bases for affiliation are set forth in §121.301.

(b) *Exceptions to affiliation coverage.* (1) Business concerns owned in whole or substantial part by investment companies licensed, or development companies qualifying, under the Small Business Investment Act of 1958, as amended, are not considered affiliates of such investment companies or development companies.

(2)(i) Business concerns owned and controlled by Indian Tribes, Alaska Native Corporations (ANCs) organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), Native Hawaiian Organizations (NHOs), Community Development Corporations (CDCs) authorized by 42 U.S.C. 9805, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs are not considered affiliates of such entities.

(ii) Business concerns owned and controlled by Indian Tribes, ANCs, NHOs, CDCs, or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs, are not considered to be affiliated with other concerns owned by these entities because of their common ownership or common management. In addition, affiliation will not be found based upon the performance of common administrative services so long as adequate

payment is provided for those services. Affiliation may be found for other reasons.

(A) Common administrative services which are subject to the exception to affiliation include, bookkeeping, payroll, recruiting, other human resource support, cleaning services, and other duties which are otherwise unrelated to contract performance or management and can be reasonably pooled or otherwise performed by a holding company, parent entity, or sister business concern without interfering with the control of the subject firm.

(B) Contract administration services include both services that could be considered ''common administrative services'' under the exception to affiliation and those that could not.

(*1*) Contract administration services that encompass actual and direct day-to-day oversight and control of the performance of a contract/project are not shared common administrative services, and would include tasks or functions such as negotiating directly with the government agency regarding proposal terms, contract terms, scope and modifications, project scheduling, hiring and firing of employees, and overall responsibility for the day-to-day and overall project and contract completion.

(*2*) Contract administration services that are administrative in nature may constitute administrative services that can be shared, and would fall within the exception to affiliation. These administrative services include tasks such as record retention not related to a specific contract (*e.g.*, employee time and attendance records), maintenance of databases for awarded contracts, monitoring for regulatory compliance, template development, and assisting accounting with invoice preparation as needed.

(C) Business development may include both services that could be considered ''common administrative services'' under the exception to affiliation and those that could not. Efforts at the holding company or parent level to identify possible procurement opportunities for specific subsidiary companies may properly be considered ''common administrative services'' under the exception to affiliation. However, at some point the opportunity identified by the holding company's or parent entity's business development efforts becomes concrete enough to assign to a subsidiary and at that point the subsidiary must be involved in the business development efforts for such opportunity. At the proposal or bid preparation stage of business development, the appropriate subsidiary company for the opportunity has been identified and a representative of that company must be involved in preparing an appropriate offer. This does not mean to imply that one or more representatives of a holding company or parent entity cannot also be involved in preparing an offer. They may be involved in assisting with preparing the generic part of an offer, but the specific subsidiary that intends to ultimately perform the contract must control the technical and contract specific portions of preparing an offer. In addition, once award is made, employee assignments and the logistics for contract performance must be controlled by the specific subsidiary company and should not be performed at a holding company or parent entity level.

(3) Business concerns which are part of an SBA approved pool of concerns for a joint program of research and development or for defense production as authorized by the Small Business Act are not affiliates of one another because of the pool.

(4) Business concerns which lease employees from concerns primarily engaged in leasing employees to other businesses or which enter into a co-employer arrangement with a Professional Employer Organization (PEO) are not affiliated with the leasing company or PEO solely on the basis of a leasing agreement.

(5) For financial, management or technical assistance under the Small Business Investment Act of 1958, as amended, (an applicant is not affiliated with the investors listed in paragraphs (b)(5) (i) through (vi) of this section.

(i) Venture capital operating companies, as defined in the U.S. Department of Labor regulations found at 29 CFR 2510.3–101(d);

(ii) Employee benefit or pension plans established and maintained by the Federal government or any state,

or their political subdivisions, or any agency or instrumentality thereof, for the benefit of employees;

(iii) Employee benefit or pension plans within the meaning of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1001, *et seq.*);

(iv) Charitable trusts, foundations, endowments, or similar organizations exempt from Federal income taxation under section 501(c) of the Internal Revenue Code of 1986, as amended (26 U.S.C. 501(c));

(v) Investment companies registered under the Investment Company Act of 1940, as amended (1940 Act) (15 U.S.C. 80a-1, *et seq.*); and

(vi) Entities determined by SBA to be Traditional Investment Companies under 13 CFR 107.150(b)(2) and private funds exempt from registration under section 3(c)(1) or 3(c)(7) of the 1940 Act.

(6) A firm that has an SBA-approved mentor-protégé agreement authorized under §125.9 of this chapter is not affiliated with its mentor or protégé firm solely because the protégé firm receives assistance from the mentor under the agreement. Similarly, a protégé firm is not affiliated with its mentor solely because the protégé firm receives assistance from the mentor under a federal mentor-protégé program where an exception to affiliation is specifically authorized by statute or by SBA under the procedures set forth in §121.903. Affiliation may be found in either case for other reasons as set forth in this section.

(7) The member shareholders of a small agricultural cooperative, as defined in the Agricultural Marketing Act (12 U.S.C. 1141j), are not considered affiliated with the cooperative by virtue of their membership in the cooperative.

(8) These exceptions to affiliation and any others set forth in §121.702 apply for purposes of SBA's SBIR and STTR programs.

(9) In the case of a solicitation for a bundled contract or a Multiple Award Contract with a value in excess of the agency's substantial bundling threshold, a small business contractor may enter into a Small Business Teaming Arrangement with one or more small business subcontractors and submit an offer as a small business without regard to affiliation, so long as each team member is small for the size standard assigned to the contract or subcontract. The agency shall evaluate the offer in the same manner as other offers with due consideration of the capabilities of the subcontractors.

(10)(i) The relationship of a faith-based organization to another organization is not considered an affiliation with the other organization under this subpart if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion. In addition, the eligibility criteria set forth in 15 U.S.C. 636(a)(36)(D) are satisfied for any faith-based organization having not more than 500 employees (including individuals employed on a full-time, part-time, or other basis) that pays Federal payroll taxes using its own Internal Revenue Service Employer Identification Number (EIN) or that would support a deduction under the second sentence of 26 U.S.C. 512(b)(12) if the organization generated unrelated business taxable income. For purposes of this paragraph (b)(10), the term ''faith-based organization'' includes, but is not limited to, any organization associated with a church or convention or association of churches within the meaning of 26 U.S.C. 414(e)(3)(D). The term ''organization'' has the meaning given in 26 U.S.C. 414(m)(6)(A). The terms ''church'' and ''convention or association of churches'' have the same meaning that they have in 26 U.S.C. 414.

(ii) No specific process or filing is necessary to claim the benefit of the exemption in paragraph (b)(10)(i) of this section. In applying for a loan under the Paycheck Protection Program (PPP), a faith-based organization may make all necessary certifications with respect to common ownership or management or other eligibility criteria based upon affiliation, if the organization would be an eligible borrower but for application of SBA affiliation rules and if the organization falls within the terms of the exemption described in paragraph (b)(10)(i) of this section. If a faith-based organization indicates any relationship that may

pertain to affiliation, such as ownership of, ownership by, or common management with any other organization, on or in connection with a loan application, and if the faith-based organization applying for a loan falls within the terms of the exemption described in paragraph (b)(10)(i) of this section with respect to that relationship, the faith-based organization may indicate on a separate sheet that it is entitled to the exemption. That sheet may be identified as addendum A, and no further listing of the other organization or description of the relationship to that organization is required. See appendix A to this part for a sample ''Addendum A'', but the format need not be used as long as the substance is the same.

(c) *Affiliation based on stock ownership.* (1) A person (including any individual, concern or other entity) that owns, or has the power to control, 50 percent or more of a concern's voting stock, or a block of voting stock which is large compared to other outstanding blocks of voting stock, controls or has the power to control the concern.

(2) If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern's voting stock, and such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, SBA presumes that each such person controls or has the power to control the concern whose size is at issue. This presumption may be rebutted by a showing that such control or power to control does not in fact exist.

(3) If a concern's voting stock is widely held and no single block of stock is large as compared with all other stock holdings, the concern's Board of Directors and CEO or President will be deemed to have the power to control the concern in the absence of evidence to the contrary.

(d) *Affiliation arising under stock options, convertible securities, and agreements to merge.* (1) In determining size, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.

(2) Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered ''agreements in principle'' and are thus not given present effect.

(3) Options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect.

(4) An individual, concern or other entity that controls one or more other concerns cannot use options, convertible securities, or agreements to appear to terminate such control before actually doing so. SBA will not give present effect to individuals', concerns' or other entities' ability to divest all or part of their ownership interest in order to avoid a finding of affiliation.

(e) *Affiliation based on common management.* Affiliation arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns.

(f) *Affiliation based on identity of interest.* Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

(1) Firms owned or controlled by married couples, parties to a civil union, parents, children, and siblings are presumed to be affiliated with each other if they conduct business with

each other, such as subcontracts or joint ventures or share or provide loans, resources, equipment, locations or employees with one another. This presumption may be overcome by showing a clear line of fracture between the concerns. Other types of familial relationships are not grounds for affiliation on family relationships.

(2) SBA may presume an identity of interest based upon economic dependence if the concern in question derived 70% or more of its receipts from another concern over the previous three fiscal years.

(i) This presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts or where the contractual relations do not restrict the concern in question from selling the same type of products or services to another purchaser.

(ii) A business concern owned and controlled by an Indian Tribe, ANC, NHO, CDC, or by a wholly-owned entity of an Indian Tribe, ANC, NHO, or CDC, is not considered to be affiliated with another concern owned by that entity based solely on the contractual relations between the two concerns.

Example 1 to paragraph (f). Firm A has been in business for 9 months and has two contracts. Contract 1 is with Firm B and is valued at $900,000 and Contract 2 is with Firm C and is valued at $200,000. Thus, Firm B accounts for over 70% of Firm A's receipts. Absent other connections between A and B, the presumption of affiliation between A and B is rebutted because A is a new firm.

Example 2 to paragraph (f). Firm A has been in business for five years and has approximately 200 contracts. Of those contracts, 195 are with Firm B. The value of Firm A's contracts with Firm B is greater than 70% of its revenue over the previous three years. Unless Firm A can show that its contractual relations with Firm B do not restrict it from selling the same type of products or services to another purchaser, SBA would most likely find the two firms affiliated.

(g) *Affiliation based on the newly organized concern rule.* Except as provided in §124.109(c)(4)(iii), affiliation may arise where former or current officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A ''key employee'' is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(h) *Affiliation based on joint ventures.* A joint venture is an association of individuals and/or concerns with interests in any degree or proportion intending to engage in and carry out business ventures for joint profit over a two-year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that a specific joint venture generally may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for the joint venture. However, a joint venture may be issued an order under a previously awarded contract beyond the two-year period. Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award. An individual joint venture may be awarded one or more contracts after that two-year period as long as it submitted an offer prior to the end of that two-year period. SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award. The same two (or more) entities may

create additional joint ventures, and each new joint venture may submit offers for a period of two years from the date of the first contract to the joint venture without the partners to the joint venture being deemed affiliates. At some point, however, such a long-standing inter-relationship or contractual dependence between the same joint venture partners may lead to a finding of general affiliation between and among them. SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture pursuant to paragraph (h)(3) of this section. For purposes of this paragraph (h), contract refers to prime contracts, novations of prime contracts, and any subcontract in which the joint venture is treated as a similarly situated entity as the term is defined in part 125 of this chapter.

Example 1 to paragraph (h) introductory text. Joint Venture AB receives a contract on April 2, year 1. Joint Venture AB may receive additional contracts through April 2, year 3. On June 6, year 2, Joint Venture AB submits an offer for Solicitation 1. On July 13, year 2, Joint Venture AB submits an offer for Solicitation 2. On May 27, year 3, Joint Venture AB is found to be the apparent successful offeror for Solicitation 1. On July 22, year 3, Joint Venture AB is found to be the apparent successful offeror for Solicitation 2. Even though the award of the two contracts emanating from Solicitations 1 and 2 would occur after April 2, year 3, Joint Venture AB may receive those awards without causing general affiliation between its joint venture partners because the offers occurred prior to the expiration of the two-year period.

Example 2 to paragraph (h) introductory text. Joint Venture XY receives a contract on August 10, year 1. It may receive two additional contracts through August 10, year 3. On March 19, year 3, XY receives its fifth contract. It receives no other contract awards through August 10, year 3 and has submitted no additional offers prior to August 10, year 3. Because two years have passed since the date of the first contract award, after August 10, year 3, XY cannot receive an additional contract award. The individual parties to XY must form a new joint venture if they want to seek and be awarded additional contracts as a joint venture.

Example 3 to paragraph (h) introductory text. Joint Venture XY receives a contract on December 15, year 1. On May 22, year 3 XY submits an offer for Solicitation S. On December 8, year 3, XY submits a novation package for contracting officer approval for Contract C. In January, year 4 XY is found to be the apparent successful offeror for Solicitation S and the relevant contracting officer seeks to novate Contract C to XY. Because both the offer for Solicitation S and the novation package for Contract C were submitted prior to December 15 year 3, both contract award relating to Solicitation S and novation of Contract C may occur without a finding of general affiliation.

(1) *Form of joint venture.* A joint venture: must be in writing; must do business under its own name and be identified as a joint venture in the System for Award Management (SAM) for the award of a prime contract or agreement; and may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity.

(i) If a joint venture exists as a formal separate legal entity, it cannot be populated with individuals intended to perform contracts awarded to the joint venture for any contract or agreement which is set aside or reserved for small business, unless all parties to the joint venture are similarly situated as that term is defined in part 125 of this chapter (*i.e.*, the joint venture may have its own separate employees to perform administrative functions, including one or more Facility Security Officer(s), but may not have its own separate employees to perform contracts awarded to the joint venture).

(ii) A populated joint venture that is not comprised entirely of similarly situated entities will be ineligible for any contract or agreement which is set aside or reserved for small business.

(iii) In determining the size of a populated joint venture (whether one involving similarly situated entities or not), SBA will aggregate the revenues or employees of all partners to the joint venture.

(2) *Size of joint ventures.* (i) A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract. For a competitive 8(a) procurement, a joint venture between an 8(a) Participant and one or more other small business concerns (including two firms approved by SBA to be a mentor and protégé under § 125.9 of

this chapter) must also meet the requirements of §124.513(c) and (d) of this chapter as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding in order to be eligible for award.

(ii) Two firms approved by SBA to be a mentor and protégé under §125.9 of this chapter may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and the joint venture meets the requirements of §124.513 (c) and (d), §125.8(b) and (c), §128.402(c) and (d), §126.616(c) and (d), or §127.506(c) and (d) of this chapter, as appropriate. Except for sole source 8(a) awards, the joint venture must meet the requirements of §124.513(c) and (d), §125.8(b) and (c), §125.18(b)(2) and (3), §126.616(c) and (d), or §127.506(c) and (d) of this chapter, as appropriate, as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding. For a sole source 8(a) award, the joint venture must demonstrate that it meets the requirements of §124.513(c) and (d) prior to the award of the contract.

(3) *Ostensible subcontractors.* A contractor and its ostensible subcontractor are treated as joint venturers for size determination purposes. An ostensible subcontractor is a subcontractor that is not a similarly situated entity, as that term is defined in §125.1 of this chapter, and performs primary and vital requirements of a contract, or of an order, or is a subcontractor upon which the prime contractor is unusually reliant. As long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract (or the prime contractor is small if the subcontractor is the SBA-approved mentor to the prime contractor), the arrangement will qualify as a small business.

(i) All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, transfer of the subcontractor's incumbent managers, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation, and whether the prime contractor relies solely on the subcontractor's experience because it lacks any relevant experience of its own. No one factor is determinative.

(ii) A prime contractor may use the experience and past performance of a subcontractor to enhance or strengthen its offer, including that of an incumbent contractor. It is only where that subcontractor will perform primary and vital requirements of a contract or order, or the prime contractor is unusually reliant on the subcontractor, that SBA will find the subcontractor to be an ostensible subcontractor.

(iii) In the case of a contract or order set-aside or reserved for small business for services, specialty trade construction or supplies, SBA will find that a small business prime contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not small businesses, where the prime contractor can demonstrate that it, together with any subcontractors that qualify as small businesses, will meet the limitations on subcontracting provisions set forth in §125.6 of this chapter.

(iv) In a general construction contract, the primary and vital requirements of the contract are the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed.

(4) *Receipts/employees attributable to joint venture partners.* For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts. Proportionate receipts do not include proceeds from transactions between the concern and its joint ventures (e.g., subcontracts from a joint venture entity to joint venture partners) already accounted for in the concern's tax return. In determining the number of employees, a concern must

include in its total number of employees its proportionate share of individuals employed by the joint venture. For the calculation of receipts, the appropriate proportionate share is the same percentage of receipts or employees as the joint venture partner's percentage share of the work performed by the joint venture. For a populated joint venture (where work is performed by the joint venture entity itself and not by the individual joint venture partners) the appropriate share is the same percentage as the joint venture partner's percentage ownership share in the joint venture. For the calculation of employees, the appropriate share is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in one of the partner's employee counts.

(5) *Facility security clearances.* A joint venture may be awarded a contract requiring a facility security clearance where either the joint venture itself or the individual partner(s) to the joint venture that will perform the necessary security work has (have) a facility security clearance.

(i) Where a facility security clearance is required to perform primary and vital requirements of a contract, the lead small business partner to the joint venture must possess the required facility security clearance.

(ii) Where the security portion of the contract requiring a facility security clearance is ancillary to the principal purpose of the procurement, the partner to the joint venture that will perform that work must possess the required facility security clearance.

(i) *Affiliation based on franchise and license agreements.* The restraints imposed on a franchisee or licensee by its franchise or license agreement relating to standardized quality, advertising, accounting format and other similar provisions, generally will not be considered in determining whether the franchisor or licensor is affiliated with the franchisee or licensee provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Affiliation may arise, however, through other means, such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.

[61 FR 3286, Jan. 31, 1996]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §121.103, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

§121.104 How does SBA calculate annual receipts?

(a) *Receipts* means all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered ''total income'' (or in the case of a sole proprietorship ''gross income'') plus ''cost of goods sold'' as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from receipts.

(1) The Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern. SBA will not

use tax returns or amendments filed with the IRS after the initiation of a size determination.

(2) When a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement, SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.

(b) *Completed fiscal year* means a taxable year including any short year. ''Taxable year'' and ''short year'' have the meanings attributed to them by the IRS.

(c) *Period of measurement.* (1) Except for the Business Loan, Disaster Loan, Surety Bond Guarantee, and Small Business Investment Company (SBIC) Programs, annual receipts of a concern that has been in business for 5 or more completed fiscal years means the total receipts of the concern over its most recently completed 5 fiscal years divided by 5.

(2) Except for the Business Loan, Disaster Loan Programs, Surety Bond Guarantee, and SBIC Programs, annual receipts of a concern which has been in business for less than 5 complete fiscal years means the total receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52.

(3) Except for the Business Loan, Disaster Loan, Surety Bond Guarantee, and SBIC Programs, where a concern has been in business 5 or more complete fiscal years but has a short year as one of the years within its period of measurement, annual receipts means the total receipts for the short year and the 4 full fiscal years divided by the total number of weeks in the short year and the 4 full fiscal years, multiplied by 52.

(4) For the Business Loan, Disaster Loan, Surety Bond Guarantee, and SBIC Programs, a concern that has been in business for three or more completed fiscal years may elect to calculate annual receipts using either the total receipts of the concern over its most recently completed 5 fiscal years divided by 5, or the total receipts of the concern over its most recently completed 3 fiscal years divided by 3. Annual receipts of a concern which has been in business for less than three complete fiscal years means the total receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52. Where a concern has been in business three or more complete fiscal years but has a short year as one of the years within its period of measurement, annual receipts means the total receipts for the short year and the two full fiscal years divided by the total number of weeks in the short year and the two full fiscal years, multiplied by 52. For the purposes of this subsection, the Business Loan Programs consist of the 7(a) Loan Program, the Microloan Program, the Intermediary Lending Pilot Program, and the Development Company Loan Program (''504 Loan Program''). The Disaster Loan Programs consist of Economic Injury Disaster Loans, Military Reservist Economic Injury Disaster Loans, and Immediate Disaster Assistance Program loans.

(d) *Annual receipts of affiliates.* (1) The average annual receipts size of a business concern with affiliates is calculated by adding the average annual receipts of the business concern with the average annual receipts of each affiliate.

(2) If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the annual receipts used in determining size status includes the receipts of the acquired or acquiring concern. This aggregation applies for the entire period of measurement, not just the period after the affiliation arose. However, if a concern has acquired a segregable division of another business concern during the applicable period of measurement or before the date on which it self-certified as small, the annual receipts used in determining size status do not include the receipts of the acquired division prior to the acquisition.

(3) Except for the Business Loan and Disaster Loan Programs, if the business concern or an affiliate has been in business for a period of less than 5

years, the receipts for the fiscal year with less than a 12-month period are annualized in accordance with paragraph (c)(2) of this section. Receipts are determined for the concern and its affiliates in accordance with paragraph (c) of this section even though this may result in using a different period of measurement to calculate an affiliate's annual receipts.

(4) The annual receipts of a former affiliate are not included if affiliation ceased before the date used for determining size. This exclusion of annual receipts of such former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased. However, if a concern has sold a segregable division to another business concern during the applicable period of measurement or before the date on which it self-certified as small, the annual receipts used in determining size status will continue to include the receipts of the division that was sold.

(e) Unless otherwise defined in this section, all terms shall have the meaning attributed to them by the IRS.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 48604, Aug. 9, 2000; 69 FR 29203, May 21, 2004; 81 FR 34258, May 31, 2016; 84 FR 66578, Dec. 5, 2019; 87 FR 34120, June 6, 2022]

§ 121.105 How does SBA define "business concern or concern"?

(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

(2) A small agricultural cooperative is an association (corporate or otherwise) acting pursuant to the provisions of the Agricultural Marketing Act (12 U.S.C.A. 1141j) whose size does not exceed the size standard established by SBA for other similar agricultural small business concerns. A small agricultural cooperative's member shareholders are not considered to be affiliates of the cooperative by virtue of their membership in the cooperative. However, a business concern or cooperative that does not qualify as small under this part may not be a member of a small agricultural cooperative.

(b) A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.

(c) A firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity. In such a case, the annual receipts and employees of the predecessor will be taken into account in determining size.

[61 FR 3286, Jan. 31, 1996, as amended at 70 FR 51248, Aug. 30, 2005]

§ 121.106 How does SBA calculate number of employees?

(a) In determining a concern's number of employees, SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern. Volunteers (*i.e.*, individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees.

(b) Where the size standard is number of employees, the method for determining a concern's size includes the following principles:

(1) The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 24 calendar months.

(2) Part-time and temporary employees are counted the same as full-time employees.

(3) If a concern has not been in business for 24 months, the average number of employees is used for each of the pay

periods during which it has been in business.

(4)(i) The average number of employees of a business concern with affiliates is calculated by adding the average number of employees of the business concern with the average number of employees of each affiliate. If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the employees counted in determining size status include the employees of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

(ii) The employees of a former affiliate are not counted if affiliation ceased before the date used for determining size. This exclusion of employees of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased. However, if a concern has sold a segregable division to another business concern during the applicable period of measurement or before the date on which it self-certified as small, the employees used in determining size status will continue to include the employees of the division that was sold.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29203, May 21, 2004; 84 FR 66579, Dec. 5, 2019; 87 FR 34120, June 6, 2022]

§ 121.107 How does SBA determine a concern's "primary industry"?

In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.

§ 121.108 What are the penalties for misrepresentation of size status?

(a) *Presumption of Loss Based on the Total Amount Expended.* In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation.

(b) *Deemed Certifications.* The following actions shall be deemed affirmative, willful and intentional certifications of small business size and status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to small business concerns.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a small business concern.

(c) *Signature Requirement.* Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the small business size and status of a business concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the size status claimed by the concern.

(d) *Limitation of Liability.* Paragraphs (a) through (c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations

that demonstrate that a misrepresentation of size was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' size. Relevant factors to consider in making this determination may include the firm's internal management procedures governing size representation or certification, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as small without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) *Penalties for Misrepresentation.* (1) *Suspension or debarment.* The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's size status pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) *Civil Penalties.* Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729–3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812 and any other applicable laws or regulations, including 13 CFR part 142.

(3) *Criminal Penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct ''continuing representations'' that are no longer true.

(4) *Limitation on Liability.* An individual or business concern will not be subject to the penalties imposed under 15 U.S.C. 645(a) where it acted in good faith reliance on a small business status advisory opinion accepted by SBA under §121.109.

[78 FR 38816, June 28, 2013, as amended at 80 FR 7536, Feb. 11, 2015; 81 FR 31491, May 19, 2016]

§121.109 What is a small business status advisory opinion?

(a) *Defined.* A small business status advisory opinion is a written opinion issued by either a Small Business Development Center (SBDC) operating under part 130 of this chapter or a Procurement Technical Assistance Center (PTAC) operating under 10 U.S.C. chapter 142 which concludes that a firm is entitled to represent itself as a small business concern for purposes of federal government procurement opportunities.

(b) *Submission.* An SBDC or PTAC must submit a copy of each small business status advisory opinion it issues to the following Agency official for review: Associate General Counsel, Office of Procurement Law, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416 or by fax to (202) 205–6390 marked Attn: Small Business Status Advisory Opinion. A small business status advisory opinion must:

(1) Provide a written analysis explaining the reasoning underlying the SBDC or PTAC's determination that the covered concern, along with its affiliates, either does or does not exceed the size standard(s). This analysis must be dated and signed by an SBDC or PTAC business counselor or similarly qualified individual.

(2) Include, as an attachment, a completed copy of an SBA Form 355 for the covered concern and its affiliates.

(3) Include, as an attachment, copies of the evidence (such as payroll records, time sheets, federal income tax returns, etc.) provided by the covered concern to the SBDC or PTAC clearly documenting its annual receipts and/or number of employees as those terms are defined by §§121.104 and 121.106.

(c) *Review.* Unless a referral is made under paragraph (e) of this section,

SBA will decide within 10 business days of receiving a small business status advisory opinion to accept or reject it based on its consistency with part 121. SBA will provide written notification of that decision to the SBDC or PTAC that issued the small business status advisory opinion as well as to the covered concern.

(d) *Reliance.* A concern that receives a small business status advisory opinion holding that it does not exceed the applicable size standard(s) may rely upon that determination for purposes of responding to Federal procurement opportunities from the date it is issued unless and until that advisory opinion is rejected by SBA in accordance with paragraph (c) of this section or the concern undergoes a significant change in its ownership, management, or other factors bearing on its status as a small business concern. However, the firm's size may be protested by interested parties in connection with a specific procurement.

(e) *Referral for size determination.* Nothing in this section precludes the Associate General Counsel, Office of Procurement Law from requesting a formal size determination for a concern that is the subject of a small business status advisory opinion pursuant to §121.1001(b)(9).

(f) *Penalties for misrepresentation*—(1) *Suspension or debarment.* The SBA suspension and debarment official may suspend or debar a person or concern for misrepresenting a concern's size for purposes of obtaining a small business size status advisory opinion pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) *Civil penalties.* Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729–3733, and under the Program Fraud Civil Remedies Act, 331 U.S.C. 3801–3812, and any other applicable laws.

(3) *Criminal Penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct ''continuing representations'' that are no longer true.

[80 FR 7536, Feb. 11, 2015]

§121.110 What must a concern do in order to be identified as a small business concern in any Federal procurement databases?

(a) In order to be identified as a small business concern in the System for Award Management (SAM) database (or any successor thereto), a concern must certify its size in connection with specific size standards at least annually.

(b) If a firm identified as a small business concern in SAM fails to certify its size within one year of a size certification, the firm will not be listed as a small business concern in SAM, unless and until the firm recertifies its size.

[78 FR 38817, June 28, 2013. Redesignated at 80 FR 7536, Feb. 11, 2015]

SIZE STANDARDS USED TO DEFINE SMALL BUSINESS CONCERNS

§121.201 What size standards has SBA identified by North American Industry Classification System codes?

The size standards described in this section apply to all SBA programs unless otherwise specified in this part. The size standards themselves are expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified. The number of employees or annual receipts indicates the maximum allowed for a concern and its affiliates to be considered small.

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
	Sector 11—Agriculture, Forestry, Fishing and Hunting		
	Subsector 111—Crop Production		
111110	Soybean Farming	$2.25	
111120	Oilseed (except Soybean) Farming	$2.25	
111130	Dry Pea and Bean Farming	$2.75	
111140	Wheat Farming	$2.25	
111150	Corn Farming	$2.5	
111160	Rice Farming	$2.5	
111191	Oilseed and Grain Combination Farming	$2.25	
111199	All Other Grain Farming	$2.25	
111211	Potato Farming	$4.25	
111219	Other Vegetable (except Potato) and Melon Farming	$3.75	
111310	Orange Groves	$4.0	
111320	Citrus (except Orange) Groves	$4.25	
111331	Apple Orchards	$4.5	
111332	Grape Vineyards	$4.0	
111333	Strawberry Farming	$5.5	
111334	Berry (except Strawberry) Farming	$3.75	
111335	Tree Nut Farming	$3.75	
111336	Fruit and Tree Nut Combination Farming	$5.0	
111339	Other Noncitrus Fruit Farming	$3.5	
111411	Mushroom Production	$4.5	
111419	Other Food Crops Grown Under Cover	$4.5	
111421	Nursery and Tree Production	$3.25	
111422	Floriculture Production	$3.75	
111910	Tobacco Farming	$2.5	
111920	Cotton Farming	$3.25	
111930	Sugarcane Farming	$5.0	
111940	Hay Farming	$2.5	
111991	Sugar Beet Farming	$2.5	
111992	Peanut Farming	$2.5	
111998	All Other Miscellaneous Crop Farming	$2.5	
	Subsector 112—Animal Production and Aquaculture		
112111	Beef Cattle Ranching and Farming	$2.5	
112112	Cattle Feedlots	$22.0	
112120	Dairy Cattle and Milk Production	$3.75	
112210	Hog and Pig Farming	$4.0	
112310	Chicken Egg Production	$19.0	
112320	Broilers and Other Meat Type Chicken Production	$3.5	
112330	Turkey Production	$3.75	
112340	Poultry Hatcheries	$4.0	
112390	Other Poultry Production	$3.75	
112410	Sheep Farming	$3.5	
112420	Goat Farming	$2.5	
112511	Finfish Farming and Fish Hatcheries	$3.75	
112512	Shellfish Farming	$3.75	
112519	Other Aquaculture	$3.75	
112910	Apiculture	$3.25	
112920	Horse and Other Equine Production	$2.75	
112930	Fur-Bearing Animal and Rabbit Production	$3.75	
112990	All Other Animal Production	$2.75	
	Subsector 113—Forestry and Logging		
113110	Timber Tract Operations	$19.0	
113210	Forest Nurseries and Gathering of Forest Products	$20.5	
113310	Logging		500
	Subsector 114—Fishing, Hunting and Trapping		
114111	Finfish Fishing	$25.0	
114112	Shellfish Fishing	$14.0	
114119	Other Marine Fishing	$11.5	
114210	Hunting and Trapping	$8.5	
	Subsector 115—Support Activities for Agriculture and Forestry		
115111	Cotton Ginning	$16.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
115112	Soil Preparation, Planting, and Cultivating	$9.5	
115113	Crop Harvesting, Primarily by Machine	$13.5	
115114	Postharvest Crop Activities (except Cotton Ginning)	$34.0	
115115	Farm Labor Contractors and Crew Leaders	$19.0	
115116	Farm Management Services	$15.5	
115210	Support Activities for Animal Production	$11.0	
115310	Support Activities for Forestry	$11.5	
115310 (Exception 1).	Forest Fire Suppression [1]	$34.0 [1]	
115310 (Exception 2).	Fuels Management Services [1]	$34.0 [1]	
	Sector 21—Mining, Quarrying, and Oil and Gas Extraction		
	Subsector 211—Oil and Gas Extraction		
211120	Crude Petroleum Extraction		1,250
211130	Natural Gas Extraction		1,250
	Subsector 212—Mining (except Oil and Gas)		
212114	Surface Coal Mining		1,250
212115	Underground Coal Mining		1,500
212210	Iron Ore Mining		1,400
212220	Gold Ore and Silver Ore Mining		1,500
212230	Copper, Nickel, Lead, and Zinc Mining		1,400
212290	Other Metal Ore Mining		1,250
212311	Dimension Stone Mining and Quarrying		500
212312	Crushed and Broken Limestone Mining and Quarrying		750
212313	Crushed and Broken Granite Mining and Quarrying		850
212319	Other Crushed and Broken Stone Mining and Quarrying		550
212321	Construction Sand and Gravel Mining		500
212322	Industrial Sand Mining		750
212323	Kaolin, Clay, and Ceramic and Refractory Minerals Mining		650
212390	Other Nonmetallic Mineral Mining and Quarrying		600
	Subsector 213—Support Activities for Mining		
213111	Drilling Oil and Gas Wells		1,000
213112	Support Activities for Oil and Gas Operations	$47.0	
213113	Support Activities for Coal Mining	$27.5	
213114	Support Activities for Metal Mining	$41.0	
213115	Support Activities for Nonmetallic Minerals (except Fuels)	$20.5	
	Sector 22—Utilities		
	Subsector 221—Utilities		
221111	Hydroelectric Power Generation		750
221112	Fossil Fuel Electric Power Generation		950
221113	Nuclear Electric Power Generation		1,150
221114	Solar Electric Power Generation		500
221115	Wind Electric Power Generation		1,150
221116	Geothermal Electric Power Generation		250
221117	Biomass Electric Power Generation		550
221118	Other Electric Power Generation		650
221121	Electric Bulk Power Transmission and Control		950
221122	Electric Power Distribution		1,100
221210	Natural Gas Distribution		1,150
221310	Water Supply and Irrigation Systems	$41.0	
221320	Sewage Treatment Facilities	$35.0	
221330	Steam and Air-Conditioning Supply	$30.0	
	Sector 23—Construction		
	Subsector 236—Construction of Buildings		
236115	New Single-family Housing Construction (Except For-Sale Builders)	$45.0	
236116	New Multifamily Housing Construction (except For-Sale Builders)	$45.0	
236117	New Housing For-Sale Builders	$45.0	
236118	Residential Remodelers	$45.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
236210	Industrial Building Construction	$45.0	
236220	Commercial and Institutional Building Construction	$45.0	
	Subsector 237—Heavy and Civil Engineering Construction		
237110	Water and Sewer Line and Related Structures Construction	$45.0	
237120	Oil and Gas Pipeline and Related Structures Construction	$45.0	
237130	Power and Communication Line and Related Structures Construction	$45.0	
237210	Land Subdivision	$34.0	
237310	Highway, Street, and Bridge Construction	$45.0	
237990	Other Heavy and Civil Engineering Construction	$45.0	
237900 (Exception).	Dredging and Surface Cleanup Activities[2]	$37.0[2]	
	Subsector 238—Specialty Trade Contractors		
238110	Poured Concrete Foundation and Structure Contractors	$19.0	
238120	Structural Steel and Precast Concrete Contractors	$19.0	
238130	Framing Contractors	$19.0	
238140	Masonry Contractors	$19.0	
238150	Glass and Glazing Contractors	$19.0	
238160	Roofing Contractors	$19.0	
238170	Siding Contractors	$19.0	
238190	Other Foundation, Structure, and Building Exterior Contractors	$19.0	
238210	Electrical Contractors and Other Wiring Installation Contractors	$19.0	
238220	Plumbing, Heating, and Air-Conditioning Contractors	$19.0	
238290	Other Building Equipment Contractors	$22.0	
238310	Drywall and Insulation Contractors	$19.0	
238320	Painting and Wall Covering Contractors	$19.0	
238330	Flooring Contractors	$19.0	
238340	Tile and Terrazzo Contractors	$19.0	
238350	Finish Carpentry Contractors	$19.0	
238390	Other Building Finishing Contractors	$19.0	
238910	Site Preparation Contractors	$19.0	
238990	All Other Specialty Trade Contractors	$19.0	
238990 (Exception).	Building and Property Specialty Trade Services[13]	$19.0[13]	
	Sectors 31–33—Manufacturing		
	Subsector 311—Food Manufacturing		
311111	Dog and Cat Food Manufacturing		1,250
311119	Other Animal Food Manufacturing		650
311211	Flour Milling		1,050
311212	Rice Milling		750
311213	Malt Manufacturing		500
311221	Wet Corn Milling and Starch Manufacturing		1,300
311224	Soybean and Other Oilseed Processing		1,250
311225	Fats and Oils Refining and Blending		1,100
311230	Breakfast Cereal Manufacturing		1,300
311313	Beet Sugar Manufacturing		1,150
311314	Cane Sugar Manufacturing		1,050
311340	Nonchocolate Confectionery Manufacturing		1,000
311351	Chocolate and Confectionery Manufacturing from Cacao Beans		1,250
311352	Confectionery Manufacturing from Purchased Chocolate		1,000
311411	Frozen Fruit, Juice, and Vegetable Manufacturing		1,100
311412	Frozen Specialty Food Manufacturing		1,250
311421	Fruit and Vegetable Canning[3]		1,000[3]
311422	Specialty Canning		1,400
311423	Dried and Dehydrated Food Manufacturing		750
311511	Fluid Milk Manufacturing		1,150
311512	Creamery Butter Manufacturing		750
311513	Cheese Manufacturing		1,250
311514	Dry, Condensed, and Evaporated Dairy Product Manufacturing		1,000
311520	Ice Cream and Frozen Dessert Manufacturing		1,000
311611	Animal (except Poultry) Slaughtering		1,150
311612	Meat Processed from Carcasses		1,000
311613	Rendering and Meat Byproduct Processing		750
311615	Poultry Processing		1,250
311710	Seafood Product Preparation and Packaging		750
311811	Retail Bakeries		500

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
311812	Commercial Bakeries		1,000
311813	Frozen Cakes, Pies, and Other Pastries Manufacturing		750
311821	Cookie and Cracker Manufacturing		1,250
311824	Dry Pasta, Dough, and Flour Mixes Manufacturing from Purchased Flour		850
311830	Tortilla Manufacturing		1,250
311911	Roasted Nuts and Peanut Butter Manufacturing		750
311919	Other Snack Food Manufacturing		1,250
311920	Coffee and Tea Manufacturing		1,000
311930	Flavoring Syrup and Concentrate Manufacturing		1,100
311941	Mayonnaise, Dressing, and Other Prepared Sauce Manufacturing		850
311942	Spice and Extract Manufacturing		650
311991	Perishable Prepared Food Manufacturing		700
311999	All Other Miscellaneous Food Manufacturing		700
	Subsector 312—Beverage and Tobacco Product Manufacturing		
312111	Soft Drink Manufacturing		1,400
312112	Bottled Water Manufacturing		1,100
312113	Ice Manufacturing		750
312120	Breweries		1,250
312130	Wineries		1,000
312140	Distilleries		1,100
312230	Tobacco Manufacturing		1,500
	Subsector 313—Textile Mills		
313110	Fiber, Yarn, and Thread Mills		1,250
313210	Broadwoven Fabric Mills		1,000
313220	Narrow Fabric Mills and Schiffli Machine Embroidery		550
313230	Nonwoven Fabric Mills		850
313240	Knit Fabric Mills		500
313310	Textile and Fabric Finishing Mills		1,000
313320	Fabric Coating Mills		1,000
	Subsector 314—Textile Product Mills		
314110	Carpet and Rug Mills		1,500
314120	Curtain and Linen Mills		750
314910	Textile Bag and Canvas Mills		500
314994	Rope, Cordage, Twine, Tire Cord, and Tire Fabric Mills		1,000
314999	All Other Miscellaneous Textile Product Mills		550
	Subsector 315—Apparel Manufacturing		
315120	Apparel Knitting Mills		850
315210	Cut and Sew Apparel Contractors		750
315250	Cut and Sew Apparel Manufacturing (except Contractors)		750
315990	Apparel Accessories and Other Apparel Manufacturing		600
	Subsector 316—Leather and Allied Product Manufacturing		
316110	Leather and Hide Tanning and Finishing		800
316210	Footwear Manufacturing		1,000
316990	Other Leather and Allied Product Manufacturing		500
	Subsector 321—Wood Product Manufacturing		
321113	Sawmills		550
321114	Wood Preservation		550
321211	Hardwood Veneer and Plywood Manufacturing		600
321212	Softwood Veneer and Plywood Manufacturing		1,250
321215	Engineered Wood Member Manufacturing		500
321219	Reconstituted Wood Product Manufacturing		750
321911	Wood Window and Door Manufacturing		1,000
321912	Cut Stock, Resawing Lumber, and Planing		500
321918	Other Millwork (including Flooring)		500
321920	Wood Container and Pallet Manufacturing		500
321991	Manufactured Home (Mobile Home) Manufacturing		1,250
321992	Prefabricated Wood Building Manufacturing		500
321999	All Other Miscellaneous Wood Product Manufacturing		500

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
	Subsector 322—Paper Manufacturing		
322110	Pulp Mills		1,050
322120	Paper Mills		1,250
322130	Paperboard Mills		1,250
322211	Corrugated and Solid Fiber Box Manufacturing		1,250
322212	Folding Paperboard Box Manufacturing		750
322219	Other Paperboard Container Manufacturing		1,000
322220	Paper Bag and Coated and Treated Paper Manufacturing		750
322230	Stationery Product Manufacturing		750
322291	Sanitary Paper Product Manufacturing		1,500
322299	All Other Converted Paper Product Manufacturing		500
	Subsector 323—Printing and Related Support Activities		
323111	Commercial Printing (except Screen and Books)		650
323113	Commercial Screen Printing		500
323117	Books Printing		1,250
323120	Support Activities for Printing		550
	Subsector 324—Petroleum and Coal Products Manufacturing		
324110	Petroleum Refineries[4]		1,500[4]
324121	Asphalt Paving Mixture and Block Manufacturing		500
324122	Asphalt Shingle and Coating Materials Manufacturing		1,100
324191	Petroleum Lubricating Oil and Grease Manufacturing		900
324199	All Other Petroleum and Coal Products Manufacturing		950
	Subsector 325—Chemical Manufacturing		
325110	Petrochemical Manufacturing		1,300
325120	Industrial Gas Manufacturing		1,200
325130	Synthetic Dye and Pigment Manufacturing		1,050
325180	Other Basic Inorganic Chemical Manufacturing		1,000
325193	Ethyl Alcohol Manufacturing		1,000
325194	Cyclic Crude, Intermediate, and Gum and Wood Chemical Manufacturing		1,250
325199	All Other Basic Organic Chemical Manufacturing		1,250
325211	Plastics Material and Resin Manufacturing		1,250
325212	Synthetic Rubber Manufacturing		1,000
325220	Artificial and Synthetic Fibers and Filaments Manufacturing		1,050
325311	Nitrogenous Fertilizer Manufacturing		1,050
325312	Phosphatic Fertilizer Manufacturing		1,350
325314	Fertilizer (Mixing Only) Manufacturing		550
325315	Compost Manufacturing		550
325320	Pesticide and Other Agricultural Chemical Manufacturing		1,150
325411	Medicinal and Botanical Manufacturing		1,000
325412	Pharmaceutical Preparation Manufacturing		1,300
325413	In-Vitro Diagnostic Substance Manufacturing		1,250
325414	Biological Product (except Diagnostic) Manufacturing		1,250
325510	Paint and Coating Manufacturing		1,000
325520	Adhesive Manufacturing		550
325611	Soap and Other Detergent Manufacturing		1,100
325612	Polish and Other Sanitation Good Manufacturing		900
325613	Surface Active Agent Manufacturing		1,100
325620	Toilet Preparation Manufacturing		1,250
325910	Printing Ink Manufacturing		750
325920	Explosives Manufacturing		750
325991	Custom Compounding of Purchased Resins		600
325992	Photographic Film, Paper, Plate, Chemical, and Copy Toner Manufacturing		1,500
325998	All Other Miscellaneous Chemical Product and Preparation Manufacturing		650
	Subsector 326—Plastics and Rubber Products Manufacturing		
326111	Plastics Bag and Pouch Manufacturing		750
326112	Plastics Packaging Film and Sheet (including Laminated) Manufacturing		1,000
326113	Unlaminated Plastics Film and Sheet (except Packaging) Manufacturing		750
326121	Unlaminated Plastics Profile Shape Manufacturing		600
326122	Plastics Pipe and Pipe Fitting Manufacturing		750
326130	Laminated Plastics Plate, Sheet (except Packaging), and Shape Manufacturing.		650
326140	Polystyrene Foam Product Manufacturing		1,000

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
326150	Urethane and Other Foam Product (except Polystyrene) Manufacturing		750
326160	Plastics Bottle Manufacturing		1,250
326191	Plastics Plumbing Fixture Manufacturing		750
326199	All Other Plastics Product Manufacturing		750
326211	Tire Manufacturing (except Retreading) [5]		1,500 [5]
326212	Tire Retreading		500
326220	Rubber and Plastics Hoses and Belting Manufacturing		800
326291	Rubber Product Manufacturing for Mechanical Use		750
326299	All Other Rubber Product Manufacturing		650
	Subsector 327—Nonmetallic Mineral Product Manufacturing		
327110	Pottery, Ceramics, and Plumbing Fixture Manufacturing		1,000
327120	Clay Building Material and Refractories Manufacturing		750
327211	Flat Glass Manufacturing		1,100
327212	Other Pressed and Blown Glass and Glassware Manufacturing		1,250
327213	Glass Container Manufacturing		1,250
327215	Glass Product Manufacturing Made of Purchased Glass		1,000
327310	Cement Manufacturing		1,000
327320	Ready-Mix Concrete Manufacturing		500
327331	Concrete Block and Brick Manufacturing		500
327332	Concrete Pipe Manufacturing		750
327390	Other Concrete Product Manufacturing		500
327410	Lime Manufacturing		1,050
327420	Gypsum Product Manufacturing		1,500
327910	Abrasive Product Manufacturing		900
327991	Cut Stone and Stone Product Manufacturing		500
327992	Ground or Treated Mineral and Earth Manufacturing		600
327993	Mineral Wool Manufacturing		1,500
327999	All Other Miscellaneous Nonmetallic Mineral Product Manufacturing		750
	Subsector 331—Primary Metal Manufacturing		
331110	Iron and Steel Mills and Ferroalloy Manufacturing		1,500
331210	Iron and Steel Pipe and Tube Manufacturing from Purchased Steel		1,000
331221	Rolled Steel Shape Manufacturing		1,000
331222	Steel Wire Drawing		1,000
331313	Alumina Refining and Primary Aluminum Production		1,300
331314	Secondary Smelting and Alloying of Aluminum		750
331315	Aluminum Sheet, Plate, and Foil Manufacturing		1,400
331318	Other Aluminum Rolling, Drawing, and Extruding		750
331410	Nonferrous Metal (except Aluminum) Smelting and Refining		1,000
331420	Copper Rolling, Drawing, Extruding, and Alloying		1,050
331491	Nonferrous Metal (except Copper and Aluminum) Rolling, Drawing, and Extruding.		900
331492	Secondary Smelting, Refining, and Alloying of Nonferrous Metal (except Copper and Aluminum).		850
331511	Iron Foundries		1,000
331512	Steel Investment Foundries		1,050
331513	Steel Foundries (except Investment)		700
331523	Nonferrous Metal Die-Casting Foundries		700
331524	Aluminum Foundries (except Die-Casting)		550
331529	Other Nonferrous Metal Foundries (except Die-Casting)		500
	Subsector 332—Fabricated Metal Product Manufacturing		
332111	Iron and Steel Forging		750
332112	Nonferrous Forging		950
332114	Custom Roll Forming		600
332117	Powder Metallurgy Part Manufacturing		550
332119	Metal Crown, Closure, and Other Metal Stamping (except Automotive)		500
332215	Metal Kitchen Cookware, Utensil, Cutlery, and Flatware (except Precious) Manufacturing.		1,000
332216	Saw Blade and Handtool Manufacturing		750
332311	Prefabricated Metal Building and Component Manufacturing		750
332312	Fabricated Structural Metal Manufacturing		500
332313	Plate Work Manufacturing		750
332321	Metal Window and Door Manufacturing		750
332322	Sheet Metal Work Manufacturing		500
332323	Ornamental and Architectural Metal Work Manufacturing		500
332410	Power Boiler and Heat Exchanger Manufacturing		750

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
332420	Metal Tank (Heavy Gauge) Manufacturing		750
332431	Metal Can Manufacturing		1,500
332439	Other Metal Container Manufacturing		600
332510	Hardware Manufacturing		750
332613	Spring Manufacturing		600
332618	Other Fabricated Wire Product Manufacturing		500
332710	Machine Shops		500
332721	Precision Turned Product Manufacturing		500
332722	Bolt, Nut, Screw, Rivet, and Washer Manufacturing		600
332811	Metal Heat Treating		750
332812	Metal Coating, Engraving (except Jewelry and Silverware), and Allied Services to Manufacturers.		600
332813	Electroplating, Plating, Polishing, Anodizing and Coloring		500
332911	Industrial Valve Manufacturing		750
332912	Fluid Power Valve and Hose Fitting Manufacturing		1,000
332913	Plumbing Fixture Fitting and Trim Manufacturing		1,000
332919	Other Metal Valve and Pipe Fitting Manufacturing		750
332991	Ball and Roller Bearing Manufacturing		1,250
332992	Small Arms Ammunition Manufacturing		1,300
332993	Ammunition (except Small Arms) Manufacturing		1,500
332994	Small Arms, Ordnance, and Ordnance Accessories Manufacturing		1,000
332996	Fabricated Pipe and Pipe Fitting Manufacturing		550
332999	All Other Miscellaneous Fabricated Metal Product Manufacturing		750
	Subsector 333—Machinery Manufacturing[6]		
333111	Farm Machinery and Equipment Manufacturing		1,250
333112	Lawn and Garden Tractor and Home Lawn and Garden Equipment Manufacturing.		1,500
333120	Construction Machinery Manufacturing		1,250
333131	Mining Machinery and Equipment Manufacturing		900
333132	Oil and Gas Field Machinery and Equipment Manufacturing		1,250
333241	Food Product Machinery Manufacturing		500
333242	Semiconductor Machinery Manufacturing		1,500
333243	Sawmill, Woodworking, and Paper Machinery Manufacturing		550
333248	All Other Industrial Machinery Manufacturing		750
333310	Commercial and Service Industry Machinery Manufacturing		1,000
333413	Industrial and Commercial Fan and Blower and Air Purification Equipment Manufacturing.		500
333414	Heating Equipment (except Warm Air Furnaces) Manufacturing		500
333415	Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.		1,250
333511	Industrial Mold Manufacturing		500
333514	Special Die and Tool, Die Set, Jig and Fixture Manufacturing		500
333515	Cutting Tool and Machine Tool Accessory Manufacturing		500
333517	Machine Tool Manufacturing		500
333519	Rolling Mill and Other Metalworking Machinery Manufacturing		500
333611	Turbine and Turbine Generator Set Units Manufacturing		1,500
333612	Speed Changer, Industrial High-Speed Drive, and Gear Manufacturing		750
333613	Mechanical Power Transmission Equipment Manufacturing		750
333618	Other Engine Equipment Manufacturing		1,500
333912	Air and Gas Compressor Manufacturing		1,000
333914	Measuring, Dispensing, and Other Pumping Equipment Manufacturing		750
333921	Elevator and Moving Stairway Manufacturing		1,000
333922	Conveyor and Conveying Equipment Manufacturing		500
333923	Overhead Traveling Crane, Hoist, and Monorail System Manufacturing		1,250
333924	Industrial Truck, Tractor, Trailer, and Stacker Machinery Manufacturing		900
333991	Power-Driven Hand Tool Manufacturing		950
333992	Welding and Soldering Equipment Manufacturing		1,250
333993	Packaging Machinery Manufacturing		600
333994	Industrial Process Furnace and Oven Manufacturing		500
333995	Fluid Power Cylinder and Actuator Manufacturing		800
333996	Fluid Power Pump and Motor Manufacturing		1,250
333998	All Other Miscellaneous General Purpose Machinery Manufacturing		700
	Subsector 334—Computer and Electronic Product Manufacturing[6]		
334111	Electronic Computer Manufacturing		1,250
334112	Computer Storage Device Manufacturing		1,250
334118	Computer Terminal and Other Computer Peripheral Equipment Manufacturing.		1,000

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
334210	Telephone Apparatus Manufacturing		1,250
334220	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.		1,250
334290	Other Communications Equipment Manufacturing		800
334310	Audio and Video Equipment Manufacturing		750
334412	Bare Printed Circuit Board Manufacturing		750
334413	Semiconductor and Related Device Manufacturing		1,250
334416	Capacitor, Resistor, Coil, Transformer, and Other Inductor Manufacturing ..		550
334417	Electronic Connector Manufacturing		1,000
334418	Printed Circuit Assembly (Electronic Assembly) Manufacturing		750
334419	Other Electronic Component Manufacturing		750
334510	Electromedical and Electrotherapeutic Apparatus Manufacturing		1,250
334511	Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing.		1,350
334512	Automatic Environmental Control Manufacturing for Residential, Commercial, and Appliance Use.		650
334513	Instruments and Related Products Manufacturing for Measuring, Displaying, and Controlling Industrial Process Variables.		750
334514	Totalizing Fluid Meter and Counting Device Manufacturing		850
334515	Instrument Manufacturing for Measuring and Testing Electricity and Electrical Signals.		750
334516	Analytical Laboratory Instrument Manufacturing		1,000
334517	Irradiation Apparatus Manufacturing		1,200
334519	Other Measuring and Controlling Device Manufacturing		600
334610	Manufacturing and Reproducing Magnetic and Optical Media		1,250
	Subsector 335—Electrical Equipment, Appliance and Component Manufacturing[6]		
335131	Residential Electric Lighting Fixture Manufacturing		750
335132	Commercial, Industrial, and Institutional Electric Lighting Fixture Manufacturing.		600
335139	Electric Lamp Bulb and Other Lighting Equipment Manufacturing		1,250
335210	Small Electrical Appliance Manufacturing		1,500
335220	Major Household Appliance Manufacturing		1,500
335311	Power, Distribution, and Specialty Transformer Manufacturing		800
335312	Motor and Generator Manufacturing		1,250
335313	Switchgear and Switchboard Apparatus Manufacturing		1,250
335314	Relay and Industrial Control Manufacturing		750
335910	Battery Manufacturing		1,250
335921	Fiber Optic Cable Manufacturing		1,000
335929	Other Communication and Energy Wire Manufacturing		1,000
335931	Current-Carrying Wiring Device Manufacturing		600
335932	Noncurrent-Carrying Wiring Device Manufacturing		1,000
335991	Carbon and Graphite Product Manufacturing		900
335999	All Other Miscellaneous Electrical Equipment and Component Manufacturing.		600
	Subsector 336—Transportation Equipment Manufacturing[6]		
336110	Automobile and Light Duty Motor Vehicle Manufacturing		1,500
336120	Heavy Duty Truck Manufacturing		1,500
336211	Motor Vehicle Body Manufacturing		1,000
336212	Truck Trailer Manufacturing		1,000
336213	Motor Home Manufacturing		1,250
336214	Travel Trailer and Camper Manufacturing		1,000
336310	Motor Vehicle Gasoline Engine and Engine Parts Manufacturing		1,050
336320	Motor Vehicle Electrical and Electronic Equipment Manufacturing		1,000
336330	Motor Vehicle Steering and Suspension Components (except Spring) Manufacturing.		1,000
336340	Motor Vehicle Brake System Manufacturing		1,250
336350	Motor Vehicle Transmission and Power Train Parts Manufacturing		1,500
336360	Motor Vehicle Seating and Interior Trim Manufacturing		1,500
336370	Motor Vehicle Metal Stamping		1,000
336390	Other Motor Vehicle Parts Manufacturing		1,000
336411	Aircraft Manufacturing		1,500
336412	Aircraft Engine and Engine Parts Manufacturing		1,500
336413	Other Aircraft Parts and Auxiliary Equipment Manufacturing[7]		1,250[7]
336414	Guided Missile and Space Vehicle Manufacturing		1,300
336415	Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing.		1,250

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
336419	Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing.		1,050
336510	Railroad Rolling Stock Manufacturing		1,500
336611	Ship Building and Repairing		1,300
336612	Boat Building		1,000
336991	Motorcycle, Bicycle, and Parts Manufacturing		1,050
336992	Military Armored Vehicle, Tank, and Tank Component Manufacturing		1,500
336999	All Other Transportation Equipment Manufacturing		1,000
	Subsector 337—Furniture and Related Product Manufacturing		
337110	Wood Kitchen Cabinet and Countertop Manufacturing		750
337121	Upholstered Household Furniture Manufacturing		1,000
337122	Nonupholstered Wood Household Furniture Manufacturing		750
337126	Household Furniture (except Wood and Upholstered) Manufacturing		950
337127	Institutional Furniture Manufacturing		500
337211	Wood Office Furniture Manufacturing		1,000
337212	Custom Architectural Woodwork and Millwork Manufacturing		500
337214	Office Furniture (except Wood) Manufacturing		1,100
337215	Showcase, Partition, Shelving, and Locker Manufacturing		500
337910	Mattress Manufacturing		1,000
337920	Blind and Shade Manufacturing		1,000
	Subsector 339—Miscellaneous Manufacturing		
339112	Surgical and Medical Instrument Manufacturing		1,000
339113	Surgical Appliance and Supplies Manufacturing		800
339114	Dental Equipment and Supplies Manufacturing		750
339115	Ophthalmic Goods Manufacturing		1,000
339116	Dental Laboratories		500
339910	Jewelry and Silverware Manufacturing		700
339920	Sporting and Athletic Goods Manufacturing		750
339930	Doll, Toy, and Game Manufacturing		700
339940	Office Supplies (except Paper) Manufacturing		750
339950	Sign Manufacturing		500
339991	Gasket, Packing, and Sealing Device Manufacturing		600
339992	Musical Instrument Manufacturing		1,000
339993	Fastener, Button, Needle, and Pin Manufacturing		750
339994	Broom, Brush, and Mop Manufacturing		750
339995	Burial Casket Manufacturing		1,000
339999	All Other Miscellaneous Manufacturing		550
	Sector 42—Wholesale Trade		
	(These NAICS codes shall not be used to classify Government acquisitions for supplies. They also shall not be used by Federal Government contractors when subcontracting for the acquisition for supplies. The applicable manufacturing NAICS code shall be used to classify acquisitions for supplies. A Wholesale Trade or Retail Trade business concern submitting an offer or a quote on a supply acquisition is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.)		
	Subsector 423—Merchant Wholesalers, Durable Goods		
423110	Automobile and Other Motor Vehicle Merchant Wholesalers		250
423120	Motor Vehicle Supplies and New Parts Merchant Wholesalers		200
423130	Tire and Tube Merchant Wholesalers		200
423140	Motor Vehicle Parts (Used) Merchant Wholesalers		125
423210	Furniture Merchant Wholesalers		100
423220	Home Furnishing Merchant Wholesalers		100
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers		150
423320	Brick, Stone, and Related Construction Material Merchant Wholesalers		150
423330	Roofing, Siding, and Insulation Material Merchant Wholesalers		225
423390	Other Construction Material Merchant Wholesalers		100
423410	Photographic Equipment and Supplies Merchant Wholesalers		200
423420	Office Equipment Merchant Wholesalers		200
423430	Computer and Computer Peripheral Equipment and Software Merchant Wholesalers.		250
423440	Other Commercial Equipment Merchant Wholesalers		100
423450	Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers.		200
423460	Ophthalmic Goods Merchant Wholesalers		175
423490	Other Professional Equipment and Supplies Merchant Wholesalers		150

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
423510	Metal Service Centers and Other Metal Merchant Wholesalers		200
423520	Coal and Other Mineral and Ore Merchant Wholesalers		200
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers.		200
423620	Household Appliances, Electric Housewares, and Consumer Electronics Merchant Wholesalers.		225
423690	Other Electronic Parts and Equipment Merchant Wholesalers		250
423710	Hardware Merchant Wholesalers		150
423720	Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers.		200
423730	Warm Air Heating and Air-Conditioning Equipment and Supplies Merchant Wholesalers.		175
423740	Refrigeration Equipment and Supplies Merchant Wholesalers		125
423810	Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers.		250
423820	Farm and Garden Machinery and Equipment Merchant Wholesalers		125
423830	Industrial Machinery and Equipment Merchant Wholesalers		100
423840	Industrial Supplies Merchant Wholesalers		125
423850	Service Establishment Equipment and Supplies Merchant Wholesalers		125
423860	Transportation Equipment and Supplies (except Motor Vehicle) Merchant Wholesalers.		175
423910	Sporting and Recreational Goods and Supplies Merchant Wholesalers		100
423920	Toy and Hobby Goods and Supplies Merchant Wholesalers		175
423930	Recyclable Material Merchant Wholesalers		125
423940	Jewelry, Watch, Precious Stone, and Precious Metal Merchant Wholesalers.		125
423990	Other Miscellaneous Durable Goods Merchant Wholesalers		100
	Subsector 424—Merchant Wholesalers, Nondurable Goods		
424110	Printing and Writing Paper Merchant Wholesalers		225
424120	Stationery and Office Supplies Merchant Wholesalers		150
424130	Industrial and Personal Service Paper Merchant Wholesalers		150
424210	Drugs and Druggists' Sundries Merchant Wholesalers		250
424310	Piece Goods, Notions, and Other Dry Goods Merchant Wholesalers		100
424340	Footwear Merchant Wholesalers		200
424350	Clothing and Clothing Accessories Merchant Wholesalers		150
424410	General Line Grocery Merchant Wholesalers		250
424420	Packaged Frozen Food Merchant Wholesalers		200
424430	Dairy Product (except Dried or Canned) Merchant Wholesalers		200
424440	Poultry and Poultry Product Merchant Wholesalers		150
424450	Confectionery Merchant Wholesalers		225
424460	Fish and Seafood Merchant Wholesalers		100
424470	Meat and Meat Product Merchant Wholesalers		150
424480	Fresh Fruit and Vegetable Merchant Wholesalers		100
424490	Other Grocery and Related Products Merchant Wholesalers		250
424510	Grain and Field Bean Merchant Wholesalers		200
424520	Livestock Merchant Wholesalers		125
424590	Other Farm Product Raw Material Merchant Wholesalers		175
424610	Plastics Materials and Basic Forms and Shapes Merchant Wholesalers		150
424690	Other Chemical and Allied Products Merchant Wholesalers		175
424710	Petroleum Bulk Stations and Terminals		225
424720	Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals).		200
424810	Beer and Ale Merchant Wholesalers		200
424820	Wine and Distilled Alcoholic Beverage Merchant Wholesalers		250
424910	Farm Supplies Merchant Wholesalers		200
424920	Book, Periodical, and Newspaper Merchant Wholesalers		200
424930	Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers		100
424940	Tobacco Product and Electronic Cigarette Merchant Wholesalers		250
424950	Paint, Varnish, and Supplies Merchant Wholesalers		150
424990	Other Miscellaneous Nondurable Goods Merchant Wholesalers		100
	Subsector 425—Wholesale Trade Agents and Brokers		
425120	Wholesale Trade Agents and Brokers		125

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
	Sector 44–45—Retail Trade		
(These NAICS codes shall not be used to classify Government acquisitions for supplies. They also shall not be used by Federal Government contractors when subcontracting for the acquisition for supplies. The applicable manufacturing NAICS code shall be used to classify acquisitions for supplies. A Wholesale Trade or Retail Trade business concern submitting an offer or a quote on a supply acquisition is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of 13 CFR 121.406.)			
	Subsector 441—Motor Vehicle and Parts Dealers		
441110	New Car Dealers		200
441120	Used Car Dealers	$30.5	
441210	Recreational Vehicle Dealers	$40.0	
441222	Boat Dealers	$40.0	
441227	Motorcycle, ATV, and All Other Motor Vehicle Dealers	$40.0	
441330	Automotive Parts and Accessories Retailers	$28.5	
441340	Tire Dealers	$25.5	
	Subsector 444—Building Material and Garden Equipment and Supplies Dealers		
444110	Home Centers	$47.0	
444120	Paint and Wallpaper Retailers	$34.0	
444140	Hardware Retailers	$16.5	
444180	Other Building Material Dealers	$25.0	
444230	Outdoor Power Equipment Retailers	$9.5	
444240	Nursery, Garden Center, and Farm Supply Retailers	$21.5	
	Subsector 445—Food and Beverage Stores		
445110	Supermarkets and Other Grocery Retailers (except Convenience Retailers)	$40.0	
445131	Convenience Retailers	$36.5	
445132	Vending Machine Operators	$21.0	
445230	Fruit and Vegetable Retailers	$9.0	
445240	Meat Retailers	$9.0	
445250	Fish and Seafood Retailers	$9.0	
445291	Baked Goods Retailers	$16.0	
445292	Confectionery and Nut Retailers	$19.5	
445298	All Other Specialty Food Retailers	$10.0	
445320	Beer, Wine, and Liquor Retailers	$10.0	
	Subsector 449—Furniture, Home Furnishings, Electronics, and Appliance Retailers		
449110	Furniture Retailers	$25.0	
449121	Floor Covering Retailers	$9.0	
449122	Window Treatment Retailers	$11.5	
449129	All Other Home Furnishings Retailers	$33.5	
449210	Electronics and Appliance Retailers	$40.0	
	Subsector 455—General Merchandise Retailers		
455110	Department Stores	$40.0	
455211	Warehouse Clubs and Supercenters	$47.0	
455219	All Other General Merchandise Retailers	$40.0	
	Subsector 456—Health and Personal Care Retailers		
456110	Pharmacies and Drug Retailers	$37.5	
456120	Cosmetics, Beauty Supplies, and Perfume Retailers	$34.0	
456130	Optical Goods Retailers	$29.5	
456191	Food (Health) Supplement Retailers	$22.5	
456199	All Other Health and Personal Care Retailers	$9.5	
	Subsector 457—Gasoline Stations and Fuel Dealers		
457110	Gasoline Stations with Convenience Stores	$36.5	
457120	Other Gasoline Stations	$33.5	
457210	Fuel Dealers		100
	Subsector 458—Clothing, Clothing Accessories, Shoe, and Jewelry Retailers		
458110	Clothing and Clothing Accessories Retailers	$47.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
458210	Shoe Retailers	$34.0	
458310	Jewelry Retailers	$20.5	
458320	Luggage and Leather Goods Retailers	$38.0	
	Subsector 459—Sporting Goods, Hobby, Musical Instrument, Book, and Miscellaneous Retailers		
459110	Sporting Goods Retailers	$26.5	
459120	Hobby, Toy, and Game Retailers	$35.0	
459130	Sewing, Needlework, and Piece Goods Retailers	$34.0	
459140	Musical Instrument and Supplies Retailers	$22.5	
459210	Book Retailers and News Dealers	$36.0	
459310	Florists	$9.0	
459410	Office Supplies and Stationery Retailers	$40.0	
459420	Gift, Novelty, and Souvenir Retailers	$13.5	
459510	Used Merchandise Retailers	$14.0	
459910	Pet and Pet Supplies Retailers	$32.0	
459920	Art Dealers	$16.5	
459930	Manufactured (Mobile) Home Dealers	$19.0	
459991	Tobacco, Electronic Cigarette, and Other Smoking Supplies Retailers	$11.5	
459999	All Other Miscellaneous Retailers	$11.5	
	Sectors 48–49—Transportation and Warehousing		
	Subsector 481—Air Transportation		
481111	Scheduled Passenger Air Transportation		1,500
481112	Scheduled Freight Air Transportation		1,500
481211	Nonscheduled Chartered Passenger Air Transportation		1,500
481212	Nonscheduled Chartered Freight Air Transportation		1,500
481219	Other Nonscheduled Air Transportation	$25.0	
	Subsector 482—Rail Transportation		
482111	Line-Haul Railroads		1,500
482112	Short Line Railroads		1,500
	Subsector 483—Water Transportation		
483111	Deep Sea Freight Transportation		1,050
483112	Deep Sea Passenger Transportation		1,500
483113	Coastal and Great Lakes Freight Transportation		800
483114	Coastal and Great Lakes Passenger Transportation		550
483211	Inland Water Freight Transportation		1,050
483212	Inland Water Passenger Transportation		550
	Subsector 484—Truck Transportation		
484110	General Freight Trucking, Local	$34.0	
484121	General Freight Trucking, Long-Distance, Truckload	$34.0	
484122	General Freight Trucking, Long-Distance, Less Than Truckload	$43.0	
484210	Used Household and Office Goods Moving	$34.0	
484220	Specialized Freight (except Used Goods) Trucking, Local	$34.0	
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance	$34.0	
	Subsector 485—Transit and Ground Passenger Transportation		
485111	Mixed Mode Transit Systems	$29.0	
485112	Commuter Rail Systems	$47.0	
485113	Bus and Other Motor Vehicle Transit Systems	$32.5	
485119	Other Urban Transit Systems	$37.5	
485210	Interurban and Rural Bus Transportation	$32.0	
485310	Taxi and Ridesharing Services	$19.0	
485320	Limousine Service	$19.0	
485410	School and Employee Bus Transportation	$30.0	
485510	Charter Bus Industry	$19.0	
485991	Special Needs Transportation	$19.0	
485999	All Other Transit and Ground Passenger Transportation	$19.0	
	Subsector 486—Pipeline Transportation		
486110	Pipeline Transportation of Crude Oil		1,500

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
486210	Pipeline Transportation of Natural Gas	$41.5	
486910	Pipeline Transportation of Refined Petroleum Products		1,500
486990	All Other Pipeline Transportation	$46.0	
	Subsector 487—Scenic and Sightseeing Transportation		
487110	Scenic and Sightseeing Transportation, Land	$20.5	
487210	Scenic and Sightseeing Transportation, Water	$14.0	
487990	Scenic and Sightseeing Transportation, Other	$25.0	
	Subsector 488—Support Activities for Transportation		
488111	Air Traffic Control	$40.0	
488119	Other Airport Operations	$40.0	
488190	Other Support Activities for Air Transportation	$40.0	
488210	Support Activities for Rail Transportation	$34.0	
488310	Port and Harbor Operations	$47.0	
488320	Marine Cargo Handling	$47.0	
488330	Navigational Services to Shipping	$47.0	
488390	Other Support Activities for Water Transportation	$47.0	
488410	Motor Vehicle Towing	$9.0	
488490	Other Support Activities for Road Transportation	$18.0	
488510	Freight Transportation Arrangement [10]	$20.0 [10]	
488510 (Exception).	Non-Vessel Owning Common Carriers and Household Goods Forwarders	$34.0	
488991	Packing and Crating	$34.0	
488999	All Other Support Activities for Transportation	$25.0	
	Subsector 491—Postal Service		
491110	Postal Service	$9.0	
	Subsector 492—Couriers and Messengers		
492110	Couriers and Express Delivery Services		1,500
492210	Local Messengers and Local Delivery	$34.0	
	Subsector 493—Warehousing and Storage		
493110	General Warehousing and Storage	$34.0	
493120	Refrigerated Warehousing and Storage	$36.5	
493130	Farm Product Warehousing and Storage	$34.0	
493190	Other Warehousing and Storage	$36.5	
	Sector 51—Information		
	Subsector 512—Motion Picture and Sound Recording Industries		
512110	Motion Picture and Video Production	$40.0	
512120	Motion Picture and Video Distribution	$39.0	
512131	Motion Picture Theaters (except Drive-Ins)	$47.0	
512132	Drive-In Motion Picture Theaters	$12.5	
512191	Teleproduction and Other Postproduction Services	$39.0	
512199	Other Motion Picture and Video Industries	$28.5	
512230	Music Publishers		900
512240	Sound Recording Studios	$11.0	
512250	Record Production and Distribution		900
512290	Other Sound Recording Industries	$22.5	
	Subsector 513—Publishing Industries		
513110	Newspaper Publishers		1,000
513120	Periodical Publishers		1,000
513130	Book Publishers		1,000
513140	Directory and Mailing List Publishers		1,000
513191	Greeting Card Publishers		1,000
513199	All Other Publishers		1,000
513210	Software Publishers [15]	$47.0 [15]	
	Subsector 516—Broadcasting and Content Providers		
516110	Radio Broadcasting Stations	$47.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
516120	Television Broadcasting Stations	$47.0	
516210	Media Streaming Distribution Services, Social Networks, and Other Media Networks and Content Providers.	$47.0	
	Subsector 517—Telecommunications		
517111	Wired Telecommunications Carriers		1,500
517112	Wireless Telecommunications Carriers (except Satellite)		1,500
517121	Telecommunications Resellers		1,500
517122	Agents for Wireless Telecommunications Services		1,500
517410	Satellite Telecommunications	$44.0	
517810	All Other Telecommunications	$40.0	
	Subsector 518—Computing Infrastructure Providers, Data Processing, Web Hosting, and Related Services		
518210	Computing Infrastructure Providers, Data Processing, Web Hosting, and Related Services.	$40.0	
	Subsector 519—Web Search Portals, Libraries, Archives, and Other Information Services		
519210	Libraries and Archives	$21.0	
519290	Web Search Portals and All Other Information Services		1,000
	Sector 52—Finance and Insurance		
	Subsector 522—Credit Intermediation and Related Activities		
522110	Commercial Banking [8]	$850 million in assets [8]	
522130	Credit Unions [8]	$850 million in assets [8]	
522180	Savings Institutions and Other Depository Credit Intermediation [8]	$850 million in assets [8]	
522210	Credit Card Issuing [8]	$850 million in assets [8]	
522220	Sales Financing	$47.0	
522291	Consumer Lending	$47.0	
522292	Real Estate Credit	$47.0	
522299	International, Secondary Market, and All Other Nondepository Credit Intermediation.	$47.0	
522310	Mortgage and Nonmortgage Loan Brokers	$15.0	
522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities	$47.0	
522390	Other Activities Related to Credit Intermediation	$28.5	
	Subsector 523—Securities, Commodity Contracts, and Other Financial Investments and Related Activities		
523150	Investment Banking and Securities Intermediation	$47.0	
523160	Commodity Contracts Intermediation	$41.5	
523210	Securities and Commodity Exchanges	$47.0	
523910	Miscellaneous Intermediation	$47.0	
523940	Portfolio Management and Investment Advice	$47.0	
523991	Trust, Fiduciary and Custody Activities	$47.0	
523999	Miscellaneous Financial Investment Activities	$47.0	
	Subsector 524—Insurance Carriers and Related Activities		
524113	Direct Life Insurance Carriers	$47.0	
524114	Direct Health and Medical Insurance Carriers	$47.0	
524126	Direct Property and Casualty Insurance Carriers		1,500
524127	Direct Title Insurance Carriers	$47.0	
524128	Other Direct Insurance (except Life, Health and Medical) Carriers	$47.0	
524130	Reinsurance Carriers	$47.0	
524210	Insurance Agencies and Brokerages	$15.0	
524291	Claims Adjusting	$25.0	
524292	Pharmacy Benefit Management and Other Third Party Administration of Insurance and Pension Funds.	$45.5	
524298	All Other Insurance Related Activities	$30.5	
	Subsector 525—Funds, Trusts and Other Financial Vehicles		
525110	Pension Funds	$40.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
525120	Health and Welfare Funds	$40.0	
525190	Other Insurance Funds	$40.0	
525910	Open-End Investment Funds	$40.0	
525920	Trusts, Estates, and Agency Accounts	$40.0	
525990	Other Financial Vehicles	$40.0	
	Sector 53—Real Estate and Rental and Leasing		
	Subsector 531—Real Estate		
531110	Lessors of Residential Buildings and Dwellings[9]	$34.0[9]	
531120	Lessors of Nonresidential Buildings (except Miniwarehouses)[9]	$34.0[9]	
531130	Lessors of Miniwarehouses and Self-Storage Units[9]	$34.0[9]	
531190	Lessors of Other Real Estate Property[9]	$34.0[9]	
531210	Offices of Real Estate Agents and Brokers[10]	$15.0[10]	
531311	Residential Property Managers	$12.5	
531312	Nonresidential Property Managers	$19.5	
531320	Offices of Real Estate Appraisers	$9.5	
531390	Other Activities Related to Real Estate	$19.5	
	Subsector 532—Rental and Leasing Services		
532111	Passenger Car Rental	$47.0	
532112	Passenger Car Leasing	$47.0	
532120	Truck, Utility Trailer, and RV (Recreational Vehicle) Rental and Leasing	$47.0	
532210	Consumer Electronics and Appliances Rental	$47.0	
532281	Formal Wear and Costume Rental	$25.0	
532282	Video Tape and Disc Rental	$35.0	
532283	Home Health Equipment Rental	$41.0	
532284	Recreational Goods Rental	$9.0	
532289	All Other Consumer Goods Rental	$12.5	
532310	General Rental Centers	$9.0	
532411	Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing.	$45.5	
532412	Construction, Mining and Forestry Machinery and Equipment Rental and Leasing.	$40.0	
532420	Office Machinery and Equipment Rental and Leasing	$40.0	
532490	Other Commercial and Industrial Machinery and Equipment Rental and Leasing.	$40.0	
	Subsector 533—Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)		
533110	Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)	$47.0	
	Sector 54—Professional, Scientific and Technical Services		
	Subsector 541—Professional, Scientific and Technical Services		
541110	Offices of Lawyers	$15.5	
541191	Title Abstract and Settlement Offices	$19.5	
541199	All Other Legal Services	$20.5	
541211	Offices of Certified Public Accountants	$26.5	
541213	Tax Preparation Services	$25.0	
541214	Payroll Services	$39.0	
541219	Other Accounting Services	$25.0	
541310	Architectural Services	$12.5	
541320	Landscape Architectural Services	$9.0	
541330	Engineering Services	$25.5	
541330 (Exception 1).	Military and Aerospace Equipment and Military Weapons	$47.0	
541330 (Exception 2).	Contracts and Subcontracts for Engineering Services Awarded Under the National Energy Policy Act of 1992.	$47.0	
541330 (Exception 3).	Marine Engineering and Naval Architecture	$47.0	
541340	Drafting Services	$9.0	
541350	Building Inspection Services	$11.5	
541360	Geophysical Surveying and Mapping Services	$28.5	
541370	Surveying and Mapping (except Geophysical) Services	$19.0	
541380	Testing Laboratories and Services	$19.0	
541410	Interior Design Services	$9.0	
541420	Industrial Design Services	$17.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
541430	Graphic Design Services	$9.0	
541490	Other Specialized Design Services	$13.5	
541511	Custom Computer Programming Services	$34.0	
541512	Computer Systems Design Services	$34.0	
541513	Computer Facilities Management Services	$37.0	
541519	Other Computer Related Services	$34.0	
541519 (Exception).	Information Technology Value Added Resellers [18]		150 [18]
541611	Administrative Management and General Management Consulting Services.	$24.5	
541612	Human Resources Consulting Services	$29.0	
541613	Marketing Consulting Services	$19.0	
541614	Process, Physical Distribution and Logistics Consulting Services	$20.0	
541618	Other Management Consulting Services	$19.0	
541620	Environmental Consulting Services	$19.0	
541690	Other Scientific and Technical Consulting Services	$19.0	
541713	Research and Technology in Nanotechnology [11]		1,000 [11]
541714	Research and Technology in Biotechnology (except Nanobiotechnology) [11]		1,000 [11]
541715	Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology) [11].		[11] 1,000
541715 (Exception 1).	Aircraft, Aircraft Engine and Engine Parts [11]		[11] 1,500
541715 (Exception 2).	Other Aircraft Parts and Auxiliary Equipment [11]		[11] 1,250
541715 (Exception 3).	Guided Missiles and Space Vehicles, Their Propulsion Units and Propulsion Parts [11].		[11] 1,300
541720	Research and Development in the Social Sciences and Humanities	$28.0	
541810	Advertising Agencies [10]	$25.5 [10]	
541820	Public Relations Agencies	$19.0	
541830	Media Buying Agencies	$32.5	
541840	Media Representatives	$21.0	
541850	Indoor and Outdoor Display Advertising	$34.5	
541860	Direct Mail Advertising	$22.0	
541870	Advertising Material Distribution Services	$28.5	
541890	Other Services Related to Advertising	$19.0	
541910	Marketing Research and Public Opinion Polling	$22.5	
541921	Photography Studios, Portrait	$16.0	
541922	Commercial Photography	$9.0	
541930	Translation and Interpretation Services	$22.5	
541940	Veterinary Services	$10.0	
541990	All Other Professional, Scientific and Technical Services	$19.5	
Sector 55—Management of Companies and Enterprises			
Subsector 551—Management of Companies and Enterprises			
551111	Offices of Bank Holding Companies	$38.5	
551112	Offices of Other Holding Companies	$45.5	
Sector 56—Administrative and Support and Waste Management and Remediation Services Subsector 561—Administrative and Support Services			
561110	Office Administrative Services	$12.5	
561210	Facilities Support Services [12]	$47.0 [12]	
561311	Employment Placement Agencies	$34.0	
561312	Executive Search Services	$34.0	
561320	Temporary Help Services	$34.0	
561330	Professional Employer Organizations	$41.5	
561410	Document Preparation Services	$19.0	
561421	Telephone Answering Services	$19.0	
561422	Telemarketing Bureaus and Other Contact Centers	$25.5	
561431	Private Mail Centers	$19.0	
561439	Other Business Service Centers (including Copy Shops)	$26.5	
561440	Collection Agencies	$19.5	
561450	Credit Bureaus	$41.0	
561491	Repossession Services	$19.0	
561492	Court Reporting and Stenotype Services	$19.0	
561499	All Other Business Support Services	$21.5	
561510	Travel Agencies [10]	$25.0 [10]	
561520	Tour Operators [10]	$25.0 [10]	
561591	Convention and Visitors Bureaus	$25.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
561599	All Other Travel Arrangement and Reservation Services	$32.5	
561611	Investigation and Personal Background Check Services	$25.0	
561612	Security Guards and Patrol Services	$29.0	
561613	Armored Car Services	$43.0	
561621	Security Systems Services (except Locksmiths)	$25.0	
561622	Locksmiths	$25.0	
561710	Exterminating and Pest Control Services	$17.5	
561720	Janitorial Services	$22.0	
561730	Landscaping Services	$9.5	
561740	Carpet and Upholstery Cleaning Services	$8.5	
561790	Other Services to Buildings and Dwellings	$9.0	
561910	Packaging and Labeling Services	$19.5	
561920	Convention and Trade Show Organizers[10]	$20.0[10]	
561990	All Other Support Services	$16.5	
	Subsector 562—Waste Management and Remediation Services		
562111	Solid Waste Collection	$47.0	
562112	Hazardous Waste Collection	$47.0	
562119	Other Waste Collection	$47.0	
562211	Hazardous Waste Treatment and Disposal	$47.0	
562212	Solid Waste Landfill	$47.0	
562213	Solid Waste Combustors and Incinerators	$47.0	
562219	Other Nonhazardous Waste Treatment and Disposal	$47.0	
562910	Remediation Services	$25.0	
562910 (Exception).	Environmental Remediation Services[14]		[14] 1,000
562920	Materials Recovery Facilities	$25.0	
562991	Septic Tank and Related Services	$9.0	
562998	All Other Miscellaneous Waste Management Services	$16.5	
	Sector 61—Educational Services		
	Subsector 611—Educational Services		
611110	Elementary and Secondary Schools	$20.0	
611210	Junior Colleges	$32.5	
611310	Colleges, Universities and Professional Schools	$34.5	
611410	Business and Secretarial Schools	$20.5	
611420	Computer Training	$16.0	
611430	Professional and Management Development Training	$15.0	
611511	Cosmetology and Barber Schools	$13.0	
611512	Flight Training	$34.0	
611513	Apprenticeship Training	$11.5	
611519	Other Technical and Trade Schools	$21.0	
611519 (Exception).	Job Corps Centers[16]	$47.0[16]	
611610	Fine Arts Schools	$9.0	
611620	Sports and Recreation Instruction	$9.0	
611630	Language Schools	$20.5	
611691	Exam Preparation and Tutoring	$12.5	
611692	Automobile Driving Schools	$10.0	
611699	All Other Miscellaneous Schools and Instruction	$16.5	
611710	Educational Support Services	$24.0	
	Sector 62—Health Care and Social Assistance **Subsector 621—Ambulatory Health Care Services**		
621111	Offices of Physicians (except Mental Health Specialists)	$16.0	
621112	Offices of Physicians, Mental Health Specialists	$13.5	
621210	Offices of Dentists	$9.0	
621310	Offices of Chiropractors	$9.0	
621320	Offices of Optometrists	$9.0	
621330	Offices of Mental Health Practitioners (except Physicians)	$9.0	
621340	Offices of Physical, Occupational and Speech Therapists and Audiologists	$12.5	
621391	Offices of Podiatrists	$9.0	
621399	Offices of All Other Miscellaneous Health Practitioners	$10.0	
621410	Family Planning Centers	$19.0	
621420	Outpatient Mental Health and Substance Abuse Centers	$19.0	
621491	HMO Medical Centers	$44.5	
621492	Kidney Dialysis Centers	$47.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
621493	Freestanding Ambulatory Surgical and Emergency Centers	$19.0	
621498	All Other Outpatient Care Centers	$25.5	
621511	Medical Laboratories	$41.5	
621512	Diagnostic Imaging Centers	$19.0	
621610	Home Health Care Services	$19.0	
621910	Ambulance Services	$22.5	
621991	Blood and Organ Banks	$40.0	
621999	All Other Miscellaneous Ambulatory Health Care Services	$20.5	
	Subsector 622—Hospitals		
622110	General Medical and Surgical Hospitals	$47.0	
622210	Psychiatric and Substance Abuse Hospitals	$47.0	
622310	Specialty (except Psychiatric and Substance Abuse) Hospitals	$47.0	
	Subsector 623—Nursing and Residential Care Facilities		
623110	Nursing Care Facilities (Skilled Nursing Facilities)	$34.0	
623210	Residential Intellectual and Developmental Disability Facilities	$19.0	
623220	Residential Mental Health and Substance Abuse Facilities	$19.0	
623311	Continuing Care Retirement Communities	$34.0	
623312	Assisted Living Facilities for the Elderly	$23.5	
623990	Other Residential Care Facilities	$16.0	
	Subsector 624—Social Assistance		
624110	Child and Youth Services	$15.5	
624120	Services for the Elderly and Persons with Disabilities	$15.0	
624190	Other Individual and Family Services	$16.0	
624210	Community Food Services	$19.5	
624221	Temporary Shelters	$13.5	
624229	Other Community Housing Services	$19.0	
624230	Emergency and Other Relief Services	$41.5	
624310	Vocational Rehabilitation Services	$15.0	
624410	Child Care Services	$9.5	
	Sector 71—Arts, Entertainment and Recreation **Subsector 711—Performing Arts, Spectator Sports and Related Industries**		
711110	Theater Companies and Dinner Theaters	$25.0	
711120	Dance Companies	$18.0	
711130	Musical Groups and Artists	$15.0	
711190	Other Performing Arts Companies	$34.0	
711211	Sports Teams and Clubs	$47.0	
711212	Racetracks	$47.0	
711219	Other Spectator Sports	$16.5	
711310	Promoters of Performing Arts, Sports and Similar Events with Facilities	$40.0	
711320	Promoters of Performing Arts, Sports and Similar Events without Facilities	$22.0	
711410	Agents and Managers for Artists, Athletes, Entertainers and Other Public Figures.	$17.5	
711510	Independent Artists, Writers, and Performers	$9.0	
	Subsector 712—Museums, Historical Sites and Similar Institutions		
712110	Museums	$34.0	
712120	Historical Sites	$13.0	
712130	Zoos and Botanical Gardens	$34.0	
712190	Nature Parks and Other Similar Institutions	$19.5	
	Subsector 713—Amusement, Gambling and Recreation Industries		
713110	Amusement and Theme Parks	$47.0	
713120	Amusement Arcades	$9.0	
713210	Casinos (except Casino Hotels)	$34.0	
713290	Other Gambling Industries	$40.0	
713910	Golf Courses and Country Clubs	$19.0	
713920	Skiing Facilities	$35.0	
713930	Marinas	$11.0	
713940	Fitness and Recreational Sports Centers	$17.5	
713950	Bowling Centers	$12.5	
713990	All Other Amusement and Recreation Industries	$9.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
	Sector 72—Accommodation and Food Services		
	Subsector 721—Accommodation		
721110	Hotels (except Casino Hotels) and Motels	$40.0	
721120	Casino Hotels	$40.0	
721191	Bed-and-Breakfast Inns	$9.0	
721199	All Other Traveler Accommodation	$9.0	
721211	RV (Recreational Vehicle) Parks and Campgrounds	$10.0	
721214	Recreational and Vacation Camps (except Campgrounds)	$9.0	
721310	Rooming and Boarding Houses, Dormitories, and Workers' Camps	$14.0	
	Subsector 722—Food Services and Drinking Places		
722310	Food Service Contractors	$47.0	
722320	Caterers	$9.0	
722330	Mobile Food Services	$9.0	
722410	Drinking Places (Alcoholic Beverages)	$9.0	
722511	Full-Service Restaurants	$11.5	
722513	Limited-Service Restaurants	$13.5	
722514	Cafeterias, Grill Buffets, and Buffets	$34.0	
722515	Snack and Nonalcoholic Beverage Bars	$22.5	
	Sector 81—Other Services (Except Public Administration)		
	Subsector 811—Repair and Maintenance		
811111	General Automotive Repair	$9.0	
811114	Specialized Automotive Repair	$9.0	
811121	Automotive Body, Paint and Interior Repair and Maintenance	$9.0	
811122	Automotive Glass Replacement Shops	$17.5	
811191	Automotive Oil Change and Lubrication Shops	$11.0	
811192	Car Washes	$9.0	
811198	All Other Automotive Repair and Maintenance	$10.0	
811210	Electronic and Precision Equipment Repair and Maintenance	$34.0	
811310	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance.	$12.5	
811411	Home and Garden Equipment Repair and Maintenance	$9.0	
811412	Appliance Repair and Maintenance	$19.0	
811420	Reupholstery and Furniture Repair	$9.0	
811430	Footwear and Leather Goods Repair	$9.0	
811490	Other Personal and Household Goods Repair and Maintenance	$9.0	
	Subsector 812—Personal and Laundry Services		
812111	Barber Shops	$9.5	
812112	Beauty Salons	$9.5	
812113	Nail Salons	$9.0	
812191	Diet and Weight Reducing Centers	$27.5	
812199	Other Personal Care Services	$9.0	
812210	Funeral Homes and Funeral Services	$12.5	
812220	Cemeteries and Crematories	$25.0	
812310	Coin-Operated Laundries and Drycleaners	$13.0	
812320	Drycleaning and Laundry Services (except Coin-Operated)	$8.0	
812331	Linen Supply	$40.0	
812332	Industrial Launderers	$47.0	
812910	Pet Care (except Veterinary) Services	$9.0	
812921	Photofinishing Laboratories (except One-Hour)	$29.5	
812922	One-Hour Photofinishing	$19.0	
812930	Parking Lots and Garages	$47.0	
812990	All Other Personal Services	$15.0	
	Subsector 813—Religious, Grantmaking, Civic, Professional and Similar Organizations		
813110	Religious Organizations	$13.0	
813211	Grantmaking Foundations	$40.0	
813212	Voluntary Health Organizations	$34.0	
813219	Other Grantmaking and Giving Services	$47.0	
813311	Human Rights Organizations	$34.0	
813312	Environment, Conservation and Wildlife Organizations	$19.5	
813319	Other Social Advocacy Organizations	$18.0	

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
813410	Civic and Social Organizations	$9.5	
813910	Business Associations	$15.5	
813920	Professional Organizations	$23.5	
813930	Labor Unions and Similar Labor Organizations	$16.5	
813940	Political Organizations	$14.0	
813990	Other Similar Organizations (except Business, Professional, Labor, and Political Organizations).	$13.5	
	Sector 92—Public Administration [17]		
(Small business size standards are not established for this sector. Establishments in the Public Administration sector are Federal, state, and local government agencies which administer and oversee government programs and activities that are not performed by private establishments.)			

Footnotes

1. *NAICS code 115310*—Support Activities for Forestry: Forest Fire Suppression and Fuels Management Services are two components of Support Activities for Forestry. Forest Fire Suppression includes establishments which provide services to fight forest fires. These firms usually have fire-fighting crews and equipment. Fuels Management Services firms provide services to clear land of hazardous materials that would fuel forest fires. The treatments used by these firms may include prescribed fire, mechanical removal, establishing fuel breaks, thinning, pruning, and piling.

2. *NAICS code 237990*—Dredging: To be considered small for purposes of Government procurement, a firm or its similarly situated subcontractors must perform at least 40 percent of the volume dredged with their own equipment or equipment owned by another small dredging concern.

3. *NAICS code 311421*—For purposes of Government procurement for food canning and preserving, the standard of 1,000 employees excludes agricultural labor as defined in 3306(k) of the Internal Revenue Code, 26 U.S.C. 3306(k).

4. *NAICS code 324110*—To qualify as small for purposes of Government procurement, the petroleum refiner, including its affiliates, must be a concern that has either no more than 1,500 employees or no more than 200,000 barrels per calendar day total Operable Atmospheric Crude Oil Distillation capacity. Capacity includes all domestic and foreign affiliates, all owned or leased facilities, and all facilities under a processing agreement or an arrangement such as an exchange agreement or a throughput. To qualify under the capacity size standard, the firm, together with its affiliates, must be primarily engaged in refining crude petroleum into refined petroleum products. A firm's ''primary industry'' is determined in accordance with 13 CFR 121.107.

5. *NAICS code 326211*—For Government procurement, a firm is small for bidding on a contract for pneumatic tires within Census NAICS Product Classification codes 3262111 and 3262113, provided that:

(a) The value of tires within Census NAICS Product Classification codes 3262111 and 3262113 that it manufactured in the United States during the previous calendar year is more than 50 percent of the value of its total worldwide manufacture,

(b) The value of pneumatic tires within Census NAICS Product Classification codes 3262111 and 3262113 comprising its total worldwide manufacture during the preceding calendar year was less than 5 percent of the value of all such tires manufactured in the United States during that period, and

(c) The value of the principal product that it manufactured, produced, or sold worldwide during the preceding calendar year is less than 10 percent of the total value of such products manufactured or otherwise produced or sold in the United States during that period.

6. *NAICS Subsectors 333, 334, 335* and *336*—For rebuilding machinery or equipment on a factory basis, or equivalent, use the NAICS code for a newly manufactured product. Concerns performing major rebuilding or overhaul activities do not necessarily have to meet the criteria for being a ''manufacturer'' although the activities may be classified under a manufacturing NAICS code. Ordinary repair services or preservation are not considered rebuilding.

7. *NAICS code 336413*—Contracts for the rebuilding or overhaul of aircraft ground support equipment on a contract basis are classified under NAICS code 336413.

8. *NAICS Codes 522110, 522130, 522180, and 522210*—A financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year. ''Assets'' for the purposes of this size standard means the assets defined according to the Federal Financial

Institutions Examination Council 041 call report form for NAICS codes 522110, 522180, and 522210 and the National Credit Union Administration 5300 call report form for NAICS code 522130.

9. *NAICS codes 531110, 531120, 531130, and 531190*—Leasing of Building Space to the Federal Government by Owners: For Government procurement, a size standard of $47 million in gross receipts applies to the owners of building space leased to the Federal Government. The standard does not apply to an agent.

10. *NAICS codes 488510 (excluding the exception), 531210, 541810, 561510, 561520 and 561920*—As measured by total revenues, but excluding funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions. The commissions received are included as revenue.

11. *NAICS code 541713, 541714*, and *541715*—

(a) Research and Development'' means laboratory or other physical research and development. It does not include economic, educational, engineering, operations, systems, or other nonphysical research; or computer programming, data processing, commercial and/or medical laboratory testing.

(b) For research and development contracts requiring the delivery of a manufactured product, the appropriate size standard is that of the manufacturing industry.

(c) For purposes of the Small Business Innovation Research (SBIR) and Small Business Transfer Technology (STTR) programs, the term ''research'' or ''research and development'' means any activity which is (A) a systematic, intensive study directed toward greater knowledge or understanding of the subject studied; (B) a systematic study directed specifically toward applying new knowledge to meet a recognized need; or (C) a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements. See 15 U.S.C. 638(e)(5) and section 3 of the SBIR and STTR policy directives available at *www.sbir.gov*. For size eligibility requirements for the SBIR and STTR programs, see §121.702 of this part.

(d) ''Research and Development'' for guided missiles and space vehicles includes evaluations and simulation, and other services requiring thorough knowledge of complete missiles and spacecraft.

12. *NAICS code 561210*—Facilities Support Services:

(a) If one or more activities of Facilities Support Services as defined in paragraph (b) (below in this footnote) can be identified with a specific industry and that industry accounts for 50 percent or more of the value of an entire procurement, then the proper classification of the procurement is that of the specific industry, not Facilities Support Services.

(b) ''Facilities Support Services'' requires the performance of three or more separate activities in the areas of services or specialty trade contractors industries. If services are performed, these service activities must each be in a separate NAICS industry. If the procurement requires the use of specialty trade contractors (plumbing, painting, plastering, carpentry, etc.), all such specialty trade contractors activities are considered a single activity and classified as ''Building and Property Specialty Trade Services.'' Since ''Building and Property Specialty Trade Services'' is only one activity, two additional activities of separate NAICS industries are required for a procurement to be classified as ''Facilities Support Services.''

13. *NAICS code 238990*—Building and Property Specialty Trade Services: If a procurement requires the use of multiple specialty trade contractors (*i.e.*, plumbing, painting, plastering, carpentry, etc.), and no specialty trade accounts for 50 percent or more of the value of the procurement, all such specialty trade contractors activities are considered a single activity and classified as Building and Property Specialty Trade Services.

14. *NAICS 562910*—Environmental Remediation Services:

(a) For SBA assistance as a small business concern in the industry of Environmental Remediation Services, other than for Government procurement, a concern must be engaged primarily in furnishing a range of services for the remediation of a contaminated environment to an acceptable condition including, but not limited to, preliminary assessment, site inspection, testing, remedial investigation, feasibility studies, remedial design, containment, remedial action, removal of contaminated materials, storage of contaminated materials and security and site closeouts. If one of such activities accounts for 50 percent or more of a concern's total revenues, employees, or other related factors, the concern's primary industry is that of the particular industry and not the Environmental Remediation Services Industry.

(b) For purposes of classifying a Government procurement as Environmental Remediation Services, the general purpose of the procurement must be to restore or directly support the restoration of a contaminated environment (such as, preliminary assessment, site inspection, testing, remedial investigation, feasibility studies, remedial design, remediation services, containment, removal of contaminated materials, storage of contaminated materials or security and site closeouts), although the general purpose of the procurement need not necessarily include remedial actions. Also, the procurement must be composed of activities in three

or more separate industries with separate NAICS codes or, in some instances (*e.g.*, engineering), smaller sub-components of NAICS codes with separate, distinct size standards. These activities may include, but are not limited to, separate activities in industries such as: Heavy Construction; Specialty Trade Contractors; Engineering Services; Architectural Services; Management Consulting Services; Hazardous and Other Waste Collection; Remediation Services, Testing Laboratories; and Research and Development in the Physical, Engineering and Life Sciences. If any activity in the procurement can be identified with a separate NAICS code, or component of a code with a separate distinct size standard, and that industry accounts for 50 percent or more of the value of the entire procurement, then the proper size standard is the one for that particular industry, and not the Environmental Remediation Service size standard.

15. *NAICS code 513210*—For purposes of Government procurement, the purchase of software subject to potential waiver of the non-manufacturer rule pursuant to §121.1203(d) should be classified under this NAICS code.

16. *NAICS code 611519*—Job Corps Centers. For classifying a Federal procurement, the purpose of the solicitation must be for the management and operation of a U.S. Department of Labor Job Corps Center. The activities involved include admissions activities, life skills training, educational activities, comprehensive career preparation activities, career development activities, career transition activities, as well as the management and support functions and services needed to operate and maintain the facility. For SBA assistance as a small business concern, other than for Federal Government procurements, a concern must be primarily engaged in providing the services to operate and maintain Federal Job Corps Centers.

17. *NAICS Sector 92*—Small business size standards are not established for this sector. Establishments in the Public Administration sector are Federal, State, and local government agencies which administer and oversee government programs and activities that are not performed by private establishments. Concerns performing operational services for the administration of a government program are classified under the NAICS private sector industry based on the activities performed. Similarly, procurements for these types of services are classified under the NAICS private sector industry that best describes the activities to be performed. For example, if a government agency issues a procurement for law enforcement services, the requirement would be classified using one of the NAICS industry codes under 56161, Investigation, Guard, and Armored Car Services.

18. *NAICS code 541519*—An Information Technology Value Added Reseller (ITVAR) provides a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant value added services. Significant value added services consist of, but are not limited to, configuration consulting and design, systems integration, installation of multi-vendor computer equipment, customization of hardware or software, training, product technical support, maintenance, and end user support. For purposes of Government procurement, an information technology procurement classified under this exception and 150-employee size standard must consist of at least 15% and not more than 50% of value added services, as measured by the total contract price. In addition, the offeror must comply with the manufacturing performance requirements, or comply with the non-manufacturer rule by supplying the products of small business concerns, unless SBA has issued a class or contract specific waiver of the non-manufacturer rule. If the contract consists of less than 15% of value added services, then it must be classified under a NAICS manufacturing industry. If the contract consists of more than 50% of value added services, then it must be classified under the NAICS industry that best describes the predominate service of the procurement.

[65 FR 30840, May 15, 2000]

EDITORIAL NOTES: For FEDERAL REGISTER citations affecting §121.201, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

SIZE ELIGIBILITY REQUIREMENTS FOR SBA FINANCIAL ASSISTANCE

§ 121.301 What size standards and affiliation principles are applicable to financial assistance programs?

The Small Business Act defines a small business concern as one which is independently owned and operated, and which is not dominant in its field of operation. SBA interprets this statutory definition to require, in certain circumstances, the inclusion of other entities (''Affiliates'') owned by the applicant or an owner of the applicant in determining the size of the applicant.

(a) For Business Loans (other than for 7(a) Business Loans for the period beginning May 5, 2009 and ending on September 30, 2010) and for Disaster Loans (other than physical disaster loans), an applicant business concern must satisfy two criteria:

(1) The size of the applicant alone (without affiliates) must not exceed

the size standard designated for the industry in which the applicant is primarily engaged; and

(2) The size of the applicant combined with its affiliates must not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, which ever is higher. These size standards are set forth in §121.201.

(b) For Development Company programs and, for the period beginning May 5, 2009 and ending on September 30, 2010, for 7(a) Business Loans, an applicant must meet one of the following standards:

(1) The same standards applicable under paragraph (a) of this section; or

(2) Including its affiliates, tangible net worth not in excess of $8.5 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of $3.0 million. If the applicant is not required by law to pay Federal income taxes at the enterprise level, but is required to pass income through to its shareholders, partners, beneficiaries, or other equitable owners, the applicant's ''net income after Federal income taxes'' will be its net income reduced by an amount computed as follows:

(i) If the applicant is not required by law to pay State (and local, if any) income taxes at the enterprise level, multiply its net income by the marginal State income tax rate (or by the combined State and local income tax rates, as applicable) that would have applied if it were a taxable corporation.

(ii) Multiply the applicant's net income, less any deduction for State and local income taxes calculated under paragraph (b)(2)(i) of this section, by the marginal Federal income tax rate that would have applied if the applicant were a taxable corporation.

(iii) Sum the results obtained in paragraphs (b)(2)(i) and (b)(2)(ii) of this section.

(c) For the Small Business Investment Company (SBIC) program, an applicant must meet one of the following standards:

(1) The same standards applicable under paragraph (a) of this section; or

(2) Including its affiliates, tangible net worth not in excess of $24 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of $8 million. If the applicant is not required by law to pay Federal income taxes at the enterprise level, but is required to pass income through to its shareholders, partners, beneficiaries, or other equitable owners, the applicant's ''net income after Federal income taxes'' will be its net income reduced by an amount computed as follows:

(i) If the applicant is not required by law to pay State (and local, if any) income taxes at the enterprise level, multiply its net income by the marginal State income tax rate (or by the combined State and local income tax rates, as applicable) that would have applied if it were a taxable corporation.

(ii) Multiply the applicant's net income, less any deduction for State and local income taxes calculated under paragraph (c)(2)(i) of this section, by the marginal Federal income tax rate that would have applied if the applicant were a taxable corporation.

(iii) Add the results obtained in paragraphs (c)(2)(i) and (c)(2)(ii) of this section.

(d) For Surety Bond Guarantee assistance—a business concern, combined with its affiliates, must meet the size standard for the primary industry in which such business concern, combined with its affiliates, is engaged.

(e) The applicable size standards for purposes of SBA's financial assistance programs, excluding the Surety Bond Guarantee assistance program, are increased by 25% whenever the applicant agrees to use all of the financial assistance within a labor surplus area. Labor surplus areas are listed monthly in the Department of Labor publication ''Area Trends in Employment and Unemployment.''

(f) *Affiliation.* Any of the circumstances described below establishes affiliation for applicants of SBA's Business Loan, Disaster Loan, and Surety Bond Programs. For this rule, the Business Loan Programs consist of the 7(a) Loan Program (Direct and Guaranteed Loans), the Microloan Program,

the Intermediary Lending Pilot Program, and the Development Company Loan Program (''504 Loan Program''). The Disaster Loan Programs consist of Physical Disaster Business Loans, Economic Injury Disaster Loans, Military Reservist Economic Injury Disaster Loans, and Immediate Disaster Assistance Program loans. The following principles apply for the Business Loan, Disaster Loan, and Surety Bond Guarantee Programs:

(1) *Ownership.* (i) When the Applicant owns more than 50 percent of another business, the Applicant and the other business are affiliated.

(ii) When a business owns more than 50 percent of an Applicant, the business that owns the Applicant is affiliated with the Applicant. Additionally, if the business entity owner that owns more than 50 percent of the Applicant also owns more than 50 percent of another business that operates in the same 3-digit NAICS subsector as the Applicant, then the business entity owner, the other business and the Applicant are all affiliated.

(iii) When an individual owns more than 50 percent of the Applicant and the individual also owns more than 50 percent of another business entity that operates in the same 3-digit NAICS subsector as the Applicant, the Applicant and the individual owner's other business entity are affiliated.

(iv) When the Applicant does not have an owner that owns more than 50 percent of the Applicant, if an owner of 20 percent or more of the Applicant is a business that operates in the same 3-digit NAICS subsector as the Applicant, the Applicant and the owner are affiliated.

(v) When the Applicant does not have an owner that owns more than 50 percent of the Applicant, if an owner of 20 percent or more of the Applicant also owns more than 50 percent of another business entity that operates in the same 3-digit NAICS subsector as the Applicant, the Applicant and the owner's other business entity are affiliated.

(vi) Ownership interests of spouses and minor children must be combined when determining amount of ownership interest.

(vii) When determining the percentage of ownership that an individual owns in a business, SBA considers the pro rata ownership of entities. For example, John Smith, Jane Doe, and Jane Doe, Inc., each own an interest in the Applicant. Jane Doe owns 15 percent of the Applicant, and she also owns 100 percent of Jane Doe, Inc. Jane Doe, Inc. owns 50 percent of the Applicant. SBA considers Jane Doe to own 65 percent of the Applicant.

(2) *Stock options, convertible securities, and agreements to merge.* (i) For purposes of this subparagraph, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the ownership of the entity. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.

(ii) Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at a later date are not considered ''agreements in principle'' and are thus not given present effect.

(iii) Options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect.

(iv) SBA will not give present effect to individuals', concerns', or other entities' ability to divest all or part of their ownership interest to avoid a finding of affiliation.

(3) *Determining the concern's size.* In determining the concern's size, SBA counts the receipts, employees (see §121.201), or the alternate size standard (if applicable) of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.

(4) *Exceptions to affiliation.* For exceptions to affiliation, see §121.103(b).

(g) For COVID–19 Economic Injury Disaster (COVID EIDL) loans, an ''affiliated business'' or ''affiliate'' is a business in which an eligible entity has an equity interest or right to profit distributions of not less than 50 percent, or in which an eligible entity has

the contractual authority to control the direction of the business, provided that such affiliation shall be determined as of any arrangements or agreements in existence as of January 31, 2020. For exceptions to affiliation, see §121.103(b).

[61 FR 3286, Jan. 31, 1996, as amended at 66 FR 30648, June 7, 2001; 67 FR 3056, Jan. 23, 2002; 69 FR 29204, May 21, 2004; 70 FR 69047, 69052, Nov. 14, 2005; 70 FR 72594, Dec. 6, 2005; 71 FR 62208, Oct. 24, 2006; 73 FR 41254, July 18, 2008; 74 FR 20580, May 5, 2009; 74 FR 36110, July 22, 2009; 75 FR 48550, Aug. 11, 2010; 79 FR 33669, June 12, 2014; 79 FR 71296, Dec. 2, 2014; 81 FR 41428, June 27, 2016; 85 FR 7651, Feb. 10, 2020; 85 FR 80588, Dec. 14, 2020; 86 FR 50218, Sept. 8, 2021; 87 FR 69154, Nov. 17, 2022; 88 FR 21086, Apr. 10, 2023]

§ 121.302 When does SBA determine the size status of an applicant?

(a) The size status of an applicant for SBA financial assistance is determined as of the date the application for financial assistance is accepted for processing by SBA, except for applications under the Preferred Lenders Program (PLP), the Disaster Loan program, the SBIC program, and the New Markets Venture Capital (NMCV) program.

(b) For the Preferred Lenders Program, size is determined as of the date of approval of the loan by the Preferred Lender.

(c) For disaster loan assistance (other than physical disaster loans), size status is determined as of the date the disaster commenced, as set forth in the Disaster Declaration. For pre-disaster mitigation loans, size status is determined as of the date SBA accepts a complete Pre-Disaster Mitigation Small Business Loan Application for processing. Refer to §123.408 of this chapter to find out what SBA considers to be a complete Pre-Disaster Mitigation Small Business Loan Application.

(d) For financial assistance from an SBIC licensee or an NMVC company, size is determined as of the date a concern's application is accepted for processing by the SBIC or the NMVC company.

(e) Changes in size after the applicable date when size is determined will not disqualify an applicant for assistance.

[61 FR 3286, Jan. 31, 1996, as amended at 64 FR 48276, Sept. 3, 1999; 67 FR 11880, Mar. 15, 2002; 67 FR 62337, Oct. 7, 2002; 69 FR 29204, May 21, 2004; 70 FR 72594, Dec. 6, 2005; 73 FR 41254, July 18, 2008; 75 FR 48550, Aug. 11, 2010; 79 FR 33669, June 12, 2014; 85 FR 7652, Feb. 10, 2020; 85 FR 80589, Dec. 14, 2020]

§ 121.303 What size procedures are used by SBA before it makes a formal size determination?

(a) A concern that submits an application for financial assistance is deemed to have certified that it is small under the applicable size standard. SBA may question the concern's status based on information supplied in the application or from any other source.

(b) A small business investment company, a development company, a surety bond company, or a preferred lender may accept as true the size information provided by an applicant, unless credible evidence to the contrary is apparent.

(c) Size is initially considered by the individual with final financial assistance authority. This is not a formal size determination. A formal determination may be requested prior to a denial of eligibility based on size.

(d) An applicant may request a formal size determination when assistance has been denied for size ineligibility. Except for disaster loan eligibility, a request for a formal size determination must be made to the Government Contracting Area Director serving the area in which the headquarters of the applicant is located, regardless of the location of the parent company or affiliates. For disaster loan assistance, the request for a size determination must be made to the Area Director for the Disaster Area Office which denied the assistance.

(e) There are no time limitations for making a formal size determination for purposes of financial assistance. The official making the formal size determination must provide a copy of the determination to the applicant, to the requesting SBA official, and to other interested SBA program officials.

§ 121.304 What are the size requirements for refinancing an existing SBA loan?

(a) A concern that applies to refinance an existing SBA loan or guarantee will be considered small for the refinancing even though its size has increased since the date of the original financing to exceed its applicable size standard, provided that:

(1) The increase in size is due to natural growth (as distinguished from merger, acquisition or similar management action); and

(2) SBA determines that refinancing is necessary to protect the Government's financial interest.

(b) If a concern's size has increased other than by natural growth, the concern and its affiliates must be small at the time the application for refinancing is accepted for processing by SBA.

§ 121.305 What size eligibility requirements exist for obtaining financial assistance relating to particular procurements?

A concern qualified as small for a particular procurement, including an 8(a) subcontract, is small for financial assistance directly and primarily relating to the performance of the particular procurement.

Size Eligibility Requirements for Government Procurement

§ 121.401 What procurement programs are subject to size determinations?

The rules set forth in §§ 121.401 through 121.412 apply to all Federal procurement programs for which status as a small business is required or advantageous, including the small business set-aside program, SBA's Certificate of Competency program, SBA's 8(a) Business Development program, SBA's HUBZone program, the Women Owned Small Business (WOSB) Federal Contract Program, SBA's Service-Disabled Veteran-Owned Small Business program, the Small Business Subcontracting program, and the Federal Small Disadvantaged Business (SDB) program.

[75 FR 62280, Oct. 7, 2010, as amended at 88 FR 26200, Apr. 27, 2023]

§ 121.402 What size standards are applicable to Federal Government Contracting programs?

(a) A concern must not exceed the size standard for the NAICS code specified in the solicitation. The contracting officer must specify the size standard in effect on the date the solicitation is issued. If SBA amends the size standard and it becomes effective before the date initial offers (including price) are due, the contracting officer may amend the solicitation and use the new size standard.

(b) The procuring agency contracting officer, or authorized representative, designates the proper NAICS code and corresponding size standard in a solicitation, selecting the single NAICS code which best describes the principal purpose of the product or service being acquired. Except for multiple award contracts as set forth in paragraph (c) of this section, every solicitation, including a request for quotations, must contain only one NAICS code and only one corresponding size standard.

(1) Primary consideration is given to the industry descriptions in the U.S. NAICS Manual, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased.

(2) A procurement is generally classified according to the component which accounts for the greatest percentage of contract value. Acquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code, not under a Wholesale Trade or Retail Trade NAICS code. A concern that submits an offer or quote for a contract, order, or subcontract where the NAICS code assigned to the contract, order, or subcontract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of § 121.406(b).

(c) *Multiple Award Contracts* (*see* definition at § 125.1).

(1) For a Multiple Award Contract, the contracting officer must:

(i) Assign the solicitation a single NAICS code and corresponding size standard which best describes the principal purpose of the acquisition as set forth in paragraph (b) of this section, only if the NAICS code will also best describe the principal purpose of each order to be placed under the Multiple Award Contract; or

(ii) Divide the solicitation into discrete categories (such as Contract Line Item Numbers (CLINs), Special Item Numbers (SINs), Sectors, Functional Areas (FAs), or the equivalent), and assign each discrete category the single NAICS code and corresponding size standard that best describes the principal purpose of the goods or services to be acquired under that category (CLIN, SIN, Sector, FA or equivalent) as set forth in paragraph (b) of this section. A concern must meet the applicable size standard for each category (CLIN, SIN, Sector, FA or equivalent) for which it seeks an award as a small business concern.

(2)(i) The contracting officer must assign a single NAICS code for each order issued against a Multiple Award Contract. The NAICS code assigned to an order must be a NAICS code included in the underlying Multiple Award Contract. When placing an order under a Multiple Award Contract with multiple NAICS codes, the contracting officer must assign the NAICS code and corresponding size standard that best describes the principal purpose of each order. In cases where an agency can issue an order against multiple SINs with different NAICS codes, the contracting officer must select the single NAICS code that best represents the acquisition. If the NAICS code corresponding to the principal purpose of the order is not contained in the underlying Multiple Award Contract, the contracting officer may not use the Multiple Award Contract to issue that order.

(ii) With respect to an order issued against a multiple award contract, an agency will receive small business credit for goaling only if the business concern awarded the order has represented its status as small for the underlying multiple award contract for the same NAICS code as that assigned to the order, provided recertification has not been required or occurred for the contract or order.

(d) The NAICS code assigned to a procurement and its corresponding size standard is final unless timely appealed to SBA's Office of Hearings and Appeals (OHA), or unless SBA assigns an NAICS code or size standard as provided in paragraph (e) of this section.

(e) When a NAICS code designation or size standard in a solicitation is unclear, incomplete, missing, or prohibited, SBA may clarify, complete, or supply a NAICS code designation or size standard, as appropriate, in connection with a formal size determination or size appeal.

(f) Any offeror or other interested party adversely affected by an NAICS code designation or size standard designation may appeal the designations to OHA under part 134 of this chapter.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000; 69 FR 29205, May 21, 2004; 75 FR 61604, Oct. 6, 2010; 76 FR 5683, Feb. 2, 2011; 76 FR 8252, Feb. 11, 2011; 78 FR 61130, Oct. 2, 2013; 81 FR 34259, May 31, 2016; 85 FR 66180, Oct. 16, 2020]

§ 121.403 Are SBA size determinations and NAICS code designations binding on parties?

Formal size determinations and NAICS code designations made by authorized SBA officials are binding upon the parties. Opinions otherwise provided by SBA officials to contracting officers or others are advisory in nature, and are not binding or appealable.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000]

§ 121.404 When is the size status of a business concern determined?

(a) *Time of size.* SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price.

(1) *Multiple award contracts.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(i) *Single NAICS.* If a single NAICS code is assigned as set forth in

§ 121.402(c)(1)(i), SBA determines size status for the underlying Multiple Award Contract at the time of initial offer (or other formal response to a solicitation), which includes price, based upon the size standard set forth in the solicitation for the Multiple Award Contract, unless the concern was required to recertify under paragraph (g)(1), (2), or (3) of this section.

(A) *Unrestricted Multiple Award Contracts.* For an unrestricted Multiple Award Contract, if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for the Multiple Award Contract, it is small for goaling purposes for each order issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of concerns for which small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) *Set-aside Multiple Award Contracts.* Except as set forth in § 124.503(i)(1)(iv) for sole source 8(a) orders, for a Multiple Award Contract that is set aside or reserved for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for the Multiple Award Contract, it is small for each order or Blanket Purchase Agreement issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement.

(ii) *Multiple NAICS.* If multiple NAICS codes are assigned as set forth in § 121.402(c)(1)(ii), SBA determines size status at the time a business concern submits its initial offer (or other formal response to a solicitation) which includes price for a Multiple Award Contract based upon the size standard set forth for each discrete category (*e.g.,* CLIN, SIN, Sector, FA or equivalent) for which the business concern submits an offer and represents that it qualifies as small for the Multiple Award Contract, unless the business concern was required to recertify under paragraph (g)(1), (2), or (3) of this section. If the business concern (including a joint venture) submits an offer for the entire Multiple Award Contract, SBA will determine whether it meets the size standard for each discrete category (CLIN, SIN, Sector, FA or equivalent).

(A) *Unrestricted Multiple Award Contracts.* For an unrestricted Multiple Award Contract, if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award Contract, it is small for goaling purposes for each order issued against any of those categories, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement. Except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or Blanket Purchase Agreement for a discrete category under an unrestricted Multiple Award Contract is set-aside exclusively for small business (*i.e.,* small business set, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer,

which includes price, for the particular order or Agreement. However, where the underlying Multiple Award Contract for discrete categories has been awarded to a pool of concerns for which small business status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) *Set-aside Multiple Award Contracts.* Except as set forth in §124.503(i)(1)(iv) for sole source 8(a) orders, for a Multiple Award Contract that is set aside or reserved for small business (*i.e.*, small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award Contract, it is small for each order or Agreement issued against any of those categories, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase.

(iii) SBA will determine size at the time of initial offer (or other formal response to a solicitation), which includes price, for an order or Agreement issued against a Multiple Award Contract if the contracting officer requests a new size certification for the order or Agreement.

(iv) For a Multiple Award Contract, where concerns are not required to submit price as part of the offer for the contract, size for the contract will be determined as of the date of initial offer, which may not include price. Size for set-aside orders will be determined in accordance with subparagraphs (i)(A), (i)(B), (ii)(A), or (ii)(B), as appropriate.

(2) *Agreements.* With respect to ''Agreements'' including Blanket Purchase Agreements (BPAs) (except for BPAs issued against a GSA Schedule Contract), Basic Agreements, Basic Ordering Agreements, or any other Agreement that a contracting officer sets aside or reserves awards to any type of small business, a concern must qualify as small at the time of its initial offer (or other formal response to a solicitation), which includes price, for the Agreement. Because an Agreement is not a contract, the concern must also qualify as small for each order issued pursuant to the Agreement in order to be considered small for the order and for an agency to receive small business goaling credit for the order.

(b) *Eligibility for SBA programs.* A concern applying to be certified as a Participant in SBA's 8(a) Business Development program (under part 124, subpart A, of this chapter), as a HUBZone small business (under part 126 of this chapter), or as a women-owned small business concern (under part 127 of this chapter) must qualify as a small business for its primary industry classification as of the date of its application and, where applicable, the date the SBA program office requests a formal size determination in connection with a concern that otherwise appears eligible for program certification.

(c) *Certificates of competency.* The size status of an applicant for a Certificate of Competency (COC) relating to an unrestricted procurement is determined as of the date of the concern's application for the COC.

(d) *Nonmanufacturer rule, ostensible subcontractor rule, and joint venture agreements.* Compliance with the nonmanufacturer rule set forth in §121.406(b)(1), the ostensible subcontractor rule set forth in §121.103(h)(3), and the joint venture agreement requirements in §124.513(c) and (d), §125.8(b) and (c), §128.402(c) and (d), §126.616(c) and (d), or §127.506(c) and (d) of this chapter, as appropriate, is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.

(e) *Subcontracting.* For subcontracting purposes, a concern must qualify as small as of the date that it certifies that it is small for the subcontract. The applicable size standard is that which is set forth in §121.410 and which is in effect at the time the concern self-certifies that it is small for the subcontract. A prime contractor may rely on the self-certification of

subcontractor provided it does not have a reason to doubt the concern's self-certification.

(f) *Two-step procurements.* For purposes of architect-engineering, design/build or two-step sealed bidding procurements, a concern must qualify as small as of the date that it certifies that it is small as part of its initial bid or proposal (which may or may not include price).

(g) *Effect of size certification and recertification.* A concern that represents itself as a small business and qualifies as small at the time it submits its initial offer (or other formal response to a solicitation) which includes price is generally considered to be a small business throughout the life of that contract. Similarly, a concern that represents itself as a small business and qualifies as small after a required recertification under paragraph (g)(1), (2), or (3) of this section is generally considered to be a small business throughout the life of that contract. Where a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business, except that a required recertification as other than small under paragraph (g)(1), (2), or (3) of this section changes the firm's status for future options and orders. The following exceptions apply to this paragraph (g):

(1) Within 30 days of an approved contract novation, a contractor must recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals.

(2)(i) In the case of a merger, acquisition, or sale which results in a change in controlling interest under §121.103, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.

(ii) Recertification is required:

(A) When a concern, or an affiliate of the concern, acquires or is acquired by another concern;

(B) From both the acquired concern and the acquiring concern if each has been awarded a contract as a small business; and

(C) In the context of a joint venture that has been awarded a contract or order as a small business, from any partner to the joint venture that has been acquired, is acquiring, or has merged with another business entity.

(iii) If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award. If the merger, sale or acquisition (including agreements in principle) occurs within 180 days of the date of an offer relating to the award of a contract, order or agreement and the offeror is unable to recertify as small, it will not be eligible as a small business to receive the award of the contract, order or agreement. If the merger, sale or acquisition (including agreements in principal) occurs more than 180 days after the date of an offer, award can be made, but it will not count as an award to small business.

(iv) Recertification is not required when the ownership of a concern that is at least 51% owned by an entity (*i.e.*, tribe, Alaska Native Corporation, or Community Development Corporation) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity.

Example 1 to paragraph (g)(2)(iii). Indian Tribe X owns 100% of small business ABC. ABC wins an award for a small business set-aside contract. In year two of contract performance, X changes the ownership of ABC so that X owns 100% of a holding company XYZ, Inc., which in turn owns 100% of ABC. This restructuring does not require ABC to recertify its status as a small business because it continues to be 100% owned (indirectly rather than directly) by Indian Tribe X.

(3) For the purposes of contracts (including Multiple Award Contracts)

with durations of more than five years (including options), a contracting officer must request that a business concern recertify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. If the contractor certifies that it is other than small, the agency can no longer count the options or orders issued pursuant to the contract towards its small business prime contracting goals. A contracting officer may also request size recertification, as he or she deems appropriate, prior to the 120-day point in the fifth year of a long-term multiple award contract. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.

(i) A business concern that certified itself as other than small, either initially or prior to an option being exercised, may recertify itself as small for a subsequent option period if it meets the applicable size standard.

(ii) Re-certification does not change the terms and conditions of the contract. The limitations on subcontracting, non-manufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract. However, a contracting officer may require a subcontracting plan if a prime contractor's size status changes from small to other than small as a result of a size recertification.

(iii) A request for a size re-certification shall include the size standard in effect at the time of re-certification that corresponds to the NAICS code that that was initially assigned to the contract.

(iv) A contracting officer must assign a NAICS code and size standard to each order under a long-term contract. The NAICS code and size standard assigned to an order must correspond to a NAICS code and size standard assigned to the underlying long-term contract and must be assigned in accordance with §§ 121.402(b) and (c). A concern will be considered small for that order only if it certified itself as small under the same or lower size standard.

(v) Where the contracting officer explicitly requires concerns to recertify their size status in response to a solicitation for an order, SBA will determine size as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

(4) The requirements in paragraphs (g)(1), (2), and (3) of this section apply to Multiple Award Contracts. However, if the Multiple Award Contract was set-aside for small businesses, partially set-aside for small businesses, or reserved for small business, then in the case of a contract novation, or merger or acquisition where no novation is required, where the resulting contractor is now other than small, the agency cannot count any new or pending orders issued pursuant to the contract, from that point forward, towards its small business goals. This includes set-asides, partial set-asides, and reserves for 8(a) BD Participants, certified HUBZone small business concerns, SDVO SBCs, and ED/WOSBs.

(5) If during contract performance a subcontractor that is not a similarly situated entity performs primary and vital requirements of a contract, the contractor and its ostensible subcontractor will be treated as joint venturers. *See* § 121.103(h)(3).

(6) Where a joint venture must recertify its small business size status under paragraph (g), the joint venture can recertify as small where all parties to the joint venture qualify as small at the time of recertification, or the protégé small business in a still active mentor-protégé joint venture qualifies as small at the time of recertification. A joint venture can recertify as small even though the date of recertification occurs more than two years after the joint venture received its first contract award (*i.e.*, recertification is not considered a new contract award under § 121.103(h)).

(h) *Follow-on contracts.* A follow-on or renewal contract is a new contracting action. As such, size is determined as of the date the concern submits a written self-certification that it is small to

the procuring agency as part of its initial offer including price for the follow-on or renewal contract.

[69 FR 29205, May 21, 2004, as amended at 71 FR 19813, Apr. 18, 2006; 71 FR 66443, Nov. 15, 2006; 76 FR 5683, Feb. 2, 2011; 76 FR 8252, Feb. 11, 2011; 78 FR 42403, July 16, 2013; 78 FR 38817, June 28, 2013; 78 FR 61131, Oct. 2, 2013; 81 FR 34259, May 31, 2016; 81 FR 48578, July 25, 2016; 83 FR 12851, Mar. 26, 2018; 84 FR 65239, Nov. 26, 2019; 84 FR 65661, Nov. 29, 2019; 85 FR 66180, Oct. 16, 2020; 85 FR 72917, Nov. 16, 2020; 86 FR 2959, Jan. 14, 2021; 86 FR 10732, Feb. 23, 2021; 86 FR 38538, July 22, 2021; 87 FR 73412, Nov. 29, 2022; 88 FR 26200, Apr. 27, 2023]

§ 121.405 May a business concern self-certify its small business size status?

(a) A concern must self-certify it is small under the size standard specified in the solicitation, or as clarified, completed or supplied by SBA pursuant to § 121.402(d).

(b) A contracting officer may accept a concern's self-certification as true for the particular procurement involved in the absence of a written protest by other offerors or other credible information which causes the contracting officer or SBA to question the size of the concern.

(c) Procedures for protesting the self-certification of an offeror are set forth in §§ 121.1001 through 121.1009.

§ 121.406 How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business, HUBZone, WOSB or EDWOSB, or 8(a) contract?

(a) *General.* In order to qualify as a small business concern for a small business set-aside, service-disabled veteran-owned small business set-aside or sole source contract, HUBZone set-aside or sole source contract, WOSB or EDWOSB set-aside or sole source contract, 8(a) set-aside or sole source contract, partial set-aside, or set aside of an order against a multiple award contract to provide manufactured products or other supply items, an offeror must either:

(1) Be the manufacturer or producer of the end item being procured (and the end item must be manufactured or produced in the United States); or

(2) Comply with the requirements of paragraph (b), (c) or (d) of this section as a nonmanufacturer, a kit assembler or a supplier under Simplified Acquisition Procedures.

(b) *Nonmanufacturers.* (1) A firm may qualify as a small business concern for a requirement to provide manufactured products or other supply items as a nonmanufacturer if it:

(i) Does not exceed 500 employees (or 150 employees for the Information Technology Value Added Reseller exception to NAICS Code 541519, which is found at § 121.201, footnote 18);

(ii) Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied;

(iii) Takes ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice; and

(iv) Will supply the end item of a small business manufacturer, processor or producer made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(5) of this section.

(2) For size purposes, there can be only one manufacturer of the end item being acquired. The manufacturer is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. The end item must possess characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed. The end item may be finished and ready for utilization or consumption, or it may be semifinished as a raw material to be used in further manufacturing. Firms which perform only minimal operations upon the item being procured do not qualify as manufacturers of the end item. Firms that add substances, parts, or components to an existing end item to modify its performance will not be considered the end item manufacturer where those identical modifications can be performed by and are available from the manufacturer of the existing end item:

(i) SBA will evaluate the following factors in determining whether a concern is the manufacturer of the end item:

(A) The proportion of total value in the end item added by the efforts of the concern, excluding costs of overhead, testing, quality control, and profit;

(B) The importance of the elements added by the concern to the function of the end item, regardless of their relative value; and

(C) The concern's technical capabilities; plant, facilities and equipment; production or assembly line processes; packaging and boxing operations; labeling of products; and product warranties.

(ii) Firms that provide computer and other information technology equipment primarily consisting of component parts (such as motherboards, video cards, network cards, memory, power supplies, storage devices, and similar items) who install components totaling less than 50% of the value of the end item are generally not considered the manufacturer of the end item.

(3) The nonmanufacturer rule applies only to procurements that have been assigned a manufacturing or supply NAICS code, or the Information Technology Value Added Resellers (ITVAR) exception to NAICS code 541519. The nonmanufacturer rule does not apply to contracts that have been assigned a service (except for the ITVAR exception to NAICS code 541519), construction, or specialty trade construction NAICS code.

(4) The nonmanufacturer rule applies only to the supply component of a requirement classified as a manufacturing, supply, or ITVAR contract. If a requirement is classified as a service contract, but also has a supply component, the nonmanufacturer rule does not apply to the supply component of the requirement. The rental of an item(s) is a service and should be treated as such in the application of the nonmanufacturer rule and the limitation on subcontracting.

Example 1 to paragraph (b)(4). A procuring agency seeks to acquire computer integration and maintenance services. Included within that requirement, the agency also seeks to acquire some computer hardware. If the procuring agency determines that the principal nature of the procurement is services and classifies the procurement as a services procurement, the nonmanufacturer rule does not apply to the computer hardware portion of the requirement. This means that while a contractor must meet the applicable performance of work requirement set forth in §125.6 for the services portion of the contract, the contractor does not have to supply the computer hardware of a small business manufacturer.

Example 2 to paragraph (b)(4). A procuring agency seeks to acquire computer hardware, as well as computer integration and maintenance services. If the procuring agency determines that the principal nature of the procurement is for supplies and classifies the procurement as a supply procurement, the nonmanufacturer rule applies to the computer hardware portion of the requirement. A firm seeking to qualify as a small business nonmanufacturer must supply the computer hardware manufactured by a small business. Because the requirement is classified as a supply contract, the contractor does not have to meet the performance of work requirement set forth in §125.6 for the services portion of the contract.

(5) The Administrator or designee may waive the requirement set forth in paragraph (b)(1)(iv) of this section under the following two circumstances:

(i) The contracting officer has determined that no small business manufacturer or processor reasonably can be expected to offer a product meeting the specifications (including period for performance) required by a particular solicitation and SBA reviews and accepts that determination; or

(ii) SBA determines that no small business manufacturer or processor of the product or class of products is available to participate in the Federal procurement market.

(6) The two waiver possibilities identified in paragraph (b)(5) of this section are called ''individual'' and ''class'' waivers respectively, and the procedures for requesting and granting them are contained in §121.1204.

(7) SBA's waiver of the nonmanufacturer rule means that the firm can supply the product of any size business without regard to the place of manufacture. However, SBA's waiver of the nonmanufacturer rule has no effect on requirements external to the Small Business Act which involve domestic sources of supply, such as the Buy American Act or the Trade Agreements Act.

(c) The limitations on subcontracting (performance of work) requirements, the ostensible subcontracting rule, and the nonmanufacturer rule do not apply to small business set-aside acquisitions with an estimated value between the micro-purchase threshold and the simplified acquisition threshold (as both terms are defined in the FAR at 48 CFR 2.101).

(d) *Multiple item acquisitions.* (1) If at least 50% of the estimated contract value is composed of items that are manufactured by small business concerns, then a waiver of the nonmanufacturer rule is not required. There is no requirement that each and every item acquired in a multiple-item procurement be manufactured by a small business.

(2) If more than 50% of the estimated contract value is composed of items manufactured by other than small concerns, then a waiver is required. SBA may grant a contract specific waiver for one or more items in order to ensure that at least 50% of the value of the products to be supplied by the nonmanufacturer comes from domestic small business manufacturers or are subject to a waiver.

(3) If a small business is both a manufacturer of item(s) and a nonmanufacturer of other item(s), the manufacturer size standard should be applied.

(e) These requirements do not apply to small business concern subcontractors.

[61 FR 3286, Jan. 31, 1996; 61 FR 7986, Mar. 1, 1996, as amended at 65 FR 30863, May 15, 2000; 69 FR 29205, May 21, 2004; 76 FR 8252, Feb. 11, 2011; 78 FR 61132, Oct. 2, 2013; 81 FR 4469, Jan. 26, 2016; 81 FR 34259, May 31, 2016; 81 FR 48579, July 25, 2016; 83 FR 12851, Mar. 26, 2018; 84 FR 65661, Nov. 29, 2019; 85 FR 66182, Oct. 16, 2020; 88 FR 26201, Apr. 27, 2023]

§ 121.407 What are the size procedures for multiple item procurements?

If a procurement calls for two or more specific end items or types of services with different size standards and the offeror may submit an offer on any or all end items or types of services, the offeror must meet the size standard for each end item or service item for which it submits an offer. If the procurement calls for more than one specific end item or type of service and an offeror is required to submit an offer on all items, the offeror may qualify as a small business for the procurement if it meets the size standard of the item which accounts for the greatest percentage of the total contract value.

§ 121.408 What are the size procedures for SBA's Certificate of Competency Program?

(a) A firm which applies for a COC must file an ''Application for Small Business Size Determination'' (SBA Form 355). If the initial review of SBA Form 355 indicates the applicant, including its affiliates, is small for purposes of the COC program, SBA will process the application for COC. If the review indicates the applicant, including its affiliates is other than small SBA will initiate a formal size determination as set forth in §121.1001(b)(3)(ii). In such a case, SBA will not further process the COC application until a formal size determination is made.

(b) A concern is ineligible for a COC if a formal SBA size determination finds the concern other than small.

[61 FR 3286, Jan. 31, 1996, as amended at 81 FR 34259, May 31, 2016]

§ 121.409 What size standard applies in an unrestricted procurement for Certificate of Competency purposes?

For the purpose of receiving a Certificate of Competency in an unrestricted procurement, the applicable size standard is that corresponding to the NAICS code set forth in the solicitation. The offeror need not be the manufacturer of any of the items acquired.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000; 81 FR 34259, May 31, 2016]

§ 121.410 What are the size standards for SBA's Section 8(d) Subcontracting Program?

For subcontracting purposes pursuant to sections 8(d) of the Small Business Act, a concern is small for subcontracts which relate to Government procurements if it does not exceed the size standard for the NAICS code that

the prime contractor believes best describes the product or service being acquired by the subcontract. However, subcontracts for engineering services awarded under the National Energy Policy Act of 1992 have the same size standard as Military and Aerospace Equipment and Military Weapons under NAICS code 541330.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000; 69 FR 29205, May 21, 2004; 74 FR 46313, Sept. 9, 2009]

§ 121.411 What are the size procedures for SBA's Section 8(d) Subcontracting Program?

(a) Prime contractors may rely on the information contained in the System for Award Management (SAM) (or any successor system or equivalent database maintained or sanctioned by SBA) as an accurate representation of a concern's size and ownership characteristics for purposes of maintaining a small business source list.

(b) Even if a concern is on a small business source list, it must still qualify and self-certify as a small business at the time it submits its offer as a section 8(d) subcontractor. Prime contractors (or subcontractors) may accept paper self-certifications as to size and socioeconomic status or a subcontractor's electronic self-certification as to size or socioeconomic status, if the solicitation for the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size or socioeconomic representations and certifications are accurate and complete. Electronic submission may include any method acceptable to the prime contractor (or subcontractor) including, but not limited to, size representations and certifications made in SAM (or any successor system) and electronic conveyance of subcontractor certifications in prime contractor systems in connection with an offer for a subcontract. Prime contractors or subcontractors may not require the use of SAM (or any successor system) for purposes of representing size or socioeconomic status in connection with a subcontract.

(c) Upon determination of the successful subcontract offeror for a competitive subcontract over the simplified acquisition threshold, but prior to award, the prime contractor must inform each unsuccessful subcontract offeror in writing of the name and location of the apparent successful offeror.

(d) The self-certification of a concern subcontracting or proposing to subcontract under section 8(d) of the Small Business Act may be protested by the contracting officer, the prime contractor, the appropriate SBA official or any other interested party.

(e) *Presumption of Loss Based on the Total Amount Expended.* In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation.

(f) *Deemed Certifications.* The following actions shall be deemed affirmative, willful and intentional certifications of small business size and status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to small business concerns.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a small business concern.

(g) *Signature Requirement.* Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the small business size and status of a business concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the size status claimed by the concern.

(h) *Limitation of Liability.* Paragraphs (d) through (f) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of size was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' size. Relevant factors to consider in making this determination may include the firm's internal management procedures governing size representation or certification, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as small without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(i) *Penalties for Misrepresentation.* (1) *Suspension or debarment.* The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's size status pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) *Civil Penalties.* Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729–3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812 and any other applicable laws or regulations, including 13 CFR part 142.

(3) *Criminal Penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct ''continuing representations'' that are no longer true.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29205, May 21, 2004; 78 FR 42403, July 16, 2013; 78 FR 38817, June 28, 2013; 79 FR 29661, May 23, 2014; 81 FR 31491, May 19, 2016; 81 FR 94250, Dec. 23, 2016; 88 FR 26201, Apr. 27, 2023]

§ 121.412 What are the size procedures for partial small business set-asides?

A firm is required to meet size standard requirements only for the small business set-aside portion of a procurement, and is not required to qualify as a small business for the unrestricted portion.

Size Eligibility Requirements for Sales or Lease of Government Property

§ 121.501 What programs for sales or leases of Government property are subject to size determinations?

Sections 121.501 through 121.512 apply to small business size determinations for the purpose of the sale or lease of Government property, including the Timber Sales Program, the Special Salvage Timber Sales Program, and the sale of Government petroleum, coal and uranium.

§ 121.502 What size standards are applicable to programs for sales or leases of Government property?

(a) Unless otherwise specified in this part—

(1) A concern primarily engaged in manufacturing is small for sales or leases of Government property if it does not exceed 500 employees;

(2) A concern not primarily engaged in manufacturing is small for sales or leases of Government property if it has

annual receipts not exceeding $9 million.

(b) Size status for such sales and leases is determined by the primary industry of the applicant business concern.

[61 FR 3286, Jan. 31, 1996, as amended at 67 FR 3056, Jan. 23, 2002; 70 FR 72594, Dec. 6, 2005; 73 FR 41254, July 18, 2008; 79 FR 33669, June 12, 2014; 84 FR 34281, July 18, 2019; 87 FR 69154, Nov. 17, 2022]

§ 121.503 Are SBA size determinations binding on parties?

Formal size determinations based upon a specific Government sale or lease, or made in response to a request from another Government agency under § 121.901, are binding upon the parties. Other SBA opinions provided to contracting officers or others are only advisory, and are not binding or appealable.

§ 121.504 When does SBA determine the size status of a business concern?

SBA determines the size status of a concern (including its affiliates) as of the date the concern submits a written self-certification that it is small to the Government as part of its initial offer including price where there is a specific sale or lease at issue, or as set forth in § 121.903 if made in response to a request of another Government agency.

§ 121.505 What is the effect of a self-certification?

(a) A contracting officer may accept a concern's self-certification as true for the particular sale or lease involved, in the absence of a written protest by other offerors or other credible information which would cause the contracting officer or SBA to question the size of the concern.

(b) Procedures for protesting the self-certification of an offeror are set forth in §§ 121.1001 through 121.1009.

§ 121.506 What definitions are important for sales or leases of Government-owned timber?

(a) *Computation of Market Share* means the small business share, expressed as a percentage for a market area, based on the purchase by small business over the preceding 5-year period. The computation is done every five years.

(b) *Forest product industry* means logging, wood preserving, and the manufacture of lumber and wood related products such as veneer, plywood, hardboard, particle board, or wood pulp, and of products of which lumber or wood related products are the principal raw materials.

(c) *Integrated Resource Timber Contracts* means contracts that combine product removal and service work when the value of included timber exceeds the value of services.

(d) *Logging of timber* means felling and bucking, yarding, and/or loading. It does not mean hauling.

(e) *Manufacture of logs* means, at a minimum, breaking down logs into rough cuts of the finished product.

(f) *Sell* means, in addition to its usual and customary meaning, the exchange of sawlogs for sawlogs on a product-for-product basis with or without monetary adjustment, and an indirect transfer, such as the sale of the assets of a concern after it has been awarded one or more set-aside sales of timber.

(g) *Significant logging of timber* means that a concern uses its own employees to perform at least two of the following: felling and bucking, yarding, and loading.

[61 FR 3286, Jan. 31, 1996, as amended at 88 FR 26201, Apr. 27, 2023]

§ 121.507 What are the size standards and other requirements for the purchase of Government-owned timber (other than Special Salvage Timber)?

(a) To be small for purposes of the sale of Government-owned timber (other than Special Salvage Timber) a concern must:

(1) Be primarily engaged in the logging or forest products industry;

(2) Not exceed 500 employees, taking into account its affiliates; and

(3) If it does not intend at the time of the offer to resell the timber—

(i) Agree that it will manufacture the logs with its own facilities or those of another business which meets the requirements of paragraphs (a)(1) and (a)(2) of this section;

(ii) Agree that if it eventually resells the timber, it will resell no more than 30% of the sawtimber volume to other businesses which do not meet the requirements of paragraphs (a)(1) and (a)(2) of this section; and

(iii) Agree that if it becomes acquired or controlled by a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section, it will require as a condition of the acquisition or change of control that the acquiring or controlling business resell at least 70% of the sawtimber volume to businesses which do meet the requirements of paragraphs (a)(1) and (a)(2) of this section; or

(4) If it intends at the time of offer to resell the timber—

(i) Agree that it will not sell more than 30% of such timber (50% of such timber if the concern is an Alaskan business) to a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section; and

(ii) Agree that if it becomes acquired or controlled by a business which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section, it will require as a condition of the acquisition or change of control that the acquiring or controlling business resell at least 70% of the sawtimber volume (or at least 50% of the sawtimber volume, if it is an Alaskan business) to businesses which meet the requirements of paragraphs (a)(1) and (a)(2) of this section.

(b) For a period of three years following the date upon which a concern purchases timber under a small business set-aside (other than through the Special Salvage Timber Sale program), it must maintain a record of:

(1) The name, address and size status of every concern to which it sells the timber or sawlogs; and

(2) The species, grades and volumes of sawlogs sold.

(c) For a period of three years following the date upon which a concern purchases timber, it must by contract require all small business repurchasers of the sawlogs or timber it purchased under the small business set-aside to maintain the records described in paragraph (b) of this section.

(d) The Director of Government Contracting may waive one or more of the requirements set forth in paragraphs (a)(3) and (a)(4) of this section in limited circumstances where conditions make the requirement(s) impractical or prohibitive. A request for waiver must be made to the Director of Government Contracting and contain facts, arguments, and any appropriate supporting documentation as to why a waiver should be granted.

(e) Sawtimber volume from Integrated Resource Timber Contracts shall be included in the Computation of Market Share and set-aside trigger.

[61 FR 3286, Jan. 31, 1996, as amended at 88 FR 26201, Apr. 27, 2023]

§ 121.508 What are the size standards and other requirements for the purchase of Government-owned Special Salvage Timber?

(a) In order to purchase Government-owned Special Salvage Timber from the United States Forest Service or the Bureau of Land Management as a small business, a concern must:

(1) Be primarily engaged in the logging or forest product industry;

(2) Have, together with its affiliates, no more than twenty-five employees during any pay period for the last twelve months; and

(3) If it does not intend at the time of offer to resell the timber—

(i) Agree that it will manufacture a significant portion of the logs with its own employees; and

(ii) Agree that it will log the timber only with its own employees or with employees of another business which is eligible for award of a Special Salvage Timber sales contract; or

(4) If it intends at the time of offer to resell the timber, agree that it will perform a significant portion of timber logging with its own employees and that it will subcontract the remainder of the timber logging to a concern which is eligible for award of a Special Salvage Timber sales contract.

§ 121.509 What is the size standard for leasing of Government land for coal mining?

A concern is small for this purpose if it:

(a) Together with its affiliates, does not have more than 250 employees;

(b) Maintains management and control of the actual mining operations of the tract; and

(c) Agrees that if it subleases the Government land, it will be to another small business, and that it will require its sublessors to agree to the same.

§ 121.510 What is the size standard for leasing of Government land for uranium mining?

A concern is small for this purpose if it, together with its affiliates, does not have more than 100 employees.

§ 121.511 What is the size standard for buying Government-owned petroleum?

A concern is small for this purpose if it is primarily engaged in petroleum refining and meets the size standard for a petroleum refining business.

§ 121.512 What is the size standard for stockpile purchases?

A concern is small for this purpose if:

(a) It is primarily engaged in the purchase of materials which are not domestic products; and

(b) Its annual receipts, together with its affiliates, do not exceed $76.5 million.

[61 FR 3286, Jan. 31, 1996, as amended at 67 FR 3056, Jan. 23, 2002; 70 FR 72594, Dec. 6, 2005; 73 FR 41254, July 18, 2008; 79 FR 33669, June 12, 2014; 84 FR 34281, July 18, 2019; 87 FR 69154, Nov. 17, 2022]

SIZE ELIGIBILITY REQUIREMENTS FOR THE 8(a) BUSINESS DEVELOPMENT PROGRAM

§ 121.601 What is a small business for purposes of admission to SBA's 8(a) Business Development program?

An applicant must not exceed the size standard corresponding to its primary industry classification in order to qualify for admission to SBA's 8(a) Business Development Program.

[69 FR 29205, May 21, 2004]

§ 121.602 At what point in time must a 8(a) BD applicant be small?

A 8(a) BD applicant must be small for its primary industry at the time SBA certifies it for admission into the program.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29206, May 21, 2004]

§ 121.603 How does SBA determine whether a Participant is small for a particular 8(a) BD subcontract?

(a) *Self certification by Participant.* A 8(a) BD Participant must certify that it qualifies as a small business under the NAICS code assigned to a particular 8(a) BD subcontract as part of its initial offer including price to the procuring agency. The Participant also must submit a copy of its offer, including its self-certification as to size, to the appropriate SBA district office at the same time it submits the offer to the procuring agency. *See* § 121.404 for the time at which size is determined for, and § 121.406 for the applicability of the nonmanufacturer rule to, 8(a) BD procurements.

(b) *Verification of size by SBA.* Within 30 days of its receipt of a Participant's size self-certification for a particular 8(a) BD subcontract, the SBA district office serving the geographic area in which the Participant's principal office is located will review the Participant's self-certification and determine if it is small for purposes of that subcontract. The SBA district office will review the Participant's most recent financial statements and other relevant data and then notify the Participant of its decision.

(c) *Changes in size between date of self-certification and date of award.* (1) Where SBA verifies that the selected Participant is small for a particular procurement, subsequent changes in size up to the date of award, except those due to merger with or acquisition by another business concern, will not affect the firm's size status for that procurement.

(2) Where a Participant has merged with or been acquired by another business concern between the date of its self-certification and the date of award, the concern must recertify its size status, and SBA must verify the new certification before award can occur.

(3) Recertification is not required when the ownership of a concern that is at least 51% owned by an entity (*i.e.*, tribe, Alaska Native Corporation, or

Community Development Corporation) changes to or from a wholly-owned business concern of the same entity, as long as the ultimate owner remains that entity.

(d) *Finding Participant to be other than small.* (1) A Participant may request a formal size determination (pursuant to §§ 121.1001 through 121.1009) with the SBA Government Contracting Area Office serving the geographic area in which the principal office of the Participant is located within 5 working days of its receipt of notice from the SBA district office that it is not small for a particular 8(a) BD subcontract.

(2) Where the Participant does not timely request a formal size determination, SBA may accept the procurement in support of another Participant, or may rescind its acceptance of the offer for the 8(a) BD program, as appropriate.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000; 69 FR 29206, May 21, 2004; 85 FR 66182, Oct. 16, 2020]

§ 121.604 Are 8(a) BD Participants considered small for purposes of other SBA assistance?

A concern which SBA determines to be a small business for the award of a 8(a) BD subcontract will be considered to have met applicable size eligibility requirements of other SBA programs where that assistance directly and primarily relates to the performance of the 8(a) BD subcontract in question.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29206, May 21, 2004]

SIZE AND ELIGIBILITY REQUIREMENTS FOR THE SMALL BUSINESS INNOVATION RESEARCH (SBIR) AND SMALL BUSINESS TECHNOLOGY TRANSFER (STTR) PROGRAMS

§ 121.701 What SBIR and STTR programs are subject to size and eligibility determinations and what definitions are important?

(a) These sections apply to SBA's SBIR and STTR programs, 15 U.S.C. 638.

(b) *Definitions*—(1) *Funding agreement officer* means a contracting officer, a grants officer, or a cooperative agreement officer.

(2) *Funding agreement* means any contract, grant or cooperative agreement entered into between any Federal agency and any small business for the purposes of the SBIR or STTR program.

(3) *Hedge fund* has the meaning given that term in section 13(h)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1851(h)(2)). The hedge fund must have a place of business located in the United States and be created or organized in the United States, or under the law of the United States or of any State.

(4) *Portfolio company* means any company that is owned in whole or part by a venture capital operating company, hedge fund, or private equity firm.

(5) *Private equity firm* has the meaning given the term ''private equity fund'' in section 13(h)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. 1851(h)(2)). The private equity firm must have a place of business located in the United States and be created or organized in the United States, or under the law of the United States or of any State.

(6) *Venture capital operating company* means an entity described in § 121.103(b)(5)(i), (v), or (vi). The venture capital operating company must have a place of business located in the United States and be created or organized in the United States, or under the law of the United States or of any State.

[77 FR 76225, Dec. 27, 2012]

§ 121.702 What size and eligibility standards are applicable to the SBIR and STTR programs?

To be eligible for award of funding agreements in SBA's SBIR and STTR programs, a business concern must meet the requirements below at the time of award of an SBIR or STTR Phase I or Phase II funding agreement:

(a) *Ownership and control for the SBIR program.* (1) An SBIR awardee must:

(i) Be a concern which is more than 50% directly owned and controlled by one or more individuals (who are citizens or permanent resident aliens of the United States), other small business concerns (each of which is more than 50% directly owned and controlled by individuals who are citizens or permanent resident aliens of the United States), an Indian tribe, ANC or NHO

(or a wholly owned business entity of such tribe, ANC or NHO), or any combination of these;

(ii) Be a concern which is more than 50% owned by multiple venture capital operating companies, hedge funds, private equity firms, or any combination of these (for agencies electing to use the authority in 15 U.S.C. 638(dd)(1)); or

(iii) Be a joint venture in which each entity to the joint venture must meet the requirements set forth in paragraph (a)(1)(i) or (a)(1)(ii) of this section. A joint venture that includes one or more concerns that meet the requirements of paragraph (a)(1)(ii) of this section must comply with §121.705(b) concerning registration and proposal requirements.

(2) No single venture capital operating company, hedge fund, or private equity firm may own more than 50% of the concern unless that single venture capital operating company, hedge fund, or private equity firm qualifies as a small business concern that is more than 50% directly owned and controlled by individuals who are citizens or permanent resident aliens of the United States.

(3) If an Employee Stock Ownership Plan owns all or part of the concern, each stock trustee and plan member is considered an owner.

(4) If a trust owns all or part of the concern, each trustee and trust beneficiary is considered an owner.

(b) *Ownership and control for the STTR program.* (1) An STTR awardee must:

(i) Be a concern which is more than 50% directly owned and controlled by one or more individuals (who are citizens or permanent resident aliens of the United States), other small business concerns (each of which is more than 50% directly owned and controlled by individuals who are citizens or permanent resident aliens of the United States), an Indian tribe, ANC or NHO (or a wholly owned business entity of such tribe, ANC or NHO), or any combination of these; or

(ii) Be a joint venture in which each entity to the joint venture must meet the requirements set forth in paragraph (b)(1)(i) of this section.

(2) If an Employee Stock Ownership Plan owns all or part of the concern, each stock trustee and plan member is considered an owner.

(3) If a trust owns all or part of the concern, each trustee and trust beneficiary is considered an owner.

(c) *Size and affiliation.* An SBIR or STTR awardee, together with its affiliates, must not have more than 500 employees. Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. For the purposes of the SBIR and STTR programs, the following bases of affiliation apply:

(1) *Affiliation based on ownership.* For determining affiliation based on equity ownership, a concern is an affiliate of an individual, concern, or entity that owns or has the power to control more than 50 percent of the concern's voting equity. However, SBA may find a concern an affiliate of an individual, concern, or entity that owns or has the power to control 40% or more of the voting equity based upon the totality of circumstances. If no individual, concern, or entity is found to control, SBA will deem the Board of Directors to be in control of the concern.

(2) *Affiliation arising under stock options, convertible securities, and agreements to merge.* In determining size, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.

(i) Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered ''agreements in principle'' and are thus not given present effect.

(ii) Options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the

rights) occurring is shown to be extremely remote, are not given present effect.

(iii) An individual, concern or other entity that controls one or more other concerns cannot use options, convertible securities, or agreements to appear to terminate such control before actually doing so. SBA will not give present effect to individuals', concerns' or other entities' ability to divest all or part of their ownership interest in order to avoid a finding of affiliation.

(3) *Affiliation based on common management.* Affiliation arises where the CEO or President of a concern (or other officers, managing members, or partners who control the management of the concern) also controls the management of one or more other concerns. Affiliation also arises where a single individual, concern, or entity that controls the board of directors of one concern also controls the board of directors or management of one or more other concerns.

(4) *Affiliation based on identity of interest.* Affiliation may arise among two or more persons (including any individual, concern or other entity) with an identity of interest. An individual, concern or entity may rebut a determination of identity of interest with evidence showing that the interests deemed to be one are in fact separate.

(i) SBA may presume an identity of interest between family members with identical or substantially identical business or economic interests (such as where the family members operate concerns in the same or similar industry in the same geographic area).

(ii) SBA may presume an identity of interest based upon economic dependence if the SBIR/STTR awardee relies upon another concern or entity for 70% or more of its receipts.

(iii) An SBIR or STTR awardee is not affiliated with a portfolio company of a venture capital operating company, hedge fund, or private equity firm, solely on the basis of one or more shared investors, though affiliation may be found for other reasons.

(5) *Affiliation based on the newly organized concern rule.* Affiliation may arise where former or current officers, directors, principal stockholders, managing members, general partners, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, general partners, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A ''key employee'' is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern. A concern will be considered ''new'' for the purpose of this rule if it has been actively operating continuously for less than one year.

(6) *Size requirement for joint ventures.* Two or more small business concerns may submit an application as a joint venture. The joint venture will qualify as small as long as each concern is small under the size standard for the SBIR program, found at §121.702(c), or the joint venture meets the exception at §121.103(h)(3)(ii) for two firms approved to be a mentor and protégé under SBA's All Small Mentor-Protégé Program.

(7) *Affiliation based on the ostensible subcontractor rule.* A concern and its ostensible subcontractor are treated as joint venturers. As such, they are affiliates for size determination purposes and must meet the ownership and control requirements applicable to joint ventures. An ostensible subcontractor is a subcontractor or subgrantee that performs primary and vital requirements of a funding agreement (*i.e.*, those requirements associated with the principal purpose of the funding agreement), or a subcontractor or subgrantee upon which the concern is unusually reliant. All aspects of the relationship between the concern and subcontractor are considered, including, but not limited to, the terms of the

proposal (such as management, technical responsibilities, and the percentage of subcontracted work) and agreements between the concern and subcontractor or subgrantee (such as bonding assistance or the teaming agreement). To determine whether a subcontractor performs primary and vital requirements of a funding agreement, SBA will consider whether the concern's proposal complies with the performance requirements of the SBIR or STTR program.

(8) *Affiliation based on license agreements.* SBA will consider whether there is a license agreement concerning a product or trademark which is critical to operation of the licensee. The license agreement will not cause the licensor to be affiliated with the licensee if the licensee has the right to profit from its efforts and bears the risk of loss. Affiliation may arise, however, through other means, such as common ownership or common management.

(9) *Exception to affiliation for portfolio companies.* If a venture capital operating company, hedge fund, or private equity firm that is determined to be affiliated with an awardee is a minority investor in the awardee, the awardee is not affiliated with a portfolio company of the venture capital operating company, hedge fund, or private equity firm, unless:

(i) The venture capital operating company, hedge fund, or private equity firm owns a majority of the portfolio company; or

(ii) The venture capital operating company, hedge fund, or private equity firms holds a majority of the seats of the board of directors of the portfolio company.

(10) *Totality of the circumstances.* In determining whether affiliation exists, SBA may consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

(11) *Exception to affiliation for certain investment companies.* There is an exception to affiliation for Small Business Investment Companies (SBICs) that invest in SBIR or STTR awardees, in accordance with 13 CFR 121.103(b)(1).

(d) *Calculating ownership and control.* SBA will review the small business' equity ownership on a fully diluted basis for purposes of determining ownership, control and affiliation in the SBIR and STTR programs. This means that SBA will consider the total number of shares or equity that would be outstanding if all possible sources of conversion were exercised, including, but not limited to: Outstanding common stock or equity, outstanding preferred stock (on a converted to common basis) or equity, outstanding warrants (on an as exercised and converted to common basis), outstanding options and options reserved for future grants, and any other convertible securities on an as converted to common basis.

[77 FR 76225, Dec. 27, 2012; 78 FR 11745, Feb. 20, 2013, as amended at 81 FR 34259, May 31, 2016; 81 FR 48579, July 25, 2016; 81 FR 71983, Oct. 19, 2016; 85 FR 66182, Oct. 16, 2020; 88 FR 26201, Apr. 27, 2023]

§ 121.703 Are formal size determinations binding on parties?

Size determinations by authorized SBA officials are formal actions based upon a specific funding agreement, and are binding upon the parties. Other SBA opinions provided to funding agreement officers or others, are only advisory, and are not binding or appealable.

§ 121.704 When does SBA determine the size and eligibility status of a business concern?

(a) The size and eligibility status of a concern for the purpose of a funding agreement award under the SBIR and STTR programs is determined at the time of award for both Phase I and Phase II SBIR and STTR awards, or on the date of the request for a size determination, if an award is pending.

(b) A concern that qualified as a small business at the time it receives an SBIR or STTR funding agreement is considered a small business throughout the life of that specific funding agreement. Where a concern grows to be other than small, the funding agreement agency may exercise the options on the award that is a contract, grant or cooperative agreement or issue a continuation on a grant or cooperative agreement and still count the award as an award to a small business under the SBIR or STTR program. However, the following exceptions apply:

(1) In the case of a merger or acquisition, the awardee must, within 30 days of the transaction becoming final (or the approved funding agreement novation if a novation is required), recertify its small business size status to the funding agreement agency or inform the funding agreement agency that it is other than small. If the awardee is other than small, the agency can no longer fund the options or issue a continuation pursuant to the funding agreement, from that point forward, with SBIR or STTR funds. Funding agreement novations for reasons other than a merger or acquisition do not necessarily require re-certification. The funding agreement agency and the awardee must immediately revise all applicable Federal contract and grant databases to reflect the new size status from that point forward.

(2) For the purposes of SBIR and STTR funding agreements with durations of more than five years, a funding agreement officer must request that a business concern re-certify its small business size status no more than 120 days prior to the end of the fifth year of the funding agreement, and no more than 120 days prior to exercising any option or issuing any continuation. If the awardee certifies that it is other than small, the funding agreement agency can no longer fund the options or issue a continuation pursuant to the funding agreement with SBIR or STTR funds. The funding agreement agency and the awardee must immediately revise all applicable Federal contract and grant databases to reflect the new size status from that point forward.

(c) Re-certification does not change the terms and conditions of the funding agreement. The requirements in effect at the time of award remain in effect throughout the life of the funding agreement.

(d) A request for a size re-certification shall include the size standard in effect at the time of re-certification.

[77 FR 76226, Dec. 27, 2012]

§ 121.705 Must a business concern self-certify its size and eligibility status?

(a) A business concern must self-certify that it meets the eligibility requirements set forth in § 121.702 for a Phase I or Phase II SBIR or STTR funding agreement.

(b) A business concern that is more than 50% owned by multiple venture capital operating companies, hedge funds, or private equity firms and a joint venture where one or more parties to the joint venture is more than 50% owned by multiple venture capital operating companies, hedge funds, or private equity firms must be registered with SBA as of the date it submits its initial proposal (or other formal response) to a Phase I or Phase II SBIR announcement or solicitation. The concern must indicate in any SBIR proposal or application that it is registered with SBA as majority-owned by multiple venture capital operating companies, hedge funds, or private equity firms.

(c) A small business concern that did not meet the requirements of paragraph (b) of this section at the time of its SBIR proposal or application must notify the funding agreement officer if, on the date of award, the concern is more than 50% owned by multiple venture capital operating companies, hedge funds, or private equity firms.

(1) The concern is still eligible to receive the award if it becomes majority-owned by multiple venture capital operating companies, hedge funds, or private equity firms after the time it submitted its initial proposal (or other formal response) to a Phase I or Phase II SBIR announcement or solicitation if the agency makes the award on or after the date that is 9 months from the end of the period for submitting applications under the SBIR solicitation.

(2) This small business, known as a covered small business concern, would have to certify that it meets the requirements of the SBIR program set forth in §§ 121.702(a)(1)(ii) or 121.702(a)(1)(iii), and 121.702(a)(2) and 121.702(c) at the time of award of the funding agreement.

(d) A funding agreement officer may accept a concern's self-certification as true for the particular funding agreement involved in the absence of a written protest or other credible information which would cause the funding agreement officer or SBA to question the size or eligibility of the concern.

(e) Procedures for protesting an awardee's self-certification are set forth in §§121.1001 through 121.1009. In adjudicating a protest, SBA may address both the size status and eligibility of the SBIR or STTR awardee.

[77 FR 76227, Dec. 27, 2012]

SIZE ELIGIBILITY REQUIREMENTS FOR PAYING REDUCED PATENT FEES

§ 121.801 May patent fees be reduced if a concern is small?

These sections apply to size status for the purpose of paying reduced patent fees authorized by Pub. L. 97–247, 96 Stat. 317. The eligibility requirements for independent inventors and nonprofit organizations for the purpose of paying reduced patent fees are set forth in regulations of the Patent and Trademark Office of the Department of Commerce, 37 CFR 1.9, 1.27, 1.28.

§ 121.802 What size standards are applicable to reduced patent fees programs?

A concern eligible for reduced patent fees is one:

(a) Whose number of employees, including affiliates, does not exceed 500 persons; and

(b) Which has not assigned, granted, conveyed, or licensed (and is under no obligation to do so) any rights in the invention to any person who made it and could not be classified as an independent inventor, or to any concern which would not qualify as a non-profit organization or a small business concern under this section.

§ 121.803 Are formal size determinations binding on parties?

Size determinations by authorized SBA officials are formal actions, based upon a specific patent application pursuant to the rules of the Patent and Trademark Office, Department of Commerce, and are binding upon the parties. Other SBA opinions provided to patent applicants or others are only advisory, and are not binding or appealable.

§ 121.804 When does SBA determine the size status of a business concern?

Size status is determined as of the date of the patent applicant's written verification of size.

§ 121.805 May a business concern self-certify its size status?

(a) A concern verifies its size status with its submission of its patent application.

(b) Any attempt to establish small size status improperly (fraudulently, through gross negligence, or otherwise) may result in remedial action by the Patent and Trademark Office.

(c) In the absence of credible information indicating otherwise, the Patent and Trademark Office may accept the verification by the concern as a small business as true.

(d) Questions concerning the size verification are resolved initially by the Patent and Trademark Office. If not verified as small, the applicant may request a formal SBA size determination.

SIZE ELIGIBILITY REQUIREMENTS FOR COMPLIANCE WITH PROGRAMS OF OTHER AGENCIES

§ 121.901 Can other Government agencies obtain SBA size determinations?

Upon request by another Government agency, SBA will provide a size determination, under SBA rules, standards and procedures, for its use in determining compliance with small business requirements of its statutes, regulations or programs.

§ 121.902 What size standards are applicable to programs of other agencies?

SBA size standards. The size standards for compliance with programs of other agencies are those for SBA programs which are most comparable to the programs of such other agencies, unless the agency and SBA agree otherwise.

[67 FR 13716, Mar. 26, 2002]

§ 121.903 How may an agency use size standards for its programs that are different than those established by SBA?

(a) Federal agencies or departments promulgating regulations relating to small businesses usually use SBA size criteria. In limited circumstances, if they decide the SBA size standard is not suitable for their programs, then agency heads may establish a more appropriate small business definition for the exclusive use in such programs, but only when:

(1) The size standard will determine:

(i) The size of a manufacturing concern by its average number of employees based on the preceding 24 calendar months, determined according to § 121.106;

(ii) The size of a services concern by its average annual receipts over a period of at least 5 years, determined according to § 121.104;

(iii) The size of other concerns on data over a period of at least 5 years, determined according to § 121.104; or,

(iv) Other factors approved by SBA;

(2) The agency has consulted in writing with SBA's Division Chief, office of Size Standards at least fourteen (14) calendar days before publishing the proposed rule which is part of the rulemaking process. The written consultation will include:

(i) What size standard the agency contemplates using;

(ii) To what agency program it will apply;

(iii) How the agency arrived at this particular size standard for this program; and,

(iv) Why SBA's existing size standards do not satisfy the program requirements;

(3) The agency proposes the size standard for public comment pursuant to the Administrative Procedure Act, 5 U.S.C. 553;

(4) The agency provides a copy of the proposed rule, when it publishes it for public comment as part of the rulemaking process, to SBA's Division Chief, Office of Size Standards; and

(5) SBA's Administrator approves the size standard before the agency adopts a final rule or otherwise prescribes the size standard for its use. The agency's request for the SBA Administrator's approval must include:

(i) Copies of all comments on the proposed size standard received in response to the proposed rule;

(ii) A separate written justification for the intended size standard;

(iii) A copy of the intended final rule if available at that time, or a copy of the intended final rule and preamble prior to its publication; and

(iv) Other information SBA may request in connection with the request.

(b) When approving any size standard established pursuant to this section, SBA's Administrator will ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries, and consider other relevant factors.

(c) Where the agency head is developing a size standard for the sole purpose of performing a Regulatory Flexibility Analysis pursuant to section 601(3) of the Regulatory Flexibility Act, the department or agency may, after consultation with the SBA Office of Advocacy, establish a size standard different from SBA's which is more appropriate for such analysis.

[67 FR 13716, Mar. 26, 2002, as amended at 84 FR 66579, Dec. 5, 2019; 87 FR 34120, June 6, 2022]

§ 121.904 When does SBA determine the size status of a business concern?

For compliance with programs of other agencies, SBA will base its size determination on the size of the concern as of the date set forth in the request of the other agency.

[67 FR 13716, Mar. 26, 2002]

Procedures for Size Protests and Requests for Formal Size Determinations

§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a) *Size Status Protests.* (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, or any instance in which a procurement

or order has been restricted to or reserved for small businesses or a particular group of small businesses (including a partial set-aside), the following entities may file a size protest in connection with a particular procurement, sale or order:

(i) Any offeror that the contracting officer has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a parent company or affiliates, the Director, Office of Government Contracting, or the Associate General Counsel for Procurement Law; and

(iv) Other interested parties. Other interested parties include large businesses where only one concern submitted an offer for the specific procurement in question. A concern found to be other than small in connection with the procurement is not an interested party unless there is only one remaining offeror after the concern is found to be other than small.

(2) For competitive 8(a) contracts, the following entities may protest:

(i) Any offeror that the contracting officer has not eliminated from consideration for any procurement related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range;

(ii) The contracting officer; or

(iii) The SBA District Director, or designee, in either the district office serving the geographical area in which the procuring activity is located or the district office that services the apparent successful offeror, the Associate Administrator for Business Development, or the Associate General Counsel for Procurement Law.

(3) For SBA's Subcontracting Program, the following entities may protest:

(i) The prime contractor;

(ii) The contracting officer;

(iii) Other potential subcontractors;

(iv) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting, or the SBA's Associate General Counsel for Procurement Law; and

(v) Other interested parties.

(4) For SBA's Small Business Innovation Research (SBIR) program and Small Business Technology Transfer (STTR) program, the following entities may protest:

(i) An offeror or applicant for that solicitation;

(ii) The funding agreement officer; and

(iii) The responsible SBA Government Contracting Area Director; the Director, Office of Government Contracting; the Associate Administrator, Investment Division, or the Associate General Counsel for Procurement Law.

(5) For the Department of Defense's Small Disadvantaged Business (SDB) Program, and any other similar program of another Federal agency, the following entities may file a protest in connection with a particular SDB procurement:

(i) Any offeror for the specific SDB requirement whom the contracting officer has not eliminated for reasons unrelated to size;

(ii) The contracting officer; and

(iii) The responsible SBA Area Director for Government Contracting, the SBA Director, Office of Government Contracting, or the SBA Associate Administrator for Business Development;

(6) For SBA's HUBZone program, the following entities may protest in connection with a particular HUBZone procurement:

(i) Any offeror for a specific HUBZone set-aside contract that the contracting officer has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range;

(ii) Any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given acertified HUBZone small business concern;

(iii) The contracting officer; and

(iv) The SBA Director, Office of HUBZone, or designee, or the SBA Associate General Counsel for Procurement Law.

(7) For any unrestricted Government procurement in which a business concern has represented itself as a small business concern, the following entities may protest in connection with a particular procurement:

(i) Any offeror;

(ii) The contracting officer; and

(iii) The responsible SBA Government Contracting Area Director, the Director, Office of Government Contracting, the Associate Administrator for Business Development, or the Associate General Counsel for Procurement Law.

(8) For SBA's Service Disabled Veteran-Owned Small Business Concern program, the following entities may protest in connection with a particular service-disabled veteran-owned procurement:

(i) Any offeror for a specific service-disabled veteran-owned small business set-aside contract that the contracting officer has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director; and

(iv) The Director, Office of Government Contracting, or designee, or the Associate General Counsel for Procurement Law.

(9) For SBA's WOSB Federal Contracting Program, the following entities may protest:

(i) Any offeror for a specific contract set aside for WOSBs or WOSBs owned by one or more women who are economically disadvantaged (EDWOSB) that the contracting officer has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director; and

(iv) The Director, Office of Government Contracting, or designee, or the Associate General Counsel for Procurement Law.

(b) *Request for Size Determinations.* (1) For SBA's Financial Assistance Programs, the following entities may request a formal size determination:

(i) The applicant for assistance; and

(ii) The SBA official with authority to take final action on the assistance requested. That official may also request the appropriate Government Contracting Area Office to determine whether affiliation exists between an applicant for financial assistance and one or more other entities for purposes of determining whether the applicant would exceed the loan limit amount imposed by §120.151 of this chapter.

(iii) The SBA Associate Administrator for Investment or designee may request a formal size determination for any purpose relating to the SBIC program (*see* part 107 of this chapter) or the NMVC program (*see* part 108 of this chapter). A formal size determination includes a request to determine whether or not affiliation exists between two or more entities for any purpose relating to the SBIC program.

(2) For SBA's 8(a) BD program:

(i) Concerning initial or continued 8(a) BD eligibility, the following entities may request a formal size determination:

(A) The 8(a) BD applicant concern or Participant; or

(B) The Director of the Division of Program Certification and Eligibility or the Associate Administrator for Business Development.

(ii) Concerning individual sole source and competitive 8(a) contract awards where SBA cannot verify the eligibility of the apparent successful offeror because SBA finds the concern to be other than small, the following entities may request a formal size determination:

(A) The Participant nominated for award of the particular sole source contract, or found to be ineligible for a competitive 8(a) contract due to its size;

(B) The SBA program official with authority to execute the 8(a) contract or, where applicable, the procuring activity contracting officer who has been delegated SBA's 8(a) contract execution functions; or

(C) The SBA District Director in the district office that services the Participant, the Associate Administrator for

Business Development, or the Associate General Counsel for Procurement Law.

(3) For SBA's Certificate of Competency Program, the following entities may request a formal size determination:

(i) The offeror who has applied for a COC; and

(ii) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting.

(4) For SBA's sale or lease of government property, the following entities may request a formal size determination:

(i) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting; and

(ii) Authorized officials of other Federal agencies administering a property sales program.

(5) For eligibility to pay reduced patent fees, the following entities may request a formal size determination:

(i) The applicant for the reduced patent fees; and

(ii) The Patent and Trademark Office.

(6) For purposes of determining compliance with small business requirements of another Government agency program not otherwise specified in this section, an official with authority to administer the program involved may request a formal size determination.

(7) In connection with initial or continued eligibility for the WOSB program, the following may request a formal size determination:

(i) The applicant or WOSB/EDWOSB; or

(ii) The Director of Government Contracting or the Deputy Director, Program and Resource Management, for the Office of Government Contracting.

(8) In connection with initial or continued eligibility for the HUBZone program, the following may request a formal size determination:

(i) The applicant or certified HUBZone small business concern; or

(ii) The Director, Office of HUBZone, or designee.

(9) For other purposes related to protecting the integrity of the Federal procurement process, including validating that firms listed in the System for Award Management database are small, the Government Contracting Area Director or the Director, Office of Government Contracting may initiate a formal size determination when sufficient information exists that calls into question a firm's small business status. The current date will be used to determine size, and SBA will initiate the process to remove from the database the small business designation of any firm found to be other than small.

(10) For purposes of the small business mentor-protégé program authorized pursuant to §125.9 of this chapter (based on its status as a small business for its primary or identified secondary NAICS code), the business concern seeking to be a protégé or SBA may request a formal size determination.

(11) For purposes of determining compliance with small business requirements for firms relying upon small business status advisory opinions, the Associate General Counsel, Office of Procurement Law may request a formal size determination. Additionally, any firm that is the subject of a small business status advisory opinion holding that it is other than small may request a formal size determination.

(12) In connection with eligibility for the SDVO program, the following may request a formal size determination:

(i) The SDVO business concern; or

(ii) The Director of Government Contracting or designee.

(13) The SBA Inspector General may request a formal size determination with respect to any of the programs identified in paragraph (b) of this section.

[61 FR 3286, Jan. 31, 1996, as amended at 63 FR 31907, June 11, 1998; 63 FR 35739, June 30, 1998; 69 FR 25266, May 5, 2004; 69 FR 29206, May 21, 2004; 69 FR 29420, May 24, 2004; 69 FR 44461, July 26, 2004; 73 FR 56947, Oct. 1, 2008; 74 FR 45753, Sept. 4, 2009; 75 FR 62280, Oct. 7, 2010; 76 FR 8253, Feb. 11, 2011; 77 FR 76227, Dec. 27, 2012; 78 FR 61132, Oct. 2, 2013; 80 FR 7536, Feb. 11, 2015; 81 FR 34259, May 31, 2016; 81 FR 48579, July 25, 2016; 84 FR 65239, Nov. 26, 2019; 85 FR 66182, Oct. 16, 2020; 88 FR 26202, Apr. 27, 2023]

§121.1002 Who makes a formal size determination?

The responsible Government Contracting Area Director or designee

makes all formal size determinations in response to either a size protest or a request for a formal size determination, with the exception of size determinations for purposes of the Disaster Loan Program, which will be made by the Disaster Area Office Director or designee responsible for the area in which the disaster occurred.

§ 121.1003 Where should a size protest be filed?

A protest involving a government procurement or sale must be filed with the contracting officer for the procurement or sale, who must forward the protest to the SBA Government Contracting Area Office serving the area in which the headquarters of the protested concern is located, regardless of the location of any parent company or affiliates.

§ 121.1004 What time limits apply to size protests?

(a) *Protests by entities other than contracting officers or SBA*—(1) *Sealed bids or sales (including protests on partial set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts).* (i) A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid opening for

(A) The contract;

(B) An order issued against a Multiple Award Contract if the contracting officer requested a new size certification in connection with that order; or

(C) Except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract, an order or Blanket Purchase Agreement set aside for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business) where the underlying Multiple Award Contract was awarded on an unrestricted basis.

(ii) Where the identified low bidder is determined to be ineligible for award, a protest of any other identified low bidder must be received prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified interested parties of the identity of that low bidder.

(2) *Negotiated procurement (including protests on partial set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts).* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee for

(i) The contract; or

(ii) An order issued against a Multiple Award Contract if the contracting officer requested a size recertification in connection with that order; or

(iii) Except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract, an order or Blanket Purchase Agreement set-aside for small business (*i.e.,* small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business) where the underlying Multiple Award Contract was awarded on an unrestricted basis without a reserve.

(3) *Long-Term Contracts.* For contracts with durations greater than five years (including options), including all existing long-term contracts, Multiagency contracts, Governmentwide Acquisition Contracts and Multiple Award Contracts:

(i) Protests regarding size certifications made for contracts must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award.

(ii) Protests regarding size certifications made for an option period must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the size certification made by the protested concern.

(A) A contracting officer is not required to terminate a contract where a concern is found to be other than small pursuant to a size protest concerning a size certification made for an option period.

(B) [Reserved]

(iii) Protests relating to size certifications made in response to a contracting officer's request for size certifications in connection with an individual order must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after receipt of notice (including notice received in writing, orally, or via electronic posting) of the identity of the prospective awardee or award.

(4) *Electronic notification of award.* Where notification of award is made electronically, such as posting on the Internet under Simplified Acquisition Procedures, a protest must be received by the contracting officer before close of business on the fifth day, exclusive of Saturdays, Sundays, and legal holidays, after the electronic posting.

(5) *No notice of award.* Where there is no requirement for written pre-award notice or notice of award, or where the contracting officer has failed to provide written notification of award, the 5-day protest period will commence upon oral notification by the contracting officer or authorized representative or another means (such as public announcements or other oral communications) of the identity of the apparent successful offeror.

(b) *Protests by contracting officers, funding agreement officers or SBA.* The time limitations in paragraph (a) of this section do not apply to contracting officers, funding agreement officers or SBA, and they may file protests before or after awards, except to the extent set forth in paragraph (e) of this section, including for purposes of the SBIR and STTR programs. Notwithstanding paragraph (e), for purposes of the SBIR and STTR programs the funding agreement officer or SBA may file a protest in anticipation of an award.

(c) *Effect of contract award.* A timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest.

(d) *Untimely protests.* A protest received after the allotted time limits must still be forwarded to SBA. SBA will dismiss untimely protests.

(e) *Premature protests.* A protest filed by any party, including the contracting officer, before bid opening or notification to offerors of the selection of the apparent successful offer will be dismissed as premature.

(f) *Apparent successful offeror.* A party with standing, as set forth in §121.1001(a), may file a protest only against an apparent successful offeror or an offeror in line to receive an award.

(g) *Bid protest corrective action.* SBA will generally dismiss any size protest relating to an initial apparent successful offeror where an agency decides to reevaluate offers as a corrective action in response to a FAR subpart 33.1 bid protest.

(1) SBA will complete the size determination where the procuring agency makes a written request to SBA within two business days of the agency informing SBA of the corrective action and demonstrates that the corrective action will not result in a change of the apparent successful offeror, unless the protest involves size issues determined as of the date of final proposal revision per §121.404(d).

(2) When the apparent successful offeror is announced after reevaluation, interested parties will again have the opportunity to protest the size of the new or same apparent successful offeror within five business days after such notification.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29206, May 21, 2004; 71 FR 66444, Nov. 15, 2006; 77 FR 76227, Dec. 27, 2012; 78 FR 61132, Oct. 2, 2013; 85 FR 66182, Oct. 16, 2020; 88 FR 26202, Apr. 27, 2023]

§121.1005 How must a protest be filed with the contracting officer?

A protest must be delivered to the contracting officer by hand, telegram, mail, facsimile, Federal Express or other overnight delivery service, e-mail, or telephone. If a protest is made by telephone, the contracting officer must later receive a confirming letter either within the 5-day period in

§ 121.1004(a)(1) or postmarked no later than one day after the date of the telephone protest.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29206, May 21, 2004]

§ 121.1006 When will a size protest be referred to an SBA Government Contracting Area Office?

(a) A contracting officer who receives a protest (other than from SBA) must forward the protest promptly to the SBA Government Contracting Area Office serving the area in which the headquarters of the offeror is located.

(b) A contracting officer's referral must contain the following information:

(1) The protest and any accompanying materials;

(2) A copy of the self-certification as to size;

(3) Identification of the applicable size standard;

(4) A copy of the solicitation;

(5) Identification of the date of bid opening or notification provided to unsuccessful offerors;

(6) The date on which the protest was received; and

(7) A complete address and point of contact for the protested concern.

§ 121.1007 Must a protest of size status relate to a particular procurement and be specific?

(a) *Particular procurement.* A protest challenging the size of a concern which does not pertain to a particular procurement or sale will not be acted on by SBA.

(b) *A protest must include specific facts.* A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for a protest. Where materials supporting the protest are available, they should be submitted with the protest.

(c) *Non-specific protests will be dismissed.* Protests which do not contain sufficient specificity will be dismissed by SBA. The following are examples of allegation specificity:

Example 1: An allegation that concern X is large because it employs more than 500 employees (where 500 employees is the applicable size standard) without setting forth a basis for the allegation is non-specific.

Example 2: An allegation that concern X is large because it exceeds the 500 employee size standard (where 500 employees is the applicable size standard) because a higher employment figure was published in publication Y is sufficiently specific.

Example 3: An allegation that concern X is affiliated with concern Y without setting forth any basis for the allegation is non-specific.

Example 4: An allegation that concern X is affiliated with concern Y because Mr. A is the majority shareholder in both concerns is sufficiently specific.

Example 5: An allegation that concern X has revenues in excess of $5 million (where $5 million is the applicable size standard) without setting forth a basis for the allegation is non-specific.

Example 6: An allegation that concern X exceeds the size standard (where the applicable size standard is $5 million) because it received Government contracts in excess of $5 million last year is sufficiently specific.

[61 FR 3286, Jan. 31, 1996, as amended at 69 FR 29206, May 21, 2004]

§ 121.1008 What occurs after SBA receives a size protest or request for a formal size determination?

(a) When SBA receives a size protest, the SBA Area Director for Government Contracting, or designee, will notify the contracting officer, the protested concern, and the protestor that the protest has been received. If the protest pertains to a requirement involving SBA's HUBZone program, the Area Director will also notify the D/HUB of the protest. If the protest pertains to a requirement set aside for WOSBs or EDWOSBs, the Area Director will also notify SBA's Director for Government Contracting of the protest. If the protest pertains to a requirement involving SBA's SBIR or STTR programs, the Area Director will also notify the Associate Administrator, Investment Division. If the protest involves the size status of an SDB concern (see part 124, subpart B of this chapter) the Area Director will notify SBA's Associate Administrator for Business Development. If the protest pertains to a requirement that has been reserved for competition

among eligible 8(a) BD program participants, the Area Director will notify the SBA district office servicing the 8(a) concern whose size status has been protested. SBA will provide a copy of the protest to the protested concern together with SBA Form 355, Application for Small Business Size Determination, by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt. SBA will ask the protested concern to complete the form and respond to the allegations in the protest.

(b) When SBA receives a request for a formal size determination in accord with §121.1001(b), SBA will provide a blank copy of SBA Form 355 to the concern whose size is at issue.

(c) The protested concern or concern whose size is at issue must return the completed SBA Form 355 and all other requested information to SBA within 3 working days from the date of receipt of the blank form from SBA. SBA has discretion to grant an extension of time to file the form. The firm must attach to the completed SBA Form 355 its answers to the allegations contained in the protest, where applicable, together with any supporting material.

(d) If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business. A concern whose size status is at issue must furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality, because SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.

[61 FR 3286, Jan. 31, 1996, as amended at 63 FR 31908, June 11, 1998; 69 FR 29207, May 21, 2004; 73 FR 56948, Oct. 1, 2008; 74 FR 45753, Sept. 4, 2009; 75 FR 62280, Oct. 7, 2010; 77 FR 76227, Dec. 27, 2012]

§121.1009 What are the procedures for making the size determination?

(a) *Time frame for making size determination.* (1) After receipt of a protest or a request for a formal size determination, if no protest is pending under FAR subpart 33.1, the SBA Area Office will issue a formal size determination within 15 business days, if possible;

(2) If a protest is pending under FAR subpart 33.1, the SBA Area Office will suspend processing a valid, timely and specific size protest. Once the procuring agency, GAO or the Court of Federal Claims issues a decision under FAR subpart 33.1, the SBA Area Office will recommence the size determination process.

(i) If the FAR subpart 33.1 decision denies the protest, SBA will issue a formal size determination within 15 business days of the decision, if possible.

(ii) If the decision results in a cancellation of the award or change of the apparent successful offeror, SBA will dismiss the size protest as moot.

(iii) If the decision requires re-evaluation of offers or other corrective action but the award is not cancelled, SBA will continue to suspend processing the protest.

(A) If after re-evaluation or other corrective action occurs the protested concern remains the apparent successful offeror, SBA will issue a formal size determination within 15 business days after notification of the apparent successful offeror, if possible.

(B) If after re-evaluation or other corrective action occurs a different apparent successful offeror is identified, SBA will dismiss the size protest as moot. Interested parties may file a timely size protest with respect to the newly identified apparent successful offeror after the notification of award.

(3) The contracting officer may award a contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest. Notwithstanding such a determination, the provisions of paragraph (g) of this section apply to the procurement in question.

(4) If SBA does not issue its determination in accordance with paragraph

(a)(1) of this section (or request an extension that is granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. Notwithstanding such a determination, the provisions of paragraph (g) of this section apply to the procurement in question.

(b) *Basis for determination.* The size determination will be based primarily on the information supplied by the protestor or the entity requesting the size determination and that provided by the concern whose size status is at issue. The determination, however, may also be based on grounds not raised in the protest or request for size determination. SBA may use other information and may make requests for additional information to the protestor, the concern whose size status is at issue and any alleged affiliates, or other parties.

(c) *Burden of persuasion.* The concern whose size is under consideration has the burden of establishing its small business size.

(d) *Weight of evidence.* SBA will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions. In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

(e) *Formal size determination.* The SBA will base its formal size determination upon the record, including reasonable inferences from the record, and will state in writing the basis for its findings and conclusions.

(f) *Notification of determination.* SBA will promptly notify the contracting officer, the protester, and the protested concern. SBA will send the notification by verifiable means, which may include facsimile, electronic mail, or overnight delivery service.

(g) *Results of an SBA Size Determination.* (1) A contracting officer may award a contract to a protested concern after the SBA Area Office has determined either that the protested concern is an eligible small business or has dismissed all protests against it. If OHA subsequently overturns the Area Office's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) A contracting officer shall not award a contract to a protested concern that the Area Office has determined is not an eligible small business for the procurement in question.

(i) If a contracting officer receives such a determination after contract award, and no OHA appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely OHA appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If OHA affirms the size determination finding the protested concern ineligible, the contracting officer shall either terminate the contract or not exercise the next option.

(3) The contracting officer must update the Federal Procurement Data System and other procurement reporting databases to reflect the final agency size decision (the formal size determination if no appeal is filed or the appellate decision).

(4) Once SBA has determined that a concern is other than small for purposes of a particular procurement, the concern cannot later become eligible for the procurement by reducing its size.

(5) A concern determined to be other than small under a particular size standard is ineligible for any procurement or any assistance authorized by the Small Business Act or the Small Business Investment Act of 1958 which requires the same or a lower size standard, unless SBA recertifies the concern to be small pursuant to §121.1010 or OHA reverses the adverse size determination. After an adverse size determination, a concern cannot self-certify as small under the same or lower size standard unless it is first recertified as small by SBA. If a concern does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as

small under the same or a smaller size standard on a pending procurement or on an application for SBA assistance, the concern must immediately inform the contracting officer or responsible official of the adverse size determination.

(i) Not later than two days after the date on which SBA issues a final size determination finding a business concern to be other than small, such concern must update its size status in the System for Award Management (or any successor system).

(ii) If a business concern fails to update its size status in the System for Award Management (or any successor system) in response to an adverse size determination, SBA will make such update within two days of the business's failure to do so.

(h) *Limited reopening of size determinations.* SBA may, in its sole discretion, reopen a formal size determination to correct an error or mistake, provided it is within the appeal period and no appeal has been filed with OHA. Once the agency has issued a final decision (either a formal size determination that is not timely appealed or an appellate decision), SBA cannot re-open the size determination.

[61 FR 3286, Jan. 31, 1996, as amended at 67 FR 47245, July 18, 2002; 69 FR 29207, May 21, 2004; 76 FR 5683, Feb. 2, 2011; 78 FR 38818, June 28, 2013; 88 FR 26202, Apr. 27, 2023]

§ 121.1010 How does a concern become recertified as a small business?

(a) A concern may request SBA to recertify it as small at any time by filing an application for recertification with the Government Contracting Area Office responsible for the area in which the headquarters of the applicant is located, regardless of the location of parent companies or affiliates. No particular form is prescribed for the application; however, the request for recertification must be accompanied by a current completed SBA Form 355 and any other information sufficient to show a significant change in its ownership, management, or other factors bearing on its status as a small concern.

(b) Recertification will not be required nor will the prohibition against future self-certification apply if the adverse SBA size determination is based solely on a finding of affiliation due to a joint venture (e.g., ostensible subcontracting) limited to a particular Government procurement or property sale, or is based on an ineligible manufacturer where the eligible small business bidder or offeror is a nonmanufacturer on a particular Government procurement.

(c) A denial of an application for recertification is a formal size determination and may be reviewed by OHA at the discretion of that office.

(d) The granting of an application for recertification has future effect only. While it is a formal size determination, notice of recertification is required to be given only to the applicant.

Appeals of Size Determinations and NAICS Code Designations

§ 121.1101 Are formal size determinations subject to appeal?

(a) Appeals from formal size determinations may be made to OHA. Unless an appeal is made to OHA, the size determination made by a SBA Government Contracting Area Office or Disaster Area Office is the final decision of the agency. The procedures for appealing a formal size determination to OHA are set forth in part 134 of this chapter. The OHA appeal is an administrative remedy that must be exhausted before judicial review of a formal size determination may be sought in a court.

(b) OHA will review all timely appeals of size determinations.

[69 FR 29207, May 21, 2004, as amended at 76 FR 5683, Feb. 2, 2011]

§ 121.1102 Are NAICS code designations subject to appeal?

A NAICS code designation made by a procuring activity contracting officer may be appealed to OHA. The procedures governing OHA appeals are set forth in part 134 of this chapter. The OHA appeal is an administrative remedy that must be exhausted before judicial review of a NAICS code designation may be sought in a court.

[67 FR 47245, July 18, 2002]

§ 121.1103 What are the procedures for appealing a NAICS code or size standard designation?

(a)(1) Any interested party adversely affected by a NAICS code designation may appeal the designation to OHA. An interested party would include a business concern seeking to change the NAICS code designation in order to be considered a small business for the challenged procurement, regardless of whether the procurement is reserved for small businesses or unrestricted. The only exception is that, for a sole source contract reserved under SBA's 8(a) Business Development program (*see* part 124 of this chapter), only SBA's Associate Administrator for Business Development may appeal the NAICS code designation.

(2) A NAICS code appeal may include an appeal involving the applicable size standard, such as where more than one size standard corresponds to the selected NAICS code, or a question relating to the size standard in effect at the time the solicitation was issued or amended.

(b) The contracting officer's determination of the applicable NAICS code is final unless appealed as follows:

(1) An appeal from a contracting officer's NAICS code or size standard designation must be served and filed within 10 calendar days after the issuance of the solicitation or amendment affecting the NAICS code or size standard. However, SBA may file a NAICS code appeal at any time before offers are due. OHA will summarily dismiss an untimely NAICS code appeal.

(2)(i) The appeal petition must be in writing and must be sent to the Office of Hearings & Appeals, U.S. Small Business Administration, 409 3rd Street, SW., Suite 5900, Washington, DC 20416.

(ii) There is no required format for a NAICS code appeal, but an appeal must include the following information: the solicitation or contract number; the name, address, and telephone number of the contracting officer; a full and specific statement as to why the NAICS code designation is erroneous, and argument in support thereof; and the name, address and telephone number of the appellant or its attorney.

(3) The appellant must serve the appeal petition upon the contracting officer who assigned the NAICS code to the acquisition and SBA's Office of General Counsel, Associate General Counsel for Procurement Law, 409 3rd Street, SW., Washington, DC 20416.

(c) *Procedure after a NAICS code appeal is filed and served.* (1) Upon receipt of the service copy of a NAICS code appeal, the contracting officer shall:

(i) Stay the date for the closing of receipt of offers;

(ii) Advise the public, by amendment to the solicitation or other method, of the existence of the NAICS code appeal and the procedures and deadline for interested parties to file and serve arguments concerning the appeal;

(iii) Send a copy of (or an electronic link to) the entire solicitation, including amendments, to OHA;

(iv) File and serve any response to the appeal prior to the close of the record; and

(v) Inform OHA of any amendments, actions or developments concerning the procurement in question.

(2) Upon receipt of a NAICS code appeal, OHA shall:

(i) Notify the appellant, the contracting officer, the SBA and any other known party of the date OHA received the appeal and the date the record will close; and

(ii) Conduct the appeal in accordance with part 134 of this chapter.

(3) Any interested party may file and serve its response to the NAICS code appeal.

[69 FR 29207, May 21, 2004; 74 FR 45753, Sept. 4, 2009, as amended at 76 FR 5683, Feb. 2, 2011; 78 FR 61132, Oct. 2, 2013; 85 FR 66183, Oct. 16, 2020]

Subpart B—Other Applicable Provisions

WAIVERS OF THE NONMANUFACTURER RULE FOR CLASSES OF PRODUCTS AND INDIVIDUAL CONTRACTS

§ 121.1201 What is the Nonmanufacturer Rule?

The Nonmanufacturer Rule is set forth in § 121.406(b).

§ 121.1202 When will a waiver of the Nonmanufacturer Rule be granted for a class of products?

(a) A waiver for a class of products (class waiver) will be granted when there are no small business manufacturers or processors available to participate in the Federal market for that class of products.

(b) *Federal market* means acquisitions by the Federal Government from offerors located in the United States, or such smaller area as SBA designates if it concludes that the class of products is not supplied on a national basis.

(1) When considering the appropriate market area for a product, SBA presumes that the entire United States is the relevant Federal market, unless it is clearly demonstrated that a class of products cannot be procured on a national basis. This presumption may be particularly difficult to overcome in the case of manufactured products, since such items typically have a market area encompassing the entire United States.

(2) When considering geographic segmentation of a Federal market, SBA will not necessarily use market definitions dependent on airline radius, political, or SBA regional boundaries. Market areas typically follow established transportation routes rather than jurisdictional borders. SBA examines the following factors, among others, in cases where geographic segmentation for a class of products is urged:

(i) Whether perishability affects the area in which the product can practically be sold;

(ii) Whether transportation costs are high as a proportion of the total value of the product so as to limit the economic distribution of the product;

(iii) Whether there are legal barriers to transportation of the item;

(iv) Whether a fixed, well-delineated boundary exists for the purported market area and whether this boundary has been stable over time; and

(v) Whether a small business, not currently selling in the defined market area, could potentially enter the market from another area and supply the market at a reasonable price.

(c) *Available to participate* in the context of the Federal market means that contractors exist that have been awarded or have performed a contract to supply a specific class of products to the Federal Government within 24 months from the date of the request for waiver, either directly or through a dealer, or who have submitted an offer on a solicitation for that class of products within that time frame.

(d) *Class of products* is an individual subdivision within an NAICS Industry Number as established by the Office of Management and Budget in the NAICS Manual.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000]

§ 121.1203 When will a waiver of the Nonmanufacturer Rule be granted for an individual contract?

(a) Where appropriate, SBA will generally grant waivers for an individual contract or order prior to the issuance of a solicitation, or, where a solicitation has been issued, when the contracting officer provides all potential offerors additional time to respond.

(b) SBA may grant a waiver after contract award, where the contracting officer has determined that the modification is within the scope of the contract and the agency followed the regulations prior to issuance of the solicitation and properly and timely requested a waiver for any other items under the contract, where required.

Example to paragraph (b): The Government seeks to buy spare parts to fix Item A. After conducting market research, the government determines that Items B, C, and D that are being procured may be eligible for waivers and requests and receives waivers from SBA for those items prior to issuing the solicitation. After the contract is awarded, the Government determines that it will need additional spare parts to fix Item A. The Government determines that adding the additional parts as a modification to the original contract is within scope. The contracting officer believes that one of the additional parts is also eligible for a waiver from SBA, and requests the waiver at the time of the modification. If all other criteria are met, SBA would grant the waiver, even though the contract has already been awarded.

(c) An individual waiver for an item in a solicitation will be approved when the SBA Director, Office of Government Contracting, reviews and accepts a contracting officer's determination

that no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications of a solicitation, including the period of performance.

(d) An individual waiver applies only to the contract for which it is granted and does not apply to modifications outside the scope of the contract or other procurement actions (e.g., follow-on or bridge contracts).

(e) An individual waiver in connection with a long-term contract (*i.e.*, a contract with a duration of longer than five years, including options) cannot exceed five years. A procuring agency may seek a new waiver for an additional five years if, after conducting market research, it demonstrates that there are no available small business manufacturers and that a waiver remains appropriate.

(f) For a multiple item procurement, except those described in §121.406(d)(1), a waiver must be sought and granted for each item that the procuring agency believes no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications of the solicitation and which will bring the total value of items to be procured from small business or subject to a waiver to at least 50% of the estimated value of the contract.

(1) SBA's waiver applies only to the specific item(s) identified, not to the entire contract.

(2) The estimated aggregate value of all items manufactured by small business and those subject to a waiver must equal at least 50% of the value of the contract. A contracting officer need not seek a waiver for each item for which the procuring agency believes no small business manufacturer or processor can reasonably be expected to offer a product meeting the specifications of the solicitation.

(3) When a contracting officer seeks a waiver for an individual item, the term ''item'' can be a specific broad identifying thing (e.g., all spare parts related to aircraft X), but cannot be so broad as to have no real identification (e.g., all medical supplies).

(g) *Waivers for the purchase of software.* (1) SBA may grant an individual waiver for the procurement of software provided that the software being sought is an item that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and the item:

(i) Has been sold, leased, or licensed to the general public, or has been offered for sale, lease, or license to the general public;

(ii) Is sold in substantial quantities in the commercial marketplace; and

(iii) Is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

(2) If the value of services provided related to the purchase of a supply item that meets the requirements of paragraph (d)(1) of this section exceeds the value of the item itself, the procurement should be identified as a service procurement, even if the services are provided as part of the same license, lease, or sale terms. If a contracting officer cannot make a determination of the value of services being provided, SBA will assume that the value of the services is greater than the value of items or supplies, and will not grant a waiver.

(3) Subscription services, remote hosting of software, data, or other applications on servers or networks of a party other than the U.S. Government are considered by SBA to be services and not the procurement of a supply item. Therefore SBA will not grant waivers of the nonmanufacturer rule for these types of services.

[81 FR 34260, May 31, 2016, as amended at 88 FR 26203, Apr. 27, 2023]

§ 121.1204 What are the procedures for requesting and granting waivers?

(a) *Waivers for classes of products.* (1) SBA may, at its own initiative, examine a class of products for possible waiver of the Nonmanufacturer Rule.

(2) Any interested person, business, association, or Federal agency may submit a request for a waiver for a particular class of products. Requests should be addressed or hand-carried to the Director, Office of Government Contracting, Small Business Administration, 409 3rd Street SW., Washington, DC 20416.

(3) Requests for a waiver of a class of products need not be in any particular form, but should include a statement of the class of products to be waived, the applicable NAICS code, and detailed information on the efforts made to identify small business manufacturers or processors for the class.

(4) If SBA decides that there are small business manufacturers or processors in the Federal procurement market, it will deny the request for waiver, issue notice of the denial, and provide the names, addresses, and telephone numbers of the sources found. If SBA does not initially confirm the existence of small business manufacturers or processors in the Federal market, it will:

(i) Publish notices in the Commerce Business Daily and the FEDERAL REGISTER seeking information on small business manufacturers or processors, announcing a notice of intent to waive the Nonmanufacturer Rule for that class of products and affording the public a 15-day comment period; and

(ii) If no small business sources are identified, publish a notice in the FEDERAL REGISTER stating that no small business sources were found and that a waiver of the Nonmanufacturer Rule for that class of products has been granted.

(5) An expedited procedure for issuing a class waiver may be used for emergency situations, but only if the contracting officer provides a determination to the Director, Office of Government Contracting that the procurement is proceeding under the authority of FAR §6.302–2 (48 CFR 6.302–2) for ''unusual and compelling urgency,'' or provides a determination materially the same as one of unusual and compelling urgency. Under the expedited procedure, if a small business manufacturer or processor is not identified by a PASS search, the SBA will grant the waiver for the class of products and then publish a notice in the FEDERAL REGISTER. The notice will state that a waiver has been granted, and solicit public comment for future procurements.

(6) The decision by the Director, Office of Government Contracting to grant or deny a waiver is the final decision by the Agency.

(7) A waiver of the Nonmanufacturer Rule for classes of products has no specific time limitation. SBA will, however, periodically review existing class waivers to the Nonmanufacturer Rule to determine if small business manufacturers or processors have become available to participate in the Federal market for the waived classes of products and the waiver should be terminated.

(i) Upon SBA's receipt of evidence that a small business manufacturer or processor exists in the Federal market for a waived class of products, the waiver will be terminated by the Director, Office of Government Contracting. This evidence may be discovered by SBA during a periodic review of existing waivers or may be brought to SBA's attention by other sources.

(ii) SBA will announce its intent to terminate a waiver for a class of products through the publication of a notice in the FEDERAL REGISTER, asking for comments regarding the proposed termination.

(iii) Unless public comment reveals that no small business manufacturer or processor in fact exists for the class of products in question, SBA will publish a final Notice of Termination in the FEDERAL REGISTER.

(b) *Individual waivers for specific solicitations.* (1) A contracting officer's request for a waiver of the Nonmanufacturer Rule for specific solicitations need not be in any particular form, but must, at a minimum, include:

(i) A definitive statement of each specific item sought to be waived and justification as to why the specific item is required;

(ii) The proposed solicitation number, NAICS code, dollar amount of the procurement, dollar amount of the item(s) for which a waiver is sought, and a brief statement of the procurement history;

(iii) A determination by the contracting officer that no small business manufacturer or processor reasonably can be expected to offer a product or products meeting the specifications (including period of performance) required by a particular solicitation. For a multiple item procurement, a contracting officer must determine that no small business manufacturer or

processor reasonably can be expected to offer each item for which a waiver is sought. Include a narrative describing market research and supporting documentation; and

(iv) For contracts or orders expected to exceed $500,000, a copy of the Statement of Work.

(2) Unless an agency has justified a brand-name acquisition, the market research conducted to support the waiver request should be tailored to attract the attention of potential small business manufacturers or processors, not resellers or distributors.

(3) Requests should be addressed to the Director, Office of Government Contracting, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

(4) SBA will examine the contracting officer's determination and any other information it deems necessary to make an informed decision on the individual waiver request.

(i) If SBA's research verifies that no small business manufacturers or processors exist for the item, the Director, Office of Government Contracting will grant an individual, one-time waiver.

(ii) If a small business manufacturer or processor is found for the product in question, the Director, Office of Government Contracting will deny the request.

(iii) Where an agency requests a waiver for multiple items, SBA may grant a waiver for all items requested, deny a waiver for all items requested, or grant a waiver for some but not all of the items requested. SBA's determination will specifically identify the items for which a waiver is granted, and the procuring agency must then identify the specific items for which the waiver applies in its solicitation.

(iv) The Director, Office of Government Contracting's decision to grant or deny a waiver request represents the final agency decision by SBA.

(5) A nonmanufacturer rule waiver for a specific solicitation expires one year after SBA's determination to grant the waiver. This means that contract award must occur within one year of the date SBA granted the waiver. Where a contract is not awarded within one year, the procuring agency must come back to SBA with revised market research requesting that the waiver (or waivers in the case of a multiple item procurement) be extended.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 30863, May 15, 2000; 78 FR 61132, Oct. 2, 2013; 81 FR 34260, May 31, 2016; 88 FR 26203, Apr. 27, 2023]

§ 121.1205 How is a list of previously granted class waivers obtained?

A list of classes of products for which waivers for the Nonmanufacturer Rule have been granted is maintained in SBA Web site at: *https://www.sba.gov/document/support-non-manufacturer-rule-class-waiver-list* A list of such waivers may also be obtained by contacting the Office of Government Contracting, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, or the nearest SBA Government Contracting Area Office.

[69 FR 29208, May 21, 2004, as amended at 74 FR 46313, Sept. 9, 2009; 88 FR 26204, Apr. 27, 2023]

§ 121.1206 How will potential offerors be notified of applicable waivers?

(a) Contracting officers must provide written notification to potential offerors of any waivers being applied to a specific acquisition, whether it is a class waiver or a contract specific waiver. This notification must be provided at the time a solicitation is issued. If the notification is provided after a solicitation is issued, the contracting officer must provide potential offerors a reasonable amount of additional time to respond to the solicitation.

(b) If a contracting officer does not provide notice, and additional reasonable time for responses when required, then the waiver cannot be applied to the solicitation. This applies to both class waivers and individual waivers.

[81 FR 34260, May 31, 2016]

APPENDIX A TO PART 121—PAYCHECK PROTECTION PROGRAM SAMPLE ADDENDUM A

[Sample]

ADDENDUM A

✓ The Applicant claims an exemption from all SBA affiliation rules applicable to Paycheck Protection Program loan eligibility

because the Applicant has made a reasonable, good faith determination that the Applicant qualifies for a religious exemption under 13 CFR 121.103(b)(10), which says that ''[t]he relationship of a faith-based organization to another organization is not considered an affiliation with the other organization . . . if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion.''

[85 FR 20821, Apr. 15, 2020]

PART 123—DISASTER LOAN PROGRAM

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AUTHORITY: 15 U.S.C. 632, 634(b)(6), 636(b), 636(d), 657n, and 9009.

SOURCE: 61 FR 3304, Jan. 31, 1996, unless otherwise noted.

Subpart A—Overview

§ 123.1 What do these rules cover?

This part covers the disaster loan programs authorized under the Small Business Act, 15 U.S.C. 636(b), (d), and (f); and 15 U.S.C. 657n. Since SBA cannot predict the occurrence or magnitude of disasters, it reserves the right to change the rules in this part, without advance notice, by publishing interim emergency regulations in the FEDERAL REGISTER.

[61 FR 3304, Jan. 31, 1996, as amended at 75 FR 60597, Oct. 1, 2010]

§ 123.2 What are disaster loans and disaster declarations?

SBA offers low interest, fixed rate loans to disaster victims, enabling them to repair or replace property damaged or destroyed in declared disasters. It also offers such loans to affected small businesses to help them recover from economic injury caused by such disasters. SBA also offers interim guaranteed disaster loans, in participation with financial institutions, to affected small businesses (''IDAP loans''). Disaster declarations are official notices recognizing that specific geographic areas have been damaged by floods and other acts of nature, riots, civil disorders, or industrial accidents such as oil spills. These disasters are sudden events which cause severe physical damage, and do not include slower physical occurrences such as shoreline erosion or gradual land settling. However, *for purposes of economic injury disaster loans only*, they do include droughts and below average water levels in the Great Lakes or on any body of water in the United States that supports commerce by small businesses. Sudden events that cause substantial economic injury may be disasters even if they do not cause physical damage to a victim's property. Past examples include ocean conditions causing significant displacement (major ocean currents) or closure (toxic algae blooms) of customary fishing waters, as well as contamination of food or other products for human consumption from unforeseeable and unintended events beyond the control of the victims.

[61 FR 3304, Jan. 31, 1996, as amended at 71 FR 75409, Dec. 15, 2007; 75 FR 60597, Oct. 1, 2010; 81 FR 67903, Oct. 3, 2016]

§ 123.3 How are disaster declarations made?

(a) There are seven ways in which disaster declarations are issued which make SBA disaster loans possible:

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

(2) If the President declares a Major Disaster limited to public assistance only, a private nonprofit facility which provides non-critical services under guidelines of the Federal Emergency Management Agency (FEMA) must first apply to SBA for disaster loan assistance for such non-critical services before it could seek grant assistance from FEMA.

(3) SBA makes a physical disaster declaration, based on the occurrence of at least a minimum amount of physical damage to buildings, machinery, equipment, inventory, homes and other property. Such damage usually must meet the following tests:

(i) In any county or other smaller political subdivision of a State or U.S. possession, at least 25 homes or 25 businesses, or a combination of at least 25 homes, businesses, or other eligible institutions, each sustain uninsured losses of 40 percent or more of the estimated fair replacement value or predisaster fair market value of the damaged property, whichever is lower; or

(ii) In any such political subdivision, at least three businesses each sustain uninsured losses of 40 percent or more of the estimated fair replacement value or pre-disaster fair market value of the damaged property, whichever is lower, and, as a direct result of such physical damage, 25 percent or more of the work force in their community would be unemployed for at least 90 days; and

(iii) The Governor of the State in which the disaster occurred submits a written request to SBA for a physical disaster declaration by SBA (OMB Approval No. 3245–0121). This request should be delivered to the Disaster Assistance Field Operations Center serving the jurisdiction within 60 days of the date of the disaster. The addresses, phone numbers, and jurisdictions served by the field operations centers are published in the FEDERAL REGISTER.

(4) SBA makes an economic injury disaster declaration in response to a determination of a natural disaster by the Secretary of Agriculture.

(5) SBA makes an economic injury declaration in reliance on a state certification that at least five small business concerns in a disaster area have suffered substantial economic injury as a result of the disaster and are in need of financial assistance not otherwise available on reasonable terms. The state certification must be signed by the Governor, must specify the county or counties or other political subdivision in which the disaster occurred, and must be delivered (with supporting documentation) to the Disaster Assistance Field Operations Center serving the jurisdiction within 120 days of the disaster occurrence. When a Governor certifies with respect to a drought or to below average water levels, the supporting documentation must include findings which show that conditions during the incident period meet or exceed the U.S. Drought Monitor (USDM) standard of ''severe'' (Intensity level D–2 to D–4). The USDM may be found at *http://drought.unl.edu/dm/monitor*. With respect to below average water levels, the supplementary information accompanying the certification must include findings which establish long-term average water levels based on recorded historical data, show that current water levels are below long-term average levels, and demonstrate that economic injury has occurred as a direct result of the low water levels. Not later than 30 days after SBA receives a certification by a Governor, it shall respond in writing with its decision and its reasons.

(6) SBA makes a physical disaster declaration in a rural area (rural disaster declaration) upon request from the Governor of the State or the Chief Executive of the Indian tribal government in which the rural area is located. Rural area means any county or other political subdivision of a State, the District of Columbia, or a territory or possession of the United States that is designated as a rural area by the Bureau of the Census. The following conditions must be met:

(i) The President has declared a Major Disaster for the rural area, but has not authorized individual assistance; and

(ii) Any home, small business concern, private nonprofit organization, or small agricultural cooperative in the rural area has incurred significant damage. Significant damage means uninsured losses of 40 percent or more of the estimated fair replacement value or pre-disaster fair market value of the damaged property, whichever is lower.

(7) SBA makes an economic injury disaster declaration in response to a determination of an emergency involving Federal primary responsibility by the President.

(b) SBA publishes notice of any disaster declaration in the FEDERAL REGISTER. The published notice will identify the kinds of assistance available, the date and nature of the disaster, and the deadline and location for filing loan applications. Additionally, SBA will use the local media to inform potential loan applicants where to obtain loan applications and otherwise to assist victims in applying for disaster loans. SBA will accept applications after the announced deadline only when SBA determines that the late filing resulted from substantial causes beyond the control of the applicant.

[61 FR 3304, Jan. 31, 1996, as amended at 64 FR 13667, Mar. 22, 1999; 67 FR 64518, Oct. 21, 2002; 71 FR 63676, Oct. 31, 2006; 71 FR 75409, Dec. 15, 2006; 73 FR 54675, Sept. 23, 2008; 81 FR 67903, Oct. 3, 2016; 88 FR 24109, Apr. 19, 2023]

§ 123.4 What is a disaster area and why is it important?

Each disaster declaration defines the geographical areas affected by the disaster. Only those victims located in the declared disaster area are eligible to apply for SBA disaster loans. When the President declares a major disaster, the Federal Emergency Management Agency defines the disaster area. In major disasters, economic injury disaster loans and IDAP loans may be made for victims in contiguous counties or other political subdivisions, provided, however that with respect to major disasters which authorize public assistance only, SBA shall not make economic injury disaster or IDAP loans in counties contiguous to the disaster area. Except for rural disaster declarations (as defined in §123.3), disaster declarations issued by SBA include contiguous counties for both physical, economic injury and, in some cases IDAP assistance. Rural disaster declarations do not include assistance for contiguous counties. Contiguous counties or other political subdivisions are those land areas which abut the land area of the declared disaster area without geographic separation other than by a minor body of water, not to exceed one mile between the land areas of such counties. When SBA issues an economic injury disaster declaration in response to a determination of an emergency involving Federal primary responsibility by the President, the disaster area shall include each State or subdivision thereof (including counties) included in the President's emergency determination.

[88 FR 24109, Apr. 19, 2023]

§ 123.5 What kinds of loans are available?

(a) *Disaster loans authorized under Section 7(b).* SBA offers four kinds of disaster loans as authorized by Section 7(b) of the Small Business Act: Physical disaster home loans, physical disaster business loans, economic injury disaster business loans, and Military Reservist EIDL loans. SBA makes these loans directly or in participation with a financial institution. If a disaster loan authorized under Section 7(b) is made in participation with a financial institution, SBA's share in that loan may not exceed 90 percent.

(b) *IDAP loans.* SBA also offers IDAP loans as authorized by Section 42 of the Small Business Act. SBA makes these interim guaranteed disaster loans to small businesses only in participation with a financial institution. SBA's share in an IDAP loan is equal to 85 percent.

[75 FR 60597, Oct. 1, 2010]

§ 123.6 What does SBA look for when considering a disaster loan applicant?

There must be reasonable assurance that you can repay your loan based on SBA's analysis of your credit or your personal or business cash flow, and you must also have satisfactory character. SBA will not make a loan to you if repayment depends upon the sale of collateral through foreclosure or any other disposition of assets owned by you. SBA is prohibited by statute from making a loan to you if you are engaged in the production or distribution of any product or service that has been determined to be obscene by a court.

[61 FR 3304, Jan. 31, 1996, as amended at 79 FR 22862, Apr. 25, 2014]

§ 123.7 Are there restrictions on how disaster loans can be used?

You must use disaster loans to restore or replace your primary home

(including a mobile home used as a primary residence) and your personal or business property as nearly as possible to their condition before the disaster occurred, and within certain limits, to protect damaged or destroyed real property from possible future disasters.

[61 FR 3304, Jan. 31, 1996, as amended at 88 FR 39340, June 16, 2023]

§ 123.8 Does SBA charge any fees for obtaining a disaster loan?

SBA does not charge points, closing, or servicing fees on any disaster loan authorized under Section 7(b). You will be responsible for payment of any closing costs owed to third parties on these loans, such as recording fees and title insurance premiums. If your loan is made under Section 7(b) in participation with a financial institution, SBA will charge a guarantee fee to the financial institution, which then may recover the guarantee fee from you. SBA does not charge a guarantee fee for an IDAP loan made under Section 42.

[75 FR 60598, Oct. 1, 2010]

§ 123.9 What happens if I don't use loan proceeds for the intended purpose?

(a) For disaster loans authorized under Section 7(b), when SBA approves each application, it issues a loan authorization which specifies the amount of the loan, repayment terms, any collateral requirements, and the permitted use of loan proceeds. If you wrongfully misapply the proceeds of a disaster loan authorized under Section 7(b), you will be liable to SBA for one and one-half times the proceeds disbursed to you as of the date SBA learns of your wrongful misapplication. Wrongful misapplication means the willful use of any loan proceeds without SBA approval contrary to the loan authorization. If you fail to use loan proceeds for authorized purposes for 60 days or more after receiving a loan disbursement check, such non-use also is considered a wrongful misapplication of the proceeds.

(b) If SBA learns that you may have misapplied your loan proceeds from a disaster loan authorized under Section 7(b), SBA will notify you at your last known address, by certified mail, return receipt requested. You will be given at least 30 days to submit to SBA evidence that you have not misapplied the loan proceeds or that you have corrected any such misapplication. Any failure to respond in time will be considered an admission that you misapplied the proceeds. If SBA finds a wrongful misapplication, it will cancel any undisbursed loan proceeds, call the loan, and begin collection measures to collect your outstanding loan balance and the civil penalty.

(c) If you misapply loan proceeds of any disaster loan under this Part, including an IDAP loan, you may face criminal prosecution or civil or administrative action.

[61 FR 3304, Jan. 31, 1996, as amended at 75 FR 60598, Oct. 1, 2010]

§ 123.10 What happens if I cannot use my insurance proceeds to make repairs?

If you must pay insurance proceeds to the holder of a recorded lien or encumbrance against your damaged property instead of using them to make repairs, you may apply to SBA for the full amount needed to make such repairs. If you voluntarily pay insurance proceeds to a recorded lienholder, your loan eligibility is reduced by the amount of the voluntary payment.

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

(a) When collateral is not required:

(1) *Economic injury disaster loans.* Generally, SBA will not require that you pledge collateral to secure an economic injury disaster loan of $25,000 or less.

(2) *Physical disaster home and physical disaster business loans.* Generally, SBA will not require that you pledge collateral to secure a physical disaster home or physical disaster business loan of $25,000 or less. This authority expires on November 25, 2018, unless extended by statute.

(3) *IDAP loans.* Collateral requirements for IDAP loans are set forth in Subpart H of this part.

(4) *Military Reservist EIDL.* For the purposes of the Military Reservist EIDL only, as described in section 123.513, SBA will not generally require that you pledge collateral to secure a loan of $50,000 or less.

(b) For loans larger than the amounts outlined in paragraph (a) of this section, you will be required to provide available collateral, as determined by SBA, such as a lien on the damaged or replacement property and/or a security interest in business assets.

(c) Sometimes a borrower, including affiliates as defined in part 121 of this title, will have more than one loan after a single disaster. In deciding whether collateral is required, SBA will add up all physical disaster loans to see if they exceed the applicable unsecured threshold outlined in paragraph (a)(2) of this section and all economic injury disaster loans to see if they exceed $25,000.

(d) SBA will not decline a loan if you lack a particular amount of collateral as long as it is reasonably sure that you can repay your loan. If you refuse to pledge available collateral when requested by SBA, however, SBA may decline or cancel your loan.

[61 FR 3304, Jan. 31, 1996, as amended at 73 FR 54675, Sept. 23, 2008; 75 FR 14332, Mar. 25, 2010; 75 FR 60598, Oct. 1, 2010; 79 FR 22862, Apr. 25, 2014; 81 FR 67903, Oct. 3, 2016; 88 FR 39340, June 16, 2023]

§ 123.12 Are books and records required?

You must retain complete records of all transactions financed with your SBA loan proceeds, including copies of all contracts and receipts, for a period of 3 years after you receive your final disbursement of loan proceeds. If you have a physical disaster business or economic injury loan, you must also maintain current and accurate books of account, including financial and operating statements, insurance policies, and tax returns. You must retain applicable books and records for 3 years after your loan matures including any extensions, or from the date when your loan is paid in full, whichever occurs first. You must make available to SBA or other authorized government personnel upon request all such books and records for inspection, audit, and reproduction during normal business hours and you must also permit SBA and any participating financial institution to inspect and appraise your assets. (OMB Approval No. 3245–0110.)

§ 123.13 What happens if my loan application is denied?

(a) If SBA denies your loan application, SBA will notify you in writing and set forth the specific reasons for the denial. Any applicant whose request for a loan is declined for reasons other than size (not being a small business) has the right to present information to overcome the reason or reasons for the decline and to request reconsideration in writing.

(b) Any decline due to size can only be appealed as set forth in part 121 of this chapter.

(c) Any request for reconsideration must be received by SBA's Disaster Assistance Processing and Disbursement Center (DAPDC) within six months of the date of the decline notice. After six months, a new loan application is required.

(d) A request for reconsideration must contain all significant new information that you rely on to overcome SBA's denial of your original loan application.

(e) If SBA declines your application a second time, you have the right to appeal in writing to the Director, Disaster Assistance Processing and Disbursement Center (DAPDC) or the Director's designee(s). All appeals must be received by the processing center within 30 days of the decline action. Your request must state that you are appealing, and must give specific reasons why the decline action should be reversed.

(f) The decision of the Director, DAPDC or the Director's designee(s), is final unless:

(1) The Director, DAPDC or the Director's designee(s), does not have the authority to approve the requested loan;

(2) The Director, DAPDC or the Director's designee(s), refers the matter to the SBA Associate Administrator for Disaster Assistance (AA/DA);

(3) The AA/DA, upon a showing of special circumstances, requests that the Director, DAPDC or the Director's designee(s), forward the matter to him or her for final consideration; or

(4) The SBA Administrator, solely within the Administrator's discretion, chooses to review the matter and make the final decision. Such discretionary

authority of the Administrator does not create additional rights of appeal on the part of an applicant not otherwise specified in SBA regulations.

(g) This section does not apply to IDAP loans.

[61 FR 3304, Jan. 31, 1996, as amended at 71 FR 63676, Oct. 31, 2006; 75 FR 60598, Oct. 1, 2010; 81 FR 67903, Oct. 3, 2016; 86 FR 50219, Sept. 8, 2021; 88 FR 39340, June 16, 2023]

§ 123.14 How does the Federal Debt Collection Procedures Act of 1990 apply?

(a) Under the Federal Debt Collection Procedures Act of 1990 (28 U.S.C. 3201(e)), a debtor who owns property which is subject to an outstanding judgment lien for a debt owed to the United States generally is not eligible to receive a disaster loan. The SBA Associate Administrator for Disaster Assistance, or designee, may waive this restriction as to disaster loans (except IDAP loans) upon a demonstration of good cause. Good cause means a written representation by you under oath which convinces SBA that:

(1) The declared disaster was a major contributing factor to the delinquency which led to the judgment lien, regardless of when the original debt was incurred; or

(2) The disaster directly prevented you from fulfilling the terms of an agreement with SBA or any other Federal Government entity to satisfy its pre-disaster judgment lien; in this situation, the judgment creditor must certify to SBA that you were complying with the agreement to satisfy the judgment lien when the disaster occurred; or

(3) Other circumstances exist which would justify a waiver.

(b) The waiver determination by the Associate Administrator for Disaster Assistance, or designee, is a final, nonappealable decision. The granting of a waiver does not include loan approval; a waiver recipient must then follow normal loan application procedures.

[61 FR 3304, Jan. 31, 1996, as amended at 75 FR 60598, Oct. 1, 2010]

§ 123.15 What if I change my mind?

If SBA required you to pledge collateral for your loan, you may change your mind and rescind your loan pursuant to the Consumer Credit Protection Act, 15 U.S.C. 1601, and Regulation Z of the Federal Reserve Board, 12 CFR part 226. Your note and any collateral documents signed by you will be canceled upon your return of all loan proceeds and your payment of any interest accrued. This provision does not apply to IDAP loans.

[61 FR 3304, Jan. 31, 1996, as amended at 75 FR 60598, Oct. 1, 2010]

§ 123.16 How are loans administered and serviced?

(a) If you obtained your disaster loan from a participating lender, that lender is responsible for closing and servicing your loan. If you obtained your loan directly from SBA, your loan will be closed and serviced by SBA. The SBA rules on servicing are found in Subpart H of this part and part 120 of this chapter.

(b) If you are unable to pay your SBA loan installments in a timely manner for reasons substantially beyond your control, you may request that SBA suspend your loan payments, extend your maturity, or both.

[61 FR 3304, Jan. 31, 1996, as amended at 75 FR 60598, Oct. 1, 2010]

§ 123.17 Do other Federal requirements apply?

As a condition of disbursement, you must be in compliance with certain requirements relating to flood insurance, earthquake hazards, coastal barrier islands, and child support obligations, as set forth in §§ 120.170 through 120.172, 120.174 and 120.175 of this chapter.

[61 FR 3304, Jan. 31, 1996, as amended at 87 FR 38910, June 30, 2022]

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

(a) Generally, SBA will consider your request for an increase in your loan if you can show that the eligible cost of repair or replacement of damages increased because of events occurring after the loan approval that were beyond your control. An eligible cost is one which is related to the disaster for which SBA issued the original loan. For example, if you discover hidden damage within a reasonable time after

SBA approved your original disaster loan and before repair, renovation, or reconstruction is complete, you may request an increase. Or, if applicable building code requirements were changed since SBA approved your original loan, you may request an increase in your loan amount.

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

[63 FR 15072, Mar. 30, 1998, as amended at 81 FR 67903, Oct. 3, 2016]

§ 123.19 May I request an increase in the amount of an economic injury loan?

SBA will consider your request for an increase in the loan amount if you can show that the increase is essential for your business to continue and is based on events occurring after SBA approved your original loan which were beyond your control. For example, delays may have occurred beyond your control which prevent you from resuming your normal business activity in a reasonable time frame. Your request for an increase in the loan amount must be related to the disaster for which the SBA economic injury disaster loan was originally made.

[63 FR 15072, Mar. 30, 1998]

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

(a) You should request a loan increase as soon as possible after you discover the need for the increase, but not later than two years after SBA approved your physical disaster or economic injury loan. After two years, the SBA Associate Administrator for Disaster Assistance (AA/DA) may waive this limitation after finding extraordinary and unforeseeable circumstances.

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

[63 FR 15073, Mar. 30, 1998, as amended at 81 FR 67903, Oct. 3, 2016]

§ 123.21 What is a mitigation measure?

A mitigation measure is something done for the purpose of protecting property and occupants against disaster related damage. You may implement mitigation measures after a disaster occurs (post-disaster) to protect against recurring disaster related damage, or before a disaster occurs (pre-disaster) to protect against future disaster related damage. Examples of mitigation measures include building retaining walls, sea walls, grading and contouring land, elevating flood prone structures, relocating utilities, constructing a safe room or similar storm shelter (if such safe room or similar storm shelter is constructed in accordance with applicable standards issued by the Federal Emergency Management Agency), or retrofitting structures to protect against high winds, earthquakes, flood, wildfires, or other physical disasters. Section 123.107 specifically addresses post-disaster mitigation for home disaster loans, and §123.204 specifically addresses post-disaster mitigation for businesses.

[67 FR 62337, Oct. 7, 2002, as amended at 81 FR 67903, Oct. 3, 2016; 85 FR 12864, Mar. 5, 2020]

Subpart B—Home Disaster Loans

§ 123.100 Am I eligible to apply for a home disaster loan?

(a) You are eligible to apply for a home disaster loan if you:

(1) Own and occupy your primary residence and have suffered a physical loss to your primary residence, personal property, or both; or

(2) Do not own your primary residence, but have suffered a physical loss to your personal property. Family

members sharing a residence are eligible if they are not dependents of the owners of the residence.

(b) Losses may be claimed only by the owners of the property at the time of the disaster, and all such losses will be verified by SBA. SBA will consider beneficial ownership as well as legal title (for real or personal property) in determining who suffered the loss.

§ 123.101 When am I not eligible for a home disaster loan?

You are not eligible for a home disaster loan if:

(a) You have been convicted, during the past year, of a felony during and in connection with a riot or civil disorder or other declared disaster;

(b) You acquired voluntarily more than a 50 percent ownership interest in the damaged property after the disaster, and no contract of sale existed at the time of the disaster;

(c) Your damaged property can be repaired or replaced with the proceeds of insurance, gifts or other compensation, including condemnation awards (with one exception), these amounts must either be deducted from the amount of the claimed losses or, if received after SBA has approved and disbursed a loan, must be paid to SBA as principal payments on your loan. You must notify SBA of any such recoveries collected after receiving an SBA disaster loan. The one exception applies to amounts received under the Individuals and Household Program of the Federal Emergency Management Agency solely to meet an emergency need pending processing of an SBA loan. In such an event, you must repay the financial assistance with SBA loan proceeds if it was used for purposes also eligible for an SBA loan;

(d) SBA determines that you assumed the risk (for example, by not maintaining flood insurance as required by an earlier SBA disaster loan when the current loss is also due to flood);

(e) Your damaged property is a secondary home (although if you rented the property out before the disaster and the property would not constitute a ''residence'' under the provisions of Section 280A of the Internal Revenue Code (26 U.S.C. 280A), you may be eligible for a physical disaster business loan);

(f) Your damaged property is the type of vehicle normally used for recreational purposes, such as motorhomes, aircraft, and boats;

(g) Your damaged property consists of cash or securities;

(h) The replacement value of your damaged personal property is extraordinarily high and not easily verified, such as the value of antiques, artworks, or hobby collections;

(i) You or other principal owners of the damaged property are presently incarcerated, or on probation or parole following conviction for a serious criminal offense;

(j) Your only interest in the damaged property is in the form of a security interest, mortgage, or deed of trust;

(k) The damaged building, including contents, was newly constructed or substantially improved on or after February 9, 1989, and (without a significant business justification) is located seaward of mean high tide or entirely in or over water; or

(l) You voluntarily decide to relocate outside the business area in which the disaster has occurred, and there are no special or unusual circumstances leading to your decision (business area means the municipality which provides general governmental services to your damaged home or, if not located in a municipality, the county or equivalent political entity in which your damaged home is located).

[61 FR 3304, Jan. 31, 1996, as amended at 67 FR 64519, Oct. 21, 2002]

§ 123.102 What circumstances would justify my relocating?

SBA may approve a loan if you intend to relocate outside the business area in which the disaster has occurred if your relocation is caused by such special or unusual circumstances as:

(a) Demonstrable risk that the business area will suffer future disasters;

(b) A change in employment status (such as loss of job, transfer, lack of adequate job opportunities within the business area or scheduled retirement within 18 months after the disaster occurs);

(c) Medical reasons; or

(d) Special family considerations which necessitate a move outside of the business area.

§ 123.103 What happens if I am forced to move from my home?

If you must relocate inside or outside the business area because local authorities will not allow you to repair your damaged property, SBA considers this to be a total loss and a mandatory relocation. In this case, your loan would be an amount that SBA considers sufficient to replace your residence at your new location, plus funds to cover losses of personal property and eligible refinancing.

§ 123.104 What interest rate will I pay on my home disaster loan?

If you can obtain credit elsewhere, your interest rate is set by a statutory formula, but will not exceed 8 percent per annum. If you cannot obtain credit elsewhere, your interest rate is one-half the statutory rate, but will not exceed 4 percent per annum. Credit elsewhere means that, with your cash flow and disposable assets, SBA believes you could obtain financing from non-federal sources on reasonable terms. If you cannot obtain credit elsewhere, you also may be able to borrow from SBA to refinance existing recorded liens against your damaged real property. Under prior legislation, some SBA disaster loans had split interest rates. On any such loan, repayments of principal are applied first to that portion of the loan with the lowest interest rate.

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

(a) There are limits on how much money you can borrow for particular purposes. The limits in effect for disasters occurring on or after June 16, 2023 are as follows.

(1) $100,000 for repair or replacement of household and personal effects;

(2) $500,000 for repair or replacement of a primary residence (including upgrading in order to meet minimum standards of safety and decency or current building code requirements);

(3) $500,000 for eligible refinancing purposes;

(4) 20 percent of the verified loss (not including refinancing or malfeasance), before deduction of compensation from other sources, up to a maximum of $500,000 for post-disaster mitigation (see § 123.107); and

(5) $500,000 for eligible malfeasance, pursuant to § 123.18.

(b) You may not use loan proceeds to repay any debts on personal property, secured or unsecured, unless you incurred those debts as a direct result of the disaster.

(c) SBA determines the loan maturity and repayment terms based on your needs and your ability to pay. Generally, you will pay monthly installments of principal and interest, beginning twelve months from the date of the initial disbursement. SBA will consider other payment terms if you have seasonal or fluctuating income. The maximum maturity for a home disaster loan is 30 years. There is no penalty for prepayment of disaster loans.

(d) The SBA Administrator may increase the home loan lending limits within paragraph (a) of this section under an individual disaster declaration based on appropriate economic indicators for the region(s) in which the disaster occurred. SBA will publish any increased lending limit for an individual disaster declaration in the FEDERAL REGISTER.

[61 FR 3304, Jan. 31, 1996, as amended at 75 FR 14332, Mar. 25, 2010; 81 FR 67903, Oct. 3, 2016; 88 FR 39340, June 16, 2023]

§ 123.106 What is eligible refinancing?

(a) If your home (primary residence) is totally destroyed or substantially damaged, and you do not have credit elsewhere, SBA may allow you to borrow money to refinance recorded liens or encumbrances on your home. Your home is totally destroyed or substantially damaged if it has suffered uninsured or otherwise uncompensated damage which, at the time of the disaster, is either:

(1) 40 percent or more of the home's market value or replacement cost at the time of the disaster, including land value, whichever is less; or

(2) 50 percent or more of its market value or replacement cost at the time of the disaster, not including land value, whichever is less.

(b) Your home disaster loan for refinancing existing liens or encumbrances cannot exceed an amount equal to the lesser of $500,000, or the physical damage to your primary residence. Any refinancing amount will be reduced to the extent such lien or encumbrance is satisfied by insurance or otherwise.

[61 FR 3304, Jan. 31, 1996, as amended at 88 FR 39341, June 16, 2023]

§ 123.107 How much can I borrow for post-disaster mitigation for my home?

For mitigation measures implemented after a disaster has occurred, you can request that the approved home disaster loan amount be increased by the lesser of the cost of the mitigation measure, or up to 20 percent of the verified loss (before deducting compensation from other sources), to a maximum of $500,000.

[75 FR 14332, Mar. 25, 2010, as amended at 88 FR 39341, June 16, 2023]

§ 123.108 How do the SBA disaster loan program and the FEMA grant programs interact?

After a Presidential disaster declaration is made, you may be eligible for disaster assistance, including grant assistance, from the Federal Emergency Management Agency's (FEMA) Federal Assistance to Individuals and Households Program (IHP). After you register with FEMA for disaster assistance, FEMA will consider you for IHP assistance, which includes housing assistance grants to repair or replace your damaged primary residence and temporary housing assistance (including rental assistance) to assist you temporarily with a place to live, and assistance with personal property, medical, dental and funeral expenses. FEMA may also refer you to SBA to apply for loan assistance to help repair or rebuild your home and/or to replace personal property destroyed during the disaster. If SBA is unable to approve your loan application, or if you have damage in excess of the SBA loan amount, SBA may refer you, on a timely basis, to FEMA for IHP grant consideration to assist with your unmet personal property and transportation needs. If you are approved for the SBA disaster loan and you have received grant assistance that duplicates the damage covered by the SBA loan, such grant assistance must be deducted from your loan eligibility as described in section 123.101(c) of the regulations. All grant decisions are made by FEMA. Additionally, if additional disaster assistance is available from state, local or other agencies, SBA may refer you to the appropriate agency for consideration.

[75 FR 7546, Feb. 22, 2010]

Subpart C—Physical Disaster Business Loans

§ 123.200 Am I eligible to apply for a physical disaster business loan?

(a) Almost any business concern or charitable or other non-profit entity whose real or tangible personal property is damaged in a declared disaster area is eligible to apply for a physical disaster business loan. Your business may be a sole proprietorship, partnership, corporation, limited liability company, or other legal entity recognized under State law. Your business' size (average annual receipts or number of employees) is not taken into consideration in determining your eligibility for a physical disaster business loan. If your damaged business occupied rented space at the time of the disaster, and the terms of your business' lease require you to make repairs to your business' building, you may have suffered a physical loss and can apply for a physical business disaster loan to repair the property. In all other cases, the owner of the building is the eligible loan applicant.

(b) Damaged vehicles, of the type normally used for recreational purposes, such as motorhomes, aircraft, and boats, may be repaired or replaced with SBA loan proceeds if you can submit evidence that the damaged vehicles were used in your business at the time of the disaster.

§ 123.201 When am I not eligible to apply for a physical disaster business loan?

(a) You are not eligible for a physical disaster business loan if your business is an agricultural enterprise or if you (or any principal of the business) fit into any of the categories in § 123.101. Agricultural enterprise means a business primarily engaged in the production of food and fiber, ranching and raising of livestock, aquaculture and all other farming and agriculture-related industries.

(b) Sometimes a damaged business entity (whether in the form of a corporation, limited liability company, partnership, or sole proprietorship) is engaged in both agricultural enterprise and a non-agricultural business venture. If the agricultural enterprise part of your business entity has suffered a physical disaster, that enterprise is not eligible for SBA physical disaster assistance. If the non-agricultural business venture of your entity has suffered physical disaster damage, that part of your business operation would be eligible for SBA physical disaster assistance. If both the agricultural enterprise part and the non-agricultural business venture have incurred physical disaster damage, only the non-agricultural business venture of your business entity would be eligible for SBA physical disaster assistance.

(c) If your business is going to relocate voluntarily outside the business area in which the disaster occurred, you are not eligible for a physical disaster business loan. If, however, the relocation is due to uncontrollable or compelling circumstances, SBA will consider the relocation to be involuntary and eligible for a loan. Such circumstances may include, but are not limited to:

(1) The elimination or substantial decrease in the market for your products or services, as a consequence of the disaster;

(2) A change in the demographics of your business area within 18 months prior to the disaster, or as a result of the disaster, which makes it uneconomical to continue operations in your business area;

(3) A substantial change in your cost of doing business, as a result of the disaster, which makes the continuation of your business in the business area not economically viable;

(4) Location of your business in a hazardous area such as a special flood hazard area or an earthquake-prone area;

(5) A change in the public infrastructure in your business area which occurred within 18 months or as a result of the disaster that would result in substantially increased expenses for your business in the business area;

(6) Your implementation of decisions adopted and at least partially implemented within 18 months prior to the disaster to move your business out of the business area; and

(7) Other factors which undermine the economic viability of your business area.

(d) You are not eligible if your business is engaged in any illegal activity.

(e) You are not eligible if you are a government owned entity (except for a business owned or controlled by a Native American tribe).

(f) You are not eligible if your business presents live performances of a prurient sexual nature or derives directly or indirectly more than *de minimis* gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature.

[61 FR 3304, Jan. 31, 1996, as amended at 62 FR 35337, July 1, 1997; 63 FR 46644, Sept. 2, 1998]

§ 123.202 How much can my business borrow with a physical disaster business loan?

(a) Disaster business loans, including both physical disaster and economic injury loans to the same borrower, together with its affiliates, cannot exceed the lesser of the uncompensated physical loss and economic injury or $2 million. Physical disaster loans may include amounts to meet current building code requirements. If your business is a major source of employment, SBA may waive the $2 million limitation. A major source of employment is a business concern that has one or more locations in the disaster area, on or after the date of the disaster, which:

(1) Employed 10 percent or more of the entire work force within the commuting area of a geographically identifiable community (no larger than a county), provided that the commuting area does not extend more than 50 miles from such community; or

(2) Employed 5 percent of the work force in an industry within the disaster area and, if the concern is a non-manufacturing concern, employed no less than 50 employees in the disaster area, or if the concern is a manufacturing concern, employed no less than 150 employees in the disaster area; or

(3) Employed no less than 250 employees within the disaster area.

(b) SBA will consider waiving the $2 million loan limit for a major source of employment only if:

(1) Your damaged location or locations are out of business or in imminent danger of going out of business as a result of the disaster, and a loan in excess of $2 million is necessary to reopen or keep open the damaged locations in order to avoid substantial unemployment in the disaster area; and

(2) You have used all reasonably available funds from your business, its affiliates and its principal owners (20% or greater ownership interest) and all available credit elsewhere (as described in §123.104) to alleviate your physical damage and economic injury.

(c) Physical disaster business borrowers may request refinancing of liens on both damaged real property and machinery and equipment. Such amount shall be reduced to the extent such lien or encumbrance is satisfied by insurance or otherwise. Your business property must be totally destroyed or substantially damaged, which means:

(1) 40 percent or more of the aggregate value (lesser of market value or replacement cost at the time of the disaster) of the damaged real property (including land) and damaged machinery and equipment; or

(2) 50 percent or more of the aggregate value (lesser of market value or replacement cost at the time of the disaster) of the damaged real property (excluding land) and damaged machinery and equipment.

(d) The SBA Administrator may increase the $2 million loan limit for disaster business physical and economic injury loans under an individual disaster declaration based on appropriate economic indicators for the region(s) in which the disaster occurred. SBA will publish the increased loan amount in the FEDERAL REGISTER.

[61 FR 3304, Jan. 31, 1996, as amended at 63 FR 46644, Sept. 2, 1998; 75 FR 14332, Mar. 25, 2010; 88 FR 39341, June 16, 2023]

§ 123.203 What interest rate will my business pay on a physical disaster business loan and what are the repayment terms?

(a) SBA will announce interest rates with each disaster declaration. If your business, together with its affiliates and principal owners, has credit elsewhere, your interest rate is set by a statutory formula, but will not exceed 8 percent per annum. If you do not have credit elsewhere, your interest rate will not exceed 4 percent per annum. The maturity of your loan depends upon your repayment ability, but cannot exceed seven years if you have credit elsewhere.

(b) Generally, you will pay monthly installments of principal and interest, beginning twelve months from the date of the initial disbursement. SBA will consider other payment terms if you have seasonal or fluctuating income. There is no penalty for prepayment for disaster loans.

(c) For certain disaster business physical and economic injury loans, an additional payment, based on a percentage of net earnings, will be required to reduce the balance of the loan. This additional payment will not be required until 5 years after repayment begins.

[61 FR 3304, Jan. 31, 1996, as amended at 75 FR 14333, Mar. 25, 2010; 77 FR 12157, Feb. 29, 2012; 88 FR 39341, June 16, 2023]

§ 123.204 How much can your business borrow for post-disaster mitigation?

For mitigation measures implemented after a disaster has occurred, you can request an increase in the approved physical disaster business loan by the lesser of the cost of the mitigation measure, or up to 20 percent of the verified loss, before deducting compensation from other sources, to repair or replace your damaged business.

[75 FR 14333, Mar. 25, 2010]

Subpart D—Economic Injury Disaster Loans

§ 123.300 Is my business eligible to apply for an economic injury disaster loan?

(a) If your business is located in a declared disaster area, and suffered substantial economic injury as a direct result of a declared disaster, you are eligible to apply for an economic injury disaster loan.

(1) 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.

(2) Loss of anticipated profits or a drop in sales is not considered substantial economic injury for this purpose.

(b) Economic injury disaster loans are available only if you were a small business (as defined in part 121 of this chapter) or a private non-profit organization when the declared disaster commenced, you and your affiliates and principal owners (20% or more ownership interest) have used all reasonably available funds, and you are unable to obtain credit elsewhere (see § 123.104).

(c) Eligible businesses do not include agricultural enterprises, but do include—

(1) Small nurseries affected by a drought disaster designated by the Secretary of Agriculture (nurseries are commercial establishments deriving 50 percent or more of their annual receipts from the production and sale of ornamental plants and other nursery products, including, but not limited to, bulbs, florist greens, foliage, flowers, flower and vegetable seeds, shrubbery, and sod);

(2) Small agricultural cooperatives;

(3) Producer cooperatives; and

(4) Small aquaculture enterprises.

(d) An eligible private non-profit organization is a non-governmental agency or entity that currently has:

(1) An effective ruling letter from the U.S. Internal Revenue Service, granting tax exemption under sections 510(c), (d), or (e) of the Internal Revenue Code of 1954, or

(2) Satisfactory evidence from the State that the non-revenue producing organization or entity is a non-profit one organized or doing business under State law.

(e) COVID–19 Economic Injury Disaster (COVID EIDL) loans are available if, as of the date of application, you:

(1) Are a business, including an agricultural cooperative, aquaculture enterprise, nursery, or producer cooperative (but excluding all other agricultural enterprises), that is small under SBA Size Standards (as defined in part 121 of this chapter);

(2) Are an individual who operates under a sole proprietorship, with or without employees, or as an independent contractor;

(3) Are a private non-profit organization that is a non-governmental agency or entity that currently has an effective ruling letter from the Internal Revenue Service (IRS) granting tax exemption under sections 501(c), (d), or (e) of the Internal Revenue Code of 1954, or satisfactory evidence from the State that the non-revenue-producing organization or entity is a non-profit one organized or doing business under State law, or a faith-based organization;

(4) Are a business, cooperative, agricultural enterprise, Employee Stock Ownership Plan (as defined in 15 U.S.C. 632), or tribal small business concern (as described in 15 U.S.C. 657a(b)(2)(C)), with not more than 500 employees; or

(5) Are a business that is assigned a North American Industry Classification System (NAICS) code beginning with 61, 71, 72, 213, 3121, 315, 448, 451, 481, 485, 487, 511, 512, 515, 532, or 812, employs not more than 500 employees per physical location, and together with affiliates has no more than 20 locations.

[61 FR 3304, Jan. 31, 1996, as amended at 67 FR 11880, Mar. 15, 2002; 70 FR 72595, Dec. 6, 2005; 73 FR 41254, July 18, 2008; 75 FR 14333, Mar. 25, 2010; 76 FR 63547, Oct. 12, 2011; 86 FR 50219, Sept. 8, 2021]

§ 123.301 When would my business not be eligible to apply for an economic injury disaster loan?

Your business is not eligible for an economic disaster loan if you (or any principal of the business) fit into any of the categories in §§ 123.101 and 123.201, or if your business is:

(a) Engaged in lending, multi-level sales distribution, speculation, or investment (except for real estate investment with property held for rental when the disaster occurred);

(b) A non-profit or charitable concern, other than a private non-profit organization;

(c) [Reserved]

(d) Not a small business concern; or

(e) Deriving more than one-third of gross annual revenue from legal gambling activities;

(f) A loan packager which earns more than one-third of its gross annual revenue from packaging SBA loans;

(g) Principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs, whether in a religious or secular setting; or

(h) Primarily engaged in political or lobbying activities.

[61 FR 3304, Jan. 31, 1996, as amended at 63 FR 46644, Sept. 2, 1998; 75 FR 14333, Mar. 25, 2010; 88 FR 39341, June 16, 2023]

§ 123.302 What is the interest rate on an economic injury disaster loan?

Your economic injury loan will have an interest rate of 4 percent per annum or less.

§ 123.303 How can my business spend my economic injury disaster loan?

(a) You can only use the loan proceeds for working capital necessary to carry your concern until resumption of normal operations and for expenditures necessary to alleviate the specific economic injury, but not to exceed that which the business could have provided had the injury not occurred. COVID EIDL loan proceeds also may be used to make debt payments including monthly payments, payment of deferred interest, and pre-payments on any business debts, except pre-payments are not permitted on any loans owned by a Federal agency (including SBA) or a Small Business Investment Company licensed under the Small Business Investment Act.

(b) Loan proceeds may not be used to:

(1) Refinance indebtedness which you incurred prior to the disaster event;

(2) Except for COVID EIDL loan proceeds, make payments on loans owned by a Federal agency (including SBA) or a Small Business Investment Company licensed under the Small Business Investment Act;

(3) Pay, directly or indirectly, any obligations resulting from a federal, state or local tax penalty as a result of negligence or fraud, or any non-tax criminal fine, civil fine, or penalty for non-compliance with a law, regulation, or order of a federal, state, regional, or local agency or similar matter;

(4) Repair physical damage; or

(5) Pay dividends or other disbursements to owners, partners, officers or stockholders, except for reasonable remuneration directly related to their performance of services for the business.

[61 FR 3304, Jan. 31, 1996, as amended at 86 FR 50219, Sept. 8, 2021]

§ 123.304 Is there a limit on the maximum loan amount to a single corporate group for COVID EIDL Loans?

Entities that are part of a single corporate group shall in no event receive more than $10,000,000 of COVID EIDL loans in the aggregate. For purposes of this limit, entities are part of a single corporate group if they are majority owned, directly or indirectly, by a common parent.

[86 FR 50219, Sept. 8, 2021]

Subpart E—[Reserved]

Subpart F—Military Reservist Economic Injury Disaster Loans

SOURCE: 66 FR 38530, July 25, 2001, unless otherwise noted.

§ 123.500 Definitions.

The following terms have the same meaning wherever they are used in this subpart:

(a) *Essential employee* is an individual (whether or not an owner of a small business) whose managerial or technical expertise is critical to the successful day-to-day operations of a small business.

(b) *Military reservist* is a member of a reserve component of the Armed Forces ordered to active service.

(c) *Active service* has the meaning given in 10 U.S.C. 101(d)(3):

(1) Service on active duty; or

(2) Full-time National Guard duty.

(d) *Principal owner* is a person or entity which owns 20 percent or more of the small business.

(e) *Substantial economic injury* means an economic harm to the small business such that it cannot:

(1) Meet its obligations as they mature,

(2) Pay its ordinary and necessary operating expenses, or

(3) Market, produce or provide a product or service ordinarily marketed, produced or provided by the business. Loss of anticipated profits or a drop in sales is not considered substantial economic injury for this purpose.

[66 FR 38530, July 25, 2001, as amended at 88 FR 24109, Apr. 19, 2023]

§ 123.501 Under what circumstances is your business eligible to be considered for a Military Reservist Economic Injury Disaster Loan?

Your business is eligible to apply for a Military Reservist EIDL if:

(a) It is a small business as defined in 13 CFR part 121 when the essential employee was called to active service,

(b) The owner of the business is a military reservist and an essential employee or the business employs a military reservist who is an essential employee,

(c) The essential employee has been called-up to active service for a period of more than 30 consecutive days,

(d) The business has suffered or is likely to suffer substantial economic injury as a result of the absence of the essential employee, and

(e) You and your affiliates and principal owners (20% or more ownership interest) have used all reasonably available funds, and you are unable to obtain credit elsewhere (see § 123.104).

[66 FR 38530, July 25, 2001, as amended at 67 FR 64519, Oct. 21, 2002; 88 FR 24109, Apr. 19, 2023]

§ 123.502 Under what circumstances is your business ineligible to be considered for a Military Reservist Economic Injury Disaster Loan?

Your business is ineligible for a Military Reservist EIDL if it, together with its affiliates, is subject to any of the following conditions:

(a) Any of your business' principal owners has been convicted, during the past year, of a felony during and in connection with a riot or civil disorder;

(b) You have assumed the risk associated with employing the military reservist, as determined by SBA (for example, hiring the ''essential employee'' after the employee has received call-up orders or been notified that they are imminent);

(c) Any of your business' principal owners is presently incarcerated, or on probation or parole following conviction of a serious criminal offense;

(d) Your business is an agricultural enterprise. Agricultural enterprise means a business primarily engaged in the production of food and fiber, ranching and raising of livestock, aquaculture and all other farming and agriculture-related industries. (See 13 CFR 121.107, ''How does SBA determine a concern's primary industry?'') Sometimes a business is engaged in both agricultural and non-agricultural business activities. If the primary business activity of the business is not an agricultural enterprise, it may apply for a Military Reservist EIDL, but loan proceeds may not be used, directly or indirectly, for the benefit of the agricultural enterprises;

(e) Your business is engaged in any illegal activity;

(f) Your business is a government owned entity (except for a business owned or controlled by a Native American tribe);

(g) Your business presents live performances of a prurient sexual nature or derives directly or indirectly more than an insignificant gross revenue through the sale of products or services, or through the presentation of any depictions or displays, of a prurient sexual nature;

(h) Your business is engaged in lending, multi-level sales distribution, speculation, or investment (except for real estate investment with property held for commercial rental);

(i) Your business is a non-profit or charitable concern;

(j) [Reserved]

(k) Your business is not a small business concern;

(l) Your business derives more than one-third of its gross annual revenue from legal gambling activities;

(m) Your business is a loan packager which earns more than one-third of its gross annual revenue from packaging SBA loans;

(n) Your business' principal activity is teaching, instructing, counseling, or indoctrinating religion or religious beliefs, whether in a religious or secular setting; or

(o) Your business' principal activity is political or lobbying activities.

[66 FR 38530, July 25, 2001, as amended at 88 FR 39341, June 16, 2023]

§ 123.503 When can you apply for a Military Reservist EIDL?

Your small business can apply for a Military Reservist EIDL any time beginning on the date your essential employee receives notice of expected call-up and ending one year after the date the essential employee is discharged or released from active service. The Associate Administrator for Disaster Assistance (AA/DA) or designee may extend the one year limit by no more then one additional year after finding extraordinary or unforeseeable circumstances.

[73 FR 54675, Sept. 23, 2008, as amended at 88 FR 24110, Apr. 19, 2023]

§ 123.504 How do you apply for a Military Reservist EIDL?

To apply for a Military Reservist EIDL you must complete a SBA Military Reservist EIDL application package (SBA Form 5R and supporting documentation *can be obtained through SBA's Disaster Area Office*) including:

(a) A copy of the essential employee's official call-up orders for active service showing the date of call-up, and, if known, the date of release from active service. For an essential employee who expects to be called up and who has not received official call-up orders, the application shall include the notice of the expected call-up including, if known, the expected date of call-up and expected date of release from active service;

(b) A statement from the business owner that the reservist is essential to the successful day-to-day operations of the business (detailing the employee's duties and responsibilities and explaining why these duties and responsibilities can't be completed in the essential employee's absence);

(c) A certification by the essential employee supporting that he or she concurs with the business owner's statement as described in paragraph (b) of this section;

(d) A written explanation and financial estimate of how the call-up of the essential employee has or will result in economic injury to your business;

(e) The steps your business is taking to alleviate the economic injury; and

(f) The business owners' certification that the essential employee will be offered the same or a similar job upon the employee's return from active service.

[61 FR 3304, Jan. 31, 1996, as amended at 73 FR 54675, Sept. 23, 2008; 88 FR 24110, Apr. 19, 2023]

§ 123.505 What if you are both an essential employee and the owner of the small business and you started active service before applying for a Military Reservist EIDL?

If you are both an essential employee and the owner of the small business and you started active service before applying for an Military Reservist EIDL, a person who has a power of attorney with the authority to borrow and make other related commitments on your behalf, may complete and submit the EIDL loan application package for you.

[66 FR 38530, July 25, 2001, as amended at 88 FR 24110, Apr. 19, 2023]

§ 123.506 How much can you borrow under the Military Reservist EIDL Program?

You can borrow an amount equal to the substantial economic injury you have suffered or are likely to suffer until normal operations resume as a result of the absence of one or more essential employees called to active service, up to a maximum of $2 million.

[73 FR 54675, Sept. 23, 2008, as amended at 88 FR 24110, Apr. 19, 2023]

§ 123.507 Under what circumstances will SBA consider waiving the $2 million loan limit?

SBA will consider waiving the $2 million limit if you can certify to the following conditions and SBA approves of such certification based on the information supplied in your application:

(a) Your small business is a major source of employment. A major source of employment is a business concern that, on or after the date of the disaster:

(1) Employs 10 percent or more of the work force within the commuting area of the geographically identifiable community (no larger than a county) in which the business employing the essential employee is located, provided that the commuting area does not extend more than 50 miles from such community; or

(2) Employs 5 percent of the work force in an industry within such commuting area and, if the small business is a non-manufacturing small business, employs no less than 50 employees in the same commuting area, or if the small business is a manufacturing small business, employs no less than 150 employees in the commuting area; or

(3) Employs no less than 250 employees within such commuting area;

(b) Your small business is in imminent danger of going out of business as a result of one or more essential employees being called up to active service for a period of more than 30 consecutive days, and a loan in excess of $2 million is necessary to reopen or keep open the small business; and

(c) Your small business has used all reasonably available funds from the small business, its affiliates, its principal owners and all available credit elsewhere to alleviate the small business' economic injury. Credit elsewhere means financing from non-Federal sources on reasonable terms given your available cash flow and disposable assets which SBA believes your small business, its affiliates and principal owners could obtain.

[61 FR 3304, Jan. 31, 1996, as amended at 73 FR 54675, Sept. 23, 2008; 75 FR 14333, Mar. 25, 2010; 88 FR 24109, Apr. 19, 2023]

§ 123.508 How can you use Military Reservist EIDL funds?

Your small business can use Military Reservist EIDL to:

(a) Meet obligations as they mature,

(b) Pay ordinary and necessary operating expenses, or

(c) Enable the business to market, produce or provide products or services ordinarily marketed, produced, or provided by the business, which cannot be done as a result of the essential employee's military call-up.

§ 123.509 What can't you use Military Reservist EIDL funds for?

Your small business can not use Military Reservist EIDL funds for purposes described in § 123.303(b) (See § 123.303, '' How can my business spend my economic injury disaster loan?'').

§ 123.510 What if you don't use your Military Reservist EIDL funds as authorized?

If your small business does not use Military Reservist EIDL funds as authorized by § 123.508, then § 123.9 applies (See § 123.9, ''What happens if I don't use loan proceeds for the intended purpose?'').

§ 123.511 How will SBA disburse Military Reservist EIDL funds?

Funds will be disbursed only after the essential employee has been called to active service, and you have provided a copy of the essential employee's official call-up orders for active service showing the date of the call-up. SBA will disburse your funds in quarterly installments (unless otherwise specified in your loan authorization agreement) based on a continued need as demonstrated by comparative financial information. On or about 30 days before your scheduled fund disbursement, SBA will request ordinary and usual financial statements (including balance sheets and profit and loss statements). Based on this information, SBA will assess your continued need for disbursements under this program. Upon making such assessment, SBA will notify you of the status of future disbursements.

[73 FR 54675, Sept. 23, 2008, as amended at 88 FR 24110, Apr. 19, 2023]

§ 123.512 What is the interest rate on a Military Reservist EIDL?

The interest rate on a Military Reservist EIDL will be 4 percent per annum or less. SBA will publish the interest rate quarterly in the FEDERAL REGISTER.

§ 123.513 Does SBA require collateral on its Military Reservist EIDL?

SBA will not generally require you to pledge collateral to secure a Military Reservist EIDL of $50,000 or less. For loans larger than $50,000, you will be required to provide available collateral such as a lien on business property, a security interest in personal property, or both. SBA will not decline a loan if you do not have a particular amount of collateral so long as SBA is reasonably sure that you can repay the loan. If you refuse to pledge the available collateral when requested by SBA, however, SBA may decline or cancel your loan.

[73 FR 54675, Sept. 23, 2008]

Subpart G—[Reserved]

Subpart H—Immediate Disaster Assistance Program

SOURCE: 75 FR 60598, Oct. 1, 2010, unless otherwise noted.

§ 123.700 What is the Immediate Disaster Assistance Program?

(a) 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.

(b) *Definitions.* As used in this subpart, the terms below are defined as follows:

Contiguous Counties means the counties or other political subdivisions identified in the IDAP-Eligible Disaster Declaration as abutting the Primary Counties.

Credit Elsewhere means that the IDAP Borrower is able to address disaster losses using available personal or business resources or access to nonfederal lending sources at reasonable rates and terms.

Declared Disaster is a disaster event for which an IDAP-Eligible Disaster Declaration has been issued.

Declared Disaster Area means the Primary Counties and the Contiguous Counties identified for a particular Declared Disaster.

Disaster Loan means a disaster loan authorized by Section 7(b) of the Small Business Act.

IDAP Borrower is the obligor of an IDAP loan.

IDAP Lender is a financial institution participating in the IDAP loan program, subject to the requirements of this subpart.

IDAP Loan Program Requirements are requirements imposed upon an IDAP Lender by statute, SBA regulations, any agreement the IDAP Lender has executed with SBA, SBA SOPs, SBA procedural guidance, official SBA notices and forms applicable to the IDAP loan program, and loan authorizations, as such requirements are issued and revised by SBA from time to time.

IDAP-Eligible Disaster Declaration means a Major Disaster Declaration, SBA Administrative Disaster Declaration or SBA EIDL-Only Disaster Declaration in which SBA has indicated that IDAP loans are available.

Initial Period is the IDAP loan repayment period that begins upon the initial disbursement of an IDAP loan and ends upon (i) full repayment of the IDAP loan from the proceeds of the IDAP Borrower's Disaster Loan; (ii) SBA notice to the IDAP Lender of decline of the IDAP Borrower's Disaster Loan Application; or (iii) receipt by the IDAP Lender of partial repayment of the IDAP loan from the proceeds of the Disaster Loan; provided that if the IDAP loan has not been fully disbursed at such time, the Initial Period shall not end until the IDAP loan is fully disbursed.

Major Disaster Declaration means a disaster declaration issued under §123.3(a)(1) of this part.

Other Recoveries are other compensation for disaster losses and include, but

are not limited to: Proceeds of policies of insurance or other indemnifications; grants or other reimbursement (including loans) from government agencies or private organizations; claims for civil liability against other individuals, organizations or governmental entities; gifts; condemnation awards; and salvage (including any sale or re-use) of items of disaster-damaged property. If an IDAP Borrower has voluntarily paid insurance recoveries to a recorded lienholder, the amount paid is considered to be Other Recoveries.

Primary Counties means the counties or other political subdivisions identified in the IDAP-Eligible Disaster Declaration as having been adversely affected by the disaster.

SBA Administrative Disaster Declaration means a disaster declaration issued under § 123.3(a)(3) of this part.

SBA EIDL-Only Disaster Declaration means a disaster declaration issued under § 123.3(a)(5) of this part.

Substantial Economic Injury exists when a business concern is unable to meet its obligations as they mature or to pay its ordinary and necessary operating expenses. Loss of anticipated profits or a drop in sales is not considered substantial economic injury.

Term Period is the repayment period that begins following:

(i) SBA notice to the IDAP Lender of decline of the IDAP Borrower's Disaster Loan application;

(ii) Receipt by the IDAP Lender of partial repayment of the IDAP loan from the proceeds of the Disaster Loan; or

(iii) Final disbursement of the IDAP loan, whichever is later, and ends when the IDAP loan is repaid in full.

§ 123.701 What is the application procedure for an IDAP loan?

A prospective IDAP Borrower must apply to an IDAP Lender for an IDAP loan by the application deadline for prospective IDAP Borrowers established by SBA in the IDAP-Eligible Disaster Declaration. If the IDAP Lender approves the application, it must submit a request for IDAP loan approval to SBA by the application deadline for IDAP Lenders established by SBA in the IDAP-Eligible Disaster Declaration. SBA will issue an approval or a decline of the IDAP Lender's request within 36 hours of receipt by SBA. A prospective IDAP Borrower will receive notice of approval or decline of its loan application from the IDAP Lender. Notice of decline will include the reasons. If an IDAP loan is approved, a loan authorization will be issued.

§ 123.702 What are the eligibility requirements for an IDAP loan?

(a) *Eligible IDAP applicants.* To be eligible for an IDAP loan, an applicant business must meet all of the requirements set forth below. The applicant business must:

(1) Be located within a Declared Disaster Area;

(2) Have eligible disaster losses as follows:

(i) For a Major Disaster Declaration, if located in a Primary County, have sustained damage to real or business personal property in the Declared Disaster or, if located in a Primary or Contiguous County, have sustained Substantial Economic Injury as a direct result of the Declared Disaster; or

(ii) For an SBA Administrative Disaster Declaration, have sustained damage to real or business personal property in the Declared Disaster or sustained Substantial Economic Injury as a direct result of the Declared Disaster; or

(iii) For an SBA EIDL-Only Disaster Declaration, have sustained Substantial Economic Injury as a direct result of the Declared Disaster;

(3) Have been a small business concern under the size requirements applicable to disaster loan assistance under part 121 of this chapter (including affiliates) when the Declared Disaster commenced;

(4) Together with affiliates and principal owners, not have Credit Elsewhere;

(5) Apply to SBA for a Disaster Loan within the applicable deadline and before any disbursement of the IDAP loan; and

(6) Be creditworthy and demonstrate reasonable assurance of repayment of the IDAP loan.

(b) *Ineligible IDAP applicants.* An applicant business is not eligible for an IDAP loan if it is:

(1) A non-profit or charitable concern;

(2) A business that was not a small business concern under the size requirements of part 121 of this chapter (including affiliates) when the Declared Disaster commenced;

(3) A consumer or marketing cooperative;

(4) Deriving more than one-third of gross annual revenue from legal gambling activities or a business whose purpose for being is gambling regardless of its ability to meet the one-third criteria established for otherwise eligible concerns;

(5) A loan packager which earns more than one-third of its gross annual revenue from packaging SBA loans;

(6) Principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs, whether in a religious or secular setting;

(7) Primarily engaged in political or lobbying activities;

(8) A private club or business that limits the number of memberships for reasons other than capacity;

(9) Presents live performances of a prurient sexual nature or derives directly or indirectly more than *de minimis* gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;

(10) Engaged in the production or distribution of any product or service that has been determined to be obscene by a court;

(11) Engaged in any illegal activity;

(12) A government owned entity (except for a business owned or controlled by a Native American tribe);

(13) A business in which the IDAP Lender or any of its Associates (as defined in §120.10) owns an equity interest;

(14) Primarily engaged in subdividing real property into lots and developing it for resale on its own account;

(15) Engaged in lending, multi-level sales distribution, speculation, or investment (except for real estate investment with property held for rental when the Declared Disaster occurred);

(16) Delinquent on any Federal obligation, including but not limited to any Federal loans, contracts, grants, student loans or taxes, or has a judgment lien for a Federal debt against its property;

(17) Located in a Special Flood Hazard Area (SFHA), as designated by the Federal Emergency Management Agency, and has not maintained required flood insurance on its business property (regardless of the type of disaster);

(18) Located in a SFHA within a nonparticipating community or a community under sanction;

(19) Located in a building that was newly constructed or substantially improved on or after February 9, 1989, and is currently located seaward of mean high tide or entirely in or over water;

(20) Located in a Coastal Barrier Resource Area (COBRA);

(21) A business that had a substantial change of ownership (more than 50 percent) after the Declared Disaster and no contract of sale existed prior to that time;

(22) A business that was established after the Declared Disaster;

(23) Relocating out of the Declared Disaster Area;

(24) Primarily engaged in the production of food and fiber, ranching and raising of livestock, aquaculture and all other farming and agriculture-related industries (except for a nursery deriving less than 50 percent of annual receipts from the production and sale of ornamental plants and other nursery products, a small agricultural cooperative or a small producer cooperative); or

(25) A sole proprietorship, unincorporated association, partnership or limited liability company in which a Member of Congress (or a household member) has an ownership interest.

(c) *Character requirements.* An applicant business is not eligible for an IDAP loan if any Associate (as defined in §120.10) of the applicant business:

(1) Is presently under indictment, on parole or probation;

(2) Has ever been charged with, arrested for, convicted, placed on pretrial diversion, and/or placed on any form of probation (including adjudication withheld pending probation) for any criminal offense other than a minor motor vehicle violation (including offenses which have been dismissed, discharged, or not prosecuted);

(3) Is at least a 50 percent or more owner of applicant business, and is more than 60 days delinquent on any obligation to pay child support arising under an administrative order, court order, repayment agreement between the holder and a custodial parent, or repayment agreement between the holder and a state agency providing child support enforcement services;

(4) Is an undocumented (illegal) alien; or

(5) Is delinquent on any Federal obligation, including but not limited to any Federal loans, contracts, grants, student loans or taxes.

§ 123.703 What are the terms of an IDAP loan?

(a) *Guaranty percentage.* The SBA guaranteed share of an IDAP loan is 85%.

(b) *Maximum loan size.* (1) If the amount of an IDAP Borrower's disaster losses is $25,000 or less, the principal amount of an IDAP loan must not exceed the amount of disaster losses minus Other Recoveries.

(2) If the amount of an IDAP Borrower's disaster losses is more than $25,000, the principal amount of an IDAP loan must not exceed $25,000 minus Other Recoveries.

(c) *Disbursement.* The disbursement period for an IDAP loan is generally up to 30 days from the date of SBA approval of the IDAP loan. If the IDAP Lender is notified before disbursement of the IDAP loan that the IDAP Borrower has received Other Recoveries, the IDAP Lender must decrease the approved amount of the IDAP loan by the amount of the Other Recoveries. If the IDAP Borrower's Disaster Loan is approved, SBA will contact the IDAP Lender when SBA is ready to disburse the Disaster Loan. Upon receipt of such notification by SBA, the IDAP Lender must cancel any remaining undisbursed amount of the IDAP loan.

(d) *Repayment*—(1) *Initial Period.* During the Initial Period, an IDAP Borrower will pay interest only on the disbursed principal balance of the IDAP loan. If SBA approves the IDAP Borrower's Disaster Loan application, SBA will require that the IDAP loan be repaid first from the proceeds of the Disaster Loan. If the IDAP Borrower receives Other Recoveries during the Initial Period, the IDAP Borrower must, in accordance with §123.703(h), remit the Other Recoveries to the IDAP Lender, and the IDAP Lender will apply the Other Recoveries to the IDAP loan. If the IDAP Borrower's Disaster Loan application is declined or if the amount of the approved Disaster Loan is insufficient to repay the IDAP loan in full, the remaining balance of the IDAP loan will be repaid during the Term Period as described in paragraph (2). The Initial Period ends upon (i) full repayment of the IDAP loan from the proceeds of the IDAP Borrower's Disaster Loan; (ii) SBA notice to the IDAP Lender of decline of the IDAP Borrower's Disaster Loan Application; or (iii) receipt by the IDAP Lender of partial repayment of the IDAP loan from the proceeds of the Disaster Loan; provided that if the IDAP loan has not been fully disbursed at such time, the Initial Period shall not end until the IDAP loan is fully disbursed. If an IDAP Borrower withdraws an application for a Disaster Loan, fails to close on an approved Disaster Loan or if the approved Disaster Loan is cancelled, the IDAP loan is immediately due and payable by the IDAP Borrower.

(2) *Term Period.* If SBA declines the IDAP Borrower's Disaster Loan application or the approved amount of the Disaster Loan is insufficient to repay the IDAP loan in full, the IDAP Borrower must pay principal and interest on the IDAP loan, with the IDAP loan balance to be fully amortized over a period that is at least 10 years from the date of final disbursement of the IDAP loan, but no more than 25 years from the date of final disbursement. The Term Period begins in the first month following SBA notice to the IDAP Lender of decline of the IDAP Borrower's Disaster Loan application, receipt by the IDAP Lender of partial repayment of the IDAP loan from the proceeds of the Disaster Loan, or final disbursement of the IDAP loan, whichever is later. Balloon payments are not permitted. The IDAP Borrower may prepay all or a portion of the principal during the life of the loan without penalty. If the IDAP Borrower receives

Other Recoveries during the Term Period, the IDAP Borrower must, in accordance with §123.703(h), remit the Other Recoveries to the IDAP Lender, and the IDAP Lender will apply the Other Recoveries to the IDAP loan.

(e) *Interest rate*—(1) *Initial Period.* The maximum interest rate an IDAP Lender may charge an IDAP Borrower during the Initial Period will be published by SBA in the FEDERAL REGISTER from time to time. This rate must be a fixed rate.

(2) *Term Period.* The maximum interest rate an IDAP Lender may charge an IDAP Borrower during the Term Period will be published in the FEDERAL REGISTER from time to time. The IDAP Lender may charge either a fixed or a variable rate during the Term Period.

(f) *Number of IDAP loans per small business.* No small business (including affiliates) may obtain more than one IDAP loan per Declared Disaster. The provisions of §120.151 do not apply to IDAP loans.

(g) *Personal guarantees.* Holders of at least a 20 percent ownership interest in the IDAP Borrower must guarantee the IDAP loan.

(h) *Agreement to remit Other Recoveries.* IDAP Borrowers must promptly notify the IDAP Lender of the receipt of Other Recoveries, and must promptly remit the proceeds of Other Recoveries to the IDAP Lender. The IDAP Lender must apply the Other Recoveries to the IDAP loan balance. SBA does not require any additional collateral for IDAP loans.

§ 123.704 Are there restrictions on how IDAP loan funds may be used?

(a) IDAP loan proceeds may only be used for the following purposes:

(1) For a Major Disaster Declaration:

(i) If the IDAP Borrower is located in a Primary County, to restore or replace the IDAP Borrower's real or business personal property to its condition before the Declared Disaster occurred and/or for working capital necessary to carry the IDAP Borrower until resumption of normal operations and for expenditures necessary to alleviate the specific economic injury, but not to exceed that which the IDAP Borrower could have provided had the injury not occurred; or

(ii) If the IDAP Borrower is located in a Contiguous County, for working capital necessary to carry the IDAP Borrower until resumption of normal operations and for expenditures necessary to alleviate the specific economic injury, but not to exceed that which the IDAP Borrower could have provided had the injury not occurred.

(2) For an SBA Administrative Disaster Declaration, if the IDAP Borrower is located in either a Primary County or a Contiguous County, to restore or replace the IDAP Borrower's real or business personal property to its condition before the Declared Disaster occurred and/or for working capital necessary to carry the IDAP Borrower until resumption of normal operations and for expenditures necessary to alleviate the specific economic injury, but not to exceed that which the IDAP Borrower could have provided had the injury not occurred.

(3) For an SBA EIDL-Only Disaster Declaration, if the IDAP Borrower is located in either a Primary County or a Contiguous County, for working capital necessary to carry the IDAP Borrower until resumption of normal operations and for expenditures necessary to alleviate the specific economic injury, but not to exceed that which the IDAP Borrower could have provided had the injury not occurred.

(b) IDAP loan proceeds may not be used to:

(1) Refinance or repay indebtedness incurred prior to the Declared Disaster (other than regularly due installments);

(2) Make payments on loans owned by another federal agency (including SBA) or a Small Business Investment Company licensed under the Small Business Investment Act;

(3) Pay, directly or indirectly, any obligations resulting from a federal, state or local tax penalty as a result of negligence or fraud, or any non-tax criminal fine, civil fine, or penalty for non-compliance with a law, regulation, or order of a federal, state, regional, or local agency or similar matter;

(4) Pay dividends, bonuses or other disbursements to owners, partners, officers or stockholders, except for reasonable remuneration directly related

to their performance of services for the business;

(5) Make repairs on a building rented by the IDAP Borrower if the IDAP Borrower's lease does not require the IDAP Borrower to make such repairs;

(6) Make repairs to a condominium unit owned by the IDAP Borrower;

(7) Replace landscaping in excess of $5,000 unless the disaster damaged landscaping fulfilled a functional need or contributed toward the generation of business;

(8) Repair or replace property not located within the Declared Disaster Area at the time of the Declared Disaster;

(9) Repay stockholder/Associate loans, except where the funds were injected on an interim basis as a result of the Declared Disaster and non-repayment would cause undue hardship to the stockholder/Associate;

(10) Expand facilities or acquire fixed assets, except for replacement of disaster-damaged fixed assets;

(11) Pay for contractor malfeasance;

(12) Replace damaged property that consists of cash or securities;

(13) Replace damaged property if the replacement value is extraordinarily high and not easily verified, such as the value of antiques, artworks or hobby collections; or

(14) Repair or replace damaged property where the IDAP Borrower's only interest is in the form of a security interest, mortgage or deed of trust.

§ 123.705 Are there any fees associated with IDAP loans?

(a) *IDAP Lender Fees.* An IDAP Lender must not impose any fees or direct costs on an IDAP Borrower, except for the following allowed fees or direct costs:

(1) The reasonable direct costs of liquidation;

(2) A late payment fee not to exceed 5 percent of the scheduled IDAP loan payment; and

(3) An application fee not to exceed $250. Notwithstanding the provisions of 13 CFR 103.5, no compensation agreement is required for the application fee. If an undisbursed IDAP loan is cancelled pursuant to §123.703(c), the IDAP Lender may retain the application fee.

(b) *SBA Fees.* SBA will not impose any guarantee fees on an IDAP Lender making an IDAP loan.

(c) *Prohibition on paid loan packagers, referral agents or brokers.* Other than the application fee set forth in (a)(3) of this section, no IDAP Lender or third party may charge an IDAP Borrower a fee to assist in the preparation of an IDAP loan application or application materials. No third party may charge an IDAP Borrower or an IDAP Lender a referral fee or broker's fee in connection with an IDAP loan.

§ 123.706 What are the requirements for IDAP Lenders?

(a) *IDAP Lenders.* An IDAP Lender must be a 7(a) Lender (as defined in §120.10). Notwithstanding the provisions of §120.470(a), a Small Business Lending Company (SBLC) that is a 7(a) Lender may make IDAP loans. An IDAP Lender must sign a supplemental Loan Guarantee Agreement for the IDAP loan program. An IDAP Lender must comply and maintain familiarity with the IDAP Loan Program Requirements, as such requirements are revised from time to time. IDAP Loan Program Requirements in effect at the time that an IDAP Lender takes an action in connection with a particular IDAP loan govern that specific action. With respect to their activities in the IDAP loan program, IDAP Lenders are subject to the requirements of §§120.140 (What ethical requirements apply to participants?), 120.197 (Notifying SBA's Office of Inspector General of suspected fraud), 120.400 (Loan Guarantee Agreements), 120.410 (Requirements for all participating Lenders), 120.411 (Preferences), 120.412 (Other services Lenders may provide Borrowers), and 120.413 (Advertisement of relationship with SBA) of this chapter. An IDAP Lender and its contractor(s) are independent contractors that are responsible for their own actions with respect to an IDAP loan. SBA has no responsibility or liability for any claim by an IDAP Borrower, guarantor or other party alleging injury as a result of any allegedly wrongful action taken by an IDAP Lender or an employee, agent or contractor of an IDAP Lender.

(b) *Delegated authority.* An IDAP loan must be processed, serviced and liquidated under an IDAP Lender's delegated authority provided by the supplemental Loan Guarantee Agreement for the IDAP loan program. Non-delegated processing is not available for the IDAP loan program. An IDAP Lender is responsible for all IDAP loan decisions regarding eligibility (including size) and creditworthiness. In determining creditworthiness, an IDAP Lender must use the existing practices and procedures that the IDAP Lender uses for its non-SBA guaranteed commercial loans of a similar size. The IDAP Lender's existing practices and procedures must be appropriate and generally accepted, proven and prudent credit evaluation processes and procedures, which may include credit scoring, and must ensure that there is reasonable assurance of repayment. In disbursing the IDAP loan, the IDAP Lender must use the same disbursement procedures and documentation as it uses for its similarly sized non-SBA guaranteed commercial loans. An IDAP Lender is also responsible for confirming that all IDAP loan processing, closing, servicing and liquidation decisions are correct and that all IDAP Loan Program Requirements have been followed.

(c) *IDAP Lender reporting.* An IDAP Lender must report on its IDAP loans in accordance with requirements established by SBA from time to time.

(d) *Servicing.* Each IDAP Lender must service all of its IDAP loans in accordance with the existing practices and procedures that the IDAP Lender uses for its non-SBA guaranteed commercial loans. In all circumstances, such practices and procedures must be commercially reasonable and consistent with prudent lending standards and in accordance with IDAP Loan Program Requirements. SBA's prior written consent is required for servicing actions that may have significant exposure implications for SBA. SBA may require written notice of other servicing actions it considers necessary for portfolio management purposes.

(e) *Liquidations.* Each IDAP Lender must be responsible for liquidating its defaulted IDAP loans. IDAP loans will be liquidated in accordance with the existing practices and procedures that the IDAP Lender uses for its non-SBA guaranteed commercial loans. In all circumstances, such practices and procedures must be commercially reasonable and consistent with prudent lending standards and in accordance with IDAP Loan Program Requirements. IDAP loans with *de minimis* value may, at the IDAP Lender's request and with SBA's approval, be liquidated by SBA or its agent(s). Significant liquidation actions taken on IDAP loans must be documented. The reimbursement of IDAP Lender liquidation expenses is limited to the amount of the recovery on the IDAP loan.

(f) *Purchase requests.* An IDAP Lender may request SBA to purchase the guaranteed portion of an IDAP loan when there has been an uncured payment default exceeding 60 days or when the IDAP Borrower has declared bankruptcy. IDAP loans are subject to the 7(a) loan program requirements of §§ 120.520 (Purchase of 7(a) loan guarantees), 120.521 (What interest rate applies after SBA purchases its guaranteed portion?), 120.522 (Payment of accrued interest to the Lender or Registered Holder when SBA purchases the guaranteed portion), 120.523 (What is the ''earliest uncured payment default''?), 120.524 (When is SBA released from liability on its guarantee?), 120.542 (Payment by SBA of legal fees and other expenses) and 120.546 (Loan asset sales) of this chapter.

(g) *Prohibition on secondary market sales, securitizations, loan participations and loan sales.* An IDAP Lender may not sell the guaranteed portion of an IDAP loan in the secondary market, securitize the unguaranteed portion of an IDAP loan, participate any portion of an IDAP loan with another lender, or sell all of its interest in an IDAP loan.

(h) *Loan pledges.* An IDAP Lender may pledge an IDAP loan subject to the 7(a) loan program requirements of §§ 120.434 and 120.435 of this chapter.

(i) *Oversight.* All IDAP Lenders are subject to the supervision and enforcement provisions applicable to 7(a) Lenders in part 120, subpart I of this chapter (§§ 120.1000 through 120.1600). In addition, an IDAP Lender that is an SBA Supervised Lender (as defined in

§120.10) is subject to the requirements of §§120.460 through 120.490, as applicable.

PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

Subpart A—8(a) Business Development

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AUTHORITY: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644, 42 U.S.C. 9815; and Pub. L. 99–661, 100 Stat. 3816; Sec. 1207, Pub. L. 100–656, 102 Stat. 3853; Pub. L. 101–37, 103 Stat. 70; Pub. L. 101–574, 104 Stat. 2814; Sec. 8021, Pub. L. 108–87, 117 Stat. 1054; and Sec. 330, Pub. L. 116–260.

SOURCE: 63 FR 35739, June 30, 1998, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 124 appear at 72 FR 50040, Aug. 30, 2007, and 76 FR 8253, Feb. 11, 2011.

Subpart A—8(a) Business Development

PROVISIONS OF GENERAL APPLICABILITY

§ 124.1 What is the purpose of the 8(a) Business Development program?

Sections 8(a) and 7(j) of the Small Business Act authorize a Minority Small Business and Capital Ownership Development program (designated the 8(a) Business Development or ''8(a) BD'' program for purposes of the regulations in this part). The purpose of the 8(a) BD program is to assist eligible small disadvantaged business concerns compete in the American economy through business development.

§ 124.2 What length of time may a business participate in the 8(a) BD program?

(a) Except as set forth in paragraph (b) of this section, a Participant receives a program term of nine years from the date of SBA's approval letter certifying the concern's admission to the program. The Participant must maintain its program eligibility during its tenure in the program and must inform SBA of any changes that would adversely affect its program eligibility. The nine-year program term may be shortened only by termination, early graduation (including voluntary early graduation) or voluntary withdrawal as provided for in this subpart.

(b) Pursuant to section 330 of the Consolidated Appropriations Act, 2021, and section 869 of the National Defense Authorization Act for Fiscal Year 2021, a small business concern participating the 8(a) BD program on March 13, 2020, may elect to extend such participation by a period of one year from the end of its program term, regardless of whether it previously elected to suspend participation in the program under the procedures set forth in § 124.305(h)(1)(iii).

(1) Unless expressly declined in writing, SBA will extend a Participant's

program term by one year if the concern was a Participant in the 8(a) BD program on March 13, 2020, and continued its participation through January 13, 2021. Declines of such extension must be submitted to: Deputy Associate Administrator, Office of Business Development, Small Business Administration, 409 Third Street SW, Washington, DC 20416, or email to *8aQuestions@sba.gov*.

(2) Except as set forth in paragraph (b)(2)(iii) of this section any concern that was a Participant in the 8(a) BD program on March 13, 2020, but graduated or otherwise left the program before January 13, 2021 may elect to be readmitted to the 8(a) BD program for the period of time equal to one year from the date of the original expiration of the concern's program term. A concern seeking to be readmitted to the 8(a) BD program must notify SBA of its intent to be readmitted no later than March 15, 2021.

Example 1 to paragraph (b)(2) introductory text. Business Concern A was a Participant in the 8(a) BD program on September 9, 2020, and its program term expired on November 25, 2020. On January 28, 2021, Business Concern A notified SBA of its election to be readmitted to the 8(a) BD program under the process outlined in this paragraph (b)(2). Business Concern A would be eligible to participate in the 8(a) BD program until November 25, 2021.

(i) All requests for readmittance must be submitted to: Associate Administrator, Office of Business Development, Small Business Administration, 409 Third Street SW, Washington, DC 20416, or email to *8aQuestions@sba.gov*.

(ii) As part of a concern's notification to SBA of its intent to be readmitted to the 8(a) BD program, the concern must certify that it continues to meet the applicable 8(a) BD program eligibility requirements as set forth in §§ 124.101 through 124.111. SBA may, in its discretion, request information or documentation to assess whether the concern meets the eligibility criteria for readmittance.

(iii) Business concerns that were Participants in the 8(a) BD program on March 13, 2020, but were terminated or early graduated by SBA or elected to voluntarily withdraw or early graduate in lieu of termination are not eligible to extend their program terms.

(iv) The readmittance of a business concern owned and controlled by a tribe, ANC, NHO, or CDC to the 8(a) BD program under this paragraph (b)(2) will be disregarded for purposes of the ownership restrictions applicable to Participants owned by a tribe, ANC, NHO, or CDC as set forth in §§ 124.109(c)(3)(ii), 124.110(e), and 124.111(d). The date to commence the two-year waiting period for the tribe, ANC, NHO, or CDC to own another business concern in the 8(a) BD program with the same primary NAICS code as the readmitted concern will not be readjusted with the firm's readmittance.

[86 FR 2532, Jan. 13, 2021]

§ 124.3 What definitions are important in the 8(a) BD program?

Alaska Native, as defined by the Alaska Native Claims Settlement Act (43 U.S.C. 1602), means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation or ANC means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*)

Bona fide place of business, for purposes of 8(a) construction procurements, means a location where a Participant regularly maintains an office within the appropriate geographical boundary which employs at least one individual who works at least 20 hours per week at that location. The term does not include construction trailers or other temporary construction sites.

Community Development Corporation or CDC means a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, *et seq.*

Concern is defined in part 121 of this title.

Days means calendar days unless otherwise specified.

Day-to-day operations of a firm means the marketing, production, sales, and administrative functions of the firm.

Follow-on requirement or contract. The determination of whether a particular requirement or contract is a follow-on includes consideration of whether the scope has changed significantly, requiring meaningful different types of work or different capabilities; whether the magnitude or value of the requirement has changed by at least 25 percent for equivalent periods of performance; and whether the end user of the requirement has changed. As a general guide, if the procurement satisfies at least one of these three conditions, it may be considered a new requirement. However, meeting any one of these conditions is not dispositive that a requirement is new. In particular, the 25 percent rule cannot be applied rigidly in all cases. Conversely, if the requirement satisfies none of these conditions, it is considered a follow-on procurement.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, and mother-in-law.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. *See* definition of ''tribally-owned concern.''

NAICS code means North American Industry Classification System code.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Negative control is defined in part 121 of this title.

Non-disadvantaged individual means any individual who does not claim disadvantaged status, does not qualify as disadvantaged, or upon whose disadvantaged status an applicant or Participant does not rely in qualifying for 8(a) BD program participation.

Participant means a small business concern admitted to participate in the 8(a) BD program.

Primary industry classification means the six digit North American Industry Classification System (NAICS) code designation which best describes the primary business activity of the 8(a) BD applicant or Participant. The NAICS code designations are described in the North American Industry Classification System book published by the U.S. Office of Management and Budget. SBA utilizes § 121.107 of this chapter in determining a firm's primary industry classification. A Participant may change its primary industry classification where it can demonstrate to SBA by clear evidence that the majority of its total revenues during a three-year period have evolved from one NAICS code to another.

Principal place of business means the business location where the individuals who manage the concern's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where the business records are kept are in different locations, SBA will determine the principal place of business for program purposes.

Program year means a 12-month period of an 8(a) BD Participant's program participation. The first program year begins on the date that the concern is certified to participate in the 8(a) BD program and ends one year later. Each subsequent program year begins on the Participant's anniversary of program certification and runs for one 12-month period.

Regularly maintains an office means conducting business activities as an on-going business concern from a fixed

location on a daily basis. The best evidence of the regular maintenance of an office is documentation that shows that third parties routinely transact business with a Participant at a location within a particular geographical area. Such evidence includes lease agreements, payroll records, advertisements, bills, correspondence, and evidence that the Participant has complied with all local requirements concerning registering, licensing, or filing with the State or County where the place of business is located. Although a firm would generally be required to have a license to do business in a particular location in order to ''regularly maintain an office'' there, the firm would not be required to have an additional construction license or other specific type of license in order to regularly maintain an office.

Same or similar line of business means business activities within the same four-digit ''Industry Group'' of the NAICS Manual as the primary industry classification of the applicant or Participant. The phrase ''same business area'' is synonymous with this definition.

Self-marketing of a requirement occurs when a Participant identifies a requirement that has not been committed to the 8(a) BD program and, through its marketing efforts, causes the procuring activity to offer that specific requirement to the 8(a) BD program on the Participant's behalf. A firm which identifies and markets a requirement which is subsequently offered to the 8(a) BD program as an open requirement or on behalf of another Participant has not ''self-marketed'' the requirement within the meaning of this part.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

Unconditional ownership means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8253, Feb. 11, 2011; 77 FR 28237, May 14, 2012; 85 FR 66183, Oct. 16, 2020; 88 FR 26204, Apr. 27, 2023]

§ 124.4 What restrictions apply to fees for applicant and Participant representatives?

(a) The compensation received by any packager, agent or representative of an 8(a) applicant or Participant for assisting the applicant in obtaining 8(a) certification or for assisting the Participant in obtaining 8(a) contracts, or any other assistance to support program participation, must be reasonable in light of the service(s) performed by the packager, agent or representative.

(b) In assisting a Participant obtain one or more 8(a) contracts, a packager, agent or representative cannot receive a fee that is a percentage of the gross contract value.

(c) For good cause, the AA/BD may initiate proceedings to suspend or revoke a packager's, agent's or representative's privilege to assist applicants obtain 8(a) certification, assist Participants obtain 8(a) contracts, or any other assistance to support program participation. Good cause is defined in § 103.4 of these regulations.

(1) The AA/BD may send a show cause letter requesting the agent or representative to demonstrate why the agent or representative should not be suspended or proposed for revocation, or may immediately send a written notice suspending or proposing revocation, depending upon the evidence in the administrative record. The notice will include a discussion of the relevant facts and the reason(s) why the AA/BD believes that good cause exists.

(2) Unless the AA/BD specifies a different time in the notice, the agent or representative must respond to the notice within 30 days of the date of the notice with any facts or arguments showing why good cause does not exist. The agent or representative may request additional time to respond, which the AA/BD may grant in his or her discretion.

(3) After considering the agent's or representative's response, the AA/BD will issue a final determination, setting forth the reasons for this decision and, if a suspension continues to be effective or a revocation is implemented, the term of the suspension or revocation.

(d) The AA/BD may refer a packager, agent, or other representative to SBA's Suspension and Debarment Official for possible Government-wide suspension or debarment where appropriate, including where it appears that the packager, agent or representative assisted an applicant to or Participant in the 8(a) BD program submit information to SBA that the packager, agent or representative knew was false or materially misleading.

[76 FR 8253, Feb. 11, 2011]

ELIGIBILITY REQUIREMENTS FOR PARTICIPATION IN THE 8(a) BUSINESS DEVELOPMENT PROGRAM

§ 124.101 What are the basic requirements a concern must meet for the 8(a) BD program?

Generally, a concern meets the basic requirements for admission to the 8(a) BD program if it is a small business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States, and which demonstrates potential for success.

[76 FR 8254, Feb. 11, 2011]

§ 124.102 What size business is eligible to participate in the 8(a) BD program?

(a)(1) An applicant concern must qualify as a small business concern as defined in part 121 of this title. The applicable size standard is the one for its primary industry classification. The rules for calculating the size of a tribally-owned concern, a concern owned by an Alaska Native Corporation, a concern owned by a Native Hawaiian Organization, or a concern owned by a Community Development Corporation are additionally affected by §§ 124.109, 124.110, and 124.111, respectively.

(2) In order to remain eligible to participate in the 8(a) BD program after certification, a firm must generally remain small for its primary industry classification, as adjusted during the program. SBA may graduate a Participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code, as adjusted, for three successive program years, unless the firm demonstrates that through its growth and development its primary industry is changing, pursuant to the criteria described in 13 CFR 121.107, to a related secondary NAICS code that is contained in its most recently approved business plan. The firm's business plan must contain specific targets, objectives, and goals for its continued growth and development under its new primary industry.

(b) If 8(a) BD program officials determine that a concern may not qualify as small, they may deny an application for 8(a) BD program admission or may request a formal size determination under part 121 of this title.

(c) A concern whose application is denied due to size by SBA may request a formal size determination with the SBA Government Contracting Area Office serving the geographic area in which the principal office of the business is located under part 121 of this chapter. Where the SBA Government Contracting Area Office determines that an applicant qualifies as a small business concern for the size standard corresponding to its primary NAICS code:

(1) The AA/BD will certify the concern as eligible to participate in the 8(a) BD program if size was the only reason for decline; or

(2) The concern may reapply for participation in the 8(a) BD program at any point after 90 days from the AA/BD's decline if size was not the only reason for decline. In such a case, the AA/BD will accept the size determination as conclusive of the concern's small business status, provided the applicant concern has not completed an additional fiscal year in the intervening period and SBA believes that the additional fiscal year changes the applicant's size.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8254, Feb. 11, 2011; 88 FR 26204, Apr. 27, 2023]

§ 124.103 Who is socially disadvantaged?

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.

(b) *Members of designated groups.* (1) There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. Being born in a country does not, by itself, suffice to make the birth country an individual's country of origin for purposes of being included within a designated group.

(2) An individual must demonstrate that he or she has held himself or herself out, and is currently identified by others, as a member of a designated group if SBA requires it.

(3) The presumption of social disadvantage may be overcome with credible evidence to the contrary. Individuals possessing or knowing of such evidence should submit the information in writing to the Associate Administrator for Business Development (AA/BD) for consideration.

(c) *Individuals not members of designated groups.* (1) An individual who is not a member of one of the groups presumed to be socially disadvantaged in paragraph (b)(1) of this section must establish individual social disadvantage by a preponderance of the evidence. Such individual should present corroborating evidence to support his or her claim(s) of social disadvantage where readily available.

(2) Evidence of individual social disadvantage must include the following elements:

(i) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, identifiable disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(ii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries;

(iii) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant; and

(iv) The individual's social disadvantage must have negatively impacted on his or her entry into or advancement in the business world. SBA will consider any relevant evidence in assessing this element, including experiences relating to education, employment and business history (including experiences relating to both the applicant firm and any other previous firm owned and/or controlled by the individual), where applicable.

(A) *Education.* SBA considers such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(B) *Employment.* SBA considers such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures

which have channeled the individual into nonprofessional or non-business fields.

(C) *Business history*. SBA considers such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

(3) An individual claiming social disadvantage must present facts and evidence that by themselves establish that the individual has suffered social disadvantage that has negatively impacted his or her entry into or advancement in the business world.

(i) Each instance of alleged discriminatory conduct must be accompanied by a negative impact on the individual's entry into or advancement in the business world in order for it to constitute an instance of social disadvantage.

(ii) SBA may disregard a claim of social disadvantage where a legitimate alternative ground for an adverse employment action or other perceived adverse action exists and the individual has not presented evidence that would render his/her claim any more likely than the alternative ground.

Example 1 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company X, she received less compensation than her male counterpart. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. Without additional facts, it is no more likely that the individual claiming disadvantage was paid less than her male counterpart because he had superior qualifications or because he had greater responsibilities in his employment position. She must identify her qualifications (education, experience, years of employment, supervisory functions) as being equal or superior to that of her male counterpart in order for SBA to consider that particular incident may be the result of discriminatory conduct.

Example 2 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company Y, she was not permitted to attend a professional development conference, even though male employees were allowed to attend similar conferences in the past. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. It is no more likely that she was not permitted to attend the conference based on gender bias than based on non-discriminatory reasons. She must identify that she was in the same professional position and level as the male employees who were permitted to attend similar conferences in the past, and she must identify that funding for training or professional development was available at the time she requested to attend the conference.

(iii) SBA may disregard a claim of social disadvantage where an individual presents evidence of discriminatory conduct, but fails to connect the discriminatory conduct to consequences that negatively impact his or her entry into or advancement in the business world.

Example to paragraph (c)(3)(iii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She provides instances where one or more male business clients utter derogatory statements about her because she is a woman. After each instance, however, she acknowledges that the clients gave her contracts or otherwise continued to do business with her. Despite suffering discriminatory conduct, this individual has not established social disadvantage because the discriminatory conduct did not have an adverse effect on her business.

(4) SBA may request an applicant to provide additional facts to support his or her claim of social disadvantage to substantiate that a negative outcome was based on discriminatory conduct instead of one or more legitimate non-discriminatory reasons.

(5) SBA will discount or disbelieve statements made by an individual seeking to establish his or her individual social disadvantage where such statements are inconsistent with other evidence contained in the record.

(6) In determining whether an individual claiming social disadvantage meets the requirements set forth in this paragraph (c), SBA will determine whether:

(i) Each specific claim establishes an incident of bias or discriminatory conduct;

(ii) Each incident of bias or discriminatory conduct negatively impacted

the individual's entry into or advancement in the business world; and

(iii) In the totality, the incidents of bias or discriminatory conduct that negatively impacted the individual's entry into or advancement in the business world establish chronic and substantial social disadvantage.

(d) *Socially disadvantaged group inclusion*—(1) *General.* Representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition SBA to be included as a presumptively socially disadvantaged group under paragraph (b)(1) of this section. Upon presentation of substantial evidence that members of the group have been subjected to racial or ethnic prejudice or cultural bias because of their identity as group members and without regard to their individual qualities, SBA will publish a notice in the FEDERAL REGISTER that it has received and is considering such a request, and that it will consider public comments.

(2) *Standards to be applied.* In determining whether a group has made an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this section, SBA must determine that:

(i) The group has suffered prejudice, bias, or discriminatory practices;

(ii) Those conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Those conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to small business owners generally.

(3) *Procedure.* The notice published under paragraph (d)(1) of this section will authorize a specified period for the receipt of public comments supporting or opposing the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings. SBA may also conduct its own research relative to the group's petition.

(4) *Decision.* In making a final decision that a group should be considered presumptively disadvantaged, SBA must find that a preponderance of the evidence demonstrates that the group has met the standards set forth in paragraph (d)(2) of this section based on SBA's consideration of the group petition, the comments from the public, and any independent research it performs. SBA will advise the petitioners of its final decision in writing, and publish its conclusion as a notice in the FEDERAL REGISTER. If appropriate, SBA will amend paragraph (b)(1) of this section to include a new group.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8254, Feb. 11, 2011; 81 FR 48579, July 25, 2016; 88 FR 26204, Apr. 27, 2023]

§ 124.104 Who is economically disadvantaged?

(a) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(b) *Submission of narrative and financial information.* (1) Each individual claiming economic disadvantage must submit personal financial information.

(2) When married, an individual claiming economic disadvantage must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated. SBA will consider a spouse's financial situation in determining an individual's access to credit and capital where the spouse has a role in the business (*e.g.*, an officer, employee or director) or has lent money to, provided credit support to, or guaranteed a loan of the business. SBA does not take into consideration community property laws when determining economic disadvantage.

(c) *Factors to be considered.* In considering diminished capital and credit opportunities, SBA will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including income for the past three years (including bonuses and the value of company stock received in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. An

individual who exceeds any one of the thresholds set forth in this paragraph for personal income, net worth or total assets will generally be deemed to have access to credit and capital and not economically disadvantaged.

(1) *Transfers within two years.* (i) Except as set forth in paragraph (c)(1)(ii) of this section, SBA will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the 8(a) BD program or within two years of a Participant's annual program review, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(ii) SBA will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(iii) In determining an individual's access to capital and credit, SBA may consider any assets that the individual transferred within such two-year period described by paragraph (c)(1)(i) of this section that SBA does not consider in evaluating the individual's assets and net worth (e.g., transfers to charities).

(2) *Net worth.* The net worth of an individual claiming disadvantage must be less than $850,000. In determining such net worth, SBA will exclude the ownership interest in the applicant or Participant and the equity in the primary personal residence (except any portion of such equity which is attributable to excessive withdrawals from the applicant or Participant). Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.

(i) A contingent liability does not reduce an individual's net worth.

(ii) Funds invested in an Individual Retirement Account (IRA) or other official retirement account will not be considered in determining an individual's net worth. In order to properly assess whether funds invested in a retirement account may be excluded from an individual's net worth, SBA may require the individual to provide information about the terms and restrictions of the account to SBA and certify that the retirement account is legitimate.

(iii) The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed $2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

(3) *Personal income for the past three years.* (i) SBA will presume that an individual is not economically disadvantaged if his or her adjusted gross income averaged over the three preceding years exceeds $400,000. The presumption may be rebutted by a showing that this income level was unusual and not likely to occur in the future, that losses commensurate with and directly related to the earnings were suffered, or by evidence that the income is not indicative of lack of economic disadvantage.

(ii) Income received from an applicant or Participant that is an S corporation, LLC or partnership will be excluded from an individual's income where the applicant or Participant provides documentary evidence demonstrating that the income was reinvested in the firm or used to pay taxes arising in the normal course of operations of the firm. Losses from the S corporation, LLC or partnership, however, are losses to the company only, not losses to the individual, and cannot be used to reduce an individual's personal income.

(4) *Fair market value of all assets.* An individual will generally not be considered economically disadvantaged if the fair market value of all his or her assets (including his or her primary residence and the value of the applicant/Participant firm) exceeds $6.5 million. The only assets excluded from this determination are funds excluded under paragraph (c)(2)(ii) of this section as being invested in a qualified IRA account.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8254, Feb. 11, 2011; 81 FR 48580, July 25, 2016; 85 FR 27660, May 11, 2020; 87 FR 69154, Nov. 17, 2022; 88 FR 26204, Apr. 27, 2023]

§ 124.105 What does it mean to be unconditionally owned by one or more disadvantaged individuals?

An applicant or Participant must be at least 51 percent unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States, except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations (CDCs). *See* § 124.3 for definition of unconditional ownership; and §§ 124.109, 124.110, and 124.111, respectively, for special ownership requirements for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, and CDCs.

(a) *Ownership must be direct.* Ownership by one or more disadvantaged individuals must be direct ownership. An applicant or Participant owned principally by another business entity or by a trust (including employee stock ownership trusts) that is in turn owned and controlled by one or more disadvantaged individuals does not meet this requirement. However, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a disadvantaged individual where the trust is revocable, and the disadvantaged individual is the grantor, a trustee, and the sole current beneficiary of the trust.

(b) *Ownership of a partnership.* In the case of a concern which is a partnership, at least 51 percent of every class of partnership interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged. The ownership must be reflected in the concern's partnership agreement.

(c) *Ownership of a limited liability company.* In the case of a concern which is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged.

(d) *Ownership of a corporation.* In the case of a concern which is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more individuals determined by SBA to be socially and economically disadvantaged.

(e) *Stock options' effect on ownership.* In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by disadvantaged individuals. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-disadvantaged individuals will be treated as exercised, except for any ownership interests which are held by investment companies licensed under the Small Business Investment Act of 1958.

(f) *Dividends and distributions.* One or more disadvantaged individuals must be entitled to receive:

(1) At least 51 percent of the annual distribution of dividends paid on the stock of a corporate applicant concern;

(2) 100 percent of the value of each share of stock owned by them in the event that the stock is sold; and

(3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock owned in the event of dissolution of the corporation.

(g) *Ownership of another current or former Participant by an immediate family member.* (1) An individual may not use his or her disadvantaged status to qualify a concern if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD program and any of the following circumstances exist:

(i) The concerns are connected by any common ownership or management, regardless of amount or position;

(ii) The concerns have a contractual relationship that was not conducted at arm's length;

(iii) The concerns share common facilities; or

(iv) The concerns operate in the same primary NAICS code and the individual seeking to qualify the applicant concern does not have management or technical experience in that primary NAICS code.

Example 1 to paragraph (g)(1). X applies to the 8(a) BD program. X is 95% owned by A and 5% by B, A's father and the majority owner in a former 8(a) Participant. Even though B has no involvement in X, X would be ineligible for the program.

Example 2 to paragraph (g)(1). Y applies to the 8(a) BD program. C owns 100% of Y. However, D, C's sister and the majority owner in a former 8(a) Participant, is acting as a Vice President in Y. Y would be ineligible for the program.

Example 3 to paragraph (g)(1). X seeks to apply to the 8(a) BD program with a primary NAICS code in plumbing. X is 100% owned by A. Z, a former 8(a) participant with a primary industry in general construction, is owned 100% by B, A's brother. For general construction jobs, Z has subcontracted plumbing work to X in the past at normal commercial rates. Subcontracting work at normal commercial rates would not preclude X from being admitted to the 8(a) BD program. X would be eligible for the program.

(2) If the AA/BD approves an application under paragraph (g)(1) of this section, SBA will, as part of its annual review, assess whether the firm continues to operate independently of the other current or former 8(a) concern of an immediate family member. SBA may initiate proceedings to terminate a firm from further participation in the 8(a) BD program if it is apparent that there are connections between the two firms that were not disclosed to the AA/BD at the time of application or that came into existence after program admittance.

(h) *Ownership restrictions for non-disadvantaged individuals and concerns.* (1) A non-disadvantaged individual (in the aggregate with all immediate family members) or a non-Participant concern that is a general partner or stockholder with at least a 10 percent ownership interest in one Participant may not own more than a 10 percent interest in another Participant that is in the developmental stage or more than a 20 percent interest in another Participant in the transitional stage of the program. This restriction does not apply to financial institutions licensed or chartered by Federal, state or local government, including investment companies which are licensed under the Small Business Investment Act of 1958.

(2) A non-Participant concern in the same or similar line of business or a principal of such concern may generally not own more than a 10 percent interest in a Participant that is in the developmental stage or more than a 20 percent interest in a Participant in the transitional stage of the program, except that:

(i) A former Participant in the same or similar line of business or a principal of such a former Participant (except those that have been terminated from 8(a) BD program participation pursuant to §§124.303 and 124.304) may have an equity ownership interest of up to 20 percent in a current Participant in the developmental stage of the program or up to 30 percent in a transitional stage Participant; and

(ii) A business concern approved by SBA to be a mentor pursuant to §125.9 of this chapter may own up to 40 percent of its 8(a) Participant protégé as set forth in §125.9(d)(2) of this chapter, whether or not that concern is in the same or similar line of business as the Participant.

(i) *Change of ownership.* A Participant may change its ownership or business structure so long as one or more disadvantaged individuals own and control it after the change and SBA approves the transaction in writing prior to the change. The decision to approve or deny a Participant's request for a change in ownership or business structure will be made and communicated to the firm by the AA/BD. The decision of the AA/BD is the final decision of the Agency. The AA/BD will issue a decision within 60 days from receipt of a request containing all necessary documentation, or as soon thereafter as possible. If 60 days lapse without a decision from SBA, the Participant cannot presume that it can complete the change without written approval from

SBA. A decision to deny a request for change of ownership or business structure may be grounds for program termination where the change is made nevertheless.

(1) Any Participant or former Participant that is performing one or more 8(a) contracts may substitute one disadvantaged individual or entity for another disadvantaged individual or entity without requiring the termination of those contracts or a request for waiver under §124.515, as long as it receives SBA's approval prior to the change.

(2) Prior approval by the AA/BD is not needed where all non-disadvantaged individual (or entity) owners involved in the change of ownership own no more than a 20 percent interest in the concern both before and after the transaction, the transfer results from the death or incapacity due to a serious, long-term illness or injury of a disadvantaged principal, or the disadvantaged individual or entity in control of the Participant will increase the percentage of its ownership interest. In determining whether a non-disadvantaged individual involved in a change of ownership has more than a 20 percent interest in the concern, SBA will aggregate the interests of all immediate family members as set forth in §124.3, as well as any individuals who are affiliated based on an identity of interest under §121.103(f). The concern must notify SBA within 60 days of such a change in ownership.

Example 1 to paragraph (i)(2). Disadvantaged individual A owns 90% of 8(a) Participant X; non-disadvantaged individual B owns 10% of X. In order to raise additional capital, X seeks to change its ownership structure such that A would own 80%, B would own 10% and C would own 10%. X can accomplish this change in ownership without prior SBA approval. Non-disadvantaged owner B is not involved in the transaction and non-disadvantaged individual C owns less than 20% of X both before and after the transaction.

Example 2 to paragraph (i)(2). Disadvantaged individual C owns 60% of 8(a) Participant Y; non-disadvantaged individual D owns 30% of Y; and non-disadvantaged individual E owns 10% of Y. C seeks to transfer 5% of Y to E. Prior SBA approval is not needed. Although non-disadvantaged individual D owns more than 20% of Y, D is not involved in the transfer. Because the only non-disadvantaged individual involved in the transfer, E, owns less than 20% of Y both before and after the transaction, prior approval is not needed.

Example 3 to paragraph (i)(2). Disadvantaged individual A owns 85% of 8(a) Participant X; non-disadvantaged individual B owns 15% of X. A seeks to transfer 15% of X to B. Prior SBA approval is needed. Although B, the non-disadvantaged owner of X, owns less than 20% of X prior to the transaction, prior approval is needed because B would own more than 20% after the transaction.

Example 4 to paragraph (i)(2). ANC A owns 60% of 8(a) Participant X; non-disadvantaged individual B owns 40% of X. B seeks to transfer 15% to A. Prior SBA approval is not needed. Although a non-disadvantaged individual who is involved in the transaction, B, owns more than 20% of X both before and after the transaction, SBA approval is not needed because the change only increases the percentage of A's ownership interest in X.

(3) Continued participation of the Participant with new ownership and the award of any new 8(a) contracts requires SBA's determination that all eligibility requirements are met by the concern and the new owners.

(4) Where a Participant requests a change of ownership or business structure, and proceeds with the change prior to receiving SBA approval (or where a change of ownership results from the death or incapacity of a disadvantaged individual for which a request prior to the change in ownership could not occur), SBA may suspend the Participant from program benefits pending resolution of the request. If the change is approved, the length of the suspension will be restored to the Participant's program term in the case of death or incapacity, or if the firm requested prior approval and waited 60 days for SBA approval.

(5) A change in ownership does not provide the new owner(s) with a new 8(a) BD program term. For example, if a concern has been in the 8(a) BD program for five years when a change in ownership occurs, the new owner will have four years remaining until program graduation.

(j) *Public offering.* A Participant's request for SBA's approval for the issuance of a public offering will be treated as a request for a change of ownership. Such request will cause SBA to examine the concern's continued need for access to the business development resources of the 8(a) BD program.

(k) *Community property laws given effect.* In determining ownership interests when an owner resides in any of the community property states or territories of the United States (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington and Wisconsin), SBA considers applicable state community property laws. If only one spouse claims disadvantaged status, that spouse's ownership interest will be considered unconditionally held only to the extent it is vested by the community property laws. A transfer or relinquishment of interest by the non-disadvantaged spouse may be necessary in some cases to establish eligibility.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8255, Feb. 11, 2011; 81 FR 48580, July 25, 2016; 85 FR 66183, Oct. 16, 2020; 88 FR 26204, Apr. 27, 2023]

§ 124.106 When do disadvantaged individuals control an applicant or Participant?

Control is not the same as ownership, although both may reside in the same person. SBA regards control as including both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. An applicant or Participant's management and daily business operations must be conducted by one or more disadvantaged individuals, except for concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations, or Community Development Corporations (CDCs). (*See* §§ 124.109, 124.110, and 124.111, respectively, for the requirements for concerns owned by Indian tribes or ANCs, for concerns owned by Native Hawaiian Organizations, and for CDC-owned concerns.) Management experience need not be related to the same or similar industry as the primary industry classification of the applicant or Participant. Disadvantaged individuals managing the concern must have managerial experience of the extent and complexity needed to run the concern. A disadvantaged individual need not have the technical expertise or possess a required license to be found to control an applicant or Participant if he or she can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. However, where a critical license is held by a non-disadvantaged individual having an equity interest in the applicant or Participant firm, the non-disadvantaged individual may be found to control the firm.

(a)(1) An applicant or Participant must be managed on a full-time basis by one or more disadvantaged individuals who possess requisite management capabilities.

(2) A disadvantaged full-time manager must hold the highest officer position (usually President or Chief Executive Officer) in the applicant or Participant and be physically located in the United States.

(3) One or more disadvantaged individuals who manage the applicant or Participant must devote full-time to the business during the normal working hours of firms in the same or similar line of business. Work in a wholly-owned subsidiary of the applicant or participant may be considered to meet the requirement of full-time devotion. This applies only to a subsidiary owned by the 8(a) firm, and not to firms in which the disadvantaged individual has an ownership interest.

(4) Any disadvantaged manager who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment and obtain the prior written approval of SBA. SBA will deny a request for outside employment which could conflict with the management of the firm or could hinder it in achieving the objectives of its business development plan.

(5) Except as provided in paragraph (d)(1) of this section, a disadvantaged owner's unexercised right to cause a change in the control or management of the applicant concern does not in itself constitute disadvantaged control and management, regardless of how quickly or easily the right could be exercised.

(b) In the case of a partnership, one or more disadvantaged individuals must serve as general partners, with control over all partnership decisions. A partnership in which no disadvantaged individual is a general partner will be ineligible for participation.

(c) In the case of a limited liability company, one or more disadvantaged individuals must serve as management members, with control over all decisions of the limited liability company.

(d) One or more disadvantaged individuals must control the Board of Directors of a corporate applicant or Participant.

(1) SBA will deem disadvantaged individuals to control the Board of Directors where:

(i) A single disadvantaged individual owns 100% of all voting stock of an applicant or Participant concern;

(ii) A single disadvantaged individual owns at least 51% of all voting stock of an applicant or Participant concern, the individual is on the Board of Directors and no super majority voting requirements exist for shareholders to approve corporation actions. Where super majority voting requirements are provided for in the concern's articles of incorporation, its by-laws, or by state law, the disadvantaged individual must own at least the percent of the voting stock needed to overcome any such super majority voting requirements; or

(iii) More than one disadvantaged shareholder seeks to qualify the concern (i.e., no one individual owns 51%), each such individual is on the Board of Directors, together they own at least 51% of all voting stock of the concern, no super majority voting requirements exist, and the disadvantaged shareholders can demonstrate that they have made enforceable arrangements to permit one of them to vote the stock of all as a block without a shareholder meeting. Where the concern has super majority voting requirements, the disadvantaged shareholders must own at least that percentage of voting stock needed to overcome any such super majority ownership requirements.

(2) Where an applicant or Participant does not meet the requirements set forth in paragraph (d)(1) of this section, the disadvantaged individual(s) upon whom eligibility is based must control the Board of Directors through actual numbers of voting directors or, where permitted by state law, through weighted voting (e.g., in a concern having a two-person Board of Directors where one individual on the Board is disadvantaged and one is not, the disadvantaged vote must be weighted—worth more than one vote—in order for the concern to be eligible for 8(a) participation). Where a concern seeks to comply with this paragraph:

(i) Provisions for the establishment of a quorum cannot permit non-disadvantaged Directors to control the Board of Directors, directly or indirectly;

(ii) Any Executive Committee of Directors must be controlled by disadvantaged directors unless the Executive Committee can only make recommendations to and cannot independently exercise the authority of the Board of Directors.

(3) An applicant must inform SBA of any super majority voting requirements provided for in its articles of incorporation, its by-laws, by state law, or otherwise. Similarly, after being admitted to the program, a Participant must inform SBA of changes regarding super majority voting requirements.

(4) Non-voting, advisory, or honorary Directors may be appointed without affecting disadvantaged individuals' control of the Board of Directors.

(5) Arrangements regarding the structure and voting rights of the Board of Directors must comply with applicable state law.

(e) Non-disadvantaged individuals may be involved in the management of an applicant or Participant, and may be stockholders, partners, limited liability members, officers, and/or directors of the applicant or Participant. However, no non-disadvantaged individual or immediate family member may:

(1) Exercise actual control or have the power to control the applicant or Participant;

(2) Be a former employer or a principal of a former employer of any disadvantaged owner of the applicant or Participant, unless it is determined by the AA/BD that the relationship between the former employer or principal and the disadvantaged individual or applicant concern does not give the former employer actual control or the potential to control the applicant or Participant and such relationship is in the best interests of the 8(a) BD firm; or

(3) Receive compensation from the applicant or Participant in any form as directors, officers or employees, including dividends, that exceeds the compensation to be received by the highest officer (usually CEO or President). The highest ranking officer may elect to take a lower salary than a non-disadvantaged individual only upon demonstrating that it helps the applicant or Participant. In the case of a Participant, the Participant must also obtain the prior written consent of the AA/BD or designee before changing the compensation paid to the highest ranking officer to be below that paid to a non-disadvantaged individual.

(f) Non-disadvantaged individuals who transfer majority stock ownership or control of the firm to an immediate family member within two years prior to the application and remain involved in the firm as a stockholder, officer, director, or key employee of the firm are presumed to control the firm. The presumption may be rebutted by showing that the transferee has independent management experience necessary to control the operation of the firm.

(g) Non-disadvantaged individuals or entities may be found to control or have the power to control in any of the following circumstances, which are illustrative only and not all inclusive:

(1) In circumstances where an applicant or Participant seeks to establish disadvantaged control of the Board of Directors through paragraph (d)(2) of this section, non-disadvantaged individuals control the Board of Directors of the applicant or Participant, either directly through majority voting membership, or indirectly, where the bylaws allow non-disadvantaged individuals effectively to prevent a quorum or block actions proposed by the disadvantaged individuals.

(2) A non-disadvantaged individual or entity, having an equity interest in the applicant or participant, provides critical financial or bonding support or a critical license to the applicant or Participant which directly or indirectly allows the non-disadvantaged individual significantly to influence business decisions of the Participant.

(3) A non-disadvantaged individual or entity controls the applicant or Participant or an individual disadvantaged owner through loan arrangements. Providing a loan guaranty on commercially reasonable terms does not, by itself, give a non-disadvantaged individual or entity the power to control a firm.

(4) Business relationships exist with non-disadvantaged individuals or entities which cause such dependence that the applicant or Participant cannot exercise independent business judgment without great economic risk.

(h) Notwithstanding the provisions of this section requiring a disadvantaged owner to control the daily business operations and long-term strategic planning of an 8(a) BD Participant, where a disadvantaged individual upon whom eligibility is based is a reserve component member in the United States military who has been called to active duty, the Participant may elect to designate one or more individuals to control the Participant on behalf of the disadvantaged individual during the active duty call-up period. If such an election is made, the Participant will continue to be treated as an eligible 8(a) Participant and no additional time will be added to its program term. Alternatively, the Participant may elect to suspend its 8(a) BD participation during the active duty call-up period pursuant to §§124.305(h)(1)(ii) and 124.305(h)(4).

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8255, Feb. 11, 2011; 81 FR 48580, July 25, 2016]

§ 124.107 What is potential for success?

SBA must determine that with contract, financial, technical, and management support from the 8(a) BD program, the applicant concern is able to perform 8(a) contracts and possess reasonable prospects for success in competing in the private sector. To do so, the applicant concern must show that it has operated and received contracts (either in the private sector, at the state or local government level, or with the Federal Government) in its primary industry classification for at least two full years immediately prior to the date of its 8(a) BD application, unless a waiver for this requirement is granted pursuant to paragraph (b) of this section.

(a) Income tax returns for each of the two previous tax years must show operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification.

(b)(1) SBA may waive the two years in business requirement if each of the following five conditions are met:

(i) The individual or individuals upon whom eligibility is based have substantial business management experience;

(ii) The applicant has demonstrated technical experience to carry out its business plan with a substantial likelihood for success if admitted to the 8(a) BD program;

(iii) The applicant has adequate capital to sustain its operations and carry out its business plan as a Participant;

(iv) The applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category; and

(v) The applicant has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and any other requirements needed to perform contracts as a Participant.

(2) The concern seeking a waiver under paragraph (b) must provide information on governmental and nongovernmental contracts in progress and completed (including letters of reference) in order to establish successful contract performance, and must demonstrate how it otherwise meets the five conditions for waiver. SBA considers an applicant's performance on both government and private sector contracts in determining whether the firm has an overall successful performance record. If, however, the applicant has performed only government contracts or only private sector contracts, SBA will review its performance on those contracts alone to determine whether the applicant possesses a record of successful performance.

(c) In assessing potential for success, SBA considers the concern's access to credit and capital, including, but not limited to, access to long-term financing, access to working capital financing, equipment trade credit, access to raw materials and supplier trade credit, and bonding capability.

(d) In assessing potential for success, SBA will also consider the technical and managerial experience of the applicant concern's managers, the operating history of the concern, the concern's record of performance on previous Federal and private sector contracts in the primary industry in which the concern is seeking 8(a) BD certification, and its financial capacity. The applicant concern as a whole must demonstrate both technical knowledge in its primary industry category and management experience sufficient to run its day-to-day operations.

(e) The Participant or individuals employed by the Participant must hold all requisite licenses if the concern is engaged in an industry requiring professional licensing (e.g., public accountancy, law, professional engineering).

(f) An applicant will not be denied admission into the 8(a) BD program due solely to a determination that potential 8(a) contract opportunities are unavailable to assist in the development of the concern unless:

(1) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or

(2) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other Participants providing the same or similar items or services.

[63 FR 35739, June 30, 1998, as amended at 88 FR 26204, Apr. 27, 2023]

§ 124.108 What other eligibility requirements apply for individuals or businesses?

(a) *Good character.* The applicant or Participant and all its principals must have good character.

(1) If during the processing of an application, SBA receives adverse information from the applicant or a credible source regarding possible criminal conduct by the applicant or any of its principals, SBA may suspend further processing of the application and refer it to SBA's Office of Inspector General (OIG) for review. If the SBA suspends the application, but does not hear back from OIG within 45 days, SBA may proceed with application processing. The

AA/BD will consider any findings of the OIG when evaluating the application.

(2) Violations of any of SBA's regulations may result in denial of participation in the 8(a) BD program. The AA/BD will consider the nature and severity of the violation in making an eligibility determination.

(3) Debarred or suspended concerns or concerns owned by debarred or suspended persons are ineligible for admission to the 8(a) BD program.

(4) An applicant is ineligible for admission to the 8(a) BD program if the applicant concern or a proprietor, partner, limited liability member, director, officer, or holder of at least 20 percent of its stock, or another person (including key employees) with significant authority over the concern:

(i) Lacks business integrity as demonstrated by information related to an indictment or guilty plea, conviction, civil judgment, or settlement; or

(ii) Is currently incarcerated, or on parole or probation pursuant to a pretrial diversion or following conviction for a felony or any crime involving business integrity.

(5) If, during the processing of an application, SBA determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application. If, after admission to the program, SBA discovers that false information has been knowingly submitted by a firm, SBA will initiate termination proceedings and suspend the firm under §§ 124.304 and 124.305. Whenever SBA determines that the applicant submitted false information, the matter will be referred to SBA's Office of Inspector General for review.

(b) *One-time eligibility*. Once a concern or disadvantaged individual upon whom eligibility was based has participated in the 8(a) BD program, neither the concern nor that individual will be eligible again.

(1) An individual who claims disadvantage and completes the appropriate SBA forms to qualify an applicant has participated in the 8(a) BD program if SBA approves the application.

(2) Use of eligibility will take effect on the date of the concern's approval for admission into the program.

(3) An individual who uses his or her one-time eligibility to qualify a concern for the 8(a) BD program will be considered a non-disadvantaged individual for ownership or control purposes of another applicant or Participant. The criteria restricting participation by non-disadvantaged individuals will apply to such an individual. *See* §§ 124.105 and 124.106.

(4) When at least 50% of the assets of a concern are the same as those of a former Participant, the concern will not be eligible for entry into the program.

(5) Participants which change their form of business organization and transfer their assets and liabilities to the new organization may do so without affecting the eligibility of the new organization provided the previous business is dissolved and all other eligibility criteria are met. In such a case, the new organization may complete the remaining program term of the previous organization. A request for a change in business form will be treated as a change of ownership under § 124.105(i).

(c) *Wholesalers*. An applicant concern seeking admission to the 8(a) BD program as a wholesaler need not demonstrate that it is capable of meeting the requirements of the nonmanufacturer rule for its primary industry classification.

(d) *Brokers*. Brokers are ineligible to participate in the 8(a) BD program. A broker is a concern that adds no material value to an item being supplied to a procuring activity or which does not take ownership or possession of or handle the item being procured with its own equipment or facilities.

(e) *Federal financial obligations*. Neither a firm nor any of its principals that fails to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans or other Federally assisted financing, is eligible for admission to or participation in the 8(a) BD program. However,

a firm will not be ineligible to participate in the 8(a) BD program if the firm or the affected principals can demonstrate that the financial obligations owed have been settled and discharged/forgiven by the Federal Government.

[63 FR 35739, 35772, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8255, Feb. 11, 2011; 81 FR 48580, July 25, 2016; 88 FR 26204, Apr. 27, 2023]

§ 124.109 Do Indian tribes and Alaska Native Corporations have any special rules for applying to and remaining eligible for the 8(a) BD program?

(a) *Special rules for ANCs.* Small business concerns owned and controlled by ANCs are eligible for participation in the 8(a) program and must meet the eligibility criteria set forth in § 124.112 to the extent the criteria are not inconsistent with this section. ANC-owned concerns are subject to the same conditions that apply to tribally-owned concerns, as described in paragraphs (b) and (c) of this section, except that the following provisions and exceptions apply only to ANC-owned concerns:

(1) Alaska Natives and descendants of Natives must own a majority of both the total equity of the ANC and the total voting powers to elect directors of the ANC through their holdings of settlement common stock. Settlement common stock means stock of an ANC issued pursuant to 43 U.S.C. 1606(g)(1), which is subject to the rights and restrictions listed in 43 U.S.C. 1606(h)(1).

(2) An ANC that meets the requirements set forth in paragraph (a)(1) of this section is deemed economically disadvantaged under 43 U.S.C. 1626(e), and need not establish economic disadvantage as required by paragraph (b)(2) of this section.

(3) Even though an ANC can be either for profit or non-profit, a small business concern owned and controlled by an ANC must be for profit to be eligible for the 8(a) program. The concern will be deemed owned and controlled by the ANC where both the majority of stock or other ownership interest and total voting power are held by the ANC and holders of its settlement common stock.

(4) The Alaska Native Claims Settlement Act provides that a concern which is majority owned by an ANC shall be deemed to be both owned and controlled by Alaska Natives and an economically disadvantaged business. Therefore, an individual responsible for control and management of an ANC-owned applicant or Participant need not establish personal social and economic disadvantage.

(5) Paragraphs (b)(3)(i), (ii) and (iv) of this section are not applicable to an ANC, provided its status as an ANC is clearly shown in its articles of incorporation.

(6) Paragraph (c)(1) of this section is not applicable to an ANC-owned concern to the extent it requires an express waiver of sovereign immunity or a ''sue and be sued'' clause.

(7) Notwithstanding § 124.105(i), where an ANC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the ANC and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 60 days of the transfer.

(b) *Tribal eligibility.* In order to qualify a concern which it owns and controls for participation in the 8(a) BD program, an Indian Tribe must establish its own economic disadvantaged status under paragraph (b)(2) of this section. Once an Indian Tribe establishes that it is economically disadvantaged in connection with the application for one Tribally-owned firm, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) BD program participation, unless specifically requested to do so by the AA/BD. An Indian Tribe may request to meet with SBA prior to submitting an application for 8(a) BD participation for its first applicant firm to better understand what SBA requires for it to establish economic disadvantage. Each Tribally-owned concern seeking to be certified for 8(a) BD participation must comply with the provisions of paragraph (c) of this section.

(1) *Social disadvantage.* An Indian tribe as defined in § 124.3 is considered to be socially disadvantaged.

(2) *Economic disadvantage.* In order to be eligible to participate in the 8(a) BD

program, the Indian tribe must demonstrate to SBA that the tribe itself is economically disadvantaged. This must involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information:

(i) The number of tribal members.

(ii) The present tribal unemployment rate.

(iii) The per capita income of tribal members, excluding judgment awards.

(iv) The percentage of the local Indian population below the poverty level.

(v) The tribe's access to capital.

(vi) The tribal assets as disclosed in a current tribal financial statement. The statement must list all assets including those which are encumbered or held in trust, but the status of those encumbered or in trust must be clearly delineated.

(vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises by serving as officers or directors.

(3) *Forms and documents required to be submitted*. Except as otherwise provided in this section, the Indian tribe generally must submit the forms and documents required of 8(a) BD applicants as well as the following material:

(i) A copy of all governing documents such as the tribe's constitution or business charter.

(ii) Evidence of its recognition as a tribe eligible for the special programs and services provided by the United States or by its state of residence.

(iii) Copies of its articles of incorporation and bylaws as filed with the organizing or chartering authority, or similar documents needed to establish and govern a non-corporate legal entity.

(iv) Documents or materials needed to show the tribe's economically disadvantaged status as described in paragraph (b)(2) of this section.

(c) *Business eligibility*. In order to be eligible to participate in the 8(a) BD program, a concern which is owned by an eligible Indian tribe (or wholly owned business entities of such tribe) must meet the conditions set forth in paragraphs (c)(1) through (c)(7) of this section.

(1) *Legal business entity organized for profit and susceptible to suit*. The applicant or participating concern must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. Where an applicant or participating concern is owned by a federally recognized tribe, the concern's articles of incorporation, partnership agreement, limited liability company articles of organization, or other similar incorporating documents for tribally incorporated applicants must contain express sovereign immunity waiver language, or a ''sue and be sued'' clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

(2) *Size*. (i) A tribally-owned applicant concern must qualify as a small business concern as defined for purposes of Federal Government procurement in part 121 of this title. The particular size standard to be applied is based on the primary industry classification of the applicant concern.

(ii) A tribally-owned Participant must certify to SBA that it is a small business pursuant to the provisions of part 121 of this title for the purpose of performing each individual contract which it is awarded.

(iii) In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) BD program entry or contract award, the firm's size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

(iv) In determining whether a tribally-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally as compared to the overall small business share of that industry.

(A) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.

(B) SBA does not contemplate a finding of affiliation where a tribally-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

(3) *Ownership.* (i) For corporate entities, a Tribe must unconditionally own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a Tribe must unconditionally own at least a 51 percent interest.

(ii) A Tribe may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. A Tribe may, however, own a Participant or other applicant that conducts or will conduct secondary business in the 8(a) BD program under the NAICS code which is the primary NAICS code of the applicant concern.

(A) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe. However, a tribally-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program (either as a competitive or sole source contract).

(B) If the primary NAICS code of a tribally-owned Participant is changed pursuant to §124.112(e), the tribe can submit an application and qualify another firm owned by the tribe for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

Example 1 to paragraph (c)(3)(ii)(B). Tribe X owns 100% of 8(a) Participant A. A entered the 8(a) BD program with a primary NAICS code of 236115, New Single-Family Housing Construction (except For-Sale Builders). After four years in the program, SBA noticed that the vast majority of A's revenues were in NAICS Code 237310, Highway, Street, and Bridge Construction, and notified A that SBA intended to change its primary NAICS code pursuant to §124.112(e). A agreed to change its primary NAICS Code to 237310. Once the change is finalized, Tribe X can immediately submit a new application to qualify another firm that it owns for participation in the 8(a) BD program with a primary NAICS Code of 236115.

(iii) The restrictions of §124.105(h) do not apply to tribes; they do, however, apply to non disadvantaged individuals or other business concerns that are partial owners of a tribally-owned concern.

(iv) Notwithstanding §124.105(i), where a Tribe merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between the Tribe and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 30 days of the transfer.

(4) *Control and management.* (i) The management and daily business operations of a Tribally-owned concern must be controlled by the Tribe. The Tribally-owned concern may be controlled by the Tribe through one or more individuals who possess sufficient management experience of an extent and complexity needed to run the concern, or through management as follows:

(A) Management may be provided by committees, teams, or Boards of Directors which are controlled by one or more members of an economically disadvantaged tribe, or

(B) Management may be provided by non-Tribal members if the concern can demonstrate that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how Tribal members will develop managerial skills sufficient to manage the concern or similar Tribally-owned concerns in the future.

(ii) Members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict with the management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.

(iii) The individuals responsible for the management and daily operations of a tribally-owned concern cannot manage more than two Program Participants at the same time.

(A) An individual's officer position, membership on the board of directors or position as a tribal leader does not necessarily imply that the individual is responsible for the management and daily operations of a given concern. SBA looks beyond these corporate formalities and examines the totality of the information submitted by the applicant to determine which individual(s) manage the actual day-to-day operations of the applicant concern.

(B) Officers, board members, and/or tribal leaders may control a holding company overseeing several tribally-owned or ANC-owned companies, provided they do not actually control the day-to-day management of more than two current 8(a) BD Program Participant firms.

(C) Because an individual may be responsible for the management and daily business operations of two tribally-owned concerns, the full-time devotion requirement does not apply to tribally-owned applicants and Participants.

(5) *Individual eligibility limitation.* SBA does not deem an individual involved in the management or daily business operations of a tribally-owned concern to have used his or her individual eligibility within the meaning of §124.108(b).

(6) *Potential for success.* A Tribally-owned applicant concern must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. A Tribally-owned applicant may establish potential for success by demonstrating that:

(i) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) or financial statements (either audited, reviewed or in-house as set-forth in §124.602) for each of the two previous tax years showing operating revenues in the primary industry in which the applicant seeks 8(a) BD certification; or

(ii) The individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the applicant has adequate capital to sustain its operations and carry out its business plan as a Participant; or

(iii) The Tribe, a tribally-owned economic development corporation, or other relevant tribally-owned holding company vested with the authority to oversee tribal economic development or business ventures has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

(7) *Other eligibility criteria.* (i) As with other 8(a) applicants, a tribally-owned applicant concern shall not be denied admission into the 8(a) program due solely to a determination that specific contract opportunities are unavailable to assist the development of the concern unless:

(A) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or

(B) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other program participants providing the same or similar items or services.

(ii) The officers, directors, and all shareholders owning an interest of 20% or more (other than the tribe itself) of a tribally-owned applicant or Participant must demonstrate good character (*see* § 124.108(a)) and cannot fail to pay significant Federal obligations owed to the Federal Government (*see* § 124.108(e)).

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8255, Feb. 11, 2011; 81 FR 48580, July 25, 2016; 85 FR 66184, Oct. 16, 2020; 88 FR 26204, Apr. 27, 2023]

§ 124.110 Do Native Hawaiian Organizations (NHOs) have any special rules for applying to and remaining eligible for the 8(a) BD program?

(a) Concerns owned by economically disadvantaged Native Hawaiian Organizations, as defined in § 124.3, are eligible for participation in the 8(a) program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. Such concerns must meet all eligibility criteria set forth in §§ 124.101 through 124.108 and § 124.112 to the extent that they are not inconsistent with this section.

(b) A concern owned by a Native Hawaiian Organization must qualify as a small business concern as defined in part 121 of this title. The size standard corresponding to the primary industry classification of the applicant concern applies for determining size. SBA will determine the concern's size independently, without regard to its affiliation with the Native Hawaiian Organization or any other business enterprise owned by the Native Hawaiian Organization, unless the Administrator determines that one or more such concerns owned by the Native Hawaiian Organization have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category. In determining whether an NHO-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally.

(1) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.

(2) SBA does not contemplate a finding of affiliation where an NHO-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

(c) An NHO must establish that it is economically disadvantaged and that its business activities will principally benefit Native Hawaiians. Once an NHO establishes that it is economically disadvantaged in connection with the application of one NHO-owned firm, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) BD program participation, unless specifically requested to do so by the AA/BD. If a different NHO identifies that it will serve and benefit the same Native Hawaiian community as an NHO that has already established its economic disadvantage status, that NHO need not establish its economic disadvantage status in connection with an 8(a) BD application of a business concern that it owns, unless specifically requested to do so by the AA/BD.

(1) In order to establish that an NHO is economically disadvantaged, it must demonstrate that it will principally benefit economically disadvantaged Native Hawaiians. To do this, the NHO must provide data showing the economic condition of the Native Hawaiian community that it intends to serve, including:

(i) The number of Native Hawaiians in the community that the NHO intends to serve;

(ii) The present Native Hawaiian unemployment rate of those individuals;

(iii) The per capita income of those Native Hawaiians, excluding judgment awards;

(iv) The percentage of those Native Hawaiians below the poverty level; and

(v) The access to capital of those Native Hawaiians.

(2) An NHO should describe any activities that it has done to benefit Native Hawaiians at the time its NHO-owned firm applies to the 8(a) BD program. In addition, the NHO must include statements in its bylaws or operating agreements identifying the benefits Native Hawaiians will receive from the NHO. The NHO must have a detailed plan that shows how revenue earned by the NHO will principally benefit Native Hawaiians. As part of an annual review conducted for an NHO-owned Participant, SBA will review how the NHO is fulfilling its obligation to principally benefit Native Hawaiians.

(d) An NHO must control the applicant or Participant firm. To establish that it is controlled by an NHO, an applicant or Participant must demonstrate that the NHO controls its board of directors, managing members, managers or managing partners.

(1) The NHO need not possess the technical expertise necessary to run the NHO-owned applicant or Participant firm. The NHO must have managerial experience of the extent and complexity needed to run the concern. Management experience need not be related to the same or similar industry as the primary industry classification of the applicant or Participant.

(2) An individual responsible for the day-to-day management of an NHO-owned firm need not establish personal social and economic disadvantage.

(3) The individuals responsible for the management and daily operations of an NHO-owned concern cannot manage more than two Program Participants at the same time.

(i) An individual's officer position or membership on the board of directors does not necessarily imply that the individual is responsible for the management and daily operations of a given concern. SBA looks beyond these corporate formalities and examines the totality of the information submitted by the applicant to determine which individual(s) manage the actual day-to-day operations of the applicant concern.

(ii) NHO officers and/or board members may control a holding company overseeing several NHO-owned business concerns, provided they do not actually control the day-to-day management of more than two current 8(a) BD Program Participant firms.

(iii) Because an individual may be responsible for the management and daily business operations of two NHO-owned concerns, the full-time devotion requirement does not apply to NHO-owned applicants and Participants.

(e) For corporate entities, an NHO must unconditionally own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, an NHO must unconditionally own at least a 51 percent interest.

(f) An NHO cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. An NHO may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same NAICS code that a current Participant owned by the NHO operates in the 8(a) BD program as its primary NAICS code.

(1) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same NHO. However, an NHO-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program (either as a competitive or sole source contract).

(2) If the primary NAICS code of a Participant owned by an NHO is changed pursuant to §124.112(e), the NHO can submit an application and qualify another firm owned by the NHO for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

(g) SBA does not deem an individual involved in the management or daily business operations of a Participant

owned by a Native Hawaiian Organization to have used his or her individual eligibility within the meaning of §124.108(b).

(h) An NHO-owned firm's eligibility for 8(a) BD participation is separate and distinct from the individual eligibility of the NHO's members, directors, or managers. The eligibility of an NHO-owned concern is not affected by the former 8(a) BD participation of one or more of the NHO's individual members.

(i) An applicant concern owned by a NHO must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. An applicant concern owned by a NHO may establish potential for success by demonstrating that:

(1) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) for each of the two previous tax years showing operating revenues in the primary industry in with the applicant is seeking 8(a) BD certification; or

(2) The individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the applicant has adequate capital to sustain its operations and carry out its business plan as a Participant; or

(3) The NHO has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8256, Feb. 11, 2011; 77 FR 28237, May 14, 2012; 81 FR 48580, July 25, 2016; 81 FR 71983, Oct. 19, 2016; 85 FR 66184, Oct. 16, 2020; 88 FR 26205, Apr. 27, 2023]

§124.111 Do Community Development Corporations (CDCs) have any special rules for applying to and remaining eligible for the 8(a) BD program?

(a) Concerns owned at least 51 percent by CDCs (or a wholly owned business entity of a CDC) are eligible for participation in the 8(a) BD program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. These concerns must meet all eligibility criteria set forth in §124.101 through §124.108 and §124.112 to the extent that they are not inconsistent with this section.

(b) A concern that is at least 51 percent owned by a CDC (or a wholly owned business entity of a CDC) is considered to be controlled by such CDC and eligible for participation in the 8(a) BD program, provided it meets all eligibility criteria set forth or referred to in this section and its management and daily business operations are conducted by one or more individuals determined to have managerial experience of an extent and complexity needed to run the concern.

(c) A concern that is at least 51 percent owned by a CDC (or a wholly owned business entity of a CDC) must qualify as a small business concern as defined in part 121 of this title. The size standard corresponding to the primary industry classification of the applicant concern applies for determining size. SBA will determine the concern's size independently, without regard to its affiliation with the CDC or any other business enterprise owned by the CDC, unless the Administrator determines that one or more such concerns owned by the CDC have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category. In determining whether a CDC-owned concern has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category, SBA will examine the firm's participation in the relevant six digit NAICS code nationally.

(1) SBA will consider the firm's percentage share of the national market and other relevant factors to determine whether the firm is dominant in a specific six-digit NAICS code with a particular size standard.

(2) SBA does not contemplate a finding of affiliation where a CDC-owned concern appears to have obtained an unfair competitive advantage in a local market, but remains competitive, but not dominant, on a national basis.

(3) Notwithstanding §124.105(i), where a CDC merely reorganizes its ownership of a Participant in the 8(a) BD program by inserting or removing a wholly-owned business entity between

the CDC and the Participant, the Participant need not request a change of ownership from SBA. The Participant must, however, notify SBA of the change within 30 days of the transfer.

(d) A CDC cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. For purposes of this paragraph, the same primary NAICS code means the six-digit NAICS code having the same corresponding size standard. A CDC may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same NAICS code that a current Participant owned by the CDC operates in the 8(a) BD program as its primary NAICS code.

(1) Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same CDC. However, a CDC-owned concern may receive a follow-on sole source 8(a) contract to a requirement that it performed through the 8(a) program.

(2) If the primary NAICS code of a Participant owned by a CDC is changed pursuant to §124.112(e), the CDC can submit an application and qualify another firm owned by the CDC for participation in the 8(a) BD program under the NAICS code that was the previous primary NAICS code of the Participant whose primary NAICS code was changed.

(e) SBA does not deem an individual involved in the management or daily business operations of a CDC-owned concern to have used his or her individual eligibility within the meaning of §124.108(b).

(f) An applicant concern owned by a CDC must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. An applicant concern owned by a CDC may establish potential for success by demonstrating that:

(1) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) for each of the two previous tax years showing operating revenues in the primary industry in with the applicant is seeking 8(a) BD certification; or

(2) The individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the applicant has adequate capital to sustain its operations and carry out its business plan as a Participant; or

(3) The CDC has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

(g) A CDC-owned applicant and all of its principals must have good character as set forth in §124.108(a).

[63 FR 35739, June 30, 1998, as amended at 76 FR 8257, Feb. 11, 2011; 77 FR 28237, May 14, 2012; 81 FR 48581, July 25, 2016; 85 FR 66184, Oct. 16, 2020; 88 FR 26205, Apr. 27, 2023]

§124.112 What criteria must a business meet to remain eligible to participate in the 8(a) BD program?

(a) *Standards.* In order for a concern (except those owned by Indian tribes, ANCs, Native Hawaiian Organizations or CDCs) to remain eligible for 8(a) BD program participation, it must continue to meet all eligibility criteria contained in §124.101 through §124.108. For concerns owned by Indian tribes, ANCs, Native Hawaiian Organizations or CDCs to remain eligible, they must meet the criteria set forth in this §124.112 to the extent that they are not inconsistent with §124.109, §124.110 and §124.111, respectively. The concern must inform SBA in writing of any changes in circumstances which would adversely affect its program eligibility, especially economic disadvantage and ownership and control. Any concern that fails to meet the eligibility requirements after being admitted to the program will be subject to termination or early graduation under §§124.302 through 124.304, as appropriate.

(b) *Submissions supporting continued eligibility.* As part of an annual review, each Participant must annually submit to the servicing district office the following:

(1) A certification that it meets the 8(a) BD program eligibility requirements as set forth in §124.101 through §124.108 and paragraph (a) of this section;

(2) A certification that there have been no changed circumstances which could adversely affect the Participant's program eligibility. If the Participant is unable to provide such certification, the Participant must inform SBA of any changes and provide relevant supporting documentation.

(3) Personal financial information for each disadvantaged owner;

(4) A record from each individual claiming disadvantaged status regarding the transfer of assets for less than fair market value to any immediate family member, or to a trust any beneficiary of which is an immediate family member, within two years of the date of the annual review. The record must provide the name of the recipient(s) and family relationship, and the difference between the fair market value of the asset transferred and the value received by the disadvantaged individual.

(5) A record of all payments, compensation, and distributions (including loans, advances, salaries and dividends) made by the Participant to each of its owners, officers or directors, or to any person or entity affiliated with such individuals;

(6) If it is an approved protégé, a narrative report detailing the contracts it has had with its mentor and benefits it has received from the mentor/protégé relationship. See §124.520(b)(4) for additional annual requirements;

(7) A listing of any fees paid to agents or representatives to assist the Participant in obtaining or seeking to obtain a Federal contract;

(8) A report for each 8(a) contract performed during the year explaining how the performance of work requirements are being met for the contract, including any 8(a) contracts performed as a joint venture; and

(9) Such other information as SBA may deem necessary. For other required annual submissions, *see* §§124.601 through 124.603.

(c) *Eligibility reviews.* (1) Upon receipt of specific and credible information alleging that a Participant no longer meets the eligibility requirements for continued program eligibility, SBA will review the concern's eligibility for continued participation in the program.

(2) Sufficient reasons for SBA to conclude that a socially disadvantaged individual is no longer economically disadvantaged include, but are not limited to, excessive withdrawals of funds or other assets withdrawn from the concern by its owners, or substantial personal assets, income or net worth of any disadvantaged owner. SBA may also consider access by the Participant firm to a significant new source of capital or loans since the financial condition of the Participant is considered in evaluating the disadvantaged individual's economic status.

(d) *Excessive withdrawals.* (1) The term withdrawal includes, but is not limited to, the following: Cash dividends; distributions in excess of amounts needed to pay S Corporation, LLC or partnership taxes; cash and property withdrawals; payments to immediate family members not employed by the Participant; bonuses to officers; and investments on behalf of an owner. Although officers' salaries are generally not considered withdrawals for purposes of this paragraph, SBA will count those salaries as withdrawals where SBA believes that a firm is attempting to circumvent the excessive withdrawal limitations through the payment of officers' salaries. SBA will look at the totality of the circumstances in determining whether to include any specific amount as a withdrawal under this paragraph.

(2) If SBA determines that funds or assets have been excessively withdrawn from the Participant for the personal benefit of one or more owners or managers, or any person or entity affiliated with such owners or managers, and such withdrawal was detrimental to the achievement of the targets, objectives, and goals contained in the Participant's business plan, SBA may:

(i) Initiate termination proceedings under §§124.303 and 124.304 where the withdrawals detrimentally affect the achievement of the Participant's targets, objectives and goals set forth in its business plan, or its overall business development;

(ii) Initiate early graduation proceedings under §§124.302 and 124.303 where the withdrawals do not adversely affect the Participant's business development; or

(iii) Require an appropriate reinvestment of funds or other assets, as well as any other actions SBA deems necessary to counteract the detrimental effects of the withdrawals, as a condition of the Participant maintaining program eligibility.

(3) Withdrawals are excessive if in the aggregate during any fiscal year of the Participant they exceed (i) $250,000 for firms with sales up to $1,000,000; (ii) $300,000 for firms with sales between $1,000,000 and $2,000,000; and (iii) $400,000 for firms with sales exceeding $2,000,000.

(4) The fact that a concern's net worth has increased despite withdrawals that are deemed excessive will not preclude SBA from determining that such withdrawals were detrimental to the attainment of the concern's business objectives or to its overall business development.

(5) The excessive withdrawal analysis does not apply to Participants owned by Tribes, ANCs, NHOs, or CDCs where a withdrawal is made for the benefit of the Tribe, ANC, NHO, CDC or the native or shareholder community. It does, however, apply to withdrawals from a firm owned by a Tribe, ANC, NHO, or CDC that do not benefit the relevant entity or community. Thus, if funds or assets are withdrawn from an entity-owned Participant for the benefit of a non-disadvantaged manager or owner that exceed the withdrawal thresholds, SBA may find that withdrawal to be excessive. However, a non-disadvantaged minority owner may receive a payout in excess of the excessive withdrawal amount if it is a pro rata distribution paid to all shareholders (*i.e.*, the only way to increase the distribution to the Tribe, ANC, NHO or CDC is to increase the distribution to all shareholders) and it does not adversely affect the business development of the Participant.

Example 1 to paragraph (d)(5). Tribally-owned Participant X pays $1,000,000 to a non-disadvantaged manager. If that was not part of a pro rata distribution to all shareholders, that would be deemed an excessive withdrawal.

Example 2 to paragraph (d)(5). ANC-owned Participant Y seeks to distribute $550,000 to the ANC and $450,000 to non-disadvantaged individual A based on their 55%/45% ownership interests. Because the distribution is based on the pro rata share of ownership, this would not be prohibited as an excessive withdrawal unless SBA determined that Y would be adversely affected.

(e) *Change in primary industry classification.* (1) A Participant may request that the primary industry classification contained in its business plan be changed by filing such a request with its servicing SBA district office. SBA will grant such a request where the Participant can demonstrate that the majority of its total revenues during a three-year period have evolved from one NAICS code to another.

(2) SBA may change the primary industry classification contained in a Participant's business plan where the greatest portion of the Participant's total revenues during the Participant's last three completed fiscal years has evolved from one NAICS code to another. As part of its annual review, SBA will consider whether the primary NAICS code contained in a Participant's business plan continues to be appropriate.

(i) Where SBA believes that the primary industry classification contained in a Participant's business plan does not match the Participant's actual revenues over the Participant's most recently completed three fiscal years, SBA may notify the Participant of its intent to change the Participant's primary industry classification and afford the Participant the opportunity to respond.

(ii) A Participant may challenge SBA's intent to change its primary industry classification by demonstrating why it believes the primary industry classification contained in its business plan continues to be appropriate, despite an increase in revenues in a secondary NAICS code beyond those received in its designated primary industry classification. The Participant should identify: All non-federal work that it has performed in its primary NAICS code; any efforts it has made and any plans it has to make to receive

contracts to obtain contracts in its primary NAICS code; all contracts that it was awarded that it believes could have been classified under its primary NAICS code, but which a contracting officer assigned another reasonable NAICS code; and any other information that it believes has a bearing on why its primary NAICS code should not be changed despite performing more work in another NAICS code.

(iii) As long as the Participant provides a reasonable explanation as to why the identified primary NAICS code continues to be its primary NAICS code, SBA will not change the Participant's primary NAICS code.

(iv) A Participant may appeal a district office's decision to change its primary NAICS code to SBA's Associate General Counsel for Procurement Law (AGC/PL) within 10 business days of receiving the district office's final determination. The AGC/PL will examine the record, including all information submitted by the Participant in support of its position as to why the primary NAICS code contained in its business plan continues to be appropriate despite performing more work in another NAICS code, and issue a final agency decision within 15 business days of receiving the appeal.

(v) Where an SBA change in the primary NAICS code of an entity-owned firm results in the entity having two Participants with the same primary NAICS code, the second, newer Participant will not be able to receive any 8(a) contracts in the six-digit NAICS code that is the primary NAICS code of the first, older Participant for a period of time equal to two years after the first Participant leaves the 8(a) BD program.

(f) *Graduation determination.* As part of the final annual review performed by SBA prior to the expiration of a Participant's nine-year program term, SBA will determine if the Participant has met the targets, objectives and goals set forth in its business plan and, thus, whether the Participant will be considered to have graduated from the 8(a) BD program at the expiration of its program term. A firm that has not met the targets, objectives and goals set forth in its business plan at the end of its nine-year term in the 8(a) BD program will not be considered to have graduated from the 8(a) BD program, but rather to have merely completed its program term.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8257, Feb. 11, 2011; 77 FR 28237, May 14, 2012; 81 FR 48581, July 25, 2016; 81 FR 71983, Oct. 19, 2016; 85 FR 66185, Oct. 16, 2020]

APPLYING TO THE 8(a) BD PROGRAM

§ 124.201 May any business submit an application?

Any concern or any individual on behalf of a business has the right to apply for 8(a) BD program participation whether or not there is an appearance of eligibility.

§ 124.202 How must an application be filed?

An application for 8(a) BD program admission must be filed in an electronic format. An electronic application can be found by going to the 8(a) BD page of SBA's Web site (*http://www.sba.gov*). The SBA district office will provide an applicant with information regarding the 8(a) BD program.

[81 FR 48581, July 25, 2016]

§ 124.203 What must a concern submit to apply to the 8(a) BD program?

Each 8(a) BD applicant concern must submit information and supporting documents required by SBA when applying for admission to the 8(a) BD program. This information may include, but not be limited to, financial data and statements, copies of filed Federal personal and business tax returns, individual and business bank statements, personal history statements, and any additional information or documents SBA deems necessary to determine eligibility. Each individual claiming disadvantaged status must also authorize SBA to request and receive tax return information directly from the Internal Revenue Service. In all cases, the applicant must provide a signature from each individual claiming social and economic disadvantage status. The electronic signing protocol will ensure the Agency is able to specifically identify the individual making the representation. The individual(s) upon

whom eligibility is based take responsibility for the accuracy of all information submitted on behalf of the applicant.

[81 FR 48581, July 25, 2016, as amended at 85 FR 66185, Oct. 16, 2020]

§ 124.204 How does SBA process applications for 8(a) BD program admission?

(a) The AA/BD is authorized to approve or decline applications for admission to the 8(a) BD program.

(1) Except as set forth in paragraph (a)(2) of this section, the DPCE will receive, review and evaluate all 8(a) BD applications.

(2) Where an applicant answers on its electronic application that it is not a for-profit business (*see* §§ 121.105 and 124.104), that one or more of the individuals upon whom eligibility is based is not a United States citizen (*see* § 124.104), that the applicant or one or more of the individuals upon whom eligibility is based has previously participated in the 8(a) BD program (*see* § 124.108(b)), or that the applicant is not an entity-owned business and has generated no revenues (*see* §§ 124.107(a) and 124.107(b)(1)(iv)), its application will be closed automatically and it will be prevented from completing a full electronic application.

(3) SBA will advise each program applicant within 15 days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application.

(4) SBA will process an application for 8(a) BD program participation within 90 days of receipt of an application package deemed complete by the DPCE. Incomplete packages will not be processed. Where during its screening or review SBA requests clarifying, revised or other information from the applicant, SBA's processing time for the application will be suspended pending the receipt of such information.

(b) SBA, in its sole discretion, may request clarification of information contained in the application at any time in the application process. SBA will take into account any clarifications made by an applicant in response to a request for such by SBA.

(c) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the missing information would adversely affect the firm or would demonstrate lack of eligibility in the area to which the information relates.

(d) An applicant must be eligible as of the date the AA/BD issues a decision. The decision will be based on the facts set forth in the application, any information received in response to SBA's request for clarification made pursuant to paragraph (b) of this section, and any changed circumstances since the date of application.

(e) Changed circumstances for an applicant concern occurring subsequent to its application and which adversely affect eligibility will be considered and may constitute grounds for decline. The applicant must inform SBA of any changed circumstances that could adversely affect its eligibility for the program (particularly economic disadvantage and ownership and control) during its application review. Failure to inform SBA of any such changed circumstances constitutes good cause for which SBA may terminate the Participant if non-compliance is discovered after admittance.

(f) The decision of the AA/BD to approve or deny an application will be in writing. A decision to deny admission will state the specific reasons for denial, and will inform the applicant of any appeal rights.

(g) If the AA/BD approves the application, the date of the approval letter is the date of program certification for purposes of determining the concern's program term.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8258, Feb. 11, 2011; 85 FR 66185, Oct. 16, 2020; 88 FR 26205, Apr. 27, 2023]

§ 124.205 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?

There is no reconsideration process for applications that have been declined. An applicant which has been declined may file an appeal with SBA's

Office of Hearings and Appeals pursuant to §124.206, or reapply to the program pursuant to §124.207.

[85 FR 66185, Oct. 16, 2020]

§124.206 What appeal rights are available to an applicant that has been denied admission?

(a) An applicant may appeal a denial of program admission to SBA's Office of Hearings and Appeals (OHA), if it is based solely on a negative finding of social disadvantage, economic disadvantage, ownership, control, or any combination of these four criteria. A denial decision that is based at least in part on the failure to meet any other eligibility criterion is not appealable and is the final decision of SBA.

(b) [Reserved]

(b) The applicant may initiate an appeal by filing a petition in accordance with part 134 of this chapter with OHA within 45 days after the applicant receives the Agency decision.

(c) If an appeal is filed with OHA, the written decision of the Administrative Law Judge is the final Agency decision. If an appealable decision is not appealed, the decision of the AA/BD is the final Agency decision.

[63 FR 35739, June 30, 1998, as amended at 67 FR 47246, July 18, 2002; 74 FR 45753, Sept. 4, 2009; 85 FR 66185, Oct. 16, 2020]

§124.207 Can an applicant reapply for admission to the 8(a) BD program?

A concern which has been declined for 8(a) BD program participation may submit a new application for admission to the program at any time after 90 days from the date of the Agency's final decision to decline. However, a concern that has been declined three times within 18 months of the date of the first final Agency decision finding the concern ineligible cannot submit a new application for admission to the program until 12 months from the date of the third final Agency decision to decline.

[85 FR 66185, Oct. 16, 2020]

EXITING THE 8(a) BD PROGRAM

§124.300 What are the ways a business may leave the 8(a) BD program?

A concern participating in the 8(a) BD program may leave the program by any of the following means:

(a) Expiration of the program term established pursuant to §124.2;

(b) Voluntary withdrawal or voluntary early graduation;

(c) Graduation pursuant to §124.302;

(d) Early graduation pursuant to the provisions of §§124.302 and 124.304; or

(e) Termination pursuant to the provisions of §§124.303 and 124.304.

[76 FR 8258, Feb. 11, 2011. Redesignated at 85 FR 66186, Oct. 16, 2020]

§124.301 Voluntary withdrawal or voluntary early graduation.

(a) A Participant may voluntarily withdraw from the 8(a) BD program at any time prior to the expiration of its program term. Where a Participant has substantially achieved the goals and objectives set forth in its business plan, it may elect to voluntarily early graduate from the 8(a) BD program.

(b) To initiate withdrawal or early graduation from the 8(a) BD program, a Participant must notify its servicing SBA district office of its intent to do so in writing. Once the SBA servicing district office processes the request and the District Director recognizes the withdrawal or early graduation, the Participant is no longer eligible to receive any 8(a) BD program assistance.

[85 FR 66186, Oct. 16, 2020]

§124.302 What is graduation and what is early graduation?

(a) *General.* SBA may graduate a firm from the 8(a) BD program at the expiration of its program term (graduation) or prior to the expiration of its program term (early graduation) where SBA determines that:

(1) The concern has successfully completed the 8(a) BD program by substantially achieving the targets, objectives, and goals set forth in its business plan, and has demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program; or

(2) One or more of the disadvantaged owners upon whom the Participant's

eligibility is based are no longer economically disadvantaged.

(b) *Exceeding the size standard corresponding to the primary NAICS code.* SBA may graduate a Participant prior to the expiration of its program term where the firm exceeds the size standard corresponding to its primary NAICS code, as adjusted during the program, for three successive program years unless the firm is able to demonstrate that it has taken steps to change its industry focus to another NAICS code that is contained in the goals, targets and objectives of its business plan.

(c) *Excessive withdrawals.* SBA may graduate a Participant prior to the expiration of its program term where excessive funds or other assets have been withdrawn from the Participant (see §124.112(d)(3)), causing SBA to determine that the Participant has demonstrated the ability to compete in the marketplace without assistance under the 8(a) BD program.

[63 FR 35739, 35772, June 30, 1998, as amended at 76 FR 8258, Feb. 11, 2011; 88 FR 26205, Apr. 27, 2023]

§124.303 What is termination?

(a) SBA may terminate the participation of a concern in the 8(a) BD program prior to the expiration of the concern's Program Term for good cause. Examples of good cause include, but are not limited to, the following:

(1) Submission of false information in the concern's 8(a) BD application, regardless of whether correct information would have caused the concern to be denied admission to the program, and regardless of whether correct information was given to SBA in accompanying documents or by other means.

(2) Failure by the concern to maintain its eligibility for program participation, including failure by an individual owner or manager to continue to meet the requirements for economic disadvantage set forth in §124.104 where such status is needed for eligibility.

(3) Failure by the concern for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership, full-time day-to-day management, and control by disadvantaged individuals.

(4) Failure by the concern to obtain prior written approval from SBA for any changes in ownership or business structure, management or control pursuant to §§124.105 and 124.106.

(5) Failure by the concern to disclose to SBA the extent to which non-disadvantaged persons or firms participate in the management of the Participant business concern.

(6) Failure by the concern or one or more of the concern's principals to maintain good character.

(7) A pattern of failure to make required submissions or responses to SBA in a timely manner, including a failure to provide required financial statements, requested tax returns, reports, updated business plans, information requested by SBA's Office of Inspector General, or other requested information or data within 30 days of the date of request.

(8) Cessation of business operations by the concern.

(9) Failure by the concern to pursue competitive and commercial business in accordance with its business plan, or failure in other ways to make reasonable efforts to develop and achieve competitive viability.

(10) A pattern of inadequate performance by the concern of awarded section 8(a) contracts.

(11) Failure by the concern to pay or repay significant financial obligations owed to the Federal Government.

(12) Failure by the concern to obtain and keep current any and all required permits, licenses, and charters, including suspension or revocation of any professional license required to operate the business.

(13) Excessive withdrawals that are detrimental to the achievement of the targets, objectives, and goals contained in the Participant's business plan, including transfers of funds or other business assets from the concern for the personal benefit of any of its owners or managers, or any person or entity affiliated with the owners or managers (*see* §124.112(d)).

(14) Unauthorized use of SBA direct or guaranteed loan proceeds or violation of an SBA loan agreement.

(15) Submission by or on behalf of a Participant of false information to SBA, including false certification of

compliance with non-8(a) business activity targets under §124.509 or failure to report changes that adversely affect the program eligibility of an applicant or program participant under §124.204 and §124.112, where responsible officials of the 8(a) BD Participant knew or should have known the submission to be false.

(16) Debarment, suspension, voluntary exclusion, or ineligibility of the concern or its principals pursuant to 2 CFR parts 180 and 2700 or FAR subpart 9.4 (48 CFR part 9, subpart 9.4). * * *

(17) Conduct by the concern, or any of its principals, indicating a lack of business integrity. Such conduct may be demonstrated by information related to a criminal indictment or guilty plea, a criminal conviction, or a judgment or settlement in a civil case.

(18) Willful failure by the Participant business concern to comply with applicable labor standards and obligations.

(19) Material breach of any terms and conditions of the 8(a) BD Program Participation Agreement.

(20) Willful violation by a concern, or any of its principals, of any SBA regulation pertaining to material issues.

(b) The examples of good cause listed in paragraph (a) of this section are intended to be illustrative only. Other grounds for terminating a Participant from the 8(a) BD program for cause may exist and may be used by SBA.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8258, Feb. 11, 2011; 88 FR 26205, Apr. 27, 2023]

§124.304 What are the procedures for early graduation and termination?

(a) *General.* The same procedures apply to both early graduation and termination of Participants from the 8(a) BD program.

(b) *Letter of Intent to Terminate or Graduate Early.* (1) Except as set forth in paragraph (b)(2) of this section, when SBA believes that a Participant should be terminated or graduated prior to the expiration of its program term, SBA will notify the concern in writing. The Letter of Intent to Terminate or Graduate Early will set forth the specific facts and reasons for SBA's findings and will notify the concern that it has 30 days from the date it receives the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify termination or early graduation.

(2) Where SBA obtains evidence that a Participant has ceased its operations, the AA/BD may immediately terminate a concern's participation in the 8(a) BD program by notifying the concern of its termination and right to appeal that decision to OHA.

(c) *Recommendation and decision.* Following the 30-day response period, the Assistant Administrator for DPCE (AA/DPCE) or designee will consider the proposed early graduation or termination and any information submitted in response by the concern. Upon determining that early graduation or termination is not warranted, the AA/DPCE or designee will notify the Participant in writing. If early graduation or termination appears warranted, the AA/DPCE will make such a recommendation to the AA/BD, who will then make a decision whether to early graduate or terminate the concern. SBA will act in a timely manner in processing early graduation and termination actions.

(d) *Notice requirements and effect of decision.* Upon deciding that early graduation or termination is warranted, the AA/BD will issue a Notice of Early Graduation or Termination. The Notice will set forth the specific facts and reasons for the decision, and will advise the concern that it may appeal the decision in accordance with the provisions of part 134 of this title. Once the AA/BD issues a decision to early graduate or terminate a Participant, the Participant will be immediately ineligible to receive further program assistance. If OHA overrules the AA/BD's decision on appeal, the length of time between the AA/BD's decision and OHA's decision on appeal will be added to the Participant's program term.

(e) *Appeal to OHA.* Procedures governing appeals of early graduation or termination to SBA's OHA are set forth in part 134. If a Participant does not appeal a Notification of Early Graduation or Termination within 45 days after the Participant receives the Notification, the decision of the AA/BD is the final agency decision effective on the date the appeal right expired.

(f) *Effect or early graduation or termination.* (1) After the effective date of

early graduation or termination, a Participant is no longer eligible to receive any 8(a) BD program assistance. However, such concern is obligated to complete previously awarded 8(a) contracts, including any priced options which may be exercised.

(2) When SBA early graduates or terminates a firm from the 8(a) BD program, the firm will generally not qualify as an SDB for future procurement actions. If the firm believes that it does qualify as an SDB and seeks to certify itself as an SDB, as part of its SDB certification the firm must identify:

(i) That it has been early graduated or terminated;

(ii) The statutory or regulatory authority that qualifies the firm for SDB status; and

(iii) Where applicable, the circumstances that have changed since the early graduation or termination or that do not prevent it from qualifying as an SDB.

(3) Where a concern certifies that it qualifies as an SDB pursuant to paragraph (f)(2) of the section, the procuring activity contracting officer may protest the SDB status of the firm to SBA pursuant to §124.1002 where questions regarding the firm's SDB status remain.

[63 FR 35739, June 30, 1998, as amended at 67 FR 47246, July 18, 2002; 74 FR 45753, Sept. 4, 2009; 76 FR 8258, Feb. 11, 2011; 85 FR 66186, Oct. 16, 2020; 88 FR 26205, Apr. 27, 2023]

§124.305 What is suspension and how is a Participant suspended from the 8(a) BD program?

(a) Except as set forth in paragraph (h) of this section, the AA/BD may suspend a Participant when he or she determines that suspension is needed to protect the interests of the Federal Government, such as where information showing a clear lack of program eligibility or conduct indicating a lack of business integrity exists, including where the concern or one of its principals submitted false statements to the Federal Government. SBA will suspend a Participant where SBA determines that the Participant submitted false information in its 8(a) BD application.

(b) SBA will issue a Notice of Suspension to the Participant's last known address by certified mail, return receipt requested. Suspension is effective as of the date of the issuance of the Notice. The Notice will provide the following information:

(1) The basis for the suspension;

(2) A statement that the suspension will continue pending the completion of further investigation, a final program termination determination, or some other specified period of time;

(3) A statement that awards of competitive and non-competitive 8(a) contracts, including those which have been ''self-marketed'' by a Participant, will not be made during the pendency of the suspension unless it is determined by the head of the relevant procuring agency or an authorized representative to be in the best interest of the Government to do so, and SBA adopts that determination;

(4) A statement that the concern is obligated to complete previously awarded section 8(a) contracts;

(5) A statement that the suspension is effective nationally throughout SBA;

(6) A statement that a request for a hearing on the suspension will be considered by an Administrative Law Judge at OHA, and granted or denied as a matter of discretion.

(7) A statement that the firm's participation in the program is suspended effective on the date the Notice is served, and that the program term will resume only if the suspension is lifted or the firm is not terminated.

(c) The Participant may appeal a Notice of Suspension by filing a petition in accordance with part 134 of this chapter with OHA within 45 days after the concern receives the Notice of Suspension pursuant to paragraph (b) of this section. It is contemplated that in most cases a hearing on the issue of the suspension will be afforded if the Participant requests one, but authority to grant a hearing is within the discretion of the Administrative Law Judge in OHA. A suspension remains in effect pending the result of its appeal.

(d) SBA has the burden of showing that adequate evidence exists that protection of the Federal Government's interest requires suspension.

(1) The term ''adequate evidence'' means information contained in the record before the AA/BD at the time of his or her suspension decision that is sufficient to support the reasonable belief that the Government's interests need to be protected.

(2) SBA need not demonstrate that an act or omission actually occurred in order for OHA to uphold a suspension. SBA's burden in a suspension proceeding is limited to demonstrating that it had a reasonable belief that a particular act or omission occurred, and that that act or omission requires suspension to protect the interests of the Government.

(3) OHA's review is limited to determining whether the Government's interests need to be protected, unless a termination action has also been initiated and the Administrative Law Judge consolidates the suspension and termination proceedings. In such a case, OHA will also consider the merits of the termination action.

(e) If there is a timely appeal, the decision of the Administrative Law Judge is the final SBA decision. If there is not a timely appeal, the decision of the AA/BD is the final Agency decision.

(f) Upon the request of SBA, OHA may consolidate suspension and termination proceedings when the issues presented are identical.

(g) Any program suspension which occurs under this section is effective until such time as SBA lifts the suspension or the Participant's participation in the program is fully terminated. If the concern is ultimately not terminated from the 8(a) BD program, the suspension will be lifted and the length of the suspension will be added to the concern's program term.

(h)(1) Notwithstanding paragraph (a) of this section, SBA will suspend a Participant from receiving further 8(a) BD program benefits where:

(i) A Participant requests a change of ownership and/or control and SBA discovers that a change of ownership or control has in fact occurred prior to SBA's approval; or

(ii) A disadvantaged individual who is involved in controlling the day-to-day management and control of the Participant is called to active military duty by the United States, his or her participation in the firm's management and daily business operations is critical to the firm's continued eligibility, the Participant does not designate another disadvantaged individual to control the concern during the call-up period, and the Participant requests to be suspended during the call-up period;

(iii) A Participant has a principal place of business located in a federally declared disaster area and elects to suspend its participation in the 8(a) BD program for a period of up to one year from the date of the disaster declaration to allow the firm to recover from the disaster and take full advantage of the program. A Participant that elects to be suspended may request that the suspension be lifted prior to the end date of the original request; or

(iv) Federal appropriations for one or more Federal departments or agencies have lapsed, a Participant would lose an 8(a) sole source award due to the lapse in appropriations (*e.g.*, SBA has previously accepted an offer for a sole source 8(a) award on behalf of the Participant or an agency could not offer a sole source 8(a) requirement to the program on behalf of the Participant due to the lapse in appropriations, and the Participant's program term would end during the lapse), and the Participant elects to suspend its participation in the 8(a) BD program during the lapse in Federal appropriations; or

(v) A Participant has not submitted a business plan to its SBA servicing office within 60 days after program admission.

(2) A suspension initiated under paragraph (h) of this section will be commenced by the issuance of a notice similar to that required for termination-related suspensions under paragraph (b) of this section, except that a suspension issued under paragraph (h) is not appealable.

(3) Where a Participant is suspended pursuant to paragraph (h)(1)(i) of this section and SBA approves the change of ownership and/or control, the length of the suspension will be added to the firm's program term only where the change in ownership or control results from the death or incapacity of a disadvantaged individual or where the

firm requested prior approval and waited at least 60 days for SBA approval before making the change.

(4) Where a Participant is suspended pursuant to paragraph (h)(1)(ii) of this section, the Participant must notify SBA when the disadvantaged individual returns to control the firm so that SBA can immediately lift the suspension. When the suspension is lifted, the length of the suspension will be added to the concern's program term.

(5) Where a Participant is suspended pursuant to (h)(1)(iv) of this section, the Participant must notify SBA when the lapse in appropriation ends so that SBA can immediately lift the suspension. When the suspension is lifted, the length of the suspension will be added to the concern's program term.

(6) Where a Participant is suspended pursuant to paragraph (h)(1)(iii) or paragraph (h)(1)(v) of this section, the length of the suspension will be added to the concern's program term.

(7) *Effect of suspension*. Once a suspension is issued pursuant to this section, a Participant cannot receive any additional 8(a) BD program assistance, including new 8(a) contract awards, for as long as the Participant is suspended. This includes any procurement requirements that the firm has self-marketed and those that have been accepted into the 8(a) BD program on behalf of the suspended concern. However, the suspended Participant must complete any previously awarded 8(a) contracts.

(i) SBA does not recognize the concept of de facto suspension. Adding time to the end of a Participant's program term equal to the length of a suspension will occur only where a concern's program participation has been formally suspended in accordance with the procedures set forth in this section.

(j) A suspension from 8(a) BD participation under this section has no effect on a concern's eligibility for non-8(a) Federal Government contracts. However, a debarment or suspension under the Federal Acquisition Regulation (48 CFR, chapter 1) will disqualify a concern from receiving all Federal Government contracts, including 8(a) contracts.

[63 FR 35739, June 30, 1998, as amended at 67 FR 47246, July 18, 2002; 74 FR 45753, Sept. 4, 2009; 76 FR 8259, Feb. 11, 2011; 81 FR 48582, July 25, 2016; 85 FR 66186, Oct. 16, 2020]

BUSINESS DEVELOPMENT

§ 124.401 Which SBA field office services a Participant?

The SBA district office which serves the geographical territory where a Participant's principal place of business is located normally will service the concern during its participation in the 8(a) BD program.

§ 124.402 How does a Participant develop a business plan?

(a) *General*. In order to assist the SBA servicing office in determining the business development needs of its portfolio Participants, each Participant must develop a comprehensive business plan setting forth its business targets, objectives, and goals.

(b) *Submission of initial business plan*. Each Participant must submit a business plan to its SBA servicing office as soon as possible after program admission. SBA will suspend a Participant from receiving 8(a) BD program benefits, including 8(a) contracts, if it has not submitted its business plan to the servicing district office within 60 days after program admission. Where a sole source 8(a) requirement is offered to SBA on behalf of a Participant or a Participant is the apparent successful offeror for a competitive 8(a) requirement and SBA has not yet approved the Participant's business plan, SBA will approve the Participant's business plan as part of its eligibility determination prior to contract award.

(c) *Contents of business plan*. The business plan must contain at least the following:

(1) A detailed description of any products currently being produced and any services currently being performed by the concern, as well as any future plans to enter into one or more new markets;

(2) The applicant's designation of its primary industry classification, as defined in § 124.3;

(3) An analysis of market potential, competitive environment, and the concern's prospects for profitable operations during and after its participation in the 8(a) BD program;

(4) An analysis of the concern's strengths and weaknesses, with particular attention on ways to correct any financial, managerial, technical, or work force conditions which could impede the concern from receiving and performing non-8(a) contracts;

(5) Specific targets, objectives, and goals for the business development of the concern during the next two years;

(6) Estimates of both 8(a) and non-8(a) contract awards that will be needed to meet its targets, objectives and goals; and

(7) Such other information as SBA may require.

[63 FR 35739, June 30, 1998, as amended at 85 FR 66186, Oct. 16, 2020; 88 FR 26205, Apr. 27, 2023]

§ 124.403 How is a business plan updated and modified?

(a) *Annual review.* Each Participant must annually review its business plan with its assigned Business Opportunity Specialist (BOS), and modify the plan as appropriate. If there are no changes in a Participant's business plan, the Participant need not resubmit its business plan. A Participant must submit a new or modified business plan only if its business plan has changed from the previous year. The Participant must submit a modified plan and updated information to its BOS within thirty (30) days after the close of each program year. It also must submit a capability statement describing its current contract performance capabilities as part of its updated business plan.

(b) *Contract forecast.* As part of the annual review of its business plan, each Participant must annually forecast in writing its needs for contract awards for the next program year. The forecast must include:

(1) The aggregate dollar value of 8(a) contracts to be sought, broken down by sole source and competitive opportunities where possible;

(2) The aggregate dollar value of non-8(a) contracts to be sought;

(3) The types of contract opportunities to be sought, identified by product or service; and

(4) Such other information as SBA may request to aid in providing effective business development assistance to the Participant.

(c) *Transition management strategy.* Beginning in the first year of the transitional stage of program participation, each Participant must annually submit a transition management strategy to be incorporated into its business plan. The transition management strategy must describe:

(1) How the Participant intends to meet the applicable non-8(a) business activity target imposed by § 124.509 during the transitional stage of participation; and

(2) The specific steps the Participant intends to take to continue its business growth and promote profitable business operations after the expiration of its program term.

[63 FR 35739, 35772, June 30, 1998, as amended at 76 FR 8259, Feb. 11, 2011; 88 FR 26205, Apr. 27, 2023]

§ 124.404 What business development assistance is available to Participants during the two stages of participation in the 8(a) BD program?

(a) *General.* Participation in the 8(a) BD program is divided into two stages, a developmental stage and a transitional stage. The developmental stage will last four years, and the transitional stage will last five years, unless the concern has exited the program by one of the means set forth in § 124.301 prior to the expiration of its program term or has elected to extend its participation pursuant to § 124.2(b).

(b) *Developmental stage of program participation.* A Participant, if otherwise eligible, may receive the following assistance during the developmental stage of program participation:

(1) Sole source and competitive 8(a) contract support;

(2) Financial assistance pursuant to § 120.375 of this title;

(3) The transfer of technology or surplus property owned by the United States pursuant to § 124.405; and

(4) Training to aid in developing business principles and strategies to enhance their ability to compete successfully for both 8(a) and non-8(a) contracts.

(c) *Transitional stage of program participation.* A Participant, if otherwise eligible, may receive the following assistance during the transitional stage of program participation:

(1) The same assistance as that provided to Participants in the developmental stage;

(2) Assistance from procuring agencies (in cooperation with SBA) in forming joint ventures, leader-follower arrangements, and teaming agreements between the concern and other Participants or other business concerns with respect to contracting opportunities outside the 8(a) BD program for research, development, or full scale engineering or production of major systems (these arrangements must comply with all relevant statutes and regulations, including applicable size standard requirements); and

(3) Training and technical assistance in transitional business planning.

[63 FR 35739, June 30, 1998, as amended at 86 FR 2533, Jan. 13, 2021]

§ 124.405 How does a Participant obtain Federal Government surplus property?

(a) *General.* (1) Pursuant to 15 U.S.C. 636(j)(13)(F), eligible Participants may receive surplus Federal Government property from State Agencies for Surplus Property (SASPs). The procedures set forth in 41 CFR part 102–37 and this section will be used to transfer surplus personal property to eligible Participants.

(2) The surplus personal property which may be transferred to SASPs for further transfer to eligible Participants includes all personal property which has become available for donation pursuant to 41 CFR 102–37.30.

(b) *Eligibility to receive Federal surplus property.* To be eligible to receive Federal surplus property, on the date of transfer a concern must:

(1) Be in the 8(a) BD program;

(2) Be in compliance with all program requirements, including any reporting requirements;

(3) Not be debarred, suspended, or declared ineligible under Title 2 or Title 48 of the Code of Federal Regulations;

(4) Not be under a pending 8(a) BD program suspension, termination or early graduation proceeding; and

(5) Be engaged or expect to be engaged in business activities making the item useful to it.

(6) Not have received property under part 129, Subpart B of this chapter, during the applicable period described in that section.

(c) *Use of acquired surplus personal property.* (1) Eligible Participants may acquire Federal surplus personal property from the SASP in the State(s) where the Participant is located and operates, provided the Participant represents in writing:

(i) As to what the intended use of the surplus property is to be and that this use is consistent with the objectives of the concern's 8(a) business plan;

(ii) That it will use the property to be acquired in the normal conduct of its business activities or be liable for the fair rental value from the date of its receipt;

(iii) That it will not sell or transfer the property to be acquired to any party other than the Federal Government during its term of participation in the 8(a) program and for one year after it leaves the program;

(iv) That, at its own expense, it will return the property to a SASP or transfer it to another Participant if directed to do so by SBA because it has not used the property as intended within one year of receipt;

(v) That, should it breach its agreement not to sell or transfer the property, it will be liable to the Government for the established fair market value or the sale price, whichever is greater, of the property sold or transferred; and

(vi) That it will give SBA access to inspect the property and all records pertaining to it.

(2) A firm receiving surplus property pursuant to this section assumes all liability associated with or stemming from the use of the property.

(3) If the property is not placed in use for the purposes for which it was intended within one year of its receipt, SBA may direct the concern to deliver

the property to another Participant or to the SASP from which it was acquired.

(4) Failure to comply with any of the commitments made under paragraph (c)(1) of this section constitutes a basis for termination from the 8(a) program.

(d) *Procedures for acquiring Federal Government surplus personal property.* (1) Participants may participate in the GSA Federal Surplus Personal Property Donation Program administered by the SASPs. *See* generally 41 CFR part 102–37 and/or §102–37.125 of that title.

(2) Each Participant seeking to acquire Federal Government surplus property from a SASP must:

(i) Certify in writing to the SASP that it is eligible to receive the property pursuant to paragraph (b) of this section;

(ii) Make the written representations and agreement required by paragraph (c)(1) of this section; and

(iii) Identify to the SASP its servicing SBA field office.

(3) Upon receipt of the required certification, representations, agreement, and information set forth in paragraph (d)(2) of this section, the SASP must contact the appropriate SBA field office and obtain SBA's verification that the concern seeking to acquire the surplus property is eligible, and that the identified use of the property is consistent with the concern's business activities. SASPs may not release property to a Participant without this verification.

(4) The SASP and the Participant must agree on and record the fair market value of the surplus property at the time of the transfer to the Participant. The SASP must provide to SBA a written record, including the agreed upon fair market value, of each transaction to a Participant when any property has been transferred.

(e) *Costs.* Participants acquiring surplus property from a SASP must pay a service fee to the SASP which is equal to the SASP's direct costs of locating, inspecting, and transporting the surplus property. If a Participant elects to incur the responsibility and the expense for transporting the acquired property, the concern may do so and no transportation costs will be charged by the SASP. In addition, the SASP may charge a reasonable fee to cover its costs of administering the program. In no instance will any SASP charge a Participant more for any service than their established fees charged to other transferees.

(f) *Title.* Upon execution of the SASP distribution document, the Participant has conditional title only to the surplus personal property during the applicable period of restriction. Full title to the surplus personal property will vest in the donee only after the donee has met all of the requirements of this part.

(g) *Compliance.* (1) SBA will periodically review whether Participants that have received surplus property have used and maintained the property as agreed. This review may include site visits to visually inspect the property to ensure that it is being used in a manner consistent with the terms of its transfer.

(2) Participants must provide SBA with access to all relevant records upon request.

(3) Where SBA receives credible information that transferred surplus property may have been disposed of or otherwise used in a manner that is not consistent with the terms of the transfer, SBA may investigate such claim to determine its validity.

(4) SBA may take any action to correct any noncompliance involving the use of transferred property still in possession of the Participant or to enforce any terms, conditions, reservations, or restrictions imposed on the property by the distribution document. Actions to enforce compliance, or which may be taken as a result of noncompliance, include the following:

(i) Requiring that the property be placed in proper use within a specified time;

(ii) Requiring that the property be transferred to another Participant having a need and use for the property, returned to the SASP serving the area where the property is located for distribution to another eligible transferee or to another SASP, or transferred through GSA to another Federal agency;

(iii) Recovery of the fair rental value of the property from the date of its receipt by the Participant; and

(iv) Initiation of proceedings to terminate the Participant from the 8(a) BD program.

(5) Where SBA finds that a recipient has sold or otherwise disposed of the acquired surplus property in violation of the agreement covering sale and disposal, the Participant is liable for the agreed upon fair market value of the property at the time of the transfer, or the sale price, whichever is greater. However, a Participant need not repay any amount where it can demonstrate to SBA's satisfaction that the property is no longer useful for the purpose for which it was transferred and receives SBA's prior written consent to transfer the property. For example, if a piece of equipment breaks down beyond repair, it may be disposed of without being subject to the repayment provision, so long as the concern receives SBA's prior consent.

(6) Any funds received by SBA in enforcement of this section will be remitted promptly to the Treasury of the United States as miscellaneous receipts.

[63 FR 35739, June 30, 1998, as amended at 85 FR 69124, Nov. 2, 2020]

CONTRACTUAL ASSISTANCE

§ 124.501 What general provisions apply to the award of 8(a) contracts?

(a) Pursuant to section 8(a) of the Small Business Act, SBA is authorized to enter into all types of contracts with other Federal agencies regardless of the place of performance, including contracts to furnish equipment, supplies, services, leased real property, or materials to them or to perform construction work for them, and to contract the performance of these contracts to qualified Participants. This includes set-asides, partial set-asides and reserves of Multiple Award Contracts and set-asides of orders issued against Multiple Award Contracts. Where practicable, simplified acquisition procedures should be used for 8(a) contracts at or below the simplified acquisition threshold. Where appropriate, SBA will delegate the contract execution function to procuring activities. In order to receive and retain a delegation of SBA's contract execution and review functions, a procuring activity must report all 8(a) contract awards, modifications, and options to SBA.

(b) 8(a) contracts may either be sole source awards or awards won through competition with other Participants. In addition, for multiple award contracts not set aside for the 8(a) BD program, a procuring agency may award an 8(a) sole source order or set aside one or more specific orders to be competed only among eligible 8(a) Participants. Such an order may be awarded as an 8(a) award where the order was offered to and accepted by SBA as an 8(a) award and the order specifies that the performance of work and/or nonmanufacturer rule requirements apply as appropriate. A procuring activity cannot restrict an 8(a) competition (for either a contract or order) to require SBA socioeconomic certifications other than 8(a) certification (*i.e.*, a competition cannot be limited only to business concerns that are both 8(a) and HUBZone, 8(a) and WOSB, or 8(a) and SDVO) or give evaluation preferences to firms having one or more other certifications.

(c) Admission into the 8(a) BD program does not guarantee that a Participant will receive 8(a) contracts.

(d) A requirement for possible award may be identified by SBA, a particular Participant or the procuring activity itself. SBA will submit the capability statements provided to SBA annually under §124.403 to appropriate procuring activities for the purpose of matching requirements with Participants.

(e) Participants should market their capabilities to appropriate procuring activities to increase their prospects of receiving sole source 8(a) contracts.

(f) An 8(a) participant that identifies a requirement that appears suitable for award through the 8(a) BD program may request SBA to contact the procuring activity to request that the requirement be offered to the 8(a) BD program.

(g) Before a Participant may be awarded either a sole source or competitive 8(a) contract, SBA must determine that the Participant is eligible

for award. SBA will determine eligibility at the time of its acceptance of the underlying requirement into the 8(a) BD program for a sole source 8(a) contract, and after the apparent successful offeror is identified for a competitive 8(a) contract. Where a joint venture is the apparent successful offeror in connection with a competitive 8(a) procurement or is offered a sole source order under a previously competitively awarded 8(a) multiple award contract, SBA will determine whether the 8(a) partner to the joint venture is eligible for award, but will not review the joint venture agreement to determine compliance with §124. 513 (*see* §124.513(e)(1)). In any case in which an 8(a) Participant is determined to be ineligible, SBA will notify the 8(a) Participant of that determination. Eligibility is based on 8(a) BD program criteria, including whether the 8(a) Participant:

(1) Qualifies as a small business under the size standard corresponding to the NAICS code assigned to the requirement;

(2) Is in compliance with any applicable competitive business mix targets established or remedial measure imposed by §124.509 that does not include the denial of future sole source 8(a) contracts;

(3) Complies with the continued eligibility reporting requirements set forth in §124.112(b);

(4) Has a bona fide place of business in the applicable geographic area if the procurement is for construction;

(5) Has not received 8(a) contracts in excess of the dollar limits set forth in §124.519 for a sole source 8(a) procurement;

(6) Has complied with the provisions of §124.513(c) and (d) if it is seeking a sole source 8(a) award through a joint venture; and

(7) Can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in §124.510.

(h) For a sole source 8(a) procurement, a concern must be a current Participant in the 8(a) BD program at the time of award and must qualify as small for the size standard corresponding to the NAICS code assigned to the contract or order on the date the contract or order is offered to the 8(a) BD program. If a firm's term of participation in the 8(a) BD program ends (or the firm otherwise exits the program) before a sole source 8(a) contract can be awarded, award cannot be made to that firm. This applies equally to sole source orders issued under multiple award contracts. For a competitive 8(a) procurement, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of offers contained in the solicitation as provided in §124.507(d).

(i) A Participant must certify that it qualifies as a small business under the size standard corresponding to the NAICS code assigned to each 8(a) contract. 8(a) BD program personnel will verify size prior to award of an 8(a) contract. If the Participant is not verified as small, it may request a formal size determination from the appropriate General Contracting Area Office under part 121 of this title.

(j) Any person or entity that misrepresents its status as a ''small business concern owned and controlled by socially and economically disadvantaged individuals'' in order to obtain any 8(a) contracting opportunity will be subject to possible criminal, civil and administrative penalties, including those imposed by section 16(d) of the Small Business Act, 15 U.S.C. 645(d).

(k) In order to be awarded a sole source or competitive 8(a) construction contract, a Participant must have a bona fide place of business within the applicable geographic location determined by SBA. This will generally be the geographic area serviced by the SBA district office, a Metropolitan Statistical Area (MSA), a contiguous county (whether in the same or different state), or the geographical area serviced by a contiguous SBA district office to where the work will be performed. A Participant with a bona fide place of business within a state will be deemed eligible for a construction contract anywhere in that state (even if that state is serviced by more than one SBA district office). SBA may also determine that a Participant with a bona fide place of business in the geographic area served by one of several SBA district offices or another nearby area is

eligible for the award of an 8(a) construction contract.

(1) A Participant may have bona fide places of business in more than one location.

(2) In order for a Participant to establish a bona fide place of business in a particular geographic location, the SBA district office serving the geographic area of that location must determine if the location in fact qualifies as a bona fide place of business under SBA's requirements.

(i) A Participant must submit a request for a bona fide business determination to the SBA district office servicing it. Such request may, but need not, relate to a specific 8(a) requirement. In order to apply to a specific competitive 8(a) solicitation, such request must be submitted at least 20 working days before initial offers that include price are due.

(ii) The servicing district office will immediately forward the request to the SBA district office serving the geographic area of the particular location for processing. Within 10 working days of receipt of the submission, the reviewing district office will conduct a site visit, if practicable. If not practicable, the reviewing district office will contact the Participant within such 10-day period to inform the Participant that the reviewing office has received the request and may ask for additional documentation to support the request.

(iii) In connection with a specific competitive solicitation, the reviewing office will make a determination whether or not the Participant has a bona fide place of business in its geographical area within 5 working days of a site visit or within 15 working days of its receipt of the request from the servicing district office if a site visit is not practical in that timeframe. If the request is not related to a specific procurement, the reviewing office will make a determination within 30 working days of its receipt of the request from the servicing district office, if practicable.

(A) Where SBA does not provide a determination within the identified time limit, a Participant may presume that SBA has approved its request for a bona fide place of business and submit an offer for a competitive 8(a) procurement that requires a bona fide place of business in the requested area.

(B) In order to be eligible for award, SBA must approve the bona fide place of business prior to award. If SBA has not provided a determination prior to the time that a Participant is identified as the apparent successful offeror, SBA will make the bona fide place of business determination as part of the eligibility determination set forth in paragraph (g)(4) of this section within 5 days of receiving a procuring activity's request for an eligibility determination, unless the procuring activity grants additional time for review. If, due to deficiencies in a Participant's request, SBA cannot make a determination, and the procuring activity does not grant additional time for review, SBA will be unable to verify the Participant's eligibility for award and the Participant will be ineligible for award.

(3) The effective date of a bona fide place of business is the date that the evidence (paperwork) shows that the business in fact regularly maintained its business at the new geographic location.

(4) If a Participant is currently performing a contract in a specific state, it qualifies as having a bona fide place of business in that state for one or more additional contracts. The Participant may not use contract performance in one state to allow it to be eligible for an 8(a) contract in a contiguous state unless it officially establishes a bona fide place of business in the location in which it is currently performing a contract, in the contiguous state or in a location in another state in which the geographical area serviced by the SBA district office is contiguous to the district office in the state where the work will be performed.

(5) A Participant may establish a bona fide place of business through a full-time employee in a home office.

(6) An individual designated as the full-time employee of the Participant seeking to establish a bona fide place of business in a specific geographic location need not be a resident of the state where he/she is conducting business.

(7) Except as provided in paragraph (k)(2)(iii) of this section, in order for a Participant to be eligible to submit an offer for an 8(a) procurement limited to a specific geographic area, it must receive from SBA a determination that it has a bona fide place of business within that area prior to submitting its offer for the procurement.

(8) Once a Participant has established a bona fide place of business, the Participant may change the location of the recognized office without prior SBA approval. However, the Participant must notify SBA and provide documentation demonstrating an office at that new location within 30 days after the move. Failure to timely notify SBA will render the Participant ineligible for new 8(a) construction procurements limited to that geographic area.

(9) For an 8(a) construction contract requiring work in multiple locations, a Participant is eligible if:

(i) For a single award contract, the Participant has a bona fide place of business where a majority of the work (as identified by the dollar value of the work) is anticipated to be performed; and

(ii) For a multiple award contract, the Participant has a bona fide place of business in any location where work is to be performed.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8259, Feb. 11, 2011; 78 FR 61132, Oct. 2, 2013; 81 FR 48582, July 25, 2016; 85 FR 66186, Oct. 16, 2020; 86 FR 2959, Jan. 14, 2021; 88 FR 26206, Apr. 27, 2023]

§ 124.502 How does an agency offer a procurement to SBA for award through the 8(a) BD program?

(a) A procuring activity contracting officer indicates his or her formal intent to award a procurement requirement as an 8(a) contract by submitting a written offering letter to SBA.

(1) Except as set forth in § 124.503(a)(4)(ii) and § 124.503(i)(1)(ii), a procuring activity contracting officer must submit an offering letter for each intended 8(a) procurement, including follow-on 8(a) contracts, competitive 8(a) orders issued under non-8(a) multiple award contracts, and sole source 8(a) orders issued under 8(a) multiple award contracts.

(2) The procuring activity may transmit the offering letter to SBA by electronic mail, if available, or by facsimile transmission, as well as by mail or commercial delivery service.

(b) Contracting officers must submit offering letters to the following locations:

(1) For competitive 8(a) requirements and those sole source requirements for which no specific Participant is nominated (i.e., open requirements) other than construction requirements, to the SBA district office serving the geographical area in which the procuring activity is located;

(2) For competitive and open construction requirements, to the SBA district office serving the geographical area in which the work is to be performed or, in the case of such contracts to be performed overseas, to the Office of 8(a) BD located in SBA Headquarters;

(3) For sole source requirements offered on behalf of a specific Participant, to the SBA district office servicing that concern.

(c) An offering letter must contain the following information:

(1) A description of the work to be performed;

(2) The estimated period of performance;

(3) The NAICS code that applies to the principal nature of the acquisition;

(4) The anticipated dollar value of the requirement, including options, if any;

(5) Any special restrictions or geographical limitations on the requirement;

(6) The location of the work to be performed for construction procurements;

(7) Any special capabilities or disciplines needed for contract performance;

(8) The type of contract to be awarded, such as firm fixed price, cost reimbursement, or time and materials;

(9) The acquisition history, if any, of the requirement, including specifically whether the requirement is a follow-on requirement, and whether any portion of the contract was previously performed by a small business outside of the 8(a) BD program;

(10) The names and addresses of any small business contractors which have performed on this requirement during the previous 24 months;

(11) A statement that prior to the offering no solicitation for the specific acquisition has been issued as a small business set-aside, or as a small disadvantaged business set-aside if applicable, and that no other public communication (such as a notice in the Commerce Business Daily) has been made showing the procuring activity's clear intent to use any of these means of procurement;

(12) Identification of any specific Participant that the procuring activity contracting officer nominates for award of a sole source 8(a) contract, if appropriate, including a brief justification for the nomination, such as one of the following:

(i) The Participant, through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) BD program; or

(ii) The acquisition is a follow-on or renewal contract and the nominated concern is the incumbent;

(13) Bonding requirements, if applicable;

(14) Identification of all Participants which have expressed an interest in being considered for the acquisition;

(15) Identification of all SBA field offices which have requested that the requirement be awarded through the 8(a) BD program;

(16) A request, if appropriate, that a requirement whose estimated contract value is under the applicable competitive threshold be awarded as an 8(a) competitive contract;

(17) A statement that the necessary justification and approval under the Federal Acquisition Regulation has occurred where a requirement whose estimated contract value exceeds $25,000,000, or $100,000,000 in the case of Department of Defense contracts, is offered to SBA as a sole source requirement on behalf of a specific Participant; and

(18) Any other information that the procuring activity deems relevant or which SBA requests.

[63 FR 35739, June 30, 1998, as amended at 81 FR 48582, July 25, 2016; 86 FR 61672, Nov. 8, 2021; 88 FR 26206, Apr. 27, 2023]

§ 124.503 How does SBA accept a procurement for award through the 8(a) BD program?

(a) Acceptance of the requirement. Upon receipt of the procuring activity's offer of a procurement requirement, SBA will determine whether it will accept the requirement for the 8(a) BD program. SBA's decision whether to accept the requirement will be sent to the procuring activity in writing within 10 business days of receipt of the written offering letter if the contract is valued at more than the simplified acquisition threshold, and within two business days of receipt of the offering letter if the contract is valued at or below the simplified acquisition threshold, unless SBA requests, and the procuring activity grants, an extension. SBA and the procuring activity may agree to a shorter timeframe for SBA's review under a Partnership Agreement delegating 8(a) contract execution functions to the agency. SBA is not required to accept any particular procurement offered to the 8(a) BD program.

(1) Where SBA decides to accept an offering of a sole source 8(a) procurement, SBA will accept the offer both on behalf of the 8(a) BD program and in support of a specific Participant. As part of its acceptance of a sole source requirement, SBA will determine the eligibility of the Participant identified in the offering letter, using the same analysis set forth in §124.501(g). Where a procuring agency offers a sole source 8(a) procurement on behalf of a joint venture, SBA will conduct an eligibility review of the lead 8(a) party to the joint venture as part of its acceptance, and will approve the joint venture prior to award pursuant to §124.513(e).

(2) Where SBA decides to accept an offering of a competitive 8(a) procurement, SBA will accept the offer on behalf of the 8(a) BD program. For a competitive 8(a) procurement, SBA will determine the eligibility of the apparent successful offeror pursuant to §124.507(b).

(3) Where SBA has delegated its contract execution functions to a procuring activity, the procuring activity may assume that SBA accepts its offer for the 8(a) program if the procuring

activity does not receive a reply to its offer within five days.

(4) In the case of procurement requirements valued at or below the Simplified Acquisition Procedures threshold:

(i) Where a procuring activity makes an offer to the 8(a) program on behalf of a specific Program Participant and does not receive a reply to its offer within two days, the procuring activity may assume the offer is accepted and proceed with award of an 8(a) contract;

(ii) Where SBA has delegated its 8(a) contract execution functions to an agency through a signed Partnership Agreement, SBA may authorize the procuring activity to award an 8(a) contract below the simplified acquisition threshold without requiring an offer and acceptance of the requirement for the 8(a) BD program. However, the procuring activity must request SBA to determine the eligibility of the intended awardee prior to award. SBA shall review the 8(a) Participant's eligibility and issue an eligibility determination within two business days after a request from the procuring activity. If SBA does not respond within this timeframe, the procuring activity may assume the 8(a) Participant is eligible and proceed with award. The procuring activity shall provide a copy of the executed contract to the SBA servicing district office within fifteen business days of award.

(5) Where SBA does not respond to an offering letter within the normal 10 business-day time period, the procuring activity may seek SBA's acceptance through the AA/BD. The procuring activity may assume that SBA accepts its offer for the 8(a) program if it does not receive a reply from the AA/BD within 5 business days of his or her receipt of the procuring activity request.

(b) *Verification of NAICS code.* As part of the acceptance process, SBA will verify the appropriateness of the NAICS code designation assigned to the requirement by the procuring activity contracting officer.

(1) SBA will accept the NAICS code assigned to the requirement by the procuring activity contracting officer as long as it is reasonable, even though other NAICS codes may also be reasonable.

(2) If SBA and the procuring activity are unable to agree as to the proper NAICS code designation for the requirement, SBA may either refuse to accept the requirement for the 8(a) BD program, appeal the contracting officer's determination to the head of the agency pursuant to §124.505, or appeal the NAICS code designation to OHA under part 134 of this title.

(c) *Sole source award where procuring activity nominates a specific Participant.* SBA will determine whether an appropriate match exists where the procuring activity identifies a particular Participant for a sole source award.

(1) Once SBA determines that a procurement is suitable to be accepted as an 8(a) sole source contract, SBA will normally accept it on behalf of the Participant recommended by the procuring activity, provided that:

(i) The procurement is consistent with the Participant's business plan;

(ii) The Participant complies with its applicable non-8(a) business activity target imposed by §124.509(d);

(iii) The Participant is small for the size standard corresponding to the NAICS code assigned to the requirement by the procuring activity contracting officer;

(iv) The Participant has submitted required financial statements to SBA; and

(v) The Participant can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in §124.510.

(2) If an appropriate match exists, SBA will advise the procuring activity whether SBA will participate in contract negotiations or whether SBA will authorize the procuring activity to negotiate directly with the identified Participant. Where SBA has delegated its contract execution functions to a procuring activity, SBA will also identify that delegation in its acceptance letter.

(3) If an appropriate match does not exist, SBA will notify the Participant and the procuring activity, and may then nominate an alternate Participant.

(d) *Open requirements.* When a procuring activity does not nominate a particular concern for performance of a

sole source 8(a) contract (open requirement), the following additional procedures will apply:

(1) If the procurement is a construction requirement, SBA will examine the portfolio of Participants that have a bona fide place of business within the geographical boundaries served by the SBA district office where the work is to be performed to select a qualified Participant. If none is found to be qualified or a match for a concern in that district is determined to be impossible or inappropriate, SBA may nominate a Participant with a bona fide place of business within the geographical boundaries served by another district office within the same state, or may nominate a Participant having a bona fide place of business out of state but within a reasonable proximity to the work site. SBA's decision will ensure that the nominated Participant is close enough to the work site to keep costs of performance reasonable.

(2) If the procurement is not a construction requirement, SBA may select any eligible, responsible Participant nationally to perform the contract.

(3) In cases in which SBA selects a Participant for possible award from among two or more eligible and qualified Participants, the selection will be based upon relevant factors, including business development needs, compliance with competitive business mix requirements (if applicable), financial condition, management ability, technical capability, and whether award will promote the equitable distribution of 8(a) contracts.

(e) *Withdrawal/substitution of offered requirement or Participant.* After SBA has accepted a requirement for award as a sole source 8(a) contract on behalf of a specific Participant (whether nominated by the procuring agency or identified by SBA for an open requirement), if the procuring agency believes that the identified Participant is not a good match for the procurement—including for such reasons as the procuring agency finding the Participant non-responsible or the negotiations between the procuring agency and the Participant otherwise failing—the procuring agency may seek to substitute another Participant for the originally identified Participant. The procuring agency must inform SBA of its concerns regarding the originally identified Participant and identify whether it believes another Participant could fulfill its needs.

(1) If the procuring agency and SBA agree that another Participant can fulfill its needs, the procuring agency will withdraw the original offering and reoffer the requirement on behalf of another 8(a) Participant. SBA will then accept the requirement on behalf of the newly identified Participant and authorize the procuring agency to negotiate directly with that Participant.

(2) If the procuring agency and SBA agree that another Participant cannot fulfill its needs, the procuring agency will withdraw the original offering letter and fulfill its needs outside the 8(a) BD program.

(3) If the procuring agency believes that another Participant cannot fulfill its needs, but SBA does not agree, SBA may appeal that decision to the head of the procuring agency pursuant to §124.505(a)(2).

(f) *Formal technical evaluations.* Except for requirements for architectural and engineering services, SBA will not authorize formal technical evaluations for sole source 8(a) requirements. A procuring activity:

(1) Must request that a procurement be a competitive 8(a) award if it requires formal technical evaluations of more than one Participant for a requirement below the applicable competitive threshold amount; and

(2) May conduct informal assessments of several Participants' capabilities to perform a specific requirement, so long as the statement of work for the requirement is not released to any of the Participants being assessed.

(g) *Repetitive acquisitions.* A procuring activity contracting officer must submit a new offering letter to SBA where he or she intends to award a follow-on or repetitive contract as an 8(a) award.

(1) This enables SBA to determine:

(i) Whether the requirement should be a competitive 8(a) award;

(ii) A nominated firm's eligibility, whether or not it is the same firm that performed the previous contract;

(iii) The affect that contract award would have on the equitable distribution of 8(a) contracts; and

(iv) Whether the requirement should continue under the 8(a) BD program.

(2) Where a procuring agency seeks to reprocure a follow-on requirement through an 8(a) contracting vehicle which is not available to all 8(a) BD Program Participants (*e.g.*, a multiple award or Governmentwide acquisition contract that is itself an 8(a) contract), and the previous/current 8(a) award was not so limited, SBA will consider the business development purposes of the program in determining how to accept the requirement.

(h) *Basic Ordering Agreements (BOAs) and Blanket Purchase Agreements (BPAs).* Neither a Basic Ordering Agreement (BOA) nor a Blanket Purchase Agreement (BPA) is a contract under the FAR. *See* 48 CFR 13.303 and 48 CFR 16.703(a). Each order to be issued under a BOA or BPA is an individual contract. As such, the procuring activity must offer, and SBA must accept, each order under a BOA or BPA in addition to offering and accepting the BOA or BPA itself.

(1) SBA will not accept for award on a sole source basis any task order under a BOA or BPA that would cause the total dollar amount of task orders issued to exceed the applicable competitive threshold amount set forth in § 124.506(a).

(2) Where a procuring activity believes that task orders to be issued under a proposed BOA or BPA will exceed the applicable competitive threshold amount set forth in § 124.506(a), the procuring activity must offer the requirement to the program to be competed among eligible Participants.

(3) Once a concern's program term expires, the concern otherwise exits the 8(a) BD program, or becomes other than small for the NAICS code assigned under the BOA or BPA, new orders will not be accepted for the concern.

(4) A procuring agency may offer, and SBA may accept, an order issued under a BOA or BPA to be awarded through the 8(a) BD program where the BOA or BPA itself was not accepted for the 8(a) BD program, but rather was awarded on an unrestricted basis.

(i) *Task or Delivery Order Contracts, including Multiple Award Contracts*—(1) *Contracts set-aside for exclusive competition among 8(a) Participants.* (i) A task or delivery order contract, Multiple Award Contract, or order issued against a Multiple Award Contract that is set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants must follow the established 8(a) competitive procedures. This includes an offering to and acceptance into the 8(a) program, SBA eligibility verification of the apparent successful offerors prior to contract award, compliance with the performance of work requirements set forth in § 124.510, and compliance with the nonmanufacturer rule (*see* § 121.406(b)), if applicable.

(ii) An agency is not required to offer or receive acceptance of individual orders into the 8(a) BD program if the task or delivery order contract or Multiple Award Contract was set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants, and the individual order is to be competed among all 8(a) contract holders. However, where the order includes work that was previously performed through another 8(a) contract, the procuring agency must notify and consult with SBA prior to issuing the order that it intends to procure such specified work through an order under an 8(a) Multiple Award Contract. Consultation with SBA does not require SBA concurrence or approval. Where that work is critical to the business development of a current Participant that previously performed the work through another 8(a) contract and that Participant is not a contract holder of the 8(a) Multiple Award Contract, SBA may request that the procuring agency fulfill the requirement through a competition available to all 8(a) BD Program Participants. SBA will provide any feedback in response to the procuring agency's notification within 10 business days.

(iii) A concern awarded a task or delivery order contract or Multiple Award Contract that was set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants may generally continue to receive new orders

even if it has grown to be other than small or has exited the 8(a) BD program, and agencies may continue to take SDB credit toward their prime contracting goals for orders awarded to 8(a) Participants. A procuring agency may seek to award an order only to a concern that is a current Participant in the 8(a) program at the time of the order. In such a case, the procuring agency will announce its intent to limit the award of the order to current 8(a) Participants and verify a contract holder's 8(a) BD status prior to issuing the order. Where a procuring agency seeks to award an order to a concern that is a current 8(a) Participant, a concern must be an eligible Participant in accordance with §124.501(g) as of the initial date specified for the receipt of offers contained in the order solicitation, or at the date of award of the order if there is no solicitation.

(iv) An agency may issue a sole source award against a Multiple Award Contract that has been set aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) BD Program Participants or reserved solely for 8(a) Program Participants if the required dollar thresholds for sole source awards are met. Where an agency seeks to award an order on a sole source basis (*i.e.*, to one particular 8(a) contract holder without competition among all 8(a) contract holders), the agency must offer, and SBA must accept, the order into the 8(a) program on behalf of the identified 8(a) contract holder.

(A) To be eligible for the award of a sole source order, a concern must be a current Participant in the 8(a) BD program at the time of award of the order, qualify as small for the size standard corresponding to the NAICS code assigned to the order on the date the order is offered to the 8(a) BD program, and be in compliance with any applicable competitive business mix target established or remedial measure imposed by §124.509. Where the intended sole source recipient is a joint venture, the 8(a) managing partner to the joint venture is the concern whose eligibility is considered.

(B) Where an agency seeks to issue a sole source order to a joint venture, the two-year restriction for joint venture awards set forth in §121.103(h) does not apply and SBA will not review and approve the joint venture agreement as set forth in §124.513(e)(1).

(2) *Allowing orders issued to 8(a) Participants under Multiple Award Contracts that were not set-aside for exclusive competition among eligible 8(a) Participants to be considered 8(a) awards.* In order for an order issued to an 8(a) Participant and placed against a Multiple Award Contract to be considered an 8(a) award, where the Multiple Award contract was not initially set-aside, partially set-aside or reserved for exclusive competition among 8(a) Participants, the following conditions must be met:

(i) The order must be offered to and accepted into the 8(a) BD program;

(ii) The order must be either an 8(a) sole source award or be competed exclusively among only the 8(a) awardees of the underlying multiple award contract. Where an agency seeks to issue an 8(a) competitive order under a multiple award contract that was awarded under full and open competition or as a small business set-aside, all eligible 8(a) BD Participants who are contract holders of the underlying multiple award contract must have the opportunity to compete for the order. Where an agency seeks to issue an 8(a) competitive order under the Federal Supply Schedule, an agency can utilize the procedures set forth in FAR subpart 8.4 (48 CFR part 8, subpart 8.4) to award to an eligible 8(a) BD Participant. Where an agency seeks to issue an 8(a) sole source order under a multiple award contract that was awarded under full and open competition or as a small business set-aside, the identified 8(a) Participant that is a contract holder of the underlying multiple award contract must be an eligible Participant on the date of the issuance of the order.

(iii) The order must require the concern comply with applicable limitations on subcontracting provisions (*see* §125.6) and the nonmanufacturer rule, if applicable, (*see* §121.406(b)) in the performance of the individual order; and

(iv) SBA must verify that a concern is an eligible 8(a) Participant in accordance with §124.501(g) as of the initial date specified for the receipt of offers contained in the order solicitation,

or at the date of award of the order if there is no solicitation. If a concern has exited the 8(a) BD program prior to that date, it will be ineligible for the award of the order.

(3) *Reserves.* A procuring activity must offer and SBA must accept a requirement that is reserved for 8(a) Participants (*i.e.*, an acquisition where the contracting officer states an intention to make one or more awards to only 8(a) Participants under full and open competition). However, a contracting officer does not have to offer the requirement to SBA where the acquisition has been reserved for small businesses, even if the contracting officer states an intention to make one or more awards to several types of small business including 8(a) Participants since any such award to 8(a) Participants would not be considered an 8(a) contract award.

(j) Requirements where SBA has delegated contract execution authority. Except as provided in paragraph (a)(4)(i) of this section, where SBA has delegated its 8(a) contract execution authority to the procuring activity, the procuring activity must still offer and SBA must still accept all requirements intended to be awarded as 8(a) contracts.

(k) *Contracting Among Small Business Programs*—(1) *Acquisitions Valued At or Below the Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Micropurchase Threshold but not exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from making an award to a small business under the 8(a) BD, HUBZone, SDVO SBC or WOSB Programs.

(2) *Acquisitions Valued Above the Simplified Acquisition Threshold.* (i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's System for Award Management (SAM) (or any successor system) certifications and associated representations were reviewed.

(ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

[63 FR 35739, June 30, 1998, as amended at 70 FR 51248, Aug. 30, 2005; 71 FR 66444, Nov. 15, 2006; 74 FR 45753, Sept. 4, 2009; 75 FR 62280, Oct. 7, 2010; 76 FR 8259, Feb. 11, 2011; 77 FR 1860, Jan. 12, 2012; 78 FR 61133, Oct. 2, 2013; 81 FR 48582, July 25, 2016; 84 FR 65661, Nov. 29, 2019; 85 FR 66187, Oct. 16, 2020; 88 FR 26206, Apr. 27, 2023]

§ 124.504 What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract, and when can a requirement be released from the 8(a) BD program?

SBA will not accept a procurement for award as an 8(a) contract if the circumstances identified in paragraphs (a) through (d) of this section exist.

(a) *Prior intent to award as a small business set-aside, or use the HUBZone, Service Disabled Veteran-Owned Small*

Business, or Women-Owned Small Business programs. The procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to award the contract as a small business set-aside, or to use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs prior to offering the requirement to SBA for award as an 8(a) contract. However, the AA/BD may permit the acceptance of the requirement under extraordinary circumstances.

(b) *Competition prior to offer and acceptance.* The procuring activity competed a requirement among 8(a) Participants prior to offering the requirement to SBA and did not clearly evidence its intent to conduct an 8(a) competitive acquisition.

(c) *Adverse impact.* SBA has made a written determination that acceptance of the procurement for 8(a) award would have an adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs. The adverse impact concept is designed to protect small business concerns which are performing Government contracts awarded outside the 8(a) BD program, and does not apply to follow-on or renewal 8(a) acquisitions. SBA will not consider adverse impact with respect to any requirement offered to the 8(a) program under the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101).

(1) In determining whether the acceptance of a requirement would have an adverse impact on an individual small business, SBA will consider all relevant factors.

(i) In connection with a specific small business, SBA presumes adverse impact to exist where:

(A) The small business concern has performed the specific requirement for at least 24 months;

(B) The small business is performing the requirement at the time it is offered to the 8(a) BD program, or its performance of the requirement ended within 30 days of the procuring activity's offer of the requirement to the 8(a) BD program; and

(C) The dollar value of the requirement that the small business is or was performing is 25 percent or more of its most recent annual gross sales (including those of its affiliates). For a multiyear requirement, the dollar value of the last 12 months of the requirement will be used to determine whether a small business would be adversely affected by SBA's acceptance.

(ii) Except as provided in paragraph (c)(2) of this section, adverse impact does not apply to ''new'' requirements. A new requirement is one which has not been previously procured by the relevant procuring activity.

(A) Where a requirement is new, no small business could have previously performed the requirement and, thus, SBA's acceptance of the requirement for the 8(a) BD program will not adversely impact any small business.

(B) Procurements for construction services (*e.g.*, the building of a specific structure) are generally deemed to be new requirements. However, recurring indefinite delivery or indefinite quantity task or delivery order construction services are not considered new (*e.g.*, a recurring procurement requiring all construction work at base X).

(C) The expansion or modification of an existing requirement may be considered a new requirement where the magnitude of change is significant enough to cause a price adjustment of at least 25 percent (adjusted for inflation) or to require significant additional or different types of capabilities or work.

(D) SBA need not perform an impact determination where a new requirement is offered to the 8(a) BD program.

(2) In determining whether the acceptance of a requirement would have an adverse impact on a group of small businesses, SBA will consider the effects of combining or consolidating various requirements being performed by two or more small business concerns into a single contract which would be considered a ''new'' requirement as compared to any of the previous smaller requirements. SBA may find adverse impact to exist if one of the existing small business contractors meets the presumption set forth in paragraph (c)(1)(i) of this section.

(3) In determining whether the acceptance of a requirement would have

an adverse impact on other small business programs, SBA will consider all relevant factors, including but not limited to, the number and value of contracts in the subject industry in the 8(a) BD program as compared with other small business programs.

(4) SBA does not typically consider the value of a bridge contract when determining whether an offered procurement is a new requirement. A bridge contract is meant to be a temporary stop-gap measure intended to ensure the continuation of service while an agency finalizes a long-term procurement approach.

(d) *Release for non-8(a) or limited 8(a) competition.* (1) Except as set forth in paragraph (d)(4) of this section, where a procurement is awarded as an 8(a) contract, its follow-on requirement must remain in the 8(a) BD program unless SBA agrees to release it for non-8(a) competition. Where a procurement will contain work currently performed under one or more 8(a) contracts, and the procuring agency determines that the procurement should not be considered a follow-on requirement to the 8(a) contract(s), the procuring agency must coordinate with the SBA District Office servicing the 8(a) incumbent firm and the SBA Procurement Center Representative assigned to the contracting activity initiating a non-8(a) procurement action that it intends to procure such specified work outside the 8(a) BD program through a requirement that it considers to be new. Such notification must identify the scope and dollar value of any work previously performed through another 8(a) contract and the scope and dollar value of the contract determined to be new. Additionally, a procuring agency must coordinate with SBA where it seeks to reprocure a follow-on requirement through a pre-existing limited contracting vehicle which is not available to all 8(a) BD Program Participants and the previous/current 8(a) award was not so limited. If a procuring agency would like to fulfill a follow-on requirement outside of the 8(a) BD program, it must make a written request to and receive the concurrence of the AA/BD to do so. In determining whether to release a requirement from the 8(a) BD program, SBA will consider:

(i) Whether the agency has achieved its SDB goal;

(ii) Where the agency is in achieving its HUBZone, SDVO, WOSB, or small business goal, as appropriate; and

(iii) Whether the requirement is critical to the business development of the 8(a) Participant that is currently performing it.

(2) SBA may decline to accept the offer of a follow-on or renewable 8(a) acquisition in order to give a concern previously awarded the contract that is leaving or has left the 8(a) BD program the opportunity to compete for the requirement outside of the 8(a) BD program.

(i) SBA will consider release under paragraph (2) only where:

(A) The procurement awarded through the 8(a) BD program is being or was performed by either a Participant whose program term will expire prior to contract completion, or by a former Participant whose program term expired within one year of the date of the offering letter;

(B) The concern requests in writing that SBA decline to accept the offer prior to SBA's acceptance of the requirement for award as an 8(a) contract; and

(C) The concern qualifies as a small business for the requirement now offered to the 8(a) BD program.

(ii) In considering release under paragraph (2), SBA will balance the importance of the requirement to the concern's business development needs against the business development needs of other Participants that are qualified to perform the requirement. This determination will include consideration of whether rejection of the requirement would seriously reduce the pool of similar types of contracts available for award as 8(a) contracts. SBA will also seek the views of the procuring agency.

(3) SBA may release a requirement under this paragraph only where the procuring activity agrees to procure the requirement as a small business, HUBZone, SDVO small business, or WOSB set-aside or otherwise identifies a procurement strategy that would emphasize or target small business participation.

(4) The requirement that a follow-on procurement must be released from the

8(a) BD program in order for it to be fulfilled outside the 8(a) BD program does not apply:

(i) Where previous orders were offered to and accepted for the 8(a) BD program pursuant to §124.503(i)(2); or

(ii) Where a procuring agency will use a mandatory source (*see* FAR Subparts 8.6 and 8.7(48 CFR subparts 8.6 and 8.7)). In such a case, the procuring agency should notify SBA at least 30 days prior to the end of the contract or order.

[63 FR 35739, 35772, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 76 FR 8259, Feb. 11, 2011; 78 FR 61133, Oct. 2, 2013; 81 FR 34260, May 31, 2016; 81 FR 48582, July 25, 2016; 85 FR 66188, Oct. 16, 2020; 88 FR 26207, Apr. 27, 2023]

§124.505 When will SBA appeal the terms or conditions of a particular 8(a) contract or a procuring activity decision not to use the 8(a) BD program?

(a) *What SBA may appeal.* The Administrator of SBA may appeal the following matters to the head of the procuring agency:

(1) A contracting officer's decision not to make a particular procurement available for award as an 8(a) contract;

(2) A contracting officer's decision to reject a specific Participant for award of an 8(a) contract after SBA's acceptance of the requirement for the 8(a) BD program;

(3) A decision by a contracting officer that a particular procurement is a new requirement that is not subject to the release requirements set forth in §124.504(d); and

(4) The terms and conditions of a proposed 8(a) contract, including the procuring activity's NAICS code designation and estimate of the fair market price.

(b) *Procedures for appeal.* (1) SBA must notify the contracting officer of the SBA Administrator's intent to appeal an adverse decision within 5 working days of SBA's receipt of the decision.

(2) Upon receipt of the notice of intent to appeal, the procuring activity must suspend further action regarding the procurement until the head of the procuring agency issues a written decision on the appeal, unless the head of the procuring agency makes a written determination that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for a consideration of the appeal.

(3) The SBA Administrator must send a written appeal of the adverse decision to the head of the procuring agency within 15 working days of SBA's notification of intent to appeal or the appeal may be considered withdrawn.

(4) By statute (15 U.S.C. 637(a)(1)(A)), the procuring agency head must specify in writing the reasons for a denial of an appeal brought by the Administrator under this section.

[63 FR 35739, June 30, 1998, as amended at 85 FR 66189, Oct. 16, 2020]

§124.506 At what dollar threshold must an 8(a) procurement be competed among eligible Participants?

(a) *Competitive thresholds.* (1) The Federal Acquisition Regulatory Council (FAR Council) has the responsibility of adjusting each acquisition-related dollar threshold on October 1, of each year that is evenly divisible by five. Acquisition-related dollar thresholds are defined as dollar thresholds that are specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency as determined by the FAR Council. 41 U.S.C. 431a(c). Part 124, Subpart A, 8(a) Business Development, contains acquisition-related dollar thresholds subject to inflationary adjustments. The FAR Council shall publish a notice of the adjusted dollar thresholds in the FEDERAL REGISTER. The adjusted dollar thresholds shall take effect on the date of publication.

(2) A procurement offered and accepted for the 8(a) BD program must be competed among eligible Participants if:

(i) There is a reasonable expectation that at least two eligible Participants will submit offers at a fair market price;

(ii) The anticipated award price of the contract, including options, will exceed $7,000,000 for contracts assigned manufacturing NAICS codes and $4,500,000 for all other contracts; and

(iii) The requirement has not been accepted by SBA for award as a sole

source 8(a) procurement on behalf of a tribally-owned or ANC-owned concern.

(3) For all types of contracts, the applicable competitive threshold amounts will be applied to the procuring activity estimate of the total value of the contract, including all options.

Example to paragraph (a)(3). If the anticipated award price for a professional services requirement is determined to be $3.8 million and it is accepted as a sole source 8(a) requirement on that basis, a sole source award will be valid even if the contract price arrived at after negotiation is $4.2 million.

(4) Where the estimate of the total value of a proposed 8(a) contract is less than the applicable competitive threshold amount and the requirement is accepted as a sole source requirement on that basis, award may be made even though the contract price arrived at through negotiations exceeds the competitive threshold, provided that the contract price is not more than ten percent greater than the competitive threshold amount.

(5) A proposed 8(a) requirement with an estimated value exceeding the applicable competitive threshold amount may not be divided into several separate procurement actions for lesser amounts in order to use 8(a) sole source procedures to award to a single contractor.

(b) *Exemption from competitive thresholds for Participants owned by Indian Tribes, ANCs and NHOs.* (1) A Participant concern owned and controlled by an Indian Tribe or an ANC may be awarded a sole source 8(a) contract where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement.

(2) A Participant concern owned and controlled by an NHO may be awarded a sole source Department of Defense (DoD) 8(a) contract where the anticipated value of the procurement exceeds the applicable competitive threshold if SBA has not accepted the requirement into the 8(a) BD program as a competitive procurement.

(3) There is no requirement that a procurement must be competed whenever possible before it can be accepted on a sole source basis for a tribally-owned or ANC-owned concern, or a concern owned by an NHO for DoD contracts. However, a current procurement requirement may not be removed from competition and awarded to a tribally-owned, ANC-owned or NHO-owned concern on a sole source basis (*i.e.*, a procuring agency may not evidence its intent to fulfill a requirement as a competitive 8(a) procurement, through the issuance of a competitive 8(a) solicitation or otherwise, cancel the solicitation or change its public intent, and then procure the requirement as a sole source 8(a) procurement to an entity-owned Participant). A follow-on requirement to one that was previously awarded as a competitive 8(a) procurement may be offered, accepted and awarded on a sole source basis to a tribally-owned or ANC-owned concern, or a concern owned by an NHO for DoD contracts.

(4) A joint venture between one or more eligible Tribally-owned, ANC-owned or NHO-owned Participants and one or more non-8(a) business concerns may be awarded sole source 8(a) contracts above the competitive threshold amount, provided that it meets the requirements of § 124.513.

(5) An agency may not award an 8(a) sole source contract for an amount exceeding $25,000,000, or $100,000,000 for an agency of the Department of Defense, unless the contracting officer justifies the use of a sole source contract in writing and has obtained the necessary approval under the Federal Acquisition Regulation.

(c) *Competition below thresholds.* The AA/BD, on a nondelegable basis, may approve a request from a procuring activity to compete a requirement that is below the applicable competitive threshold amount among eligible Participants.

(1) This authority will be used primarily when technical competitions are appropriate or when a large number of potential awardees exist.

(2) The AA/BD may consider whether the procuring activity has made and will continue to make available a significant number of its contracts to the 8(a) BD program on a noncompetitive basis.

(3) The AA/BD may deny a request if the procuring activity previously offered the requirement to the 8(a) BD program on a noncompetitive basis and the request is made following the inability of the procuring activity and the potential sole source awardee to reach an agreement on price or some other material term or condition.

(d) *Sole source above thresholds.* Where a contract opportunity exceeds the applicable threshold amount and there is not a reasonable expectation that at least two eligible 8(a) Participants will submit offers at a fair price, the AA/BD may accept the requirement for a sole source 8(a) award if he or she determines that an eligible Participant in the 8(a) portfolio is capable of performing the requirement at a fair price. The AA/BD may also accept a requirement that exceeds the applicable competitive threshold amount for a sole source 8(a) award if he or she determines that a FAR exception (48 CFR 6.302) to full and open competition exists (e.g., unusual and compelling urgency). An agency may not award an 8(a) sole source contract under this paragraph for an amount exceeding $25,000,000, or $100,000,000 for an agency of the Department of Defense, unless the contracting officer justifies the use of a sole source contract in writing and has obtained the necessary approval under FAR §19.808–1 or DFAR §219.808–1(a).

[63 FR 35739, June 30, 1998, as amended at 74 FR 45753, Sept. 4, 2009; 74 FR 46887, Sept. 14, 2009; 76 FR 8260, Feb. 11, 2011; 78 FR 61133, Oct. 2, 2013; 81 FR 48582, July 25, 2016; 86 FR 61672, Nov. 8, 2021; 88 FR 26208, Apr. 27, 2023]

§124.507 What procedures apply to competitive 8(a) procurements?

(a) *FAR procedures.* Procuring activities will conduct competitions among and evaluate offers received from Participants in accordance with the Federal Acquisition Regulation (48 CFR, chapter 1).

(b) *Eligibility determination by SBA.* In either a negotiated or sealed bid competitive 8(a) acquisition, the procuring activity will request that the SBA district office servicing the apparent successful offeror determine that firm's eligibility for award.

(1) Within 5 working days after receipt of a procuring activity's request for an eligibility determination, SBA will determine whether the firm identified by the procuring activity is eligible for award.

(2) SBA determines a Participant's eligibility pursuant to §124.501(g).

(3) If SBA determines that the apparent successful offeror is ineligible, SBA will notify the procuring activity. The procuring activity will then send to SBA the identity of the next highest evaluated firm for an eligibility determination. The process is repeated until SBA determines that an identified offeror is eligible for award.

(4) Except to the extent set forth in paragraph (d) of this section, SBA determines whether a Participant is eligible for a specific 8(a) competitive requirement as of the date that the Participant submitted its initial offer which includes price.

(5) If the procuring activity contracting officer believes that the apparent successful offeror is not responsible to perform the contract, he or she must refer the concern to SBA for a possible Certificate of Competency in accord with §125.5 of this title.

(c) *Restricted competition*—(1) *Construction competitions.* Based on its knowledge of the 8(a) BD portfolio, SBA will determine whether a competitive 8(a) construction requirement should be competed among only those Participants having a bona fide place of business within the geographical boundaries of one or more SBA district offices, within a state, or within the state and nearby areas. Only those Participants with bona fide places of business within the appropriate geographical boundaries are eligible to submit offers.

(2) *Competition for all non-construction requirements.* Except for construction requirements, all eligible Participants regardless of location may submit offers in response to competitive 8(a) solicitations. The only geographic restrictions pertaining to 8(a) competitive requirements, other than those for construction requirements, are any imposed by the solicitations themselves.

(d) *Award to firms whose program terms have expired.* A concern that has completed its term of participation in the

8(a) BD program may be awarded a competitive 8(a) contract if it was a Participant eligible for award of the contract on the initial date specified for receipt of offers contained in the contract solicitation, and if it continues to meet all other applicable eligibility criteria.

(1) Amendments to the solicitation extending the date for submissions of offers will be disregarded.

Example to paragraph (d)(1). The program term for 8(a) Participant X is scheduled to expire on December 19. A solicitation for a competitive 8(a) procurement specifies that initial offers are due on December 15. The procuring activity amends the solicitation to extend the date for the receipt of offers to January 5. X submits its offer on January 5 and is selected as the apparent successful offeror. X is eligible for award because it was an eligible 8(a) Participant on the initial date set forth in the solicitation for the receipt of offers.

(2) For a negotiated procurement, a Participant may submit revised offers, including a best and final offer, and be awarded a competitive 8(a) contract if it was eligible as of the initial date specified for the receipt of offers in the solicitation, even though its program term may expire after that date.

(3) For a two-step design-build procurement to be awarded through the 8(a) BD program, a firm must be a current Participant eligible for award of the contract on the initial date specified for receipt of phase one offers contained in the contract solicitation.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8260, Feb. 11, 2011; 81 FR 48582, July 25, 2016; 84 FR 65661, Nov. 29, 2019; 85 FR 66189, Oct. 16, 2020]

§ 124.508 How is an 8(a) contract executed?

(a) An 8(a) contract can be awarded in the following ways:

(1) As a tripartite agreement in which the procuring activity, SBA and the Participant all sign the appropriate contract documents. There may be separate prime and subcontract documents (i.e., a prime contract between the procuring activity and SBA and a subcontract between SBA and the selected 8(a) concern) or a combined contract document representing both the prime and subcontract relationships; or

(2) Where SBA has delegated contract execution authority to the procuring activity, directly by the procuring activity through a contract between the procuring activity and the Participant.

(b) Where SBA receives a contract for signature valued at or below the simplified acquisition threshold, it will sign the contract and return it to the procuring activity within three (3) days of receipt.

(c) In order to be eligible to receive a sole source 8(a) contract, a firm must be a current Participant on the date of award. (*See* § 124.507(d) for competitive 8(a) awards.)

§ 124.509 What are non-8(a) business activity targets?

(a) *General.* (1) To ensure that Participants do not develop an unreasonable reliance on 8(a) awards, and to ease their transition into the competitive marketplace after graduating from the 8(a) BD program, Participants must make good faith efforts to obtain business outside the 8(a) BD program. Work performed by an 8(a) Participant for any Federal department or agency other than through an 8(a) contract, including work performed on orders under the General Services Administration Multiple Award Schedule program, and work performed as a subcontractor, including work performed as a subcontractor to another 8(a) Participant on an 8(a) contract, qualifies as work performed outside the 8(a) BD program.

(2) During both the developmental and transitional stages of the 8(a) BD program, a Participant must make good faith efforts, including following a reasonable marketing strategy, to attain the targeted dollar levels of non-8(a) revenue established in its business plan. It must attempt to use the 8(a) BD program as a resource to strengthen the firm for economic viability when program benefits are no longer available.

(b) *Required non-8(a) business activity targets during transitional stage*—(1) *General.* During the transitional stage of the 8(a) BD program, a Participant must achieve certain targets of non-8(a) contract revenue (i.e., revenue from other than sole source or competitive 8(a) contracts). These targets

are called non-8(a) business activity targets and are expressed as a percentage of total revenue. The targets call for an increase in non-8(a) revenue over time.

(2) *Non-8(a) business activity targets*—(i) During their transitional stage of program participation, Participants must meet the following non-8(a) business activity targets each year:

TABLE 1 TO PARAGRAPH (b)(2)(i)

Participant's year in the transitional stage	Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)
1	15
2	25
3	30
4	40
5	50

(ii) Any Participant that extended its program term pursuant to §124.2(b) of this chapter must meet the business activity target for year 5 or meet the applicable requirements of paragraph (d) or (e) of this section in order to preserve its eligibility for sole source 8(a) contracts during the extended program period. The applicable business activity target for the extended program period will be the same as that for year 5 of the transitional stage (*i.e.*, 50% non-8(a) revenue).

(3) *Compliance with non-8(a) business activity targets.* SBA will measure the Participant's compliance with the applicable non-8(a) business activity target at the end of each program year in the transitional stage by comparing the Participant's non-8(a) revenue to its total revenue during the program year just completed. Thus, at the end of the first year in the transitional stage of program participation, SBA will compare the Participant's non-8(a) revenue to its total revenue during that first year. If appropriate, SBA will require remedial measures during the subsequent program year. Thus, for example, non-compliance with the required non-8(a) business activity target in year one of the transitional stage would cause SBA to initiate remedial measures under paragraph (d) of this section for year two in the transitional stage.

(4) *Certification of compliance.* A Participant must certify as part of its offer that it complies with the applicable non-8(a) business activity target or with the measures imposed by SBA under paragraph (d) of this section before it can receive any 8(a) contract during the transitional stage of the 8(a) BD program.

(c) *Reporting and verification of business activity.* (1) As part of its annual review after being admitted to the 8(a) BD program, a Participant must provide to SBA within 30 days from the end of its program year:

(i) Annual financial statements with a breakdown of 8(a) and non-8(a) revenue in accord with §124.602; and

(ii) An estimate of 8(a) and non-8(a) revenue derived during the program year, which may be obtained from monthly, quarterly or semi-annual interim financial statements or otherwise.

(2) At the end of each year of participation in the transitional stage, the BOS assigned to work with the Participant will review the Participant's total revenues to determine whether the non-8(a) revenues have met the applicable target. In determining compliance, SBA will compare all 8(a) revenues received during the year, including those from options and modifications, to all non-8(a) revenues received during the year.

(d) *Consequences of not meeting competitive business mix targets.* (1) Beginning at the end of the first year in the transitional stage (the fifth year of participation in the 8(a) BD program), any firm that does not meet its applicable competitive business mix target for the just completed program year must demonstrate to SBA the specific efforts it made during that year to obtain non-8(a) revenue.

(i) SBA will determine whether the Participant made good faith efforts to attain the targeted non-8(a) revenues during the just completed program year. A Participant may establish that it made good faith efforts by demonstrating to SBA that:

(A) It submitted offers for one or more non-8(a) procurements which, if awarded to the Participant during its just completed program year, would have given the Participant sufficient

revenues to achieve the applicable non-8(a) business activity target during that same program year. In such a case, the Participant must provide copies of offers submitted in response to solicitations and documentary evidence of its projected revenues under these missed contract opportunities; or

(B) Individual extenuating circumstances adversely impacted its efforts to obtain non-8(a) revenues, including but not limited to a reduction in government funding, continuing resolutions and budget uncertainties, increased competition driving prices down, or having one or more prime contractors award less work to the Participant than originally contemplated. Where available, supporting information and documentation must be included to show how such extenuating circumstances specifically prevented the Participant from attaining its targeted non-8(a) revenues during the just completed program year.

(ii) The Participant bears the burden of establishing that it made good faith efforts to meet its non-8(a) business activity target. SBA's determination as to whether a Participant made good faith efforts is final and no appeal may be taken with respect to that decision.

(2) If SBA determines that an 8(a) Participant has failed to meet its applicable competitive business mix target during any program year in the transitional stage of program participation, SBA will increase its monitoring of the Participant's contracting activity during the ensuing program year.

(3) As a condition of eligibility for new 8(a) sole source contracts, SBA may require a Participant that fails to achieve the non-8(a) business activity targets to take one or more specific actions. These include requiring the Participant to obtain management assistance, technical assistance, and/or counseling from an SBA resource partner or otherwise, and/or attend seminars relating to management assistance, business development, financing, marketing, accounting, or proposal preparation. Where any such condition is imposed, SBA will not accept a sole source requirement offered to the 8(a) BD program on behalf of the Participant until the Participant demonstrates to SBA that the condition has been met.

(4) If SBA determines that a Participant has not made good faith efforts to meet its applicable non-8(a) business activity target, the Participant will be ineligible for sole source 8(a) contracts in the current program year. SBA will notify the Participant in writing that the Participant will not be eligible for further 8(a) sole source contract awards until it has demonstrated to SBA that it has complied with its non-8(a) business activity requirements as described in paragraphs (d)(4)(i) and (ii) of this section. In order for a Participant to come into compliance with the non-8(a) business activity target and be eligible for further 8(a) sole source contracts, it may:

(i) Wait until the end of the current program year and demonstrate to SBA as part of the normal annual review process that it has met the revised non-8(a) business activity target; or

(ii) At its option, submit information regarding its non-8(a) revenue to SBA quarterly throughout the current program year in an attempt to come into compliance before the end of the current program year. If the Participant satisfies the requirements of paragraphs (d)(2)(ii)(A) or (B) of this section, SBA will reinstate the Participant's ability to get sole source 8(a) contracts prior to its annual review.

(A) To qualify for reinstatement during the first six months of the current program year (*i.e.*, at either the first or second quarterly review), the Participant must demonstrate that it has received non-8(a) revenue and new non-8(a) contract awards that are equal to or greater than the dollar amount by which it failed to meet its non-8(a) business activity target for the just completed program year. For this purpose, SBA will not count options on existing non-8(a) contracts in determining whether a Participant has received new non-8(a) contract awards.

(B) To qualify for reinstatement during the last six months of the current program year (*i.e.*, at either the nine-month or one year review), the Participant must demonstrate that it has achieved its non-8(a) business activity target as of that point in the current program year.

Example 1 to paragraph (d)(4). Firm A had $10 million in total revenue during year 2 in the transitional stage (year 6 in the program), but failed to meet the minimum non-8(a) business activity target of 25 percent. It had 8(a) revenues of $8.5 million and non-8(a) revenues of $1.5 million (15 percent). Based on total revenues of $10 million, Firm A should have had at least $2.5 million in non-8(a) revenues. Thus, Firm A missed its target by $1 million (its target ($2.5 million) minus its actual non-8(a) revenues ($1.5 million)). Because Firm A did not achieve its non-8(a) business activity target and SBA determined that it did not make good faith efforts to obtain non-8(a) revenue, it cannot receive 8(a) sole source awards until correcting that situation. The firm may wait until the next annual review to establish that it has met the revised target, or it can choose to report contract awards and other non-8(a) revenue to SBA quarterly. Firm A elects to submit information to SBA quarterly in year 3 of the transitional stage (year 7 in the program). In order to be eligible for sole source 8(a) contracts after either its 3 month or 6 month review, Firm A must show that it has received non-8(a) revenue and/or been awarded new non-8(a) contracts totaling $1 million (the amount by which it missed its target in year 2 of the transitional stage).

Example 2 to paragraph (d)(4). Firm B had $10 million in total revenue during year 2 in the transitional stage (year 6 in the program), of which $8.5 million were 8(a) revenues and $1.5 million were non-8(a) revenues, and SBA determined that Firm B did not make good faith efforts to meet its non-8(a) business activity target. At its first two quarterly reviews during year 3 of the transitional stage (year 7 in the program), Firm B could not demonstrate that it had received at least $1 million in non-8(a) revenue and new non-8(a) awards. In order to be eligible for sole source 8(a) contracts after its 9 month or 1 year review, Firm B must show that at least 35% (the non-8(a) business activity target for year 3 in the transitional stage) of all revenues received during year 3 in the transitional stage as of that point are from non-8(a) sources.

Example 3 to paragraph (d)(4). Firm C elected to extend its participation in the 8(a) BD program as set forth in §124.2 of this chapter. Firm C had $10 million in total revenue during year 5 in the transitional stage (year 9 in the program), of which $8.5 million were 8(a) revenues and $1.5 million were non-8(a) revenues, and SBA determined that Firm C did not make good faith efforts to meet its non-8(a) business activity target. In order to be eligible for sole source 8(a) contracts during year 6 of the transitional stage (year 10 in the program), Firm C must demonstrate at its first or second quarterly review that it had received at least $3.5 million in non-8(a) revenue and new non-8(a) awards (the amount by which it failed to meet the 50% non-8(a) business activity target for year 5 in the transitional stage). If, at its first two quarterly reviews during year 6 of the transitional stage (year 10 in the program), Firm C could not demonstrate that it had received at least $3.5 million in non-8(a) revenue and new non-8(a) awards, Firm C would not be eligible for sole source 8(a) contracts for the remainder of its program term.

(5) In determining whether a Participant has achieved its required non-8(a) business activity target at the end of any program year in the transitional stage, or whether a Participant that failed to meet the target for the previous program year has achieved the required level of non-8(a) business at its nine-month review, SBA will measure 8(a) support by adding the base year value of all 8(a) contracts awarded during the applicable program year to the value of all options and modifications executed during that year.

(6) SBA may initiate proceedings to terminate a Participant from the 8(a) BD program where the firm makes no good faith efforts to obtain non-8(a) revenues.

(e) *Waiver of sole source prohibition.* (1) Despite a finding by SBA that a Participant did not make good faith efforts to meet its non-8(a) business activity target, SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts where a denial of a sole source contract would cause severe economic hardship on the Participant so that the Participant's survival may be jeopardized, or where extenuating circumstances beyond the Participant's control caused the Participant not to meet its non-8(a) business activity target.

(2) SBA may waive the requirement prohibiting a Participant from receiving further sole source 8(a) contracts when the Participant does not meet its non-8(a) business activity target where the head of a procuring activity represents to SBA that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

(3) The decision to grant or deny a request for a waiver is at SBA's discretion, and no appeal may be taken with respect to that decision.

(4) A waiver generally applies to a specific sole source opportunity. If SBA grants a waiver with respect to a specific procurement, the firm will be able to self-market its capabilities to the applicable procuring activity with respect to that procurement. If the Participant seeks an additional sole source opportunity, it must request a waiver with respect to that specific opportunity. Where, however, a Participant can demonstrate that the same extenuating circumstances beyond its control affect its ability to receive specific multiple 8(a) contracts, one waiver can apply to those multiple contract opportunities.

[63 FR 35739, June 30, 1998, as amended at 74 FR 45754, Sept. 4, 2009; 76 FR 8261, Feb. 11, 2011; 85 FR 66189, Oct. 16, 2020; 86 FR 2533, Jan. 13, 2021; 86 FR 38538, July 22, 2021; 88 FR 26208, Apr. 27, 2023]

§ 124.510 What limitations on subcontracting apply to an 8(a) contract?

(a) To assist the business development of Participants in the 8(a) BD program, there are limitations on the percentage of an 8(a) contract award amount that may be spent on subcontractors. The prime contractor recipient of an 8(a) contract must comply with the limitations on subcontracting at § 125.6 of this chapter.

(b) Indefinite delivery and indefinite quantity contracts. In order to ensure that the required limitations on subcontracting requirements on an indefinite delivery or indefinite quantity 8(a) award are met by the Participant, the Participant cannot subcontract more than the required percentage to subcontractors that are not similarly situated entities for each performance period of the contract (*i.e.*, during the base term and then during each option period thereafter). However, the contracting officer, in his or her discretion, may require the Participant to meet the applicable limitation on subcontracting or comply with the nonmanufacturer rule for each order.

(1) This includes Multiple Award Contracts that were set-aside or partially set-aside for 8(a) BD Participants.

(2) For orders that are set aside for eligible 8(a) Participants under full and open contracts or reserves, the Participant must meet the applicable limitation on subcontracting requirement and comply with the nonmanufacturer rule, if applicable, for each order.

[81 FR 34260, May 31, 2016]

§ 124.511 How is fair market price determined for an 8(a) contract?

(a) The procuring activity determines what constitutes a ''fair market price'' for an 8(a) contract.

(1) The procuring activity must derive the estimate of a current fair market price for a new requirement, or a requirement that does not have a satisfactory procurement history, from a price or cost analysis. This analysis may take into account prevailing market conditions, commercial prices for similar products or services, or data obtained from any other agency. The analysis must also consider any cost or pricing data that is timely submitted by SBA.

(2) The procuring activity must base the estimate of a current fair market price for a requirement that has a satisfactory procurement history on recent award prices adjusted to ensure comparability. Adjustments will take into account differences in quantities, performance, times, plans, specifications, transportation costs, packaging and packing costs, labor and material costs, overhead costs, and any other additional costs which may be appropriate.

(b) Upon the request of SBA, a procuring activity will provide to SBA a written statement detailing the method it has used to estimate the current fair market price for the 8(a) requirement. This statement must be submitted within 10 working days of SBA's request. The procuring activity must identify the information, studies, analyses, and other data it used in making its estimate.

(c) The procuring activity's estimate of fair market price and any supporting data may not be disclosed by SBA to any Participant or potential contractor.

(d) The concern selected to perform an 8(a) contract may request SBA to protest the procuring activity's estimate of current fair market price to the Secretary of the Department or head of the agency in accordance with § 124.505.

§ 124.512 Delegation of contract administration to procuring agencies.

(a) SBA may delegate, by the use of special clauses in the 8(a) contract documents or by a separate agreement with the procuring activity, all responsibilities for administering an 8(a) contract to the procuring activity except the approval of novation agreements under 48 CFR 42.302(a)(25). Tracking compliance with the performance of work requirements set forth in § 124.510 is included within the functions performed by the procuring activity as part of contract administration.

(b) This delegation of contract administration authorizes a contracting officer to execute any priced option or in scope modification without SBA's concurrence. The contracting officer must, however, submit copies to the SBA servicing district office of all modifications and options exercised within 15 business days of their occurrence, or by another date agreed upon by SBA.

(c) SBA may conduct periodic compliance on-site agency reviews of the files of all contracts awarded pursuant to Section 8(a) authority.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8261, Feb. 11, 2011]

§ 124.513 Under what circumstances can a joint venture be awarded an 8(a) contract?

(a) *General.* (1) A Participant may enter into a joint venture agreement with one or more other small business concerns, whether or not 8(a) Participants, for the purpose of performing one or more specific 8(a) contracts.

(2) A joint venture agreement is permissible only where an 8(a) concern lacks the necessary capacity to perform the contract on its own, and the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern. However, where SBA concludes that an 8(a) Participant brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status, SBA will not approve the joint venture to receive an 8(a) sole source contract award and will find the joint venture to be ineligible for a competitive 8(a) award if it is determined to be the apparent successful offeror.

(3) As long as a joint venture qualifies as small under the size standard corresponding to the NAICS code assigned to a specific contract or order (*see* § 124.513(b)), it will be eligible for award based on the status of its 8(a) managing venturer.

(4) A Program Participant cannot be a joint venture partner on more than one joint venture that submits an offer for a specific 8(a) contract or for an 8(a) order under a multiple award contract that is not itself an 8(a) contract.

(b) *Size of concerns to an 8(a) joint venture.* (1) A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer as a small business for a competitive 8(a) procurement, or be awarded a sole source 8(a) procurement, so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, a joint venture between a protégé firm and its approved mentor (*see* § 124.520) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the contract and has not reached the dollar limits set forth in § 124.519.

(3) SBA approval of a joint venture agreement pursuant to paragraph (e) of this section does not equate to a formal size determination. As such, despite SBA's approval of a joint venture, the size status of a joint venture that is the apparent successful offeror for a competitive 8(a) contract may be protested pursuant to § 121.1001(a)(2) of this chapter. *See* § 124.517(b).

(c) *Contents of joint venture agreement.* Every joint venture agreement to perform an 8(a) contract, including those between mentors and protégés authorized by § 124.520, must contain a provision:

(1) Setting forth the purpose of the joint venture;

(2) Designating an 8(a) Participant as the managing venturer of the joint venture, and designating a named employee of the 8(a) managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the 8(a) Participant at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the 8(a) Participant if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the 8(a) Participant for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

(3) Stating that with respect to a separate legal entity joint venture the 8(a) Participant(s) must own at least 51% of the joint venture entity;

(4) Stating that the 8(a) Participant(s) must receive profits from the joint venture commensurate with the work performed by the 8(a) Participant(s), or a percentage agreed to by the parties to the joint venture whereby the 8(a) Participant(s) receive profits from the joint venture that exceed the percentage commensurate with the work performed by the 8(a) Participant(s);

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. All payments due the joint venture for performance on an 8(a) contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(8) Obligating all parties to the joint venture to ensure performance of the 8(a) contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the 8(a) Participant managing

venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(10) Requiring the final original records be retained by the 8(a) Participant managing venturer upon completion of the 8(a) contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) *Performance of work.* (1) For any 8(a) contract, including those between a protégé and a mentor authorized by §124.520, the joint venture must perform the applicable percentage of work required by §124.510 of this chapter.

(2) The 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(i) The work performed by the 8(a) partner(s) to a joint venture must be more than administrative or ministerial functions so that the 8(a) partners gain substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the 8(a) partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-8(a) partner, all work done by the non-8(a) partner and any of its affiliates at any subcontracting tier will be counted.

(e) *Prior approval by SBA.* (1) When a joint venture between one or more 8(a) Participants seeks a sole source 8(a) award, SBA must approve the joint venture prior to the award of the sole source 8(a) contract. SBA will not approve joint ventures in connection with competitive 8(a) awards (*but see* §124.501(g) for SBA's determination of Participant eligibility).

(2) Where a joint venture has been established for one 8(a) contract, the joint venture may receive additional 8(a) contracts provided the parties create an addendum to the joint venture agreement setting forth the performance requirements for each additional award (and provided any contract is awarded within two years of the first award as set forth in §121.103(h)). If an additional 8(a) contract is a sole source award, SBA must also approve the addendum prior to contract award.

(f) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for an 8(a) contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the 8(a) Participant to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

(g) *Contract execution.* Where an 8(a) award will be made to a joint venture, the procuring activity will execute an 8(a) contract in the name of the joint venture entity or the 8(a) Participant, but in either case will identify the award as one to an 8(a) joint venture or an 8(a) mentor-protege joint venture, as appropriate.

(h) *Amendments to joint venture agreement.* Where SBA has approved a joint venture for a sole source 8(a) contract, all amendments to the joint venture agreement must be approved by SBA.

(i) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(j) *Certification of compliance.* Prior to the performance of any 8(a) contract by a joint venture, the 8(a) BD Participant to the joint venture must submit a written certification to the contracting

officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(1) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section; and

(2) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(3) For a sole source 8(a) contract, the parties have obtained SBA's approval of the joint venture agreement and any addendum to that agreement and that there have been no modifications to the agreement that SBA has not approved.

(k) *Performance of work reports.* An 8(a) Participant to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each 8(a) contract it performs as a joint venture.

(1) As part of its annual review, the 8(a) Participant(s) to the joint venture must explain for each 8(a) contract performed during the year how the performance of work requirements are being met for the contract.

(2) At the completion of every 8(a) contract awarded to a joint venture, the 8(a) Participant(s) to the joint venture must submit a report to the local SBA district office explaining how the performance of work requirements were met for the contract.

(l) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (i) of this section.

[63 FR 35739, June 30, 1998, as amended at 69 FR 29208, May 21, 2004; 76 FR 8261, Feb. 11, 2011; 77 FR 28238, May 14, 2012; 81 FR 34261, May 31, 2016; 81 FR 48582, July 25, 2016; 81 FR 71983, Oct. 19, 2016; 85 FR 66190, Oct. 16, 2020; 86 FR 2959, Jan. 14, 2021; 88 FR 26208, Apr. 27, 2023]

§ 124.514 Exercise of 8(a) options and modifications.

(a) *Unpriced options.* The exercise of an unpriced option is considered to be a new contracting action.

(1) If a concern has graduated or been terminated from the 8(a) BD program or is no longer small under the size standard corresponding to the NAICS code for the requirement, negotiations to price the option cannot be entered into and the option cannot be exercised.

(2) If the concern is still a Participant and otherwise eligible for the requirement on a sole source basis, the procuring activity contracting officer may negotiate price and exercise the option provided the option, considered a new contracting action, meets all regulatory requirements, including the procuring activity's offering and SBA's acceptance of the requirement for the 8(a) BD program.

(3) If the estimated fair market price of the option exceeds the applicable threshold amount set forth in § 124.506, the requirement must be competed as a new contract among eligible Participants.

(b) *Priced options.* Except as set forth in § 124.521(e)(2), the procuring activity contracting officer may exercise a priced option to an 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

(c) *Modifications beyond the scope.* A modification beyond the scope of the initial 8(a) contract award is considered to be a new contracting action. It will be treated the same as an unpriced option as described in paragraph (a) of this section.

(d) *Modifications within the scope.* The procuring activity contracting officer may exercise a modification within the

scope of the initial 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

[63 FR 35739, June 30, 1998, as amended at 85 FR 66191, Oct. 16, 2020]

§ 124.515 Can a Participant change its ownership or control and continue to perform an 8(a) contract, and can it transfer performance to another firm?

(a) An 8(a) contract (or 8(a) order where the underlying contract is not an 8(a) contract) must be performed by the Participant that initially received it unless a waiver is granted under paragraph (b) of this section.

(1) An 8(a) contract or order, whether in the base or an option year, must be terminated for the convenience of the Government if one or more of the individuals upon whom eligibility for the 8(a) BD program was based relinquishes or enters into any agreement to relinquish ownership or control of the Participant such that the Participant would no longer be controlled or at least 51% owned by disadvantaged individuals.

(2) The procuring activity may not assess repurchase costs or other damages against the Participant due solely to the provisions of this section.

(b) The SBA Administrator may waive the requirements of paragraph (a)(1) of this section if requested to do so by the 8(a) contractor when:

(1) It is necessary for the owners of the concern to surrender partial control of such concern on a temporary basis in order to obtain equity financing;

(2) Ownership and control of the concern that is performing the 8(a) contract will pass to another Participant, but only if the acquiring firm would otherwise be eligible to receive the award directly as an 8(a) contract;

(3) Any individual upon whom eligibility was based is no longer able to exercise control of the concern due to physical or mental incapacity or death;

(4) The head of the procuring agency, or an official with delegated authority from the agency head, certifies that termination of the contract would severely impair attainment of the agency's program objectives or missions; or

(5) It is necessary for the disadvantaged owners of the initial 8(a) awardee to relinquish ownership of a majority of the voting stock of the concern in order to raise equity capital, but only if—

(i) The concern has graduated from the 8(a) BD program;

(ii) The disadvantaged owners will maintain ownership of the largest single outstanding block of voting stock (including stock held by affiliated parties); and

(iii) The disadvantaged owners will maintain control of the daily business operations of the concern.

(c) The 8(a) contractor must request a waiver in writing prior to the change of ownership and control except in the case of death or incapacity. A request for waiver due to incapacity or death must be submitted within 60 calendar days after such occurrence.

(1) A request for a waiver to the termination for convenience requirement must be sent to the AA/BD.

(2) The Participant seeking to change ownership or control must specify the grounds upon which it requests a waiver and must demonstrate that the proposed transaction would meet such grounds.

(3) If a Participant seeks a waiver based on the impairment of the agency's objectives under paragraph (b)(4) of this section, it must identify and provide a certification from the procuring agency relating to each 8(a) contract for which a waiver is sought.

(4) SBA will process a request for waiver within 90 days of receipt of a complete waiver package by the AA/BD.

(d) SBA determines the eligibility of an acquiring Participant under paragraph (b)(2) of this section by referring to the items identified in §124.501(g) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is an eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring concern must certify that it is a small business for the size standard corresponding to the NAICS

code assigned to each contract for which a waiver is sought.

(e) Anyone other than a procuring agency head who submits a certification regarding the impairment of the agency's objectives under paragraph (b)(4) of this section, must also certify delegated authority to make the certification.

(f) In processing a request for a waiver under paragraph (b)(2) of this section, SBA will treat a transfer of all a Participant's operating assets to another Participant the same as the transfer of an ownership interest, provided the Participant that transfers its assets to another eligible Participant:

(1) Voluntarily graduates from the 8(a) BD program; and

(2) Ceases its business operations, or presents a plan to SBA for its orderly dissolution.

(g) A concern performing an 8(a) contract must notify SBA in writing immediately upon entering into an agreement or agreement in principle (either oral or written) to transfer all or part of its stock or other ownership interest or assets to any other party. Such an agreement could include an oral agreement to enter into a transaction to transfer interests in the future.

(h) The Administrator has discretion to decline a request for waiver even though legal authority exists to grant the waiver.

(i) The 8(a) contractor may appeal SBA's denial of a waiver request by filing a petition with OHA pursuant to part 134 of this chapter within 45 days after the contractor receives the Administrator's decision.

[63 FR 35739, June 30, 1998, as amended at 67 FR 47246, July 18, 2002; 81 FR 48584, July 25, 2016; 85 FR 66191, Oct. 16, 2020; 88 FR 26208, Apr. 27, 2023]

§ 124.516 [Reserved]

§ 124.517 Can the eligibility or size of a Participant for award of an 8(a) contract be questioned?

(a) The eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest.

(b) The size status of the apparent successful offeror for a competitive 8(a) procurement may be protested pursuant to §121.1001(a)(2) of this chapter. The size status of a nominated Participant for a sole source 8(a) procurement may not be protested by another Participant or any other party.

(c) A Participant cannot appeal SBA's determination not to award it a specific 8(a) contract because the concern lacks an element of responsibility or is ineligible for the contract, other than the right set forth in §124.501(h) to request a formal size determination where SBA cannot verify it to be small.

(d)(1) The NAICS code assigned to a sole source 8(a) requirement may not be challenged by another Participant or any other party either to SBA or any administrative forum as part of a bid or contract protest. Only the AA/BD may appeal a NAICS code designation with respect to a sole source 8(a) requirement.

(2) In connection with a competitive 8(a) procurement, any interested party who has been adversely affected by a NAICS code designation may appeal the designation to SBA's OHA pursuant to §121.1103 of this title.

(e) Anyone with information questioning the eligibility of a Participant to continue participation in the 8(a) BD program or for purposes of a specific 8(a) contract may submit such information to SBA under §124.112(c).

[63 FR 35739, June 30, 1998, as amended at 74 FR 45754, Sept. 4, 2009]

§ 124.518 How can an 8(a) contract be terminated before performance is completed?

(a) *Termination for default.* A decision to terminate a specific 8(a) contract for default can be made by the procuring activity contracting officer after consulting with SBA. The contracting officer must advise SBA of any intent to terminate an 8(a) contract for default in writing before doing so. SBA may provide to the Participant any program benefits reasonably available in order to assist it in avoiding termination for default. SBA will advise the contracting officer of this effort. Any procuring activity contracting officer who believes grounds for termination continue to exist may terminate the 8(a)

contract for default, in accordance with the Federal Acquisition Regulations (48 CFR chapter 1). SBA will have no liability for termination costs or reprocurement costs.

(b) *Termination for convenience.* After consulting with SBA, the procuring activity contracting officer may terminate an 8(a) contract for convenience when it is in the best interests of the Government to do so. A termination for convenience is appropriate if any disadvantaged owner of the Participant performing the contract relinquishes ownership or control of such concern, or enters into any agreement to relinquish such ownership or control, unless a waiver is granted pursuant to §124.515.

(c) *Substitution of one 8(a) contractor for another.* SBA may authorize another Participant to complete performance and, in conjunction with the procuring activity, permit novation of an 8(a) contract without invoking the termination for convenience or waiver provisions of §124.515 where a procuring activity contracting officer demonstrates to SBA that the Participant that was awarded the 8(a) contract is unable to complete performance, where an 8(a) contract will otherwise be terminated for default, or where SBA determines that substitution would serve the business development needs of both 8(a) Participants.

[63 FR 35739, June 30, 1998, as amended at 85 FR 66191, Oct. 16, 2020]

§124.519 Are there any dollar limits on the amount of 8(a) contracts that a Participant may receive?

(a) A Participant (other than one owned by an Indian Tribe, ANC, NHO, or CDC) may not receive sole source 8(a) contract awards where it has received a combined total of competitive and sole source 8(a) contracts in excess of $168,500,000 during its participation in the 8(a) BD program.

(b) In determining whether a Participant has reached the limit identified in paragraph (a) of this section, SBA:

(1) Looks at the 8(a) revenues a Participant has actually received, not projected 8(a) revenues that a Participant might receive through an indefinite delivery or indefinite quantity contract, a multiple award contract, or options or modifications; and

(2) Will not consider 8(a) contracts awarded under the Simplified Acquisition Threshold.

(c) Once the limit is reached, a firm may not receive any more 8(a) sole source contracts, but may remain eligible for competitive 8(a) awards.

(d) A Participant's eligibility for a sole source award in terms of whether it has exceeded the dollar limit for 8(a) contracts is measured as of the date that the requirement is accepted for the 8(a) program without taking into account whether the value of that award will cause the limit to be exceeded.

(e) The AA/BD may waive the requirement prohibiting a Participant from receiving sole source 8(a) contracts in excess of the dollar amount set forth in this section where the head of a procuring activity represents that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8262, Feb. 11, 2011; 77 FR 28238, May 14, 2012; 85 FR 66191, Oct. 16, 2020; 87 FR 69154, Nov. 17, 2022]

§124.520 Can 8(a) BD Program Participants participate in SBA's Mentor-Protégé program?

(a) An 8(a) BD Program Participant, as any other small business, may participate in SBA's All Small Mentor-Protégé Program authorized under §125.9 of this chapter.

(b) In order for a joint venture between a protégé and its SBA-approved mentor to receive the exclusion from affiliation with respect to a sole source or competitive 8(a) contract, the joint venture must meet the requirements set forth in §124.513(c) and (d).

[85 FR 66191, Oct. 16, 2020]

§124.521 What are the requirements for representing 8(a) status, and what are the penalties for misrepresentation?

(a) *Presumption of Loss Based on the Total Amount Expended.* In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is

set aside, reserved, or otherwise classified as intended for award to 8(a) Participants, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than an 8(a) Participant willfully sought and received the award by misrepresentation.

(b) *Deemed Certifications.* The following actions shall be deemed affirmative, willful and intentional certifications of 8(a) status:

(1) Submission of a bid or proposal for an 8(a) sole source or competitive contract.

(2) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a small disadvantaged business (SDB).

(c) *Signature Requirement.* Each offer for an 8(a) contract shall contain a certification concerning the 8(a) status of a business concern seeking the contract. An authorized official must sign the certification on the same page containing the 8(a) status claimed by the concern.

(d) *Limitation of Liability.* Paragraphs (a)–(c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of 8(a) status was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. 3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' 8(a) status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing representation or certification as an eligible 8(a) Participant, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as an eligible 8(a) Participant without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) *Recertification.* (1) Generally, a concern that is an eligible 8(a) Participant at the time of initial offer or response, which includes price, for an 8(a) contract, including a Multiple Award Contract, is considered an 8(a) Participant throughout the life of that contract. For an indefinite delivery, indefinite quantity (IDIQ), Multiple Award 8(a) Contract, where concerns are not required to submit price as part of the offer for the contract, a concern that is an eligible 8(a) Participant at the time of initial offer, which may not include price, is considered an 8(a) Participant throughout the life of that contract. This means that if an 8(a) Participant is qualified at the time of initial offer for a Multiple Award 8(a) Contract, then it will be considered an 8(a) Participant for each order issued against the contract, unless a contracting officer requests a new 8(a) eligibility determination in connection with a specific order. Except as set forth in paragraph (e)(2) of this section, where a concern later fails to qualify as an 8(a) Participant, the procuring agency may exercise options and still count the award as an award to a Small Disadvantaged Business (SDB).

(i) Where an 8(a) contract is novated to another business concern, or where the concern performing the 8(a) contract is acquired by, acquires, or merges with another concern and contract novation is not required, the concern must comply with the process outlined at §§ 124.105(i) and 124.515.

(ii) Where an 8(a) Participant that was initially awarded a non-8(a) contract that is subsequently novated to another business concern, the concern that will continue performance on the contract must certify its SDB status to the procuring agency, or inform the procuring agency that it does not qualify as an SDB, within 30 days of the novation approval. If the concern is not an SDB, the agency can no longer

count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals.

(iii) Where an 8(a) Participant receives a non-8(a) contract, and that Participant acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its SDB status to the procuring agency, or inform the procuring agency that it no longer qualifies as an SDB. If the contractor is no longer a current 8(a) Participant, the contractor is not eligible for orders limited to 8(a) awardees. If the contractor is not an SDB, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDB goals. The agency and the contractor must immediately revise all applicable Federal contract databases for which they directly certify information to reflect the new status.

(2) For the purposes of 8(a) contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must verify in *SAM.gov* (or successor system) whether a business concern continues to be an eligible 8(a) Participant no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. Where a concern fails to qualify or will no longer qualify as an eligible 8(a) Participant at any point during the 120 days prior to the end of the fifth year of the contract, the option shall not be exercised.

(3) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(4) Where the contracting officer explicitly requires concerns to qualify as eligible 8(a) Participants in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

(5) A concern's status will be determined at the time of a response to a solicitation for a basic ordering agreement (BOA), basic agreement (BA), or blanket purchase agreement (BPA) and each order issued pursuant to the BOA, BA, or BPA.

[78 FR 38818, June 28, 2013, as amended at 84 FR 65661, Nov. 29, 2019; 85 FR 66191, Oct. 16, 2020; 88 FR 26209, Apr. 27, 2023]

MISCELLANEOUS REPORTING REQUIREMENTS

§ 124.601 What reports does SBA require concerning parties who assist Participants in obtaining federal contracts?

(a) Each Participant must submit semi-annually a written report to its assigned BOS that includes a listing of any agents, representatives, attorneys, accountants, consultants and other parties (other than employees) receiving fees, commissions, or compensation of any kind to assist such Participant in obtaining or seeking to obtain a Federal contract. The listing must indicate the amount of compensation paid and a description of the activities performed for such compensation.

(b) Failure to submit the report is good cause for the initiation of a termination proceeding pursuant to §§ 124.303 and 124.304.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8264, Feb. 11, 2011]

§ 124.602 What kind of annual financial statement must a Participant submit to SBA?

(a) Except as set forth in paragraph (a)(1) of this section, Participants with gross annual receipts of more than $10,000,000 must submit to SBA audited annual financial statements prepared by a licensed independent public accountant within 120 days after the close of the concern's fiscal year.

(1) Participants with gross annual receipts of more than $10,000,000 which are owned by a Tribe, ANC, NHO, or CDC may elect to submit unaudited financial statements within 120 days after the close of the concern's fiscal year, provided the following additional documents are submitted simultaneously:

(i) Audited annual financial statements for the parent company owner of the Participant, prepared by a licensed independent public accountant, for the equivalent fiscal year;

(ii) Certification from the Participant's Chief Executive Officer and Chief Financial Officer (or comparable positions) that each individual has read the unaudited financial statements, affirms that the statements do not contain any material misstatements, and certifying that the statements fairly represent the Participant's financial condition and result of operations.

(2) In the first year that a Participant's gross receipts exceed $10,000,000, a Participant may provide an audited balance sheet, with the income and cash flow statements receiving the level of service required for the previous year (review or none, depending on sales the year before the audit is required).

(3) The servicing SBA District Director may waive the requirement for audited financial statements for good cause shown by the Participant.

(4) Circumstances where waivers of audited financial statements may be granted include, but are not limited to, the following:

(i) The concern has an unexpected increase in sales towards the end of its fiscal year that creates an unforeseen requirement for audited statements;

(ii) The concern unexpectedly experiences severe financial difficulties which would make the cost of audited financial statements a particular burden; and

(iii) The concern has been a Participant less than 12 months.

(b)(1) Participants with gross annual receipts between $2,000,000 and $10,000,000 must submit to SBA reviewed annual financial statements prepared by a licensed independent public accountant within 90 days after the close of the concern's fiscal year.

(2) The servicing SBA District Director may waive the requirement for reviewed financial statements for good cause shown by the Participant.

(c) Participants with gross annual receipts of less than $2,000,000 must submit to SBA an annual statement prepared in-house or a compilation statement prepared by a licensed independent public accountant, verified as to accuracy by an authorized officer, partner, limited liability member, or sole proprietor of the Participant, including signature and date, within 90 days after the close of the concern's fiscal year.

(d) Any audited or reviewed financial statements submitted to SBA pursuant to paragraphs (a) or (b) of this section must be prepared in accordance with Generally Accepted Accounting Principles.

(e) While financial statements need not be submitted until 90 or 120 days after the close of a Participant's fiscal year, depending on the receipts of the concern, a Participant seeking to be awarded an 8(a) contract between the close of its fiscal year and such 90 or 120-day time period must submit a final sales report signed by the CEO or President to SBA in order for SBA to determine the concern's eligibility for the 8(a) contract. This report must show a breakdown of 8(a) and non-8(a) sales.

(f) Notwithstanding the amount of a Participant's gross annual receipts, SBA may require audited or reviewed statements whenever they are needed to obtain more complete information as to a concern's assets, liabilities, income or expenses, such as when the concern's capacity to perform a specific 8(a) contract must be determined, or when they are needed to determine continued program eligibility.

(g) Participants owned by Tribes, ANCs, NHOs and CDCs may submit consolidated financial statements prepared by the parent entity that include schedules for each 8(a) Participant instead of separate audited financial statements for each individual 8(a) Participant. If one Participant must submit an audited financial statement, then the consolidated statement and the schedules for each 8(a) Participant must be audited.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8264, Feb. 11, 2011]

§ 124.603 What reports regarding the continued business operations of former Participants does SBA require?

Former Participants must provide such information as SBA may request

concerning the former Participant's continued business operations, contracts, and financial condition for a period of three years following the date on which the concern leaves the 8(a) BD program (either through the expiration of the firm's program term, graduation, or termination). Failure to provide such information when requested will constitute a violation of the regulations set forth in this part, and may result in the nonexercise of options on or termination of contracts awarded through the 8(a) BD program, debarment, or other legal recourse.

[63 FR 35739, June 30, 1998, as amended at 88 FR 26209, Apr. 27, 2023]

§ 124.604 Report of benefits for firms owned by Tribes, ANCs, NHOs and CDCs.

As part of its annual financial statement submission (*see* § 124.602), each Participant owned by a Tribe, ANC, NHO or CDC must submit to SBA information showing how the Tribe, ANC, NHO or CDC has provided benefits to the Tribal or native members and/or the Tribal, native or other community due to the Tribe's/ANC's/NHO's/CDC's participation in the 8(a) BD program through one or more firms. This data includes information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services provided by the Tribe, ANC, NHO or CDC to the affected community.

[76 FR 8264, Feb. 11, 2011, as amended at 81 FR 48585, July 25, 2016]

MANAGEMENT AND TECHNICAL ASSISTANCE PROGRAM

§ 124.701 What is the purpose of the 7(j) management and technical assistance program?

Section 7(j)(1) of the Small Business Act, 15 U.S.C. 636(j)(1), authorizes SBA to enter into grants, cooperative agreements, or contracts with public or private organizations to pay all or part of the cost of technical or management assistance for individuals or concerns eligible for assistance under sections 7(a)(11), 7(j)(10), or 8(a) of the Small Business Act.

§ 124.702 What types of assistance are available through the 7(j) program?

Through its private sector service providers, SBA may provide a wide variety of management and technical assistance to eligible individuals or concerns to meet their specific needs, including:

(a) Counseling and training in the areas of financing, management, accounting, bookkeeping, marketing, and operation of small business concerns; and

(b) The identification and development of new business opportunities.

§ 124.703 Who is eligible to receive 7(j) assistance?

The following businesses are eligible to receive assistance from SBA through its service providers:

(a) Businesses which qualify as small under part 121 of this title, and which are located in urban or rural areas with a high proportion of unemployed or low-income individuals, or which are owned by such low-income individuals; and

(b) Businesses eligible to receive 8(a) contracts.

§ 124.704 What additional management and technical assistance is reserved exclusively for concerns eligible to receive 8(a) contracts?

In addition to the management and technical assistance available under § 124.702, Section 7(j)(10) of the Small Business Act authorizes SBA to provide additional management and technical assistance through its service providers exclusively to small business concerns eligible to receive 8(a) contracts, including:

(a) Assistance to develop comprehensive business plans with specific business targets, objectives, and goals;

(b) Other nonfinancial services necessary for a Participant's growth and development, including loan packaging; and

(c) Assistance in obtaining equity and debt financing.

Subpart B—Eligibility, Certification, and Protests Relating to Federal Small Disadvantaged Business Programs

SOURCE: 63 FR 35772, June 30, 1998, unless otherwise noted.

§ 124.1001 What is a Small Disadvantaged Business?

(a) *General.* A Small Disadvantaged Business (SDB) for purposes of any Federal subcontracting program is a concern that qualifies as small under part 121 of this title for the size standard corresponding to the six-digit North American Industry Classification System (NAICS) code that is assigned by the contracting officer to the procurement at issue, and that is owned and controlled by one or more socially and economically disadvantaged individuals. Unless specifically stated otherwise, the phrase ''socially and economically disadvantaged individuals'' includes Indian tribes, ANCs, CDCs, and NHOs. A firm may represent that it qualifies as an SDB for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals.

(b) *Reliance on 8(a) criteria.* In determining whether a firm qualifies as an SDB, the criteria of social and economic disadvantage and other eligibility requirements established in subpart A of this part apply, including the requirements of ownership and control and disadvantaged status, unless otherwise provided in this subpart. All current Participants in the 8(a) BD program qualify as SDBs.

[85 FR 27292, May 8, 2020]

§ 124.1002 Reviews and protests of SDB status.

(a) SBA may initiate the review of SDB status on any firm that has represented itself to be an SDB on a prime contract (for goaling purposes or otherwise) or subcontract to a federal prime contract whenever SBA receives credible information calling into question the SDB status of the firm.

(b) Requests for an SBA review of SDB status may be forwarded to the Small Business Administration, Associate Administrator for Business Development (AA/BD), 409 Third Street SW, Washington, DC 20416.

(c) The contracting officer or the SBA may protest the SDB status of a proposed subcontractor or subcontract awardee. Other interested parties may submit information to the contracting officer or the SBA in an effort to persuade the contracting officer or the SBA to initiate a protest. Such protests, in order to be considered timely, must be submitted to the SBA prior to completion of performance by the intended subcontractor.

(1) SBA will request relevant information from the protested concern pertaining to: (i) the social and economic disadvantage of the individual(s) claiming to own and control the protested concern; (ii) the ownership and control of the protested concern; and (iii) the size of the protested concern.

(2) The concern whose disadvantaged status is under consideration has the burden of establishing that it qualifies as an SDB.

(3) Where SBA requests specific information and the concern does not submit it, SBA may draw adverse inferences against the concern.

(4) SBA will base its SDB determination upon the record, including reasonable inferences from the record, and will state in writing the basis for its findings and conclusions.

(d) Where SBA determines that a subcontractor does not qualify as an SDB, the prime contractor must not include subcontracts to that subcontractor as subcontracts to an SDB in its subcontracting reports, starting from the time that the protest was decided.

[88 FR 26209, Apr. 27, 2023]

PART 125—GOVERNMENT CONTRACTING PROGRAMS

Sec.

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AUTHORITY: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657f, 657q, 657r, and 657s; 38 U.S.C. 501 and 8127.

SOURCE: 61 FR 3312, Jan. 31, 1996, unless otherwise noted.

§ 125.1 What definitions are important to SBA's Government Contracting Programs?

Chief Acquisition Officer means the employee of a Federal agency designated as such pursuant to section 16(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(a)).

Commercial off-the-shelf item has the same definition as set forth in 41 U.S.C. 101 (as renumbered) and Federal Acquisition Regulation (FAR) 2.101 (48 U.S.C. 2.101).

Consolidation of contract requirements, consolidated contract, or consolidated requirement means a solicitation for a single contract, a Multiple Award Contract, or Blanket Purchase Agreement to:

(1) Satisfy two or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under two or more separate contracts each of which was lower in cost than the total cost of the contract or agreement for which the offers are solicited, the total cost of which exceeds $2 million (including options), regardless of whether new work is added to the solicitation for the contract or agreement; or

(2) Satisfy requirements of the Federal agency for construction projects to be performed at two or more discrete sites.

Contract, unless otherwise noted, has the same definition as set forth in FAR 2.101 (48 U.S.C. 2.101) and includes orders issued against Multiple Award Contracts and orders competed under agreements where the execution of the order is the contract (*e.g.*, a Blanket Purchase Agreement (BPA), a Basic Agreement (BA), or a Basic Ordering Agreement (BOA)).

Contract bundling, bundled requirement, bundled contract, or bundling means the consolidation of two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract, a Multiple Award Contract, or Blanket Purchase Agreement that is likely to be unsuitable for award to a small business concern (but may be suitable for award to a small business with a Small Business Teaming Arrangement), regardless of whether new work is added to the solicitation for the contract or agreement, due to:

(1) The diversity, size, or specialized nature of the elements of the performance specified;

(2) The aggregate dollar value of the anticipated award;

(3) The geographical dispersion of the contract performance sites; or

(4) Any combination of the factors described in paragraphs (1), (2), and (3) of this definition.

Cost of materials means costs of the items purchased, handling and associated shipping costs for the purchased items (which includes raw materials), commercial off-the-shelf items (and similar common supply items or commercial products that require additional manufacturing, modification or integration to become end items), special tooling, special testing equipment, and construction equipment purchased for and required to perform on the contract. In the case of a supply contract, cost of materials includes the acquisition of services or products from outside sources following normal commercial practices within the industry.

Covered territory business means a small business concern that has its principal office located in one of the following:

(1) The United States Virgin Islands;

(2) American Samoa;

(3) Guam; or

(4) The Commonwealth of the Northern Mariana Islands.

General Services Administration (GSA) Schedule Contract means a Multiple Award Contract issued by GSA and includes the Federal Supply Schedules and other Multiple Award Schedules.

Multiple Award Contract means a contract that is:

(1) A Multiple Award Schedule contract issued by GSA (*e.g.*, GSA Schedule Contract) or agencies granted Multiple Award Schedule contract authority by GSA (*e.g.*, Department of Veterans Affairs) as described in FAR part 38 and subpart 8.4;

(2) A multiple award task-order or delivery-order contract issued in accordance with FAR subpart 16.5, including Governmentwide acquisition contracts; or

(3) Any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.

Office of Small and Disadvantaged Business Utilization (OSDBU) or the Office of Small Business Programs (OSBP) means the office in each Federal agency having procurement powers that is responsible for ensuring that small businesses receive a fair proportion of Federal contracts in that agency. The office is managed by a Director, who is responsible and reports directly to the head of the agency or deputy to the agency (except that for DoD, the Director reports to the Secretary or the Secretary's designee).

Partial set-aside (or partially set-aside) means, for a Multiple Award Contract, a contracting vehicle that can be used when: market research indicates that a total set-aside is not appropriate; the procurement can be broken up into smaller discrete portions or discrete categories such as by Contract Line Items, Special Item Numbers, Sectors or Functional Areas or other equivalent; and two or more small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs are expected to submit an offer on the set-aside part or parts of the requirement at a fair market price.

Reserve means, for a Multiple Award Contract,

(1) An acquisition conducted using full and open competition where the contracting officer makes—

(i) Two or more contract awards to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and competes any orders solely amongst the specified types of small business concerns if the ''rule of two'' or any alternative set-aside requirements provided in the small business program have been met;

(ii) Several awards to several different types of small businesses (*e.g.*, one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB) and competes any orders solely amongst all of the small business concerns if the ''rule of two'' has been met; or

(iii) One contract award to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and subsequently issues orders directly to that concern.

(2) An award on a bundled contract to one or more small businesses with a Small Business Teaming Arrangement.

''*Rule of Two*'' refers to the requirements set forth in §§ 124.506, 125.2(f), 125.19(c), 126.607(c) and 127.503 of this chapter that there is a reasonable expectation that the contracting officer will obtain offers from at least two small businesses and award will be made at fair market price.

Senior Procurement Executive (SPE) means the employee of a Federal agency designated as such pursuant to section 16(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(c)).

Separate contract means a contract or order (including those placed against a GSA Schedule Contract or an indefinite delivery, indefinite quantity contract) that has previously been performed by any business, including an other-than-small business or small business concern.

Separate smaller contract means a contract that has previously been performed by one or more small business concerns or was suitable for award to one or more small business concerns.

Similarly situated entity means a subcontractor that has the same small business program status as the prime

contractor. This means that: For a HUBZone contract, a subcontractor that is a certified HUBZone small business concern; for a small business set-aside, partial set-aside, or reserve, a subcontractor that is a small business concern; for a SDVOSB contract, a subcontractor that is a certified SDVOSB; for a VOSB contract, a subcontractor that is a certified VOSB; for an 8(a) contract, a subcontractor that is a certified 8(a) BD Program Participant; for a WOSB or EDWOSB contract, a subcontractor that is a certified WOSB or EDWOSB. In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also be small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform.

Single contract means any contract or order (including those placed against a GSA Schedule Contract or an indefinite delivery, indefinite quantity contract) resulting in one or more awardee(s).

Small business concern owned and controlled by socially and economically disadvantaged individuals means, for both SBA's subcontracting assistance program in 15 U.S.C. 637(d) and for the goals described in 15 U.S.C. 644(g), a small business concern unconditionally and directly owned by and controlled by one or more socially and economically disadvantaged individuals.

Socially and economically disadvantaged individuals, for both SBA's subcontracting assistance program in 15 U.S.C. 637(d) and for the goals described in 15 U.S.C. 644(g), means:

(1) Individuals who meet the criteria for social disadvantage in §124.103(a) through (c) of this chapter and the criteria for economic disadvantage in §124.104(a) and (c) of this chapter;

(2) Indian tribes and Alaska Native Corporations that satisfy the ownership, control, and disadvantage criteria in §124.109 of this chapter;

(3) Native Hawaiian Organizations that satisfy the ownership, control, and disadvantage criteria in §124.110 of this chapter; or

(4) Community Development Corporations that satisfy the ownership and control criteria in §124.111 of this chapter.

Subcontract or subcontracting means, except for purposes of §125.3, that portion of the contract performed by a business concern, other than the business concern awarded the contract, under a second contract, purchase order, or agreement for any parts, supplies, components, or subassemblies which are not available commercial off-the-shelf items, and which are manufactured in accordance with drawings, specifications, or designs furnished by the contractor, or by the government as a portion of the solicitation. Raw castings, forgings, and moldings are considered as materials, not as subcontracting costs. Where the prime contractor has been directed by the Government as part of the contract to use any specific source for parts, supplies, or components subassemblies, the costs associated with those purchases will be considered as part of the cost of materials, not subcontracting costs.

Substantial bundling means any bundling that meets or exceeds the following dollar amounts (if the acquisition strategy contemplates multiple award contracts, orders placed under unrestricted multiple award contracts, or a Blanket Purchase Agreement issued against a GSA Schedule contract or a task or delivery order contract awarded by another agency, these thresholds apply to the cumulative estimated value of the Multiple Award Contracts, orders, or Blanket Purchase Agreement, including options):

(1) $8.0 million or more for the Department of Defense;

(2) $6.0 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; and

(3) $2.5 million or more for all other agencies.

[78 FR 61134, Oct. 2, 2013, as amended at 81 FR 34261, May 31, 2016; 84 FR 65239, Nov. 26, 2019; 87 FR 50927, Aug. 19, 2022; 87 FR 73412, Nov. 29, 2022; 88 FR 26209, Apr. 27, 2023]

§125.2 What are SBA's and the procuring agency's responsibilities when providing contracting assistance to small businesses?

(a)(1) *General.* The objective of the SBA's contracting programs is to assist small business concerns, including

8(a) BD Participants, HUBZone small business concerns, Service-Disabled Veteran-Owned Small Business Concerns, Women-Owned Small Businesses and Economically Disadvantaged Women-Owned Small Businesses, in obtaining a fair share of Federal Government prime contracts, subcontracts, orders, and property sales. Therefore, these regulations apply to all types of Federal Government contracts, including Multiple Award Contracts, and contracts for architectural and engineering services, research, development, test and evaluation. Small business concerns must receive any award (including orders, and orders placed against Multiple Award Contracts) or contract, part of any such award or contract, any contract for the sale of Government property, or any contract resulting from a reverse auction, regardless of the place of performance, which SBA and the procuring or disposal agency determine to be in the interest of:

(i) Maintaining or mobilizing the Nation's full productive capacity;

(ii) War or national defense programs;

(iii) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with small business concerns; or

(iv) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.

(2) *One acceptable offer.* If the contracting officer receives only one acceptable offer from a responsible small business concern in response to any small or socioeconomic set-aside, the contracting officer should make an award to that firm.

(b) *SBA's responsibilities in the acquisition planning process*—(1) *SBA Procurement Center Representative (PCR) Responsibilities*—

(i) *PCR Review*—(A) SBA has PCRs who are generally located at Federal agencies and buying activities which have major contracting programs. At the SBA's discretion, PCRs may review any acquisition to determine whether a set-aside or sole-source award to a small business under one of SBA's programs is appropriate and to identify alternative strategies to maximize the participation of small businesses in the procurement. PCRs also advocate for the maximum practicable utilization of small business concerns in Federal contracting, including by advocating against the consolidation or bundling of contract requirements, as defined in §125.1, and reviewing any justification provided by the agency for consolidation or bundling. This review includes acquisitions that are Multiple Award Contracts where the agency has not set-aside all or part of the acquisition or reserved the acquisition for small businesses. It also includes acquisitions where the agency has not set-aside orders placed against Multiple Award Contracts for small business concerns. Unless the contracting agency requests a review, PCRs will not review an acquisition by or on behalf of the Department of Defense if the acquisition is conducted for a foreign government pursuant to section 22 of the Arms Control Export Act (22 U.S.C. 2762), is humanitarian or civic assistance provided in conjunction with military operations as defined in 10 U.S.C. 401(e), is for a contingency operation as defined in 10 U.S.C. 101(a)(13), is to be awarded pursuant to an agreement with the government of a foreign country in which Armed Forces of the United States are deployed, or where both the place of award and place of performance are entirely outside of the United States and its territories.

(B) PCRs will work with the cognizant Small Business Specialist (SBS) and agency OSDBU or OSBP as early in the acquisition process as practicable to identify proposed solicitations that involve bundling, and with the agency acquisition officials to revise the acquisition strategies for such proposed solicitations, where appropriate, to increase the probability of participation by small businesses, including small business contract teams and Small Business Teaming Arrangements, as prime contractors.

(C) In conjunction with their duties to promote the set-aside of procurements for small business, PCRs may identify small businesses that are capable of performing particular requirements.

(D) PCRs will also ensure that any Federal agency decision made concerning the consolidation of contract requirements considers the use of small businesses and ways to provide small businesses with maximum opportunities to participate as prime contractors and subcontractors in the acquisition or sale of real property.

(E) PCRs will review whether, for bundled and consolidated contracts that are recompeted, the amount of savings and benefits was achieved under the prior bundling or consolidation of contract requirements, that such savings and benefits will continue to be realized if the contract remains bundled or consolidated, or such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(F) PCRs also advocate competitive procedures and recommend the breakout for competition of items and requirements which previously have not been competed when appropriate. They may appeal the failure by the buying activity to act favorably on a recommendation in accord with the appeal procedures in paragraph (b)(2) of this section. PCRs also review restrictions and obstacles to competition and make recommendations for improvement.

(ii) *PCR recommendations.* The PCR must recommend to the procuring activity alternative procurement methods that would increase small business prime contract participation if a PCR believes that a proposed procurement includes in its statement of work goods or services currently being performed by a small business and is in a quantity or estimated dollar value the magnitude of which renders small business prime contract participation unlikely; will render small business prime contract participation unlikely (*e.g.*, ensure geographical preferences are justified); or is for construction and seeks to package or consolidate discrete construction projects. If a PCR does not believe a bundled or consolidated requirement is necessary or justified the PCR shall advocate against the consolidation or bundling of such requirement and recommend to the procuring activity alternative procurement methods which would increase small business prime contract participation. Such alternatives may include:

(A) Breaking up the procurement into smaller discrete procurements, especially construction acquisitions that can be procured as separate projects;

(B) Breaking out one or more discrete components, for which a small business set-aside may be appropriate;

(C) Reserving one or more awards for small businesses when issuing Multiple Award Contracts;

(D) Using a partial set-aside;

(E) Stating in the solicitation for a Multiple Award Contract that the orders will be set-aside for small businesses; and

(F) Where the bundled or consolidated requirement is necessary and justified, the PCR will work with the procuring activity to tailor a strategy that preserves small business contract participation to the maximum extent practicable.

(iii) *PCR Recommendations for Small Business Teaming Arrangements and Subcontracting.* The PCR will work to ensure that small business participation is maximized both at the prime contract level such as through Small Business Teaming Arrangements and through subcontracting opportunities. This may include the subcontracting considerations in source selections set forth in §125.3(g), as well as the following:

(A) Reviewing an agency's oversight of its subcontracting program, including its overall and individual assessment of a contractor's compliance with its small business subcontracting plans. The PCR will furnish a copy of the information to the SBA Commercial Market Representative (CMR) servicing the contractor;

(B) Recommending that the solicitation and resultant contract specifically state the small business subcontracting goals that are expected of the contractor awardee;

(C) Recommending that the small business subcontracting goals be based on total contract dollars in addition to goals based on a percentage of total subcontracted dollars;

(D) Recommending that separate evaluation factors be established for

evaluating the offerors' proposed approach to small business subcontracting participation in the subject procurement, the extent to which the offeror has met its small business subcontracting goals on previous contracts; and/or the extent to which the offeror actually paid small business subcontractors within the specified number of days;

(E) Recommending that a contracting officer include an evaluation factor in a solicitation which evaluates an offeror's commitment to pay small business subcontractors within a specified number of days after receipt of payment from the Government for goods and services previously rendered by the small business subcontractor. The contracting officer will comparatively evaluate the proposed timelines. Such a commitment shall become a material part of the contract. The contracting officer must consider the contractor's compliance with the commitment in evaluating performance, including for purposes of contract continuation (such as exercising options);

(F) For bundled and consolidated requirements, recommending that a separate evaluation factor with significant weight be established for evaluating the offeror's proposed approach to small business utilization, the extent to which the offeror has met its small business subcontracting goals on previous contracts; and the extent to which the other than small business offeror actually paid small business subcontractors within the specified number of days;

(G) For bundled or consolidated requirements, recommending the solicitation state that the agency must evaluate offers from teams of small businesses the same as other offers, with due consideration to the capabilities and past performance of all proposed subcontractors. It may also include recommending that the agency reserve at least one award to a small business prime contractor with a Small Business Teaming Arrangement;

(H) For Multiple Award Contracts and multiple award requirements above the substantial bundling threshold, recommending or requiring that the solicitation state that the agency will solicit offers from small business concerns and small business concerns with Small Business Teaming Arrangements;

(I) For consolidated contracts, ensuring that agencies have provided small business concerns with appropriate opportunities to participate as prime contractors and subcontractors and making recommendations on such opportunities as appropriate; and

(J) Recommending paragraphs (B) through (I) above apply to an ordering agency placing an order against a Multiple Award Contract or Agreement.

(iv) PCRs will consult with the agency OSDBU regarding agency decisions to convert an activity performed by a small business concern to an activity performed by a Federal employee.

(v) PCRs may receive unsolicited proposals from small business concerns and will transmit those proposals to the agency personnel responsible for reviewing such proposals. The agency personnel shall provide the PCR with information regarding the disposition of such proposal.

(2) *Appeals of PCR recommendations.* In cases where there is disagreement between a PCR and the contracting officer over the suitability of a particular acquisition for a small business set-aside, partial set-aside or reserve, whether or not the acquisition is a bundled, substantially bundled or consolidated requirement, the PCR may initiate an appeal to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal the matter to the Secretary of the Department or head of the agency. The time limits for such appeals are set forth in FAR subpart 19.5 (48 CFR 19.5).

(c) *Procuring Agency Responsibilities—* (1) *Requirement to Foster Small Business Participation.* The Small Business Act requires each Federal agency to foster the participation of small business concerns as prime contractors and subcontractors in the contracting opportunities of the Government regardless of the place of performance of the contract. In addition, Federal agencies must ensure that all bundled and consolidated contracts contain the required analysis and justification and provide small business concerns with

appropriate opportunities to participate as prime contractors and subcontractors. Agency acquisition planners must:

(i) Structure procurement requirements to facilitate competition by and among small business concerns, including small business concerns owned and controlled by service-disabled veterans, certified HUBZone small business concerns , 8(a) BD small business concerns (including those owned by ANCs, Indian Tribes and NHOs), and small business concerns owned and controlled by women;

(ii) Avoid unnecessary and unjustified bundling of contracts or consolidation of contract requirements that inhibits or precludes small business participation in procurements as prime contractors;

(iii) Follow the limitations on use of consolidated contracts;

(iv) With respect to any work to be performed the amount of which would exceed the maximum amount of any contract for which a surety may be guaranteed against loss under 15 U.S.C. 694b, to the extent practicable, place contracts so as to allow more than one small business concern to perform such work;

(v) Provide SBA the necessary information relating to the acquisition under review at least 30 days prior to issuance of a solicitation. This includes providing PCRs (to the extent allowable pursuant to their security clearance) copies of all documents relating to the acquisition under review, including, but not limited to, the performance of work statement/statement of work, technical data, market research, hard copies or their electronic equivalents of Department of Defense (DoD) Form 2579 or equivalent, and other relevant information. The DoD Form 2579 or equivalent must be sent electronically to the PCR (or if a PCR is not assigned to the procuring activity, to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located);

(vi) Provide opportunities for the participation of small business concerns during acquisition planning processes and in acquisition plans; and

(vii) Invite the participation of the appropriate Director of Small and Disadvantaged Business Utilization in acquisition planning processes and provide that Director with access to acquisition plans.

(2) *Requirement for market research.* Each agency, as part of its acquisition planning, must conduct market research to determine the type and extent of foreseeable small business participation in the acquisition. In addition, each agency must conduct market research and any required analysis and justifications before proceeding with an acquisition strategy that could lead to a bundled, substantially bundled, or consolidated contract. The purpose of the market research and analysis is to determine whether the bundling or consolidation of the requirements is necessary and justified and all statutory requirements for such a strategy have been met. Agencies should be as broad as possible in their search for qualified small businesses, using key words as well as NAICS codes in their examination of the System for Award Management (SAM) and the Dynamic Small Business Search (DSBS), and must not place unnecessary and unjustified restrictions when conducting market research (*e.g.*, requiring that small businesses prove they can provide the best scientific and technological sources) when determining whether to set-aside, partially set-aside, reserve or sole source a requirement to small businesses. During the market research phase, the acquisition team must consult with the applicable PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located) and the activity's Small Business Specialist.

(3) *Proposed Acquisition Strategy.* A procuring activity must provide to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) at least 30 days prior to a solicitation's issuance:

(i) A copy of a proposed acquisition strategy (*e.g.*, DoD Form 2579, or equivalent) whenever a proposed acquisition strategy:

(A) Includes in its description goods or services the magnitude of the quantity or estimated dollar value of which would render small business prime contract participation unlikely;

(B) Seeks to package or consolidate discrete construction projects;

(C) Is a bundled or substantially bundled requirement; or

(D) Is a consolidation of contract requirements;

(ii) A written statement explaining why, if the proposed acquisition strategy involves a bundled or consolidated requirement, the procuring activity believes that the bundled or consolidated requirement is necessary and justified; the analysis required by paragraph (d)(2)(i) of this section; the acquisition plan; any bundling information required under paragraph (d)(3) of this section; and any other relevant information. The PCR and agency OSDBU or OSBP, as applicable, must then work together to develop alternative acquisition strategies identified in paragraph (b)(1) of this section to enhance small business participation;

(iii) All required clearances for the bundled, substantially bundled, or consolidated requirement; and

(iv) A written statement explaining why—if the description of the requirement includes goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects—

(A) The proposed acquisition cannot be divided into reasonably small lots to permit offers on quantities less than the total requirement;

(B) Delivery schedules cannot be established on a basis that will encourage small business participation;

(C) The proposed acquisition cannot be offered so as to make small business participation likely; or

(D) Construction cannot be procured through separate discrete projects.

(4) *Procuring Agency Small Business Specialist (SBS) Responsibilities.*

(i) As early in the acquisition planning process as practicable—but no later than 30 days before the issuance of a solicitation, or prior to placing an order without a solicitation—the procuring activity must coordinate with the procuring activity's SBS when the acquisition strategy contemplates an acquisition meeting the dollar amounts set forth for substantial bundling. If the acquisition strategy contemplates Multiple Award Contracts or orders under the GSA Multiple Award Schedule Program or a task or delivery order contract awarded by another agency, these thresholds apply to the cumulative estimated value of the Multiple Award Contracts or orders, including options. The procuring activity is not required to coordinate with its SBS if the contract or order is entirely set-aside for small business concerns, or small businesses under one of SBA's small business programs, as authorized under the Small Business Act.

(ii) The SBS must notify the agency OSDBU or OSBP if the agency's acquisition strategy or plan includes bundled or consolidated requirements that the agency has not identified as bundled, or includes unnecessary or unjustified bundling of requirements. If the strategy involves substantial bundling, the SBS must assist in identifying alternative strategies that would reduce or minimize the scope of the bundling.

(iii) The SBS must coordinate with the procuring activity and PCR on all required determinations and findings for bundling and/or consolidation, and acquisition planning and strategy documentation.

(5) *OSDBU and OSBP Oversight Functions.* The Agency OSDBU or OSBP must:

(i) Conduct annual reviews to assess the:

(A) Extent to which small businesses are receiving their fair share of Federal procurements, including contract opportunities under programs administered under the Small Business Act;

(B) Adequacy of the bundling or consolidation documentation and justification; and

(C) Adequacy of actions taken to mitigate the effects of necessary and justified contract bundling or consolidation on small businesses (*e.g.,* review agency oversight of prime contractor

subcontracting plan compliance under the subcontracting program);

(ii) Provide a copy of the assessment under paragraph (c)(5)(i) of this section to the agency head and SBA's Administrator;

(iii) Identify proposed solicitations that involve significant bundling of contract requirements, and work with the agency acquisition officials and the SBA to revise the procurement strategies for such proposed solicitations to increase the probability of participation by small businesses as prime contractors through Small Business Teaming Arrangements;

(iv) Facilitate small business participation as subcontractors and suppliers, if a solicitation for a substantially bundled contract is to be issued;

(v) Assist small business concerns to obtain payments, required late payment interest penalties, or information regarding payments due to such concerns from an executive agency or a contractor, in conformity with chapter 39 of Title 31 or any other protection for contractors or subcontractors (including suppliers) that is included in the FAR or any individual agency supplement to such Government-wide regulation;

(vi) Cooperate, and consult on a regular basis with the SBA with respect to carrying out these functions and duties;

(vii) Make recommendations to contracting officers as to whether a particular contract requirement should be awarded to any type of small business. The Contracting Officer must document any reason not to accept such recommendations and include the documentation in the appropriate contract file; and

(viii) Coordinate on any acquisition planning and strategy documentation, including bundling and consolidation determinations at the agency level.

(6) *Communication on Achieving Goals.* All Senior Procurement Executives, senior program managers, Directors of OSDBU or Directors of OSBP must communicate to their subordinates the importance of achieving small business goals and ensuring that a fair proportion of awards are made to small businesses.

(d) *Contract Consolidation and Bundling*—(1) *Limitation on the Use of Consolidated Contracts.* (i) An agency may not conduct an acquisition that is a consolidation of contract requirements unless the Senior Procurement Executive or Chief Acquisition Officer for the Federal agency, before carrying out the acquisition strategy:

(A) Conducts adequate market research;

(B) Identifies any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements;

(C) Makes a written determination, which is coordinated with the agency's OSDBU/OSBP, that the consolidation of contract requirements is necessary and justified;

(D) Identifies any negative impact by the acquisition strategy on contracting with small business concerns; and

(E) Ensures that steps will be taken to include small business concerns in the acquisition strategy.

(ii) A Senior Procurement Executive or Chief Acquisition Officer may determine that an acquisition strategy involving a consolidation of contract requirements is necessary and justified.

(A) A consolidation of contract requirements may be necessary and justified if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches identified under paragraph (d)(1)(i)(B).

(B) The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to: benefits equivalent to 10 percent of the contract or order value (including options) where the contract or order value is $94 million or less; or benefits equivalent to 5 percent of the contract or order value (including options) or $9.4 million, whichever is greater, where the contract or order value exceeds $94 million.

(C) Savings in administrative or personnel costs alone do not constitute a

sufficient justification for a consolidation of contract requirements in a procurement unless the expected total amount of the cost savings, as determined by the Senior Procurement Executive or Chief Acquisition Officer, is expected to be substantial in relation to the total cost of the procurement. To be substantial, such administrative or personnel cost savings must be at least 10 percent of the contract value (including options).

(iii) Each agency must ensure that any decision made concerning the consolidation of contract requirements considers the use of small businesses and ways to provide small businesses with opportunities to participate as prime contractors and subcontractors in the acquisition.

(iv) If the consolidated requirement is also considered a bundled requirement, then the contracting officer must instead follow the provisions regarding bundling set forth in paragraphs (d)(2) through (7) of this section.

(v) Not later than 7 days after making a determination that an acquisition strategy involving a consolidation of contract requirements is necessary and justified under subparagraph (d)(1)(i) of this section, the Senior Procurement Executive (SPE) or Chief Acquisition Officer (CAO), or designee, shall publish a notice on the Government Point of Entry (GPE) that such determination has been made. Any solicitation for a procurement related to the acquisition strategy shall not be issued earlier than 7 days after such notice is published. Along with the publication of the solicitation, the SPE or CAO (or designee) must publish in the GPE the justification for the determination, which shall include the information in paragraphs (d)(1)(i)(A) through (E) of this section.

(2) *Limitation on the Use of Contract Bundling.*(i) When the procuring activity intends to proceed with an acquisition involving bundled or substantially bundled procurement requirements, it must document the acquisition strategy to include a determination that the bundling is necessary and justified, when compared to the benefits that could be derived from meeting the agency's requirements through separate smaller contracts.

(ii) A bundled requirement is necessary and justified if, as compared to the benefits that the procuring activity would derive from contracting to meet those requirements if not bundled, it would derive measurably substantial benefits. The procuring activity must quantify the identified benefits and explain how their impact would be measurably substantial. This analysis must include quantification of the reduction or increase in price of the proposed bundled strategy as compared to the cumulative value of the separate contracts. The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to:

(A) Benefits equivalent to 10 percent of the contract or order value (including options), where the contract or order value is $94 million or less; or

(B) Benefits equivalent to 5 percent of the contract or order value (including options) or $9.4 million, whichever is greater, where the contract or order value exceeds $94 million.

(iii) Notwithstanding paragraph (d)(2)(ii) of this section, the Senior Procurement Executives or the Under Secretary of Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense and the Deputy Secretary or equivalent in civilian agencies may, on a non-delegable basis, determine that a bundled requirement is necessary and justified when:

(A) There are benefits that do not meet the thresholds set forth in paragraph (d)(2)(ii) of this section but, in the aggregate, are critical to the agency's mission success; and

(B) The procurement strategy provides for maximum practicable participation by small business.

(iv) The reduction of administrative or personnel costs alone must not be a justification for bundling of contract requirements unless the administrative or personnel cost savings are expected to be substantial, in relation to the dollar value of the procurement to be

bundled (including options). To be substantial, such administrative or personnel cost savings must be at least 10 percent of the contract value (including options).

(v) In assessing whether cost savings and/or a price reduction would be achieved through bundling, the procuring activity and SBA must compare the price that has been charged by small businesses for the work that they have performed and, where available, the price that could have been or could be charged by small businesses for the work not previously performed by small business.

(vi) The substantial benefit analysis set forth in paragraph (d)(2)(ii) of this section is still required where a requirement is subject to a Cost Comparison Analysis under OMB Circular A–76.

(3) *Limitations on the Use of Substantial Bundling.* Where a proposed procurement strategy involves a Substantial Bundling of contract requirements, the procuring agency must, in the documentation of that strategy, include a determination that the anticipated benefits of the proposed bundled contract justify its use, and must include, at a minimum:

(i) The analysis for bundled requirements set forth in paragraphs (d)(2)(i) and (ii) of this section;

(ii) An assessment of the specific impediments to participation by small business concerns as prime contractors that will result from the substantial bundling;

(iii) Actions designed to maximize small business participation as prime contractors, including provisions that encourage small business teaming for the substantially bundled requirement;

(iv) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements; and

(v) The identification of the alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives (*i.e.*, consider the strategies under paragraph (b)(1)(ii) of this section).

(4) *Significant Subcontracting Opportunities in Justified Consolidated, Bundled and Substantially Bundled Requirements.*

(i) Where a justified consolidated, bundled, or substantially bundled requirement offers a significant opportunity for subcontracting, the procuring agency must designate the following factors as significant factors in evaluating offers:

(A) A factor that is based on the rate of participation provided under the subcontracting plan for small business in the performance of the contract; and

(B) For the evaluation of past performance of an offeror, a factor that is based on the extent to which the offeror attained applicable goals for small business participation in the performance of contracts.

(ii) Where the offeror for such a contract qualifies as a small business concern, the procuring agency must give to the offeror the highest score possible for the evaluation factors identified above.

(5) *Notification to Current Small Business Contractors of Intent to Bundle.* The procuring activity must notify each small business which is performing a contract that it intends to bundle that requirement with one or more other requirements at least 30 days prior to the issuance of the solicitation for the bundled or substantially bundled requirement. The procuring activity, at that time, should also provide to the small business the name, phone number and address of the applicable SBA PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located). This notification must be documented in the contract file.

(6) *Notification to Public of Rationale for Bundled Requirement.* The head of a Federal agency must publish on the agency's Web site a list and rationale for any bundled requirement for which the agency solicited offers or issued an award. The notification must be made within 30 days of the agency's data certification regarding the validity and verification of data entered in that Federal Procurement Data Base to the Office of Federal Procurement Policy. However, to foster transparency in

Federal procurement, the agency is encouraged to provide such notification before issuance of the solicitation.

(7) *Notification to public of rationale for substantial bundling.* If the head of a contracting agency determines that an acquisition plan for a procurement involves a substantial bundling of contract requirements, the head of a contracting agency shall publish a notice on the GPE that such determination has been made not later than 7 days after making such determination. Any solicitation for a procurement related to the acquisition plan may not be published earlier than 7 days after such notice is published. Along with the publication of the solicitation, the head of a contracting agency shall publish in the GPE a justification for the determination, which shall include the following information:

(i) The specific benefits anticipated to be derived from the bundling of contract requirements and a determination that such benefits justify the bundling;

(ii) An identification of any alternative contracting approaches that would involve a lesser degree of bundling of contract requirements;

(iii) An assessment of the specific impediments to participation by small business concerns as prime contractors that result from the bundling of contract requirements; and

(iv) The specific actions designed to maximize participation of small business concerns as subcontractors (including suppliers) at various tiers under the contract or contracts that are awarded to meet the requirements.

(8) *Notification to SBA of Recompeted Bundled or Consolidated Requirement.* For each bundled or consolidated contract that is to be recompeted (even if additional requirements have been added or deleted) the procuring agency must notify SBA's PCR as soon as possible but no later than 30 days prior to issuance of the solicitation of:

(i) The amount of savings and benefits achieved under the prior bundling or consolidation of contract requirements;

(ii) Whether such savings and benefits will continue to be realized if the contract remains bundled or consolidated; and

(iii) Whether such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(e) *Multiple Award Contract*—(1) *General.*(i) The contracting officer must set-aside a Multiple Award Contract if the requirements for a set-aside are met. This includes set-asides for small businesses, 8(a) Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs.

(ii) The contracting officer in his or her discretion may partially set-aside or reserve a Multiple Award Contract, or set aside, or preserve the right to set aside, orders against a Multiple Award Contract that was not itself set aside for small business. The ultimate decision of whether to use any of the above-mentioned tools in any given procurement action is a decision of the contracting agency.

(iii) The procuring agency contracting officer must document the contract file and explain why the procuring agency did not partially set-aside or reserve a Multiple Award Contract, or set-aside orders issued against a Multiple Award Contract, when these authorities could have been used.

(2) *Total Set-aside of Multiple Award Contracts.*(i) The contracting officer must conduct market research to determine whether the ''rule of two'' can be met. If the ''rule of two'' can be met, the contracting officer must follow the procedures for a set-aside set forth in paragraph (f) of this section.

(ii) The contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order pursuant to §121.402(c) of this chapter. *See* §121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) When drafting the solicitation for the contract, agencies should consider an ''on-ramp'' provision that permits the agency to refresh the awards by adding more small business contractors throughout the life of the contract. Agencies should also consider the need to ''off-ramp'' existing contractors that no longer qualify as small for the size standard corresponding to

the NAICS code assigned to the contract (*e.g.*, termination for convenience).

(iv) A business must comply with the applicable limitations on subcontracting provisions (*see* §125.6) and the nonmanufacturer rule (*see* §121.406(b)), if applicable, during each performance period of the contract (e.g., the base term and each subsequent option period). However, the contracting officer, in his or her discretion, may require the contractor perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(3) *Partial Set-asides of Multiple Award Contracts.*(i) A contracting officer may partially set-aside a multiple award contract when: market research indicates that a total set-aside is not appropriate; the procurement can be broken up into smaller discrete portions or discrete categories such as by Contract Line Items, Special Item Numbers, Sectors or Functional Areas or other equivalent; and two or more small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs are expected to submit an offer on the set-aside part or parts of the requirement at a fair market price. A contracting officer has the discretion, but is not required, to set-aside the discrete portions or categories for different small businesses participating in SBA's small business programs (*e.g.*, CLIN 0001, 8(a) set-aside; CLIN 0002, HUBZone set-aside; CLIN 0003, SDVO SBC set-aside; CLIN 0004, WOSB set-aside; CLIN 0005 EDWOSB set-aside; CLIN 0006, small business set-aside). If the contracting officer decides to partially set-aside a Multiple Award Contract, the contracting officer must follow the procedures for a set-aside set forth in paragraph (f) of this section for the part or parts of the contract that have been set-aside.

(ii) The contracting officer must assign a NAICS code and corresponding size standard to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to §121.402(c) of this chapter. *See* §121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) A contracting officer must state in the solicitation that the small business will not compete against other-than-small businesses for any order issued against that part or parts of the Multiple Award Contract that are set-aside.

(iv) A contracting officer must state in the solicitation that the small business will be permitted to compete against other-than-small businesses for an order issued against the portion of the Multiple Award Contract that has not been partially set-aside if the small business submits an offer for the non-set-aside portion. The business concern will not have to comply with the limitations on subcontracting (*see* §125.6) and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed and awarded under the portion of the contract that is not set-aside.

(v) When drafting the solicitation for the contract, agencies should consider an ''on ramp'' provision that permits the agency to refresh these awards by adding more small business contractors to that portion of the contract that was set-aside throughout the life of the contract. Agencies should also consider the need to ''off ramp'' existing contractors that no longer qualify as small for the size standard corresponding to the NAICS code assigned to the contract (*e.g.*, termination for convenience).

(vi) The small business must submit one offer that addresses each part of the solicitation for which it wants to compete. A small business (or 8(a) Participant, HUBZone SBC, SDVO SBC or ED/WOSB) is not required to submit an offer on the part of the solicitation that is not set-aside. However, a small business may choose to submit an offer on the part or parts of the solicitation that have been set-aside and/or on the parts that have not been set-aside.

(vii) A small business must comply with the applicable limitations on subcontracting provisions (*see* §125.6) and the nonmanufacturer rule (*see* §121.406(b)), if applicable, during each performance period of the contract (e.g., during the base term and then

during option period thereafter). However, the contracting officer, in his or her discretion, may require the contractor perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(4) *Reserves of Multiple Award Contracts Awarded in Full and Open Competition.* (i) A contracting officer may reserve one or more awards for small business where:

(A) The market research and recent past experience evidence that—

(*1*) At least two small businesses, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs could perform one part of the requirement, but the contracting officer was unable to divide the requirement into smaller discrete portions or discrete categories by utilizing individual Contract Line Items (CLINs), Special Item Numbers (SINs), Functional Areas (FAs), or other equivalent; or

(*2*) At least one small business, 8(a) BD Participant, HUBZone SBC, SDVO SBC, WOSB or EDWOSB can perform the entire requirement, but there is not a reasonable expectation of receiving at least two offers from small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs at a fair market price for all the work contemplated throughout the term of the contract; or

(B) The contracting officer makes:

(1) Two or more contract awards to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and competes any orders solely amongst the specified types of small business concerns if the ''rule of two'' or any alternative set-aside requirements provided in the small business program have been met;

(2) Several awards to several different types of small businesses (*e.g.*, one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB) and competes any orders solely amongst all of the small business concerns if the ''rule of two'' has been met; or

(3) One contract award to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and subsequently issues orders directly to that concern.

(ii) If the contracting officer decides to reserve a multiple award contract established through full and open competition, the contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to §121.402(c) of this chapter. *See* §121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) A contracting officer must state in the solicitation that if there are two or more contract awards to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB), the agency may compete any orders solely amongst the specified types of small business concerns if the ''rule of two'' or an alternative set-aside requirement provided in the small business program have been met.

(iv) A contracting officer must state in the solicitation that if there are several awards to several different types of small businesses (*e.g.*, one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB), the agency may compete any orders solely amongst all of the small business concerns if the ''rule of two'' has been met.

(v) A contracting officer must state in the solicitation that if there is only one contract award to any one type of small business concern (*e.g.*, small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB), the agency may issue orders directly to that concern for work that it can perform.

(vi) A contracting officers may, but is not required to, set forth targets in the contract showing the estimated dollar value or percentage of the total contract to be awarded to small businesses.

(vii) A small business offeror must submit one offer that addresses each part of the solicitation for which it wants to compete.

(viii) Small businesses are permitted to compete against other-than-small businesses for an order issued against the Multiple Award Contract if agency issued the small business a contract for those supplies or services.

(ix) A business must comply with the applicable limitations on subcontracting provisions (*see* §125.6) and the nonmanufacturer rule (*see* §121.406(b)), if applicable, for any order issued against the Multiple Award Contract if the order is set aside or awarded on a sole source basis. However, a business need not comply with the limitations on subcontracting provisions (*see* §125.6) and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst small and other-than-small business concerns.

(5) *Reserve of Multiple Award Contracts that are Bundled.*

(i) If the contracting officer decides to reserve a multiple award contract established through full and open competition that is a bundled contract, the contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to §121.402(c) of this chapter. *See* §121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(ii) The Small Business Teaming Arrangement must comply with the applicable limitations on subcontracting provisions (*see* §125.6) and the nonmanufacturer rule (*see* §121.406(b)), if applicable, on all orders issued against the Multiple Award Contract, although the cooperative efforts of the team members will be considered in determining whether the subcontracting limitations requirement is met (*see* §125.6(j)).

(iii) Team members of the Small Business Teaming Arrangement will not be affiliated for the specific solicitation or contract (*see* §121.103(b)(8)).

(6) *Set-aside of orders against Multiple Award Contracts.*

(i) Notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 4106(c), a contracting officer may set aside orders for small businesses, eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs against full and open Multiple Award Contracts. In addition, a contracting officer may set aside orders for eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs against total small business set-aside Multiple Award Contracts, partial small business set-aside Multiple Award Contracts, and small business reserves of Multiple Award Contracts awarded in full and open competition. Although a contracting officer can set aside orders issued under a small business set-aside Multiple Award Contract or reserve to any subcategory of small businesses, contracting officers are encouraged to review the award dollars under the Multiple Award Contract and aim to make available for award at least 50% of the award dollars under the Multiple Award Contract to all contract holders of the underlying small business set-aside Multiple Award Contract or reserve. However, a contracting officer may not further set aside orders for specific types of small business concerns against Multiple Award Contracts that are set-aside or reserved for eligible 8(a) Participants, certified HUBZone small business concerns, SDVO small business concerns, WOSBs, and EDWOSBs (*e.g.*, a contracting officer cannot set-aside an order for 8(a) Participants that are also certified HUBZone small business concerns against an 8(a) Multiple Award Contract).

(ii) The contracting officer may state in the solicitation and resulting contract for the Multiple Award Contract that:

(A) Based on the results of market research, orders issued against the Multiple Award Contract will be set-aside for small businesses or any subcategory of small businesses whenever the ''rule of two'' or any alternative set-aside requirements provided in the small business program have been met; or

(B) The agency is preserving the right to consider set-asides using the ''rule of two'' or any alternative set-aside requirements provided in the small business program, on an order-by-order basis.

(iii) For the acquisition of orders valued at or below the simplified acquisition threshold (SAT), the contracting officer may set-aside the order for

small businesses, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs in accordance with the relevant program's regulations. For the acquisition of orders valued above the SAT, the contracting officer shall first consider whether there is a reasonable expectation that offers will be obtained from at least two 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs in accordance with the program's regulations, before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs.

(iv) The contracting officer must assign a NAICS code to the solicitation for each order issued against the Multiple Award Contract pursuant to §121.402(c) of this chapter. *See* §121.404 for further determination on size status for each order issued against that contract.

(v) A business must comply with applicable limitations on subcontracting provisions (*see* §125.6) and the nonmanufacturer rule (*see* §121.406(b)), if applicable in the performance of each order that is set-aside against the contract.

(7) *Tiered evaluation of offers, or cascading.* An agency cannot create a tiered evaluation of offers or ''cascade'' unless it has specific statutory authority to do so. This is a procedure used in negotiated acquisitions when the contracting officer establishes a tiered or cascading order of precedence for evaluating offers that is specified in the solicitation, which states that if no award can be made at the first tier, it will evaluate offers at the next lower tier, until award can be made. For example, unless the agency has specific statutory authority to do so, an agency is not permitted to state an intention to award one contract to an 8(a) BD Participant and one to a HUBZone SBC, but only if no awards are made to 8(a) BD Participants.

(f) *Contracting Among Small Business Programs*—(1) *Acquisitions Valued At or Below the Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Micropurchase Threshold but not exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from making an award to a small business under the 8(a) BD, HUBZone, SDVO SBC or WOSB Programs.

(2) *Acquisitions Valued Above the Simplified Acquisition Threshold.* (i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's certifications in the System for Award Management (SAM) (or successor system) and associated representations were reviewed.

(ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

(g) *Capabilities, past performance, and experience.* When an offer of a small

business prime contractor includes a proposed team of small business subcontractors and specifically identifies the first-tier subcontractor(s) in the proposal, the head of the agency must consider the capabilities, past performance, and experience of each first tier subcontractor that is part of the team as the capabilities, past performance, and experience of the small business prime contractor if the capabilities, past performance, and experience of the small business prime does not independently demonstrate capabilities and past performance necessary for award.

[61 FR 3312, Jan. 31, 1996, as amended at 63 FR 31908, June 11, 1998; 64 FR 57370, Oct. 25, 1999; 65 FR 45833, July 26, 2000; 68 FR 60012, Oct. 20, 2003; 74 FR 46887, Sept. 14, 2009; 75 FR 62281, Oct. 7, 2010; 76 FR 63547, Oct. 12, 2011; 77 FR 1860, Jan. 12, 2012; 78 FR 61135, Oct. 2, 2013; 81 FR 34261, May 31, 2016; 81 FR 48585, July 25, 2016; 84 FR 65239, Nov. 26, 2019; 84 FR 65662, Nov. 29, 2019; 85 FR 66191, Oct. 16, 2020; 88 FR 26210, Apr. 27, 2023]

§ 125.3 What types of subcontracting assistance are available to small businesses?

(a) *General.* The purpose of the subcontracting assistance program is to provide the maximum practicable subcontracting opportunities for small business concerns, including small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, certified HUBZone small business concerns, certified small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The subcontracting assistance program implements section 8(d) of the Small Business Act, which includes the requirement that, unless otherwise exempt, other than small business concerns awarded contracts that offer subcontracting possibilities by the Federal Government in excess of $750,000, or in excess of $1,500,000 for construction of a public facility, must submit a subcontracting plan to the appropriate contracting agency. The Federal Acquisition Regulation sets forth the requirements for subcontracting plans in 48 CFR 19.7, and the clause at 48 CFR 52.219–9.

(1) Subcontract under this section means a legally binding agreement between a contractor that is already under contract to another party to perform work and a third party (other than one involving an employer-employee relationship), hereinafter referred to as the subcontractor, for the subcontractor to perform a part or all of the work that the contractor has undertaken.

(i) Subcontract award data reported by prime contractors and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made beyond the immediate next-tier, except as follows:

(A) The contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from an ANC or Indian Tribe; or

(B) Purchases from a corporation, company, or subdivision that is an affiliate of the prime contractor or subcontractor, or a joint venture in which the contractor is one of the joint venturers, are not included in the subcontracting base. Subcontracts by first-tier affiliates, and subcontracts by a joint venture in which the prime contractor is one of the joint venturers, shall be treated as subcontracts of the prime.

(C) Where the subcontracting goals pertain only to a single contract with one Federal agency, the contractor may elect to receive credit for small business concerns performing as first-tier subcontractors or subcontractors at any tier pursuant to the subcontracting plans required under paragraph (c) of this section in an amount equal to the dollar value of work awarded to such small business concerns. The election must be recorded in the subcontracting plan. If the contractor elects to receive credit for subcontractors at any tier, the following requirements apply:

(*1*) The prime contractor must incorporate the subcontracting-plan goals of their lower-tier subcontractors in its individual-subcontracting-plan goals.

(*2*) To receive credit for their subcontracting, lower-tier subcontractors must have their own individual subcontracting plans.

(*3*) The prime contractor and any subcontractor with a subcontracting plan are responsible for reporting on subcontracting performance under their contracts or subcontracts at their first tier. This reporting method applies to both individual subcontracting reports and summary subcontracting reports.

(*4*) The prime contractor's performance under its individual subcontracting plan will be calculated by aggregating the prime contractor's first-tier subcontracting achievements with the achievements of the prime contractor's lower-tier subcontractors that have flow-down subcontracting plans.

(*5*) If the subcontracting goals pertain to more than one contract with one or more Federal agencies, or to one contract with more than one Federal agency, the prime contractor shall receive credit only for first-tier subcontractors that are small business concerns. This restriction applies to all commercial plans, all comprehensive subcontracting plans with the Department of Defense, governmentwide contracts, and multi-agency contracts.

(D) Other-than-small prime contractors and subcontractors with subcontracting plans shall report on their subcontracting performance on the Summary Subcontracting report (SSR) at their first tier only.

(ii) Only subcontracts involving performance in the United States or its outlying areas should be included, with the exception of subcontracts under a contract awarded by the U.S. Department of State or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed outside the United States and its outlying areas and subcontracts for foreign military sales unless waived in accordance with agency regulations.

(iii) The following should not be included in the subcontracting base: internally generated costs such as salaries and wages; employee insurance; other employee benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; fines, claims, and dues; Original Equipment Manufacturer relationships during warranty periods (negotiated up front with product); utilities such as electricity, water, sewer, and other services purchased from a municipality or solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. Utility companies may be eligible for additional exclusions unique to their industry, which may be approved by the contracting officer on a case-by-case basis. Exclusions from the subcontracting base include but are not limited to those listed above.

(2) Subcontracting goals required under paragraph (c) of this section must be established in terms of the total dollars subcontracted and as a percentage of total subcontract dollars. However, a contracting officer may establish additional goals as a percentage of total contract dollars.

(3) A prime contractor has a history of unjustified untimely or reduced payments to subcontractors if the prime contractor has reported itself to a contracting officer in accordance with paragraph (c)(5) of this section on three occasions within a 12 month period.

(b) *Responsibilities of prime contractors.* (1) Prime contractors (including small business prime contractors) selected to receive a Federal contract that exceeds the simplified acquisition threshold, that will not be performed entirely outside of any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico, and that is not for services which are personal in nature, are responsible for ensuring that small business concerns have the maximum practicable opportunity to participate in the performance of the contract, including subcontracts for subsystems, assemblies, components, and related services for major systems, consistent with the efficient performance of the contract.

(2) A small business cannot be required to submit a formal subcontracting plan or be asked to submit a formal subcontracting plan, a small-business prime contractor is encouraged to provide maximum practicable opportunity to other small businesses to participate in the performance of the contract, consistent with the efficient performance of the contract. This applies whether the firm qualifies as a

small business concern for the size standard corresponding to the NAICS code assigned to the contract, or is deemed to be treated as a small business concern by statute (*see e.g.*, 43 U.S.C. 1626(e)(4)(B)).

(3) Efforts to provide the maximum practicable subcontracting opportunities for small business concern may include, as appropriate for the procurement, one or more of the following actions:

(i) Breaking out contract work items into economically feasible units, as appropriate, to facilitate small business participation;

(ii) Conducting market research to identify small business subcontractors and suppliers through all reasonable means, such as performing online searches via the System for Award Management (SAM) (or any successor system), posting Notices of Sources Sought and/or Requests for Proposal on SBA's SUB-Net, participating in Business Matchmaking events, and attending pre-bid conferences;

(iii) Soliciting small business concerns as early in the acquisition process as practicable to allow them sufficient time to submit a timely offer for the subcontract;

(iv) Providing interested small businesses with adequate and timely information about the plans, specifications, and requirements for performance of the prime contract to assist them in submitting a timely offer for the subcontract;

(v) Negotiating in good faith with interested small businesses;

(vi) Directing small businesses that need additional assistance to SBA;

(vii) Assisting interested small businesses in obtaining bonding, lines of credit, required insurance, necessary equipment, supplies, materials, or services;

(viii) Utilizing the available services of small business associations; local, state, and Federal small business assistance offices; and other organizations; and

(ix) Participating in a formal mentor-protégé program with one or more small-business protégés that results in developmental assistance to the protégés.

(c) *Additional responsibilities of other than small contractors.* (1) In addition to the responsibilities provided in paragraph (b) of this section, a prime contractor selected for award of a contract or contract modification that exceeds $750,000, or $1,500,000 in the case of construction of a public facility, is responsible for the following:

(i) Submitting and negotiating before award an acceptable subcontracting plan that reflects maximum practicable opportunities for small businesses in the performance of the contract as subcontractors or suppliers at all tiers of performance. A prime contractor may submit a commercial plan, described in paragraph (c)(2) of this section, instead of an individual subcontracting plan, when the product or service being furnished to the Government meets the definition of a commercial product or commercial service under 48 CFR 2.101;

(ii) Making a good-faith effort to achieve the dollar and percentage goals and other elements in its subcontracting plan;

(iii) The contractor may not prohibit a subcontractor from discussing any material matter pertaining to payment or utilization with the contracting officer;

(iv) When developing an individual subcontracting plan (also called individual contract plan), the contractor must determine whether to include indirect costs in its subcontracting goals. A prime contractor must include indirect costs in its subcontracting goals if the contract exceeds $7.5 million. Below $7.5 million, a prime contractor may include indirect costs in its subcontracting plan at its option. If indirect costs are included in the goals, these costs must be included in the Individual Subcontract Report (ISR) in *www.esrs.gov* (eSRS) or Subcontract Reports for Individual Contracts (the paper SF–294, if authorized). Contractors may use a pro rata formula to allocate indirect costs to covered individual contracts, if the indirect costs are not already allocable to specific contracts. Regardless of whether the contractor has included indirect costs in the subcontracting plan, indirect costs must be included on a prorated basis in the Summary Subcontracting

Report (SSR) in the eSRS system. A contractor authorized to use a commercial subcontracting plan must include all indirect costs in its subcontracting goals and in its SSR;

(v) The contractor must assign to each subcontract, and to each solicitation, if a solicitation is utilized, the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract (see §121.410 of this chapter). A formal solicitation is not required for each subcontract, but the contractor must provide some form of written notice of the NAICS code and size standard assigned to potential offerors prior to acceptance and award of the subcontract. The prime contractor (or subcontractor) may rely on a subcontractor's electronic representations and certifications, if the solicitation for the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size or socioeconomic representations and certifications are current, accurate and complete as of the date of the offer for the subcontract. Electronic submission may include any method acceptable to the prime contractor (or subcontractor) including, but not limited to, size or socioeconomic representations and certifications made in SAM (or any successor system). A prime contractor (or subcontractor) may not require the use of SAM (or any successor system) for purposes of representing size or socioeconomic status in connection with a subcontract;

(vi) The contractor must submit timely and accurate ISRs and SSRs in eSRS (or any successor system), or if information for a particular procurement cannot be entered into eSRS (or any successor system), submit a timely SF–294, Subcontracting Report for Individual Contract. When a report is rejected by the contracting officer, the contractor must make the necessary corrections and resubmit the report within 30 days of receiving the notice of rejection;

(vii) The contractor must cooperate in the reviews of subcontracting plan compliance, including providing requested information and supporting documentation reflecting actual achievements and good-faith efforts to meet the goals and other elements in the subcontracting plan;

(viii) The contractor must provide pre-award written notification to unsuccessful small business offerors on all competitive subcontracts over the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101). The written notification must include the name and location of the apparent successful offeror and if the successful offeror is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business;

(ix) As a best practice, the contractor may provide the pre-award written notification cited in paragraph (c)(1)(viii) of this section to unsuccessful and small business offerors on subcontracts at or below the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101) and should do so whenever practical;

(x) Except when subcontracting for commercial products or commercial services, the prime contractor must require all subcontractors (except small business concerns) who receive subcontracts in excess of $1,500,000 in the case of a subcontract for the construction of any public facility, or in excess of $750,000 in the case of all other subcontracts, and which offer further subcontracting possibilities, to adopt a subcontracting plan of their own consistent with this section, and must ensure at a minimum that all subcontractors required to maintain subcontracting plans pursuant to this paragraph will review and approve subcontracting plans submitted by their subcontractors; monitor their subcontractors' compliance with their approved subcontracting plans; ensure that subcontracting reports are submitted by their subcontractors when required; acknowledge receipt of their subcontractors' reports; compare the performance of their subcontractors to their subcontracting plans and goals; and discuss performance with their subcontractors when necessary to ensure their subcontractors make a good-faith effort to comply with their subcontracting plans;

(xi) The prime contractor must provide a written statement of the types of records it will maintain to demonstrate procedures which have been adopted to ensure subcontractors at all tiers comply with the requirements and goals set forth in the subcontracting plan established in accordance with paragraph (c)(1)(x) of this section, including the establishment of source lists of small business concerns, small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, certified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women; the efforts to identify and award subcontracts to such small business concerns; and size or socioeconomic certifications or representations received in connection with each subcontract;

(xii) The prime contractor must provide a written statement of the types of records it will maintain to demonstrate that procedures have been adopted to substantiate the subcontracting credit that the prime contractor elects under paragraph (a)(1)(i)(C) of this section; and

(xiii)(A) The prime contractor, upon request from a first-tier small business subcontractor, shall provide the subcontractor with a rating of the subcontractor's past performance. The prime contractor must provide the small business subcontractor the requested rating within 15 calendar days of the request. The rating provided by the prime contractor to the first-tier small business subcontractor shall utilize the five-scale ratings system found in FAR 42.1503 (48 CFR 42.1503): Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory. If the subcontractor will use the rating for an offer on a prime contract, it must include, at a minimum, the following evaluation factors in the requested rating:

(*1*) Technical (quality of product or service);

(*2*) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements);

(*3*) Schedule/timeliness;

(*4*) Management or business relations; and

(*5*) Other (as applicable).

(B) The requirement in paragraph (c)(1)(xii)(A) of this section is not subject to the flow-down in paragraph (c)(1)(x) of this section.

(C) A first-tier small business subcontractor must make the request for a performance rating from the prime contractor within 30 calendar days after the completion of the period of performance for the prime contractor's contract with the Government. The prime contractor and the first-tier small business subcontractor may negotiate a later deadline for the request for a performance rating, but in no case can the prime contractor impose a deadline earlier than 30 calendar days after the completion of the period of performance for the prime contractor's contract with the Government.

(D) The rating provided by the prime contractor to the first-tier small business subcontractor shall utilize the five-scale ratings system found in FAR 42.1503 (48 CFR 42.1503): Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory.

(2) A commercial plan, also referred to as an annual plan or company-wide plan, is the preferred type of subcontracting plan for contractors furnishing commercial products and commercial services. A commercial plan covers the offeror's fiscal year and applies to all of the commercial products and commercial services sold by either the entire company or a portion thereof (e.g., division, plant, or product line). Once approved, the plan remains in effect during the federal fiscal year for all Federal Government contracts in effect during that period. The contracting officer of the agency that originally approved the commercial plan will exercise the functions of the contracting officer on behalf of all agencies that award contracts covered by the plan.

(3) An offeror must represent to the contracting officer that it will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that it used in preparing the bid or proposal, in the same scope,

amount, and quality used in preparing and submitting the bid or proposal. Merely responding to a request for a quote does not constitute use in preparing a bid or offer. An offeror used a small business concern in preparing the bid or proposal if:

(i) The offeror references the small business concern as a subcontractor in the bid or proposal or associated small business subcontracting plan;

(ii) The offeror has a subcontract or agreement in principle to subcontract with the small business concern to perform a portion of the specific contract; or

(iii) The small business concern drafted any portion of the bid or proposal or the offeror used the small business concern's pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence (including email) of an intent or understanding that the small business concern will be awarded a subcontract for the related work if the offeror is awarded the contract.

(4) If a prime contractor fails to acquire articles, equipment, supplies, services or materials or obtain the performance of construction work as described in (c)(3), the prime contractor must provide the contracting officer with a written explanation. This written explanation must be submitted to the contracting officer prior to the submission of the invoice for final payment and contract close-out.

(5) A prime contractor shall notify the contracting officer in writing if upon completion of the responsibilities of the small business subcontractor (i.e., the subcontractor is entitled to payment under the terms of the subcontract), the prime contractor pays a reduced price to a small business subcontractor for goods and services provided for the contract or the payment to a small business subcontractor is more than 90 days past due under the terms of the subcontract for goods and services provided for the contract and for which the Federal agency has paid the prime contractor. ''Reduced price'' means a price that is less than the price agreed upon in a written, binding contractual document. The prime contractor shall include the reason for the reduction in payment to or failure to pay a small business subcontractor in any written notice.

(6) If at the conclusion of a contract the prime contractor did not meet all of the small business subcontracting goals in the subcontracting plan, the prime contractor shall provide the contracting officer with a written explanation as to why it did not meet the goals of the plan so that the contracting officer can evaluate whether the prime contractor acted in good faith as set forth in paragraph (d)(3) of this section.

(7) The additional prime contractor responsibilities described in paragraph (c)(1) of this section do not apply if:

(i) The prime contractor is a small business concern;

(ii) The prime contract or contract modification is a personal services contract; or

(iii) The prime contract or contract modification will be performed entirely outside of any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(8) A prime contractor that identifies a small business by name as a subcontractor in a proposal, offer, bid or subcontracting plan must notify those subcontractors in writing prior to identifying the concern in the proposal, bid, offer or subcontracting plan.

(9) Anyone who has a reasonable basis to believe that a prime contractor or a subcontractor may have made a false statement to an employee or representative of the Federal Government, or to an employee or representative of the prime contractor, with respect to subcontracting plans must report the matter to the SBA Office of Inspector General. All other concerns as to whether a prime contractor or subcontractor has complied with SBA regulations or otherwise acted in bad faith may be reported to the Government Contracting Area Office where the firm is headquartered.

(d) *Contracting officer responsibilities.* The contracting officer (or administrative contracting officer if specifically delegated in writing to accomplish this task) is responsible for evaluating the prime contractor's compliance with its subcontracting plan, including:

(1) Ensuring that all contractors submit their subcontracting reports into the eSRS (or any successor system) or, if applicable, the SF–294, Subcontracting Report for Individual Contracts, within 30 days after the report ending date (e.g., by October 30th for the fiscal year ended September 30th).

(2) Reviewing all ISRs, and where applicable, SSRs, in eSRS (or any successor system) within 60 days of the report ending date (e.g., by November 30th for a report submitted for the fiscal year ended September 30th) and either accepting or rejecting the reports in accordance with the Federal Acquisition Regulation (FAR) provisions set forth in 48 CFR subpart 19.7, 52.219–9, and the eSRS instructions (*www.esrs.gov*). The authority to acknowledge or reject SSRs for commercial plans resides with the contracting officer who approved the commercial plan. If a report is rejected, the contracting officer must provide an explanation for the rejection to allow prime contractors the opportunity to respond specifically to perceived deficiencies.

(3) Evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan.

(i) Evidence that a large business prime contractor has made a good faith effort to comply with its subcontracting plan or other subcontracting responsibilities includes supporting documentation that:

(A) The contractor performed one or more of the actions described in paragraph (b) of this section, as appropriate for the procurement;

(B) Although the contractor may have failed to achieve its goal in one socioeconomic category, it overachieved its goal by an equal or greater amount in one or more of the other categories; or

(C) The contractor fulfilled all of the requirements of its subcontracting plan.

(ii) Examples of activities reflective of a failure to make a good faith effort to comply with a subcontracting plan include, but are not limited, to:

(A) Failure to submit the acceptable individual or summary subcontracting reports in eSRS by the report due dates or as provided by other agency regulations within prescribed time frames;

(B) Failure to pay small business concern subcontractors in accordance with the terms of the contract with the prime;

(C) Failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan;

(D) Failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan including subcontracting flow-down requirements;

(E) Adoption of company policies or documented procedures that have as their objectives the frustration of the objectives of the plan;

(F) Failure to correct substantiated findings from federal subcontracting compliance reviews or participate in subcontracting plan management training offered by the government;

(G) Failure to conduct market research identifying potential small business concern subcontractors through all reasonable means including outreach, industry days, or the use of federal database marketing systems such as SBA's Dynamic Small Business Search (DSBS) or SUBNet Systems or any successor federal systems;

(H) Failure to comply with regulations requiring submission of a written explanation to the contracting officer to change small business concern subcontractors that were used in preparing offers; or

(I) Falsifying records of subcontracting awards to SBCs.

(4) Evaluating the prime contractor's written explanation concerning the prime contractor's failure to use a small business concern in performance in the same scope, amount, and quality used in preparing and submitting the bid or proposal, and considering that information when rating the contractor for past performance purposes.

(5) Evaluating the prime contractor's written explanation concerning its payment of a reduced price to a small business subcontractor for goods and services upon completion of the responsibilities of the subcontractor or its payment to a subcontractor more than 90 days past due under the terms of the

subcontract for goods and services provided for the contract and for which the Federal agency has paid the prime contractor, and considering that information when rating the contractor for past performance purposes.

(6) Evaluating whether the prime contractor has a history of unjustified untimely or reduced payments to subcontractors, and if so, recording the identity of the prime contractor in the Federal Awardee Performance and Integrity Information System (FAPIIS), or any successor database.

(7) In his or her discretion, requiring the prime contractor (other than a prime contractor with a commercial plan) to update its subcontracting plan when an option is exercised.

(8) Requiring the prime contractor (other than a contractor with a commercial plan) to submit a subcontracting plan if the value of a modification causes the value of the contract to exceed the subcontracting plan threshold and to the extent that subcontracting opportunities exist.

(9) In his or her discretion, requiring a subcontracting plan if a prime contractor's size status changes from small to other than small as a result of a size recertification.

(10) Where a subcontracting plan is amended in connection with an option, or added as a result of a recertification or modification, the changes to any existing plan are for prospective subcontracting opportunities and do not apply retroactively. However, since achievements must be reported on the ISR (or the SF–294, if applicable) on a cumulative basis from the inception of the contract, the contractor's achievements prior to the modification or option will be factored into its overall achievement on the contract from inception.

(11) Evaluating whether the contractor or subcontractor complied in good faith with the requirement to provide periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the contractor or subcontractor with the subcontracting plan. The contractor or subcontractor's failure to comply with this requirement in good faith shall be a material breach of such contract or subcontract and may be considered in any past performance evaluation of the contractor.

(e) *CMR Responsibilities.* Commercial Market Representatives (CMRs) are SBA's subcontracting specialists. CMRs are responsible for:

(1) Facilitating the matching of large prime contractors with small business concerns;

(2) Counseling large prime contractors on their responsibilities to maximize subcontracting opportunities for small business concerns;

(3) Instructing large prime contractors on identifying small business concerns by means of SAM (or any successor system), SUB-Net, Business Matchmaking events, and other resources and tools;

(4) Counseling small business concerns on how to market themselves to large prime contractors;

(5) Maintaining a portfolio of large prime contractors and conducting Subcontracting Orientation and Assistance Reviews (SOARs). SOARs are conducted for the purpose of assisting prime contractors in understanding and complying with their small business subcontracting responsibilities, including developing subcontracting goals that reflect maximum practicable opportunity for small business; maintaining acceptable books and records; and periodically submitting reports to the Federal government; and

(6) Conducting periodic reviews, including compliance reviews in accordance with paragraph (f) of this section.

(f) *Compliance reviews.* (1) A prime contractor's performance under its subcontracting plan is evaluated by means of on-site compliance reviews and follow-up reviews, as a supplement to evaluations performed by the contracting agency, either on a contract-by-contract basis or, in the case of contractors having multiple contracts, on an aggregate basis. A compliance review is a surveillance review that determines a contractor's achievements in meeting the goals and other elements in its subcontracting plan for both open contracts and contracts completed during the previous twelve months. A follow-up review is done after a compliance review, generally

within six to eight months, to determine if the contractor has implemented SBA's recommendations.

(2) All compliance reviews begin with a validation of the prime contractor's most recent ISR (or SF–294, if applicable) or SSR. A compliance review includes:

(i) An evaluation of whether the prime contractor assigned the proper NAICS code and corresponding size standard to a subcontract, and a review of whether small business subcontractors qualify for the size or socioeconomic status claimed;

(ii) Validation of the prime contractor's methodology for completing its subcontracting reports; and

(iii) Consideration of whether the prime contractor is monitoring its other than small subcontractors with regard to their subcontracting plans, determining achievement of their proposed subcontracting goals, and reviewing their subcontractors' ISRs (or SF–294s, if applicable).

(3) Upon completion of the review and evaluation of a contractor's performance and efforts to achieve the requirements in its subcontracting plans, the contractor's performance will be assigned one of the following ratings: Exceptional, Very Good, Satisfactory, Marginal or Unsatisfactory. The factors listed in paragraph (c) of this section will be taken into consideration, where applicable, in determining the contractor's rating. However, a contractor may be found Unsatisfactory, regardless of other factors, if it cannot substantiate the claimed achievements under its subcontracting plan.

(4) Any contractor that receives a marginal or unsatisfactory rating must provide a written corrective action plan to SBA, or to both SBA and the agency that conducted the compliance review if the agency conducting the review has an agreement with SBA, within 30 days of its receipt of the official compliance report.

(5) Any contractor that fails to comply with paragraph (f)(4) of this section, or any contractor that fails to demonstrate a good-faith effort, as set forth in paragraph (d) of this section:

(i) May be considered for liquidated damages under the procedures in 48 CFR 19.705–7 and the clause at 52.219–16; and

(ii) Shall be in material breach of such contract or subcontract, and such failure to demonstrate good faith must be considered in any past performance evaluation of the contractor. This action shall be considered by the contracting officer upon receipt of a written recommendation to that effect from the CMR. The CMR's recommendation must include a copy of the compliance report and any other relevant correspondence or supporting documentation. Furthermore, if the CMR has a reasonable basis to believe that a contractor has made a false statement to an employee or representative of the Federal Government, or to an employee or representative of the prime contractor, the CMR must report the matter to the SBA Office of Inspector General. All other concerns as to whether a prime contractor or subcontractor has complied with SBA regulations or otherwise acted in bad faith may be reported to the Area Government Contracting Office where the firm is headquartered.

(6) Reviews and evaluations of contractors with commercial plans are identical to reviews and evaluations of other contractors, except that contractors with commercial subcontracting plans do not submit the SF–294, Subcontracting Report for Individual Contracts. Instead, goal achievement is determined by comparing the goals in the approved commercial subcontracting plan against the cumulative achievements on the SF–295, Summary Subcontract Report, for the same period. The same ratings criteria set forth in paragraph (f)(3) of this section apply to contractors with commercial plans.

(7) SBA is authorized to enter into agreements with other Federal agencies or entities to conduct compliance reviews and otherwise further the objectives of the subcontracting program. Copies of these agreements will be published on *http://www.sba.gov/GC*. SBA is the lead agency on all joint compliance reviews with other agencies.

(8) The head of the contracting agency shall ensure that:

(i) The agency collects and reports data on the extent to which contractors of the agency meet the goals and

objectives set forth in subcontracting plans; and

(ii) The agency periodically reviews data collected and reported pursuant to paragraph (f)(8)(i) of this section for the purpose of ensuring that such contractors comply in good faith with the requirements of this section.

(g) *Subcontracting consideration in source selection.* (1) A contracting officer may include an evaluation factor in a solicitation which evaluates:

(i) An offeror's proposed approach to small business subcontracting participation in the subject procurement;

(ii) The extent to which the offeror has met its small business subcontracting plan goals on previous covered contracts; and/or

(iii) The extent to which the offeror timely paid its small business subcontractors under covered contracts.

(2) A contracting officer may include an evaluation factor in a solicitation which evaluates an offeror's commitment to pay small business subcontractors within a specific number of days after receipt of payment from the Government for goods and services previously rendered by the small business subcontractor.

(i) The contracting officer will comparatively evaluate the proposed timelines.

(ii) Such a commitment shall become a material part of the contract.

(iii) The contracting officer must consider the contractor's compliance with the commitment in evaluating performance, including for purposes of contract continuation (such as exercising options).

(3) A small business concern submitting an offer shall receive the maximum score, credit or rating under an evaluation factor described in paragraph (g) of this section without having to submit any information in connection with this factor.

(4) A contracting officer shall include a significant evaluation factor for the criteria described in paragraphs (g)(1)(i) and (g)(1)(ii) of this section in a bundled contract or order as defined in § 125.2.

(5) Paragraph (g) of this section may apply to solicitations for orders against multiple award contracts, (including a Federal Supply Schedule or Multiple Award Schedule contract, a Government-wide acquisition contract (GWAC), or a multi-agency contract (MAC)), blanket purchase agreements or basic ordering agreements.

(h) *Multiple award contracts.* (1) Except where a prime contractor has a commercial plan, the contracting officer shall require a subcontracting plan for each multiple award indefinite delivery, indefinite quantity contract (including Multiple Award Schedule), where the estimated value of the contract exceeds the subcontracting plan thresholds in paragraph (a) of this section and the contract has subcontracting opportunities.

(2) Contractors shall submit small business subcontracting reports for individual orders to the contracting agency on an annual basis.

(3) The agency funding the order shall receive credit towards its small business subcontracting goals. More than one agency may not receive credit towards its subcontracting goals for a particular subcontract.

(4) The agency funding the order may in its discretion establish small business subcontracting goals for individual orders, blanket purchase agreements or basic ordering agreements.

(i) *Subcontracting consideration in bundled and consolidated contracts.* (1) For bundled requirements, the agency must evaluate offers from teams of small businesses the same as other offers, with due consideration to the capabilities of all proposed subcontractors.

(2) For substantial bundling, the agency must design actions to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements.

(3) For significant subcontracting opportunities in consolidated contracts, bundled requirements, and substantially bundled requirements, *see* § 125.2(d)(4).

[69 FR 75824, Dec. 20, 2004, as amended at 74 FR 46887, Sept. 14, 2009; 78 FR 42403, July 16, 2013; 78 FR 59798, Sept. 30, 2013; 78 FR 61142, Oct. 2, 2013; 81 FR 34262, May 31, 2016; 81 FR 94250, Dec. 23, 2016; 83 FR 12852, Mar. 26, 2018; 84 FR 65239, Nov. 26, 2019; 84 FR 65663, Nov. 29, 2019; 85 FR 66192, Oct. 16, 2020; 86 FR 61672, Nov. 8, 2021; 87 FR 43739, July 22, 2022; 88 FR 26210, Apr. 27, 2023; 88 FR 70343, Oct. 11, 2023]

§ 125.4 What is the Government property sales assistance program?

(a) The purpose of SBA's Government property sales assistance program is to:

(1) Insure that small businesses obtain their fair share of all Federal real and personal property qualifying for sale or other competitive disposal action; and

(2) Assist small businesses in obtaining Federal property being processed for disposal, sale, or lease.

(b) SBA property sales assistance primarily consists of two activities:

(1) Obtaining small business setasides when necessary to insure that a fair share of Government property sales are made to small businesses; and

(2) Providing advice and assistance to small businesses on all matters pertaining to sale or lease of Government property.

(c) The program is intended to cover the following categories of Government property:

(1) Sales of timber and related forest products;

(2) Sales of strategic material from national stockpiles;

(3) Sales of royalty oil by the Department of Interior's Minerals Management Service;

(4) Leases involving rights to minerals, petroleum, coal, and vegetation; and

(5) These provisions are contained in §§ 121.501 through 121.512 of this chapter.

(d) SBA has established specific small business size standards and rules for the sale or lease of the different kinds of Government property. These provisions are contained in §§ 121.501 through 121.514 of this chapter.

[61 FR 3312, Jan. 31, 1996, as amended at 88 FR 70343, Oct. 11, 2023]

§ 125.5 What is the Certificate of Competency Program?

(a) *General.* (1) The Certificate of Competency (COC) Program is authorized under section 8(b)(7) of the Small Business Act (15 U.S.C. 637(b)(7)). The COC Program is applicable to all Government procurement actions, with the exception of 8(a) sole source awards but including Multiple Award Contracts and orders placed against Multiple Award Contracts, where the contracting officer has used any issues of capacity or credit (responsibility) to determine suitability for an award. The COC Program is applicable to all Government procurement actions, including Multiple Award Contracts and orders placed against Multiple Award Contracts, where the contracting officer has used any issues of capacity or credit (responsibility) to determine suitability for an award. With respect to Multiple Award Contracts, contracting officers generally determine responsibility at the time of award of the contract. However, if a contracting officer makes a responsibility determination as set forth in paragraph (a)(2) of this section for an order issued against a Multiple Award Contract, the contracting officer must refer the matter to SBA for a COC. The COC procedures apply to all Federal procurements, regardless of the location of performance or the location of the procuring activity.

(2) A contracting officer must refer a small business concern to SBA for a possible COC, even if the next apparent successful offeror is also a small business, when the contracting officer:

(i) Denies an apparent successful small business offeror award of a contract or order on the basis of responsibility (including those bases set forth in paragraphs (a)(1)(ii) and (iii) of this section);

(ii) Refuses to consider a small business concern for award of a contract or order after evaluating the concern's offer on a non-comparative basis (e.g., a pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance); or

(iii) Refuses to consider a small business concern for award of a contract or order because it failed to meet a definitive responsibility criterion contained in the solicitation.

(3) A small business offeror referred to SBA as nonresponsible may apply to SBA for a COC. Where the applicant is a non-manufacturing offeror on a supply contract, the COC applies to the responsibility of the non-manufacturer, not to that of the manufacturer.

(b) *COC Eligibility*. (1) The offeror seeking a COC has the burden of proof to demonstrate its eligibility for COC review. (i) To be eligible for a COC, an offeror must qualify as a small business under the applicable size standard in accordance with part 121 of this chapter.

(ii) To be eligible for a COC, an offeror must qualify as a small business under the applicable size standard in accordance with part 121 of this chapter, and must have agreed to comply with the applicable limitations on subcontracting and the nonmanufacturer rule, where applicable.

(2) SBA will determine a concern ineligible for a COC if the concern, or any of its principals, appears in the ''Parties Excluded From Federal Procurement Programs'' section found in the U.S. General Services Administration Office of Acquisition Policy Publication: List of Parties Excluded From Federal Procurement or Nonprocurement Programs. If a principal is unable to presently control the applicant concern, and appears in the Procurement section of the list due to matters not directly related to the concern itself, responsibility will be determined in accordance with paragraph (f)(2) of this section.

(3) An eligibility determination will be made on a case-by-case basis, where a concern or any of its principals appears in the Nonprocurement Section of the publication referred to in paragraph (b)(2) of this section.

(c) *Referral of nonresponsibility determination to SBA*. (1) The contracting officer must refer the matter in writing to the SBA Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located. The referral must include a copy of the following:

(i) Solicitation;

(ii) Offer submitted by the concern whose responsibility is at issue for the procurement (its Best and Final Offer for a negotiated procurement);

(iii) Abstract of Bids, where applicable, or the Contracting Officer's Price Negotiation Memorandum;

(iv) Preaward survey, where applicable;

(v) Contracting officer's written determination of nonresponsibility;

(vi) Technical data package (including drawings, specifications, and Statement of Work); and

(vii) Any other justification and documentation used to arrive at the nonresponsibility determination.

(2) Contract award must be withheld by the contracting officer for a period of 15 working days (or longer if agreed to by SBA and the contracting officer) following receipt by the appropriate Area Office of a referral which includes all required documentation.

(3) The COC referral must indicate that the offeror has been found responsive to the solicitation, and also identify the reasons for the nonresponsibility determination.

(d) *Application for COC*. (1) Upon receipt of the contracting officer's referral, the Area Office will inform the concern of the contracting officer's negative responsibility determination, and offer it the opportunity to apply to SBA for a COC by a specified date.

(2) The COC application must include all information and documentation requested by SBA and any additional information which the firm believes will demonstrate its ability to perform on the proposed contract. The application should be returned as soon as possible, but no later than the date specified by SBA.

(3) Upon receipt of a complete and acceptable application, SBA may elect to visit the applicant's facility to review its responsibility. SBA personnel may obtain clarification or confirmation of information provided by the applicant by directly contacting suppliers, financial institutions, and other third parties upon whom the applicant's responsibility depends.

(e) *Incomplete applications*. If an application for a COC is materially incomplete or is not submitted by the date specified by SBA, SBA will close the case without issuing a COC and will notify the contracting officer and the concern with a declination letter.

(f) *Reviewing an application*. (1) The COC review process is not limited to the areas of nonresponsibility cited by the contracting officer. SBA may, at its discretion, independently evaluate the COC applicant for all elements of responsibility, but it may presume responsibility exists as to elements other

than those cited as deficient. SBA may deny a COC for reasons of nonresponsibility not originally cited by the contracting officer.

(2) An offeror seeking a COC has the burden of proof to demonstrate that it possesses all relevant elements of responsibility and that it has overcome the contracting officer's objection(s).

(3) A small business will be rebuttably presumed nonresponsible if any of the following circumstances are shown to exist:

(i) Within three years before the application for a COC, the concern, or any of its principals, has been convicted of an offense or offenses that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR part 9, subpart 9.4), and the matter is still under the jurisdiction of a court (e.g., the principals of a concern are incarcerated, on probation or parole, or under a suspended sentence); or

(ii) Within three years before the application for a COC, the concern or any of its principals has had a civil judgment entered against it or them for any reason that would constitute grounds for debarment or suspension under FAR subpart 9.4 (48 CFR part, subpart 9.4).

(4) Where a contracting officer finds a concern to be non-responsible for reasons of financial capacity on an indefinite delivery or indefinite quantity task or delivery order contract, the Area Director will consider the firm's maximum financial capacity. If the Area Director issues a COC, it will be for a specific amount that is the limit of the firm's financial capacity for that contract. The contracting officer may subsequently determine to exceed the amount, but cannot deny the firm award of an order or contract on financial grounds if the firm has not reached the financial maximum the Area Director identified in the COC letter.

(g) *Decision by Area Director (''Director'').* After reviewing the information submitted by the applicant and the information gathered by SBA, the Area Director will make a determination, either final or recommended as set forth in the following chart:

Contracting actions	SBA official or office with authority to make decision	Finality of decision; options for contracting agencies
Less than or equal to the Simplified Acquisition Threshold.	Director may approve or deny	Final. The Director will notify both applicant and contracting agency in writing of the decision.
Above the Simplified Acquisition Threshold and less than or equal to $25 million.	(1) Director may deny	(1) Final.
	(2) Director may approve, subject to right of appeal and other options.	(2) Contracting agency may proceed under paragraph (h) or paragraph (i) of this section.
Exceeding $25 million	(1) Director may deny	(1) Final.
	(2) Director must refer to SBA Headquarters recommendation for approval.	(2) Contracting agency may proceed under paragraph (j) of this section.

(h) *Notification of intent to issue on a contract or order with a value between the simplified acquisition threshold and $25 million.* Where the Director determines that a COC is warranted, he or she will notify the contracting officer (or the procurement official with the authority to accept SBA's decision) of the intent to issue a COC, and of the reasons for that decision, prior to issuing the COC. At the time of notification, the contracting officer or the procurement official with the authority to accept SBA's decision has the following options:

(1) Accept the Director's decision to issue the COC and award the contract to the concern. The COC issuance letter will then be sent, including as an attachment a detailed rationale of the decision; or

(2) Ask the Director to suspend the case for one of the following purposes:

(i) To forward a detailed rationale for the decision to the contracting officer for review within a specified period of time;

(ii) To afford the contracting officer the opportunity to meet with the Area

Office to review all documentation contained in the case file;

(iii) To submit any information which the contracting officer believes SBA has not considered (at which time, SBA will establish a new suspense date mutually agreeable to the contracting officer and SBA); or

(iv) To permit resolution of an appeal by the contracting agency to SBA Headquarters under paragraph (i) of this section.

(i) *Appeals of Area Director determinations.* For COC actions with a value exceeding the simplified acquisition threshold , contracting agencies may appeal a Director's decision to issue a COC to SBA Headquarters by filing an appeal with the Area Office processing the COC application. The Area Office must honor the request to appeal if the contracting officer agrees to withhold award until the appeal process is concluded. Without such an agreement from the contracting officer, the Director must issue the COC. When such an agreement has been obtained, the Area Office will immediately forward the case file to SBA Headquarters.

(1) The intent of the appeal procedure is to allow the contracting agency the opportunity to submit to SBA Headquarters any documentation which the Area Office may not have considered.

(2) SBA Headquarters will furnish written notice to the Director, OSDBU or OSBP of the procuring agency, with a copy to the contracting officer, that the case file has been received and that an appeal decision may be requested by an authorized official. If the contracting agency decides to file an appeal, it must notify SBA Headquarters through its Director, OSDBU, within 10 working days (or a time period agreed upon by both agencies) of its receipt of the notice under paragraph (h) of this section. The appeal and any supporting documentation must be filed within 10 working days (or a different time period agreed to by both agencies) after SBA receives the request for a formal appeal.

(3) The SBA Director, Office of Government Contracting (D/GC) will make a final determination, in writing, to issue or to deny the COC.

(j) *Decision by SBA Headquarters where contract value exceeds $25 million.* (1) Prior to taking final action, SBA Headquarters will contact the contracting agency at the secretariat level or agency equivalent and afford it the following options:

(i) Ask SBA Headquarters to suspend the case so that the agency can meet with Headquarters personnel and review all documentation contained in the case file; or

(ii) Submit to SBA Headquarters for evaluation any information which the contracting agency believes has not been considered.

(2) After reviewing all available information, the AA/GC will make a final decision to either issue or deny the COC. If the AA/GC's decision is to deny the COC, the applicant and contracting agency will be informed in writing by the Area Office. If the decision is to issue the COC, a letter certifying the responsibility of the firm will be sent to the contracting agency by Headquarters and the applicant will be informed of such issuance by the Area Office. Except as set forth in paragraph (l) of this section, there can be no further appeal or reconsideration of the decision of the AA/GC.

(k) *Notification of denial of COC.* The notification to an unsuccessful applicant following either an Area Director or a Headquarters denial of a COC will briefly state all reasons for denial and inform the applicant that a meeting may be requested with appropriate SBA personnel to discuss the denial. Upon receipt of a request for such a meeting, the appropriate SBA personnel will confer with the applicant and explain the reasons for SBA's action. The meeting does not constitute an opportunity to rebut the merits of the SBA's decision to deny the COC, and is for the sole purpose of giving the applicant the opportunity to correct deficiencies so as to improve its ability to obtain future contracts either directly or, if necessary, through the issuance of a COC.

(l) *Reconsideration of COC after issuance.* (1) An approved COC may be reconsidered and possibly rescinded, at the sole discretion of SBA, where an award of the contract has not occurred, and one of the following circumstances exists:

(i) The COC applicant submitted false or omitted materially adverse information;

(ii) New materially adverse information has been received relating to the current responsibility of the applicant concern; or

(iii) The COC has been issued for more than 60 days (in which case SBA may investigate the business concern's current circumstances and the reason why the contract has not been issued).

(2) Where SBA reconsiders and reaffirms the COC the procedures under paragraph (h) of this section do not apply.

(m) *Effect of a COC.* By the terms of the Act, a COC is conclusive as to responsibility. Where SBA issues a COC on behalf of a small business with respect to a particular contract, contracting officers are required to award the contract without requiring the firm to meet any other requirement with respect to responsibility. Where SBA issues a COC with respect to a referral in paragraph (a)(2)(ii) or (a)(2)(iii) of this section, the contracting officer is not required to issue an award to that offeror if the contracting officer denies the contract for reasons unrelated to responsibility.

(n) *Effect of Denial of COC.* Denial of a COC by SBA does not preclude a contracting officer from awarding a contract to the referred firm, nor does it prevent the concern from making an offer on any other procurement.

(o) *Monitoring performance.* Once a COC has been issued and a contract awarded on that basis, SBA will monitor contractor performance.

[61 FR 3312, Jan. 31, 1996; 61 FR 7987, Mar. 1, 1996, as amended at 72 FR 50041, Aug. 30, 2007; 78 FR 61142, Oct. 2, 2013; 81 FR 34262, May 31, 2016; 81 FR 48585, July 25, 2016; 85 FR 66192, Oct. 16, 2020]

§ 125.6 What are the prime contractor's limitations on subcontracting?

(a) *General.* In order to be awarded a full or partial small business set-aside contract with a value greater than the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101), an 8(a) contract, an SDVOSB contract, a VOSB contract, a HUBZone contract, or a WOSB or EDWOSB contract pursuant to part 127 of this chapter, a small business concern must agree that:

(1) In the case of a contract for services (except construction), it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded. Other direct costs may be excluded to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service, such as airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code (562910), cloud computing services, or mass media purchases. In addition, work performed overseas on awards made pursuant to the Foreign Assistance Act of 1961 or work required to be performed by a local contractor, is excluded.

(2)(i) In the case of a contract for supplies or products (other than from a nonmanufacturer of such supplies), it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(ii) In the case of a contract for supplies from a nonmanufacturer, it will supply the product of a domestic small business manufacturer or processor, unless a waiver as described in §121.406(b)(5) of this chapter is granted.

(A) For a multiple item procurement where a waiver as described in §121.406(b)(5) of this chapter has not been granted for one or more items, more than 50% of the value of the products to be supplied by the nonmanufacturer must be the products of one or more domestic small business manufacturers or processors.

(B) For a multiple item procurement where a waiver as described in §121.406(b)(5) of this chapter is granted for one or more items, compliance with

the limitation on subcontracting requirement will be determined by combining the value of the items supplied by domestic small business manufacturers or processors with the value of the items subject to a waiver. As such, as long as the value of the items to be supplied by domestic small business manufacturers or processors plus the value of the items to be supplied that are subject to a waiver account for at least 50% of the value of the contract, the limitations on subcontracting requirement is met.

(C) For a multiple item procurement, the same small business concern may act as both a manufacturer and a nonmanufacturer.

Example 1 to paragraph (a)(2). A contract calls for the supply of one item valued at $1,000,000. The market research shows that there are no small business manufacturers that produce this item, and the contracting officer seeks and is granted a contract specific waiver for this item. In this case, a small business nonmanufacturer may supply an item manufactured by a large business.

Example 2 to paragraph (a)(2). A procurement is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that nine of the items can be sourced from small business manufacturers and one item is subject to an SBA class waiver. Since 100% of the value of the contract can be procured through domestic small business manufacturers or processors plus manufacturers or processors of the item for which a waiver has been granted, the procurement should be set aside for small business. At least 50% of the value of the contract, or 50% of $1,000,000, must be supplied by one or more domestic small business manufacturers or manufacturers or processors of the one item for which class waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

Example 3 to paragraph (a)(2). A contract is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that only four of these items are manufactured by small businesses. The value of the items manufactured by small business is estimated to be $400,000. The contracting officer seeks and is granted contract specific waivers on the other six items. Since 100% of the value of the contract can be procured through domestic small business manufacturers or processors plus manufacturers or processors of the items for which a waiver has been granted, the procurement should be set aside for small business. At least 50% of the value of the contract, or 50% of $1,000,000, must be supplied by one or more domestic small business manufacturers or manufacturers or processors of the six items for which a contract specific waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

Example 4 to paragraph (a)(2). A contract is for $1,000,000 and calls for the acquisition of 10 items. Market research shows that three of the items can be sourced from small business manufacturers at this particular time, and the estimated value of these items is $300,000. There are no class waivers subject to the remaining seven items. In order for this procurement to be set aside for small business, a contracting officer must seek and be granted a contract specific waiver for one or more items totaling $200,000 (so that $300,000 plus $200,000 equals 50% of the value of the entire procurement). Once a contract specific waiver is received for one or more items, at least 50% of the value of the contract, or 50% of $1,000,000, must be supplied by one or more domestic small business manufacturers or processors or by manufacturers or processors of the items for which a contract specific waiver has been granted. In addition, the prime small business nonmanufacturer may act as a manufacturer for one or more items.

(3) In the case of a contract for general construction, it will not pay more than 85% of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 85% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(4) In the case of a contract for special trade contractors, no more than 75% of the amount paid by the government to the prime may be paid to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 75% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(b) *Mixed contracts.* Where a contract integrates any combination of services, supplies, or construction, the contracting officer shall select the appropriate NAICS code as prescribed in §121.402(b) of this chapter. The contracting officer's selection of the applicable NAICS code is determinative as to which limitation on subcontracting and performance requirement applies.

Based on the NAICS code selected, the relevant limitation on subcontracting requirement identified in paragraphs (a)(1) through (4) of this section will apply only to that portion of the contract award amount. In no case shall more than one limitation on subcontracting requirement apply to the same contract.

Example 1 to paragraph (b). A procuring agency is acquiring both services and supplies through a small business set-aside. The total value of the requirement is $3,000,000, with the supply portion comprising $2,500,000, and the services portion comprising $500,000. The contracting officer appropriately assigns a manufacturing NAICS code to the requirement. The cost of material is $500,000. Thus, because the services portion of the contract and the cost of materials are excluded from consideration, the relevant amount for purposes of calculating the performance of work requirement is $2,000,000 and the prime and/or similarly situated entities must perform at least $1,000,000 and the prime contractor may not subcontract more than $1,000,000 to non-similarly situated entities.

Example 2 to paragraph (b). A procuring agency is acquiring both services and supplies through a small business set-aside. The total value of the requirement is $3,000,000, with the services portion comprising $2,500,000, and the supply portion comprising $500,000. The contracting officer appropriately assigns a services NAICS code to the requirement. Thus, because the supply portion of the contract is excluded from consideration, the relevant amount for purposes of calculating the performance of work requirement is $2,500,000 and the prime and/or similarly situated entities must perform at least $1,250,000 and the prime contractor may not subcontract more than $1,250,000 to non-similarly situated entities.

Example 3 to paragraph (b). A procuring activity is acquiring both services and general construction through a small business set-aside. The total value of the requirement is $10,000,000, with the construction portion comprising $8,000,000, and the services portion comprising $2,000,000. The contracting officer appropriately assigns a construction NAICS code to the requirement. The 85% limitation on subcontracting identified in paragraph (a)(3) would apply to this procurement. Because the services portion of the contract is excluded from consideration, the relevant amount for purposes of calculating the limitation on subcontracting requirement is $8,000,000. As such, the prime contractor cannot subcontract more than $6,800,000 to non-similarly situated entities, and the prime and/or similarly situated entities must perform at least $1,200,000.

(c) *Subcontracts to similarly situated entities.* A small business concern prime contractor that receives a contract listed in paragraph (a) of this section and spends contract amounts on a subcontractor that is a similarly situated entity shall not consider those subcontracted amounts as subcontracted for purposes of determining whether the small business concern prime contractor has violated paragraph (a) of this section, to the extent the subcontractor performs the work with its own employees. Any work that the similarly situated subcontractor does not perform with its own employees shall be considered subcontracted. SBA will also exclude a subcontract to a similarly situated entity from consideration under the ostensible subcontractor rule (§121.103(h)(3)). A prime contractor may no longer count a similarly situated entity towards compliance with the limitations on subcontracting where the subcontractor ceases to qualify as small or under the relevant socioeconomic status.

Example 1 to paragraph (c): An SDVO SBC sole source contract is awarded in the total amount of $500,000 for hammers. The prime contractor is a manufacturer and subcontracts 51% of the total amount received, less the cost of materials ($100,000) or $204,000, to an SDVO SBC subcontractor that manufactures the hammers in the U.S. The prime contractor does not violate the limitation on subcontracting requirement because the amount subcontracted to a similarly situated entity (less the cost of materials) is excluded from the limitation on subcontracting calculation.

Example 2 to paragraph (c): A competitive 8(a) BD contract is awarded in the total amount of $10,000,000 for janitorial services. The prime contractor subcontracts $8,000,000 of the janitorial services to another 8(a) BD certified firm. The prime contractor does not violate the limitation on subcontracting for services because the amount subcontracted to a similarly situated entity is excluded from the limitation on subcontracting.

Example 3 to paragraph (c): A WOSB set-aside contract is awarded in the total amount of $1,000,000 for landscaping services. The prime contractor subcontracts $500,001 to an SDVO SBC subcontractor that is not also a WOSB under the WOSB program. The prime contractor is in violation of the limitation on subcontracting requirement because it has subcontracted more than 50% of the contract amount to an SDVO SBC subcontractor, which is not considered similarly situated to a WOSB prime contractor.

(d) *Determining compliance with applicable limitation on subcontracting.* The period of time used to determine compliance for a total or partial set-aside contract will generally be the base term and then each subsequent option period. However, for a multi-agency set aside contract where more than one agency can issue orders under the contract, the ordering agency must use the period of performance for each order to determine compliance. For an order set aside under a full and open contract or a full and open contract with reserve, the agency will use the period of performance for each order to determine compliance unless the order is competed among small and other-than-small businesses (in which case the subcontracting limitations will not apply).

(1) The contracting officer, in his or her discretion, may require the concern to comply with the applicable limitations on subcontracting and the nonmanufacturer rule for each order awarded under a total or partial set-aside contract.

(2) Compliance will be considered an element of responsibility and not a component of size eligibility.

(3) Work performed by an independent contractor shall be considered a subcontract, and may count toward meeting the applicable limitation on subcontracting where the independent contractor qualifies as a similarly situated entity.

(e) *Past Performance Evaluation.* Where an agency determines that a contractor has not met the applicable limitation on subcontracting requirement at the conclusion of contract performance, the agency must notify the business concern and give it the opportunity to explain any extenuating or mitigating circumstances that negatively impacted its ability to do so.

(1) Where a small business does not provide any extenuating or mitigating circumstances or the agency determines that the concern's failure to meet the applicable limitation on subcontracting requirement was not beyond the concern's control, the agency may not give a satisfactory or higher past performance rating for the appropriate factor or subfactor in accordance with FAR 42.1503.

(2) Where a contracting officer determines that extenuating circumstances warrant a satisfactory/positive past performance evaluation for the appropriate evaluation factor or subfactor and the individual at least one level above the contracting officer concurs with that determination, a satisfactory or higher past performance rating may be given.

(i) Extenuating or mitigating circumstances that could lead to a satisfactory/positive rating include, but are not limited to, unforeseen labor shortages, modifications to the contract's scope of work which were requested or directed by the Government, emergency or rapid response requirements that demand immediate subcontracting actions by the prime small business concern, unexpected changes to a subcontractor's designation as a similarly situated entity (as defined in §125.1), differing site or environmental conditions which arose during the course of performance, force majeure events, and the contractor's good faith reliance upon a similarly situated subcontractor's representation of size or relevant socioeconomic status.

(ii) An agency cannot rely on any circumstances that were within the contractor's control, or those which could have been mitigated without imposing an undue cost or burden on the contractor.

(f) *Inapplicability of limitations on subcontracting.* The limitations on subcontracting do not apply to:

(1) Small business set-aside contracts with a value that is greater than the micro-purchase threshold but less than or equal to the simplified acquisition threshold (as both terms are defined in the FAR at 48 CFR 2.101); or

(2) Subcontracts (except where a prime is relying on a similarly situated entity to meet the applicable limitations on subcontracting).

(3) For contracts where an independent contractor is not otherwise treated as an employee of the concern for which he/she is performing work for size purposes under §121.106(a) of this chapter, work performed by the independent contractor shall be considered a subcontract. Such work will count

toward meeting the applicable limitation on subcontracting where the independent contractor qualifies as a similarly situated entity.

(4) Contracting officers may, at their discretion, require the contractor to demonstrate its compliance with the limitations on subcontracting at any time during performance and upon completion of a contract if the information regarding such compliance is not already available to the contracting officer. Evidence of compliance includes, but is not limited to, invoices, copies of subcontracts, or a list of the value of tasks performed.

(g) *Request to change applicable limitation on subcontracting.* SBA may use different percentages if the Administrator determines that such action is necessary to reflect conventional industry practices among small business concerns that are below the numerical size standard for businesses in that industry group. Representatives of a national trade or industry group or any interested SBC may request a change in subcontracting percentage requirements for the categories defined by six digit industry codes in the North American Industry Classification System (NAICS) pursuant to the following procedures:

(1) *Format of request.* Requests from representatives of a trade or industry group and interested SBCs should be in writing and sent or delivered to the Director, Office of Government Contracting, U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416. The requester must demonstrate to SBA that a change in percentage is necessary to reflect conventional industry practices among small business concerns that are below the numerical size standard for businesses in that industry category, and must support its request with information including, but not limited to:

(i) Information relative to the economic conditions and structure of the entire national industry;

(ii) Market data, technical changes in the industry and industry trends;

(iii) Specific reasons and justifications for the change in the subcontracting percentage;

(iv) The effect such a change would have on the Federal procurement process; and

(v) Information demonstrating how the proposed change would promote the purposes of the small business, 8(a), SDVOSB, VOSB, HUBZone, WOSB, or EDWOSB programs.

(2) *Notice to public.* Upon an adequate preliminary showing to SBA, SBA will publish in the FEDERAL REGISTER a notice of its receipt of a request that it considers a change in the subcontracting percentage requirements for a particular industry. The notice will identify the group making the request, and give the public an opportunity to submit information and arguments in both support and opposition.

(3) *Comments.* SBA will provide a period of not less than 30 days for public comment in response to the FEDERAL REGISTER notice.

(4) *Decision.* SBA will render its decision after the close of the comment period. If SBA decides against a change, SBA will publish notice of its decision in the FEDERAL REGISTER. Concurrent with the notice, SBA will advise the requester of its decision in writing. If SBA decides in favor of a change, SBA will propose an appropriate change to this part.

(h) *Penalties.* Whoever violates the requirements set forth in paragraph (a) of this section shall be subject to the penalties prescribed in 15 U.S.C. 645(d), except that the fine shall be treated as the greater of $500,000 or the dollar amount spent, in excess of permitted levels, by the entity on subcontractors. A party's failure to comply with the spirit and intent of a subcontract with a similarly situated entity may be considered a basis for debarment on the grounds, including but not limited to, that the parties have violated the terms of a Government contract or subcontract pursuant to FAR 9.406–2(b)(1)(i) (48 CFR 9.406–2(b)(1)(i)).

[81 FR 34262, May 31, 2016, as amended at 81 FR 67093, Sept. 30, 2016; 83 FR 12852, Mar. 26, 2018; 84 FR 65239, Nov. 26, 2019; 84 FR 65664, Nov. 29, 2019; 85 FR 66192, Oct. 16, 2020; 87 FR 73412, Nov. 29, 2022; 88 FR 26210, Apr. 27, 2023]

EDITORIAL NOTE: At 81 FR 48585, July 25, 2016, §125.6 was amended; however, the amendment could not be incorporated due to inaccurate amendatory instruction.

§ 125.7 Acquisition-related dollar thresholds.

The Federal Acquisition Regulatory Council (FAR Council) has the responsibility of adjusting each acquisition-related dollar threshold on October 1, of each year that is evenly divisible by five. Acquisition-related dollar thresholds are defined as dollar thresholds that are specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency as determined by the FAR Council. 41 U.S.C. 431a(c). Part 125, Government Contracting Programs, contains acquisition-related dollar thresholds subject to inflationary adjustments. The FAR Council shall publish a notice of the adjusted dollar thresholds in the FEDERAL REGISTER. The adjusted dollar thresholds shall take effect on the date of publication.

[74 FR 46887, Sept. 14, 2009]

§ 125.8 What requirements must a joint venture satisfy to submit an offer for a procurement or sale set aside or reserved for small business?

(a) *General.* A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, or qualify as small under one of the exceptions to affiliation set forth in §121.103(h)(4) of this chapter.

(b) *Contents of joint venture agreement.* (1) A joint venture agreement between two or more entities that individually qualify as small need not be in any specific form or contain any specific conditions in order for the joint venture to qualify as a small business.

(2) Every joint venture agreement to perform a contract set aside or reserved for small business between a protégé small business and its SBA-approved mentor authorized by §125.9 must contain a provision:

(i) Setting forth the purpose of the joint venture;

(ii) Designating a small business as the managing venturer of the joint venture, and designating a named employee of the small business managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(A) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary. The joint venture agreement may not give to a non-managing venturer negative control over activities of the joint venture, unless those provisions would otherwise be commercially customary for a joint venture agreement for a government contract outside of SBA's programs. A non-managing venturer's approval may be required in, among other things, determining what contract opportunities the joint venture should seek and initiating litigation on behalf of the joint venture.

(B) The individual identified as the Responsible Manager of the joint venture need not be an employee of the small business at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the small business if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the small business for purposes of performance under the joint venture.

(C) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

(iii) Stating that with respect to a separate legal entity joint venture, the small business must own at least 51% of the joint venture entity;

(iv) Stating that the small business participant(s) must receive profits from the joint venture commensurate with the work performed by them, or a percentage agreed to by the parties to the joint venture whereby the small business participant(s) receive profits

from the joint venture that exceed the percentage commensurate with the work performed by them, and that at the termination of a joint venture, any funds remaining in the joint venture bank account shall be distributed according to the percentage of ownership;

(v) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. All payments due the joint venture for performance on a contract set aside or reserved for small business will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(vi) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(vii) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (c) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (c) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(viii) Obligating all parties to the joint venture to ensure performance of a contract set aside or reserved for small business and to complete performance despite the withdrawal of any member;

(ix) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the small business managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(x) Requiring that the final original records be retained by the small business managing venturer upon completion of any contract set aside or reserved for small business that was performed by the joint venture;

(xi) Stating that annual performance-of-work statements required by paragraph (h)(1) must be submitted to SBA and the relevant contracting officer not later than 45 days after each operating year of the joint venture; and

(xii) Stating that the project-end performance-of-work required by paragraph (h)(2) must be submitted to SBA and the relevant contracting officer no later than 90 days after completion of the contract.

(c) *Performance of work.* (1) For any contract set aside or reserved for small business that is to be performed by a joint venture between a small business protégé and its SBA-approved mentor authorized by §125.9, the joint venture must perform the applicable percentage of work required by §125.6, and the small business partner to the joint venture must perform at least 40% of the work performed by the joint venture. Except as set forth in paragraph (c)(4) of this section, the 40% calculation for

protégé workshare follows the same rules as those set forth in §125.6 concerning supplies, construction, and mixed contracts, including the exclusion of the same costs from the limitation on subcontracting calculation (*e.g.*, cost of materials excluded from the calculation in construction contracts).

(2) The work performed by the small business partner to a joint venture must be more than administrative or ministerial functions so that it gains substantive experience.

(3) The amount of work done by the partners will be aggregated and the work done by the small business protégé partner must be at least 40% of the total done by the partners. In determining the amount of work done by a mentor participating in a joint venture with a small business protégé, all work done by the mentor and any of its affiliates at any subcontracting tier will be counted.

(4) Work performed by a similarly situated entity will not count toward the requirement that a protégé must perform at least 40% of the work performed by a joint venture.

(d) *Certification of compliance.* Prior to the performance of any contract set aside or reserved for small business by a joint venture between a protégé small business and a mentor authorized by §125.9, the small business partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(1) The parties have entered into a joint venture agreement that fully complies with paragraph (b) of this section;

(2) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (c) of this section.

(e) *Capabilities, past performance and experience.* When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

(f) *Contract execution.* The procuring activity will execute a contract set aside or reserved for small business in the name of the joint venture entity or a small business partner to the joint venture, but in either case will identify the award as one to a small business joint venture or a small business mentor-protégé joint venture, as appropriate.

(g) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(h) *Performance of work reports.* In connection with any contract set aside or reserved for small business that is awarded to a joint venture between a protégé small business and a mentor authorized by §125.9, the small business partner must describe how it is meeting or has met the applicable performance of work requirements for each contract set aside or reserved for small business that it performs as a joint venture.

(1) The small business partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how the performance of work requirements are being met for each contract set aside or reserved for small business that is performed during the year.

(2) At the completion of every contract set aside or reserved for small business that is awarded to a joint venture between a protégé small business and a mentor authorized by §125.9, and upon request by SBA or the relevant

contracting officer prior to contract completion, the small business partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (b) of this section.

(i) *Basis for suspension or debarment.* For any joint venture between a protégé small business and a mentor authorized by §125.9, the Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (b) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (c) of this section; or

(3) Failure to submit the certification required by paragraph (d) of this section or comply with paragraph (g) of this section.

(j) *Compliance with performance of work requirements.* Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

[81 FR 48585, July 25, 2016, as amended at 81 FR 94941, Dec. 27, 2016; 85 FR 66193, Oct. 16, 2020; 88 FR 26211, Apr. 27, 2023; 88 FR 70343, Oct. 11, 2023]

§ 125.9 What are the rules governing SBA's small business mentor-protégé program?

(a) *General.* The small business mentor-protégé program is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts (either from the mentor to the protégé or from the protégé to the mentor); trade education; and/or assistance in performing prime contracts with the Government through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business so that protégé firms may more fully develop their capabilities.

(b) *Mentors.* Any concern that demonstrates a commitment and the ability to assist small business concerns may act as a mentor and receive benefits as set forth in this section. This includes other than small businesses.

(1) In order to qualify as a mentor, a concern must demonstrate that it:

(i) Is capable of carrying out its responsibilities to assist the protégé firm under the proposed mentor-protégé agreement;

(ii) Does not appear on the Federal list of debarred or suspended contractors; and

(iii) Can impart value to a protégé firm due to lessons learned and practical experience gained or through its knowledge of general business operations and government contracting.

(2) SBA will decline an application if SBA determines that the mentor does not possess good character or a favorable financial position, employs or otherwise controls the managers of the protégé, or is otherwise affiliated with the protégé. Once approved, SBA may terminate the mentor-protégé agreement if the mentor does not possess good character or a favorable financial position, was affiliated with the protégé at time of application, or is affiliated with the protégé for reasons other than the mentor-protégé agreement or assistance provided under the agreement.

(3) In order for SBA to agree to allow a mentor to have more than one protégé at time, the mentor and proposed additional protégé must demonstrate that the added mentor-protégé relationship will not adversely affect the development of either protégé firm (*e.g.*, the second firm may not be a competitor of the first firm).

(i) A mentor that has more than one protégé cannot submit competing offers in response to a solicitation for a specific procurement through separate joint ventures with different protégés.

(ii) A mentor (including in the aggregate a parent company and all of its subsidiaries) generally cannot have more than three protégés at one time.

(A) The first two mentor-protégé relationships approved by SBA between a specific mentor and a small business that has its principal office located in the Commonwealth of Puerto Rico do not count against the limit of three proteges that a mentor can have at one time.

(B) Where a mentor purchases another business entity that is also an SBA-approved mentor of one or more protégé small business concerns and the purchasing mentor commits to honoring the obligations under the seller's mentor-protégé agreement(s), that entity may have more than three protégés (*i.e.*, those of the purchased concern in addition to those of its own). In such a case, the entity could not add another protégé until it fell below three in total.

(c) *Protégés.* (1) In order to initially qualify as a protégé firm, a concern must qualify as small for the size standard corresponding to its primary NAICS code or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code.

(i) A firm may self-certify that it qualifies as small for its primary or identified secondary NAICS code.

(ii) Where a small business concern seeks to qualify as a protégé in a secondary NAICS code, the concern must demonstrate how the mentor-protégé relationship will help it further develop or expand its current capabilities in that secondary NAICS code. SBA will not approve a mentor-protégé relationship in a secondary NAICS code in which the small business concern has no prior experience. SBA may approve a mentor-protégé relationship where the small business concern can demonstrate that it has performed work in one or more similar NAICS codes or where the NAICS code in which the small business concern seeks a mentor-protégé relationship is a logical business progression to work previously performed by the concern.

(2) A protégé firm may generally have only one mentor at a time. SBA may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship, and:

(i) The second relationship pertains to an unrelated NAICS code; or

(ii) The protégé firm is seeking to acquire a specific expertise that the first mentor does not possess.

(3) SBA may authorize a small business to be both a protégé and a mentor at the same time where the small business can demonstrate that the second relationship will not compete or otherwise conflict with the first mentor-protégé relationship.

(d) *Benefits.* (1) A protégé and mentor may joint venture as a small business for any government prime contract, subcontract or sale, provided the protégé qualifies as small for the procurement or sale. Such a joint venture may seek any type of small business contract (*i.e.*, small business set-aside, 8(a), HUBZone, SDVO, or WOSB) for which the protégé firm qualifies (*e.g.*, a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor). Similarly, a joint venture between a protégé and mentor may seek a subcontract as a HUBZone small business, small disadvantaged business, SDVO small business, or WOSB provided the protégé individually qualifies as such.

(i) SBA must approve the mentor-protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract in order for the joint venture to receive the exclusion from affiliation.

(ii) In order to receive the exclusion from affiliation, the joint venture must meet the requirements set forth in §125.8(b)(2), (c), and (d).

(iii) A joint venture between a protégé and its mentor will qualify as a small business for any procurement for which the protégé individually qualifies as small. Once a protégé firm no longer qualifies as a small business for

the size standard corresponding to the NAICS code under which SBA approved its mentor-protégé relationship, any joint venture between the protégé and its mentor will no longer be able to seek additional contracts or subcontracts as a small business for any NAICS code having the same or lower size standard. A joint venture between a protégé and its mentor could seek additional contract opportunities in NAICS codes having a size standard for which the protégé continues to qualify as small. A change in the protégé's size status does not generally affect contracts previously awarded to a joint venture between the protégé and its mentor.

(A) Except for contracts with durations of more than five years (including options), a contract awarded to a joint venture between a protégé and a mentor as a small business continues to qualify as an award to small business for the life of that contract and the joint venture remains obligated to continue performance on that contract.

(B) For contracts with durations of more than five years (including options), where size re-certification is required under §121.404(g)(3) of this chapter no more than 120 days prior to the end of the fifth year of the contract and no more than 120 days prior to exercising any option thereafter, once the protégé no longer qualifies as small for the size standard corresponding to the NAICS code assigned to the contract, the joint venture will not be able re-certify itself to be a small business for that contract. The rules set forth in §121.404(g)(3) of this chapter apply in such circumstances.

(2) In order to raise capital, the protégé firm may agree to sell or otherwise convey to the mentor an equity interest of up to 40% in the protégé firm.

(3) Notwithstanding the mentor-protégé relationship, a protégé firm may qualify for other assistance as a small business, including SBA financial assistance.

(4) No determination of affiliation or control may be found between a protégé firm and its mentor based solely on the mentor-protégé agreement or any assistance provided pursuant to the agreement. However, affiliation may be found for other reasons set forth in §121.103 of this chapter.

(5) Where appropriate, procuring activities may provide incentives in the contract evaluation process to a firm that will provide significant subcontracting work to its SBA-approved protégé firm.

(6) A mentor that provides a subcontract to its protégé that is a covered territory business, or that has its principal office located in the Commonwealth of Puerto Rico, may:

(i) receive positive consideration for the mentor's past performance evaluation, and (ii) apply costs incurred for providing training to such protege toward the subcontracting goals contained in the subcontracting plan of the mentor.

(ii) [Reserved]

(e) *Written agreement.* (1) The mentor and protégé firms must enter a written agreement setting forth an assessment of the protégé's needs and providing a detailed description and timeline for the delivery of the assistance the mentor commits to provide to address those needs (*e.g.*, management and or technical assistance; loans and/or equity investments; bonding; use of equipment; export assistance; assistance as a subcontractor under prime contracts being performed by the protégé; cooperation on joint venture projects; or subcontracts under prime contracts being performed by the mentor). The mentor-protégé agreement must:

(i) Specifically identify the business development assistance to be provided and address how the assistance will help the protégé enhance its growth and/or foster or acquire needed capabilities;

(ii) Identify the specific entity or entities that will provide assistance to or participate in joint ventures with the protégé where the mentor is a parent or subsidiary concern;

(iii) Establish a single point of contact in the mentor concern who is responsible for managing and implementing the mentor-protégé agreement; and

(iv) Provide that the mentor will provide such assistance to the protégé firm for at least one year.

(2) A firm seeking SBA's approval to be a protégé must identify any other mentor-protégé relationship it has through another federal agency or SBA and provide a copy of each such mentor-protégé agreement to SBA.

(i) The small business mentor-protégé agreement must identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another mentor-protégé relationship, either with the same or a different mentor.

(ii) A firm seeking SBA's approval to be a protégé may terminate a mentor-protégé relationship it has through another agency and use any not yet provided assistance identified in the other mentor-protégé agreement as part of the assistance that will be provided through the small business mentor-protégé relationship. Any assistance that has already been provided through another mentor-protégé relationship cannot be identified as assistance that will be provided through the small business mentor-protégé relationship.

(3) The written agreement must be approved by the Associate Administrator for Business Development (AA/BD) or his/her designee. The agreement will not be approved if SBA determines that the assistance to be provided is not sufficient to promote any real developmental gains to the protégé, or if SBA determines that the agreement is merely a vehicle to enable the mentor to receive small business contracts.

(4) The agreement must provide that either the protégé or the mentor may terminate the agreement with 30 days advance notice to the other party to the mentor-protégé relationship and to SBA.

(5) The term of a mentor-protégé agreement may not exceed six years. If an initial mentor-protégé agreement is for less than six years, it may be extended by mutual agreement prior to the expiration date for an additional amount of time that would total no more than six years from its inception (*e.g.*, if the initial mentor-protégé agreement was for two years, it could be extended for an additional four years by consent of the two parties; if the initial mentor-protégé agreement was for three years, it could be extended for an additional three years by consent of the two parties). Unless rescinded in writing as a result of an SBA review, the mentor-protégé relationship will automatically renew without additional written notice of continuation or extension to the protégé firm.

(6) A protégé may generally have a total of two mentor-protégé agreements with different mentors.

(i) Each mentor-protégé agreement may last for no more than six years, as set forth in paragraph (e)(5) of this section.

(ii) If a mentor-protégé agreement is terminated within 18 months from the date SBA approved the agreement, that mentor-protégé relationship will generally not count as one of the two mentor-protégé relationships that a small business may enter as a protégé. However, where a specific small business protégé appears to enter into many short-term mentor-protégé relationships as a means of extending its program eligibility as a protégé, SBA may determine that the business concern has exhausted its participation in the mentor-protégé program and not approve an additional mentor-protégé relationship.

(iii) If during the evaluation of the mentor-protégé relationship pursuant to paragraphs (g) and (h) of this section SBA determines that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided was not satisfactory, SBA may allow the protégé to substitute another mentor for the time remaining in the mentor-protégé agreement without counting against the two-mentor limit.

(iv) Instead of having a six-year mentor-protégé relationship with two separate mentors, a protégé may elect to extend or renew a mentor-protégé relationship with the same mentor for a second six-year term. In order for SBA to approve an extension or renewal of a mentor-protégé relationship with the same mentor, the mentor must commit to providing additional business development assistance to the protégé.

(7) SBA must approve all changes to a mentor-protégé agreement in advance, and any changes made to the

agreement must be provided in writing. If the parties to the mentor-protégé relationship change the mentor-protégé agreement without prior approval by SBA, SBA shall terminate the mentor-protégé relationship and may also propose suspension or debarment of one or both of the firms pursuant to paragraph (h) of this section where appropriate.

(8) If control of the mentor changes (through a stock sale or otherwise), the previously approved mentor-protégé relationship may continue provided that, after the change in control, the mentor expresses in writing to SBA that it acknowledges the mentor-protégéagreement and certifies that it will continue to abide by its terms.

(9) SBA may terminate the mentor-protégé agreement at any time if it determines that the protégé is not benefiting from the relationship or that the parties are not complying with any term or condition of the mentor protégé agreement. In the event SBA terminates the relationship, the mentor-protégé joint venture is obligated to complete any previously awarded contracts unless the procuring agency issues a stop work order.

(f) *Decision to decline mentor-protégé relationship.* Where SBA declines to approve a specific mentor-protégé agreement, SBA will issue a written decision setting forth its reason(s) for the decline. The small business concern seeking to be a protégé cannot attempt to enter into another mentor-protégé relationship with the same mentor for a period of 60 calendar days from the date of the final decision. The small business concern may, however, submit another proposed mentor-protégé agreement with a different proposed mentor at any time after the SBA's final decline decision.

(g) *Evaluating the mentor-protégé relationship.* SBA will review the mentor-protégé relationship annually. SBA will ask the protégé for its assessment of how the mentor-protégé relationship is working, whether or not the protégé received the agreed upon business development assistance, and whether the protégé would recommend the mentor to be a mentor for another small business in the future. At any point in the mentor-protégé relationship where a protégé believes that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided did not meet its expectations, the protégé can ask SBA to intervene on its behalf with the mentor.

(1) Within 30 days of the anniversary of SBA's approval of the mentor-protégé agreement, the protégé must report to SBA for the preceding year:

(i) All technical and/or management assistance provided by the mentor to the protégé;

(ii) All loans to and/or equity investments made by the mentor in the protégé;

(iii) All subcontracts awarded to the protégé by the mentor and all subcontracts awarded to the mentor by the protégé, and the value of each subcontract;

(iv) All federal contracts awarded to the mentor-protégé relationship as a joint venture (designating each as a small business set-aside, small business reserve, or unrestricted procurement), the value of each contract, and the percentage of the contract performed and the percentage of revenue accruing to each party to the joint venture; and

(v) A narrative describing the success such assistance has had in addressing the developmental needs of the protégé and addressing any problems encountered.

(2) The protégé must report the mentoring services it receives by category and hours.

(3) The protégé must annually certify to SBA whether there has been any change in the terms of the agreement.

(4) At any point in the mentor-protégé relationship where a protégé believes that a mentor has not provided the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided did not meet its expectations, the protégé can ask SBA to intervene on its behalf with the mentor.

(5) SBA may decide not to approve continuation of a mentor-protégé agreement where:

(i) SBA finds that the mentor has not provided the assistance set forth in the mentor-protégé agreement;

(ii) SBA finds that the assistance provided by the mentor has not resulted in any material benefits or developmental gains to the protégé; or

(iii) A protégé does not provide information relating to the mentor-protégé relationship, as set forth in paragraph (g).

(h) *Consequences of not providing assistance set forth in the mentor-protégé agreement.* (1) Where SBA determines that a mentor may not have provided to the protégé firm the business development assistance set forth in its mentor-protégé agreement or that the quality of the assistance provided may not have been satisfactory, SBA will notify the mentor of such determination and afford the mentor an opportunity to respond. The mentor must respond within 30 days of the notification, presenting information demonstrating that it did satisfactorily provide the assistance set forth in the mentor-protégé agreement or explaining why it has not provided the agreed upon assistance and setting forth a definitive plan as to when it will provide such assistance. If the mentor fails to respond, does not adequately provide information demonstrating that it did satisfactorily provide the assistance set forth in the mentor-protégé agreement, does not supply adequate reasons for its failure to provide the agreed upon assistance, or does not set forth a definite plan to provide the assistance:

(i) SBA will terminate the mentor-protégé agreement;

(ii) The firm will be ineligible to again act as a mentor for a period of two years from the date SBA terminates the mentor-protégé agreement; and

(iii) SBA may recommend to the relevant procuring agency to issue a stop work order for each federal contract for which the mentor and protégé are performing as a small business joint venture in order to encourage the mentor to comply with its mentor-protégé agreement. Where a protégé firm is able to independently complete performance of any such contract, SBA may recommend to the procuring agency to authorize a substitution of the protégé firm for the joint venture.

(2) SBA may consider a mentor's failure to comply with the terms and conditions of an SBA-approved mentor-protégé agreement as a basis for debarment on the grounds, including but not limited to, that the mentor has not complied with the terms of a public agreement under 2 CFR 180.800(b).

(i) *Results of mentor-protégé relationship.* (1) In order to assess the results of a mentor-protégé relationship upon its completion, the protégé must report to SBA whether it believed the mentor-protégé relationship was beneficial and describe any lasting benefits to the protégé.

(2) Where a protégé does not report the results of a mentor-protégé relationship upon its completion, SBA will not approve a second mentor-protégé relationship either under this section or under § 124.520 of this chapter.

[81 FR 48585, July 25, 2016, as amended at 85 FR 66194, Oct. 16, 2020; 87 FR 50927, Aug. 19, 2022; 88 FR 26211, Apr. 27, 2023]

§ 125.10 Mentor-Protégé programs of other agencies.

(a) Except as provided in paragraph (c) of this section, a Federal department or agency may not carry out a mentor-protégé program for small business unless the head of the department or agency submits a plan to the SBA Administrator for the program and the SBA Administrator approves the plan. Before starting a new mentor protégé program, the head of a department or agency must submit a plan to the SBA Administrator. Within one year of the effective date of this section, the head of a department or agency must submit a plan to the SBA for any previously existing mentor-protégé program that the department or agency seeks to continue.

(b) The SBA Administrator will approve or disapprove a plan submitted under paragraph (a) of this section based on whether the proposed program:

(1) Will assist protégés to compete for Federal prime contracts and subcontracts; and

(2) Complies with the provisions set forth in §§ 125.9 and 124.520 of this chapter, as applicable.

(c) Paragraph (a) of this section does not apply to:

(1) Any mentor-protégé program of the Department of Defense;

(2) Any mentoring assistance provided under a Small Business Innovation Research Program or a Small Business Technology Transfer Program; and

(3) A mentor-protégé program operated by a Department or agency on January 2, 2013, for a period of one year after the effective date of this section.

(d) The head of each Federal department or agency carrying out an agency-specific mentor-protégé program must report annually to SBA:

(1) The participants (both protégé firms and their approved mentors) in its mentor-protégé program. This includes identifying the number of participants that are:

(i) Small business concerns;

(ii) Small business concerns owned and controlled by service-disabled veterans;

(iii) Small business concerns owned and controlled by socially and economically disadvantaged individuals;

(iv) Small business concerns owned and controlled by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, and Community Development Corporations; and

(v) Small business concerns owned and controlled by women;

(2) The assistance provided to small businesses through the program; and

(3) The progress of protégé firms under the program to compete for Federal prime contracts and subcontracts.

[81 FR 48585, July 25, 2016]

§ 125.11 Past performance ratings for certain small business concerns.

(a) *General.* In accordance with sections 15(e)(5) and 8(d)(17) of the Small Business Act, agencies are required to consider the past performance of certain small business offerors that have been members of joint ventures or have been first-tier subcontractors. The agencies shall consider the small business' past performance for the evaluated contract or order similarly to a prime-contract past performance.

(b) *Small business concerns that have been members of joint ventures*—(1) *Joint venture past performance.* (i) When submitting an offer for a prime contract, a small business concern that has been a member of a joint venture may elect to use the experience and past performance of the joint venture (whether or not the other joint venture partners were small business concerns) where the small business does not independently demonstrate past performance necessary for award. The small business concern, when making such an election, shall:

(A) Identify to the contracting officer the joint venture of which the small business concern is or was a member;

(B) Identify the contract or contracts of the joint venture that the small business elects to use for its experience and past performance for the prime contract offer; and

(C) Inform the contracting officer what duties and responsibilities the concern carried out or is carrying out as part of the joint venture.

(ii) A small business cannot identify and use as its own experience and past performance work that was performed exclusively by other partners to the joint venture.

(2) *Evaluation.* When evaluating the past performance of a small business concern that has submitted an offer on a prime contract, the contracting officer shall consider the joint venture past performance that the concern elected to use under paragraph (b)(1) of this section, giving due consideration to the information provided under paragraph (b)(1)(i)(C) of this section for the performance of the evaluated contract or order. This includes where the small business concern lacks a past performance rating as a prime contractor in the Contractor Performance Assessment Reporting System, or successor system used by the Federal Government to monitor or rate contractor past performance.

(c) *Small business concerns that have performed as first-tier subcontractors*—(1) *Responsibility of prime contractors.* A small business concern may request a rating of its subcontractor past performance from the prime contractor for a contract on which the concern was a first-tier subcontractor and which included a subcontracting plan. The prime contractor shall provide the rating to the small business concern within 15 calendar days of the request. The rating provided by the prime contractor to the first-tier small business subcontractor shall utilize the five-

scale ratings system found in FAR 42.1503 (48 CFR 42.1503): Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory. The prime contractor must include, at a minimum, the following evaluation factors in the requested rating:

(i) Technical (quality of product or service);

(ii) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements);

(iii) Schedule/timeliness;

(iv) Management or business relations; and

(v) Other (as applicable).

(2) *Responsibility of first-tier small business subcontractors.* A first-tier small business subcontractor must make the request for a performance rating from the prime contractor within 30 days after the completion of the period of performance for the prime contractor's contract with the Government. However, the prime contractor and the first-tier small business subcontractor may negotiate a later deadline for the request for a performance rating, but in no case can the prime contractor impose a deadline earlier than 30 days after the completion of the period of performance for the prime contractor's contract with the Government. The subcontractor may notify the contracting officer in the event that the prime contractor does not comply with its responsibility to submit a timely rating.

(3) *Joint ventures that performed as first-tier subcontractors.* A small business member of a joint venture may request a past performance rating under paragraph (c)(1) of this section, where a joint venture performed as a first-tier subcontractor. The joint venture member may then submit the subcontractor past performance rating to a procuring agency in accordance with paragraph (b) of this section.

(4) *Evaluation.* When evaluating the past performance of a small business concern that elected to use a rating for its offer on a prime contract, a contracting officer shall consider the concern's experience and rating of past performance as a first-tier subcontractor. This includes where the small business concern lacks a past performance rating as a prime contractor in the Contractor Performance Assessment Reporting System (CPARS), or successor system used by the Federal Government to monitor or rate contractor past performance.

[87 FR 43739, July 22, 2022]

PART 126—HUBZONE PROGRAM

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AUTHORITY: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a.

SOURCE: 63 FR 31908, June 11, 1998, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 126 appear at 72 FR 50041, Aug. 30, 2007.

Subpart A—Provisions of General Applicability

§ 126.100 What is the purpose of the HUBZone program?

The purpose of the HUBZone program is to provide federal contracting assistance for qualified SBCs located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in such areas.

§ 126.101 Which government departments or agencies are affected directly by the HUBZone program?

(a) The HUBZone Program applies to all federal departments or agencies that employ one or more contracting officers.

(b) The HUBZone program does not apply to contracts awarded by state and local governments. However, state and local governments may use the List of certified HUBZone small business concerns to identify certified HUBZone small business concerns for similar programs authorized under state or local law.

[63 FR 31908, June 11, 1998, as amended at 66 FR 4645, Jan. 18, 2001; 69 FR 29420, May 24, 2004; 84 FR 65239, Nov. 26, 2019]

§ 126.102 What is the effect of the HUBZone program on the section 8(d) subcontracting program?

The HUBZone Act of 1997 amended the section 8(d) subcontracting program to include qualified HUBZone SBCs in the formal subcontracting plans described in § 125.3 of this title.

§ 126.103 What definitions are important in the HUBZone program?

Administrator means the Administrator of the United States Small Business Administration (SBA).

AA/BD means SBA's Associate Administrator for Business Development.

Agricultural commodity has the same meaning as in section 102 of the Agricultural Trade Act of 1978 (7 U.S.C. 5602).

Alaska Native Corporation (ANC) has the same meaning as the term ''Native Corporation'' in section 3 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1602.

Attempt to maintain means making substantive and documented efforts, such as written offers of employment, published advertisements seeking employees, and attendance at job fairs and applies only to concerns during the performance of any HUBZone contract. A certified HUBZone small business concern that has less than 20% of its total employees residing in a HUBZone during the performance of a HUBZone contract has failed to attempt to maintain the HUBZone residency requirement.

Base closure area means:

(1) Lands within the external boundaries of a military installation that were closed through a privatization process under the authority of:

(i) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of division B of Pub. L. 101–510; 10 U.S.C. 2687 note);

(ii) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Pub. L. 100–526; 10 U.S.C. 2687 note);

(iii) 10 U.S.C. 2687; or

(iv) Any other provision of law authorizing or directing the Secretary of Defense or the Secretary of a military department to dispose of real property at the military installation for purposes relating to base closures of redevelopment, while retaining the authority to enter into a leaseback of all or a portion of the property for military use;

(2) The census tract or nonmetropolitan county (excluding any qualified census tract and any qualified nonmetropolitan county) in which the

lands described in paragraph (1) of this definition are wholly contained;

(3) A census tract or nonmetropolitan county (excluding any qualified census tract and any qualified non-metropolitan county) the boundaries of which intersect the area described in paragraph (1) of this definition; and

(4) A census tract or nonmetropolitan county (excluding any qualified census tract and any qualified non-metropolitan county) the boundaries of which are contiguous to the area described in paragraph (2) or paragraph (3) of this definition.

Certify means the process by which SBA determines that a concern is qualified for the HUBZone program and eligible to be designated by SBA as a certified HUBZone small business concern in the Dynamic Small Business Search (DSBS) system (or successor system).

Citizen means a person born or naturalized in the United States. SBA does not consider holders of permanent visas and resident aliens to be citizens.

Community Development Corporation (CDC) means a corporation that has received financial assistance under Part 1 of Subchapter A of the Community Economic Development Act of 1981, 42 U.S.C. 9805–9808.

Concern means a firm which satisfies the requirements in §§121.105(a) and (b) of this title.

Contract opportunity means a situation in which a requirement for a procurement exists, none of the exclusions from §126.605 applies, and any applicable conditions in §126.607 are met.

Contracting Officer (CO) has the meaning given that term in 41 U.S.C. 423(f)(5), which defines a CO as a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.

County means the political subdivisions recognized as a county by a state or commonwealth or which is an equivalent political subdivision such as a parish, borough, independent city, or *municipio*, where such subdivisions are not subdivisions within counties.

D/HUB means the Director of SBA's Office of HUBZone.

Decertify means the process by which SBA determines that a concern no longer qualifies as a HUBZone small business concern and removes that concern as a certified HUBZone small business concern from DSBS (or successor system), or the process by which SBA removes a concern as a certified HUBZone small business concern from DSBS (or successor system) after receiving a request to voluntarily withdraw from the HUBZone program.

Dynamic Small Business Search (DSBS) means the database that government agencies use to find small business contractors for upcoming contracts. The information a business provides when registering in the System for Award Management (SAM) is used to populate DSBS. For HUBZone Program purposes, a concern's DSBS profile will indicate whether it is a certified HUBZone small business concern, and if so, the date it was certified or recertified.

Employee means all individuals employed on a full-time, part-time, or other basis, so long as that individual works a minimum of 40 hours during the four-week period immediately prior to the relevant date of review, which is either the date the concern submits its HUBZone application to SBA or the date of recertification. SBA will review a concern's payroll records for the most recently completed pay periods that account for the four-week period immediately prior to the date of application or date of recertification in order to determine which individuals meet this definition. To determine if an individual is an employee, SBA reviews the totality of circumstances, including criteria used by the Internal Revenue Service (IRS) for Federal income tax purposes and the factors set forth in SBA's Size Policy Statement No. 1 (51 FR 6099, February 20, 1986).

(1) In general, the following are considered employees:

(i) Individuals obtained from a temporary employee agency, leasing concern, or through a union agreement, or co-employed pursuant to a professional employer organization agreement;

(ii) An individual who has an ownership interest in the concern and who

works for the concern a minimum of 40 hours during the four-week period immediately prior to the relevant date of review, whether or not the individual receives compensation;

(iii) The sole owner of a concern who works less than 40 hours during the four-week period immediately prior to the relevant date of review, but who has not hired another individual to direct the actions of the concern's employees;

(iv) Individuals who receive in-kind compensation commensurate with work performed. Such compensation must provide a demonstrable financial value to the individual and must be compliant with all relevant federal and state laws.

(2) In general, the following are not considered employees:

(i) Individuals who are not owners and receive no compensation (including no in-kind compensation) for work performed;

(ii) Individuals who receive deferred compensation for work performed;

(iii) Independent contractors that receive payment via IRS Form 1099 and are not considered employees under SBA's Size Policy Statement No. 1; and

(iv) Subcontractors.

(3) Employees of an affiliate may be considered employees, if the totality of the circumstances shows that there is no clear line of fracture between the HUBZone applicant (or certified HUBZone small business concern) and its affiliate(s) (*see* § 126.204).

Governor-designated covered area means an area that the Administrator has designated as a HUBZone by approving a Governor-generated petition as described in § 126.104.

HUBZone means a historically underutilized business zone, which is an area located within one or more:

(1) Qualified census tracts;

(2) Qualified non-metropolitan counties;

(3) Lands within the external boundaries of an Indian reservation;

(4) Redesignated areas;

(5) Qualified base closure areas;

(6) Qualified disaster areas; or

(7) Governor-designated covered areas.

HUBZone small business concern or certified HUBZone small business concern means a small business concern that meets the requirements described in § 126.200 and that SBA has certified as eligible for federal contracting assistance under the HUBZone program. A concern that was a certified HUBZone small business concern as of December 12, 2017, and that had its principal office located in a redesignated area set to expire prior to January 1, 2020, shall remain a certified HUBZone small business concern until June 30, 2023, so long as all other HUBZone eligibility requirements are met.

Indian reservation (1) Has the same meaning as the term ''Indian country'' in 18 U.S.C. 1151, except that such term does not include:

(i) Any lands that are located within a State in which a tribe did not exercise governmental jurisdiction as of December 21, 2000, unless that tribe is recognized after that date by either an Act of Congress or pursuant to regulations of the Secretary of the Interior for the administrative recognition that an Indian group exists as an Indian tribe (25 CFR part 83); and

(ii) Lands taken into trust or acquired by an Indian tribe after December 21, 2000 if such lands are not located within the external boundaries of an Indian reservation or former reservation or are not contiguous to the lands held in trust or restricted status as of December 21, 2000; and

(2) In the State of Oklahoma, means lands that:

(i) Are within the jurisdictional areas of an Oklahoma Indian tribe (as determined by the Secretary of the Interior); and

(ii) Are recognized by the Secretary of the Interior as of December 21, 2000, as eligible for trust land status under 25 CFR part 151.

Indian Tribal Government means the governing body of any Indian tribe, band, nation, pueblo, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Interested party means any concern that submits an offer for a specific HUBZone set-aside contract (including Multiple Award Contracts) or order, any concern that submitted an offer in

full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone small business concern, any concern that submitted an offer in a full and open competition and its opportunity for award will be affected by a reserve of an award given to a qualified HUBZone small business concern, the contracting activity's contracting officer, or SBA.

Lands within the external boundaries of an Indian reservation include all lands within the perimeter of an Indian reservation, whether tribally owned and governed or not. For example, land that is individually owned and located within the perimeter of an Indian reservation is ''lands within the external boundaries of an Indian reservation.'' By contrast, an Indian-owned parcel of land that is located outside the perimeter of an Indian reservation is not ''lands within the external boundaries of an Indian reservation.''

Native Hawaiian Organization (NHO) means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organziation chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Non-metropolitan has the meaning used by the Bureau of the Census, United States Department of Commerce, in its publication titled, ''1990 Census of Population, Social and Economic Characteristics,'' Report Number CP–2, page A–9. This publication is available for inspection at any local Federal Depository Library. For the location of a Federal Depository Library, call toll-free (888) 293–6498 or contact the Bureau of the Census, Population Distribution Branch, Population Division, Washington D.C. 20233–8800.

Person means a natural person.

Primary industry classification or primary industry means the six-digit North American Industry Classification System (NAICS) code designation which best describes the primary business activity of the HUBZone applicant or certified HUBZone small business concern. SBA utilizes § 121.107 of this chapter in determining a concern's primary industry classification.

Principal office means the location where the greatest number of the concern's employees at any one location perform their work.

(1) If an employee works at multiple locations, then the employee will be deemed to work at the location where the employee spends more than 50% of his or her time. If an employee does not spend more than 50% of his or her time at any one location and at least one of those locations is a non-HUBZone location, then the employee will be deemed to work at a non-HUBZone location.

(2) In order for a location to be considered the principal office, the concern must conduct business at this location.

(3) For those concerns whose ''primary industry classification'' is services or construction (*see* § 121.201 of this chapter), the determination of principal office excludes the concern's employees who perform more than 50% of their work at job-site locations to fulfill specific contract obligations. If all of a concern's employees perform more than 50% of their work at job sites, the concern does not comply with the principal office requirement.

(i) *Example 1:* A business concern whose primary industry is construction has a total of 78 employees, including the owners. The business concern has one office (Office A), which is located in a HUBZone, with 3 employees working at that location. The business concern also has a job-site for a current contract, where 75 employees perform more than 50% of their work. The 75 job-site employees are excluded for purposes of determining principal office. Since the remaining 3 employees all work at Office A, Office A is the concern's principal office. Since Office A is in a HUBZone, the business concern complies with the principal office requirement.

(ii) *Example 2:* A business concern whose primary industry is services has a total of 4 employees, including the owner. The business concern has one office located in a HUBZone (Office A), where 2 employees perform more than 50% of their work, and a second office not located in a HUBZone (Office B), where 2 employees perform more than 50% of their work. Since there is not

one location where the greatest number of the concern's employees at any one location perform their work, the business concern would not have a principal office in a HUBZone.

(iii) *Example 3:* A business concern whose primary industry is services has a total of 6 employees, including the owner. Five of the employees perform all of their work at job-sites fulfilling specific contract obligations. The business concern's owner performs 45% of her work at job-sites, and 55% of her work at an office located in a HUBZone (Office A) conducting tasks such as writing proposals, generating payroll, and responding to emails. Office A would be considered the principal office of the concern since it is the only location where any employees of the concern work that is not a job site and the 1 individual working there spends more than 50% of her time at Office A. Since Office A is located in a HUBZone, the small business concern would meet the principal office requirement.

Qualified base closure area means a base closure area that is treated by SBA as a HUBZone for a period of at least 8 years, beginning on the date on which the Administrator designates the base closure area as a HUBZone and ending on the date on which the base closure area ceases to be a qualified census tract or a qualified nonmetropolitan county in accordance with the online tool prepared by the Administrator.

Qualified census tract. (1) Qualified census tract means a census tract which is designated by the Secretary of Housing and Urban Development, and for the most recent year for which census data are available on household income in such tract, either in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent. *See* 26 U.S.C. 42(d)(5)(B)(ii)(I).

(2) The portion of a metropolitan statistical area (as defined by the Bureau of the Census, United States Department of Commerce, in its publications on the Census of Population, Social and Economic Characteristics) which may be designated as ''qualified census tracts'' shall not exceed an area having 20 percent of the population of such metropolitan statistical area. *See* 26 U.S.C. 42(d)(5)(B)(ii)(II). This paragraph does not apply to any metropolitan statistical area in the Commonwealth of Puerto Rico until December 22, 2027, or the date on which the Financial Oversight and Management Board for the Commonwealth of Puerto Rico created by the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) (Pub. L. 114–187, June 30, 2016) ceases to exist, whichever event occurs first.

(3) Qualified census tracts are reflected in a publicly accessible online tool that depicts HUBZones and will be updated every 5 years.

Qualified disaster area. (1) Qualified disaster area means any census tract or nonmetropolitan county located in an area where a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) has occurred or an area in which a catastrophic incident has occurred if such census tract or nonmetropolitan county ceased to be a qualified census tract or qualified nonmetropolitan county during the period beginning 5 years before the date on which the President declared the major disaster or the catastrophic incident occurred.

(2) A census tract or nonmetropolitan county shall be considered to be a qualified disaster area only for the period of time ending on the date the area ceases to be a qualified census tract or a qualified nonmetropolitan county, in accordance with the publicly accessible online tool that depicts HUBZones, and beginning—

(i) In the case of a major disaster, on the date on which the President declared the major disaster for the area in which the census tract or nonmetropolitan county, as applicable, is located; or

(ii) In the case of a catastrophic incident, on the date on which the catastrophic incident occurred in the area in which the census tract or nonmetropolitan county, as applicable, is located.

Qualified non-metropolitan county means any county that was not located in a metropolitan statistical area (as

defined by the Bureau of the Census, United States Department of Commerce, in its publications on the Census of Population, Social and Economic Characteristics) at the time of the most recent census taken for purposes of selecting qualified census tracts under section 26 U.S.C. 42(d)(5)(B)(ii), and in which:

(1) The median household income is less than 80% of the State median household income, based on a 5-year average of the available data from the Bureau of the Census of the Department of Commerce;

(2) The unemployment rate is not less than 140% of the average unemployment rate for the United States or for the State in which such county is located, whichever is less, based on a 5-year average of the data available from the Local Area Unemployment Statistics report, produced by the Department of Labor's Bureau of Labor Statistics; or

(3) There is located a Difficult Development Area within Alaska, Hawaii, or any territory or possession of the United States outside the 48 contiguous States. A Difficult Development Area (DDA) is an area designated by the Secretary of the Department of Housing and Urban Development, in accordance with section 26 U.S.C. 42(d)(5)(B)(iii), with high construction, land, and utility costs relative to its area median gross income.

(4) Qualified non-metropolitan counties are reflected in a publicly accessible online tool that depicts HUBZones and will be updated every 5 years.

Redesignated area means any census tract that ceases to be a ''qualified census tract'' or any non-metropolitan county that ceases to be a ''qualified non-metropolitan county.'' A redesignated area generally shall be treated as a HUBZone for a period of three years, starting from the date on which the area ceased to be a qualified census tract or a qualified non-metropolitan county. The date on which the census tract or non-metropolitan county ceases to be qualified is the date on which the official government data affecting the eligibility of the HUBZone is released to the public. However, an area that was a redesignated area on or after December 12, 2017 shall remain a redesignated area until June 30, 2023.

Reside means to live at a location full-time and for at least 180 days immediately prior to the date of application (or date of recertification where the individual is being treated as a HUBZone resident for the first time).

(1) To determine residence, SBA will first look to an individual's address identified on his or her driver's license or voter's registration card. Where such documentation is not available, SBA will require other specific proof of residency, such as deeds, leases, or utility bills. Where the documentation provided does not demonstrate 180 days of residency, SBA will require a signed statement attesting to an individual's dates of residency.

(2) For HUBZone purposes, SBA will consider individuals temporarily residing overseas in connection with the performance of a contract to reside at their U.S. residence.

(i) *Example 1:* A person possesses the deed to a residential property and pays utilities and property taxes for that property. However, the person does not live at this property, but instead rents out this property to another individual. For HUBZone purposes, the person does not reside at the address listed on the deed.

(ii) *Example 2:* A person moves into an apartment under a month-to-month lease and lives in that apartment full-time. SBA would consider the person to reside at the address listed on the lease if the person can show that he or she has lived at that address for at least 180 days immediately prior to the date of application or date of recertification.

(iii) *Example 3:* A person is working overseas on a contract for the small business and is therefore temporarily living abroad. The employee can provide documents showing he is paying rent for an apartment located in a HUBZone. That person is deemed to reside in a HUBZone.

Small agricultural cooperative means an association (corporate or otherwise), comprised exclusively of other small agricultural cooperatives, small business concerns, or U.S. citizens, pursuant to the provisions of the Agricultural Marketing Act, 12 U.S.C. 1141j,

whose size does not exceed the applicable size standard pursuant to part 121 of this chapter. In determining such size, an agricultural cooperative is treated as a ''business concern'' and its member shareholders are not considered affiliated with the cooperative by virtue of their membership in the cooperative.

Small business concern (SBC) means a concern that, with its affiliates, meets the size standard for its primary industry, pursuant to part 121 of this chapter.

[63 FR 31908, June 11, 1998, as amended at 66 FR 4645, Jan. 18, 2001; 69 FR 29421, May 24, 2004; 70 FR 51248, Aug. 30, 2005; 72 FR 50041, Aug. 30, 2007; 74 FR 45754, Sept. 4, 2009; 74 FR 56702, Nov. 3, 2009; 78 FR 61144, Oct. 2, 2013; 81 FR 51313, Aug. 4, 2016; 82 FR 48904, Oct. 23, 2017; 84 FR 62449, Nov. 15, 2019; 84 FR 65239, Nov. 26, 2019; 86 FR 23864, May 5, 2021; 88 FR 21088, Apr. 10, 2023]

§ 126.104 How can a Governor petition for the designation of a Governor-designated covered area?

(a) For a specific covered area to receive a designation as a Governor-designated covered area, the Governor of the State in which the identified covered area is wholly contained shall include such area in a petition to the Administrator requesting such a designation. In reviewing a request for designation included in such a petition, the Administrator may consider—

(1) The potential for job creation and investment in the covered area;

(2) The demonstrated interest of small business concerns in the covered area to be designated as a Governor-designated covered area;

(3) How State and local government officials have incorporated the covered area into an economic development strategy; and

(4) If the covered area was a HUBZone before becoming the subject of the petition, the impact on the covered area if the Administrator did not approve the petition.

(b) Each calendar year, a Governor may submit not more than 1 petition described in this section. Such petition shall include all covered areas in a State for which the Governor seeks designation as a Governor-designated covered area, except that the total number of covered areas included in such petition may not exceed 10 percent of the total number of covered areas in the State.

(c) If the Administrator grants a petition described in this section, the Governor of the Governor-designated covered area shall, not less frequently than annually, submit data to the Administrator certifying that each Governor-designated covered area continues to meet the requirements of paragraph (d)(1) of this section.

(d) In this section:

(1) The term ''covered area'' means an area in a State—

(i) That is located outside of an urbanized area, as determined by the Bureau of the Census;

(ii) With a population of not more than 50,000; and

(iii) For which the average unemployment rate is not less than 120 percent of the average unemployment rate of the United States or of the State in which the covered area is located, whichever is less, based on the most recent data available from the American Community Survey conducted by the Bureau of the Census.

(2) The term ''Governor'' means the chief executive of a State.

(3) The term ''State'' means each of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, or American Samoa.

[84 FR 62449, Nov. 15, 2019]

Subpart B—Requirements To Be a Certified HUBZone Small Business Concern

§ 126.200 What requirements must a concern meet to be eligible as a certified HUBZone small business concern?

(a) *Ownership.* In order to be eligible for HUBZone certification and to remain certified, a small business concern must be owned in accordance with this paragraph. The concern must be:

(1) At least 51% owned and controlled by one or more individuals who are United States citizens;

(2) An ANC or at least 51% owned by an ANC or a wholly-owned business entity of an ANC;

(3) At least 51% owned by one or more Indian Tribal Governments, or by a corporation that is wholly owned by one or more Indian Tribal Governments;

(4) At least 51% owned by one or more CDCs;

(5) A small agricultural cooperative organized or incorporated in the United States, or at least 51% owned by one or more small agricultural cooperatives organized or incorporated in the United States; or

(6) At least 51% owned by one or more NHOs, or by a corporation that is wholly owned by one or more NHOs.

(b) *Size.* (1) In order to be eligible for HUBZone certification and remain eligible as a certified HUBZone small business concern, a concern, together with its affiliates, must qualify as a small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its profile in the System for Award Management (*SAM.gov*).

(2) In order to be eligible for a HUBZone contract, a certified HUBZone small business concern must qualify as small under the size standard corresponding to the NAICS code assigned to the HUBZone contract.

(3) If the concern is a small agricultural cooperative, in determining size, the small agricultural cooperative is treated as a ''business concern'' and its member shareholders are not considered affiliated with the cooperative by virtue of their membership in the cooperative.

(c) *Principal office.* In order to be eligible for HUBZone certification, a concern's principal office must be located in a HUBZone, except for concerns owned in whole or in part by one or more Indian Tribal Governments.

(1) A concern that owns or makes a long-term investment (*i.e.*, a lease of at least 10 years) in a principal office in an area that qualifies as a HUBZone at the time of its initial certification will be deemed to have its principal office located in a HUBZone for at least 10 years from the date of that certification as long as the firm maintains the long-term lease or continues to own the property upon which the principal office designation was made. This does not apply to leases of office space that are shared with one or more other concerns or individuals.

(2) A concern that is owned in whole or in part by one or more Indian Tribal Governments (or by a corporation that is wholly owned by Indian Tribal Governments) must either:

(i) Maintain a principal office located in a HUBZone and ensure that at least 35% of its employees reside in a HUBZone as provided in paragraph (d)(1) of this section; or

(ii) Certify that when performing a HUBZone contract, at least 35% of its employees engaged in performing that contract will reside within any Indian reservation governed by one or more of the Indian Tribal Government owners, or reside within any HUBZone adjacent to such Indian reservation.

(d) *Employees.* (1) In order to be eligible for HUBZone certification, at least 35% of a concern's employees must reside in a HUBZone. When determining the percentage of employees that reside in a HUBZone, if the percentage results in a fraction, SBA rounds to the nearest whole number.

(i) *Example 1 to paragraph (d)(1):* A concern has 25 employees; 35% of 25, or 8.75, employees must reside in a HUBZone. The number 8.75 rounded to the nearest whole number is 9. Thus, 9 employees must reside in a HUBZone.

(ii) *Example 2 to paragraph (d)(1):* A concern has 95 employees; 35% of 95, or 33.25, employees must reside in a HUBZone. The number 33.25 rounded to the nearest whole number is 33. Thus, 33 employees must reside in a HUBZone.

(2) If the concern is owned in whole or in part by one or more Indian Tribal Governments (or by a corporation that is wholly owned by one or more Indian Tribal Governments), *see* paragraph (c)(2) of this section.

(3) An employee who resides in a HUBZone at the time of certification (or time of recertification where the individual is being treated as a HUBZone resident for the first time) shall continue to count as a HUBZone resident employee if the individual continues to live in the HUBZone for at least 180 days immediately after certification (or recertification) and remains an employee of the concern, even if the employee subsequently

moves to a location that is not in a HUBZone or the area in which the employee's residence is located no longer qualifies as a HUBZone. The certified HUBZone small business concern must maintain records of the employee's original HUBZone address, as well as records of the individual's continued and uninterrupted employment by the HUBZone small business concern, for the duration of the concern's participation in the HUBZone program.

(i) *Example to paragraph (d)(3):* As part of its application for HUBZone certification, a concern provides documentation showing that 35% of its employees have lived in a HUBZone for more than 180 days. SBA certifies the concern as a certified HUBZone small business concern. Within 180 after being certified, an individual critical to the concern's meeting the 35% residency requirement moves out of the HUBZone area. That individual will continue to be treated as a HUBZone resident during the first year after the concern's certification; however, at the time of the firm's recertification, that individual will not be counted as a resident of a HUBZone.

(ii) [Reserved]

(e) *Attempt to maintain.* (1) At the time of application, a concern must certify that it will ''attempt to maintain'' (*see* §126.103) having at least 35% of its employees reside in a HUBZone during the performance of any HUBZone contract it receives.

(2) If the concern is owned in whole or in part by one or more Indian Tribal Governments (or by a corporation that is wholly owned by one or more Indian Tribal Governments), the concern must certify that it will ''attempt to maintain'' (*see* §126.103) the applicable employment percentage described in paragraph (c)(2) of this section during the performance of any HUBZone contract it receives.

(f) *Subcontracting.* At the time of application, an applicant concern must certify that it will comply with the applicable limitations on subcontracting requirements in connection with any procurement that it receives as a certified HUBZone small business concern (*see* §§125.6 and 126.700).

(g) *Suspension and Debarment.* In order to be eligible for HUBZone certification and to remain certified, the concern and any of its owners must not have an active exclusion in the System for Award Management, available at *www.SAM.gov*, at the time of application.

[84 FR 65242, Nov. 26, 2019, as amended at 86 FR 61673, Nov. 8, 2021; 88 FR 26212, Apr. 27, 2023]

§ 126.201 Who does SBA consider to own a HUBZone SBC?

An owner of a SBC seeking HUBZone certification or a qualified HUBZone SBC is a person who owns any legal or equitable interest in such SBC. If an Employee Stock Ownership Plan owns all or part of the concern, SBA considers each stock trustee and plan member to be an owner. If a trust owns all or part of the concern, SBA considers each trustee and trust beneficiary to be an owner. In addition:

(a) *Corporations.* SBA considers any person who owns stock, whether voting or non-voting, to be an owner. SBA considers options to purchase stock and the right to convert debentures into voting stock to have been exercised.

Example: U.S. citizens own all of the stock of a corporation. A corporate officer, a non-U.S. citizen, owns no stock in the corporation but owns options to purchase stock in the corporation. SBA will consider the options exercised and the individual to be an owner. Therefore, if that corporate officer has options to purchase 50% or more of the corporate stock, pursuant to §126.200, the corporation would not be eligible to be a qualified HUBZone SBC because it is not at least 51% owned and controlled by persons who are U.S. citizens.

(b) *Partnerships.* SBA considers all partners, whether general or limited, to be owners in a partnership.

(c) *Sole proprietorships.* The proprietor is the owner.

(d) *Limited liability companies.* SBA considers each member to be an owner of a limited liability company.

[69 FR 29422, May 24, 2004, as amended at 70 FR 51249, Aug. 30, 2005; 71 FR 69183, Nov. 30, 2006]

§ 126.202 Who does SBA consider to control a HUBZone SBC?

Control means both the day-to-day management and long-term decision-

making authority for the HUBZone SBC. Many persons may share control of a concern, including each of those occupying the following positions: officer, director, general partner, managing partner, managing member and manager. In addition, key employees who possess expertise or responsibilities related to the concern's primary economic activity may share significant control of the concern. SBA will consider the control potential of such key employees on a case by case basis.

[69 FR 29422, May 24, 2004, as amended at 84 FR 65243, Nov. 26, 2019]

§ 126.203 [Reserved]

§ 126.204 May a HUBZone small business concern have affiliates?

(a) A HUBZone small business concern may have affiliates, provided that the aggregate size of the concern together with all of its affiliates is small as defined in part 121 of this title, except as otherwise provided for small agricultural cooperatives in § 126.103.

(b) Employees of affiliates are not automatically considered employees of a HUBZone applicant or HUBZone small business concern solely on the basis of affiliation.

(c) The employees of an affiliate may be counted as employees of a HUBZone applicant or HUBZone small business concern for purposes of determining compliance with the HUBZone program's principal office and 35% residency requirements in certain circumstances. In determining whether individuals should be counted as employees of a HUBZone applicant or HUBZone small business concern, SBA will consider all information, including criteria used by the IRS for Federal income tax purposes and those set forth in SBA's Size Policy Statement No. 1. Employees of the concern's affiliate will not be counted as the concern's employees if there is a clear line of fracture between the concern and its affiliate.

(1) SBA generally will find that there is a clear line of fracture where the concern demonstrates that it does not share employees, facilities, or equipment with the affiliate; has different customers or lines of business (or is distinctly segregated geographically); and does not receive significant contracts or financial assistance from the affiliate.

(2) The use of common administrative services between parent and/or sister concerns by itself will not result in an affiliate's employees being counted as employees of the HUBZone applicant or HUBZone small business concern.

(3) Minimal business activity between the concern and its affiliate will not result in an affiliate's employees being counted as employees of the HUBZone applicant or HUBZone small business concern.

(i) *Example to paragraph (c):* X owns 100% of Company A and 51% of Company B. Based on X's common ownership of A and B, the two companies are affiliated under SBA's size regulations. SBA will look at the totality of circumstances to determine whether it would be reasonable to treat the employees of B as employees of A for HUBZone program purposes. If both companies do construction work and share office space and equipment, then SBA would find that there is not a clear line of fracture between the two concerns and would treat the employees of B as employees of A for HUBZone program purposes. In order to be eligible for the HUBZone program, at least 35% of the combined employees of A and B must reside in a HUBZone.

(ii) [Reserved]

[84 FR 65243, Nov. 26, 2019]

§ 126.205 May participants in other SBA programs be certified as HUBZone small business concerns?

Participants in other SBA programs may be certified as HUBZone small business concerns if they meet all of the requirements set forth in this part.

[84 FR 65243, Nov. 26, 2019]

§ 126.206 May nonmanufacturers be certified as HUBZone small business concerns?

Nonmanufacturers (referred to in the HUBZone Act of 1997 as ''regular dealers'') may be certified as HUBZone small business concerns if they meet all of the requirements set forth in § 126.200. For purposes of this part, a

''nonmanufacturer'' is defined in §121.406(b) of this chapter.

[84 FR 65243, Nov. 26, 2019]

§ 126.207 Do all of the offices or facilities of a certified HUBZone small business concern have to be located in a HUBZone?

A HUBZone small business concern may have offices or facilities in multiple HUBZones or even outside a HUBZone. However, in order to be certified as a HUBZone small business concern, the concern's principal office must be located in a HUBZone (except *see* §126.200(c)(2) for concerns owned by Indian Tribal Governments).

[84 FR 65243, Nov. 26, 2019]

Subpart C—Certification

§ 126.300 How may a concern be certified as a HUBZone small business concern?

(a) A concern must apply to SBA for HUBZone certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies.

(b) SBA, at its discretion, may rely solely upon the information submitted, may request additional information, may conduct independent research, or may verify the information before making an eligibility determination.

(c) If SBA determines that a concern meets the eligibility requirements of a HUBZone small business concern, it will notify the concern and designate the concern as a certified HUBZone small business concern in DSBS (or successor system).

[84 FR 65243, Nov. 26, 2019]

§ 126.301 Is there any other way for a concern to obtain certification?

No. SBA certification is the only way to qualify for HUBZone program status.

§ 126.302 When may a concern apply for certification?

A concern may apply to SBA and submit the required information whenever it can represent that it meets the eligibility requirements, subject to §126.309. All representations and supporting information contained in the application must be complete and accurate as of the date of submission. The application must be signed by an officer of the concern who is authorized to represent the concern.

§ 126.303 Where must a concern submit its application for certification?

A concern seeking certification as a HUBZone small business concern must submit an electronic application to SBA's HUBZone Program Office via SBA's web page at *www.SBA.gov*. The application and any supporting documentation must be submitted by a person authorized to represent the concern.

[84 FR 65243, Nov. 26, 2019]

§ 126.304 What must a concern submit to SBA in order to be certified as a HUBZone small business concern?

(a) *General.* To be certified by SBA as a HUBZone small business concern, a concern must submit a completed application and all documents requested by SBA. The concern must also represent to SBA that it meets the requirements set forth in §126.200 and that all of the information provided as of the date of the application (and any subsequent information provided) is complete, true and accurate. The representation must be signed by an owner or officer of the applicant.

(b) *Supporting documents.* (1) SBA may request documents to verify that the applicant meets the HUBZone program's eligibility requirements. The documents must show that the concern meets the program's requirements at the time it submits its application to SBA.

(2) The concern must document compliance with the requirements listed in §126.200, including but not limited to employment records and documentation showing the address of each HUBZone resident employee. Records sufficient to demonstrate HUBZone residency include copies of driver's licenses and voter registration cards; only where such documentation is unavailable will SBA accept alternative documentation (such as copies of leases, deeds, and/or utility bills) accompanied by signed statements explaining why the alternative documentation is being provided.

(c) *Changes after submission of application.* After submitting an application, a concern applying for HUBZone certification must immediately notify SBA of any changes that could affect its eligibility and provide information and documents to verify the changes. If the changed information indicates that the concern is not eligible, the applicant will be given the option to withdraw its application, or SBA will decline certification and the concern must wait 90 days to reapply.

(d) *HUBZone areas.* Concerns applying for HUBZone status must use SBA's website (*e.g.*, maps or other tools showing qualified HUBZones) to verify that the location of the concern's principal office and the residences of at least 35% of the concern's employees are within HUBZones. If SBA's website indicates that a particular location is not within a HUBZone and the applicant disagrees, then the applicant must note this on the application and submit relevant documents showing why the applicant believes the area meets the statutory criteria of a HUBZone. SBA will determine whether the location is within a HUBZone using available methods (*e.g.*, by contacting Bureau of Indian Affairs for Indian reservations or Department of Defense for BRACs).

(e) *Record maintenance.* HUBZone small business concerns must retain documentation demonstrating satisfaction of all qualifying requirements for 6 years from date of submission of all initial and continuing eligibility actions as required by this part. In addition, HUBZone small business concerns must retain documentation as required in § 126.200(d)(3).

[84 FR 65244, Nov. 26, 2019]

§ 126.305 [Reserved]

§ 126.306 How will SBA process an application for HUBZone certification?

(a) The D/HUB or designee is authorized to approve or decline applications for HUBZone certification. SBA will receive and review all applications and request supporting documents. SBA must receive all required information, supporting documents, and a completed HUBZone representation before it will begin processing a concern's application. SBA will not process incomplete packages. SBA will make its determination within 60 calendar days after receipt of a complete package.

(b) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may draw an adverse inference and presume that the information that the applicant failed to provide would demonstrate ineligibility and deny certification on this basis.

(1) If a concern submits inconsistent information that results in SBA's inability to determine the concern's compliance with any of the HUBZone eligibility requirements, SBA will decline the concern's application.

(2) If, during the processing of an application, SBA determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application.

(c) SBA's decision will be based on the facts set forth in the application, any information received in response to SBA's request for clarification, any independent research conducted by SBA, and any changed circumstances.

(d) In order to be certified into the program, the applicant must be eligible as of the date it submitted its application and at the time the D/HUB issues a decision. An applicant must inform SBA of any changes to its circumstances that occur after its application and before its certification that may affect its eligibility. SBA will consider such changed circumstances in determining whether to certify the concern.

(e) If SBA approves the application, it will send a written notice to the concern and designate the concern as a certified HUBZone small business concern in DSBS (or successor system) as described in § 126.307.

(f) If SBA denies the application, it will send a written notice to the concern and state the specific reasons for denial.

(g) SBA will presume that notice of its decision was provided to an applicant if SBA sends a communication to the concern at a mailing address, email address, or fax number provided in the concern's profile in the System for Award Management (or successor system).

[84 FR 65244, Nov. 26, 2019, as amended at 88 FR 26212, Apr. 27, 2023]

§ 126.307 Where is there a list of certified HUBZone small business concerns?

SBA designates concerns as certified HUBZone small business concerns in DSBS (or successor system).

[84 FR 65244, Nov. 26, 2019]

§ 126.308 What happens if a HUBZone small business concern receives notice of its certification but it does not appear in DSBS as a certified HUBZone small business concern?

(a) A certified HUBZone small business concern that has received SBA's notice of certification, but does not appear in DSBS (or successor system) as a certified HUBZone small business concern within 10 business days, should immediately notify the D/HUB via email at *hubzone@sba.gov*.

(b) A certified HUBZone small business concern that has received SBA's notice of certification must appear as a certified HUBZone small business concern in DSBS (or successor system) in order to be eligible for HUBZone contracts (*i.e.*, it cannot ''opt out'' of a public display in the System for Award Management (*SAM.gov*) or DSBS (or successor systems)).

[84 FR 65244, Nov. 26, 2019]

§ 126.309 May a declined or decertified concern seek certification at a later date?

A concern that SBA has declined or decertified may seek certification after ninety (90) calendar days from the date of decline or decertification if it believes that it has overcome all reasons for decline or decertification through changed circumstances and is currently eligible. A concern found to be ineligible during a HUBZone status protest is precluded from applying for HUBZone certification for ninety (90) calendar days from the date of the final agency decision (*i.e.*, the D/HUB's decision if the protest determination is not appealed, or OHA's decision if the protest determination is appealed) pursuant to 13 CFR 126.803(d)(5).

[76 FR 43574, July 21, 2011, as amended at 88 FR 21088, Apr. 10, 2023]

Subpart D—Program Examinations

§ 126.400 Who will conduct program examinations?

SBA field staff or others designated by the D/HUB will conduct program examinations.

§ 126.401 What is a program examination?

A program examination is an investigation by SBA officials, which verifies the accuracy of any certification made or information provided as part of the HUBZone application or recertification process. Examiners may verify that the concern met the program's eligibility requirements at the time of its certification or, if applicable, at the time of its most recent recertification.

[84 FR 65244, Nov. 26, 2019]

§ 126.402 When will SBA conduct program examinations?

(a) SBA may conduct a program examination at any time after the concern submits its application, during the processing of the application, and at any time while the concern is a certified HUBZone small business concern.

(b) SBA will conduct program examinations periodically as part of the recertification process set forth in § 126.500.

(c) Upon receipt of specific and credible information alleging that a certified HUBZone small business concern no longer meets the eligibility requirements for continued program eligibility, SBA will examine the concern's eligibility for continued participation in the program.

[84 FR 65245, Nov. 26, 2019]

§ 126.403 What will SBA review during a program examination?

(a) SBA may conduct a program examination, or parts of an examination, at one or more of the concern's offices.

SBA will determine the location and scope of the examination and may review any information related to the concern's HUBZone eligibility including, but not limited to, documentation related to the location and ownership of the concern, compliance with the 35% HUBZone residency requirement, and the concern's ''attempt to maintain'' (*see* § 126.103) this percentage.

(b) SBA may require that a HUBZone small business concern (or applicant) submit additional information as part of the program examination. If SBA requests additional information, SBA will presume that written notice of the request was provided when SBA sends such request to the concern at a mailing address, email address or fax number provided in the concern's profile in the Dynamic Small Business Search (DSBS) or the System for Award Management (SAM) (or successor systems). SBA may draw an adverse inference from a concern's failure to cooperate with a program examination or provide requested information and assume that the information that the HUBZone small business concern (or applicant) failed to provide would demonstrate ineligibility, and decertify (or deny certification) on this basis.

(c) The concern must retain documentation provided in the course of a program examination for 6 years from the date of submission.

[84 FR 65245, Nov. 26, 2019]

§ 126.404 What are the possible outcomes of a program examination and when will SBA make its determination?

(a) *Timing.* SBA will make its determination within 90 calendar days after SBA receives all requested information, when practicable.

(b) *Program examinations on certified HUBZone small business concerns.* If the program examination was conducted on a certified HUBZone small business concern—

(1) And the D/HUB (or designee) determines that the concern is eligible, SBA will send a written notice to the HUBZone small business concern and continue to designate the concern as a certified HUBZone small business concern in DSBS (or successor system).

(2) And the D/HUB (or designee) determines that the concern is not eligible, the concern will have 30 days to submit documentation showing that it is eligible. During the 30-day period, such concern may not compete for or be awarded a HUBZone contract. If such concern fails to demonstrate its eligibility by the last day of the 30-day period, the concern will be decertified.

(c) *Program examinations on applicants.* If the program examination was conducted on an applicant to the HUBZone program—

(1) And the D/HUB (or designee) determines that the concern is eligible, SBA will send a written certification notice to the concern and designate the concern as a certified HUBZone small business concern in DSBS (or successor system).

(2) And the D/HUB (or designee) determines that the concern is ineligible, SBA will send a written decline notice to the concern.

[84 FR 65245, Nov. 26, 2019]

Subpart E—Maintaining HUBZone Status

§ 126.500 How does a concern maintain HUBZone certification?

(a) Any concern seeking to remain a certified HUBZone small business concern in DSBS (or successor system) must annually represent to SBA that it continues to meet all HUBZone eligibility criteria (*see* § 126.200).

(1) If at the time of its recertification the certified HUBZone small business concern is not currently performing a HUBZone contract, its representation means that at least 35% of its employees continue to reside in a HUBZone and the principal office of the concern continues to be located in a HUBZone.

(2) If at the time of its recertification the certified HUBZone small business concern is currently performing a HUBZone contract, its representation means that at least 20% of its employees continue to reside in a HUBZone and the principal office of the concern continues to be located in a HUBZone.

(3) Except as provided in paragraph (b) of this section, unless SBA has reason to question the concern's representation of its continued eligibility, SBA

will accept the representation without requiring the certified HUBZone small business concern to submit any supporting information or documentation.

(4) The concern's recertification must be submitted within 30 days of the anniversary date of its original HUBZone certification. The date of HUBZone certification is the date specified in the concern's certification letter. If the business fails to recertify, SBA may propose the concern for decertification pursuant to § 126.503.

(b) SBA will conduct a program examination of each certified HUBZone small business concern pursuant to § 126.403 at least once every three years to ensure continued program eligibility. Specifically, SBA will conduct a program examination as part of the recertification process three years after the concern's initial HUBZone certification or three years after the date of the concern's last program examination, whichever date is later.

(1) *Example:* Concern A is certified by SBA to be eligible for the HUBZone program on September 27, 2020. During that year, Concern A does not receive a HUBZone contract. Concern A must recertify its eligibility to SBA between August 27, 2021 and September 26, 2021. Concern A must represent that at least 35% of its employees continue to reside in a HUBZone and that its principal office continues to be located in a HUBZone. Concern A will continue to be a certified HUBZone small business concern that is eligible to receive HUBZone contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through September 26, 2022. On June 28, 2022, Concern A is awarded a HUBZone contract. Concern A must recertify its eligibility to SBA between August 27, 2022 and September 26, 2022. Because Concern A is performing a HUBZone contract, Concern A must represent that at least 20% of its employees continue to reside in a HUBZone and that its principal office continues to be located in a HUBZone. Concern A will continue to be a certified HUBZone small business concern that is eligible to receive HUBZone contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through September 26, 2023. Concern A must recertify its eligibility to SBA between August 27, 2023 and September 26, 2023. Because three years have elapsed since its application and original certification, SBA will conduct a program examination of Concern A at that time. In addition to its representation that it continues to be eligible as a certified HUBZone small business concern, Concern A must provide additional information as requested by SBA to demonstrate that it continues to meet all the eligibility requirements of the HUBZone Program.

(2) [Reserved]

[84 FR 65245, Nov. 26, 2019, as amended at 85 FR 66197, Oct. 16, 2020]

§ 126.501 How long does HUBZone certification last?

(a) *One-year certification.* Once SBA certifies a concern as eligible to participate in the HUBZone program, the concern will be treated as a certified HUBZone small business concern eligible for all HUBZone contracts for which the concern qualifies as small, for a period of one year from the date of its initial certification or recertification, unless the concern acquires, is acquired by, or merges with another firm during that one-year period, or the concern is performing a HUBZone contract and fails to attempt to maintain the minimum employee HUBZone residency requirement (*see* § 126.103).

(1) A certified HUBZone small business concern that acquires, is acquired by, or merges with another business entity must notify SBA within 30 days of the transaction becoming final. The concern must then demonstrate to SBA that it continues to meet the HUBZone eligibility requirements in order for it to remain eligible as a certified HUBZone small business concern.

(2) A certified HUBZone small business concern that is performing a HUBZone contract and fails to attempt to maintain the minimum employee HUBZone residency requirement (*see* § 126.103) must notify SBA within 30 days of such occurrence. A concern that cannot meet the requirement may voluntarily withdraw from the program, or it will be removed by SBA pursuant to program decertification procedures.

(b) *Annual recertification.* On the annual anniversary of a concern's certification or recertification, the concern must recertify that it is fully compliant with all HUBZone eligibility requirements (*see* § 126.200), or it can request to voluntarily withdraw from the HUBZone program.

(c) *Review of recertification.* SBA may review the concern's recertification through the program examination process when deemed appropriate and will do so every three years pursuant to § 126.500.

(1) If SBA determines that the concern is no longer eligible at the time of its recertification, SBA will propose the HUBZone small business concern for decertification pursuant to § 126.503.

(2) If SBA determines that the concern continues to be eligible, SBA will notify the concern of this determination. In such case, the concern will:

(i) Continue to be designated as a certified HUBZone small business concern in DSBS (or successor system); and

(ii) Be treated as an eligible HUBZone small business concern for all HUBZone contracts for which the concern qualifies as small for a period of one year from the date of the recertification.

(d) *Voluntary withdrawal.* A HUBZone small business concern may request to voluntarily withdraw from the HUBZone program at any time. Once SBA concurs, SBA will decertify the concern and no longer designate it as a certified HUBZone small business concern in DSBS (or successor system). The concern may apply again for certification at any point ninety (90) calendar days after the date of decertification. At that point, the concern would have to demonstrate that it meets all HUBZone eligibility requirements.

[84 FR 65246, Nov. 26, 2019]

§ 126.502 Is there a limit to the length of time a concern may be a certified HUBZone small business concern?

There is no limit to the length of time a concern may remain designated as a certified HUBZone small business concern in DSBS (or successor system) so long as it continues to comply with the provisions of §§ 126.200, 126.500, and 126.501.

[84 FR 65246, Nov. 26, 2019]

§ 126.503 What happens if SBA is unable to verify a HUBZone small business concern's eligibility or determines that a concern is no longer eligible for the program?

(a) *Proposed decertification*—(1) *General.* If SBA is unable to verify a certified HUBZone small business concern's eligibility or has information indicating that a concern was not eligible for the program at the time of certification or recertification, SBA may propose decertification of the concern. In addition, if during the one-year period of time after certification or recertification SBA believes that a HUBZone small business concern that is performing one or more HUBZone contracts no longer has at least 20% of its employees living in a HUBZone, SBA will propose the concern for decertification based on the concern's failure to attempt to maintain compliance with the HUBZone residency requirement.

(i) *Notice of proposed decertification.* SBA will notify the HUBZone small business concern in writing that SBA is proposing to decertify it and state the reasons for the proposed decertification. The notice of proposed decertification will notify the concern that it has 30 days from the date it receives the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify decertification. SBA will consider that written notice was provided if SBA sends the notice of proposed decertification to the concern at a mailing address, email address, or fax number provided in the concern's profile in the System for Award Management (*SAM.gov*) or the Dynamic Small Business Search (DSBS) (or successor systems).

(ii) *Response to notice of proposed decertification.* The HUBZone small business concern must submit a written response to the notice of proposed decertification within the timeframe specified in the notice. In this response, the HUBZone small business concern must rebut each of the reasons set forth by

SBA in the notice of proposed decertification, and where appropriate, the rebuttal must include documents showing that the concern is eligible for the HUBZone program as of the date specified in the notice.

(iii) *Adverse inference.* If a HUBZone small business concern fails to cooperate with SBA or fails to provide the information requested, the D/HUB may draw an adverse inference and assume that the information that the concern failed to provide would demonstrate ineligibility.

(2) *SBA's decision.* SBA will determine whether the HUBZone small business concern remains eligible for the program within 90 calendar days after receiving all requested information, when practicable. The D/HUB will provide written notice to the concern stating the basis for the determination.

(i) If SBA finds that the concern is not eligible, the D/HUB will decertify the concern and remove its designation as a certified HUBZone small business concern in DSBS and the System for Award Management (or successor system) within four business days of the determination.

(ii) If SBA finds that the concern is eligible, the concern will continue to be designated as a certified HUBZone small business concern in DSBS (or successor system).

(b) *Decertification pursuant to a protest.* The procedures described in paragraph (a) of this section do not apply to HUBZone status protests. If the D/HUB sustains a protest pursuant to §126.803, SBA will decertify the HUBZone small business concern immediately and change the concern's status in DSBS (or successor system) to reflect that it no longer qualifies as a certified HUBZone small business concern without first proposing it for decertification.

(c) *Decertification due to submission of false information.* If SBA discovers that a certified HUBZone small business concern or its representative knowingly submitted false information, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may request that Government-wide debarment or suspension proceedings be initiated by the agency.

(d) *Effect of decertification.* Once SBA has decertified a concern, the concern cannot submit an offer or quote as a HUBZone small business concern. If a concern does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified as a HUBZone small business on a pending procurement, the concern must immediately inform the contracting officer for the procuring agency of the adverse eligibility determination. A contracting officer shall not award a HUBZone contract to a concern that the D/HUB has determined is not an eligible HUBZone small business concern for the procurement in question.

[84 FR 65246, Nov. 26, 2019, as amended at 88 FR 26212, Apr. 27, 2023]

§ 126.504 When will SBA remove the designation of a concern in DSBS (or successor system) as a certified HUBZone small business concern?

(a) SBA will remove the designation of a concern in DSBS (or successor system) as a certified HUBZone small business concern if the concern has:

(1) Been decertified as a result of a HUBZone status protest pursuant to §126.803;

(2) Been decertified as a result of the procedures set forth in §126.503; or

(3) Voluntarily withdrawn from the HUBZone program pursuant to §126.501(b).

(b) SBA will remove the designation of a concern in DSBS (or successor system) as a certified HUBZone small business concern as soon as the D/HUB issues a decision decertifying the concern from the program.

(c) After a concern has been removed as a certified HUBZone small business concern in DSBS (or successor system), it is ineligible for the HUBZone program and may not submit an offer for a HUBZone contract.

(1) As long as the concern was eligible at the time of its offer (and eligibility relates back to the date of its certification or recertification), it could be awarded a HUBZone contract

even if it no longer appears as a certified HUBZone small business concern on DSBS on the date of award.

(2) If SBA determines that the concern's recertification was invalid (*i.e.*, based on a protest or program examination SBA determines that the concern did not qualify as a HUBZone small business concern on the date of its recertification), the concern will be ineligible for the award of any HUBZone contract for which it previously certified its HUBZone status.

[84 FR 65247, Nov. 26, 2019]

Subpart F—Contracting With Certified HUBZone Small Business Concerns

§ 126.600 What are HUBZone contracts?

HUBZone contracts are contracts awarded to a certified HUBZone small business concern, regardless of the place of performance, through any of the following procurement methods:

(a) Sole source awards to certified HUBZone small business concerns;

(b) Set-aside awards, including partial set-asides, based on competition restricted to certified HUBZone small business concerns;

(c) Awards to certified HUBZone small business concerns through full and open competition after a price evaluation preference is applied to an other than small business in favor of certified HUBZone small business concerns;

(d) Awards based on a reserve for certified HUBZone small business concerns in a solicitation for a Multiple Award Contract (*see* § 125.1); or

(e) Orders set-aside for certified HUBZone small business concerns under a Multiple Award Contract that was awarded in full and open competition.

[78 FR 61144, Oct. 2, 2013, as amended at 81 FR 48591, July 25, 2016; 84 FR 65247, Nov. 26, 2019]

§ 126.601 What additional requirements must a certified HUBZone small business concern meet to submit an offer on a HUBZone contract?

(a) Only certified HUBZone small business concerns are eligible to submit offers for a HUBZone contract or to receive a price evaluation preference under § 126.613.

(b) At the time a certified HUBZone small business concern submits its initial offer (including price) on a specific HUBZone contract, it must certify to the contracting officer that it:

(1) Is a certified HUBZone small business concern in DSBS (or successor system);

(2) Is small, together with its affiliates, at the time of its offer under the size standard corresponding to the NAICS code assigned to the procurement;

(3) Will ''attempt to maintain'' having at least 35% of its employees residing in a HUBZone during the performance of the contract, as set forth in § 126.200(e); and

(4) Will comply with the applicable limitations on subcontracting during performance of the contract, as set forth in § 125.6 of this chapter and §§ 126.200(f) and 126.700.

(c) A certified HUBZone small business concern may submit an offer on a HUBZone contract for supplies as a nonmanufacturer if it meets the requirements of the nonmanufacturer rule set forth at § 121.406 of this chapter.

(d) Where a subcontractor that is not a certified HUBZone small business will perform the primary and vital requirements of a HUBZone contract, or where a HUBZone prime contractor is unduly reliant on one or more small businesses that are not HUBZone-certified to perform the HUBZone contract, the prime contractor is not eligible for award of that HUBZone contract.

(1) When the subcontractor qualifies as small for the size standard assigned to the procurement, this issue may be grounds for a HUBZone status protest, as described in § 126.801. When the subcontractor is alleged to be other than small for the size standard assigned to the procurement, this issue may be grounds for a size protest under the ostensible subcontractor rule, as described at § 121.103(h)(3) of this chapter.

(2) In the case of a contract or order for services, specialty trade construction or supplies, SBA will find that a

prime HUBZone contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not HUBZone-certified, where the prime contractor can demonstrate that it, together with any subcontractors that are certified HUBZone small business concerns, will meet the limitations on subcontracting provisions set forth in §125.6 of this chapter.

(3) In a general construction contract, the primary and vital requirements of the contract are the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed.

(e) For two-step procurements (including architect-engineering and design-build procurements) to be awarded as HUBZone contracts, a concern must be a certified HUBZone small business concern as of the date that it submits its initial bid or proposal (which may or may not include price) during phase one.

[84 FR 65247, Nov. 26, 2019, as amended at 84 FR 65664, Nov. 29, 2019; 85 FR 5304, Jan. 30, 2020; 88 FR 26212, Apr. 27, 2023]

§ 126.602 Must a certified HUBZone small business concern maintain the employee residency percentage during contract performance?

(a) A certified HUBZone small business concern that has not received a HUBZone contract must have at least 35% of its employees residing within a HUBZone at the time of certification and annual recertification. Such a concern need not meet the 35% HUBZone residency requirement at all times while certified in the program. A certified HUBZone small business concern that has received a HUBZone contract must ''attempt to maintain'' (*see* §126.103) having 35% of its employees residing in a HUBZone during the performance of any HUBZone contract awarded to the concern on the basis of its HUBZone status. Such a concern must have at least 20% of its employees residing within a HUBZone at the time of its annual recertification.

(b) For orders under indefinite delivery, indefinite quantity contracts, including orders under multiple award contracts, a certified HUBZone small business concern must ''attempt to maintain'' the HUBZone residency requirement during the performance of each order that is set aside for HUBZone small business concerns.

(c) A certified HUBZone small business concern eligible for the program pursuant to §126.200(c)(2)(ii) must have at least 35% of its employees engaged in performing a HUBZone contract residing within any Indian reservation governed by one or more of the concern's Indian Tribal Government owners, or residing within any HUBZone adjoining any such Indian reservation.

(d) A certified HUBZone small business concern that has less than 20% of its total employees residing in a HUBZone during the performance of a HUBZone contract has failed to attempt to maintain the HUBZone residency requirement. Such failure will result in proposed decertification pursuant to §126.503.

[84 FR 65247, Nov. 26, 2019, as amended at 85 FR 66197, Oct. 16, 2020]

§ 126.603 Does HUBZone certification guarantee receipt of HUBZone contracts?

HUBZone certification does not guarantee that a certified HUBZone small business concernwill receive HUBZone contracts. Certified HUBZone small business concerns should market their capabilities to appropriate contracting activities in order to increase the prospect that the contracting activity will adopt an acquisition strategy that includes HUBZone contract opportunities.

[69 FR 29425, May 24, 2004, as amended at 84 FR 65247, Nov. 26, 2019]

§ 126.604 Who decides if a contract opportunity for HUBZone set-aside competition exists?

The contracting officer for the contracting activity makes this decision.

§ 126.605 What requirements are not available for HUBZone contracts?

A contracting activity may not make a requirement available for a HUBZone contract if:

(a) The contracting activity otherwise would fulfill that requirement

through award to Federal Prison Industries, Inc. under 18 U.S.C. 4124 or 4125, or to Javits-Wagner-O'Day Act participating non-profit agencies for the blind and severely disabled, under 41 U.S.C. 46 *et seq.*, as amended; or

(b) An 8(a) participant currently is performing the requirement through the 8(a)BD program or SBA has accepted the requirement for award through the 8(a)BD program, unless SBA has consented to release the requirement from the 8(a)BD program.

[63 FR 31908, June 11, 1998, as amended at 69 FR 29425, May 24, 2004]

§ 126.606 May a procuring activity request that SBA release a requirement from the 8(a) BD program for award as a HUBZone contract?

A procuring activity may request that SBA release an 8(a) requirement for award as a HUBZone contract under the procedures set forth in § 124.504(d).

[85 FR 66197, Oct. 16, 2020]

§ 126.607 When must a contracting officer set aside a requirement for certified HUBZone small business concerns?

(a) The contracting officer first must review a requirement to determine whether it is excluded from HUBZone contracting pursuant to § 126.605.

(b) *Contracting Among Small Business Programs*—(1) *Acquisitions Valued at or below the Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Micropurchase Threshold but not exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from making an award to a small business under the 8(a) BD, HUBZone, SDVO SBC or WOSB Programs.

(2) *Acquisitions Valued Above the Simplified Acquisition Threshold.* (i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's certifications in the System for Award Management (SAM) (or any successor system) and associated representations were reviewed.

(ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

(c) If the contracting officer decides to set aside the requirement for competition restricted to certified HUBZone small business concerns, the contracting officer must:

(1) Have a reasonable expectation after reviewing the list of certified HUBZone small business concerns contained in DSBS (or successor system) that at least two responsible qualified HUBZone SBCs will submit offers; and

(2) Determine that award can be made at fair market price.

[63 FR 31908, June 11, 1998, as amended at 70 FR 51250, Aug. 30, 2005; 75 FR 62281, Oct. 7, 2010; 77 FR 1860, Jan. 12, 2012; 78 FR 61146, Oct. 2, 2013; 84 FR 65247, Nov. 26, 2019]

§ 126.608 Are there HUBZone contract opportunities at or below the simplified acquisition threshold or micropurchase threshold?

A CO may make a requirement available as a HUBZone set-aside or sole source award if it is at or below the simplified acquisition threshold. In addition, a CO may award a requirement as a HUBZone contract to a certified HUBZone small business concern at or below the micropurchase threshold.

[69 FR 29425, May 24, 2004, as amended at 84 FR 65248, Nov. 26, 2019]

§ 126.609 Can a HUBZone competition be limited or authorize preferences to small business concerns having additional socioeconomic certifications?

A procuring activity cannot restrict a HUBZone competition (for either a contract or order) to require SBA socioeconomic certifications other than HUBZone certification (*i.e.*, a competition cannot be limited only to business concerns that are both HUBZone and 8(a), HUBZone and WOSB, or HUBZone and SDVO) or give evaluation preferences to firms having one or more other certifications.

[88 FR 26212, Apr. 27, 2023]

§ 126.610 May SBA appeal a contracting officer's decision not to make a procurement available for award as a HUBZone contract?

(a) The Administrator may appeal a CO's decision not to make a particular requirement available for award as a HUBZone contract to the Secretary of the department or head of the agency.

(b) An appeal is initiated by SBA's Procurement Center Representative to the CO, and may be in response to information supplied by the D/HUB, his or her designee, or other interested parties.

[69 FR 29425, May 24, 2004]

§ 126.611 What is the process for an appeal of a contracting officer's decision not to issue a procurement as a HUBZone contract?

(a) *Notice of appeal.* When the contracting officer rejects a recommendation by SBA's Procurement Center Representative to make a requirement available for award as a HUBZone contract, he or she must notify the Procurement Center Representative as soon as practicable. If the Administrator intends to appeal the decision, SBA must notify the contracting officer no later than five business days after receiving notice of the contracting officer's decision.

(b) *Suspension of action.* Upon receipt of notice of SBA's intent to appeal, the contracting officer must suspend further action regarding the procurement until the head of the contracting activity issues a written decision on the appeal, unless the head of the contracting activity makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.

(c) *Deadline for appeal.* Within 15 business days of SBA's notification to the CO, SBA must file its formal appeal with the Secretary of the department or head of the agency, or the appeal will be deemed withdrawn.

(d) *Decision.* The contracting activity must specify in writing the reasons for a denial of an appeal brought under this section.

[63 FR 31908, June 11, 1998, as amended at 69 FR 29425, May 24, 2004; 84 FR 65248, Nov. 26, 2019]

§ 126.612 When may a CO award sole source contracts to HUBZone small business concerns?

A contracting officer may award a sole source contract to a HUBZone small business concern only when the contracting officer determines that:

(a) None of the provisions of §§ 126.605 or 126.607 apply;

(b) The anticipated award price of the contract, including options, will not exceed:

(1) $7,000,000 for a contract assigned a manufacturing NAICS code, or

(2) $4,500,000 for all other contracts.

(c) Two or more HUBZone small business concerns are not likely to submit offers;

(d) A HUBZone small business concern is a responsible contractor able to perform the contract; and

(e) In the estimation of the CO, contract award can be made at a fair and reasonable price.

[63 FR 31908, June 11, 1998, as amended at 69 FR 29425, May 24, 2004; 74 FR 46887, Sept. 14, 2009; 83 FR 12852, Mar. 26, 2018; 84 FR 65248, Nov. 26, 2019; 86 FR 61673, Nov. 8, 2021]

§ 126.613 How does a price evaluation preference affect the bid of a certified HUBZone small business concern in full and open competition?

(a)(1) Where a CO will award a contract on the basis of full and open competition, the CO must deem the price offered by a certified HUBZone small business concern to be lower than the price offered by another offeror (other than another small business concern) if the price offered by the certified HUBZone small business concern is not more than 10% higher than the price offered by the otherwise lowest, responsive, and responsible offeror. For a best value procurement, the CO must apply the 10% preference to the otherwise successful offer of a large business and then determine which offeror represents the best value to the Government, in accordance with the terms of the solicitation. This does not apply if the certified HUBZone small business concern will receive the contract as part of a reserve for certified HUBZone small business concerns.

(2) Where, after considering the price evaluation adjustment, the price offered by a certified HUBZone small business concern is equal to the price offered by a large business (or, in a best value procurement, the total evaluation points received by a certified HUBZone small business concern is equal to the total evaluation points received by a large business), award shall be made to the certified HUBZone small business concern.

(i) *Example 1*:

In a full and open competition, a certified HUBZone small business concern submits an offer of $98, a non-HUBZone small business concern submits an offer of $95, and a large business submits an offer of $93. The lowest, responsive, responsible offeror would be the large business. However, the CO must apply the HUBZone price evaluation preference. In this example, the certified HUBZone small business concern's offer is not more than 10% higher than the large business' offer and, consequently, the certified HUBZone small business concern displaces the large business as the lowest, responsive, and responsible offeror.

(ii) *Example 2*:

In a full and open competition, a certified HUBZone small business concern submits an offer of $103, a non-HUBZone small business concern submits an offer of $100, and a large business submits an offer of $93. The lowest, responsive, responsible offeror would be from the large business. The CO must then apply the HUBZone price evaluation preference. In this example, the certified HUBZone small business concern's offer is more than 10% higher than the large business' offer and, consequently, the certified HUBZone small business concern does not displace the large business as the lowest, responsive, and responsible offeror. In addition, the non-HUBZone small business concern's offer at $100 does not displace the large business' offer because a price evaluation preference is not applied to change an offer and benefit a non-HUBZone small business concern.

(iii) *Example 3*:

In a full and open competition, a certified HUBZone small business concern submits an offer of $98 and a non-HUBZone small business concern submits an offer of $93. The CO would not apply the price evaluation preference in this procurement because the lowest, responsive, responsible offeror is a SBC.

(iv) *Example 4*:

In a full and open competition, a certified HUBZone small business concern submits an offer of $98 and a large business submits an offer of $93. The contracting officer has stated in the solicitation that one contract will be reserved for a certified HUBZone small business concern. The contracting officer would not apply the price evaluation preference when determining which HUBZone small business concern would receive the contract reserved for HUBZone small business concerns, but would apply the price evaluation preference when determining the awardees for the non-reserved portion.

(b)(1) For purchases by the Secretary of Agriculture of agricultural commodities, the price evaluation preferences shall be:

(i) 10%, for the portion of a contract to be awarded that is not greater than 25% of the total volume being procured for each commodity in a single invitation for bids (IFB);

(ii) 5%, for the portion of a contract to be awarded that is greater than 25%, but not greater than 40%, of the total volume being procured for each commodity in a single IFB; and

(iii) Zero, for the portion of a contract to be awarded that is greater than 40% of the total volume being procured for each commodity in a single IFB.

(2) The 10% and 5% price evaluation preferences for agricultural commodities apply to all offers from certified HUBZone small business concerns up to the 25% and 40% volume limits specified in paragraph (b)(1) of this section. As such, more than one certified HUBZone small business concern may receive a price evaluation preference for any given commodity in a single IFB.

(i) *Example*:

There is an IFB for 100,000 pounds of wheat. Bid 1 (from a large business) is $1/pound for 100,000 pounds of wheat. Bid 2 (from a HUBZone small business concern) is $1.05/pound for 20,000 pounds of wheat. Bid 3 (from a HUBZone small business concern) is $1.04/pound for 20,000 pounds. Bid 3 receives a 10% price evaluation adjustment for 20,000 pounds, since 20,000 is less than 25% of 100,000 pounds. With the 10% price evaluation adjustment, Bid 1 changes from $20,000 for the first 20,000 pounds to $22,000. Bid 3's price of $20,800 ($1.04 × 20,000) is now lower than any other bid for 20,000 pounds. Thus, Bid 3 will be accepted for the full 20,000 pounds. Bid 2 receives a 10% price evaluation adjustment for that amount of its bid when added to the volume in Bid 3 that does not exceed 25% of the total volume being procured. Since 25,000 pounds is 25% of the total volume of wheat under the IFB, and Bid 3 totaled 20,000 pounds, a 10% price evaluation adjustment will be applied to the first 5,000 pounds of Bid 2. With the price evaluation adjustment, the price for Bid 1, as measured against Bid 2, for 5,000 pounds changes from $5,000 to $5,500. Bid 2's price of $5,250 ($1.05 × 5,000) is lower than Bid 1 for 5,000 pounds. Bid 2 will then receive a 5% price evaluation adjustment for the remaining 15,000 pounds, since the total volume of Bids 3 and 2 receiving an adjustment does not exceed 40% of the total volume of wheat under the IFB (*i.e.*, 40,000 pounds). With the 5% price evaluation adjustment, Bid 1's price for the next 15,000 pounds changes from $15,000 to $15,750. Bid 2's price for that 15,000 pounds is also $15, 750 ($1.05 × 15,000). Because the evaluation price for Bid 2 is *not more than* 10% higher than the price offered by Bid 1, Bid 2's price is deemed to be lower than the price offered by Bid 1. Since the evaluation price for both the first 5,000 pounds (receiving a 10% price evaluation adjustment) and the remaining 15,000 pounds (receiving a 5% price evaluation adjustment) is less than Bid 1, Bid 2 will be accepted for the full 20,000 pounds.

(ii) [Reserved]

(c) For purchases by the Secretary of Agriculture of agricultural commodities for export operations through international food aid programs administered by the Farm Service Agency, the price evaluation preference shall be 5% on the first portion of a contract to be awarded that is not greater than 20% of the total volume being procured for each commodity in a single IFB.

(d) A contract awarded to a certified HUBZone small business concern under a preference described in paragraph (b) of this section shall not be counted toward the fulfillment of any requirement partially set aside for competition restricted to small business concerns.

[69 FR 29425, May 24, 2004, as amended at 70 FR 51250, Aug. 30, 2005; 78 FR 61146, Oct. 2, 2013; 84 FR 65248, Nov. 26, 2019]

§ 126.614 [Reserved]

§ 126.615 May a large business participate on a HUBZone contract?

Except as provided in § 126.618, a large business may not participate as a prime contractor on a HUBZone award, but may participate as a subcontractor to an otherwise qualified HUBZone

SBC, subject to the contract performance requirements set forth in §126.700.

[81 FR 48591, July 25, 2016, as amended at 81 FR 71983, Oct. 19, 2016]

§ 126.616 What requirements must a joint venture satisfy to submit an offer and be eligible to perform on a HUBZone contract?

(a) *General.* A certified HUBZone small business concern may enter into a joint venture agreement with one or more other small business concerns, or with an SBA-approved mentor authorized by §125.9 of this chapter, for the purpose of submitting an offer for a HUBZone contract.

(1) The joint venture itself need not be a certified HUBZone small business concern, but the joint venture should be designated as a HUBZone joint venture in SAM (or successor system) with the HUBZone-certified joint venture partner identified.

(2) A certified HUBZone small business concern cannot be a joint venture partner on more than one joint venture that submits an offer for a specific contract or order set-aside or reserved for certified HUBZone small business concerns.

(b) *Size.* (1) A joint venture of at least one certified HUBZone small business concern and one or more other business concerns may submit an offer as a small business for a HUBZone procurement or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.

(2) A joint venture between a protégé firm and its SBA-approved mentor (*see* §125.9 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the HUBZone procurement or sale.

(c) *Contents of joint venture agreement.* Every joint venture agreement to perform a HUBZone contract, including those between a protégé firm that is a certified HUBZone small business concern and its SBA-approved mentor authorized by §124.520 or §125.9 of this chapter, must contain a provision:

(1) Setting forth the purpose of the joint venture;

(2) Designating a certified HUBZone small business concern as the managing venturer of the joint venture, and designating a named employee of the certified HUBZone small business managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the certified HUBZone small business concern at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the certified HUBZone small business concern if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the certified HUBZone small business concern for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager.

(3) Stating that with respect to a separate legal entity joint venture, the certified HUBZone small business concern must own at least 51% of the joint venture entity;

(4) Stating that the certified HUBZone small business concern must receive profits from the joint venture commensurate with the work performed by the certified HUBZone small business concern, or a percentage agreed to by the parties to the joint venture whereby the certified HUBZone small business concern receives profits from the joint venture that exceed the percentage commensurate with the work performed by the certified HUBZone small business concern;

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. All payments due the joint venture for performance on a HUBZone contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the HUBZone partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the HUBZone partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(8) Obligating all parties to the joint venture to ensure performance of the HUBZone contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the certified HUBZone small business concern managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(10) Requiring that the final original records be retained by the certified HUBZone small business concern managing venturer upon completion of the HUBZone contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) *Limitations on subcontracting.* (1) For any HUBZone contract to be performed by a joint venture between a certified HUBZone small business concern and another certified HUBZone small business concern, the aggregate of the certified HUBZone small business concerns to the joint venture, not each concern separately, must perform the applicable percentage of work required by §125.6 of this chapter.

(2) For any HUBZone contract to be performed by a joint venture between a certified HUBZone small business concern and a small business concern or its SBA-approved mentor authorized by §125.9 or §124.520 of this chapter, the joint venture must perform the applicable percentage of work required by §125.6 of this chapter, and the certified HUBZone small business concern partner to the joint venture must perform

at least 40% of the work performed by the joint venture.

(i) The work performed by the certified HUBZone small business concern partner to a joint venture must be more than administrative or ministerial functions so that it gains substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the certified HUBZone small business concern partner must be at least 40% of the total done by the partners. In determining the amount of work done by a mentor participating in a joint venture with a HUBZone qualified protégé, all work done by the mentor and any of its affiliates at any subcontracting tier will be counted.

(e) *Certification of compliance*—(1) *At time of offer*. If submitting an offer as a joint venture for a HUBZone contract, at the time of initial offer (and if applicable, final offer), each certified HUBZone small business concern joint venture partner must make the following certifications to the contracting officer separately under its own name:

(i) It is a certified HUBZone small business concern that appears in DSBS (or successor system) as a certified HUBZone small business concern and it met the eligibility requirements in §126.200 at the time of its initial certification or, if applicable, at the time of its most recent recertification;

(ii) It, together with its affiliates, is small under the size standard corresponding to the NAICS code assigned to the procurement;

(iii) It will ''attempt to maintain'' having at least 35% of its employees residing in a HUBZone during performance of the contract; and

(iv) It will comply with the applicable limitations on subcontracting during performance of the contract, as set forth in §125.6 of this chapter and §§126.200(f) and 126.700.

(2) *Prior to performance*. Prior to the performance of any HUBZone contract as a joint venture, the HUBZone small business concern partner to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating the following:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section; and

(ii) The parties will perform the contract in compliance with the joint venture agreement.

(f) *Capabilities, past performance, and experience*. When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for a HUBZone contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the HUBZone small business concern to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

(g) *Contract execution*. The procuring activity will execute a HUBZone contract in the name of the joint venture entity or the certified HUBZone small business concern, but in either case will identify the award as one to a HUBZone joint venture or a HUBZone mentor-protégé joint venture, as appropriate.

(h) *Inspection of records*. The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(i) *Limitations on subcontracting reports*. The certified HUBZone small business concern partner to a joint venture must describe how it is meeting or has met the applicable limitations on subcontracting requirements for each HUBZone contract it performs as a joint venture.

(1) The certified HUBZone small business concern partner to the joint venture must annually submit a report to the relevant contracting officer and to

the SBA, signed by an authorized official of each partner to the joint venture, explaining how the limitations on subcontracting requirements are being met for each HUBZone contract performed during the year.

(2) At the completion of every HUBZone contract awarded to a joint venture, the certified HUBZone small business concern partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the limitations on subcontracting requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (c) of this section.

(j) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or limitations on subcontracting requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (h) of this section.

(k) Any person with information concerning a joint venture's compliance with the limitations on subcontracting requirements may report that information to SBA and/or the SBA Office of Inspector General.

[81 FR 48591, July 25, 2016, as amended at 81 FR 94942, Dec. 27, 2016; 83 FR 12852, Mar. 26, 2018; 84 FR 65248, Nov. 29, 2019; 85 FR 66197, Oct. 16, 2020; 86 FR 2959, Jan. 14, 2021; 88 FR 26212, Apr. 27, 2023]

§ 126.617 Who decides contract disputes arising between a certified HUBZone small business concern and a contracting activity after the award of a HUBZone contract?

For purposes of the Disputes Clause of a specific HUBZone contract, the contracting activity will decide disputes arising between a certified HUBZone small business concern and the contracting activity.

[69 FR 29426, May 24, 2004, as amended at 84 FR 65249, Nov. 26, 2019]

§ 126.618 How does a certified HUBZone small business concern's participation in a Mentor-Protégé relationship affect its participation in the HUBZone Program?

(a) A certified HUBZone small business concern may enter into a mentor-protégé relationship under § 125.9 of this chapter or in connection with a mentor-protégé program of another agency, provided that such relationships do not conflict with the HUBZone requirements described in § 126.200.

(b) For purposes of determining whether an applicant to the HUBZone Program or a certified HUBZone small business concern qualifies as small under part 121 of this chapter, SBA will not find affiliation between the applicant or certified HUBZone small business concern and the firm that is its mentor in an SBA-approved mentor-protégé relationship (including a mentor that is other than small) on the basis of the mentor-protégé agreement or the assistance provided to the protégé firm under the agreement. SBA will not consider the employees of the mentor in determining whether the applicant or certified HUBZone small business concern meets (or continues to meet) the 35% HUBZone residency requirement or the principal office requirement, or in determining the size of the applicant or certified HUBZone small business concern for any employee-based size standard.

(c) A certified HUBZone small business concern that is a prime contractor on a HUBZone contract may subcontract work to its mentor.

(1) The certified HUBZone small business concern must meet the applicable limitations on subcontracting requirements set forth in § 125.6(c) of this chapter.

(2) SBA may find affiliation between a prime HUBZone contractor and its

mentor subcontractor where the mentor will perform primary and vital requirements of the contract. *See* § 121.103(h)(3) of this chapter.

[81 FR 48593, July 25, 2016, as amended at 84 FR 65249, Nov. 26, 2019; 85 FR 66197, Oct. 16, 2020; 88 FR 26213, Apr. 27, 2023]

§ 126.619 When must a certified HUBZone small business concern recertify its status for a HUBZone contract?

(a) A concern that is a certified HUBZone small business concern at the time of initial offer (including a Multiple Award Contract) is generally considered a HUBZone small business concern throughout the life of that contract.

(1) If a concern is a certified HUBZone small business concern at the time of initial offer for a HUBZone Multiple Award Contract, then it will be considered a certified HUBZone small business concern for each order issued against the contract, unless a contracting officer requests a new HUBZone certification in connection with a specific order (see paragraph (b)(4) of this section).

(2) Except for orders under Federal Supply Schedule contracts, where the underlying Multiple Award Contract is not a HUBZone contract and a procuring agency is setting aside an order for the HUBZone program, a concern must be a certified HUBZone small business concern and appear in DSBS (or successor system) as a certified HUBZone small business concern at the time it submits its offer for the order.

(3) Where a contract is novated to another business concern, the concern that will continue performance on the contract must certify its status as a certified HUBZone small business concern to the procuring agency, or inform the procuring agency that it is not a certified HUBZone small business concern, within 30 days of the novation approval. If the concern is not a certified HUBZone small business concern, the agency can no longer count any work performed under the contract, including any options or orders issued pursuant to the contract, from that point forward towards its HUBZone goals.

(4) Where a concern that is performing a contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its status as a certified HUBZone small business concern to the procuring agency, or inform the procuring agency that it no longer qualifies as a HUBZone small business concern. If the contractor is unable to recertify its status as a HUBZone small business concern, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals. The agency must immediately revise all applicable Federal contract databases to reflect the new status.

(5) Where a concern is decertified after the award of a HUBZone contract, the procuring agency may exercise options and still count the award as an award to a HUBZone small business concern, except where recertification is required or requested under this section, or where the concern has been found to be ineligible for award pursuant to a HUBZone status protest pursuant to § 126.803.

(b) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its status as a HUBZone small business concern no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option. If the business is unable to recertify its HUBZone status, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals.

(1) If the concern cannot recertify that it qualifies as a HUBZone small business concern, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals. This means that if the concern either no longer meets the HUBZone eligibility requirements or no longer qualifies as small for the size standard corresponding to NAICS code assigned to the contract, the agency

can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals.

(2) A concern that did not certify itself as a HUBZone small business concern, either initially or prior to an option being exercised, may recertify itself as a HUBZone small business concern for a subsequent option period if it meets the eligibility requirements at that time.

(3) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(4) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date of the concern's initial certification or, if applicable, its most recent recertification.

(c) Except for Blanket Purchase Agreements under Federal Supply Schedule contracts, a concern's status will be determined at the time of submission of its initial response to a solicitation for an Agreement (including Blanket Purchase Agreements (BPAs), Basic Agreements, Basic Ordering Agreements, or any other Agreement that a contracting officer sets aside or reserves awards for certified HUBZone small business concerns) and each order issued pursuant to the Agreement.

[84 FR 65249, Nov. 26, 2019, as amended at 85 FR 5304, Jan. 30, 2020; 85 FR 27660, May 11, 2020]

Subpart G—Contract Performance Requirements

§ 126.700 What are the limitations on subcontracting requirements for HUBZone contracts?

(a) *Other than Multiple Award Contracts.* For other than a Multiple Award Contract, a prime contractor receiving an award as a certified HUBZone small business concern must meet the limitations on subcontracting requirements set forth in § 125.6 of this chapter.

(b) *Multiple Award Contracts*—(1) *Total Set-Aside Contracts.* For a Multiple Award Contract that is totally set aside for certified HUBZone small business concerns, a certified HUBZone small business concern must comply with the applicable limitations on subcontracting (*see* § 125.6), or if applicable, the nonmanufacturer rule (*see* § 121.406 of this chapter), during the base term and during each subsequent option period. However, the contracting officer, at his or her discretion, may also require the concern to comply with the limitations on subcontracting or the nonmanufacturer rule for each individual order awarded under the Multiple Award Contract.

(2) *Partial Set-Aside Contracts.* For Multiple Award Contracts that are partially set aside for certified HUBZone small business concerns, paragraph (b)(1) of this section applies to the set-aside portion of the contract. For orders awarded under the non-set-aside portion of a Multiple Award Contract, a certified HUBZone small business concern need not comply with any limitations on subcontracting or nonmanufacturer rule requirements.

(3) *Orders Set Aside for certified HUBZone small business concerns.* For each individual order that is set aside for certified HUBZone small business concerns under a Multiple Award Contract that is not itself set aside for certified HUBZone small business concerns, a certified HUBZone small business concern must comply with the applicable limitations on subcontracting (*see* § 125.6 of this chapter), or if applicable, the nonmanufacturer rule (*see* § 121.406 of this chapter), in the performance of such order.

(4) *Reserves.* For an order that is set aside for certified HUBZone small business concerns against a Multiple Award Contract with a HUBZone reserve, a certified HUBZone small business concern must comply with the applicable limitations on subcontracting (*see* § 125.6 of this chapter), or if applicable, the nonmanufacturer rule (*see* § 121.406 of this chapter), in the performance of such order. However, the certified HUBZone small business concern does not have to comply with the limitations on subcontracting or the nonmanufacturer rule for any order issued

against the Multiple Award Contract if the order is competed amongst certified HUBZone small business concerns and one or more other-than-small business concerns.

[84 FR 65249, Nov. 26, 2019, as amended at 86 FR 61673, Nov. 8, 2021]

§ 126.701 Can these subcontracting percentages requirements change?

Yes. The Administrator may change the subcontracting percentage requirements if the Administrator determines that such action is necessary to reflect conventional industry practices.

§ 126.702 How can the subcontracting percentage requirements be changed?

SBA may change the required subcontracting percentage for a specific industry if the Administrator determines that such action is necessary to reflect conventional industry practices among SBCs that are below the numerical size standard for businesses in that industry group. The procedures for requesting changes in subcontracting percentages are set forth in §125.6 of this chapter.

[69 FR 29427, May 24, 2004]

Subpart H—Protests

§ 126.800 Who may protest the status of a certified HUBZone small business concern?

(a) *For sole source procurements.* SBA or the contracting officer may protest the proposed awardee's status as a certified HUBZone small business concern.

(b) *For all other procurements, including Multiple Award Contracts (see §125.1 of this chapter).* SBA, the contracting officer, or any other interested party may protest the apparent successful offeror's status as a certified HUBZone small business concern.

[84 FR 65250, Nov. 26, 2019]

§ 126.801 How does an interested party file a HUBZone status protest?

(a) *General.* (1) A HUBZone status protest is the process by which an interested party may challenge the HUBZone status of an apparent successful offeror on a HUBZone contract, including a HUBZone joint venture submitting an offer under §126.616. SBA will also consider a protest challenging whether a HUBZone prime contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract.

(2) The protest procedures described in this part are separate from those governing size protests and appeals. All protests relating to whether a certified HUBZone small business concern is other than small for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of the HUBZone small business concern and whether the concern meets the HUBZone eligibility requirements set forth in §126.200, SBA will process the protests concurrently, under the procedures set forth in part 121 of this chapter and this part.

(3) SBA does not review issues concerning the administration of a HUBZone contract.

(b) *Format and specificity.* (1) Protests must be in writing and must state all specific grounds as to why the protestor believes the protested concern should not qualify as a certified HUBZone small business concern. Specifically, a protestor must explain why:

(i) The protested concern did not meet the HUBZone eligibility requirements set forth in §126.200;

(ii) The protested joint venture does not meet the requirements set forth in §126.616;

(iii) The protested concern, as a HUBZone prime contractor, is unduly reliant on one or more small subcontractors that are not HUBZone-certified, or subcontractors that are not HUBZone-certified will perform the primary and vital requirements of the contract; and/or

(iv) The protested concern, on the anniversary date of its initial HUBZone certification, failed to attempt to maintain compliance with the 35% HUBZone residency requirement during the performance of a HUBZone contract.

(2) Specificity requires more than conclusions of ineligibility. A protest merely asserting that the protested

concern did not qualify as a HUBZone small business concern, or that it did not meet the principal office and/or 35% residency requirements, without setting forth specific facts or allegations, is insufficient and will be dismissed.

(3) For a protest filed against a HUBZone joint venture, the protest must state all specific grounds as to why:

(i) The HUBZone small business partner to the joint venture did not meet the HUBZone eligibility requirements set forth in §126.200 at the time the concern applied for certification or on the anniversary of such certification; and/or

(ii) The protested HUBZone joint venture does not meet the requirements set forth in §126.616.

(4) For a protest alleging that the prime contractor has an ostensible subcontractor, the protest must state all specific grounds as to why:

(i) The protested concern is unduly reliant on one or more small subcontractors that are not HUBZone-certified, or

(ii) One or more subcontractors that are not HUBZone-certified will perform the primary and vital requirements of the contract.

(5) For a protest alleging that the protested concern failed to attempt to maintain compliance with the 35% HUBZone residency requirement during the performance of a HUBZone contract, the protest must state all specific grounds explaining why the protester believes that at least 20% of the protested firm's employees do not reside in a HUBZone.

(c) *Filing.* (1) An interested party other than a contracting officer or SBA must submit its written protest to the contracting officer.

(2) A contracting officer and SBA must submit their protest to the D/HUB.

(3) Protestors may submit their protests by email to *hzprotests@sba.gov*.

(d) *Timeliness.* A protest challenging the HUBZone status of an apparent successful offeror on a HUBZone contract must be timely, or it will be dismissed.

(1) For negotiated acquisitions, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

(i) Except for an order or Blanket Purchase Agreement issued under a Federal Supply Schedule contract, for an order or Agreement that is set-aside for certified HUBZone small business concerns under a multiple award contract that was not itself set aside or reserved for certified HUBZone small business concerns, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order or Agreement.

(ii) Where a contracting officer has required offerors for a specific order under a multiple award HUBZone contract to recertify their HUBZone status, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order.

(2) For sealed bid acquisitions:

(i) An interested party must submit its protest by close of business on the fifth business day after bid opening, or where the identified low bidder is determined to be ineligible for award, by close of business on the fifth business day after the contracting officer has notified interested parties of the identity of that low bidder, or

(ii) If the price evaluation preference was not applied at the time of bid opening, an interested party must submit its protest by close of business on the fifth business day after the date of identification of the apparent successful low bidder.

(3) Any protest submitted after the time limits is untimely, unless it is from SBA or the CO.

(4) Any protest received prior to bid opening or notification of intended award, whichever applies, is premature.

(e) *Referral to SBA.* The contracting officer must forward to SBA any nonpremature HUBZone status protest received, notwithstanding whether he or she believes it is sufficiently specific or timely. The contracting officer must send the protest, along with a referral letter, to the D/HUB by email to *hzprotests@sba.gov*.

(1) The contracting officer's referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including the following:

(i) The solicitation number;

(ii) The name, address, telephone number, email address, and facsimile number of the contracting officer;

(iii) The type of HUBZone contract at issue (*i.e.,* HUBZone set-aside; HUBZone sole source; full and open competition with a HUBZone price evaluation preference applied; reserve for HUBZone small business concerns under a Multiple Award Contract; or order set-aside for HUBZone small business concerns against a Multiple Award Contract);

(iv) If the procurement was conducted using full and open competition with a HUBZone price evaluation preference, whether the protester's opportunity for award was affected by the preference;

(v) If the procurement was a HUBZone set-aside, whether the protester submitted an offer;

(vi) Whether the protested concern was the apparent successful offeror;

(vii) Whether the procurement was conducted using sealed bid or negotiated procedures;

(viii) If the procurement was conducted using sealed bid procedures, the bid opening date;

(ix) The date the protester was notified of the apparent successful offeror;

(x) The date the protest was submitted to the contracting officer;

(xi) The date the protested concern submitted its initial offer or bid to the contracting activity; and

(xii) Whether a contract has been awarded, and if applicable, the date of contract award and contract number.

(2) Where a protestor alleges that a certified HUBZone small business concern is unduly reliant on one or more subcontractors that are not certified HUBZone small business concerns or a subcontractor that is not a certified HUBZone small business concern will perform primary and vital requirements of the contract, the D/HUB will refer the matter to the Government Contracting Area Office serving the geographic area in which the principal office of the certified HUBZone small business concern is located for a determination as to whether the ostensible subcontractor rule has been met.

[63 FR 31908, June 11, 1998, as amended at 69 FR 29427, May 24, 2004, 84 FR 65250, Nov. 26, 2019; 84 FR 65665, Nov. 29, 2019; 85 FR 66197, Oct. 16, 2020; 88 FR 26213, Apr. 27, 2023]

§ 126.802 Who decides a HUBZone status protest?

The D/HUB or designee will determine whether the concern qualifies as a certified HUBZone small business concern.

[63 FR 31908, June 11, 1998, as amended at 84 FR 65250, Nov. 26, 2019]

§ 126.803 How will SBA process a HUBZone status protest and what are the possible outcomes?

(a) *Date at which eligibility determined.* SBA will determine the eligibility of a concern subject to a HUBZone status protest as of the date of its initial certification or, if applicable, its most recent recertification.

(b) *Notice of receipt of protest.* (1) SBA immediately will notify the contracting officer and the protestor of the date SBA receives a protest and whether SBA will process the protest or dismiss it in accordance with § 126.804.

(2) If SBA determines the protest is timely and sufficiently specific, SBA will notify the protested concern of the protest and the identity of the protestor. The protested concern must submit information responsive to the protest within 5 business days of the date of receipt of the protest.

(c) *Time period for determination.* (1) SBA will determine the HUBZone status of the protested concern within 15 business days after receipt of a complete protest referral.

(2) If SBA does not issue its determination within 15 business days (or request an extension that is granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. Notwithstanding such a determination, the provisions of

paragraph (e) of this section apply to the procurement in question.

(d) *Notice of determination.* SBA will notify the contracting officer, the protestor, and the protested concern of its determination.

(e) *Effect of determination.* The determination is effective immediately and is final, unless overturned on appeal by SBA's Office of Hearings and Appeals (OHA) pursuant to part 134 of this chapter.

(1) *Protest sustained.* If the D/HUB finds the protested concern ineligible and sustains the protest, SBA will decertify the concern and remove its designation as a certified HUBZone small business concern in DSBS (or successor system). A contracting officer shall not award a contract to a protested concern that the D/HUB has determined is not an eligible HUBZone small business concern for the procurement in question.

(i) *No appeal filed.* If a contracting officer receives a determination sustaining a protest after contract award, and no appeal has been filed, the contracting officer shall terminate the award.

(ii) *Appeal filed.* (A) If a timely appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(B) If OHA affirms the initial determination finding the protested concern ineligible, the contracting officer shall either terminate the contract or not exercise the next option.

(iii) *Update FPDS–NG.* Where the contract was awarded to a concern that is found not to qualify as a HUBZone small business concern, the contracting officer must update the Federal Procurement Data System-Next Generation (FPDS–NG) and other procurement reporting databases to reflect the final agency HUBZone decision (*i.e.,* the D/HUB's decision if the protest determination is not appealed, or OHA's decision if the protest determination is appealed).

(2) *Protest dismissed or denied.* If the D/HUB denies or dismisses the protest, the contracting officer may award the contract to the protested concern.

(i) *No appeal filed.* If a contracting officer receives a determination dismissing or denying a protest and no appeal has been filed, the contracting officer may:

(A) Award the contract to the protested concern if it has not yet been awarded; or

(B) Authorize contract performance to proceed if the contract has been awarded.

(ii) *Appeal filed.* If OHA overturns the initial determination or dismissal, the contracting officer may apply the appeal decision to the procurement in question.

(3) A concern found to be ineligible is precluded from applying for HUBZone certification for ninety (90) calendar days from the date of the final agency decision (*i.e.,* the D/HUB's decision if the protest determination is not appealed, or OHA's decision if the protest determination is appealed).

[63 FR 31908, June 11, 1998, as amended at 69 FR 29427, May 24, 2004; 74 FR 45754, Sept. 4, 2009; 76 FR 5685, Feb. 2, 2011; 76 FR 43574, July 21, 2011; 84 FR 65250, Nov. 26, 2019; 88 FR 21088, Apr. 10, 2023]

§ 126.804 Will SBA decide all HUBZone status protests?

SBA will decide all protests not dismissed on the basis that they are premature, untimely, non-specific, moot, or not filed by an interested party.

[84 FR 65251, Nov. 26, 2019]

§ 126.805 What are the procedures for appeals of HUBZone status protest determinations?

The protested concern, the protester, or the contracting officer may file an appeal of a HUBZone status protest determination with SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter.

[88 FR 21089, Apr. 10, 2023]

Subpart I—Penalties

§ 126.900 What are the requirements for representing HUBZone status, and what are the penalties for misrepresentation?

(a) *Presumption of Loss Based on the Total Amount Expended.* In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is

set aside, reserved, or otherwise classified as intended for award to HUBZone SBCs, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a HUBZone SBC willfully sought and received the award by misrepresentation.

(b) *Deemed Certifications.* The following actions shall be deemed affirmative, willful and intentional certifications of HUBZone SBC status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to HUBZone SBCs.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a HUBZone SBC.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a HUBZone SBC.

(c) *Signature Requirement.* Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the HUBZone SBC status of a business concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the HUBZone status claimed by the concern.

(d) *Limitation of Liability.* Paragraphs (a)–(c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of HUBZone status was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§ 3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' HUBZone status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing HUBZone status representations or certifications, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as a HUBZone SBC without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) *Penalties for Misrepresentation.* (1) *Suspension or debarment.* The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's status as a HUBZone SBC pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) *Civil Penalties.* Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729–3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812, and any other applicable laws or regulations, including 13 CFR part 142.

(3) *Criminal Penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the HUBZone status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct ''continuing representations'' that are no longer true.

[78 FR 38820, June 28, 2013, as amended at 81 FR 31492, May 19, 2016]

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

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AUTHORITY: 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

SOURCE: 75 FR 62282, Oct. 7, 2010, unless otherwise noted.

Subpart A—General Provisions

§ 127.100 What is the purpose of this part?

Section 8(m) of the Small Business Act authorizes certain procurement mechanisms to ensure that Women-Owned Small Businesses (WOSBs) have an equal opportunity to participate in Federal contracting. This part implements these mechanisms and ensures that the program created, referred to as the WOSB Program, is substantially related to this important Congressional goal in accordance with applicable law.

§ 127.101 What type of assistance is available under this part?

This part authorizes contracting officers to restrict competition or award sole source contracts or orders to eligible Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) for certain Federal contracts or orders in industries in which the Small Business Administration (SBA) determines that WOSBs are underrepresented in Federal procurement. It also authorizes contracting officers to restrict competition or award sole source contracts or orders to eligible WOSBs for certain Federal contracts or orders in industries in which SBA determines that WOSBs are substantially underrepresented in Federal procurement and has waived the economically disadvantaged requirement.

[80 FR 55021, Sept. 14, 2015]

§ 127.102 What are the definitions of the terms used in this part?

For purposes of this part:

8(a) Business Development (8(a) BD) concern means a concern that SBA has certified as an 8(a) BD program participant and whose term has not expired or otherwise left the 8(a) BD program early.

AA/GC&BD means SBA's Associate Administrator for Government Contracting and Business Development.

Citizen means a person born or naturalized in the United States. Resident aliens and holders of permanent visas are not considered to be citizens.

Concern means a firm that satisfies the requirements in §121.105 of this chapter.

Contracting officer has the meaning given to that term in Section 27(f)(5) of the Office of Federal Procurement Policy Act (codified at 41 U.S.C. 423(f)(5)).

D/GC means SBA's Director for Government Contracting.

Economically Disadvantaged WOSB (EDWOSB) means a concern that is small pursuant to part 121 of this chapter and that is at least 51 percent owned and controlled by one or more women who are citizens and who are economically disadvantaged in accordance with §§127.200, 127.201, 127.202 and 127.203. An EDWOSB automatically qualifies as a WOSB.

EDWOSB requirement means a Federal requirement for services or supplies for which a contracting officer has restricted competition or awarded a sole source contract or order to eligible EDWOSBs, including Multiple Award Contracts, partial set-asides, reserves, sole source awards, and orders set aside for EDWOSBs issued against a Multiple Award Contract.

Immediate family member means father, mother, husband, wife, son, daughter, stepchild, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, and daughter-in-law.

Interested party means any concern that submits an offer for a specific EDWOSB or WOSB requirement (including Multiple Award Contracts), any concern that submitted an offer in a full and open competition and its opportunity for award will be affected by a reserve of an award given a WOSB or EDWOSB, the contracting activity's contracting officer, or SBA.

Primary industry classification means the six-digit North American Industry Classification System (NAICS) code designation that best describes the primary business activity of the concern.

The NAICS code designations are described in the NAICS manual available via the Internet at *http://www.census.gov/NAICS*. In determining the primary industry in which a concern is engaged, SBA will consider the factors set forth in §121.107 of this chapter.

Same or similar line of business means business activities within the same four-digit ''Industry Group'' of the NAICS Manual as the primary industry classification of the WOSB or EDWOSB.

Substantial underrepresentation is determined by a study using a reliable and relevant methodology.

System for Award Management (SAM) (or any successor system) means a federal system that consolidates various federal procurement systems (*e.g.*, Central Contractor Registration (CCR), Federal Agency Registration (Fedreg), Online Representations and Certifications Application (ORCA), Excluded Parties List System (EPLS)) and the Catalog of Federal Domestic Assistance into one system.

Underrepresentation is determined by a study using a reliable and relevant methodology.

Women-Owned Small Business (WOSB) means a concern that qualifies as small pursuant to part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile, and that is at least 51 percent owned and controlled by one or more women who are citizens in accordance with §§127.200, 127.201 and 127.202. This definition applies to any certification as to a concern's status as a WOSB, not solely to those certifications relating to a WOSB contract.

WOSB Program Repository means a secure, Web-based application that collects, stores and disseminates documents to the contracting community and SBA, which verify the eligibility of a business concern for a contract to be awarded under a WOSB or EDWOSB requirement.

WOSB requirement means a Federal requirement for services or supplies for which a contracting officer has restricted competition or awarded a sole source contract or order to eligible WOSBs, including Multiple Award Contracts, partial set-asides, reserves, sole source awards, and orders set aside for WOSBs issued against a Multiple Award Contract.

[75 FR 62282, Oct. 7, 2010, as amended at 78 FR 61146, Oct. 2, 2013; 80 FR 55022, Sept. 14, 2015; 88 FR 26214, Apr. 27, 2023]

Subpart B—Eligibility Requirements To Qualify as an EDWOSB or WOSB

§ 127.200 What are the requirements a concern must meet to qualify as an EDWOSB or WOSB?

(a) *Qualification as an EDWOSB.* To qualify as an EDWOSB, a concern must be:

(1) A small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile; and

(2) Not less than 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens and are economically disadvantaged.

(b) *Qualification as a WOSB.* To qualify as a WOSB, a concern must be:

(1) A small business as defined in part 121 of this chapter for the size standard corresponding to any NAICS code listed in its SAM profile; and

(2) Not less than 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens.

(c) *WOSB and EDWOSB certifications.* (1) A concern must be certified as a WOSB or EDWOSB pursuant to §127.300 in order to be awarded a WOSB or EDWOSB set-aside or sole-source contract.

(2) Other women-owned small business concerns that do not seek WOSB or EDWOSB set-aside or sole-source contracts may continue to self-certify their status, receive contract awards outside the Program, and count toward an agency's goal for awards to WOSBs.

(d) *Suspension and debarment.* In order to be eligible for WOSB and EDWOSB certification and to remain certified, the concern and any of its owners must not have an active exclusion in the System for Award Management at the time of application or recertification.

[75 FR 62282, Oct. 7, 2010, as amended at 85 FR 27660, May 11, 2020; 88 FR 26214, Apr. 27, 2023]

§ 127.201 What are the requirements for ownership of an EDWOSB and WOSB?

(a) *General.* To qualify as an EDWOSB one or more economically disadvantaged women must unconditionally and directly own at least 51 percent of the concern. To qualify as a WOSB, one or more women must unconditionally and directly own at least 51 percent of the concern. Ownership will be determined without regard to community property laws.

(b) *Requirement for unconditional ownership.* To be considered unconditional, the ownership must not be subject to any conditions, executory agreements, voting trusts, or other arrangements that cause or potentially cause ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

(c) *Requirement for direct ownership.* To be considered direct, the qualifying women must own 51 percent of the concern directly. The 51 percent ownership may not be through another business entity or a trust (including employee stock ownership plan) that is, in turn, owned and controlled by one or more women or economically disadvantaged women. However, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a woman or economically disadvantaged woman where the trust is revocable, and the woman is the grantor, the trustee, and the sole current beneficiary of the trust.

(d) *Ownership of a partnership.* In the case of a concern that is a partnership, at least 51 percent of each class of partnership interest must be unconditionally owned by one or more women or in the case of an EDWOSB, economically disadvantaged women. The ownership must be reflected in the concern's partnership agreement. For purposes of this requirement, general and limited partnership interests are considered different classes of partnership interest.

(e) *Ownership of a limited liability company.* In the case of a concern that is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more women or in the case of an EDWOSB, economically disadvantaged women.

(f) *Ownership of a corporation.* In the case of a concern that is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more women, or in the case of an EDWOSB, economically disadvantaged women. In determining unconditional ownership of the concern, any unexercised stock options or similar agreements held by a woman will be disregarded. However, any unexercised stock option or other agreement, including the right to convert non-voting stock or debentures into voting stock, held by any other individual or entity will be treated as having been exercised.

[75 FR 62282, Oct. 7, 2010, as amended at 88 FR 26214, Apr. 27, 2023]

§ 127.202 What are the requirements for control of an EDWOSB or WOSB?

(a) *General.* To qualify as a WOSB, the management and daily business operations of the concern must be controlled by one or more women. To qualify as an EDWOSB, the management and daily business operations of the concern must be controlled by one or more women who are economically disadvantaged. Control by one or more women or economically disadvantaged women means that both the long-term decision making and the day-to-day management and administration of the business operations must be conducted by one or more women or economically disadvantaged women.

(b) *Managerial position and experience.* A woman, or in the case of an EDWOSB an economically disadvantaged woman, must hold the highest officer position in the concern and must have managerial experience of the extent and complexity needed to run the concern. The woman or economically disadvantaged woman manager need not have the

technical expertise or possess the required license to be found to control the concern if she can demonstrate that she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. However, if a man possesses the required license and has an equity interest in the concern, he may be found to control the concern.

(c) *Limitation on outside employment.* The woman or economically-disadvantaged woman who holds the highest officer position of the business concern may not engage in outside employment that prevent her from devoting sufficient time and attention to the business concern to control its management and daily operations. Where a woman or economically disadvantaged woman claiming to control a business concern devotes fewer hours to the business than its normal hours of operation, there is a rebuttable presumption that she does not control the business concern. In such a case, the woman must provide evidence that she has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management and administration of the business.

(d) *Control over a partnership.* In the case of a partnership, one or more women, or in the case of an EDWOSB, economically disadvantaged women, must serve as general partners, with control over all partnership decisions.

(e) *Control over a limited liability company.* In the case of a limited liability company, one or more women, or in the case of an EDWOSB, economically disadvantaged women, must serve as management members, with control over all decisions of the limited liability company.

(f) *Control over a corporation.* One or more women, or in the case of an EDWOSB, economically disadvantaged women, must control the Board of Directors of the concern. Women or economically disadvantaged women are considered to control the Board of Directors when either:

(1) One or more women or economically disadvantaged women own at least 51 percent of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements; or

(2) Women or economically disadvantaged women comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.

(g) *Involvement in the concern by other individuals or entities.* Men or other entities may be involved in the management of the concern and may be stockholders, partners or limited liability members of the concern. However, no males or other entity may exercise actual control or have the power to control the concern.

[75 FR 62282, Oct. 7, 2010, as amended at 88 FR 26214, Apr. 27, 2023]

§ 127.203 What are the rules governing the requirement that economically disadvantaged women must own EDWOSBs?

(a) *General.* To qualify as an EDWOSB, the concern must be at least 51 percent owned by one or more women who are economically disadvantaged. A woman is economically disadvantaged if she can demonstrate that her ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business. SBA does not take into consideration community property laws when determining economic disadvantage when the woman has no direct, individual or separate ownership interest in the property.

(b) *Limitation on personal net worth.* (1) In order to be considered economically disadvantaged, the woman's personal net worth must be less than $850,000, excluding her ownership interest in the concern and her equity interest in her primary personal residence.

(2) Income received from an EDWOSB that is an S corporation, LLC or partnership will be excluded from net worth where the EDWOSB provides documentary evidence demonstrating that the income was reinvested in the business concern or the distribution was solely for the purposes of paying taxes arising in the normal course of operations of the business concern. Losses from the S corporation, LLC or partnership, however, are losses to the

EDWOSB only, not losses to the individual, and cannot be used to reduce an individual's net worth.

(3) Funds invested in an Individual Retirement Account (IRA) or other official retirement account will not be considered in determining an individual's net worth. In order to properly assess whether funds invested in a retirement account may be excluded from a woman's net worth, she must provide information about the terms and restrictions of the account to SBA and certify that the retirement account is legitimate.

(c) *Factors to be considered.* (1) *General.* The personal financial condition of the woman claiming economic disadvantage, including her personal income for the past three years (including bonuses, and the value of company stock given in lieu of cash), her personal net worth and the fair market value of all of her assets, whether encumbered or not, will be considered in determining whether she is economically disadvantaged.

(2) *Spouse's financial situation.* SBA may consider a spouse's financial situation in determining a woman's access to credit and capital. When married, an individual claiming economic disadvantage must submit separate financial information for her spouse, unless the individual and the spouse are legally separated. SBA will consider a spouse's financial situation in determining an individual's access to credit and capital where the spouse has a role in the business (e.g., an officer, employee or director) or has lent money to, provided credit or financial support to, or guaranteed a loan of the business. SBA may also consider the spouse's financial condition if the spouse's business is in the same or similar line of business as the EDWOSB or WOSB and the spouse's business and WOSB share similar names, Web sites, equipment or employees. In addition, all transfers to a spouse within two years of a certification will be attributed to a woman claiming economic disadvantage as set forth in paragraph (d) of this section.

(3) *Income.*

(i) When considering a woman's personal income, if the adjusted gross yearly income averaged over the three years preceding the certification exceeds $400,000, SBA will presume that she is not economically disadvantaged. The presumption may be rebutted by a showing that this income level was unusual and not likely to occur in the future, that losses commensurate with and directly related to the earnings were suffered, or by evidence that the income is not indicative of lack of economic disadvantage.

(ii) Income received by an EDWOSB that is an S corporation, LLC, or partnership will be excluded from an individual's income where the EDWOSB provides documentary evidence demonstrating that the income was reinvested in the EDWOSB or the distribution was solely for the purposes of paying taxes arising in the normal course of operations of the business concern. Losses from the S corporation, LLC or partnership, however, are losses to the EDWOSB only, not losses to the individual, and cannot be used to reduce a woman's personal income.

(4) *Fair market value of all assets.* A woman will generally not be considered economically disadvantaged if the fair market value of all her assets (including her primary residence and the value of the business concern) exceeds $6.5 million. The only assets excluded from this determination are funds excluded under paragraph (b)(3) of this section as being invested in a qualified IRA account or other official retirement account.

(d) *Transfers within two years.* Assets that a woman claiming economic disadvantage transferred within two years of the date of the concern's certification will be attributed to the woman claiming economic disadvantage if the assets were transferred to an immediate family member, or to a trust that has as a beneficiary an immediate family member. The transferred assets within the two-year period will not be attributed to the woman if the transfer was:

(1) To or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support; or

(2) To an immediate family member in recognition of a special occasion,

such as a birthday, graduation, anniversary, or retirement.

[75 FR 62282, Oct. 7, 2010, as amended at 85 FR 27660, May 11, 2020; 87 FR 69154, Nov. 17, 2022]

Subpart C—Certification of EDWOSB or WOSB Status

CERTIFICATION

§ 127.300 How is a concern certified as an WOSB or EDWOSB?

(a) *WOSB certification.* (1) A concern may apply to SBA for WOSB certification. There is no cost to apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where the concern fails to cooperate with SBA or submit information requested by SBA.

(2) A concern may submit evidence to SBA that it is a women-owned and controlled small business that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation as a Service-Disabled Veteran Owned Business or Veteran-Owned Business.

(3) A concern may submit evidence that it has been certified as a WOSB by an approved Third-Party Certifier in accordance with this subpart.

(b) *EDWOSB certification.* (1) A concern may apply to SBA for EDWOSB certification. There is no cost to apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where the concern fails to cooperate with SBA or submit information requested by SBA.

(2) A concern that is a certified participant in the 8(a) BD Program and owned and controlled by one or more women qualifies as an EDWOSB.

(3) A concern may submit evidence to SBA that it is an economically disadvantaged women-owned and controlled small business that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation as a Service-Disabled Veteran Owned Business or Veteran-Owned Business.

(4) A concern may submit evidence that it has been certified as an EDWOSB by a Third-Party Certifier under this subpart.

(c) *SBA notification and designation.* If SBA determines that the concern is a qualified WOSB or EDWOSB, it will issue a letter of certification and designate the concern as a certified WOSB or EDWOSB on the Dynamic Small Business Search (DSBS) system, or successor system.

[85 FR 27660, May 11, 2020]

§ 127.301 When may a concern apply for certification?

A concern may apply for WOSB or EDWOSB certification and submit the required information whenever it can represent that it meets the eligibility requirements, subject to the restrictions of §127.306. All representations and supporting information contained in the application must be complete and accurate as of the date of submission. The application must be signed by an officer of the concern who is authorized to represent the concern.

[85 FR 27661, May 11, 2020]

§ 127.302 Where can a concern apply for certification?

A concern seeking certification as a WOSB or EDWOSB may apply to SBA for certification via *https://certify.sba.gov* or any successor system. Certification pages must be validated electronically or signed by a person authorized to represent the concern.

[85 FR 27661, May 11, 2020]

§ 127.303 What must a concern submit for certification?

(a)(1) *SBA certification.* (i) To be certified by SBA as a WOSB or EDWOSB, a concern must provide documents and information demonstrating that it

meets the requirements set forth in part 127, subpart B. SBA maintains a list of the minimum required documents that can be found at *https://certify.sba.gov* or any successor system. A concern may submit additional documents and information to support its eligibility. The required documents must be provided to SBA during the application process electronically. This may include, but is not limited to, corporate records, business and personal financial records, including copies of signed Federal personal and business tax returns, and individual and business bank statements.

(ii) A concern that is certified by the 8(a) BD Program and is owned and controlled by one or more women may use documentation of its most recent annual review, or documentation of its 8(a) acceptance if it has not yet had an annual review, in support of its application for certification.

(iii) A concern that is certified through a program examination or status protest may use the positive determination from SBA as evidence for certification.

(2) *CVE certification.* (i) To be certified as a WOSB, a concern that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation may submit documentation of its most recent certification, along with documentation confirming that it is owned and controlled by one or more women, in support of its application for certification.

(ii) To be certified as an EDWOSB, a concern that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation may submit documentation of its most recent certification, along with documentation confirming that it is owned and controlled by one or more women who are economically disadvantaged in accordance with § 127.203(b)(3), in support of its application for certification.

(3) *Third-Party Certifier certification.* A concern that is certified by a Third-Party Certifier must provide a current, valid certification from an entity designated as an SBA-approved certifier.

(b) In addition to the minimum required documents, SBA may request additional information from applicants in order to verify eligibility.

(c) After submitting the required documentation, an applicant must notify SBA of any changes that could affect its eligibility.

(d) If a concern was decertified or previously denied certification, it must include with its application for certification a full explanation of why it was decertified or denied certification, and what, if any, changes have been made. If SBA is not satisfied with the explanation provided, SBA will decline to certify the concern.

(e) If the concern was decertified for failure to notify SBA of a material change affecting its eligibility pursuant to § 127.401, it must include with its application for certification a full explanation of why it failed to notify SBA of the material change. If SBA is not satisfied with the explanation provided, SBA will decline to certify the concern.

[85 FR 27661, May 11, 2020]

§ 127.304 How is an application for certification processed?

(a) The SBA's Director of Government Contracting (D/GC) or designee is authorized to approve or decline applications for certification. SBA must receive all required information and supporting documents before it will begin processing a concern's application. SBA will not process incomplete applications. SBA will advise each applicant within 15 calendar days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application. SBA will make its determination within ninety (90) calendar days after receipt of a complete package, whenever practicable.

(b) SBA may request additional information or clarification of information contained in an application or document submission at any time.

(c) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the missing information would adversely affect the

business concern's eligibility or demonstrate a lack of eligibility in the area or areas to which the information relates.

(1) If a concern submits inconsistent information that results in SBA's inability to determine the concern's compliance with any of the WOSB or EDWOSB eligibility requirements, SBA will decline the concern's application.

(2) If, during the processing of an application, SBA determines that an applicant or its representative has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application.

(d) The applicant must be eligible as of the date it submitted its application and up until the time the D/GC issues a decision. The decision will be based on the facts contained in the application, any information received in response to SBA's request for clarification, and any changed circumstances since the date of application.

(e) Any changed circumstances occurring after an applicant has submitted an application will be considered and may constitute grounds for decline. After submitting the application and signed representation, an applicant must notify SBA of any changes that could affect its eligibility. The D/GC may propose decertification for any EDWOSB or WOSB that fails to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

(f) If SBA approves the application, SBA will send a written notice to the concern and update *https://certify.sba.gov* or any successor system, and update DSBS and the System for Award Management (or any successor systems) to indicate the concern has been certified by SBA as a WOSB and/or EDWOSB.

(g) A decision to deny eligibility must be in writing and state the specific reasons for denial.

(1) If SBA denies a business concern's application for WOSB certification based on lack of ownership or lack of control by women, within two days of SBA's denial, the applicant concern must update its WOSB self-certification status in the System for Award Management (or any successor system) to reflect that the concern is not an eligible WOSB.

(2) If a business concern fails to update its WOSB self-certification status in the System for Award Management (or any successor system), SBA will make such update within two days of the business's failure to do so.

(h) SBA will send a copy of the decision letter to the electronic mail address provided with the application. SBA will consider any decision sent to this electronic mail address provided to have been received by the applicant concern.

(i) The decision of the D/GC to decline certification is the final agency decision. The concern can reapply for certification after ninety (90) days, as set forth in § 127.305.

[85 FR 27661, May 11, 2020, as amended at 88 FR 26214, Apr. 27, 2023]

§ 127.305 May declined or decertified concerns seek recertification at a later date?

(a) A concern that SBA or a third-party certifier has declined or that SBA has decertified may seek certification after ninety (90) days from the date of decline or decertification if it believes that it has overcome all of the reasons for decline or decertification and is currently eligible. A concern that has been declined may seek certification by any of the certification options listed in § 127.300.

(b) A concern found to be ineligible during a WOSB/EDWOSB status protest or program examination is precluded from applying for certification for ninety (90) days from the date of the final agency decision (the D/GC's decision if no appeal is filed or the decision of SBA's Office of Hearings and Appeals (OHA) where an appeal is filed pursuant to § 127.605).

[85 FR 27661, May 11, 2020]

REQUIREMENTS FOR THIRD-PARTY CERTIFIERS

§ 127.350 What is a third-party certifier?

A third-party certifier is a non-governmental entity that SBA has authorized to certify that an applicant concern is eligible for the WOSB or EDWOSB contracting program. A third-party certifier may be a for-profit or non-profit entity. The list of SBA-approved third-party certifiers may be found on SBA's website at *sba.gov*.

[85 FR 27662, May 11, 2020]

§ 127.351 What third-party certifications may a concern use as evidence of its status as a qualified EDWOSB or WOSB?

In order for SBA to accept a third-party certification that a concern qualifies as a WOSB or EDWOSB, the concern must have a current, valid certification from an entity designated as an SBA-approved certifier. The third-party certification must be submitted to SBA through *https://certify.sba.gov* or a successor system.

[85 FR 27662, May 11, 2020]

§ 127.352 What is the process for becoming a third-party certifier?

SBA will periodically hold open solicitations. All entities that believe they meet the criteria to act as a third-party certifier will be free to respond to the solicitation.

[85 FR 27662, May 11, 2020]

§ 127.353 May third-party certifiers charge a fee?

(a) Third-party certifiers may charge a reasonable fee, but must notify applicants first, in writing, that SBA offers certification for free.

(b) The method of notification and the language that will be used for this notification must be approved by SBA. The third-party certifier may not change its method or the language without SBA approval.

[85 FR 27662, May 11, 2020]

§ 127.354 What requirements must a third-party certifier follow to demonstrate capability to certify concerns?

(a) All third-party certifiers must enter into written agreements with SBA. This agreement will detail the requirements that the third-party certifier must meet. SBA may terminate the agreement if SBA subsequently determines that the entity's certification process does not comply with SBA-approved certification standards or is not based on the same program eligibility requirements as set forth in subpart B of this part or if, upon review, SBA determines that the third-party certifier has demonstrated a pattern of certifying concerns that SBA later determines to be ineligible for certification.

(b) Third-party certifiers' certification process must comply with SBA-approved certification standards and track the WOSB or EDWOSB eligibility requirements set forth in subpart B of this part.

(c) In order for SBA to enter into an agreement with a third-party certifier, the entity must establish the following:

(1) It will render fair and impartial WOSB/EDWOSB Federal Contract Program eligibility determinations;

(2) It will provide the approved applicant a valid certificate for entering into the SBA electronic platform, and will retain documents used to determine eligibility for a period of six (6) years to support SBA's responsibility to conduct a status protest, eligibility examination, agency investigation, or audit of the third party determinations;

(3) Its certification process will require applicant concerns to register in SAM (or any successor system) and submit sufficient information as determined by SBA to enable it to determine whether the concern qualifies as a WOSB. This information must include documentation demonstrating whether the concern is:

(i) A small business concern under the SBA size standard corresponding to the concern's primary industry, as defined in § 121.107 of this part;

(ii) At least 51 percent owned and controlled by one or more women who are United States citizens; and

(4) It will not decline to accept a concern's application for WOSB/EDWOSB certification on the basis of race, color, national origin, religion, age, disability, sexual orientation, marital or family status, or political affiliation.

[85 FR 27662, May 11, 2020]

§ 127.355 How will SBA ensure that approved third-party certifiers are meeting the requirements?

(a) SBA will require third-party certifiers to submit monthly reports to SBA. These reports will contain information including the number of applications received, number of applications approved and denied, and other information that SBA determines may be helpful for ensuring that third-party certifiers are meeting their obligations or information or data that may be useful for improving the program.

(b) SBA will conduct periodic compliance reviews of third-party certifiers and their underlying certification determinations to ensure that they are properly applying SBA's WOSB/EDWOSB requirements and certifying concerns in accordance with those requirements.

(1) SBA will conduct a full compliance review on every third-party certifier at least once every three years.

(2) At the conclusion of each compliance review, SBA will provide the third-party certifier with a written report detailing SBA's findings with regard to the third-party certifier's compliance with SBA's requirements. The report will include recommendations for possible improvements, and detailed explanations for any deficiencies identified by SBA.

(c) If SBA determines that a third-party certifier is not properly applying SBA's eligibility requirements, SBA may revoke the approval of that third-party certifier.

[85 FR 27662, May 11, 2020]

§ 127.356 How does a concern obtain certification from an approved certifier?

(a) A concern that seeks WOSB or EDWOSB certification from an SBA-approved third-party certifier must submit its application directly to the approved certifier in accordance with the specific application procedures of the particular certifier.

(b) The concern must register in the System for Award Management (SAM), or any successor system.

(c) The approved certifier must ensure that all documents used to determine that a concern is approved for certification are uploaded in *https://certify.sba.gov* or any successor system.

[85 FR 27662, May 11, 2020]

Subpart D—Eligibility Examinations

§ 127.400 How does a concern maintain its WOSB or EDWOSB certification?

Any concern seeking to remain a certified WOSB or EDWOSB must undergo a program examination every three years.

(a) SBA or a third-party certifier will conduct a program examination three years after the concern's initial WOSB or EDWOSB certification (whether by SBA or a third-party certifier) or three years after the date of the concern's last program examination, whichever date is later.

Example to paragraph (a). Concern A is certified by SBA to be eligible for the WOSB Program on March 31, 2023. Concern A is considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through March 30, 2026. On April 22, 2025, after Concern A is identified as the apparent successful offeror on a WOSB set-aside contract, its status as an eligible WOSB is protested. On May 15, 2025, Concern A receives a positive determination from SBA confirming that it is an eligible WOSB. Concern A's new certification date is May 15, 2025. Concern A is now considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through May 14, 2028.

(b) The concern must either request a program examination from SBA or notify SBA that it has requested a program examination from a third-party certifier no later than 30 days prior to its certification anniversary. Failure to do so will result in the concern being decertified.

Example to paragraph (b). Concern B is certified by a third-party certifier to be eligible for the WOSB Program on July 20, 2023. Concern B is considered a certified WOSB that is eligible to receive WOSB contracts (as long as it is small for the size standard corresponding to the NAICS code assigned to the contract) through July 19, 2026. Concern B must request a program examination from SBA or notify SBA that it has requested a program examination from a third-party certifier, by June 20, 2026, to continue participating in the WOSB Program after July 19, 2026.

[88 FR 26214, Apr. 27, 2023]

§ 127.401 What are a WOSB's and EDWOSB's ongoing obligations to SBA?

Once certified, a WOSB or EDWOSB must notify SBA of any material changes that could affect its eligibility within 30 calendar days of any such change. Material change includes, but is not limited to, a change in the ownership, business structure, or management. The notification must be in writing and must be uploaded into the concern's profile with SBA. The method for notifying SBA can be found on *https://certify.sba.gov*. A concern's failure to notify SBA of such a material change may result in decertification and removal from SAM and DSBS (or any successor system) as a designated certified WOSB/EDWOSB concern. In addition, SBA may seek the imposition of penalties under § 127.700.

[85 FR 27663, May 11, 2020]

§ 127.402 What is a program examination, who will conduct it, and what will SBA examine?

(a) A program examination is an investigation by SBA officials or authorized third-party certifier that verifies the accuracy of any certification of a concern issued in connection with the concern's WOSB or EDWOSB status. Thus, examiners may verify that the concern currently meets the program's eligibility requirements, and that it met such requirements at the time of its application for certification, its most recent recertification, or its certification in connection with a WOSB or EDWOSB contract.

(b) Examiners may review any information related to the concern's eligibility requirements. SBA may also conduct site visits.

(c) It is the responsibility of program participants to ensure the information provided to SBA is kept up to date and is accurate. SBA considers all required information and documents material to a concern's eligibility and assumes that all information and documentation submitted are up to date and accurate unless SBA has information that indicates otherwise.

[85 FR 27664, May 11, 2020]

§ 127.403 When will SBA conduct program examinations?

(a) SBA may conduct a program examination at any time after the concern submits its application, during the processing of the application, and at any time while the concern is a certified WOSB or EDWOSB.

(b) SBA will conduct program examinations periodically as part of the recertification process set forth in § 127.400.

[85 FR 27664, May 11, 2020]

§ 127.404 May SBA require additional information from a WOSB or EDWOSB during a program examination?

At the discretion of the D/GC, SBA has the right to require that a WOSB or EDWOSB submit additional information at any time during the program examination. SBA may draw an adverse inference from the failure of a concern to cooperate with a program examination or provide requested information.

[85 FR 27664, May 11, 2020]

§ 127.405 What happens if SBA determines that the concern is no longer eligible for the program?

If SBA believes that a concern does not meet the program eligibility requirements, the concern fails to recertify in accordance with the requirements in § 127.400, or the concern has failed to notify SBA of a material change, SBA will propose the concern for decertification from the program.

(a) *Proposed decertification.* The D/GC or designee will notify the concern in

writing that it has been proposed for decertification. This notice will state the reasons why SBA has proposed decertification, and that the WOSB or EDWOSB must respond to each of the reasons set forth.

(1) The WOSB or EDWOSB must respond in writing to a proposed decertification within 20 calendar days from the date of the proposed decertification.

(2) If the initial certification was done by a third-party certifier, SBA will also notify the third-party certifier of the proposed decertification in writing.

(b) *Decertification.* The D/GC or designee will consider the reasons for proposed decertification and the concern's response before making a written decision whether to decertify. The D/GC may draw an adverse inference where a concern fails to cooperate with SBA or provide the information requested. The D/GC's decision is the final agency decision.

(c) *Decertification in response to adverse protest decision.* SBA will decertify a concern found to be ineligible during a WOSB/EDWOSB status protest.

(d) *Decertification due to submission of false information.* If SBA discovers that a WOSB or EDWOSB or its representative knowingly submitted false information, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may request that Government-wide debarment or suspension proceedings be initiated by the agency.

(e) *Effect of decertification.* Once SBA has decertified a concern, the concern cannot self-certify as a WOSB or EDWOSB, as applicable, for any WOSB or EDWOSB contract. If a concern does so, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as a WOSB or EDWOSB on a pending procurement, the concern must immediately inform the contracting officer for the procuring agency of its decertification.

(1) Not later than two days after the date on which SBA decertifies a business concern, such concern must update its WOSB/EDWOSB status in the System for Award Management (or any successor system).

(2) If a business concern fails to update its WOSB/EDWOSB status in the System for Award Management (or any successor system) in response to decertification, SBA will make such update within two days of the business's failure to do so.

(f) *Reapplication.* A concern decertified pursuant to this section may reapply to the program pursuant to §127.305.

[85 FR 27664, May 11, 2020, as amended at 88 FR 26215, Apr. 27, 2023]

Subpart E—Federal Contract Assistance

§ 127.500 In what industries is a contracting officer authorized to restrict competition or make a sole source award under this part?

A contracting officer may restrict competition or make a sole source award under this part only in those industries in which SBA has determined that WOSBs are underrepresented or substantially underrepresented in Federal procurement, as specified in §127.501, regardless of the place of performance.

[80 FR 55022, Sept. 14, 2015, as amended at 81 FR 48593, July 25, 2016]

§ 127.501 How will SBA determine the industries that are eligible for EDWOSB or WOSB requirements?

(a) Based upon its analysis, SBA will designate by NAICS Industry Subsector Code those industries in which WOSBs are underrepresented and substantially underrepresented.

(b) In determining the extent of underrepresentation of WOSBs, SBA may request that the head of any Federal department or agency provide SBA, data or information necessary to analyze the extent of underrepresentation of WOSBs.

[75 FR 62282, Oct. 7, 2010, as amended at 80 FR 55022, Sept. 14, 2015]

§ 127.502 How will SBA identify and provide notice of the designated industries?

SBA will post on its Internet Web site at *http://www.sba.gov* a list of

NAICS Industry Subsector industries it designates under §127.501. The list of designated industries also may be obtained from the local SBA district office and may be posted on the General Services Administration Internet Web site.

§ 127.503 When is a contracting officer authorized to restrict competition or award a sole source contract or order under this part?

(a) *Competition restricted to EDWOSBs.* For requirements in industries designated by SBA as underrepresented pursuant to §127.501, a contracting officer may restrict competition to EDWOSBs if the contracting officer has a reasonable expectation based on market research that:

(1) Two or more EDWOSBs will submit offers for the contract; and

(2) Contract award may be made at a fair and reasonable price.

(b) *Competition restricted to WOSBs.* For requirements in industries designated by SBA as substantially underrepresented pursuant to §127.501, a contracting officer may restrict competition to WOSBs if the contracting officer has a reasonable expectation based on market research that:

(1) Two or more WOSBs will submit offers (this includes EDWOSBs, which are also WOSBs); and

(2) Contract award may be made at a fair and reasonable price.

(c) *Sole source awards to EDWOSBs.* For requirements in industries designated by SBA as underrepresented pursuant to §127.501, a contracting officer may issue a sole source award to an EDWOSB when the contacting officer determines that:

(1) The EDWOSB is a responsible contractor with respect to performance of the requirement and the contracting officer does not have a reasonable expectation that 2 or more EDWOSBs will submit offers;

(2) The anticipated award price of the contract (including options) will not exceed $7,000,000 in the case of a contract assigned a North American Industry Classification System (NAICS) code for manufacturing, or $4,500,000 in the case of any other contract opportunity; and

(3) In the estimation of the contracting officer, the award can be made at a fair and reasonable price.

(d) *Sole source awards to WOSBs.* For requirements in industries designated by SBA as substantially underrepresented pursuant to §127.501, a contracting officer may issue a sole source award to a WOSB when the contacting officer determines that:

(1) The WOSB is a responsible contractor with respect to performance of the requirement and the contracting officer does not have a reasonable expectation that 2 or more WOSBs will submit offers;

(2) The anticipated award price of the contract (including options) will not exceed $7,000,000 in the case of a contract assigned a NAICS code for manufacturing, or $4,500,000 in the case of any other contract opportunity; and

(3) In the estimation of the contracting officer, the award can be made at a fair and reasonable price.

(e) *Competitions requiring or favoring additional socioeconomic certifications.* A procuring activity cannot restrict a WOSB or EDWOSB competition (for either a contract or order) to require SBA socioeconomic certifications other than WOSB/EDWOSB certification (*i.e.,* a competition cannot be limited only to business concerns that are both WOSB/EDWOSB and 8(a), WOSB/EDWOSB and HUBZone, or WOSB/EDWOSB and SDVO) or give evaluation preferences to firms having one or more other certifications.

(f) *8(a) BD requirements.* A contracting officer may not restrict competition to eligible EDWOSBs or WOSBs if an 8(a) BD Participant is currently performing the requirement under the 8(a) BD Program or SBA has accepted the requirement for performance under the authority of the 8(a) BD program, unless SBA consented to release the requirement from the 8(a) BD program.

(g) *Contracting Among Small Business Programs.* (1) *Acquisitions Valued At or Below the Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Micropurchase Threshold but not exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for

small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from making an award to a small business under the 8(a) BD, HUBZone, SDVO SBC or WOSB Programs.

(2) *Acquisitions Valued Above the Simplified Acquisition Threshold.* (i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the Simplified Acquisition Threshold (defined in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's certifications in SAM (or any successor system) and associated representations were reviewed.

(ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

(h) *Contract file.* When restricting competition to WOSBs or EDWOSBs in accordance with §127.503, the contracting officer must document the contract file accordingly, including the type and extent of market research and the fact that the NAICS code assigned to the contract is for an industry that SBA has designated as an underrepresented or, with respect to WOSBs, substantially underrepresented, industry. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's documents and certifications in SAM (or any successor system) and associated representations were reviewed.

[75 FR 62282, Oct. 7, 2010, as amended at 77 FR 1861, Jan. 12, 2012; 78 FR 26506, May 7, 2013; 78 FR 61147, Oct. 2, 2013; 79 FR 31849, June 3, 2014; 80 FR 55022, Sept. 14, 2015; 83 FR 12852, Mar. 26, 2018; 84 FR 65665, Nov. 29, 2019; 85 FR 27664, May 11, 2020; 85 FR 66197, Oct. 16, 2020; 86 FR 61673, Nov. 8, 2021; 88 FR 26215, Apr. 27, 2023]

§ 127.504 What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB requirement?

(a) *General.* In order for a concern to submit an offer on a specific EDWOSB or WOSB set-aside requirement, the concern must qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract, and either be a certified EDWOSB or WOSB pursuant to §127.300, or represent that it has submitted a complete application for WOSB or EDWOSB certification to SBA or a third-party certifier and has not received a negative determination regarding that application from SBA or the third party certifier.

(1) If a concern becomes the apparent successful offeror while its application for WOSB or EDWOSB certification is pending, either at SBA or a third-party certifier, the contracting officer for the particular contract must immediately inform SBA's D/GC. SBA will then prioritize the concern's WOSB or EDWOSB application and make a determination regarding the firm's status as a WOSB or EDWOSB within 15 calendar days from the date that SBA received the contracting officer's notification. Where the application is pending with a third-party certifier, SBA will immediately contact the third-party certifier to require the third-

party certifier to complete its determination within 15 calendar days.

(2) If the contracting officer does not receive an SBA or third-party certifier determination within 15 calendar days after the SBA's receipt of the notification, the contracting officer may presume that the apparently successful offeror is not an eligible WOSB or EDWOSB and may make award accordingly, unless the contracting officer grants an extension to the 15-day response period.

(b) *Sole source EDWOSB or WOSB requirements.* In order for a concern to seek a specific sole source EDWOSB or WOSB requirement, the concern must be a certified EDWOSB or WOSB pursuant to §127.300 and qualify as small under the size standard corresponding to the requirement being sought.

(c) *Joint ventures.* A business concern seeking an EDWOSB or WOSB contract as a joint venture may submit an offer if the joint venture meets the requirements as set forth in §127.506.

(d) *Multiple Award Contracts.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(1) SBA determines EDWOSB or WOSB eligibility for the underlying Multiple Award Contract as of the date a concern certifies its status as an EDWOSB or WOSB as part of its initial offer (or other formal response to a solicitation), which includes price, unless the concern was required to recertify its status as a WOSB or EDWOSB under paragraph (f) of this section.

(i) *Unrestricted Multiple Award Contracts or Set-Aside Multiple Award Contracts for Other than EDWOSB or WOSB.* For an unrestricted Multiple Award Contract or other Multiple Award Contract not set aside specifically for EDWOSB or WOSB, if a business concern is an EDWOSB or WOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is an EDWOSB or WOSB for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as an EDWOSB or WOSB for a specific order or Blanket Purchase Agreement. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set aside exclusively for EDWOSB or WOSB, a concern must recertify it qualifies as an EDWOSB or WOSB at the time it submits its initial offer, which includes price, for the particular order or Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of WOSB or EDWOSB concerns for which WOSB or EDWOSB status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set aside exclusively for concerns in the WOSB or EDWOSB pool, concerns need not recertify their status as WOSBs or EDWOSBs (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(ii) *EDWOSB or WOSB Set-Aside Multiple Award Contracts.* For a Multiple Award Contract that is set aside specifically for EDWOSB or WOSB, if a business concern is an EDWOSB or WOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is an EDWOSB or WOSB for each order issued against the contract, unless a contracting officer requests recertification as an EDWOSB or WOSB for a specific order or Blanket Purchase Agreement.

(2) SBA will determine EDWOSB or WOSB status at the time a business concern submits its initial offer (or other formal response to a solicitation) which includes price for an order or an Agreement issued against a Multiple Award Contract if the contracting officer requests a new EDWOSB or WOSB certification for the order or Agreement.

(e) *Limitations on subcontracting.* A business concern seeking an EDWOSB or WOSB requirement must also meet the applicable limitations on subcontracting requirements as set forth in §125.6 of this chapter for the performance of EDWOSB or WOSB contracts (both sole source and those totally set aside for EDWOSB or WOSB), the performance of the set-aside portion of a partial set-aside contract, or the performance of orders set-aside for EDWOSB or WOSB.

(f) *Non-manufacturers.* An EDWOSB or WOSB that is a non-manufacturer, as defined in §121.406(b) of this chapter, may submit an offer on an EDWOSB or WOSB contract for supplies, if it meets the requirements under the non-manufacturer rule set forth in §121.406(b) of this chapter.

(g) *Ostensible subcontractor.* Where a subcontractor that is not similarly situated performs primary and vital requirements of a set-aside service contract, or where a prime contractor is unduly reliant on a small business that is not similarly situated to perform the set-aside service contract, the prime contractor is not eligible for award of a WOSB or EDWOSB contract.

(1) When the subcontractor is small for the size standard assigned to the procurement, this issue may be grounds for a WOSB or EDWOSB status protest, as described in subpart F of this part. When the subcontractor is other than small or alleged to be other than small for the size standard assigned to the procurement, this issue may be grounds for a size protest, as described at §121.103(h)(3) of this chapter.

(2) In the case of a contract or order for services, specialty trade construction or supplies, SBA will find that a prime WOSB or EDWOSB contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not certified WOSBs or EDWOSBs, where the prime contractor can demonstrate that it, together with any subcontractors that are certified WOSBs or EDWOSBs, will meet the limitations on subcontracting provisions set forth in §125.6 of this chapter.

(3) In a general construction contract, the primary and vital requirements of the contract are the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed.

(h) *Recertification.* (1) Where a contract being performed by an EDWOSB or WOSB is novated to another business concern, the concern that will continue performance on the contract must recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) to the procuring agency, or inform the procuring agency that it does not qualify as an EDWOSB or WOSB, (or qualify as a certified EDWOSB or WOSB for a WOSB contract) within 30 days of the novation approval. If the concern cannot recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(2) Where an EDWOSB or WOSB concern that is performing a contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) to the procuring agency, or inform the procuring agency that it no longer qualifies as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract). If the concern is unable to recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), the agency must modify the contract to reflect the new status, and may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(3) For purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option. If the concern is unable to recertify its status as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract), the agency must modify the contract to reflect the new status, and

may not count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(4) A business concern that did not certify as an EDWOSB or WOSB, either initially or prior to an option being exercised, may recertify as an EDWOSB or WOSB (or qualify as a certified EDWOSB or WOSB for a WOSB contract) for a subsequent option period if it meets the eligibility requirements at that time. The agency must modify the contract to reflect the new status, and may count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(5) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(6) A concern's status will be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

[85 FR 66197, Oct. 16, 2020, as amended at 86 FR 10732, Feb. 23, 2021; 88 FR 26215, Apr. 27, 2023]

§ 127.505 [Reserved]

§ 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

A joint venture, including those between a protégé and a mentor under § 125.9 of this chapter (or, if also an 8(a) BD Participant, under § 124.520 of this chapter), may submit an offer on a WOSB Program contract if the joint venture meets all of the following requirements:

(a)(1) A joint venture of at least one WOSB or EDWOSB and one or more other business concerns may submit an offer as a small business for a WOSB Program procurement or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.

(2) A joint venture between a protégé firm and its SBA-approved mentor (*see* § 125.9 and § 124.520 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the WOSB Program procurement or sale.

(3) A WOSB or EDWOSB cannot be a joint venture partner on more than one joint venture that submits an offer for a specific contract or order set-aside or reserved for WOSBs or EDWOSBs.

(b) The EDWOSB or WOSB participant of the joint venture must be designated in SAM (or any successor system)as an EDWOSB or WOSB;

(c) *Contents of joint venture agreement.* The parties to the joint venture must enter into a written joint venture agreement. The joint venture agreement must contain a provision:

(1) Setting forth the purpose of the joint venture.

(2) Designating a WOSB or EDWOSB as the managing venturer of the joint venture, and designating a named employee of the WOSB or EDWOSB managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'').

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the WOSB or EDWOSB at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the WOSB or EDWOSB if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the WOSB or EDWOSB for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by

the joint venture's Responsible Manager.

(3) Stating that with respect to a separate legal entity joint venture, the WOSB must own at least 51% of the joint venture entity;

(4) Stating that the WOSB or EDWOSB must receive profits from the joint venture commensurate with the work performed by the WOSB or EDWOSB, or a percentage agreed to by the parties to the joint venture whereby the WOSB or EDWOSB receives profits from the joint venture that exceed the percentage commensurate with the work performed by the WOSB or EDWOSB;

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. All payments due the joint venture for performance on a WOSB Program contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the WOSB Program participant(s) in the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the WOSB Program participant(s) in the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(8) Obligating all parties to the joint venture to ensure performance of the WOSB contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the WOSB managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(10) Requiring that the final original records be retained by the WOSB managing venturer upon completion of the WOSB Program contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) *Performance of work.* (1) For any WOSB Program contract, the joint venture (including one between a protégé and a mentor authorized by § 125.9 or § 124.520 of this chapter) must perform the applicable percentage of work required by § 125.6 of this chapter.

(2) The WOSB partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(i) The work performed by the WOSB partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the WOSB partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by the non-WOSB partner, all work done by the non-WOSB partner and any of its affiliates at any subcontracting tier will be counted.

(e) *Certification of compliance.* Prior to the performance of any WOSB Program contract as a joint venture, the WOSB Program participant in the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(i) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section;

(ii) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(f) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for an EDWOSB or WOSB contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the EDWOSB or WOSB small business concern to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

(g) *Contract execution.* The procuring activity will execute a WOSB Program contract in the name of the joint venture entity or the WOSB, but in either case will identify the award as one to a WOSB Program joint venture or a WOSB Program mentor-protégé joint venture, as appropriate.

(h) *Submission of joint venture agreement.* The WOSB Program participant must provide a copy of the joint venture agreement to the contracting officer.

(i) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(j) *Performance of work reports.* The WOSB Program participant in the joint venture must describe how it is meeting or has met the applicable performance of work requirements for each WOSB Program contract it performs as a joint venture.

(1) The WOSB partner to the joint venture must annually submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how the performance of work requirements are being met for each WOSB Program contract performed during the year.

(2) At the completion of every WOSB Program contract awarded to a joint venture, the WOSB partner to the joint venture must submit a report to the relevant contracting officer and to the SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (c) of this section.

(k) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement

applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) or comply with paragraph (i) of this section.

(l) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

[75 FR 62282, Oct. 7, 2010, as amended at 78 FR 61147, Oct. 2, 2013; 81 FR 34265, May 31, 2016; 81 FR 48593, July 25, 2016; 81 FR 94942, Dec. 27, 2016; 85 FR 66199, Oct. 16, 2020; 86 FR 2960, Jan. 14, 2021; 88 FR 26215, Apr. 27, 2023]

§ 127.507 Are there EDWOSB and WOSB contracting opportunities at or below the simplified acquisition threshold?

If the requirement is valued at or below the simplified acquisition threshold, the contracting officer may set aside the requirement or award the requirement on a sole source basis as set forth in § 127.503.

[80 FR 55022, Sept. 14, 2015]

§ 127.508 May SBA appeal a contracting officer's decision not to make a requirement available for award as a WOSB Program contract?

The Administrator may appeal a contracting officer's decision not to make a particular requirement available for award under the WOSB Program.

§ 127.509 What is the process for such an appeal?

(a) *Notice of appeal.* When the contacting officer rejects a recommendation by SBA's Procurement Center Representative to make a requirement available for the WOSB Program, he or she must notify the Procurement Center Representative as soon as practicable. If the Administrator intends to appeal the decision, SBA must notify the contracting officer no later than five (5) business days after receiving notice of the contracting officer's decision.

(b) *Suspension of action.* Upon receipt of notice of SBA's intent to appeal, the contracting officer must suspend further action regarding the procurement until the Secretary of the department or head of the agency issues a written decision on the appeal, unless the Secretary of the department or head of the agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.

(c) *Deadline for appeal.* Within fifteen (15) business days of SBA's notification to the CO, SBA must file its formal appeal with the Secretary of the department or head of the agency, or the appeal will be deemed withdrawn.

(d) *Decision.* The Secretary of the department or head of the agency must specify in writing the reasons for a denial of an appeal brought under this section.

Subpart F—Protests

§ 127.600 Who may protest the status of a concern as an EDWOSB or WOSB?

(a) *For sole source procurements.* SBA or the contracting officer may protest the proposed awardee's EDWOSB or WOSB status.

(b) *For all other EDWOSB or WOSB requirements.* An interested party may protest the apparent successful offeror's EDWOSB or WOSB status.

[80 FR 55022, Sept. 14, 2015]

§ 127.601 May a protest challenging the size and status of a concern as an EDWOSB or WOSB be filed together?

An interested party seeking to protest both the size and the EDWOSB or WOSB status of an apparent successful offeror on an EDWOSB or WOSB requirement must file two separate protests, one size protest pursuant to part 121 of this chapter and one EDWOSB or WOSB status protest pursuant to this subpart. An interested party seeking to protest only the size of an apparent successful EDWOSB or WOSB offeror

must file a size protest to the contracting officer pursuant to part 121 of this chapter.

§ 127.602 What are the grounds for filing an EDWOSB or WOSB status protest?

(a) SBA will consider a protest challenging the status of a concern as an EDWOSB or WOSB if the protest presents sufficient credible evidence to show that the concern may not be owned and controlled by one or more women who are United States citizens and, if the protest is in connection with an EDWOSB contract, that the concern is not at least 51 percent owned and controlled by one or more women who are economically disadvantaged. SBA will also consider a protest challenging the status of a concern as an EDWOSB or WOSB if the contracting officer has protested because the WOSB or EDWOSB apparent successful offeror has failed to provide all of the required documents, as set forth in §127.300. In addition, when sufficient credible evidence is presented, SBA will consider a protest challenging whether the prime contractor is unusually reliant on a small, non-similarly situated entity subcontractor, as defined in §125.1 of this chapter, or a protest alleging that such subcontractor is performing the primary and vital requirements of a set-aside or sole-source WOSB or EDWOSB contract.

(b) For a protest filed against an EDWOSB or WOSB joint venture, the protest must state all specific grounds for why—

(1) The EDOWSB or WOSB partner to the joint venture did not meet the EDWOSB or WOSB eligibility requirements set forth in §127.200; and/or

(2) The protested EDWOSB or WOSB joint venture did not meet the requirements set forth in §127.506.

[75 FR 62282, Oct. 7, 2010, as amended at 84 FR 65251, Nov. 26, 2019; 84 FR 65665, Nov. 29, 2019]

§ 127.603 What are the requirements for filing an EDWOSB or WOSB status protest?

(a) *Format.* Protests must be in writing and must specify all the grounds upon which the protest is based. A protest merely asserting that the protested concern is not an eligible EDWOSB or WOSB, without setting forth specific facts or allegations, is insufficient.

(b) *Filing.* Protestors may deliver their written protests in person, by facsimile, by express delivery service, e-mail, or by U.S. mail (received by the applicable date) to the following:

(1) To the contracting officer, if the protestor is an offeror for the specific contract; or

(2) To the D/GC, if the protest is initiated by the contracting officer or SBA. IF SBA initiates a protest, the D/GC will notify the contracting officer of such protest.

(c) *Timeliness.* (1) For negotiated acquisitions, a protest from an interested party must be received by the contracting officer prior to the close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror or notification of award. Except for an order or Blanket Purchase Agreement issued under any Federal Supply Schedule contact, for an order or a Blanket Purchase Agreement that is set-aside for EDWOSB or WOSB small business under a Multiple Award Contract that is not itself set aside for EDWOSB or WOSB small business or have a reserve for EDWOSB or WOSB small business (or any EDWOSB or WOSB order where the contracting officer has requested recertification of such status), an interested party must submit its protest challenging the EDWOSB or WOSB status of a concern for the order or Blanket Purchase Agreement by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

(2) For sealed bid acquisitions, a protest from an interested party must be received by close of business on the fifth business day after bid opening. Where the identified low bidder is determined to be ineligible for award, a protest of any other identified low bidder must be received prior to the close of business on the 5th business day after the contracting officer has notified interested parties of the identity of that low bidder.

(3) Any protest received after the time limit is untimely, unless it is from SBA or the contracting officer. A

contracting officer or SBA may file an EDWOSB or WOSB protest at any time after bid opening or notification of intended awardee, whichever applies.

(4) Any protest received prior to bid opening or notification of intended awardee, whichever applies, is premature.

(5) A timely filed protest applies to the procurement in question even if filed after award.

(d) *Referral to SBA.* The contracting officer must forward to SBA any WOSB or EDWOSB status protest received, notwithstanding whether he or she believes it is premature, sufficiently specific, or timely. The contracting officer must send all WOSB and EDWOSB status protests, along with a referral letter and documents, directly to the Director for Government Contracting, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416, or by fax to (202) 205–6390, Attn: Women-Owned Small Business Status Protest.

(1) The contracting officer's referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including: the solicitation number; the name, address, telephone number and facsimile number of the contracting officer; whether the protestor submitted an offer; whether the protested concern was the apparent successful offeror; when the protested concern submitted its offer; whether the procurement was conducted using sealed bid or negotiated procedures; the bid opening date, if applicable; when the protest was submitted to the contracting officer; when the protestor received notification about the apparent successful offeror, if applicable; and whether a contract has been awarded.

(2) Where a protestor alleges that a WOSB/EDWOSB is unduly reliant on one or more subcontractors that are not WOSBs/EDWOSBs or a subcontractor that is not a WOSB/EDWOSB will perform primary and vital requirements of the contract, the D/GC or designee will refer the matter to the Government Contracting Area Office serving the geographic area in which the principal office of the SDVO SBC is located for a determination as to whether the ostensible subcontractor rule has been met.

(3) The D/GC or designee will decide the merits of EDWOSB or WOSB status protests.

[75 FR 62282, Oct. 7, 2010, as amended at 85 FR 27665, May 11, 2020; 85 FR 66199, Oct. 16, 2020; 88 FR 26215, Apr. 27, 2023]

§ 127.604 How will SBA process an EDWOSB or WOSB status protest?

(a) *Notice of receipt of protest.* Upon receipt of the protest, SBA will notify the contracting officer and the protestor of the date SBA received the protest and whether SBA will process the protest or dismiss it under paragraph (b) of this section. The contracting officer may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest. Notwithstanding such a determination, the provisions of paragraph (f) of this section apply to the procurement in question.

(b) *Dismissal of protest.* If SBA determines that the protest is premature, untimely, nonspecific, or is based on nonprotestable allegations, SBA will dismiss the protest and will send the contracting officer and the protestor a notice of dismissal, citing the reason(s) for the dismissal. Notwithstanding SBA's dismissal of the protest, SBA may, in its sole discretion, consider the protest allegations in determining whether to conduct an examination of the protested concern pursuant to subpart D of this part or submit a protest itself.

(c) *Notice to protested concern.* If SBA determines that the protest is timely, sufficiently specific and is based upon protestable allegations, SBA will:

(1) Notify the protested concern of the protest and request information and documents responding to the protest within five (5) business days from the date of the notice. These documents will include those that verify the eligibility of the concern, respond to the protest allegations, and copies of proposals or bids submitted in response to an EDWOSB or WOSB requirement. In addition, EDWOSBs will be required to submit signed copies of SBA Form 413, Personal Financial Statement, the

three most recent personal income tax returns (including all schedules and W–2 forms) for the women claiming economic disadvantage and their spouses, unless the individuals and their spouses are legally separated, and SBA Form 4506–T, Request for Tax Transcript Form. SBA may draw an adverse inference where a concern fails to cooperate in providing the requested information and documents; and

(2) Forward a copy of the protest to the protested concern.

(d) *Time period for determination.* SBA will determine the EDWOSB or WOSB status of the protested concern within fifteen (15) business days after receipt of the protest, or within any extension of that time that the contracting officer may grant SBA. If SBA does not issue its determination within the fifteen (15) business day period (or within any extension of that time the contracting officer has granted), the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. Notwithstanding such a determination, the provisions of paragraph (f) of this section apply to the procurement in question. The determination must be included in the contract file and a written copy sent to the D/GC.

(e) *Notification of determination.* SBA will notify the contracting officer, the protestor, and the protested concern in writing of its determination. If SBA sustains the protest, SBA will issue a decision explaining the basis of its determination and requiring that the concern remove its designation in SAM (or any successor system) as an EDWOSB or WOSB, as appropriate. Regardless of a decision not to sustain the protest, SBA may, in its sole discretion, consider the protest allegations in determining whether to conduct an examination of the protested concern pursuant to subpart D of this part.

(f) *Effect of determination.* SBA's determination is effective immediately and is final unless overturned by SBA's Office of Hearings and Appeals (OHA) on appeal pursuant to §127.605.

(1) A contracting officer may award the contract to a protested concern after the D/GC either has determined that the protested concern is an eligible WOSB or EDWOSB or has dismissed all protests against it. If OHA subsequently overturns the D/GC's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) A contracting officer shall not award the contract to a protested concern that the D/GC has determined is not an EDWOSB or WOSB for the procurement in question.

(i) If a contracting officer receives such a determination after contract award, and no OHA appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely OHA appeal has been filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If OHA affirms the D/GC's determination finding that the protested concern is ineligible, the contracting officer shall either terminate the contract, not exercise the next option or not award further task or delivery orders.

(3) The contracting officer must update the Federal Procurement Data System and other procurement reporting databases to reflect the final agency decision (the D/GC's decision if no appeal is filed or OHA's decision).

(4) A concern that has been found to be ineligible will be decertified from the program and may not submit an offer as a WOSB or EDWOSB on another procurement until it is recertified. A concern may be recertified by reapplying to the program pursuant to §127.305.

[75 FR 62282, Oct. 7, 2010, as amended at 77 FR 1861, Jan. 12, 2012; 78 FR 61148, Oct. 2, 2013; 85 FR 27665, May 11, 2020]

§127.605 What are the procedures for appealing an EDWOSB or WOSB status protest decision?

The protested concern, the protestor, or the contracting officer may file an appeal of a WOSB or EDWOSB status protest determination with SBA's Office of Hearings and Appeals (OHA) in

accordance with part 134 of this chapter.

Subpart G—Penalties

§ 127.700 What are the requirements for representing EDWOSB or WOSB status, and what are the penalties for misrepresentation?

(a) *Presumption of Loss Based on the Total Amount Expended.* In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to EDWOSBs or WOSBs, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a EDWOSB or WOSB willfully sought and received the award by misrepresentation.

(b) *Deemed Certifications.* The following actions shall be deemed affirmative, willful and intentional certifications of EDWOSB or WOSB status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to EDWOSBs or WOSBs.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a EDWOSB or WOSB.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as an EDWOSB or WOSB.

(c) *Signature Requirement.* Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the EDWOSB or WOSB status of a business concern seeking the Federal contract, subcontract or grant. An authorized official must sign the certification on the same page containing the EDWOSB or WOSB status claimed by the concern.

(d) *Limitation of Liability.* Paragraphs (a)–(c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of EDWOSB or WOSB status was not affirmative, intentional, willful or actionable under the False Claims Act, 31 U.S.C. §§3729, et seq. A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' EDWOSB or WOSB status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing EDWOSB or WOSB status representations or certifications, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where government personnel have erroneously identified a concern as an EDWOSB or WOSB without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) *Penalties for Misrepresentation.* (1) *Suspension or debarment.* The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's status as an EDWOSB or WOSB pursuant to the procedures set forth in 48 CFR subpart 9.4.

(2) *Civil Penalties.* Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729–3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812, and any other applicable laws or regulations, including 13 CFR part 142.

(3) *Criminal Penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the EDWOSB or WOSB status of a concern in connection with procurement programs pursuant to section

16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct ''continuing representations'' that are no longer true.

[78 FR 38820, June 28, 2013, as amended at 81 FR 31492, May 19, 2016]

§ 127.701 What must a concern do in order to be identified as an EDWOSB or WOSB in any Federal procurement databases?

(a) In order to be identified as an EDWOSB or WOSB in the System for Award Management (SAM) database (or any successor thereto), a concern must certify its EDWOSB or WOSB status in connection with specific eligibility requirements at least annually.

(b) If a firm identified as an EDWOSB or WOSB in SAM fails to certify its status within one year of a status certification, the firm will not be listed as an EDWOSB or WOSB in SAM, unless and until the firm recertifies its EDWOSB or WOSB status.

[78 FR 38821, June 28, 2013]

PART 128—VETERAN SMALL BUSINESS CERTIFICATION PROGRAM

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AUTHORITY: 15 U.S.C. 632(q), 634(b)(6), 644, 645, 657f, 657f–1.

SOURCE: 87 FR 73412, Nov. 29, 2022, unless otherwise noted.

Subpart A—Provisions of General Applicability

§ 128.100 What is the purpose of this part?

Section 8127 of Title 38 within the U.S. Code (38 U.S.C. 8127) authorizes certain procurement mechanisms to provide Veteran-Owned Small Business Concerns (VOSB) and Service-Disabled Veteran-Owned Small Business Concerns (SDVOSB) with contracting assistance opportunities at the Department of Veterans Affairs (VA). Section 36 of the Small Business Act (15 U.S.C. 657f) authorizes certain procurement mechanisms to provide SDVOSBs with contracting assistance opportunities across the Federal Government. In addition, sections 36 and 36A of the Small Business Act (15 U.S.C. 657f, 657f–1) authorize the Small Business Administration (SBA) to certify the status of VOSB and SDVOSBs. This part implements these mechanisms and ensures that the program created, referred to as the Veteran Small Business Certification Program, is substantially related to this important congressional goal in accordance with applicable law.

§ 128.101 What type of assistance is available under this part?

Contracting officers are authorized to restrict competition or award sole source contracts or orders to eligible SDVOSBs. In addition, 48 CFR chapter 8 authorizes VA contracting officers to restrict competition or award sole source contracts or orders to eligible VOSBs and SDVOSBs.

§ 128.102 What definitions are important in the Veteran Small Business Certification Program?

Applicant means a firm applying for certification in the Veteran Small Business Certification Program.

Certification database means the database of certified VOSBs and SDVOSBs eligible to participate in the Veteran Small Business Certification Program.

Contracting officer has the meaning given such term in section 2101(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 2101(1)).

Day-to-day operations means the marketing, production, sales, and administrative functions of the firm.

Employee Stock Ownership Plan (ESOP) has the meaning given such term in section 4975(e)(7) of the Internal Revenue Code of 1986 (26 U.S.C. 4975(e)(7)).

Negative control includes, but is not limited to, instances where a non-qualifying-veteran has the ability, under the concern's governing documents (*e.g.*, charter, by-laws, operating agreement, or shareholder's agreement), to prevent a quorum or otherwise block action by the board of directors or qualifying veteran owner(s).

Non-veteran means any individual who does not claim veteran status, or upon whose status an Applicant or Participant does not rely in qualifying for certification.

Participant means a small business that has been certified by SBA as eligible to participate in the Veteran Small Business Certification Program or verified by VA's Center for Verification and Evaluation prior to January 1, 2023, and appearing in the certification database.

Permanent caregiver, for purposes of this part, means the spouse, or an individual, 18 years of age or older, who is legally designated, in writing, to undertake responsibility for managing the well-being of the service-disabled veteran with a permanent and severe disability, as determined by the Department of Veterans Affairs' Veterans Benefits Administration, to include housing, health and safety. A permanent caregiver may, but does not need to, reside in the same household as the service-disabled veteran with a permanent and severe disability. In the case

of a service-disabled veteran with a permanent and severe disability lacking legal capacity, the permanent caregiver shall be a parent, guardian, or person having legal custody. There may be no more than one permanent caregiver per service-disabled veteran with a permanent and severe disability.

(1) A permanent caregiver may be appointed, in a number of ways, including:

(i) By a court of competent jurisdiction;

(ii) By the Department of Veterans Affairs, National Caregiver Support Program, as the Primary Family Caregiver of a Veteran participating in the Program of Comprehensive Assistance for Family Caregivers (this designation is subject to the Veteran and the caregiver meeting other specific criteria as established by law and the Secretary and may be revoked if the eligibility criteria do not continue to be met); or

(iii) By a legal designation.

(2) Any appointment of a permanent caregiver must in all cases be accompanied by a written determination from the Department of Veterans Affairs that the veteran has a permanent and total service-connected disability as set forth in 38 CFR 3.340 for purposes of receiving disability compensation or a disability pension. The appointment must also delineate why the permanent caregiver is given the appointment, must include the consent of the veteran to the appointment and how the appointment would contribute to managing the veteran's well-being.

Qualifying veteran means a veteran upon which a VOSB's eligibility is based, or in the case of an SDVOSB, a service-disabled veteran (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) (as those terms are defined in this part) upon which a SDVOSB's eligibility is based.

Service-connected has the meaning given that term in 38 U.S.C. 101(16).

Service-disabled veteran means a veteran who is registered in the Beneficiary Identification and Records Locator Subsystem or successor system, maintained by Department of Veterans Affairs' Veterans Benefits Administration as a service-disabled veteran.

Service-Disabled Veteran-Owned Small Business Concern (SDVOSB) means a small business concern that meets the requirements described in §128.200(b).

Service-disabled veteran with a permanent and severe disability means a veteran with a service-connected disability that has been determined by the Department of Veterans Affairs, in writing, to have a permanent and total service-connected disability as set forth in 38 CFR 3.340 for purposes of receiving disability compensation or a disability pension.

Small business concern (SBC) means, a concern that, with its affiliates, meets the size standard corresponding to any North American Industry Classification System (NAICS) code listed in its SAM profile, pursuant to part 121 of this chapter. At the time of contract offer, a VOSB or SDVOSB must be small within the size standard corresponding to the NAICS code assigned to the contract.

Surviving spouse has the meaning given the term in 38 U.S.C. 101(3).

System for Award Management (SAM) (or any successor system) means a federal system available at *www.sam.gov* that consolidates various federal procurement systems (*e.g.*, Central Contractor Registration, Federal Agency Registration, Online Representations and Certifications Application, Excluded Parties List System) and the Catalog of Federal Domestic Assistance into one system.

VA means the U.S. Department of Veterans Affairs.

Veteran has the meaning given such term in 38 U.S.C. 101(2). A Reservist or member of the National Guard called to Federal active duty or disabled from a disease or injury incurred or aggravated in line of duty or while in training status also qualifies as a veteran.

Veterans Affairs Acquisition Regulation (VAAR) is the set of rules, located at 48 CFR chapter 8, that specifically govern requirements exclusive to VA prime and subcontracting actions.

Veteran-Owned Small Business Concern (VOSB) means a small business concern that meets the requirements described in §128.200(a).

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 42592, July 3, 2023]

Subpart B—Eligibility Requirements for the Veteran Small Business Certification Program

§ 128.200 What are the requirements a concern must meet to qualify as a VOSB or SDVOSB?

(a) *Qualification as a VOSB.* To qualify as a VOSB, a business entity must be:

(1) A small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile;

(2) Not less than 51 percent owned and controlled by one or more veterans.

(b) *Qualification as an SDVOSB.* To qualify as an SDVOSB, a business entity must be:

(1) A small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile;

(2) Not less than 51 percent owned and controlled by one or more service-disabled veterans or, in the case of a veteran with a disability that is rated by the Secretary of Veterans Affairs as a permanent and total disability who are unable to manage the daily business operations of such concern, the spouse or permanent caregiver of such veteran.

(c) *VOSB and SDVOSB certification requirement.* (1) A concern must be certified as a VOSB or SDVOSB pursuant to § 128.300 in order to be awarded a VOSB or SDVOSB set-aside or sole source contract. Any small business concern that submits a complete certification application to SBA on or before December 31, 2023, shall be eligible to self-certify for SDVOSB sole source or set-aside contracts (other than VA contracts) until SBA declines or approves the concern's application. Any small business concern that does not submit a complete SDVOSB certification application to SBA on or before December 31, 2023, will no longer be eligible to self-certify for SDVOSB sole source or set-aside contracts effective January 1, 2024.

(2) Other small business concerns that meet the eligibility requirements of this part but do not seek SDVOSB set-aside or sole source contracts may continue to self-certify their SDVOSB status, receive prime contract or subcontract awards that are not SDVOSB set-aside or sole source contracts, and count toward an agency's goal for SDVOSB awards.

§ 128.201 What other eligibility requirements apply for certification as a VOSB or SDVOSB?

(a) *Suspension and debarment.* (1) In order to be eligible for VOSB or SDVOSB certification and to remain certified, the concern and any of its owners must not have an active exclusion in SAM.

(2) An Applicant or Participant must immediately notify SBA of any active exclusion.

(3) If, after certifying a Participant, SBA discovers that a firm has been suspended from Federal Government contracting, SBA will propose the firm for decertification pursuant to § 128.310.

(4) If, after certifying a Participant, SBA discovers that a firm has been debarred from federal government contracting, SBA will remove the Participant from the certification database immediately, notwithstanding the provisions of § 128.310.

(b) *Financial obligations.* An Applicant is not eligible for certification as a VOSB or SDVOSB if the concern, or any of the principals, fail to pay significant financial obligations owed to the Federal Government, including unresolved tax liens and defaults on Federal loans, or other government-assisted financing. An Applicant may become eligible for certification as a VOSB or SDVOSB if the firm or the affected principals can demonstrate that the financial obligations owed have been settled, discharged, or forgiven by the Federal Government. If, after certifying a Participant, SBA discovers that the Participant or any principals have failed to pay significant financial obligations owed to the Federal Government, SBA will initiate proceedings to decertify the Participant and remove it from the certification database pursuant to § 128.310.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023]

§ 128.202 Who does SBA consider to own a VOSB or SDVOSB?

To qualify as a VOSB, one or more veterans must unconditionally and directly own at least 51 percent of the concern. To qualify as a SDVOSB, one or more service-disabled veterans must unconditionally and directly own at least 51 percent of the concern.

(a) *Direct ownership.* To be considered direct ownership, the qualifying veteran must own 51 percent of the concern directly, and not through another business entity or trust (including an ESOP). However, ownership by a trust, such as a living trust, may be considered direct ownership where the trust is revocable, and qualifying veterans are the grantors, trustees, and the current beneficiaries of the trust.

(b) *Unconditional ownership.* To be considered unconditional, ownership must not be subject to any conditions, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity).

(1) The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

(2) In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by qualifying veterans. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-veterans will be treated as exercised, except for any ownership interests which are held by investment companies licensed under 15 U.S.C. 681 *et. seq.*

(3) A right of first refusal granting the non-qualifying-veteran the contractual right to purchase the ownership interests of the qualifying veteran, does not affect the unconditional nature of ownership, if the terms follow normal commercial practices. If those rights are exercised by the non-qualifying-veteran, a Participant must notify SBA in accordance with § 128.307. If the exercise of those rights results in the qualifying veteran(s) owning less than 51% of the concern, SBA will initiate decertification pursuant to § 128.310.

(c) *Ownership of a partnership.* In the case of a concern that is a partnership, at least 51% of aggregate voting interest must be unconditionally owned by one or more qualifying veterans. The ownership must be reflected in the concern's partnership agreement.

(d) *Ownership of a limited liability company.* In the case of a concern which is a limited liability company, at least 51% of each class of member interest must be unconditionally owned by one or more qualifying veterans.

(e) *Ownership of a corporation.* In the case of a concern which is a corporation, at least 51% of the aggregate of all stock outstanding and at least 51% of each class of voting stock outstanding must be unconditionally owned by one or more qualifying veterans. In the case of a publicly-owned business, not less than 51 percent of the stock (not including any stock owned by an ESOP) must be unconditionally owned by one or more qualifying veterans.

(f) *Change of ownership.* A Participant may change its ownership or business structure so long as one or more qualifying veterans own and control it after the change. A Participant must notify SBA of a change of ownership in accordance with § 128.307 and attest to its continued eligibility.

(g) *Dividends and distributions.* One or more qualifying veterans must be entitled to receive:

(1) At least 51 percent of the annual distribution of profits paid to the owners of a corporation, partnership, or limited liability company concern, and a qualifying veteran's ability to share in the profits of the concern must be commensurate with the extent of his/her ownership interest in that concern.

(2) 100 percent of the value of each share of stock owned by them in the event that the stock or member interest is sold;

(3) At least 51 percent of the retained earnings of the concern and 100 percent of the unencumbered value of each share of stock or member interest

owned in the event of dissolution of the corporation, partnership, or limited liability company; and

(h) *Community property.* Ownership will be determined without regard to community property laws.

(i) *Surviving spouse.* (1) A small business concern owned and controlled by one or more service-disabled veterans immediately prior to the death of a service-disabled veteran who was the owner of the concern, the death of whom causes the concern to be less than 51 percent owned by one or more service-disabled veterans, will continue to qualify as a small business concern owned and controlled by service-disabled veterans during the time period specified in paragraph (i)(2) of this section if:

(i) The surviving spouse of the deceased veteran acquires such veteran's ownership interest in such concern;

(ii) Such veteran had a service-connected disability (as defined in 38 U.S.C. 101(16)); and

(iii) For a Participant, immediately prior to the death of such veteran, and during the period described in paragraph (i)(2) of this section, the small business concern is included in the certification database.

(2) The time period described in paragraph (i)(1)(iii) of this section is the time period beginning on the date of the veteran's death and ending on the earlier of—

(i) The date on which the surviving spouse remarries;

(ii) The date on which the surviving spouse relinquishes an ownership interest in the small business concern;

(iii) In the case of a surviving spouse of a veteran with a service-connected disability rated as 100 percent disabling or who dies as a result of a service-connected disability, 10 years after the date of the death of the veteran; or

(iv) In the case of a surviving spouse of a veteran with a service-connected disability rated as less than 100 percent disabling who does not die as a result of a service-connected disability, 3 years after the date of the death of the veteran.

§ 128.203 Who does SBA consider to control a VOSB or SDVOSB?

(a) *General.* To be an eligible VOSB, the management and daily business operations of the concern must be controlled by one or more veterans. To be an eligible SDVOSB, the management and daily business operations of the concern must be controlled by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran). Control by one or more qualifying veterans means that one or more qualifying veterans controls both the long-term decision-making and the day-to-day operations of the Applicant or Participant.

(b) *Managerial position and experience.* A qualifying veteran must hold the highest officer position in the concern (usually President or Chief Executive Officer) and must have managerial experience of the extent and complexity needed to control the concern. The qualifying veteran need not have the technical expertise or possess the required license to be found to control of the concern if the qualifying veteran can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

(c) *Control over a partnership.* In the case of a partnership, one or more qualifying veterans must serve as general partners, with control over all partnership decisions.

(d) *Control over a limited liability company.* In the case of a limited liability company, one or more qualifying veterans must serve as managing members, with control over all decisions of the limited liability company.

(e) *Control over a corporation.* One or more qualifying veterans must control the Board of Directors of the concern.

(1) SBA will deem qualifying veterans to control the Board of Directors where:

(i) One qualifying veteran owns 100% of all voting stock and is on the Board of Directors;

(ii) One qualifying veteran owns at least 51% of all voting stock, the qualifying veteran is on the Board of Directors, and no supermajority voting requirements exist for shareholders to

approve corporation actions. Where supermajority voting requirements are provided for in the concern's articles of incorporation, its by-laws, or by state law, the qualifying veteran must own at least the percent of the voting stock needed to overcome any such supermajority voting requirements; or

(iii) Two or more qualifying veterans together own at least 51% of all voting stock, each such qualifying veteran is on the Board of Directors, no supermajority voting requirements exist, and the qualifying veteran shareholders can demonstrate that they have made enforceable arrangements to permit one qualifying veteran to vote the stock of all qualifying veterans as a block without a shareholder meeting. Where the concern has supermajority voting requirements, the qualifying veteran shareholders must own at least that percentage of voting stock needed to overcome any such supermajority ownership requirements.

(2) Where a concern does not meet the requirements set forth in paragraph (e)(1) of this section, the qualifying veteran(s) must control the Board of Directors through actual numbers of voting directors or, where permitted by state law, through weighted voting (*e.g.,* in a concern having a two-person Board of Directors where one individual on the Board is a qualifying veteran and one is not, the qualifying veteran vote must be weighted—worth more than one vote—in order for the concern to be eligible). Where a concern seeks to comply with this paragraph (e)(2):

(i) Provisions for the establishment of a quorum cannot permit non-qualifying-veteran Directors to control the Board of Directors, directly or indirectly; and

(ii) Any Executive Committee of Directors must be controlled by qualifying veteran Directors unless the Executive Committee can only make recommendations to and cannot independently exercise the authority of the Board of Directors.

(iii) Non-qualifying-veterans may be found to control or have the power to control in circumstances where non-qualifying-veterans control the Board of Directors of the Applicant or Participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-qualifying-veterans to prevent a quorum or block actions proposed by the qualifying veterans.

(3) Non-voting, advisory, or honorary Directors may be appointed without affecting qualifying veterans' control of the Board of Directors.

(4) Arrangements regarding the structure and voting rights of the Board of Directors must comply with applicable state law.

(f) *Supermajority requirements.* One or more qualifying veteran(s) must meet all supermajority voting requirements regarding the management and daily business operations of the concern, regardless of the legal structure of the firm. An Applicant must inform the SBA, when applicable, of any supermajority voting requirements provided for in its articles of incorporation, its by-laws, by state law, or otherwise. Similarly, after being certified, a Participant must inform the SBA of changes regarding supermajority voting requirements.

(g) *Unexercised rights.* A qualifying veteran's unexercised right to cause a change in the control or management of the concern does not in itself constitute control, regardless of how quickly or easily the right could be exercised.

(h) *Limitations on control by non-qualifying-veterans.* (1) A non-qualifying-veteran must not:

(i) Exercise actual control or have the power to control the concern;

(ii) Have business relationships that cause such dependence that the qualifying veteran cannot exercise independent business judgment without great economic risk;

(iii) Control the Applicant or Participant through loan arrangements (which does not include providing a loan guaranty on commercially reasonable terms);

(iv) Provide critical financial or bonding support or a critical license to the Applicant or Participant, which directly or indirectly allows the non-qualifying-veteran significantly to influence business decisions of the qualifying veteran.

(2) A non-qualifying-veteran may be involved in the management of the

concern, and may be a stockholder, partner, limited liability member, officer, and/or director of the concern. However, a non-qualifying-veteran generally may not:

(i) Be a former employer, or a principal of a former employer, of any qualifying veteran, unless the concern demonstrates that the relationship between the former employer or principal and the qualifying veteran does not give the former employer actual control or the potential to control the Applicant or Participant and such relationship is in the best interests of the concern; or

(ii) Receive compensation from the concern in any form as a director, officer, or employee, that exceeds the compensation to be received by the qualifying veteran who holds the highest officer position (usually Chief Executive Officer or President), unless the concern demonstrates that the compensation to be received by the non-qualifying veteran is commercially reasonable or that the qualifying veteran has elected to take lower compensation to benefit the concern.

(i) *Limitation on outside employment.* The qualifying veteran who holds the highest officer position of the business concern may not engage in outside employment that prevent the qualifying veteran from devoting the time and attention to the concern necessary to control its management and daily business operations. A qualifying veteran generally must devote full-time during the business's normal hours of operations, unless the concern demonstrates that the qualifying veteran has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management of the concern. Where a qualifying veteran claiming to control a business concern devotes fewer hours to the business than its normal hours of operation, SBA will assume that the qualifying veteran does not control the concern, unless the concern demonstrates that the qualifying veteran has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management of the business.

(j) *Exception for extraordinary circumstances.* SBA will not find that a lack of control exists where a qualifying veteran does not have the unilateral power and authority to make decisions regarding the following extraordinary circumstances:

(1) Adding a new equity stakeholder;

(2) Dissolution of the company;

(3) Sale of the company or all assets of the company;

(4) The merger of the company; and

(5) Company declaring bankruptcy.

(k) *Exception for active duty.* Notwithstanding the requirements of this section, where a qualifying veteran is a reserve component member in the United States military who has been called to active duty, the concern may elect to designate in writing one or more individuals to control the concern on behalf of the qualifying veteran during the period of active duty. The concern must keep records evidencing the qualifying veteran's active duty status and the written designation of control and provide those documents to SBA.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023]

§ 128.204 What size standards apply to VOSBs and SDVOSBs?

(a) *Time of certification.* At the time of certification, a VOSB or SDVOSB must be a small business under the size standard corresponding to any NAICS code listed in its SAM profile. If SBA is unable to verify that an Applicant is small, SBA may deny the concern's application as a certified VOSB or SDVOSB, or SBA may request a formal size determination pursuant to part 121 of this chapter.

(b) *Time of contract offer.* In connection with a VOSB or SDVOSB contract, a VOSB or SDVOSB must be small under the size standard corresponding to the NAICS code assigned to the contract at the time it submits its initial offer or response which includes price. To be eligible for a VOSB or SDVOSB multiple award contract, a VOSB or SDVOSB must be small pursuant to the requirements of §121.404(a)(1) of this chapter. If the contracting officer is unable to verify that the VOSB or SDVOSB is small, the contracting officer should submit a size protest to SBA in accordance with part 121 of this chapter.

Subpart C—Certification of VOSB or SDVOSB Status

§ 128.300 How is a concern certified as a VOSB or SDVOSB?

A concern must apply to SBA for certification as a VOSB or SDVOSB. The concern must submit evidence that it is a small business owned and controlled by one or more qualifying veterans. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. If SBA determines that a concern meets the eligibility requirements of a VOSB or SDVOSB, it will notify the concern and designate the concern as a certified VOSB or SDVOSB in the certification database.

§ 128.301 Where must an application be filed?

An application for certification as a VOSB or SDVOSB must be electronically filed according to the instructions on SBA's website at *www.sba.gov*. Upon receipt of the Applicant's electronic submission, an acknowledgment message will be dispatched to the concern containing estimated processing time and other information.

§ 128.302 How does SBA process applications for certification?

(a) SBA's Director of Government Contracting (D/GC) (or designee) is authorized to approve or deny applications for certification as a VOSB or SDVOSB.

(b) SBA, in its sole discretion, may request clarification of information relating to eligibility at any time in the eligibility determination process. SBA will take into account any clarifications made by an Applicant in response to such a request.

(c) SBA, in its sole discretion, may request additional documentation at any time in the eligibility determination process. Failure to adequately respond to the documentation request shall constitute grounds for a denial. If an Applicant does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may draw an adverse inference and presume that the information that the Applicant failed to provide would demonstrate ineligibility and deny certification on this basis.

(d) An Applicant's eligibility will be based on the totality of circumstances, including facts set forth in the application, supporting documentation, any information received in response to any SBA request for clarification, any independent research conducted by SBA, and any changed circumstances. The Applicant bears the burden of proof to demonstrate its eligibility as a VOSB or SDVOSB.

(1) If a concern submits inconsistent information that results in SBA's inability to determine the concern's compliance with any of the VOSB or SDVOSB eligibility requirements, SBA will decline the concern's application.

(2) If, during the processing of an application, SBA determines that an applicant has knowingly submitted false information, regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application.

(e) The Applicant must inform SBA of any changed circumstances that occur during its application review and that could affect its eligibility for the program (*e.g.*, change in size status, ownership, or control, filing of bankruptcy, or calling to active duty) and may withdraw its application at that time. Changed circumstances will be considered by SBA in determining an Applicant's eligibility and may constitute grounds for denial of the application. The D/GC may propose decertification for any VOSB or SDVOSB that failed to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

(f) The decision of the D/GC to approve or deny an application will be in writing. A decision to deny certification status will state the specific reason(s) for denial and will inform the Applicant of any appeal rights.

(1) If SBA denies a business concern's application for VOSB or SDVOSB certification, within two days of SBA's denial becoming a final agency decision, the applicant concern must update its VOSB or SDVOSB self-certification

status in the System for Award Management (or any successor system) to reflect that the concern is not an eligible VOSB or SDVOSB.

(i) If an applicant appeals the D/GC's denial decision to SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter and OHA affirms the ineligibility determination, the two-day requirement applies immediately upon OHA's final decision.

(ii) If an applicant does not appeal the D/GC's denial decision to OHA, the two-day requirement begins 10 business days after receipt of the D/GC's denial.

(2) If a business concern fails to update its VOSB or SDVOSB self-certification status in the System for Award Management (or any successor system) after a final SBA decision, SBA will make such update within two days of the business's failure to do so.

(g) If the D/GC approves the application, the period of program eligibility will be specified in the concern's certification letter.

(h) SBA will send a copy of the decision letter to the electronic mail address provided with the application. SBA will consider any decision sent to this electronic mail address provided to have been received by the applicant concern. It is the responsibility of the Applicant to ensure all contact information is current in the certification database.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023; 88 FR 42592, July 3, 2023]

§ 128.303 What must a concern submit to apply for VOSB or SDVOSB certification?

(a) To be certified by SBA as a VOSB or SDVOSB, a concern must provide documents and information demonstrating that it is owned and controlled by one or more qualifying veterans and qualifies as a small business concern as defined in part 121 of this chapter under the size standard corresponding to any NAICS code listed in its SAM profile. A list of the minimum required documents that must be submitted can be found on SBA's website at *www.sba.gov* on or before January 1, 2023.

(b) Where an Applicant small business concern is a participant in the 8(a) Business Development (BD) Program and the individual upon whom 8(a) BD Program eligibility is based is a qualifying veteran, the Applicant may use documentation of its most recent annual review, or documentation of its 8(a) BD Program acceptance if it has not yet had an annual review, in support of its application for certification as a VOSB or SDVOSB. An Applicant must certify that there have been no material changes in its ownership or control since its 8(a) BD Program certification or annual review and demonstrate that the individual(s) who own and control it are qualifying veterans.

(c) A small business concern that is certified by the WOSB/EDWOSB Program and the individual(s) upon whom WOSB/EDWOSB Program eligibility is based is one or more qualifying veterans may use documentation of its most recent annual recertification, or documentation of its acceptance in support of its application for certification. An Applicant must certify that there are no material changes in its ownership or control since its WOSB certification or recertification and demonstrate that the individuals who own and control it are qualifying veterans.

(d) If a concern was decertified or previously denied certification from the Veteran Small Business Certification Program within the past 3 years, it must include with its application for certification a full explanation of why it was decertified or denied certification, and what, if any, changes have been made. If SBA is not satisfied with the explanation provided, SBA will deny the concern.

(e) If the concern was decertified for failure to notify SBA of a material change affecting its eligibility pursuant to § 128.307, it must include with its application for certification a full explanation of why it failed to notify SBA of the material change. If SBA is not satisfied with the explanation provided, SBA will deny the concern.

(f) Participants must retain documentation demonstrating satisfaction of all qualifying requirements during the entire period of participation.

§ 128.304 Can an Applicant appeal SBA's initial decision to deny an application?

An Applicant may appeal SBA's decision to deny an application for certification as a VOSB or SDVOSB by filing an appeal with the SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter. A denial or decertification based on the failure to provide sufficient evidence of the qualifying individual's status as a veteran or a service-disabled veteran is not subject to appeal to OHA.

§ 128.305 Can an Applicant or Participant reapply for certification after a denied certification or decertification?

An Applicant that SBA denied certification or a Participant that SBA has decertified may submit an application for certification no sooner than ninety (90) calendar days from the date of final agency decision (*i.e.*, the SBA decision if no appeal is filed or the decision of SBA's OHA where an appeal is filed pursuant to §128.304) if it believes that it has overcome all of the reasons for denial or decertification and is currently eligible.

§ 128.306 How does a concern maintain its VOSB or SDVOSB certification?

(a) Any Participant seeking to remain certified must recertify its eligibility every 3 years. There is no limitation on the number of times a business may recertify. Participants may recertify within 120 calendar days prior to the termination of their eligibility period. If the concern fails to recertify, SBA may decertify the firm at the end of their eligibility period.

(b) The Participant must maintain its eligibility during its participation in the program and must inform SBA of any changes that may affect its eligibility within 30 calendar days in accordance with §128.307.

(c) The Participant must respond to any program examination initiated by SBA to remain a certified VOSB or SDVOSB.

(d) At the discretion of the Administrator (or designee), a Participant's eligibility period may be extended by a period of up to one year.

§ 128.307 What are a Participant's ongoing obligations to SBA?

Once certified, a VOSB or SDVOSB must notify SBA of any material changes that could affect its eligibility, within 30 calendar days of any such change, and attest to its continued eligibility. Material changes include, but are not limited to, a change in the firm's ownership, business structure, or control, filing of bankruptcy, or change in active duty status. The method for notifying SBA can be found on SBA's web page. A concern's failure to notify SBA of a material change may result in decertification, pursuant to §128.310. In addition, SBA may seek the imposition of penalties under §128.600.

§ 128.308 What is a program examination and what will SBA examine?

(a) *General.* A program examination is an investigation by SBA officials, which verifies the accuracy of any statement or information provided by a certified Participant. SBA may verify that the Participant currently meets the eligibility requirements of this part and that it met such requirements at the time of its application. An examination may be conducted on a random, unannounced basis, or upon receipt of specific and credible information alleging that a Participant did not meet the eligibility requirements in this part when it was certified or no longer meets all of those requirements.

(b) *Scope of examination.* SBA may review any information related to the concern's eligibility including, but not limited to, documentation related to the firm's legal structure, ownership, and control. Examiners may review any information previously provided to SBA and any additional information requested by SBA at the time of program examination. SBA may draw an adverse inference from a concern's failure to cooperate with a program examination or provide requested information and assume that the information that the concern failed to provide would demonstrate ineligibility, and decertify on this basis pursuant to §128.310.

(c) *Outcome of examination.* Upon its completion of the examination, SBA will issue a written decision.

(1) If SBA finds that the Participant does not qualify as a VOSB or SDVOSB, the procedures at § 128.310 will apply, except as provided in § 128.201.

(2) If SBA finds that the Participant continues to qualify as a VOSB or SDVOSB, the original eligibility period remains in effect.

§ 128.309 What are the ways a Participant may exit the Veteran Small Business Certification Program?

(a) *Voluntary withdrawal.* A Participant may voluntarily withdraw from the Veteran Small Business Certification Program at any time. Once a concern notifies SBA that it seeks to voluntarily withdraw from the program, SBA will decertify the concern and remove its designation as a certified VOSB or SDVOSB in the certification database. The concern may reapply for SDVOSB or VOSB certification ninety (90) calendar days after the date of decertification. At reapplication, the concern must demonstrate that it meets all eligibility requirements.

(b) *Decertification by SBA.* SBA may decertify a Participant and remove its designation as a VOSB or SDVOSB in the certification database in accordance with § 128.310. The concern may reapply for certification ninety (90) calendar days after the date of decertification. At reapplication, the concern must demonstrate that it meets all eligibility requirements.

(c) *Decertification pursuant to a protest.* Any certified VOSB or SDVOSB that is found to be ineligible through a VOSB or SDVOSB status protest decision will be immediately removed from the certification database. The concern may reapply for certification ninety (90) calendar days after the date of decertification. At reapplication, the concern must demonstrate that it meets all eligibility requirements.

(d) *Decertification due to suspension or debarment.* SBA may decertify a Participant immediately upon notice that the Participant or any of its owners has an active exclusion in SAM, pursuant to § 128.201.

§ 128.310 What are the procedures for decertification?

(a) *Proposed decertification.* If SBA has information indicating that a Participant may not meet the eligibility requirements of this part, SBA may propose decertification of the concern. The notice of proposed decertification will notify the concern that it has 30 calendar days from the date it receives the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify decertification. SBA will consider that written notice was provided if SBA sends the notice of proposed decertification to the concern at an email address in the Participant's certification database profile.

(b) *Response to proposed decertification.* The Participant must submit a written response to the notice of proposed decertification within the timeframe specified in the notice. In this response, the Participant must rebut each of the reasons set forth by SBA in the notice of proposed decertification, and where appropriate, the rebuttal must include documents showing that the concern is eligible as of the date specified in the notice. If a Participant fails to cooperate with SBA or fails to provide the information requested, SBA may draw an adverse inference and assume that the information that the concern failed to provide would demonstrate ineligibility.

(c) *Decision.* SBA will review the response and determine whether the Participant remains eligible. If SBA determines that the Participant is not eligible, the D/GC will issue a notice of decertification. The notice will set forth the specific facts and reasons for the decision, notify the concern of the right to appeal, and will advise the concern that it may re-apply after it has met all eligibility criteria in this part and completed the waiting period as set forth in § 128.305(a). If SBA finds that the concern is eligible, the Participant will continue to be designated as a VOSB or SDVOSB in the certification database.

(d) *Decertification due to submission of false information.* If SBA discovers that a VOSB/SDVOSB or its representative

knowingly submitted false information, SBA will propose the firm for decertification. In addition, SBA will refer the matter to the SBA Office of Inspector General for review and may request that Government-wide debarment or suspension proceedings be initiated by the agency.

(e) *Effect of decertification.* On the effective date of a concern's decertification, SBA will remove its designation as a certified VOSB or SDVOSB in the certification database. However, such concern is obligated to perform previously awarded contracts to the completion of their existing term of performance.

(f) *Appeals.* A concern that has been decertified pursuant to this section may file an appeal with OHA in accordance with part 134 of this chapter. The decision on the appeal shall be final. If no appeal is filed, the D/GC's decision is the final agency decision.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023]

Subpart D—Federal Contract Assistance

§ 128.400 What are VOSB and SDVOSB contracts?

(a) VOSB contracts are exclusively VA procurements, including prime contracts and subcontracts for which the VA is the procuring agency. For VA procurements, the VAAR (48 CFR chapter 8) specifically governs requirements exclusive to VA prime and subcontracting actions. The VAAR supplements the Federal Acquisition Regulation (FAR), which contains guidance applicable to most Federal agencies.

(b) SDVOSB contracts, including Multiple Award Contracts (see §125.1 of this chapter), are contracts available to an SDVOSB through any of the following procurement methods:

(1) Sole source awards to an SDVOSB;

(2) Set-aside awards, including partial set-asides, based on competition restricted to SDVOSBs;

(3) Awards based on a reserve for SDVOSBs in a solicitation for a Multiple Award Contract (*see* §125.1 of this chapter); or

(4) Orders set aside for SDVOSBs against a Multiple Award Contract, which had been awarded in full and open competition or as a small business set-aside.

§ 128.401 What requirements must a VOSB or SDVOSB meet to submit an offer on a contract?

(a) *Certification requirement.* Only certified VOSBs and SDVOSBs are eligible to submit an offer on a specific VOSB or SDVOSB requirement. The concern must qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract and be a certified VOSB or SDVOSB at the time of initial offer or response which includes price. Any small business concern that submits a complete certification application with to SBA on or before December 31, 2023, shall be eligible to self-certify for SDVOSB sole source or set-aside contracts (other than VA contracts) until SBA declines or approves the concern's application. Any small business concern that does not submit to SBA a complete SDVOSB certification application to SBA on or before December 31, 2023, will no longer be eligible to self-certify for SDVOSB sole source or set-aside contracts effective January 1, 2024.

(b) *Joint ventures.* A joint venture may submit an offer for a VOSB or SDVOSB contract if the joint venture meets the requirements set forth in §128.402.

(c) *Non-manufacturers.* A certified VOSB or SDVOSB that is a non-manufacturer may submit an offer on a VOSB or SDVOSB contract for supplies if it meets the requirements of the non-manufacturer rule set forth at §121.406(b)(1) of this chapter.

(d) *Multiple Award Contracts*—(1) *VOSB or SDVOSB status.* With respect to Multiple Award Contracts, orders issued against a Multiple Award Contract, and Blanket Purchase Agreements issued against a Multiple Award Contract:

(i) SBA determines a VOSB or SDVOSB's eligibility for the underlying Multiple Award Contract as of the date a business concern certifies its status as a certified VOSB or SDVOSB as part of its initial offer or response which includes price, unless the firm

was required to recertify under paragraph (e) of this section.

(A) *Unrestricted Multiple Award Contracts or set-aside Multiple Award Contracts for other than VOSB or SDVOSB.* For an unrestricted Multiple Award Contract or other Multiple Award Contract not specifically set aside for VOSBs or SDVOSBs, if a business concern is a certified VOSB or SDVOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is a VOSB or SDVOSB for goaling purposes for each order issued against the contract, unless a contracting officer requests recertification as a VOSB or SDVOSB for a specific order or Blanket Purchase Agreement or a contracting officer sets aside an order exclusively for VOSBs or SDVOSBs. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set aside exclusively for VOSBs or SDVOSBs, a concern must be a certified VOSB or SDVOSB at the time it submits its initial offer or response which includes price, for the particular order or Blanket Purchase Agreement. However, where the underlying Multiple Award Contract has been awarded to a pool of concerns for which certified VOSB or SDVOSB status is required, if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set aside exclusively for concerns in the certified VOSB or SDVOSB pool, concerns need not recertify their status as VOSBs or SDVOSBs (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(B) *VOSB or SDVOSB set-aside Multiple Award Contracts.* For a Multiple Award Contract that is specifically set aside for VOSBs or SDVOSBs, if a business concern is a certified VOSB or SDVOSB at the time of offer and contract-level recertification for the Multiple Award Contract, it is a VOSB or SDVOSB for each order issued against the contract, unless a contracting officer requests recertification as a VOSB or SDVOSB for a specific order or Blanket Purchase Agreement.

(ii) SBA will determine VOSB or SDVOSB status at the time of initial offer or response which includes price, for an order or an Agreement issued against a Multiple Award Contract, if the contracting officer requests a new VOSB or SDVOSB certification for the order or Agreement.

(iii) For an indefinite delivery, indefinite quantity (IDIQ), Multiple Award Contract, where concerns are not required to submit price as part of the offer for the IDIQ contract, size will be determined as of the date of initial offer, which may not include price.

(2) *Total set-aside contracts.* The certified VOSB or SDVOSB must comply with the applicable limitations on subcontracting provisions (*see* §125.6 of this chapter) and the nonmanufacturer rule (*see* §121.406(b) of this chapter), if applicable, in the performance of a contract totally set aside for VOSBs or SDVOSBs. However, contracting officers, in their discretion, may require a concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(3) *Partial set-aside contracts.* For orders awarded under a partial set-aside contract, the certified VOSB or SDVOSB must comply with the applicable limitations on subcontracting provisions (*see* §125.6 of this chapter) and the nonmanufacturer rule (*see* §121.406(b) of this chapter), if applicable, during each performance period of the contract (*e.g.,* during the base term and then during each option period thereafter). For orders awarded under the non-set-aside portion, the VOSB or SDVOSB need not comply with any limitations on subcontracting or nonmanufacturer rule requirements. However, contracting officers, in their discretion, may require a concern to perform the applicable amount of work or comply with the nonmanufacturer rule for each order awarded under the contract.

(4) *Orders.* The certified VOSB or SDVOSB must comply with the applicable limitations on subcontracting provisions (*see* §125.6 of this chapter) and the nonmanufacturer rule (*see*

§121.406(b) of this chapter), if applicable, in the performance of each individual order that has been set aside for VOSBs or SDVOSBs.

(5) *Reserves.* The certified VOSB or SDVOSB must comply with the applicable limitations on subcontracting provisions (*see* §125.6 of this chapter) and the nonmanufacturer rule (*see* §121.406(b) of this chapter), if applicable, in the performance of an order that is set aside for VOSBs or SDVOSBs. However, the VOSB or SDVOSB will not have to comply with the limitations on subcontracting provisions and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed among VOSBs or SDVOSBs, and other-than-small business concerns.

(e) *Recertification.* (1) A Participant that qualifies as a VOSB or SDVOSB at the time of initial offer response which includes price, including a Multiple Award Contract, is generally considered to be a VOSB or SDVOSB throughout the life of that contract. This means that if a VOSB or SDVOSB is certified at the time of initial offer for a Multiple Award Contract, then it will be considered a VOSB or SDVOSB for each order issued against the contract, unless a contracting officer requests a new VOSB or SDVOSB eligibility review in connection with a specific order. Where a concern is later decertified from the Veteran-Owned Small Business Contracting Program, the procuring agency may exercise options and still count the award as an award to a VOSB or SDVOSB. For a Multiple Award Contract, a concern that has been decertified from the Veteran-Owned Small Business Contracting Program may still be issued orders as a VOSB or SDVOSB unless the contracting officer requests recertification of VOSB or SDVOSB status in connection with the order. However, the following exceptions apply to this paragraph (e)(1):

(i) Where a contract is novated to another business concern, the concern that will continue performance on the contract must recertify its status as a VOSB or SDVOSB to the procuring agency or inform the procuring agency that it does not qualify as a VOSB or SDVOSB within 30 calendar days of the novation approval. If the concern is not a VOSB or SDVOSB, the agency can no longer count the options or orders issued pursuant to the contract from that point forward towards its VOSB or SDVOSB goals.

(ii) Where a concern that is performing a contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its VOSB or SDVOSB status to the procuring agency or inform the procuring agency that it no longer qualifies as a VOSB or SDVOSB. If the contractor is not a VOSB or SDVOSB, the agency can no longer count the options or orders issued pursuant to the contract from that point forward towards its VOSB or SDVOSB goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status.

(iii) Where there has been a VOSB or SDVOSB status protest on the solicitation or contract, part 134 of this chapter describes the effect of the status determination on the contract award.

(2) For the purposes of VOSB or SDVOSB contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its VOSB or SDVOSB status no more than 120 calendar days prior to the end of the fifth year of the contract, and no more than 120 calendar days prior to exercising any option. If the business is unable to recertify its status as a certified VOSB or SDVOSB, the procuring agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its VOSB or SDVOSB goals.

(i) A business concern that did not certify itself as a VOSB or SDVOSB, either initially or prior to an option being exercised, may recertify itself as a VOSB or SDVOSB for a subsequent option period if it meets the eligibility requirements in this part at that time.

(ii) Recertification does not change the terms and conditions of the contract. The limitations on subcontracting (*see* §125.6 of this chapter),

nonmanufacturer (*see* §121.406(b) of this chapter), and subcontracting plan requirements (*see* §125.3(a) of this chapter) in effect at the time of contract award remain in effect throughout the life of the contract. However, a concern that initially self-certified as an SDVOSB for the award of an SDVOSB contract may recertify as an SDVOSB only if it is currently a certified SDVOSB.

(iii) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its response to the solicitation for the order.

(iv) A concern's status may be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

(f) *Limitations on subcontracting.* A business concern seeking a VOSB or SDVOSB contract must meet the applicable limitations on subcontracting requirements set forth in §125.6 of this chapter.

(g) *Ostensible subcontractor.* Where a subcontractor that is not a certified VOSB or SDVOSB will perform the primary and vital requirements of a VOSB or SDVOSB contract, or where a VOSB or SDVOSB prime contractor is unduly reliant on one or more small businesses that are not certified VOSBs or SDVOSBs to perform the VOSB or SDVOSB contract, the prime contractor is not eligible for award of that VOSB or SDVOSB contract.

(1) When the subcontractor qualifies as small for the size standard assigned to the procurement, this issue may be grounds for a VOSB or SDVOSB status protest, as described in §134.1003(c) of this chapter. When the subcontractor is alleged to be other than small for the size standard assigned to the procurement, this issue may be grounds for a size protest under the ostensible subcontractor rule, as described at §121.103(h)(2) of this chapter.

(2) In the case of a contract or order for services, specialty trade construction or supplies, SBA will find that a prime VOSB or SDVOSB contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not certified VOSBs or SDVOSBs, where the prime contractor can demonstrate that it, together with any subcontractors that are certified VOSBs or SDVOSBs, will meet the limitations on subcontracting provisions set forth in §125.6 of this chapter.

(3) In a general construction contract, the primary and vital requirements of the contract are the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed.

(h) *Two-step procurements.* For purposes of architect-engineering, design-build or two-step sealed bidding procurements, a concern must be certified as a VOSB or SDVOSB as of the date that it submits its initial bid or proposal (which may or may not include price) during phase one.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023; 88 FR 42593, July 3, 2023]

§128.402 When may a joint venture submit an offer on a VOSB or SDVOSB contract?

(a) *General.* A certified VOSB or SDVOSB may enter into a joint venture agreement with one or more other small business concerns, or with an approved mentor authorized by §125.9 of this chapter, for the purpose of submitting an offer for a VOSB or SDVOSB contract. The joint venture itself need not be a certified VOSB or SDVOSB. Where this section references the requirements of a VOSB or SDVOSB joint venture partner, the VOSB or SDVOSB status of that joint venture partner must correspond with the type of award (*e.g.,* to be eligible for a SDVOSB contract, a SDVOSB joint venture partner must be the managing venturer of the joint venture).

(1) The VOSB or SDVOSB joint venture partner must be certified in accordance with this part;

(2) The joint venture agreement must comply with the requirements set forth in this part; and

(3) A VOSB or SDVOSB cannot be a joint venture partner on more than one joint venture that submits an offer for

a specific contract or order set-aside or reserved for VOSBs or SDVOSBs.

(b) *Size.* (1) A joint venture of at least one certified VOSB or SDVOSB and one or more other business concerns may submit an offer as a small business for a competitive VOSB or SDVOSB procurement or sale, or be awarded a sole source VOSB or SDVOSB contract, so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale.

(2) A joint venture between a protégé firm certified as a VOSB or SDVOSB and its SBA-approved mentor (*see* §125.9 of this chapter) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the VOSB or SDVOSB procurement or sale.

(c) *Contents of joint venture agreement.* Every joint venture agreement to perform a VOSB or SDVOSB contract, including those between a protégé firm certified as a VOSB or SDVOSB and its SBA-approved mentor authorized by §125.9 of this chapter, must contain a provision:

(1) Setting forth the purpose of the joint venture;

(2) Designating a certified VOSB or SDVOSB as the managing venturer of the joint venture and designating a named employee of the certified VOSB or SDVOSB managing venturer as the manager with ultimate responsibility for performance of the contract (the ''Responsible Manager'');

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary;

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the certified VOSB or SDVOSB at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the certified VOSB or SDVOSB if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the certified VOSB or SDVOSB for purposes of performance under the joint venture; and

(iii) Although the joint venture managers responsible for orders issued under an indefinite delivery/indefinite quantity contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

(3) Stating that with respect to a separate legal entity joint venture, the certified VOSB or SDVOSB must own at least 51% of the joint venture entity;

(4) Stating that the certified VOSB or SDVOSB must receive profits from the joint venture commensurate with the work performed by the certified VOSB or SDVOSB, or a percentage agreed to by the parties to the joint venture whereby the certified VOSB or SDVOSB receives profits from the joint venture that exceed the percentage commensurate with the work performed by the certified VOSB or SDVOSB;

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. All payments due the joint venture for performance on a VOSB or SDVOSB contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed

schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the certified VOSB or SDVOSB partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the certified VOSB or SDVOSB partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(8) Obligating all parties to the joint venture to ensure performance of the VOSB or SDVOSB contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the certified VOSB or SDVOSB managing venturer, unless approval to keep them elsewhere is granted by the District Director (or designee) upon written request;

(10) Requiring that the final original records be retained by the certified VOSB or SDVOSB managing venturer upon completion of the VOSB or SDVOSB contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 calendar days after completion of the contract.

(d) *Limitations on subcontracting.* (1) For any VOSB or SDVOSB contract, including those between a protégé and a mentor authorized by §125.9 of this chapter, the joint venture must perform the applicable percentage of work required by §125.6 of this chapter.

(2) The certified VOSB or SDVOSB partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture, except that in the context of a joint venture between a protégé VOSB or SDVOSB and its SBA-approved mentor the VOSB or SDVOSB protégé must individually perform at least 40% of the work performed by the joint venture.

(i) The work performed by the certified VOSB or SDVOSB partner(s) to a joint venture must be more than administrative or ministerial functions so that they gain substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the certified VOSB or SDVOSB partners must be at least 40% of the total done by all partners. In determining the amount of work done by a non-VOSB or SDVOSB partner, all work done by the non-VOSB or SDVOSB partner and any of its affiliates at any subcontracting tier will be counted.

(e) *Certification of compliance*—(1) *At time of offer.* If submitting an offer as a joint venture for a VOSB or SDVOSB contract, at the time of initial offer (and if applicable, final offer), each certified VOSB or SDVOSB joint venture partner must make the following certifications to the contracting officer separately under its own name:

(i) It is a certified VOSB or SDVOSB;

(ii) It, together with its affiliates, is small under the size standard corresponding to the NAICS code assigned to the procurement;

(iii) It will comply with the applicable limitations on subcontracting during performance of the contract, as set forth in §125.6 of this chapter.

(2) *Prior to identification as apparent successful offeror.* (i) Prior to being identified as an apparent successful offeror for a VOSB or SDVOSB contract, the certified VOSB or SDVOSB partner to the joint venture must submit a certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(A) The parties have entered into a joint venture agreement that fully complies with paragraph (c) of this section;

(B) The parties will perform the contract in compliance with the joint venture agreement and with the limitations on subcontracting requirements set forth in paragraph (d) of this section.

(ii) Although the managing venturer must be a certified VOSB or SDVOSB as of the date of the joint venture's initial offer which includes price in order for the joint venture to qualify as an eligible VOSB or SDVOSB, the joint venture must meet the joint venture agreement requirements set forth in paragraph (c) of this section at the time the joint venture is identified as an apparent successful offeror.

(f) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for a VOSB or SDVOSB contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the certified VOSB or SDVOSB to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

(g) *Contract execution.* The procuring activity will execute a VOSB or SDVOSB contract in the name of the joint venture entity or the certified VOSB or SDVOSB, but in either case will identify the award as one to a VOSB or SDVOSB joint venture or a VOSB or SDVOSB mentor-protégé joint venture, as appropriate.

(h) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(i) *Performance of work reports.* A certified VOSB or SDVOSB partner to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each VOSB or SDVOSB contract it performs as a joint venture.

(1) The certified VOSB or SDVOSB partner to the joint venture must annually submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements are being met.

(2) At the completion of every VOSB or SDVOSB contract awarded to a joint venture, the certified VOSB or SDVOSB partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (c) of this section.

(3) Any person with information concerning a joint venture's compliance with the performance of work requirements may report that information to SBA and/or the SBA Office of Inspector General.

(j) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement

applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or limitations on subcontracting requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (h) of this section.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023; 88 FR 42593, July 3, 2023]

§ 128.403 What requirements are not available for VOSB or SDVOSB contracts?

For VA procurements, a contracting officer may award a VOSB or SDVOSB contract as set forth in the VAAR. For non-VA SDVOSB contracts, a contracting activity may not make a requirement available for a SDVOSB contract if:

(a) The contracting activity otherwise would fulfill that requirement through award to Federal Prison Industries, Inc. under 18 U.S.C. 4124 or 4125, or to Javits-Wagner-O'Day Act participating non-profit agencies for the blind and severely disabled, under 41 U.S.C. 8501 *et seq.*, as amended; or

(b) An 8(a) BD program participant currently is performing that requirement or SBA has accepted that requirement for performance under the authority of the section 8(a) BD program, unless SBA has consented to release of the requirement from the section 8(a) BD program.

§ 128.404 When may a contracting officer set aside a procurement for VOSBs or SDVOSBs?

(a) *VA procurements.* For VA procurements, a contracting officer may set aside a contract for a VOSB or SDVOSB as set forth in the VAAR. For non-VA procurements, the contracting officer first must review a requirement to determine whether it is excluded from SDVOSB contracting pursuant to § 128.403.

(b) *Contracting among small business programs*—(1) *Acquisitions valued at or below the simplified acquisition threshold.* For VA procurements, a contracting officer may award at or below the simplified acquisition threshold as set forth in the VAAR. For non-VA procurements, the contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the micro-purchase threshold but not exceeding the simplified acquisition threshold (defined in the FAR at 48 CFR 2.101) for small business concerns, regardless of the place of performance, when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. The requirement in this paragraph (b)(1) does not preclude a contracting officer from making an award to a small business under the 8(a) BD, Historically Underutilized Business Zone (HUBZone), SDVOSB, or WOSB Programs.

(2) *Acquisitions valued above the simplified acquisition threshold.* (i) For VA procurements, a contracting officer may award above the simplified acquisition threshold as set forth in the VAAR. For non-VA procurements, the contracting officer shall set aside any acquisition with an anticipated dollar value exceeding the simplified acquisition threshold (defined in the FAR at 48 CFR 2.101) for small business concerns, regardless of the place of performance, when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVOSB, or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVOSB, or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type

and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's certifications in the System for Award Management (SAM) (or any successor system) and associated representations were reviewed.

(ii) SBA believes that progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

(c) *SDVOSB set-asides.* If the contracting officer decides to set aside the requirement for competition restricted to SDVOSBs, the contracting officer must:

(1) Have a reasonable expectation that at least two responsible SDVOSBs will submit offers; and

(2) Determine that the award can be made at fair market price.

(d) *Prohibition on competitions requiring or favoring additional socioeconomic certifications.* A procuring activity cannot restrict an SDVOSB competition (for either a contract or order) to require certifications other than SDVOSB certification (*i.e.*, a competition cannot be limited only to business concerns that are both SDVOSB and 8(a), SDVOSB and HUBZone, or SDVOSB and WOSB) or give evaluation preferences to firms having one or more other certifications.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023]

§ 128.405 When may a contracting officer award a sole source contract to a VOSBs or SDVOSB?

For VA procurements, a contracting officer may award a sole source contract to a VOSB or SDVOSB as set forth in the VAAR. A contracting officer may award a sole source contract to an SDVOSB for non-VA procurements only when the contracting officer determines that:

(a) None of the provisions of § 128.403 or § 128.404 apply;

(b) The anticipated award price of the contract, including options, will not exceed:

(1) $7,000,000 for a contract assigned a manufacturing NAICS code; or

(2) $4,000,000 for all other contracts;

(c) A SDVOSB is a responsible contractor able to perform the contract; and

(d) Contract award can be made at a fair and reasonable price.

§ 128.406 Are there VOSB or SDVOSB contracting opportunities at or below the simplified acquisition threshold?

(a) For VA procurements, a contracting officer may award at or below the simplified acquisition threshold as set forth in the VAAR.

(b) For non-VA procurements, if a SDVOSB requirement is at or below the simplified acquisition threshold, the contracting officer may set aside the requirement for consideration among SDVOSBs using simplified acquisition procedures or may award a sole source contract to an SDVOSB.

§ 128.407 May SBA appeal a contracting officer's decision not to make a procurement available for award as a SDVOSB contract?

The SBA Administrator may appeal a contracting officer's decision not to make a particular requirement available for award as an SDVOSB sole source or a SDVOSB set-aside contract at or above the simplified acquisition threshold.

§ 128.408 What is the process for such an appeal?

(a) *Notice of appeal.* When the contracting officer rejects a recommendation by SBA's Procurement Center Representative to make a requirement available for award as an SDVOSB contract, the contracting officer must notify the Procurement Center Representative as soon as practicable. If the SBA Administrator intends to appeal the decision, SBA must notify the contracting officer no later than five business days after receiving notice of the contracting officer's decision.

(b) *Suspension of action.* Upon receipt of notice of SBA's intent to appeal, the contracting officer must suspend further action regarding the procurement

until the Secretary of the department or head of the agency issues a written decision on the appeal, unless the Secretary of the department or head of the agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.

(c) *Deadline for appeal.* Within 15 business days of SBA's notification to the contracting officer, SBA must file its formal appeal with the Secretary of the department or head of the agency, or the appeal will be deemed withdrawn.

(d) *Decision.* The Secretary of the department or head of the agency must specify in writing the reasons for a denial of an appeal brought under this section.

Subpart E—Protests Concerning VOSBs and SDVOSBs

§ 128.500 What are the requirements for filing a VOSB or SDVOSB status protest?

(a) All challenges to the inclusion in the certification database of a VOSB or SDVOSB based on the status of the concern as a small business concern or the ownership or control of the concern, shall be heard by the Office of Hearings and Appeals of the Small Business Administration in accordance with part 134 of this chapter. The decision of the Office of Hearings and Appeals shall be considered final agency action.

(b) The protest procedures described in part 134 of this chapter are separate from those governing size protests and appeals. All protests relating to whether an eligible VOSB or SDVOSB is a small business for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of the VOSB or SDVOSB and whether the concern meets the VOSB or SDVOSB requirements set forth in § 128.200, SBA will process each protest concurrently under the procedures set forth in parts 121 and 134 of this chapter. SBA does not review issues concerning the administration of a VOSB or SDVOSB contract.

(c) When challenging the SDVOSB status of a joint venture, the managing SDVOSB party to the joint venture must be a certified SDVOSB as of the date of the joint venture's initial offer, including price, for the SDVOSB contract and compliance with the joint venture agreement requirements set forth in § 128.402(c) is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.

(d) A concern found not to qualify as a VOSB or SDVOSB in a status protest may not submit an offer on a future VOSB or SDVOSB procurement until the protested concern reapplies to the Veteran Small Business Certification Program and has been designated by SBA as a VOSB or SDVOSB into the certification database. If a concern found to be ineligible submits an offer, it may be in violation of criminal laws, including section 16(d) of the Small Business Act, 15 U.S.C. 645(d). If the concern has already certified itself as a VOSB or SDVOSB on a pending procurement, the concern must immediately inform the contracting officer for the procuring agency of the adverse determination.

(1) Not later than two days after SBA's final determination finding a concern ineligible as a VOSB or SDVOSB, such concern must update its VOSB or SDVOSB status in the System for Award Management (or any successor system).

(2) If a business concern fails to update its VOSB or SDVOSB status in the System for Award Management (or any successor system) in response to decertification, SBA will make such update within two days of the business's failure to do so.

[87 FR 73412, Nov. 29, 2022, as amended at 88 FR 26216, Apr. 27, 2023]

Subpart F—Penalties and Retention of Records

§ 128.600 What are the requirements for representing VOSB or SDVOSB status, and what are the penalties for misrepresentation?

(a) *Presumption of loss based on the total amount expended.* In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to VOSBs or SDVOSBs, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a VOSB or SDVOSB willfully sought and received the award by misrepresentation.

(b) *Deemed certifications.* The following actions shall be deemed affirmative, willful, and intentional certifications of VOSB or SDVOSB status:

(1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to VOSBs or SDVOSBs.

(2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a VOSB or SDVOSB.

(3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a VOSB or SDVOSB.

(c) *Signature requirement.* Each offer, proposal, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the VOSB or, in the case of an SDVOSB, SDVOSB status of a business concern seeking the Federal contract, subcontract, or grant. An authorized official must sign the certification on the same page containing the SDVOSB status claimed by the concern.

(d) *Limitation of liability.* Paragraphs (a) through (c) of this section may be determined not to apply in the case of unintentional errors, technical malfunctions, and other similar situations that demonstrate that a misrepresentation of VOSB or SDVOSB status was not affirmative, intentional, willful, or actionable under the False Claims Act, 31 U.S.C. 3729, *et seq.* A prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' VOSB or SDVOSB status. Relevant factors to consider in making this determination may include the firm's internal management procedures governing VOSB or SDVOSB status representations or certifications, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner. An individual or firm may not be held liable where Government personnel have erroneously identified a concern as a VOSB or SDVOSB without any representation or certification having been made by the concern and where such identification is made without the knowledge of the individual or firm.

(e) *Penalties for misrepresentation*—(1) *Suspension or debarment.* The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's status as a VOSB or SDVOSB pursuant to the procedures set forth in 48 CFR part 9, subpart 9.4.

(2) *Civil penalties.* Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729–3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812, and any other applicable laws or regulations, including part 142 of this chapter.

(3) *Criminal penalties.* Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the VOSB or SDVOSB status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15

U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct ''continuing representations'' that are no longer true.

Subpart G—Surplus Personal Property for Veteran-Owned Small Business Programs

§ 128.700 How does a VOSB obtain Federal surplus personal property?

(a) *General.* (1) Pursuant to 15 U.S.C. 657b(g), eligible small business concerns owned and controlled by veterans may receive surplus Federal Government property from State Agencies for Surplus Property (SASPs). The procedures set forth in 41 CFR part 102–37 and this section will be used to transfer surplus personal property to such concerns.

(2) The surplus personal property which may be transferred to SASPs for further transfer to eligible small business concerns owned and controlled by veterans includes all surplus personal property which has become available for donation pursuant to 41 CFR 102–37.30.

(b) *Eligibility to receive Federal surplus personal property.* To be eligible to receive Federal surplus personal property, on the date of transfer a concern must:

(1) Be a small business concern owned and controlled by veterans, that has been certified by SBA under this part;

(2) Not be debarred, suspended, or declared ineligible under title 2 or title 48 of the CFR; and

(3) Be engaged or expect to be engaged in business activities making the item useful to it.

(c) *Use of acquired surplus personal property.* (1) Eligible concerns may acquire Federal surplus personal property from the SASP in the state(s) where the concern is located and operates, provided the concern represents and agrees in writing:

(i) As to what the intended use of the surplus personal property is to be;

(ii) That it will use the surplus personal property to be acquired in the normal conduct of its business activities or be liable for the fair rental value from the date of its receipt;

(iii) That it will not sell or transfer the surplus personal property to be acquired to any party other than the Federal Government as required by General Services Administration (GSA) and SASP requirements and guidelines;

(iv) That, at its own expense, it will return the surplus personal property to a SASP if directed to do so by SBA, including where the concern has not used the property as intended within one year of receipt;

(v) That, should it breach its agreement not to sell or transfer the surplus personal property, it will be liable to the Federal Government for the established fair market value or the sale price, whichever is greater, of the property sold or transferred; and

(vi) That it will give GSA and the SASP access to inspect the surplus personal property and all records pertaining to it.

(2) A concern receiving surplus personal property pursuant to this section assumes all liability associated with or stemming from the use of the property, and all costs associated with the use and maintenance of the property.

(d) *Costs.* Concerns acquiring surplus personal property from a SASP may be required to pay a service fee to the SASP in accordance with 41 CFR 102–37.280. In no instance will any SASP charge a concern more for any service than their established fees charged to other transferees.

(e) *Title.* Upon execution of the SASP distribution document, the firm receiving the property has only conditional title to the property during the applicable period of restriction. Full title to the property will vest in the recipient concern only after the recipient concern has met all of the requirements of this part and the requirements of GSA and the SASP that it received the property from.

PART 129—CONTRACTS FOR SMALL BUSINESSES LOCATED IN DISASTER AREAS, AND SURPLUS PERSONAL PROPERTY FOR SMALL BUSINESSES LOCATED IN DISASTER AREAS, PUERTO RICO, AND COVERED TERRITORY BUSINESSES

Subpart A—Contracts for Small Businesses Located in Disaster Areas

Sec.
129.100 What definitions are important in this part?
129.101 What contracting preferences are available for small business concerns located in disaster areas?
129.102 What small business goaling credit do agencies receive for awarding an emergency response contract to a small business concern under this part?
129.103 What are the applicable performance requirements?
129.104 What are the penalties of misrepresentation of size or status?

Subpart B—Surplus Personal Property For Small Businesses Located in Disaster Areas

129.200 What definitions are important in this subpart?
129.201 How does a small business concern located in a disaster area obtain Federal surplus personal property?

Subpart C—Surplus Personal Property for Small Businesses Located in Puerto Rico and for Covered Territory Businesses

129.300 What definitions are important in this subpart?
129.301 How does a covered territory business or small business concern located in Puerto Rico obtain Federal surplus personal property?

AUTHORITY: 15 U.S.C. 636(j)(13)(F)(ii), (iii), 644(f).

SOURCE: 84 FR 65665, Nov. 29, 2019, unless otherwise noted.

Subpart A—Contracts for Small Businesses Located in Disaster Areas

§ 129.100 What definitions are important in this part?

For the purposes of this part:

Concern located in a disaster area is a firm that during the last twelve months—

(1)(i) Had its main operating office in the area; and

(ii) Generated at least half of the firm's gross revenues and employed at least half of its permanent employees in the area.

(2) If the firm does not meet the criteria in paragraph (1) of this definition, factors to be considered in determining whether a firm resides or primarily does business in the disaster area include—

(i) Physical location(s) of the firm's permanent office(s) and date any office in the disaster area(s) was established;

(ii) Current state licenses;

(iii) Record of past work in the disaster area(s) (*e.g.*, how much and for how long);

(iv) Contractual history the firm has had with subcontractors and/or suppliers in the disaster area;

(v) Percentage of the firm's gross revenues attributable to work performed in the disaster area;

(vi) Number of permanent employees the firm employs in the disaster area;

(vii) Membership in local and state organizations in the disaster area; and

(viii) Other evidence that establishes the firm resides or primarily does business in the disaster area. For example, sole proprietorships may submit utility bills and bank statements.

Disaster area means the area for which the President has declared a major disaster under section 401 of the Robert T. Stafford Disaster Relief and Assistance Act (42 U.S.C. 5170), during the period of the declaration.

Emergency response contract means a contract with private entities that supports assistance activities in a disaster area, such as debris cleanup, distribution of supplies, or reconstruction.

§ 129.101 What contracting preferences are available for small business concerns located in disaster areas?

Contracting officers may set aside solicitations for emergency response contracts to allow only small businesses located in the disaster area to compete.

[84 FR 65665, Nov. 29, 2019. Redesignated at 85 FR 69125, Nov. 2, 2020]

§ 129.102 What small business goaling credit do agencies receive for awarding an emergency response contract to a small business concern under this part?

If an agency awards an emergency response contract to a local small business concern through the use of a local area set-aside that is also set aside under a small business or socioeconomic set-aside (8(a), HUBZone, SDVO, WOSB, EDWOSB), the value of the contract shall be doubled for purposes of determining compliance with the goals for procurement contracts under section 15(g)(1)(A) of the Small Business Act (15 U.S.C. 644(g)(1)(A)). The procuring agency shall enter the actual contract value, not the doubled contract value in the required contract reporting systems, and appropriately code the contract action to receive the credit. SBA will provide the double credit as part of the Scorecard process.

[84 FR 65665, Nov. 29, 2019. Redesignated at 85 FR 69125, Nov. 2, 2020]

§ 129.103 What are the applicable performance requirements?

The performance requirements of § 125.6 of this chapter apply to small and socioeconomic set-asides under this part. A similarly situated entity as that term is used in § 125.6 of this chapter must qualify as a concern located in a disaster area.

[84 FR 65665, Nov. 29, 2019. Redesignated at 85 FR 69125, Nov. 2, 2020]

§ 129.104 What are the penalties of misrepresentation of size or status?

The penalties relevant to the particular size or socioeconomic status representation under 13 CFR 121.108, 125.32, 126.900, and 127.700 are applicable to set-asides under this part.

[84 FR 65665, Nov. 29, 2019. Redesignated at 85 FR 69125, Nov. 2, 2020]

Subpart B—Surplus Personal Property for Small Businesses Located in Disaster Areas

SOURCE: 85 FR 69125, Nov. 2, 2020, unless otherwise noted.

§ 129.200 What definitions are important in this subpart?

Covered period means the 2-year period beginning on the date on which the President declared the applicable major disaster. 15 U.S.C. 636(j)(f)(13)(F)(ii)(I)(aa).

§ 129.201 How does a small business concern located in a disaster area obtain Federal surplus personal property?

(a) *General.* Pursuant to 15 U.S.C. 636(j)(13)(F)(ii) eligible small business concerns located in disaster areas may receive surplus Federal Government property from State Agencies for Surplus Property (SASPs). The procedures set forth in 41 CFR part 102–37 and this section will be used to transfer surplus personal property to eligible small business concerns.

(1) The property which may be transferred to SASPs for further transfer to eligible small business concerns includes all personal property which has become available for donation pursuant to 41 CFR 102–37.30.

(b) *Eligibility to receive Federal surplus personal property.* To be eligible to receive Federal surplus personal property, on the date of transfer a concern must:

(1) Be located in a disaster area;

(2) Qualify as small under the size standard corresponding to its primary NAICS code and certify its size in SAM.gov, or a successor system, prior to seeking access to surplus property. SASPs and GSA may rely on a concern's certification as small for purposes of this program;

(3) Not be debarred, suspended, or declared ineligible under Title 2 or Title 48 of the Code of Federal Regulations;

(4) Be engaged or expect to be engaged in business activities making the item useful to it; and

(5) Not have received a transfer of property under § 124.405 of this chapter during the covered period. The 2-year period of the presidentially declared disaster does not affect eligibility for additional technology transfers or surplus personal property to a small business concern located in a disaster area for a subsequent presidentially declared disaster occurring within the

original 2-year period of a prior presidentially declared disaster.

(c) *Use of acquired surplus personal property.* (1) Eligible concerns may acquire surplus Federal personal property from the SASP in the State(s) where the concern is located and operates, provided the concern represents and agrees in writing:

(i) As to what the intended use of the surplus personal property is to be;

(ii) That it will use the property to be acquired in the normal conduct of its business activities or be liable for the fair rental value from the date of its receipt;

(iii) That it will not sell or transfer the property to be acquired to any party other than the Federal Government as required by GSA and SASP requirements and guidelines;

(iv) That, at its own expense, it will return the property to a SASP if directed to do so by SBA, including where the concern has not used the property as intended within one year of receipt;

(v) That, should it breach its agreement not to sell or transfer the property, it will be liable to the Federal Government for the established fair market value or the sale price, whichever is greater, of the property sold or transferred; and

(vi) That it will give GSA and the SASP access to inspect the property and all records pertaining to it.

(2) A concern receiving surplus personal property pursuant to this section assumes all liability associated with or stemming from the use of the property.

(d) *Costs.* Concerns acquiring surplus personal property from a SASP must pay a service fee to the SASP in accordance with 41 CFR 102–37.280. In no instance will any SASP charge a concern more for any service than their established fees charged to other transferees.

(e) *Title.* Upon execution of the SASP distribution document, the firm receiving the surplus personal property has only conditional title only to the surplus personal property during the applicable period of restriction. Full title to the property will vest in the donee only after the donee has met all of the requirements of this part and the requirements of GSA and the SASP that it received the property from.

Subpart C—Surplus Personal Property for Small Businesses Located in Puerto Rico and for Covered Territory Businesses

SOURCE: 85 FR 69125, Nov. 2, 2020, unless otherwise noted.

§ 129.300 What definitions are important in this subpart?

Covered period means:

(1) In the case of a Puerto Rico business, the period beginning on August 13, 2018 and ending on the date which the Oversight Board established under section 101 of the Puerto Rico Oversight, Management, and Economic Stability Act (48 U.S.C. 2121) terminates. 15 U.S.C. 636(j)(13)(F)(iii); or

(2) In the case of a Covered territory business, the period beginning on January 1, 2021, the period ending on January 1, 2025. 15 U.S.C. 636(j)(13)(f)(iii).

Covered territory business means a small business concern that has its principal office located in one of the following:

(1) The United States Virgin Islands;

(2) American Samoa;

(3) Guam; or

(4) The Commonwealth of the Northern Mariana Islands.

Located in Puerto Rico means a concern with a physical location in Puerto Rico and organized under the laws of Puerto Rico.

[85 FR 69125, Nov. 2, 2020, as amended at 87 FR 50927, Aug. 19, 2022]

§ 129.301 How does a covered territory business or small business concern located in Puerto Rico obtain Federal surplus personal property?

(a) *General.* Pursuant to 15 U.S.C. 636(j)(13)(F)(iii), eligible covered territory businesses may receive surplus Federal Government property from their territory State Agency for Surplus Property (SASP), and eligible small business concerns located in Puerto Rico may receive such property from the Puerto Rico SASP. The procedures set forth in 41 CFR part 102–37 and this section will be used to transfer surplus personal property to eligible

small business concerns. The property which may be transferred to the territory SASP or the Puerto Rico SASP for further transfer to eligible small business concerns includes all personal property which has become available for donation pursuant to 41 CFR 102–37.30.

(b) *Eligibility to receive Federal surplus personal property.* To be eligible to receive Federal surplus personal property, on the date of transfer a concern must:

(1) Be a covered territory business or be located in Puerto Rico;

(2) Qualify as small under the size standard corresponding to its primary NAICS code and certify its size in SAM.gov, or a successor system, prior to seeking access to surplus property. SASPs and GSA may rely on concern's certification as small for purposes of this program;

(3) Not be debarred, suspended, or declared ineligible under Title 2 or Title 48 of the Code of Federal Regulations; and

(4) Be engaged or expect to be engaged in business activities making the item useful to it.

(c) *Use of acquired surplus personal property.* (1) Eligible concerns may acquire surplus Federal personal property from their territory SASP or, for a Puerto Rico concern, the Puerto Rico SASP, provided the concern represents and agrees in writing:

(i) As to what the intended use of the surplus personal property is to be;

(ii) That it will use the property to be acquired in the normal conduct of its business activities or be liable for the fair rental value from the date of its receipt;

(iii) That it will not sell or transfer the property to be acquired to any party other than the Federal Government as required by GSA and SASP requirements and guidelines;

(iv) That, at its own expense, it will return the property to the SASP if directed to do so by SBA, including where the concern has not used the property as intended within one year of receipt;

(v) That, should it breach its agreement not to sell or transfer the property, it will be liable to the Federal Government for the established fair market value or the sale price, whichever is greater, of the property sold or transferred; and

(vi) That it will give GSA and SASPs access to inspect the property and all records pertaining to it.

(2) A concern receiving surplus personal property pursuant to this section assumes all liability associated with or stemming from the use of the property.

(d) *Costs.* Concerns acquiring surplus personal property from a SASP must pay a service fee to the SASP in accordance with 41 CFR 102–37.280. In no instance will any SASP charge a concern more for any service than their established fees charged to other transferees.

(e) *Title.* Upon execution of the SASP distribution document, the firm receiving the surplus personal property has only conditional title to the surplus personal property during the applicable period of restriction. Full title to the surplus personal property will vest in the donee only after the donee has met all of the requirements of this part.

[85 FR 69125, Nov. 2, 2020, as amended at 87 FR 50927, Aug. 19, 2022]

PART 130—SMALL BUSINESS DEVELOPMENT CENTERS

Sec.

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AUTHORITY: 15 U.S.C. 634(b)(6), 648, and 648 note.

SOURCE: 60 FR 31056, June 13, 1995, unless otherwise noted.

§ 130.100 Introduction.

(a) *Objective.* The Small Business Development Centers (SBDC) Program creates a broad-based system of assistance for the small business community by linking the resources of Federal, state, tribal, and local governments with the resources of the educational community and the private sector. The Program provides small businesses and aspiring entrepreneurs with a wide array of technical assistance and support to strengthen performance and sustainability of existing small businesses, and to enable the creation of new business entities. The Small Business Administration (SBA or the Agency) articulates its responsibilities for the general management and oversight of the SBDC Program by means of a cooperative agreement with the recipient organization.

(b) *Adoption of amended references.* All references in this part to Standard Operating Procedures, SBA official policies and procedures, and award documents adopt all ensuing changes or amendments to such sources.

[88 FR 76639, Nov. 7, 2023]

§ 130.110 Definitions.

Accreditation process. An evaluation process to assist an SBDC with assessing its processes and outlining areas needing improvement by providing recommendations to strengthen delivery of services and assistance.

Applicant organization. A qualified eligible entity that applies for Federal financial assistance to establish, administer, and operate an SBDC network under a new or renewed cooperative agreement.

Application. Also referred to as the proposal or the renewal application, the written submission by a new applicant organization or an existing recipient organization describing its projected SBDC activities for the upcoming budget period and requesting SBA funding for use in its operations.

Area of service. As designated in the cooperative agreement, the state or region in which an applicant organization proposes to provide services, or in which a recipient organization currently provides services.

Associate Administrator/Entrepreneurial Development (*AA/ED*). The individual who is appointed by the SBA Administrator to oversee the Office of Entrepreneurial Development (OED), where the SBDC Program is located.

Associate Administrator/Small Business Development Centers (*AA/SBDC*). The individual who is statutorily mandated to administer the SBDC Program.

Budget period. The 12-month period in which expenditure obligations are incurred by an SBDC network, coinciding with either the calendar year or the Federal fiscal year.

Cash match. Non-Federal funds budgeted and expended by the recipient organization and/or sponsoring SBDC organization for direct costs of the project. Cash match excludes indirect costs, overhead costs, in-kind contributions, and program income. See 2 CFR 200.306.

Clearinghouse. A source of market and industry information made available to all SBDC networks to assist clients and supports the exchange of information between SBDCs.

Client. A nascent entrepreneur or existing small business seeking services provided by the SBDC.

Cognizant agency. The Federal awarding agency that provides the predominant amount of direct funding to a recipient. See 29 CFR 99.105.

Cooperative agreement. A legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity that, consistent with 31 U.S.C. 6302–6305:

(1) Is used to enter into a relationship the principal purpose of which is

to transfer anything of value from the Federal awarding agency or pass-through entity to the non-Federal entity to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal Government or pass-through entity's direct benefit or use.

(2) Is distinguished from a grant in that it provides for substantial involvement between the Federal awarding agency or pass-through entity and the non-Federal entity in carrying out the activity contemplated by the Federal award.

(3) The term does not include:

(i) A cooperative research and development agreement as defined in 15 U.S.C. 3710a; or

(ii) An agreement that provides only:

(A) Direct United States Government cash assistance to an individual;

(B) A subsidy;

(C) A loan;

(D) A loan guarantee; or

(E) Insurance.

(4) Is a negotiated legal agreement between SBA and a recipient organization containing the terms and conditions under which SBA provides Federal funds for the performance of SBDC activities.

Cosponsorship. A ''Cosponsorship'' as defined in and governed by §8(b)(1)(A) of the Act and SBA's Standard Operating Procedures.

Counseling. Qualifying technical or management assistance, as defined in the cooperative agreement, provided through the SBDC Program to clients on an individual basis, as established by policy.

Counseling record. A record that provides individual client contact information, demographics about the client/business and data on the counseling provided.

Direct costs. Expenditures that can be identified specifically with a final cost objective and are further defined in 2 CFR part 200.

Dispute. A programmatic or financial disagreement that the recipient organization requests be handled in accordance with the dispute resolution procedures set forth at §130.630.

District Office. The local SBA office, in collaboration with the OSBDC, is charged with: ensuring that small business market needs are met by the SBDC; conducting the regularly scheduled compliance reviews; monitoring statements as required; and collaborating with the SBDC to perform joint events and trainings.

Grants and Cooperative Agreement Appeals Committee. The SBA committee, appointed by the SBA Administrator, which resolves appeals arising from financial Disputes between a recipient organization and SBA.

Grants Management Specialist. An SBA employee within the Office of SBDC, designated by the AA/SBDC, who meets the Office of Management and Budget (OMB) standards and certifications and is responsible for the budgetary review, award, and administration of one or more SBDC cooperative agreements.

In-kind contributions. Property, facilities, services, or other nonmonetary contributions from non-Federal sources. See 2 CFR part 215 (OMB Circular A–110) and part 143 of this chapter, as applicable.

Indirect costs. Costs generally incurred for a common or joint purpose. See 2 CFR part 220 (OMB Circular A–21), 225 (OMB Circular A– 87), and/or 230 (OMB Circular A–122).

Insular areas. Territories include the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Government of the Northern Mariana Islands. See 48 U.S.C. 1469a.

Key personnel. Principal staff of the Lead Center and SBDC service centers, including SBDC Lead Center Directors, SBDC Service Center Directors, or managers of International Trade Centers, Technology Program Centers, and directors of other SBDC specialty programs and any other leadership positions identified by the SBDC network.

Lead Center. The administrative office of the recipient organization that operates and manages an SBDC network.

Lobbying. ''Lobbying'' as described in 2 CFR parts 220 (OMB Circular A–21), 225 (OMB Circular A–87), and 230 (OMB Circular A–122) and Public Law 101–121, section 319, which discuss the limitations on use of appropriated funds to influence decisions of certain of Federal officials, including Members of

Congress, Federal contracting, and financial transactions.

Matching funds. The combined amounts of non-Federal cash and noncash resources proposed for the cooperative agreement or claimed to fulfill statutory match requirements.

Notice of funding opportunity. The annual solicitation that an applicant organization or recipient organization must respond to in its initial or renewal application.

Notice of non-renewal. A notice provided to an SBDC stating that the SBA will not renew the cooperative agreement with the current recipient organization.

Notice of suspension. A notice provided to an SBDC stating that the SBDC is under suspension.

Notice of termination. A notice provided to an SBDC stating that the SBDC is terminated.

Office of Small Business Development Centers (OSBDC). The SBA program office providing leadership and program oversight, managing the funding formula, program budget, and the establishment and maintenance of all program policy over the national SBDC network.

Overmatched amount. Contributions of non-Federal cash and of non-cash resources for authorized SBDC activities in excess of the statutorily required match.

Prior approval. The written concurrence from the appropriate SBA AA/SBDC, Deputy Associate Administrator for the Office of Small Business Development Centers, Grants Management Officer, Grants Management Specialist, or Program Manager for a proposed action or amendment to the SBDC cooperative agreement.

Program Announcement. SBA's annual publication of requirements which an applicant or recipient organization must address in its initial or renewal application.

Program funds. Also referred to as project funds and defined as all funds authorized under the cooperative agreement including, but not limited to, Federal funds, cash match, non-cash match from indirect costs, in-kind contributions, and program income revenues.

Program income. Gross income earned as a result of the Federal award during the period of performance, including funds received under a sponsorship agreement, as defined in 2 CFR 200.80.

Program Manager. An SBA employee designated by the AA/SBDC who oversees and monitors the SBDC network operations, including meeting the statutorily required programmatic reviews.

Program performance data. Any anonymous data or information that captures the outputs of the SBDC service center and outcomes of services provided to clients.

Project Officer. The individual who serves as the primary local contact for the SBDC, conducts regular compliance oversight as required by AA/SBDC, and works in conjunction with the Program Manager.

Project period. The total annual period of performance for an award made under the notice of funding opportunity.

Proposal. Also known as the application, the written submission by a new applicant organization or an existing recipient organization describing its projected SBDC activities for the upcoming budget period and requesting Federal funding for use in its operations.

Recipient organization. The selected applicant organization receiving Federal funding to deliver SBDC services under a cooperative agreement.

Recognized Organization. The organization whose members include a majority of SBDCs and which is recognized as an SBDC representative by SBA in accordance with §21(a)(3)(A) of the Small Business Act, 15 U.S.C. 648(a)(3)(A).

SBDC Director. The full-time senior manager designated by each recipient organization and approved by SBA.

SBDC Lead Center Director. Also referred to as the State/Region Director, an individual or position whose time is allocated to the SBDC grant program or other related small business grant programs that provide comparable management and technical assistance to the small business community in accordance with the cooperative agreement. For the purposes of meeting the Program requirements, no less than 75

percent of the SBDC Lead Center Director's time and effort must be devoted specifically to the SBDC grant. The SBDC Lead Center Director has clear and complete control of all SBDC Program funds.

SBDC network. The Lead Center, SBDC service centers, and SBDC satellite locations funded and affiliated by sub-agreements and comprising a single service delivery network administered by a recipient organization.

SBDC satellite location. A geographic point of service delivery that operates on a full- or part-time basis under direct management of an SBDC Lead Center Director or SBDC Service Center Director.

SBDC service center. An entity operating full-time authorized by the Lead Center to perform SBDC counseling and training services. Any applicant commencing after January 1, 1992, establishing service centers within its area of service, to the extent practicable, should be primarily housed within institutions of higher education or a Women's Business Center (WBC) operating pursuant to section 29 of the Small Business Act (15 U.S.C. 656) as stated in section 21(a)(1) of the Small Business Act (15 U.S.C. 648(a)(1)).

SBDC Service Center Director. The individual responsible for SBDC Program implementation and management at an SBDC service center within an SBDC network.

SBDC service providers. SBDC network participants, including the Lead Center, subcenters (at times referred to as regional centers), satellite locations, and any other entity authorized by the recipient organization to perform SBDC services.

Specialized services. SBDC services other than counseling or training, *e.g.*, extensive research, hiring outside consultants for a client, translation services, etc.

Sponsoring SBDC organizations. Organizations or entities which establish one or more SBDC service providers as part of the SBDC network under a contract or agreement with the recipient organization.

Training. An educational activity or event presented by an SBDC that delivers a structured program of knowledge on an entrepreneurial or business-related subject, as established in the cooperative agreement.

Training record. A record that provides aggregate data about a training event to include training topic and program format.

[60 FR 31056, June 13, 1995, as amended at 88 FR 76639, Nov. 7, 2023]

§ 130.200 Eligible entities.

The following entities are eligible to operate an SBDC network:

(a) A public or private institution of higher education;

(b) A land-grant college or university;

(c) A college or school of business, engineering, commerce or agriculture;

(d) A community or junior college;

(e) A Women's Business Center operating pursuant to section 29 of the Small Business Act (15 U.S.C. 656);

(f) The Commonwealth of the Northern Mariana Islands SBDC must have its principal office located in the Commonwealth of the Northern Mariana Islands (CNMI) and must:

(1) Be a CNMI government or agency;

(2) Be a regional entity;

(3) Be a CNMI-chartered development, credit, or finance corporation;

(4) Be an institution of higher education (including but not limited to any land-grant college or university, any college or school of business, engineering, commerce, or agriculture, community college or junior college);

(5) Be a current SBA Women's Business Center (WBC); or

(6) Be any entity formed by two or more of the entities in paragraphs (f)(1) through (5) of this section;

(g) Any entity which was operating as a recipient organization as of December 31, 1990; or

(h) Any entity operating continually as a recipient organization on or before December 31, 1990.

[60 FR 31056, June 13, 1995, as amended at 88 FR 76642, Nov. 7, 2023]

§ 130.300 Small Business Development Centers (SBDCs).

The Small Business Development Center Program is established under the statutory authority of the Small

Business Act (15 U.S.C. 648) and administered through cooperative agreements issued to recipient organizations.

[88 FR 76642, Nov. 7, 2023]

§ 130.310 Area of service.

(a) The AA/SBDC will designate, in the cooperative agreement, the geographic area of service of each recipient organization. Generally, no more than one recipient organization may be located in a state.

(1) The AA/SBDC may determine that making awards to multiple recipient organizations in a state is necessary to more effectively implement the Program and provide services to all interested small businesses.

(2) Once the Administration has entered into a cooperative agreement, a subsequent decision to change the recipient organization's area of service will be considered a non-renewal or termination. This decision will be subject to the procedures outlined in § 130.700.

(b) The recipient organization must locate its Lead Center and SBDC service centers in the designated area of service to ensure that services are readily accessible to all small businesses within the designated area of service.

(c) Any applicant commencing after January 1, 1992, must ensure that any new SBDC service centers established within its area of service, to the extent practicable, are primarily housed within institutions of higher education or a WBC operating pursuant to section 29 of the Small Business Act (15 U.S.C. 656) as stated in section 21(a)(1) of the Small Business Act (15 U.S.C. 648(a)(1)).

(d) The allocation of resources, including site locations of the Lead Center and the SBDC service centers, will be reviewed for adequacy of coverage by SBA as part of the application review process for each budget period.

[88 FR 76642, Nov. 7, 2023]

§ 130.320 Operating requirements.

(a) The recipient organization has the contractual responsibility for performing the duties of the Lead Center in accordance with the cooperative agreement. The Lead Center must be an independent department within the recipient organization, having its own staff, including a full-time SBDC Director.

(b) A Lead Center must provide administrative services and coordination for the SBDC network, including program development, program management, financial management, reports management, promotion and public relations, program assessment and evaluation, and internal quality control. The Lead Center must conduct and document annual financial and programmatic reviews and evaluations of its SBDC service centers consistent with § 130.820(a).

(c) The Lead Center's and SBDC service center's services will be available to the public throughout the year during the normal hours of the business community. In addition, every effort should be made to provide assistance, including during nonbusiness hours, both in-person and virtually, as appropriate, to meet local community business demands and needs. Variations from these schedules or other anticipated closures will be included in the new or annual renewal application. Emergency closures will be reported to the SBA District Office as soon as is feasible.

(d) The specific identification ''Small Business Development Center'' must be a part of the official name of every SBDC Lead Center and SBDC service center within the SBDC network, unless waived by the AA/SBDC.

(e) Any entity that is using the term ''Small Business Development Center'' and under contract with the Lead Center and receiving program funds, whether receiving Federal funding or not, is considered a part of the recipient organization's network and as such the recipient organization is required to report to the OSBDC each SBDC service center's performance as well as any funds or program income generated by the activities of that Service Center.

(f) Each SBDC must maintain a minimum number of export and trade certified counselors to assist clients develop export and international trade opportunities. The standard for establishing the number of counselors required to have this certification is based on the total number of full-time

equivalent (FTE) counseling employees in an SBDC's network. The minimum number of certified counselors for an SBDC network is the *lesser* of:

(1) Five counselors; or

(2) Ten percent of the total number of FTE counselors in the network.

(g) The Lead Center and all its SBDC service centers must implement and have in effect at all times, a uniform and enforceable conflict of interest policy applicable to all SBDC employees, contractors, consultants, and volunteers and must be signed annually. At a minimum, this policy must be consistent with the conflict of interest principles set forth in 2 CFR 2701.112.

(h) The SBDC network will comply with 13 CFR parts 112, 113, 117, and 136 requiring that no person, on the grounds of race, color, handicap, marital status, national origin, race, religion, or gender, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the SBDC network.

[60 FR 31056, June 13, 1995. Redesignated and amended at 88 FR 76642, Nov. 7, 2023]

§ 130.330 SBDC services and restrictions on service.

(a) *Services.* The SBDC network, to the extent practicable, must provide prospective entrepreneurs and existing small businesses, known as clients, with counseling, access to training, and specialized services. The SBDC must create counseling records for clients when required by the cooperative agreement. The services provided must relate to the formation, financing, management, and operation of small business enterprises. The network must provide services that meet local needs as determined through periodic needs assessments, which are continually improved to keep pace with changing local small business needs. It is the responsibility of the recipient organization to change local SBDC service centers, as necessary, to meet the needs of the communities it serves in accordance with §§ 130.310 and 130.620. See section 21(c)(3) of the Small Business Act (15 U.S.C. 648(c)(36)) for the full list of compulsory services. To the extent possible, SBDCs will work in collaboration with other Federal, state, tribal, and local government programs that assist small businesses and will coordinate and cooperate, to the extent practicable, with other local public and private providers of small business assistance. An SBDC Lead Center should use and compensate qualified small business vendors as one of its resources.

(b) *Access to Capital.* (1) SBDCs must provide counseling services that increase a small business concern's access to capital, such as business plan development, financial statement preparation and analysis, and cash flow preparation and analysis.

(2) SBDCs may provide assistance and guidance with the necessary documentation required for applications for capital assistance; including assistance for SBA loan products and services, including small dollar loans, free of charge as stated in § 130.470.

(3) SBDCs should prepare their clients to represent themselves to lending institutions. SBDCs may attend meetings with lenders to assist clients in preparing financial packages; however, SBDCs may not attest to a client's readiness or creditworthiness to the lending institution either verbally or in writing.

(4) SBDCs may participate on boards and panels of financial institutions and with outside organizations but may not be involved in any final credit decisions involving SBDC clients or in making or servicing loans.

(5) With respect to SBA loan guaranty programs, SBDCs may accompany an applicant organization appearing before SBA or a lender but may not advocate for, promote, recommend approval or otherwise attempt in any manner to influence SBA or a lender to provide financial assistance to any of its clients.

(c) *Special emphasis initiatives.* Periodically, SBA may identify, and include in the cooperative agreement, portions of the general population to be targeted for assistance by SBDCs and specific focus areas including, but not limited to: base closure assistance; cybersecurity and preparedness; employee ownership program; and intellectual property protections. (Refer to current cooperative agreement.)

(d) *Portable assistance.* The current cooperative agreement is a startup and sustainability non-matching program to be conducted by eligible SBDCs in communities that are economically challenged as a result of a business or government facility downsizing or closing, which has resulted in the loss of jobs or small business instability. The funds will be used for small business development center personnel expenses and related small business programs and services.

[60 FR 31056, June 13, 1995. Redesignated and amended at 88 FR 76642, 76643, Nov. 7, 2023]

§ 130.340 Specific program responsibilities.

(a) *Policy development.* The AA/SBDC will establish program policies and procedures to improve the delivery of services by SBDCs to the small business community, and to enhance compliance with applicable laws, regulations, OMB guidelines, and Executive orders. The AA/SBDC will, to the extent practicable, consult with the recognized association.

(b) *Program administration.* The AA/SBDC or designee will recommend the annual program budget, establish appropriate funding levels in compliance with the statute, and review the annual budgets submitted by each applicant. The AA/SBDC will also select applicants to participate in the Program, to maintain a clearinghouse to provide for the dissemination and exchange of information between SBDCs, and to conduct audits of recipients of SBDC grants.

(c) *Responsibilities of SBDC Lead Center Directors.* (1) The SBDC Lead Center Director must be an individual dedicating not less than 75 percent of their time to the supervision and control of the SBDC on behalf of the recipient organization. The position may not be held by a company or contractor.

(2) The SBDC Lead Center Director position must have direct reporting authority, at a minimum, equivalent to that of a college dean in a university setting or the third level of management or administration within a state agency.

(3) The Lead Center Director will direct and monitor program activities and financial affairs of the SBDC network to ensure effective delivery of services to the small business community, and compliance with applicable laws, regulations, 2 CFR part 200, and the terms and conditions of the cooperative agreement.

(4) The SBDC Lead Center Director must have the authority necessary to control all personnel, budgets, and expenditures under the cooperative agreement.

(5) The SBDC Lead Center Director will serve as the SBA's principal contact for all matters involving the SBDC network including, but not limited to, ensuring that state and local needs are addressed; financial and programmatic reporting are submitted; service centers are providing access to training; employees have experience necessary to conduct meaningful counseling; etc.

[88 FR 76643, Nov. 7, 2023]

§ 130.350 SBDC advisory boards.

(a) *State/Regional Advisory Boards.* (1) The Lead Center will establish an advisory board to advise, counsel, and confer with the SBDC Director on matters pertaining to the operation of the SBDC network.

(2) This advisory board will be referred to as a State SBDC Advisory Board in a state/territory having only one recipient organization, and a Regional SBDC Advisory Board in a state having more than one recipient organization.

(3) These advisory boards must include small business owners and other representatives from the entire area of service.

(4) New Lead Centers must establish a State or Regional SBDC Advisory Board by the beginning of the second project period.

(5) A State or Regional SBDC Advisory Board member may also be a member of the National SBDC Advisory Board.

(6) The reasonable cost of travel of any Board member for official Board activities may be paid out of the SBDC's budgeted funds. Federal and program funds are not to be used to compensate advisory board members for non-travel related expenses such as time and effort.

(b) *National SBDC Advisory Board.* (1) The SBA will establish a National SBDC Advisory Board, appointed by the SBA Administrator, and comprised of members who are not Federal employees. The Board will elect a chairperson. Three members of the Board will be from universities, or their affiliates and the remainder will be from small businesses or associations representing small businesses. Board members will serve staggered three-year terms. The SBA Administrator may appoint successors to fill unexpired terms.

(2) The National SBDC Advisory Board shall advise and confer with SBA's AA/SBDCs on policy matters pertaining to the operation of the SBDC program. The Board shall meet with the AA/SBDCs at least semiannually.

(3) The reasonable cost of travel of any National SBDC Advisory Board member for official Board activities will be paid by SBA out of SBDC line-item program funds.

(4) Each member of the Board will be entitled to be reimbursed for expenses as a member of the Board.

(5) The Board will meet at least semiannually and at the call of the Chairman of the Board.

[60 FR 31056, June 13, 1995. Redesignated and amended at 88 FR 76642, 76643, Nov. 7, 2023]

§ 130.360 Selection of the SBDC Lead Center Director.

(a) *Selection.* Selection of an SBDC Lead Center Director must be accomplished in accordance with the guidelines set forth in the notice of funding opportunity and cooperative agreement.

(b) *Vacancy.* (1) The recipient organization must notify the appropriate SBA District Director (DD), Regional Administrator, and AA/SBDC within ten business days of either:

(i) Being notified by the incumbent SBDC Lead Center Director of their intent to vacate the position; or

(ii) Its formal decision to remove the incumbent SBDC Lead Center Director.

(2) If the position will be vacated prior to the selection of a replacement, the recipient organization must appoint an interim SBDC Lead Center Director, prior to the vacancy, who will serve in that capacity until a permanent SBDC Lead Center Director is in position.

(3) The recipient organization must inform the SBA District Director, Regional Administrator, and the AA/SBDC within ten business days of the appointment of the interim SBDC Lead Center Director and provide that individual's contact information.

(4) An interim Lead Center Director must allocate at least 75 percent of their time and effort to the SBDC Program until a permanent SBDC Lead Center Director is in position. This must be documented in accordance with the policies of the recipient organization. An interim SBDC Lead Center Director must be knowledgeable about sponsored programs. The appointment period for such interim SBDC Lead Center Director will not exceed 120 days. Should more time be needed the recipient organization must obtain prior approval from the AA/SBDC for an extension.

[88 FR 76644, Nov. 7, 2023]

§ 130.370 Contracts with other Federal agencies.

(a) An SBDC Lead Center or SBDC service center organization may enter into a contract or grant with a Federal department or agency to provide specific assistance to small business concerns in accordance with paragraphs (b) and (c) of this section.

(b) Prior to bidding on a non-SBA Federal award or contract, the SBDC Lead Center or service center must obtain written consent from the AA/SBDC or designee regarding the subject and general scope of the award or contract to ensure that performance under the award or contract does not represent a conflict with the SBA's cooperative agreement. The AA/OSBDC or designee shall respond to any written request within five business days.

(c) Federal funds from other Federal programs (except for certain Community Development Block Grant program funds) may not be counted as match for purposes of the SBDC Program. In addition, match expenditures

reported to the SBA under the cooperative agreement may not be used or reported as match for another Federal program.

[88 FR 76644, Nov. 7, 2023]

§ 130.380 Client privacy.

(a) SBDCs, including their contractors and other agents, are not permitted to disclose the Client's name, address, email address, or telephone number, hereafter referred to as ''client contact data,'' of individuals or small businesses that obtain any type of assistance from the Program to any person or entity other than the SBDC, without the consent of the client, except in instances where:

(1) Court orders require the SBA Administrator to do so in any civil or criminal enforcement action initiated by a Federal or state agency; or

(2) The Administrator considers such a disclosure to be necessary for the purpose of conducting a financial audit of a center, not including those required under §130.830, as determined on a case-by-case basis when formal requests are made by a Federal or state agency. Such formal requests must justify and document the need for individual client contact and/or program activity data to the satisfaction of the Administrator; or

(3) SBA requires client contact data to directly survey SBDC clients.

(b) SBDCs must provide an opportunity for a client to opt-in to allow the SBA to obtain client contact data. The SBA may use the permitted client contact data only to conduct surveys or studies that help stakeholders better understand how the services the client received affect their business outcomes over time. These surveys or studies would include, but not be limited to:

(1) Studying evaluation and performance management;

(2) Measuring the effect and economic or other impact of Agency programs;

(3) Assessing public and SBDC partner needs;

(4) Measuring customer satisfaction;

(5) Guiding program policy development;

(6) Improving grant-making processes; and

(7) Other areas SBA determines would be valuable to strengthen the SBDC Programs and/or enhance support for SBDC clients.

(c) SBDCs may not deny access to services to clients solely based on their refusal to provide consent as referenced in this section.

(d) Any reports or studies on program activity produced by SBDC and/or the Administrator, including their contractors and other agents, may not disseminate client contact data and must only report data in the aggregate. Individual client contact data will not be disclosed in any way that could individually identify a client.

(e) SBDCs and the Administrator, including their contractors and other agents, must obtain consent from the client prior to publishing media or reports that identify an individual client.

(f) This section does not restrict the Agency in any way from access and use of program performance data.

[88 FR 76644, Nov. 7, 2023]

§ 130.400 Application procedures.

All SBDC applicants must comply with the annual notice of funding opportunity, including format, conditions, submission requirements, and due dates, for their new or renewal application to receive consideration.

[88 FR 76645, Nov. 7, 2023]

§ 130.410 New applications.

(a) *New applicants.* New applicants must comply with the requirements set forth in the applicable notice of funding opportunity, including format, conditions, and due dates for their applications to receive consideration.

(b) *Consideration.* Except in cases involving insular areas, only those applicants operating under §130.200 and incorporated solely within the state where the new SBDC is to be located will receive consideration.

(c) *Recruiting and selecting new recipient organizations.* (1) SBA will use a fair, open and competitive procurement process to solicit proposals for new SBDC Program awards.

(2) After completion of an objective review process, the AA/SBDC will make the final selection and notify the successful applicant.

(3) The newly selected recipient organization may, with prior written approval from the SBA, incur qualified pre-award matching expenditures for the establishment of the Lead Center office, to recruit Lead Center staff, and to cover other related start-up expenditures to the extent permitted under 2 CFR 215.25(e)(1).

[88 FR 76645, Nov. 7, 2023]

§ 130.420 Renewal applications.

(a) The recipient organization will submit the renewal application to the OSBDC using the submission process outlined in the annual notice of funding opportunity.

(b) If the OSBDC chooses to not renew the award of an existing recipient organization or the recipient organization elects not to reapply, the OSBDC will award a cooperative agreement for the conduct of an SBDC project to a new recipient organization in the same area of service using a competitive process. If the OSBDC has initiated a non-renewal or termination action, the Agency will not issue the new award until all administrative remedies have been exhausted. For further information regarding the termination and non-renewal procedures, see § 130.700.

(c) Significant factors considered in the renewal application review will include:

(1) The applicant's ability to obtain matching funds;

(2) The quality of prior performance under the cooperative agreement as measured by client satisfaction rate;

(3) The results of any examination conducted pursuant to § 130.810(b);

(4) Corrective measures implemented as a result of examinations conducted; and

(5) The accreditation provisions of § 130.810(c) including any conditions, the most current accreditation report, and corrective measures implemented, affecting the recipient organization and the SBDC network.

(d) The OSBDC will review the renewal application for conformity with the notice of funding opportunity. The AA/SBDC may request additional information and documentation prior to issuing the cooperative agreement.

[88 FR 76645, Nov. 7, 2023]

§ 130.430 Application decisions.

(a) New applications will either be accepted or rejected in accordance with the evaluation criteria set forth in the applicable notice of funding opportunity. The AA/SBDC may approve, or conditionally approve, or deny any new application. The AA/SBDC may approve or conditionally approve or deny a renewal application. The AA/SBDC may also reject a renewal application after following due process in accordance with the procedures set forth in § 130.700. If a renewal application is conditionally approved, the requirements that the recipient organization must meet in order to obtain full and unconditional approval, will be specified as special terms and conditions in the cooperative agreement.

(b) In the event of a conditional approval, the SBA may fund a recipient organization for one or more specified periods of time up to a maximum of one budget period. If the recipient organization fails to comply with the special terms and conditions of the award to the satisfaction of the AA/SBDC within the allotted time period, the AA/SBDC may suspend, non-renew, or terminate the cooperative agreement with the SBDC, in accordance with the procedures set forth in § 130.700.

[88 FR 76645, Nov. 7, 2023]

§ 130.440 Maximum grant.

(a) No recipient organization will receive an SBDC grant, in any fiscal year under a cooperative agreement, exceeding the greater of the minimum statutory amount, or its pro rata share of all SBDC grants as determined by the statutory formula set forth in section 21(a)(4)(C) of the Small Business Act (15 U.S.C. 648(a)(4)(C)). This limit does not apply to the distribution of supplemental funds, or to grants provided pursuant to sections 21(a)(4)(C)(viii) and 21(a)(6) of the Small Business Act (15 U.S.C. 648(a)(6)).

(b) Additional grants are subject to the limitations set forth in section

21(a)(6) of the Small Business Act unless the statute providing for the additional grant states otherwise.

[88 FR 76645, Nov. 7, 2023]

§ 130.450 Matching funds.

(a) The recipient organization must provide total Matching Funds equal to the total amount of SBA funding. Cash match must be equal to or greater than 50 percent of the SBA funds used by the SBDC. The remaining match required to equal the one-to-one match requirement may be provided through any allowable combination of additional cash, in-kind contributions or indirect costs.

(b) All sources of Matching Funds must be identified as specifically as possible in the budget proposal. Cash sources shall be identified by name and account. Any additional SBA requirements, specifications, or deliverables must be clearly identified in the budget narrative. If a political entity is providing such cash and the funds have not been appropriated prior to issuance of the cooperative agreement, the recipient organization must certify that sufficient funds will be available from the political entity prior to the use of Federal dollars.

(c) Under the authority of 48 U.S.C. 1469a(d), the AA/SBDC may, at his/her discretion, waive any requirement of matching funds for an insular territory otherwise required by law to be provided. Notwithstanding any other provision of law, in the case of American Samoa, Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands, any department or agency shall waive any requirements for local matching funds under $200,000, including in-kind contributions, required by law to be provided by American Samoa, Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(d) All applicants must submit a certification of cash match and program income. This certification must be executed by an authorized official of the recipient organization and must identify any SBDC service center organization(s) providing cash match under a subcontract or other agreement.

(e) In addition to the Federal and program income funds, all matching funds must be under the direct management of either the SBDC Lead Center Director or an SBDC Service Center Director, when budgeted under an SBDC service center organization. If in-kind contributions are utilized by the SBDC, the State Director or an SBDC Service Center Director is then considered to be in control of those contributions.

(f) The Grants Management Specialist will determine whether matching funds and cash match set forth in the budget proposal are sufficient to issue the cooperative agreement.

(g) Recipient organizations are not required but encouraged to identify overmatched amounts as part of the cooperative agreement. Overmatching expenditures are those which are derived from eligible matching sources; are reasonable, allowable, and allocable to the SBDC program; are over and above the minimum match required to the Federal expenditures; and are included on the required SBDC financial reporting to SBA for the project period.

(1) Recipient organizations are encouraged to identify overmatched amounts as part of the cooperative agreement. The recipient organization must fully identify the amount and sources of claimed overmatched amounts. If overmatched amounts are reported, they are subject to the provisions of the cooperative agreement and SBA biennial programmatic and financial examinations.

(2) An overmatched amount can be applied as matching funds for any funding increase (*i.e.,* supplemental funds) received by the SBDC during the budget period, as long as the total cash match contributed by the SBDC is 50 percent or more of the total SBA funds tendered during the budget period and provided that the total match is still 100 percent.

(3) Allowable overmatched amounts which have not been used in the manner described in this section may, with the approval of the AA/SBDC, be used as a credit to offset any confirmed audit disallowances applicable only to the budget period in which the overmatched amount exists and the two

previous budget periods. Such offsetting funds will be considered matching funds.

(h) The following sources cannot be used as matching funds for the SBDC network:

(1) Uncompensated student labor;

(2) SCORE, SBA, Women's Business Centers, or other SBA resource partners;

(3) Program income or fees collected from individuals or small businesses receiving assistance;

(4) Federal funds other than Community Development Block Grant (CDBG) funds;

(5) In-kind contributions, or indirect costs not solely dedicated to the SBDC Program, or under its control;

(6) Any resource allocated and claimed as a matching cost to another federally funded program; or

(7) Funds or other resources provided for an agreed upon scope of work inconsistent with the authorized activities of the SBDC Program.

[60 FR 31056, June 13, 1995, as amended at 88 FR 76645, Nov. 7, 2023]

§ 130.460 Budget justification.

(a) *General.* The SBDC Lead Center Director, as a part of the annual renewal proposal, or the applicant organization's authorized representative, in the case of a new SBDC application, shall prepare and submit to the SBA Project Officer the budget justification for the upcoming budget period. The budget will be reviewed annually upon submission of a renewal application.

(b) *Direct costs.* At least 80 percent of SBA funding must be allocated to the direct cost of program delivery.

(c) *Indirect costs.* If the applicant organization or recipient organization waives all indirect costs, then 100 percent of SBA funding must be allocated to program delivery. If the reimbursements of some, but not all, indirect costs are waived to meet the matching funds requirement, the lesser of the following may be allocated as reimbursed indirect costs of the Program and charged against the Federal contribution:

(1) Twenty percent of Federal contribution; or

(2) The amount remaining after the waived portion of indirect costs is deducted from the total indirect costs allowed by the SBA.

(d) *Separate SBDC service provider budgets.* The applicant organization shall include separate budgets for all SBDC service providers in conformity with 2 CFR part 220, appendix A. Applicable direct cost categories and indirect cost base/rate agreements will be included for the Lead Center and all SBDC service providers, using a rate equal to or less than the negotiated predetermined rate. If no such rate exists, the sponsoring SBDC organization or SBDC service provider will negotiate a rate with its cognizant agency. In the event the sponsoring SBDC organization or SBDC service provider does not have a cognizant agency, the rate shall be, in accordance with OMB guidelines:

(1) Negotiated with the SBA Project Officer; or

(2) Apply the OMB de minimis rate.

(e) *Cost principles.* Principles for determining allowable costs are contained in 2 CFR part 200, subpart E.

(f) *Salaries.* (1) Where the recipient organization is an educational institution, the salaries of the SBDC Lead Center Director and the SBDC Service Center Director at a minimum must approximate the average annualized salary of a full professor and an assistant professor, respectively, in the school or department in which the SBDC is located. If a recipient organization is not an educational institution, the salaries of the SBDC Lead Center Director and the subcenter Directors must approximate the average salaries of parallel positions within the recipient organization. In both cases, the recipient organization should consider the Director's longevity in the Program, the number of subcenters, the size of the SBDC budget, the number of service centers, and the individual's experience and background when determining the salary.

(2) Salaries for Lead Center Directors should be comparable to salaries paid Lead Center Directors in other states or regions with comparably sized programs, responsibilities, and authority.

(3) Salaries for all other positions within the SBDC should be based upon

level of responsibility and be comparable to salaries for similar positions in the area served by the SBDC.

(g) *Equipment.* In accordance with 2 CFR part 200, capital expenditures for equipment must have the prior approval of the Program Manager of the OSBDC, either through a specific disclosure in an annual cost proposal or through an approved amendment to an existing cooperative agreement.

(h) *Travel.* (1) All travel must be separately identified in the proposed budget under the categories of: planned in-state/region, planned out-of-state/region, unanticipated in-state/region, or unanticipated out-of-state/region. Unplanned travel estimates may be based on the SBDC's experience.

(2) Transportation costs must be justified in writing, including the estimated cost, number of persons traveling, and the benefit to be derived by the small business community from the proposed travel.

(3) Any proposed unplanned out-of-state/region travel exceeding the approved amount budgeted for this category must be submitted to the SBA for approval on a case-by-case basis prior to traveling.

(4) All foreign travel requests must be submitted to the appropriate District Director and the SBDC Program Manager for review and provided to the AA/SBDC for final approval in accordance with the notice of funding opportunity. Foreign travel charged to the SBDC cooperative agreement or performed by SBDC staff, while on duty for the recipient organization, must be approved in advance.

(i) Planned foreign travel costs allocable to the SBDC cooperative agreement for SBDC network staff may be approved by AA/SBDC through the annual proposal process, but such planned costs must be fully disclosed and justified in the budget narrative for Agency review. Prior approval should be obtained from the AA/SBDC prior to travel in accordance with 2 CFR part 200.

(ii) Unanticipated foreign travel must be approved using the process set forth in this paragraph (h).

[88 FR 76646, Nov. 7, 2023]

§ 130.465 Restricted and prohibited costs.

(a) SBA prohibitions are consistent with those outlined in 2 CFR part 200.

(b) An SBDC must not use project funds as collateral for a loan or other such monetary purpose.

(c) An SBDC must not use project funds for memorabilia, gifts, prizes, souvenirs, entertainment, alcoholic beverages, amusement, social activities, or any other such costs.

(d) Prior written approval from the AA/SBDC is need for SBDC project funds to be used for the purpose of fundraising activities and costs. SBDCs may include in initial applications and renewal applications proposed fundraising activities. After issuance of an approved cooperative agreement, an SBDC wishing to seek prior approval for new fundraising activities not already approved should follow the prior approval guidance in the cooperative agreement. Prohibited fundraising activities include, but are not limited to:

(1) Costs of organized fundraising, endowment drives;

(2) Financial or capital campaigns; or

(3) Solicitation of gifts and bequests.

(e) Project funds found to be used in violation of the restrictions in this section may be cause for termination, suspension, or non-renewal of the cooperative agreement.

[88 FR 76647, Nov. 7, 2023]

§ 130.470 Fees.

(a) An SBDC may charge clients a reasonable fee to cover the costs of training (sponsored or cosponsored) by the SBDC, the sale of books, the rental of equipment or space, research work, hiring outside consultants for a particular client, or other specialized services.

(b) SBDC network entities, staff, consultants, or volunteers must not solicit or accept fees or other compensation for counseling services, including, but not limited to, business or marketing plan development, loan packaging or credit application assistance, or other advisory services described in section 21 of the Small Business Act.

[88 FR 76647, Nov. 7, 2023]

§ 130.480 Program income.

(a) Program income and interest earned on program income, may only be used for authorized purposes, in accordance with 2 CFR 200.307 and the cooperative agreement, such as to expand the quantity or quality of services, resources or outreach provided by the SBDC network.

(b) Program income may not be reported or used as a matching resource. Unused program income must be carried over to the subsequent budget period by the SBDC network; however, the aggregate amount of network program income cannot exceed 25 percent of the total SBDC budget (Federal and matching expenditures).

(c) Program income exceeding 25 percent of the total approved SBDC budget must be expended by the SBDC network prior to the end of the budget/project period in which the excess occurs.

(d) The Lead Center must report the consolidated program income sources and uses as an attachment to the financial status report for the SBDC network during the budget period. The SBDC must provide a narrative describing how program income was used to further program objectives.

[88 FR 76647, Nov. 7, 2023]

§ 130.490 Property standard.

See 2 CFR part 200, subpart D.

[88 FR 76647, Nov. 7, 2023]

§ 130.500 Funding.

See 2 CFR 200.305.

[88 FR 76647, Nov. 7, 2023]

§ 130.600 Cooperative agreement.

(a) *Cooperative agreement provisions.* A recipient organization will incorporate into its SBDC sub-agreements and contracts the provisions of the cooperative agreement.

(b) *Sub-agreements.* SBA reserves the right to disapprove any sub-agreement entered into by recipient organizations with SBDC service center organizations, vendors, or contractors.

(c) *Goals and milestones.* (1) The AA/SBDC or designee will develop performance measurements for SBDC networks and include provisions for their achievement in the cooperative agreement.

(2) The AA/SBDC or designee will negotiate with the designated association and Lead Center to establish the annual goals, milestones, and activities for the cooperative agreement.

(3) Failure to meet the goals and milestones of the cooperative agreement may be considered in part of the determination for suspension, termination, or non-renewal in accordance with the dispute resolution procedures set forth in § 130.630.

(4) Agency loan goals may not be negotiated or incorporated into the cooperative agreement without the prior written approval of the AA/SBDC.

(d) *Procurement policies and procedures.* (1) Contracts and sub-agreements supported with funds provided under the cooperative agreement must comply with the procurement procedures of the recipient organization.

(2) Contracting procedures must encourage open competition among qualified vendors and promote the effective, efficient, and responsible use of program resources and OMB guidance.

(3) Contracting procedures should provide for domestic sourcing preferences to the greatest extent practicable, showing preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States.

[88 FR 76647, Nov. 7, 2023]

§ 130.610 General terms.

Upon approval of the initial or renewal application, SBA will enter into a cooperative agreement with the recipient organization, setting forth the programmatic and fiscal responsibilities of the recipient organization and SBA, the scope of the project to be funded, and the budget of the program year covered by the cooperative agreement.

[60 FR 31056, June 13, 1995, as amended at 88 FR 76647, Nov. 7, 2023]

§ 130.620 Revisions and amendments to cooperative agreements.

(a) *Requests for revisions.* The cooperative agreement may not be unilaterally amended, modified, or revised by the

recipient organization. Rather, a recipient organization must submit a written request to AA/SBDC along with a copy to the appropriate District Office when it wants to make one or more revisions to the cooperative agreement. Written approval from the AA/SBDC is required prior to the implementation of a proposed revision. Revisions that require amendment of the cooperative agreement include:

(1) Any change in project scope or objectives that will substantially change outcomes described in the cooperative agreement;

(2) Budget revisions exceeding the limit established in the cooperative agreement; and

(3) Any proposed sole-source or one-bid contracts exceeding the limits established by applicable administrative regulations or OMB.

(b) *Emergency authorizations.* (1) In consultation with the Recognized Organization, the AA/SBDC may amend one or more cooperative agreements to authorize unanticipated out-of-state travel by SBDC personnel responding to a need for services in a presidentially or SBA Administrator declared major disaster area. Notification of this type of authorization will be accomplished through the publication of an SBA Notice in the FEDERAL REGISTER.

(2) Proposed and actual travel costs incurred under an emergency authorization must comply with the requirements of §130.460(h), as well as the relevant notice of funding opportunity and OMB guidelines.

(c) *Supplemental funding.* If supplemental funds are available for distribution, SBA will publish a notice of funding opportunity in consultation with the Recognized Organization.

[88 FR 76647, Nov. 7, 2023]

§130.630 Dispute resolution procedures.

(a) *Financial disputes.* (1) A recipient organization wishing to resolve a financial dispute must submit a written statement to the appropriate Grants Management Officer with copies to the Project Officer describing the subject of the dispute, along with any relevant documentation. The Grants Management Officer will respond in writing to the recipient organization within 30 calendar days of receipt of the descriptive statement.

(2) If the recipient organization receives an unfavorable decision from the SBA, it may file an appeal with the AA/SBDC within 30 calendar days of the date of receipt of the unfavorable decision.

(3) The AA/SBDC may request additional information or documentation from the recipient organization at any stage of the proceedings. The response to the request for additional information must be provided in writing to the AA/SBDC within 15 calendar days of receipt of the request. The AA/SBDC will transmit a written decision to the recipient organization within 15 calendar days of receipt of the appeal or within 15 calendar days of receipt of additional information requested.

(4) If the recipient organization receives an unfavorable decision from the AA/SBDC, it may make a final appeal to the SBA Grants and cooperative agreements Appeals Committee (the ''Committee''). The final appeal to the Committee must be filed within 30 calendar days of the date of receipt of the AA/SBDC's written decision. Copies of the appeal must also be sent to the Grants Management Specialist and the Program Manager. If the recipient organization elects not to file an appeal with the Committee, the decision of the AA/SBDC becomes the final Agency decision on the matter.

(5) A recipient organization may request a hearing before the Committee, but such requests will not be granted, unless material facts are substantially in dispute. Legal briefs and other technical forms of pleading are not required. However, appeals to the Committee must be in writing and contain at least the following information and supporting documentation:

(i) Name and address of the recipient organization;

(ii) Name and address of the appropriate SBA District Office(s);

(iii) A copy of the underlying cooperative agreement, including all amendments;

(iv) A statement of the grounds for appeal, with reasons why the appeal should be sustained;

(v) A statement of the specific relief desired on appeal; and

(vi) If a hearing is requested, a statement of the material facts the recipient organization believes are substantially in dispute. In the event a recipient organization fails to provide any of the information specified in paragraphs (a)(5)(i) through (v) of this section, the Committee may dismiss the appeal.

(6) The Committee may request additional information or documentation from the recipient organization at any stage in the proceedings. The recipient organization's response to the Committee must be submitted, in writing, within 15 calendar days of receipt of the request.

(7) If a request for a hearing is granted, the Committee will provide the recipient organization with written instructions and will afford the parties the opportunity to present their respective positions to the Committee.

(8) The Chairperson of the Committee, with the advice of the SBA's Office of General Counsel (OGC), will issue a final written decision within 30 calendar days of receipt of all information or within 30 calendar days of the completion of the hearing. Copies of the decision will be provided to the recipient organization, the AA/SBDC, the Grants Management Specialist, and the SBA Project Officer.

(9) Where a recipient organization's appeal to the Committee commences or is pending within 120 days of the end of the current budget period, the recipient organization has the right to request, in writing, that the matter be handled under an expedited appeal process. In such circumstances, the Committee, by an affirmative vote of its membership, may expedite the appeals process to attain final resolution of a dispute before the anticipated issuance date of a new cooperative agreement.

(b) *Programmatic (non-financial) disputes.* (1) The SBDC Lead Center and the SBA District Office must make every effort to resolve any disputes that arise between the SBDC network and SBA involving non-financial, programmatic issues. If the recipient organization is not satisfied with the resolution, it may, by written request to the AA/SBDC, seek reconsideration of the programmatic dispute within 30 calendar days. When a recipient organization requests reconsideration of a programmatic dispute, the appropriate Program Manager will forward a written summary of the dispute, including comments from the SBDC Lead Center Director, the SBA District Office, and all other pertinent background information to the AA/SBDC within 15 calendar days of SBA's receipt of the request.

(2) The AA/SBDC will transmit a final, written decision to the recipient organization, the Lead Center Director, the SBA Project Officer, and the SBA District Office within 30 calendar days of the receipt of such documentation, unless the recipient organization agrees to an extension of time.

[88 FR 76648, Nov. 7, 2023]

§ 130.700 Suspension, termination, and non-renewal.

(a) *General.* After entering into a cooperative agreement with a recipient organization, the SBA may take, as it determines appropriate, any of the following actions based upon one or more of the circumstances listed in paragraph (b) of this section.

(1) *Non-renewal.* The AA/SBDC may elect not to renew a cooperative agreement with a recipient organization at any point. In undertaking a non-renewal action, the AA/SBDC may either choose not to accept or consider any application for renewal from the recipient organization or the Agency may choose not to exercise option years remaining under the cooperative agreement. When a cooperative agreement is not renewed, the recipient organization may continue to conduct project activities and incur allowable expenses until the end of the current budget period. If a recipient organization decides to not seek to renew its grant, it must notify the District Office and send a letter of intent to withdraw to the AA/SBDC as soon as it is feasible.

(2) *Suspension.* (i) The AA/SBDC may suspend a cooperative agreement with a recipient organization at any point. A decision to suspend a cooperative agreement is effective immediately. The suspension of a recipient organization begins on the date the notice of suspension is issued, and the period of suspension will last no longer than six

months. At the end of the period of suspension or at any point during that period, the AA/SBDC will either reinstate the cooperative agreement or commence an action for termination or non-renewal.

(ii) The notice of suspension will recommend that the recipient organization cease work on the project immediately. The SBA is under no obligation to reimburse any expenses incurred by a recipient organization while its cooperative agreement is under suspension. Where AA/SBDC decides to lift a suspension and reinstate a recipient organization's cooperative agreement, the Agency may, at its discretion, choose to reimburse a recipient organization for some or all of the expenses it incurred in furtherance of project objectives during the period of suspension. However, there is no guarantee that the Agency will elect to accept such expenses, and recipient organizations incurring expenses while under suspension do so at their own risk.

(b) *Cause.* The AA/SBDC may terminate, elect not to renew, or suspend a cooperative agreement with a recipient organization for cause. The cause may include, but is not limited to the following:

(1) Non-performance;

(2) Poor performance;

(3) Unwillingness or inability to implement changes to improve performance;

(4) Disregard or material violation of regulations;

(5) Willful or material failure to comply with the terms of the cooperative agreement, including relevant OMB Circulars;

(6) Conduct of the SBDC Lead Center Director or other key personnel, reflecting a lack of business integrity or honesty, which is not properly addressed on the part of the recipient organization or sponsoring SBDC organizations;

(7) A conflict of interest on the part of the recipient organization, the SBDC service centers, the SBDC Lead Center Director, other key personnel, contractors or volunteers that causes a real or perceived detriment to a small business concern, a contractor, the SBDC network, including but not limited to, SBDC service centers, or SBA;

(8) Improper use of Federal funds;

(9) Failure of a Lead Center or its service centers to consent to audits, examinations, certification reviews, or to maintain required documents or records;

(10) Failure to implement recommendations from the audits or examinations within one year of notification of deficiencies;

(11) Failure to implement conditions from accreditation reviews within the time frame recommended by the accreditation committee and established by the AA/SBDC;

(12) Failure of the SBDC Lead Center Director to work at the SBDC Lead Center on a full-time basis;

(13) Failure to promptly suspend or terminate the employment of an SBDC Lead Center Director, Service Center Director, or other key personnel, contractors, or volunteers upon receipt of knowledge or written information by the recipient organization and/or SBA indicating that such individual has engaged in conduct which may result or has resulted in a criminal conviction or civil judgment that would cause the public to question the SBDC's integrity. The SBDC Lead Center Director (or other appropriate official in the SBDC network), when making the decision to suspend or terminate such an employee, must consider the magnitude of the behavior, the repetitiveness of the conduct, and the remoteness in time of the behavior underlying any conviction or judgment;

(14) Failure to maintain adequate client service facilities or service hours; and

(15) Any other action that materially and adversely affects the operation or integrity of an SBDC or the SBDC Program.

(c) *Administrative procedure for suspension, termination, and nonrenewal.* These procedures apply to termination, nonrenewal, and suspension of cooperative agreements with recipient organizations.

(1) *Taking action.* When the Program Manager has reason to believe that there is cause to suspend, terminate, or non-renew a cooperative agreement with a recipient organization, either

based on their own knowledge or upon information provided by other parties, the AA/SBDC may undertake an enforcement action by issuing a written notice of suspension, termination, or non-renewal to the recipient organization. The effects of such notice are addressed in paragraph (a) of this section.

(2) *Notice requirements.* Each notice of suspension, termination, or non-renewal will set forth the specific facts and reasons for the AA/SBDC's decision and will include reference to the appropriate legal authority. The notice will also advise the recipient organization that it has the right to request an administrative review of the decision to suspend, terminate, or non-renew its cooperative agreement in accordance with the procedures set forth in paragraph (d) of this section. The notice will be transmitted electronically, via email, to the recipient organization on the same date it is issued by mail.

(3) *Relationship to Government-wide suspension and debarment.* A decision by the AA/SBDC to suspend, terminate, or not renew an SBDC cooperative agreement does not constitute a non-procurement suspension or debarment of a recipient organization under Executive Order 12549, *Debarment and Suspension*, and SBA's implementation of OMB regulations at 2 CFR part 2700. However, a decision by the AA/SBDC to undertake a suspension, termination, or non-renewal enforcement action with regard to a particular SBDC cooperative agreement does not preclude or preempt the Agency from also taking action to suspend or debar a recipient organization for purposes of all Federal procurement and/or non-procurement opportunities.

(d) *Administrative review of suspension, termination and nonrenewal actions.* When the AA/SBDC has suspended, terminated, or elected not to renew a cooperative agreement, the recipient organization has the right to request an administrative review of the enforcement action. Administrative review of the AA/SBDC's enforcement actions will be conducted by the Associate Administrator for Entrepreneurial Development (AA/ED).

(1) *Format.* There is no prescribed format for a request for an administrative review of an SBA enforcement action. While a recipient organization has the right to retain legal counsel to represent its interests in connection with an administrative review, it is under no obligation to do so. Formal briefs and other technical forms of pleading are not required. However, a request for an administrative review of an SBA enforcement action must be in writing, should be concise and logically arranged, and must at a minimum include the following information:

(i) Name and address of the recipient organization;

(ii) Identification of the relevant SBA office/program (*i.e.*, Office of Small Business Development Centers/Small Business Development Center Program);

(iii) Cooperative agreement number;

(iv) Copy of the notice of suspension, termination, or non-renewal;

(v) Statement discussing why the recipient organization believes the SBA's actions were arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the law or governing regulations;

(vi) Identification of the specific relief being sought (*e.g.*, lifting of the suspension);

(vii) Statement as to whether the recipient organization is requesting a hearing, and if so, the reasons why it believes a hearing is necessary; and

(viii) Copies of any documents or other evidence the recipient organization believes support its position.

(2) *Service.* Any recipient organization requesting an administrative review of an SBA enforcement action must submit copies of its request (including any attachments) to:

(i) AA/SBDC; and

(ii) the Associate General Counsel for Procurement Law.

(3) *Timeliness.* To be considered timely, the AA/ED must receive a request for an administrative review from the recipient organization within 30 days of the date of the notice of termination, non-renewal, or suspension. Any request for administrative review received by the AA/ED more than 30 days after the date of the notice of suspension, termination, or non-renewal will be considered untimely and will be rejected without being considered.

(i) In addition, if the AA/ED does not receive a request for an administrative review within the 30-day deadline, then the decision by the AA/SBDC to suspend, terminate, or non-renew a recipient organization's cooperative agreement will become the final Agency decision on the matter.

(ii) [Reserved]

(4) *Standard of review.* In order to have the suspension, termination, or non-renewal of a cooperative agreement reversed on an administrative review, a recipient organization must successfully demonstrate that the SBA enforcement action was arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the law or governing regulations.

(5) *Conduct of the proceeding.* Each party must serve the opposing party with copies of all requests, arguments, evidence, and any other filings it submits pursuant to the administrative review. Within 30 days of the AA/ED receiving a request for an administrative review, the AA/ED must also receive the SBA's arguments and evidence in defense of its decision to suspend, terminate, or non-renew a recipient organization's cooperative agreement. If the SBA fails to provide its arguments and evidence in a timely manner, the administrative review will be conducted solely on the basis of the information provided by the recipient organization. After receiving the SBA's response to the request for an administrative review or after the passage of the 30-day deadline for filing such a response, the AA/ED will take one or more of the following actions, as applicable:

(i) Notify the parties whether the AA/ED has decided to grant a request for a hearing.

(ii) Direct the parties to submit further arguments and/or evidence on any issues, that she/he believes require clarification.

(iii) Notify the parties that the AA/ED has declared the record to be closed and therefore will refuse to admit any further evidence or argument.

(iv) Within ten calendar days of declaring the record to be closed, provide all parties with a copy of the AA/ED's written decision on the merits of the administrative review.

(6) *Request for hearing.* The AA/ED will only grant a request for a hearing if she/he concludes that there is a genuine dispute as to a material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses. If the AA/ED grants a request for a hearing, they will set the time and place for the hearing, determine whether the hearing will be conducted in person, via telephone or virtually, and identify which witnesses will be permitted to give testimony.

(7) *Evidence.* The recipient organization and SBA each have the right to submit whatever evidence they believe is relevant to the matter in dispute. No form of evidence will be permitted unless a party has made a substantial showing, based upon credible evidence and not mere allegation, that the other party has acted in bad faith or engaged in improper behavior.

(8) *Decision.* The decision of the AA/ED will be effective immediately as of the date it is issued. The decision of the AA/ED will represent the final Agency decision on all matters in dispute on administrative review. No further relief may be sought from or granted by the Agency. If the AA/ED determines that the SBA's decision to suspend, terminate, or non-renew a cooperative agreement was arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the law, she/he will reverse the Agency's enforcement action and direct the SBA to reinstate the recipient organization's cooperative agreement.

(i) Where an enforcement action has been reversed on administrative review, the SBA will have no more than ten calendar days to implement the AA/ED's decision. However, to the extent permitted under the applicable OMB Circulars, the SBA reserves the right to impose such special conditions in the recipient organization's cooperative agreement as it deems necessary to protect the Government's interests.

(ii) [Reserved]

[88 FR 76648, Nov. 7, 2023]

§ 130.800 Oversight of the SBDC Program.

(a) The AA/SBDC and designees will monitor the SBDC's performance and

its ongoing operations under the cooperative agreement to determine if the SBDC is making effective and efficient use of program funds for the benefit of the small business community.

(b) The District Office is the primary contact for the coordination of the delivery of services to the small businesses in each area of service.

(c) The AA/SBDC may change the primary contact for coordination at any time and will notify the recipient organization of such a change in a timely manner.

[88 FR 76650, Nov. 7, 2023]

§ 130.810 SBA review authority.

(a) *Site visits.* The AA/SBDC and designees will coordinate with, and provide written advance notice to, the SBDC Lead Center Director when conducting periodic programmatic visits to the recipient organization, Lead Center, SBDC service center organizations, and other service locations.

(1) The programmatic reviews will incorporate District Office oversight which will include conducting yearly reviews.

(2) Site visits may be incorporated into oversight and monitoring activities of the SBA program office or the SBA District Office.

(b) *SBA examinations.* The SBA designees shall perform a biennial programmatic and financial examination of each SBDC network. The purpose of these visits is to verify compliance with the cooperative agreement, analyze, assess, and evaluate performance management regarding its SBDC activities, and if necessary, make recommendations for improved service delivery. See 15 U.S.C. 648(k)(1).

(c) *Accreditation program.* (1) When extending or renewing a cooperative agreement of an SBDC, SBA shall consider the results of the examinations and accreditation reviews. See 15 U.S.C. 648(k)(3)(A).

(i) The Small Business Act provides that the Administration may provide financial support, by contract or otherwise, to the association for the purpose of developing a SBDCs accreditation program. See 15 U.S.C. 648(k)(2).

(ii) SBDC networks must be reviewed for accreditation purposes and receive accreditation periodically, as negotiated between the AA/SBDC and the accreditation committee of the recognized association.

(iii) If an SBDC does not receive accreditation, the SBA may initiate the non-renewal or termination procedure pursuant to § 130.700.

(iv) The statue at 15 U.S.C. 648(k)(3)(B) states the SBA may not renew or extend any cooperative agreement with a SBDC unless the center has been approved under the accreditation program conducted pursuant to this section, except that the AA/SBDC may waive such accreditation requirement, at their discretion, upon a showing that the center is making a good faith effort to obtain accreditation.

(2) The AA/SBDC and/or designee will participate in the deliberations of the accreditation committee.

(d) *Audits.* The examinations by the SBA will not serve as a substitute for audits required of Federal recipients under the Single Audit Act of 1984 (31 U.S.C. 7501) or applicable OMB guidelines (see 2 CFR part 200, subpart F) nor will such internal review substitute for investigations conducted by the SBA Office of Inspector General under the authority of the Inspector General Act of 1978 (Pub. L. 95–452, 92 Stat. 1101) as amended (see § 130.830).

[88 FR 76650, Nov. 7, 2023]

§ 130.820 Records and recordkeeping.

(a) *Records.* (1) The recipient organization will ensure that all financial and programmatic records, whether prepared by itself or another entity, are adequately maintained in accordance with Federal regulations in order to corroborate its performance and financial reports to the SBA, as well as to support SBA examinations or other audits. These records must include adequate documentation to support the expenditures claimed and activities performed under the cooperative agreement. The documentation should provide the means to verify proper separation of costs among various Federal awards and non-Federal spending. See also 2 CFR 200.333 through 200.337.

(2) The recipient organization will ensure complete and accurate detailed financial and programmatic documentation by all SBDC service center organizations and service centers. The

recipient organization will monitor and oversee its SBDC service center organizations and SBDC service centers each budget period to ensure compliance with the OMB guidelines and regulations. See 2 CFR part 200, subpart D.

(i) The recipient organization and Lead Center will ensure that:

(A) All funds received throughout the SBDC network, both Federal and non-Federal, including program income, are properly accounted for, adequately safeguarded, accurately reported, and properly used to further program objectives.

(B) Each SBDC service center organization has reviewed all charges made to its SBDC accounts, including program income, to ensure that they are allowable.

(ii) The recipient organization's Lead Center monitoring and oversight activities must include annual on-site or virtual visits to all its SBDC service center organizations.

(A) These review procedures must ensure that SBDCs are in compliance with the terms and conditions of the cooperative agreement.

(B) The Lead Center will document the results of annual reviews of the financial and program records of its SBDC service center organizations.

(C) An in-person monitoring review must be conducted the same year that there is a change in leadership or a record of problems in that year and must be conducted not less than every 4 years.

(3) The recipient organization must keep records on the amount, source, and purpose of all funding under the overall management of the SBDC network, including Federal programs.

(b) *Availability of records.* (1) All SBDC network records must be made available to the SBA for review upon request.

(2) All SBDC network records, financial and programmatic, must be maintained for a period of three years following the date SBA accepted the annual performance report and final financial status report from the recipient organization.

(3) The recipient organization will maintain sufficiently detailed program and financial documentation to facilitate transition and provide continuous SBDC services when changes occur in SBDC service center organizations, as well as to support reviews and audits authorized by the SBA.

[88 FR 76651, Nov. 7, 2023]

§ 130.825 Reports.

(a) *General.* The recipient organization will submit consolidated performance and financial reports for the SBDC network to the SBA for review. These reports will reflect actual SBDC network activity and accomplishments pertinent to the funding periods. Report formats will be specified in the annual notice of funding opportunity. See also 2 CFR 200.327 through 200.329.

(b) *Frequency.* (1) Recipient organizations that have been in the Program for more than three years must submit financial and programmatic performance reports 30 calendar days after completion of six months of operation each budget year.

(2) Recipient organizations that have been in the Program for fewer than three years must submit financial and programmatic performance reports 30 calendar days after completion of each quarter for the first three years.

(3) The final report from recipient organizations must be submitted in accordance with the notice of funding opportunity and terms and conditions.

(c) *Electronic data reports.* Lead Centers are responsible for reporting their consolidated network performance data quarterly to the SBA. The format of the reports will be designated in the notice of funding opportunity. Lead Centers must ensure that the data is submitted to the SBA within the timeframe stipulated and that the data is accurate and complete.

(d) *Performance reports.* Performance reports must include the data specified in paragraphs (d)(1) and (2) of this section, along with any other information the SBDC feels may be relevant to a full appraisal of its performance.

(1) The quarterly and semiannual performance reports will address, in a brief narrative, the SBDC's major activities and objectives. The reports should include a discussion on the progress toward achieving those objectives.

(2) Final performance reports should include an overall summary of effort

expended to deliver the core services described in the cooperative agreement for the full budget period. A discussion of performance measurements achieved and an explanation of those objectives or measurements not met should be included. Performance reports should be a summary of the activities, events or achievements by reportable category with an accompanying management analysis.

[88 FR 76651, Nov. 7, 2023]

§ 130.830 Audits and investigations.

See 2 CFR part 200, subpart F.

[88 FR 76652, Nov. 7, 2023]

§ 130.840 Closeout procedures.

(a) *General.* The purpose of closeout procedures is to ensure that the program funds and property acquired or developed under the SBDC cooperative agreement are fully reconciled and transferred seamlessly between recipient organizations, SBDC service center organizations, or other Federal programs. The responsibility of conducting closeout procedures is vested with the recipient organization whose cooperative agreement is not being renewed. The procedures should be documented and accomplished in accordance with the applicable property standards and the provisions of this part.

(b) *Supplies and equipment.* Supplies and equipment acquired with funds under the cooperative agreement must be accounted for at closeout.

(c) *Intellectual property.* (1) In accordance with 2 CFR part 200, subpart D, intangible property and items subject to copyright that are purchased or developed under the cooperative agreement must be accounted for at closeout.

(2) Inventory and documentation of intellectual property must be collected by the Lead Center for close out. In circumstances where SBA is not renewing the cooperative agreement, the recipient organization must provide an intellectual property inventory and the support documentation to the SBDC clearinghouse and to the District Office for disposition instructions.

(d) *Responsibilities*—(1) *Recipient organizations.* When an SBDC cooperative agreement is not being renewed, regardless of cause, the recipient organization will ensure the following steps are taken in their closeout process and perform the necessary inventories and reconciliations prior to submitting the final annual financial report.

(i) An inventory of the SBDC property must be compiled and evaluated. An asset evaluation final report accounting for the property, equipment, and the aggregate of usable supplies and materials must be provided to the Program Manager.

(ii) Program income balances must be reconciled, and unused program income transferred to the Lead Center from SBDC service center organization accounts.

(iii) Client counseling and training records, paper and electronic, must be compiled to facilitate an SBA program closeout review.

(iv) Financial records will be compiled to facilitate an SBA closeout financial examination.

(2) *Close out actions.* Recipient organizations that terminate SBDC service center organization agreements will perform the close out actions in paragraphs (d)(1)(i) through (iv) of this section to ensure the safeguard of program resources under the cooperative agreement.

(3) *SBA.* Upon receipt of the final financial report from a non-renewing recipient organization, the AA/SBDC will issue disposition instructions to the former recipient organization as described in paragraph (e) of this section.

(e) *Final disposition.* (1) The final financial status report from the recipient organization must include the information identified in the inventory process and identify any program income collected from the SBDC network.

(2) The AA/SBDC will issue written disposition instructions to the recipient organization providing:

(i) The name and address of the entity or agency to which property and program income must be transferred;

(ii) A date by which the transfer must be completed;

(iii) Actions to be taken regarding property and program income;

(iv) Actions to be taken regarding program records such as client and training files; and

(v) Authorization to incur costs for accomplishing the transfer. Such costs may, when authorized, be applied to residual program income or Federal or matching funds.

[88 FR 76652, Nov. 7, 2023]

PART 131—WOMEN'S BUSINESS CENTER PROGRAM

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AUTHORITY: 15 U.S.C. 656.

SOURCE: 84 FR 64713, Nov. 25, 2019, unless otherwise noted.

§ 131.100 Introduction.

(a) The Women's Business Centers (WBC) program has grown and evolved to provide a variety of services to many entrepreneurs ranging from those interested in starting businesses to those looking to expand an existing business.

(b) The U.S. Small Business Administration (SBA), through the Office of Women's Business Ownership (OWBO), is responsible for the general management and oversight of the WBC program. The SBA issues an annual cooperative agreement to recipient organizations for the delivery of assistance to individuals and small businesses. The WBC program acts as a catalyst for providing in-depth, substantive, outcome-oriented business services, including training, counseling, and technical assistance, to women entrepreneurs and both nascent and established businesses, a representative number of whom are socially and economically disadvantaged. By providing training and counseling on a wide variety of topics through WBCs, the SBA meets the needs of the individual client in the local marketplace.

(c) Unless otherwise indicated, all deadlines referred to in this Part are measured in terms of calendar days.

§ 131.110 Definitions.

Advisory board. A group established to confer with and provide recommendations to the WBC Program Director on matters pertaining to the operation of the WBC. The advisory board will also act as a catalyst to raise funds for the WBC.

Applicant organization. An entity that applies for Federal financial assistance to establish, administer, and operate a WBC under a new or renewed cooperative agreement.

Application (also known as the proposal). The written submission by a new applicant organization or an existing recipient organization describing its projected WBC activities for the upcoming budget period and requesting SBA funding for use in its operations.

Annual work plan. See option year work plan and budget.

Area of service. The State or U.S. Territory, or a regional portion of a State or U.S. Territory, in which the SBA approves a WBC to provide services.

Assistant Administrator of the Office of Women's Business Ownership. (AA/OWBO). The AA/OWBO is statutorily responsible for management of the WBC program. The AA/OWBO may elect to designate staff to complete tasks assigned to the AA/OWBO position. When AA/OWBO is referenced, it includes the designee.

Associate Administrator for the Office of Entrepreneurial Development. (AA/OED).

The AA/OED is responsible for enhancing the nationwide network of offices, business executives, and mentors that support current and aspiring business owners as they start, grow, and expand in today's global market. This nationwide network includes the following Resource Partners: Women's Business Centers (WBCs), Small Business Development Centers (SBDCs), and SCORE.

Authorized official. A person who has the legal authority to sign for and/or speak on behalf of an organization.

Budget period. The period of performance in which expenditures and obligations are incurred by a WBC, consistent with 2 CFR 200.77.

Carryover funds (carryover). Unobligated Federal funds reallocated from one budget period to the next through an amendment to the current year's cooperative agreement.

Cash match. Non-Federal funds specifically budgeted and expended by the recipient organization for the operation of a WBC project. Cash match must be in the form of cash and/or program income.

Client. An entrepreneur or existing small business seeking services provided by a WBC.

Client record. A record that provides individual client contact information, client/business demographics, and documentation of the services provided. Additionally, the record provides aggregate data about a training event, including topic, date, attendance, format, and evaluation.

Cognizant agency for audit. The Federal agency designated to carry out the responsibilities as described in 2 CFR 200.513(a).

Cognizant agency for indirect costs. The Federal agency responsible for reviewing, negotiating, and approving cost allocation plans or indirect cost proposals developed under 2 CFR 200.19.

Conditional approval. An approval granted when an application has been determined to meet eligibility requirements and has been recommended for funding, but requiring special conditions, such as submitting certifications, assurances, or other documentation.

Cooperative agreement (also known as notice of award). A legal instrument of financial assistance between the SBA and a recipient organization that is consistent with 31 U.S.C. 6302–6305 and provides for substantial involvement between the SBA and the recipient organization in carrying out the proposed activities.

Counseling. Services provided to an individual and/or small business owner that are substantive in nature, require assistance from a resource partner or SBA district office personnel regarding the formation, management, financing, and/or operation of a small business enterprise, and are specific to the needs of the business or individual.

Direct costs. Costs as defined in 2 CFR 200.413.

Dispute. A programmatic or financial disagreement that the recipient organization requests be handled according to the dispute resolution procedures under § 131.840.

Distinct population. A specific targeted group. For the purpose of the WBC program, the targeted group is women entrepreneurs.

District office. The local SBA office charged, in collaboration with the WBCs, with meeting the needs of women entrepreneurs in the community.

Financial examiner. An SBA employee, or designee, charged with conducting financial examinations.

Full-time. An employee all of whose time and effort (minimum of 30 hours per week, as defined by the Internal Revenue Service, § 4980H(c)(4)) is allocated to the WBC project. An employee who is full-time under the WBC should not engage in activities that do not pertain to the WBC project.

Grants and Cooperative Agreement Appeals Committee. The SBA committee, appointed by the SBA Administrator, to resolve appeals arising from disputes between a recipient organization and the SBA.

Grants Management Officer. An SBA employee who meets the Office of Management and Budget standards and certifications to obligate Federal funds by signing a notice of award.

Grants management specialist. An SBA employee responsible for the budgetary review and financial oversight of WBC agreements.

Indirect costs. Costs as defined in 2 CFR 200.56.

In-kind contributions (third party). Costs incurred as described in 2 CFR 200.96.

Interim Program Director. An individual temporarily assigned by the recipient organization to fulfill the responsibilities of a vacant WBC Program Director position for no more than 90 days.

Key personnel/key employee. For the purposes of the WBC program, the WBC Program Director is identified as the key employee.

Loan packaging. Includes any activity done in support of a client or in preparation of the client's credit application to a lender for a loan, line of credit, or other financial instrument.

Matching funds. For all Federal awards, any shared costs or matching funds and all contributions, as defined in 2 CFR 200.306.

Microloan. A loan as specified in 13 CFR 120.701.

Non-Federal entity. An organization as defined in 2 CFR 200.69.

Nonprofit organization. Any corporation, trust, association, cooperative, or other organization as defined in 2 CFR 200.70.

Notice of award (NOA). See cooperative agreement.

Office of Women's Business Ownership Program Analyst. An SBA employee designated by the AA/OWBO who oversees and monitors WBC operations.

Option year. Additional 12-month budget period awarded after the first budget year (base year) as determined by the period of performance identified in the cooperative agreement.

Option year work plan and budget. The written submission by an existing WBC applying for an additional year of grant funding. This submission is required to ensure the recipient organization's continued alignment with the WBC program and to update its description of projected WBC activities for the upcoming option year budget period.

Overmatch. Any non-Federal contribution applied to the WBC award in excess of the minimum amount of match required. See §131.530 for specific details on match requirements.

Period of performance. The period of time as specified in 2 CFR 200.77.

Principal investigator. The individual primarily responsible for achieving the technical success of a project, while also complying with the financial and administrative policies and regulations associated with the grant.

Prior approval. The written concurrence from the appropriate Office of Women's Business Ownership official for a proposed action or amendment to a WBC cooperative agreement. Specific guidelines governing the prior approval process, including the documentation required, are outlined in the cooperative agreement.

Program announcement. The SBA's annual publication of requirements, to which an applicant organization must respond in its five-year initial or three-year renewal application.

Program income. Gross income earned by a non-Federal entity, as described in 2 CFR 200.80.

Project funds. All funds authorized under the cooperative agreement including Federal funds, non-Federal cash, in-kind contributions (third party), and program income, as well as any Federal funds and/or non-Federal match authorized or reported as carryover funds.

Project period. The period of time specified in the notice of award, which identifies the start and end date of a recipient organization's five-year or three-year project.

Recipient organization. An applicant organization selected to receive Federal funding to deliver WBC services under a cooperative agreement. By statute, only private, nonprofit organizations certified under §501(c) of the Internal Revenue Code of 1986 can be recipient organizations.

Socially and economically disadvantaged women. As defined by 13 CFR 124.103 and 124.104, respectively.

Specialized services. WBC services other than basic counseling and training. The services can include, but are not limited to, assistance with disaster readiness; assistance to home-based businesses; assistance to agribusinesses; and assistance to construction, childcare, elder care, manufacturing or procurement businesses.

State or U.S. Territory. For the purpose of these regulations, the 50 United States, and the U.S. Territories of

Guam, the U.S. Virgin Islands, American Samoa, the Northern Mariana Islands, the Commonwealth of Puerto Rico and the District of Columbia.

Training. A qualified activity or event, presented or cosponsored by a WBC, that delivers a structured program of knowledge, information, or experience on an entrepreneurial or business-related subject.

WBC Program Director. An individual whose time and effort is allocated solely to the WBC program. The WBC Program Director position is the only position that requires approval from the Office of Women's Business Ownership prior to hiring.

Women's Business Centers (WBCs). WBCs represent a national network of educational centers throughout the United States and its territories that assist women in starting and growing small businesses.

Women-owned businesses. A business concern that is not less than 51 percent owned by one or more women; additionally, its management and daily operations are controlled by one or more women.

§ 131.200 Eligible entities.

(a) *Eligible organizations*. By statute, only a nonprofit organization with active 501(c) certification from the United States Department of the Treasury/Internal Revenue Service is eligible to apply for Federal funding to operate a WBC project.

(b) *Ineligible organizations*. Organizations ineligible to receive Federal funds to manage a WBC project include, but are not limited to, the following:

(1) Any organization that owes an outstanding and unresolved financial obligation to the Federal Government;

(2) Any organization, employee, or principal investigator of an organization that is currently suspended, debarred, or otherwise prohibited from receiving awards, contracts, or grants from the Federal Government;

(3) Any organization with an outstanding and unresolved material deficiency reported under the requirements of the Single Audit Act within the past three years, consistent with 2 CFR 200.501;

(4) Any organization that has had a grant or cooperative agreement involuntarily terminated or non-renewed by the SBA for cause/material non-compliance;

(5) Any organization that has filed for bankruptcy within the past five years;

(6) Any organization that does not propose to hire and employ a full-time WBC Program Director whose time is solely dedicated to managing the day-to-day operation of the WBC and staff;

(7) Any organization that proposes to serve as a pass-through and permit another organization to manage the day-to-day operations of the project;

(8) Any organization that had an officer or agent acting on its behalf convicted of a felony criminal violation under any Federal law within the preceding 24 months; or

(9) Any other organization the SBA reasonably determines to be ineligible to receive Federal funds to manage a WBC project.

§ 131.300 Women's Business Centers (WBCs).

Women's Business Centers (WBCs) are established under the statutory authority of the SBA through cooperative agreements with nonprofit recipient organizations. WBC program announcements and requests for work plans and budgets establish the operating and performance parameters, initiatives, and strategies for each project period.

(a) *Program announcements*. (1) The SBA will issue a program announcement each fiscal year to fund those recipient organizations already operating successful WBC projects. The program announcement will detail the goals, objectives, and other terms and conditions for renewable projects entering a three-year phase of the program. The issuance of the program announcement is contingent upon SBA's approved budget and funding availability.

(2) At any time during the current fiscal year, and based on the availability of funds, the SBA may, at its discretion, also issue a program announcement for the upcoming fiscal year, detailing the goals, objectives, and other terms and conditions for new WBC projects. New WBC projects may be awarded a maximum of one base

year and 4 additional option years of funding.

(3) The SBA reserves the right to cancel a program announcement, in whole or in part, at the agency's discretion.

(b) *Option year work plans and budgets.* (1) Each year, the SBA will issue instructions for the submission of the option year work plan and budget for those WBCs currently in (and wishing to continue in) the SBA's WBC program that will have successfully completed year one, two, three or four of an initial project, or year one or two of a renewal project. In order to be considered for renewal, submissions for option year work plans and budget must be received by OWBO by the deadline specified in the annual instructions for the submission of each work plan.

(2) The SBA reserves the right to revise the submission requirements, in whole or in part, at the Agency's discretion.

(3) Awarding option year funding is at the sole discretion of the SBA and is subject to continuing program authority, the availability of funds, and satisfactory performance by the recipient organization.

(c) *Cooperative agreement.* (1) The terms and conditions must include, but are not limited to, Office of Management and Budget guidelines for grant administration and cost principles, regulations and laws governing the WBC project and federally sponsored programs, and current year guidelines from the program announcement.

(2) The SBA will issue a notice of award annually to each eligible WBC participant, based on the acceptance of the organization's annual proposal or work plan.

(d) *Negotiating the cooperative agreement.* The WBC's participation in negotiations should include, but is not limited to, the following:

(1) Proposing services and an appropriate delivery structure to meet the needs of the local small business community, specifically targeting women, including a representative number of women who are socially and economically disadvantaged; and

(2) Proposing adequate technical and managerial resources for the WBC to achieve its performance goals and program objectives, as set forth in the cooperative agreement.

(e) *Women's Business Center (WBC) funds.* Budgeted WBC funds (including match) must be used solely for the WBC project.

§ 131.310 Operating requirements.

(a) The recipient organization has contractual responsibility for the duties of the WBC project, which must be a separate and distinct entity within the recipient organization, having its own budget, staff, and full-time WBC Program Director.

(b) The WBC must establish an advisory board that is representative of the community it will serve and that will confer with and provide recommendations to the WBC Program Director on matters pertaining to the operation of the WBC. The advisory board will also assist the WBC in meeting the match requirements of the program.

(c) An employee who is full-time under the WBC program should not engage in activities that do not pertain to the WBC project. The WBC is not prohibited from operating other Federal programs that focus on women or other underserved small business concerns if doing so does not hinder its ability to deliver the services of the WBC program.

(d) The WBC must have facilities and administrative infrastructure sufficient for its operations, including program development, program management, financial management, reports management, promotion and public relations, program assessment, program evaluation, and internal quality control. The WBC must document annual financial and programmatic reviews and evaluations of its center(s) consistent with Agency policy.

(e) Any new applicant that is accepted into the WBC program after January 24, 2020 must include as part of its official name the specific identification ''Women's Business Center.'' For the purpose of the WBC program, the official name used is the name assigned to the WBC by the host organization. The legal name of the organization is the name of the host organization and is the name usually listed on line 7a of the Application for Federal Assistance, SF 424. Any WBC that is applying for a

renewal grant after January 24, 2020 must also include the specific identification ''Women's Business Center'' as part of its official name. Until such time that any existing WBC has to submit a renewal application to the SBA for funding, and does not currently include ''Women's Business Center'' in its official name, it must include the following language prominently on its website and promotional documents: ''The Women's Business Center is funded in part by the U.S. Small Business Administration.'' However, at the time of submission of its renewal application, it must include WBC as part of its official name.

(f) The WBC must maintain adequate staff to operate the WBC, including the WBC Program Director and at least one other person, preferably a business counselor.

(g) The WBC must use an enforceable conflict-of-interest policy that is consistent with the requirements of 2 CFR 2701.112.

(h) The WBC must be open to the public a minimum of 40 hours a week (which must include evening and weekend hours) and meet other requirements as specified in the program announcement. Emergency closures must be reported to the district office and Office of Women's Business Ownership Program Analyst as soon as is feasible.

(i) The WBC must comply with 13 CFR parts 112, 113, 117, and 136 requiring that no person be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the WBC. However, all WBC marketing programs and services must target women.

(j) The WBC project must not be listed in the organizational structure under any other Federal grant.

§ 131.320 Area of service.

(a) *Cooperative agreement.* The recipient organization will identify in its application the geographic area for which it plans to provide assistance and should strive to not duplicate services to the same client population as an existing WBC. Once approved, the AA/OWBO will codify, in writing, the geographic area of service of each recipient organization. More than one recipient organization may be located in a State, Territory, or other geographic area. Once the SBA has entered into a cooperative agreement with a recipient organization, the area of service cannot be changed without prior approval by the AA/OWBO. A subsequent decision by the recipient organization to change the area of service in the cooperative agreement without prior approval by OWBO may constitute grounds for suspension, non-renewal, and/or termination as set forth in § 131.830.

(b) *Location of WBC projects.* An applicant organization responding to a program announcement and within proximity of an existing WBC project shall provide in its written narrative a justification for placing another WBC in the proximity of an existing WBC, including the number of socially and economically disadvantaged persons within the proposed service area, relevant census data, and information on population density. The information provided must clearly justify the necessity for an additional WBC project within the same area of service as the existing WBC project. The SBA will take the narrative and any supporting documentation into consideration when reviewing, ranking, and scoring the applicant organization's proposal.

(c) *Resources.* An applicant organization's plan for the commitment and allocation of resources, including the site from which the WBC plans to provide services, will be reviewed as part of the application review process for each budget period to ensure adequate coverage in the area of service.

§ 131.330 WBC services and restrictions on services.

(a) *Services.* The WBC must provide prospective entrepreneurs and existing small businesses, known as clients, with training, counseling, and specialized services. The services provided must relate to the formation, financing, management, and operation of small business enterprises. The WBC must create and update client records to document each time that services are provided to a client. The WBC must provide services that meet local needs as determined through periodic needs assessments; additionally, services

must be adjusted over time to meet changing small business needs. Any changes to the scope of services must be in accordance with §131.820.

(b) *Access to capital.* (1) WBCs must provide training and counseling services that enhance a small business concern's ability to access capital, such as business plan development, financial statement preparation/analysis, and cash flow preparation/analysis.

(2) WBCs may provide loan packaging services and other related services to WBC clients and may charge a fee for such assistance (see §131.540). Any fees so generated will constitute program income. The WBC must ensure that these services are not credited to both the WBC program and any other Federally-funded program, thereby double counting the efforts.

(3) WBCs shall prepare their clients to represent themselves to lending institutions. WBC personnel may attend meetings with lenders to assist clients in preparing financial packages; however, neither WBC staff nor their agents may take a direct or indirect role in representing clients in any loan negotiations.

(4) WBCs shall disclose to their clients that financial counseling assistance, including loan packaging, will not guarantee receipt or imply approval of a loan or loan guarantee.

(5) WBCs must not intervene in loan decisions, service loans, make credit recommendations, or otherwise influence decisions regarding the award of any loans or lines of credit on behalf of the WBC's clients, unless the WBC operates as an SBA Microloan Intermediary and is awarding an individual or small business concern an SBA microloan.

(6) When the recipient organization operates both a WBC and a separate loan program, the WBC must disclose to the client other financing options that may be available besides the one offered by the recipient organization to ensure that the client has the opportunity to seek financing outside of the recipient organization. If the recipient organization operates an SBA loan program, it must comply with §120.140 of this chapter.

(7) WBCs must disclose to loan packaging clients any financial relationships between the WBC and a lender or the sale of their credit products.

(8) With respect to loan programs, allowable activities include the following: assisting clients in formulating a business plan, preparing financial statements, completing forms that are part of a loan application, and accompanying an applicant appearing before the SBA or other lenders. See paragraph (b)(5) of this section for further limitations.

(9) WBCs are to collaborate with state, local, and Federal government agencies to identify other resources that may be available to its clients and to facilitate interactions deriving from these collaborations.

(c) *Special emphasis initiatives.* In addition to requiring WBCs to assist women entrepreneurs, including a representative number of women who are socially and economically disadvantaged, the SBA may identify and include in the cooperative agreement other portions of the general population that WBCs must target for assistance.

§131.340 Specific WBC program responsibilities.

(a) *Policy development.* The AA/OWBO will establish and modify WBC program policies and procedures to improve the delivery of services by WBCs to the small business community and to enhance compliance with applicable laws, regulations, Office of Management and Budget guidelines, and Executive Orders.

(b) *Program administration.* The AA/OWBO will recommend the annual program budget, establish appropriate funding levels in compliance with the statute, and review the annual budgets submitted by each organization.

(c) *Responsibilities of WBC Program Director.* (1) The WBC Program Director must be a full-time employee of the recipient organization and not a contractor, consultant, or company. The WBC Program Director will direct and monitor all program activities and all financial affairs of the WBC to ensure effective delivery of services to the small business community and compliance with applicable laws, regulations, Office of Management and Budget circulars, Executive Orders, and the terms

and conditions of the cooperative agreement.

(2) The WBC Program Director may not manage any other programs under the recipient organization.

(3) The WBC Program Director will serve as the SBA's principal contact for all matters involving the WBC.

(d) *Principal investigator.* The principal investigator is primarily responsible for achieving the technical success of the project while also complying with the financial and administrative policies and regulations associated with the grant. Although principal investigators may have administrative staff to assist them with the management of the project, the ultimate responsibility for the management of the project rests with the principal investigator. The principal investigator of a recipient organization could also fill the role of Executive Director, WBC Program Director, President/CEO, or another key position.

§ 131.350 Selection and retention of the WBC Program Director.

(a) *General.* (1) The WBC Program Director selected to manage the daily operations of the WBC shall possess core competencies in the areas of business and/or entrepreneurship training, project and/or small business management, effective communication, and collaboration.

(2)(i) The recipient organization must provide written notification to the AA/OWBO or his/her designee within five business days following a vacancy in a WBC Program Director position. The notification must include the date the former WBC Program Director vacated the position, as well as the name, resume, salary, date of appointment, and contact information for the person assigned the role of the WBC Interim Program Director. If the WBC Program Director temporarily vacates the position, the notification must include the projected date of return. The placement of an Interim Program Director does not require the submission of a key personnel change request; however, the information outlined in this section must be submitted to the OWBO Program Analyst, via email, consistent with the required timeframe.

(ii) The Interim Director may not remain in the position more than 90 calendar days from the date of the vacancy without written approval from the AA/OWBO. The recipient organization must document the appointment of the Interim Program Director in accordance with its policies and procedures and the cooperative agreement.

(3) An Interim Program Director must allocate a sufficient amount of his/her time and effort to management of the daily operations of the WBC program until a permanent WBC Program Director is in position.

(4) Within 30 days from the date of the vacancy, the recipient organization must provide OWBO with its plan of how it will ensure that a full-time WBC Program Director is hired within the 90 day timeframe allocated.

(5) If it is anticipated that the Interim Program Director will be in the position for more than 90 days, prior to the end of the 90 day period, the recipient organization must submit a written request to the OWBO Program Analyst for approval of an extension. OWBO is not required to reimburse personnel costs for any WBC Interim Program Director that remains in the position for more than 90 days without prior written approval.

(b) *SBA involvement.* The AA/OWBO will review the selection of the new WBC Program Director submitted by the recipient organization to ensure the candidate selected is qualified and their hiring would not present a conflict of interest or similar concern that would negatively affect the WBC's ability to carry out project and program objectives.

(c) *Recruitment activity and associated costs.* Allocable personnel compensation and benefits costs are as provided in 2 CFR 200.463.

§ 131.400 Grant administration and cost principles.

Upon approval of a WBC's initial or renewal application, the SBA will enter into a cooperative agreement with the recipient organization, setting forth the programmatic and fiscal responsibilities of the recipient organization and the SBA, the scope of the project

to be funded, and the budget for the period covered by the cooperative agreement. The WBC program adopts and implements Office of Management and Budget regulations as published and amended in 2 CFR part 200. Additional qualifications or clarifications may be promulgated through the program announcement, a revised notice of award, or the regulatory process.

§ 131.410 Maximum grant.

No individual WBC project will receive a WBC grant in any fiscal year under a cooperative agreement in excess of the amount authorized by statute. While an individual WBC project cannot exceed the statutory limit, a recipient organization is not limited from establishing multiple WBC projects as long as the projects are distinct from each other and are serving distinct populations that would not otherwise be served.

§ 131.420 Carryover of Federal funds.

The AA/OWBO will approve requests for carryover on a case-by-case basis. In doing so, the AA/OWBO will take into account the amount of carryover requested, whether the WBC currently has any funds carried over from prior years, the WBC's record of utilizing all of its awarded funding or providing the required level of match, and any factors beyond the WBC's control that impeded its ability to conduct project activities as originally proposed.

§ 131.430 Matching funds.

(a) The recipient organization must provide matching funds equal to one-half of the Federal funding received for the first two years of its initial award (a statutory match ratio of 2:1 Federal to non-Federal funding). For the remainder of the time the recipient organization is in the WBC program, it must provide matching funds of one dollar for every dollar of its annual Federal award amount (a statutory match ratio of 1:1 Federal to non-Federal funding). At least 50 percent of the matching funds must be in cash (the sum of non-Federal cash and program income). The remaining 50 percent may be provided through allowable combinations of cash, in-kind contributions (third party), or authorized indirect costs.

(b) Once the cash match and total match requirements have been met, any additional matching funds are considered overmatch. WBCs may provide overmatch if they choose to do so; however, if they have used Federal funds to raise match above the required amount, the funds must only be used to meet the Federal objective of the WBC program and must be verifiable from the non-Federal entity's records. All funds allocated to a WBC project through a budget proposal are subject to Federal rules and regulations, consistent with 2 CFR part 200. The funds must also be used solely for the WBC project. However, this does not prohibit WBC recipient organizations from raising funds separately and apart from the WBC program. Those funds that are not raised with WBC funds and are not used as match are not subject to the same recordkeeping requirements as they are not tied to the WBC program.

(c) If the recipient organization indicates difficulty in meeting the match requirement, it can request a reduction of the Federal award. For specific guidance regarding the allowability, valuation, and documentation of match please see 2 CFR 200.306.

§ 131.440 Program income and fees.

(a) Program income, including any interest earned on program income, may only be used for authorized purposes and in accordance with the cooperative agreement. Program income may be used as matching funds and, when expended, is counted towards the cash match requirement of the award. Program income must be used to expand the quantity or quality of services and for resources or outreach provided by the WBC project.

(b) Unused program income may be carried over to the subsequent budget period by a WBC. The WBC must report the consolidated program income sources and uses.

(c) A WBC may charge clients a reasonable fee for services, including training and counseling provided by the WBC (sponsored or cosponsored), the sale of books, or the rental of equipment or space. Any fees so generated will constitute program income,

and such fees must not restrict access to any services for economically disadvantaged entrepreneurs.

§ 131.450 Budget justification.

General. The WBC Program Director or finance person of the non-Federal entity will prepare and submit the budget justification for the upcoming program/budget period for review by the SBA as part of the WBC's application package pursuant to the applicable program announcement. Worksheets are provided by OWBO for this purpose.

§ 131.460 Restricted and prohibited costs.

SBA prohibitions are consistent with those set forth in 2 CFR part 200.

(a) A WBC may not use project funds as collateral for a loan, assign an interest in them, or use them for any other such monetary purpose.

(b) Use of project funds in violation of these restrictions may be cause for termination, suspension, or non-renewal of the cooperative agreement.

§ 131.500 Oversight of the WBC program.

(a) The AA/OWBO will monitor the WBC's performance and its ongoing operations under the cooperative agreement to determine if the WBC is making effective and efficient use of program funds, in compliance with applicable law and other requirements, for the benefit of the small business community.

(b) The AA/OWBO may revoke delegated authority of oversight responsibilities at any time it is deemed necessary and will notify the recipient organization of such a change in a timely manner.

§ 131.510 SBA review authority.

To ensure compliance and the effectiveness of WBCs, OWBO staff will coordinate with SBA district offices to provide periodic programmatic site visits on behalf of OWBO. Prior to conducting such visits, SBA district office personnel will coordinate with and provide written notice to the WBC Program Director. The SBA's district office personnel may inspect WBC records and client files to analyze and assess WBC activities, and, if necessary, make recommendations for improved service delivery to the OWBO Program Analyst. Periodic district office site visits do not supersede or replace OWBO site visits.

§ 131.520 Audits, examinations, and investigations.

(a) *General audits.* The SBA may conduct WBC audits.

(1) Audits of a recipient organization will be conducted pursuant to the Single Audit Act of 1984 (if applicable) and applicable Office of Management and Budget circulars.

(2) The SBA's Office of Inspector General (OIG) or its agents may inspect, audit, investigate, or otherwise review the WBC as the Inspector General deems appropriate.

(b) *Financial examinations.* The WBC will have periodic financial examinations conducted by either the SBA or an independent contracted firm. WBCs, in accordance with the program announcement and the cooperative agreement, must comply with all requirements set forth for such purposes.

(1) Applicant organizations proposing to enter the WBC program for the first time shall be subject to a post-award examination or sufficiency review conducted by or coordinated with the SBA or its designee. As part of the financial examination, the financial examiner will verify the adequacy of the accounting system, the suitability of proposed costs, and the nature and sources of proposed matching funds.

(2) Examinations by the SBA will not serve as a substitute for audits required of Federal recipients under the Single Audit Act of 1984, 31 U.S.C. Chapter 75 or applicable Office of Management and Budget guidelines (see 2 CFR part 200), nor will such internal reviews serve as a substitute for audits to be conducted by the SBA's Office of the Inspector General under authority of the Inspector General Act of 1978, as amended.

(c) *Investigations.* The SBA may conduct investigations to determine whether any person or entity has engaged in acts or practices constituting a violation of the Small Business Act,

15 U.S.C. 656; any rule, order, or regulation; or any other applicable Federal law.

§ 131.600 Cooperative agreement and contracts.

(a) *General.* A recipient organization will incorporate into its WBC the applicable provisions of the cooperative agreement.

(b) *Goals and milestones.* (1) OWBO will work in conjunction with WBC participants to establish program goals for the cooperative agreement annually. Agency loan goals may not be negotiated or incorporated into the cooperative agreement without the prior written approval of the AA/OWBO.

(2) Failing to meet the goals and milestones of the cooperative agreement may result in suspension, termination, or non-renewal in accordance with § 131.830.

(c) *Procurement policies and procedures.* (1) The WBC may contract out for certain functions as permitted by the terms and conditions of the cooperative agreement but may not expend more than 49 percent of the total project funds on contractors and consultants.

(2) The SBA may direct or otherwise approve any obligations or expenditures by recipient organizations, including those related to vendors or contractors, as deemed appropriate by the Agency.

§ 131.610 Other Federal grants.

(a) *Grants from other agencies.* A recipient organization may enter into a contract or grant with another Federal department or agency to provide specific assistance to small business concerns in accordance with the following conditions:

(1) Any additional contract or grant funds obtained from a Federal source may not be used as matching funds for the WBC project, with the exception of Community Development Block Grant (CDBG) funds.

(2) Federal funds from the SBA and match expenditures reported to the SBA under the cooperative agreement may not be used or reported as match for another Federal program.

(3) The SBA does not impose any requirements for additional matching funds for those recipient organizations managing other Federal contracts.

(4) The WBC must report these other Federal funds and any associated matching funds separately to the SBA.

(b) *RISE After Disaster grants.* In accordance with 15 U.S.C. 636(b)(12), the SBA may provide financial assistance to a WBC, SBDC (under 13 CFR part 130), SCORE, or any proposed consortium of such individuals or entities to spur disaster recovery and growth of small business concerns located in an area for which the President has declared a major disaster.

(1) The Administrator, in cooperation with the recipients of financial assistance under this paragraph, shall establish metrics and goals for performance of grants, contracts, and cooperative agreements under this paragraph, which shall include recovery of sales, recovery of employment, reestablishment of business premises, and establishment of new small business concerns.

(2) Matching funds are not required for any grant, contract, or cooperative agreement under this paragraph (see section 7(b) of the Small Business Act 15 U.S.C. 636 (b)).

§ 131.620 Revisions and amendments to cooperative agreements.

During a project period, the WBC may request, in writing, one or more revisions to the cooperative agreement. The request must be submitted by the recipient organization's authorized official. Revisions will normally relate to changes in scope, work, or funding during the specified budget period. No proposed revision will be implemented without the prior approval from the OWBO Program Analyst. Revisions that require an amendment include the prior approval items set forth in 2 CFR 200.308 and 200.407.

§ 131.630 Suspension, termination, and non-renewal.

(a) *General.* After entering into a cooperative agreement with a recipient organization, the AA/OWBO may take, as appropriate, any of the following enforcement actions based upon one or more of the circumstances set forth in paragraph (b) of this section:

(1) *Suspension.* (i) The AA/OWBO may suspend a cooperative agreement with a recipient organization at any point. The decision to suspend a cooperative agreement with a recipient organization is effective immediately as of the date of the notice of suspension. The period of suspension will begin on the date of the notice of suspension and will last no longer than six months. At the end of the period of suspension, or at any point during that period, the AA/OWBO will either reinstate the cooperative agreement or commence an action for termination or non-renewal.

(ii) The notice of suspension will recommend that the recipient organization cease work on the WBC project immediately. The AA/OWBO is under no obligation to reimburse any expenses incurred by a recipient organization while its cooperative agreement is under suspension. Where the AA/OWBO decides to lift a suspension and reinstate a recipient organization's cooperative agreement, the Agency may, at its discretion, choose to make funds available to reimburse a recipient organization for some or all of the expenses it incurred in furtherance of project objectives during the period of suspension. However, there is no guarantee that the Agency will elect to accept such expenses and recipient organizations incurring expenses while under suspension do so at their own risk.

(2) *Termination.* (i) The AA/OWBO may terminate a cooperative agreement with a recipient organization at any point. A decision to terminate a cooperative agreement is effective immediately as of the date of the notice of termination. A recipient organization may not incur further obligations under the cooperative agreement after the date of termination unless it has been expressly authorized to do so in the notice of termination.

(ii) Funds remaining under the cooperative agreement may be made available by the AA/OWBO to satisfy financial obligations properly incurred by the recipient organization prior to the date of termination. Award funds will not be available for obligations incurred subsequent to the effective date of termination unless expressly authorized under the notice of termination. A recipient organization that has had its cooperative agreement terminated will have 90 days to submit final closeout documents as instructed by the SBA.

(3) *Non-renewal.* (i) The AA/OWBO may elect not to renew a cooperative agreement with a recipient organization at any point. In undertaking a non-renewal action, the SBA may either decline to accept or consider any application for renewal the organization submits, or the agency may decline to exercise any option years remaining under the cooperative agreement. A recipient organization that has had its cooperative agreement non-renewed may continue to conduct project activities and incur allowable expenses until the end of the current budget period.

(ii) Funds remaining under a non-renewed cooperative agreement may be utilized to satisfy financial obligations the recipient organization properly incurred prior to the end of the budget period. Award funds will not be available for obligations incurred subsequent to the end of the current budget period. A recipient organization that has had its cooperative agreement non-renewed will have until the end of the current budget period or 120 days, whichever is longer, to conclude its operations and submit closeout documents as instructed by the SBA.

(b) *Material non-compliance.* The AA/OWBO may suspend, terminate, or not renew a cooperative agreement, in whole or in part, with a recipient organization for material non-compliance (frequently referred to as for cause). Material non-compliance may include, but is not limited to, the following:

(1) Non-performance;

(2) Poor performance;

(3) Unwillingness or inability to implement changes to improve performance;

(4) Willful or material failure to comply with the terms and conditions of the cooperative agreement, including relevant Office of Management and Budget circulars;

(5) Conduct reflecting a lack of business integrity or honesty on the part of the recipient organization, the WBC Program Director, or other significant employee(s), which has not been properly addressed;

(6) A conflict of interest on the part of the recipient organization, the WBC Program Director, or other significant employees causing real or perceived detriment to a small business concern, a contractor, the WBC, or the SBA;

(7) Improper management or use of Federal funds;

(8) Failure of a WBC to consent to audits or examinations, or to maintain required documents or records;

(9) Failure to implement recommendations from the audits or examinations within 30 days of their receipt;

(10) Failure of the WBC Program Director to work at the WBC on a 100 percent full-time basis on the WBC project;

(11) Failure to promptly suspend or terminate the employment of a WBC Program Director, or other significant employee, upon receipt of knowledge or written information by the recipient organization and/or the SBA indicating that such individual has engaged in conduct, which may result or has resulted in a criminal conviction or civil judgment which would cause the public to question the WBC's integrity. In making the decision to suspend or terminate such an employee, the recipient organization must consider such factors as the magnitude and repetitiveness of the harm caused and the remoteness in time of the behavior underlying any conviction or judgment;

(12) Failure to maintain adequate client service facilities or service hours;

(13) Fraud, waste, abuse, mismanagement or criminal activity on the part of the recipient organization and/or its staff/employees; or

(14) Any other action that the AA/OWBO believes materially and adversely affects the operation or integrity of a WBC or the WBC program.

(c) *Procedures*. The same procedures will apply regardless of whether a cooperative agreement with a recipient organization is being suspended, terminated, or non-renewed by the SBA.

(1) *Taking action*. When the AA/OWBO has reason to believe there is cause to suspend, terminate, or non-renew a cooperative agreement with a recipient organization (either based on its own knowledge or upon information provided to it by other parties), the AA/OWBO may undertake such an enforcement action by issuing a written notice of suspension, termination, or non-renewal to the recipient organization.

(2) *Notice requirements*. Each notice of suspension, termination, or non-renewal will set forth the specific facts and reasons for the AA/OWBO decision and will include reference to the appropriate legal authority. The notice will also advise the recipient organization that it has the right to request an administrative review of the decision to suspend, terminate, or non-renew its cooperative agreement in accordance with the procedures set forth in paragraph (d) of this section. The notice will be transmitted to the recipient organization on the same date it is issued by both U.S. Mail and facsimile or as an email attachment.

(3) *Relationship to government-wide suspension and debarment*. A decision by the AA/OWBO to suspend, terminate, or non-renew a WBC cooperative agreement does not constitute a nonprocurement suspension or debarment of a recipient organization under Executive Order 12549 and SBA's implementing regulations (2 CFR part 2700). However, a decision by the AA/OWBO to undertake a suspension, termination, or nonrenewal enforcement action with regard to a particular WBC cooperative agreement does not preclude or preempt the Agency from also taking action to suspend or debar a recipient organization for purposes of all Federal procurement and/or nonprocurement opportunities.

(d) *Administrative review*. Any recipient organization that has had its cooperative agreement suspended, terminated, or non-renewed has the right to request an administrative review of the AA/OWBO's enforcement action. Administrative review of WBC enforcement actions will be conducted by the AA/OED.

(1) *Format*. There is no prescribed format for a request for administrative review of an SBA enforcement action. While a recipient organization has the right to retain legal counsel to represent its interests in connection with an administrative review, it is under no obligation to do so. Formal briefs and other technical forms of pleading are not required. However, a request

for administrative review of an SBA enforcement action must be in writing, should be concise and logically arranged, and must at a minimum include the following information:

(i) Name and address of the recipient organization;

(ii) Identification of the relevant SBA office/program (*i.e.,* OWBO/WBC Program);

(iii) Cooperative agreement number;

(iv) Copy of the notice of suspension, termination, or non-renewal;

(v) Statement regarding why the recipient organization believes the SBA's actions were arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the law;

(vi) Identification of the specific relief being sought (*e.g.,* lifting of the suspension);

(vii) Statement as to whether the recipient organization is requesting a hearing and, if so, the reasons why it believes a hearing is necessary; and

(viii) Copies of any documents or other evidence the recipient organization believes support its position.

(2) *Service.* Any recipient organization requesting administrative review of an SBA enforcement action must submit copies of its request (including any attachments) to all of the following parties:

(i) Associate Administrator for the Office of Entrepreneurial Development, U.S. Small Business Administration;

(ii) Assistant Administrator for the Office of Women's Business Ownership U.S. Small Business Administration;

(iii) Associate General Counsel for Procurement Law, U.S. Small Business Administration.

(e) *Timeliness.* (i) In order to be considered timely, the AA/OED must receive a recipient organization's request for administrative review within 30 days of the date of the notice of suspension, termination, or non-renewal. Any request for administrative review received by the AA/OED more than 30 days after the date of the notice of suspension, termination, or non-renewal will be considered untimely and will automatically be rejected without being considered.

(ii) In addition, if the AA/OED does not receive a request for administrative review within the 30-day deadline, then the decision by the AA/OWBO to suspend, terminate, or non-renew a recipient organization's cooperative agreement will automatically become the final Agency decision on the matter.

(f) *Standard of review.* In order to have the suspension, termination, or non-renewal of a cooperative agreement reversed on administrative review, a recipient organization must successfully demonstrate that the SBA enforcement action was arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the law.

(g) *Conduct of the proceeding.* (1) Each party must serve the opposing party with copies of all requests, arguments, evidence, and any other filings it submits pursuant to the administrative review. Within 30 days of the AA/OED receiving a request for administrative review, the AA/OED must also receive the SBA's arguments and evidence in defense of its decision to suspend, terminate, or non-renew a recipient organization's cooperative agreement. If the SBA fails to provide its arguments and evidence in a timely manner, the administrative review will be conducted solely on the basis of the information provided by the recipient organization.

(2) After receiving the SBA's response to the request for administrative review or the passage of the 30-day deadline for filing such a response, the AA/OED will take one or more of the following actions, as applicable:

(i) Notify the parties whether she/he has decided to grant a request for a hearing;

(ii) Direct the parties to submit further arguments and/or evidence on any issues which she/he believes require clarification; and/or

(iii) Notify the parties that she/he has declared the record to be closed and therefore she/he will refuse to admit any further evidence or argument.

(3) The AA/OED will only grant a request for a hearing if she/he concludes that there is a genuine dispute as to a material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses. If the AA/OED grants a request for a hearing,

she/he will set the time and place for the hearing, determine whether the hearing will be conducted in person or via telephone, and identify which witnesses will be permitted to give testimony.

(4) Within 10 calendar days of declaring the record to be closed, the AA/OED will provide all parties with a copy of her/his written decision on the merits of the administrative review.

(h) *Evidence.* The recipient organization and the SBA each have the right to submit whatever evidence they believe is relevant to the matter in dispute. No form of discovery will be permitted unless a party has made a substantial showing, based upon credible evidence and not mere allegation that the other party has acted in bad faith or engaged in improper behavior.

(i) *Decision.* (1) The decision of the AA/OED will be effective immediately as of the date it is issued. The decision of the AA/OED will represent the final Agency decision on all matters in dispute on administrative review. No further relief may be sought from or granted by the Agency. If the AA/OED determines that the SBA's decision to suspend, terminate, or non-renew a cooperative agreement was arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the law, she/he will reverse the Agency's enforcement action and direct the SBA to reinstate the recipient organization's cooperative agreement.

(2) Where an enforcement action has been reversed on administrative review, the SBA will have no more than 10 calendar days to implement the AA/OED's decision. However, to the extent permitted under the applicable Office of Management and Budget circulars, the SBA reserves the right to impose such special conditions in the recipient organization's cooperative agreement as it deems necessary to protect the government's interests.

§ 131.640 Dispute procedures.

(a) *Financial and Programmatic disputes.* (1) A recipient organization wishing to resolve a dispute regarding a financial or programmatic matter other than suspension, termination, or non-renewal of its award must submit a written appeal petition describing the subject of the dispute, along with any relevant documentation, to the Chairman of the grant appeals committee (the Committee).

(2) The appeal petition must be received by the Committee within 30 calendar days of the date of SBA's decision. A copy of the appeal petition must also be provided to the AA/OWBO.

(3) There is no prescribed format for the submission of an appeal petition. Formal briefs and other technical forms of pleading are not required, nor is the grantee required to obtain civil representation. However, the appeal petition must be in writing and must be concise, factual, and logically arranged. In addition, the appeal petition must contain the following:

(i) Name and address of organization;
(ii) Name and address of the appropriate local SBA district office;

(iii) Identification of the appropriate SBA program office and the award number;

(iv) A statement of the material which are substantially in dispute;

(v) Copies of any documents or other evidence supporting the appeal;

(vi) A request for the specific relief desired on appeal: and

(vii) A statement as to whether an oral hearing is being requested and, if so, the reason for the hearing.

(4) The Committee will first rule on a request for an oral hearing before proceeding to consider the merits of an appeal petition. Within 60 calendar days of receiving the appeal petition, the Committee will present its decision in writing to the recipient organization and the AA/OWBO. The Committee's ruling will represent the final Agency decision on the subject of the dispute and will not be further appealable within SBA.

(5) Requests for an appeal before the Committee will not be granted unless the Agency determines there are substantial material facts in dispute.

(6) The Committee may request additional information or documentation from the recipient organization at any stage in the proceedings. The recipient organization's response to the Committee's request for additional information or documentation must be submitted, in writing, to the Committee within 15 calendar days of receipt of the request.

In the event that the recipient organization fails to follow the procedures specified in paragraph (a)(3) of this section, the Committee may dismiss the appeal by a written order.

(7) If a request for an appeal is granted, the Committee will provide the recipient organization with written instructions and will afford the parties an opportunity to present their positions to the Committee in writing.

(8) The chairperson of the Committee, with advice from the SBA's Office of General Counsel, will issue a final written decision within 30 calendar days of receipt of all information or inform the recipient organization that additional time to issue a decision is necessary. A copy of the decision will be transmitted to the recipient organization, with copies to the AA/OWBO.

(9) At any time within 120 days of the end of the budget period, the recipient organization may submit a written request to use an expedited dispute appeal process. The Committee, by an affirmative vote of a majority of its total membership, may expedite the appeals process to attain final resolution of a dispute before the issuance date of a new cooperative agreement.

(b) [Reserved]

§ 131.650 Closeout procedures.

(a) *General.* Closeout procedures are used to ensure that the WBC program funds and property acquired or developed under the WBC cooperative agreement are fully reconciled and transferred seamlessly between the recipient organization and other Federal programs. The responsibility of conducting closeout procedures is vested with the recipient organization whose cooperative agreement is being relinquished, terminated, non-renewed, or suspended.

(b) *Responsibilities*—(1) *Recipient organizations.* When a WBC cooperative agreement is not being renewed or a WBC is terminated, regardless of cause, the recipient organization will address the following in its closeout process and perform the necessary inventories and reconciliations prior to submitting the final annual financial report.

(i) An inventory of WBC property must be compiled, evaluated, and all property and the aggregate of usable supplies and materials accounted for in this inventory.

(ii) Program income balances will be reconciled and unused WBC program income which is not used as match or cannot otherwise be used to offset legitimate expenditures of the WBC must be returned to the SBA.

(iii) Client records, paper and electronic, will be compiled to facilitate an SBA program closeout review.

(iv) Financial records will be compiled to facilitate a closeout of the SBA financial examination.

(2) *SBA.* Upon receipt of the final annual financial report from a non-renewing or terminated recipient organization, the AA/OWBO will issue disposition instructions to the former recipient organization.

(c) *Final disposition.* (1) The final financial status report from the recipient organization must include the information identified in the inventory process and identify any WBC program income collected for services provided.

(2) The AA/OWBO will issue written disposition instructions to the recipient organization providing the following:

(i) The name and address of the entity or agency to which property and program income must be transferred;

(ii) The date by which the transfer must be completed;

(iii) Actions to be taken regarding property and WBC program income;

(iv) Actions to be taken regarding WBC program records such as client and training files; and

(v) Authorization to incur costs for accomplishing the transfer. Such costs may, when authorized, be applied to residual WBC program income or Federal or matching funds.

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

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AUTHORITY: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), 657t and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart J issued under 15 U.S.C. 657f.

Subpart K issued under 15 U.S.C. 657f.

Subpart L issued under 15 U.S.C. 636(a)(36); Pub. L. 116–136, 134 Stat. 281; Pub. L. 116–139, 134 Stat. 620; Pub. L. 116–142, 134 Stat. 641; and Pub. L. 116–147, 134 Stat. 660.

Subpart M issued under 15 U.S.C. 657a; Pub. L. 117–81, 135 Stat. 1541.

SOURCE: 61 FR 2683, Jan. 29, 1996, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 134 appear at 72 FR 50042, Aug. 30, 2007.

Subpart A—General Rules

§ 134.101 Definitions.

As used in this part:

AA/OHA means the Assistant Administrator for OHA, who is also the Chief Hearing Officer.

Act means the Small Business Act, 15 U.S.C. 631 *et seq*.

Address means the primary home or business address of a person or entity, including the street location or postal box number, city or town, state, and postal zip code.

Administrative Judge means a Hearing Officer, as described at 15 U.S.C. 634(i), appointed by OHA to adjudicate cases.

Appeal petition has the same meaning as petition.

Area Office means a Government Contracting Area Office or a Disaster Area Office of the Small Business Administration.

Business day means any day other than a Saturday, Sunday, or a Federal holiday.

Day means a calendar day, unless a Judge specifies otherwise.

Hearing means the presentation and consideration of argument and evidence. A hearing need not include live testimony or argument.

Investment Act means the Small Business Investment Act of 1958, 15 U.S.C. 661 *et seq*.

Judge means the Administrative Judge or Administrative Law Judge who decides an appeal or petition brought before OHA, or the AA/OHA when he or she acts as an Administrative Judge.

NAICS code means North American Industry Classification System code.

OHA means the Office of Hearings and Appeals.

Party means the petitioner, appellant, respondent, or intervenor, and the contracting officer in a NAICS code appeal.

Person means an individual or any form of business entity.

Petition (or *appeal petition*) means a written complaint, a written appeal from an SBA determination, or a written request for the initiation of proceedings before OHA.

Petitioner means the person who initially files a petition before OHA.

Pleading means a petition, an order to show cause commencing a case, an appeal petition, an answer, a response, or any amendment or supplement to those documents.

Respondent means any person or governmental agency against which a case has been brought before OHA.

SBA means the Small Business Administration.

Size determination means a formal size determination made by an Area Office and includes decisions by Government Contracting Area Directors that determine whether two or more concerns are affiliated for purposes of SBA's financial assistance programs, or other programs for which an appropriate SBA official requested an affiliation determination.

Size Standard Petition means a petition for reconsideration of a revised, modified, or established size standard filed with OHA pursuant to 15 U.S.C. 632(a)(9) and subpart I of this part.

Step One and *Step Two* refer to the steps of the Employee Dispute Resolution Process, see §134.801(a) for more information.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47246, July 18, 2002; 69 FR 29208, May 21, 2004; 75 FR 47438, Aug. 6, 2010; 82 FR 25506, June 2, 2017]

§134.102 Jurisdiction of OHA.

OHA has authority to conduct proceedings in the following cases:

(a) The revocation or suspension of Small Business Investment Company licenses, cease and desist orders, and the removal or suspension of directors and officers of licensees, under the Investment Act and part 107 of this chapter;

(b) Alleged violations of those civil rights laws which are effectuated by parts 112, 113, 117, and 136 of this chapter;

(c) The revocation of the privilege of a person to conduct business with SBA under the Act and part 103 of this chapter;

(d) 7(a) Lender appeals from informal enforcement actions and final agency decisions on 7(a) Lender formal enforcement actions, and any other appeal that is specifically authorized by part 120 of this title, but not including appeals of actions against SBA Supervised Lenders under §120.1600(b) or (c) or under §120.465;

(e) The suspension or termination of surety bond program participants under 15 U.S.C. 694a *et seq.* and part 115 of this chapter;

(f) [Reserved]

(g) Allowance of fees and expenses under the Equal Access to Justice Act, 5 U.S.C. 504;

(h) Debarment from appearance before the SBA because of post-employment restrictions under 18 U.S.C. 207 and part 105 of this chapter;

(i) Collection of debts owed to SBA and the United States under the Debt Collection Act of 1982, the Debt Collection Improvement Act of 1996, and part 140 of this chapter;

(j) Appeals from the following SBA 8(a) program determinations under the Act and part 124 of this chapter:

(1) Denial of program admission based solely on a negative finding as to social disadvantage, economic disadvantage, ownership or control; program termination; program graduation; or denial of a waiver of the requirement to perform to completion an 8(a) contract; and

(2) Program suspension;

(k) Appeals from size determinations and NAICS code designations under part 121 of this chapter;

(l) The imposition of civil penalties and assessments against persons who make false claims or statements to SBA under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812 and part 142 of this chapter;

(m)–(n) [Reserved]

(o) The suspension, termination, or non-renewal of cooperative agreements with Women's Business Centers and Small Business Development Centers under the Act and part 130 of this chapter;

(p) Certain matters involving debarments and suspensions under 2 CFR parts 180 and 2700;

(q) [Reserved]

(r) Appeals from SBA Employee Dispute Resolution Process cases (Employee Disputes) under Standard Operating Procedure (SOP) 37 71 (available at *http://www.sba.gov/tools/resourcelibrary/sops/index.html* or through OHA's Web site *http://www.sba.gov/oha*) and subpart H of this part;

(s) Appeals from Women-Owned Small Business or Economically-Disadvantaged Women-Owned Small Business protest determinations under part 127 of this chapter;

(t) Petitions for reconsideration of revised, modified, or established size standards pursuant to 15 U.S.C. 632(a)(9);

(u) Protests of eligibility for inclusion in the Veteran Small Business Certification Program;

(v) Appeals of denials of certification in and decertification from the Veteran Small Business Certification Program;

(w) Appeals of certain SBA loan review decisions as defined in 13 CFR 134.1201; and

(x) Appeals from HUBZone status protest determinations under part 126 of this chapter.

[61 FR 2683, Jan. 29, 1996, as amended at 66 FR 47074, Sept. 11, 2001; 67 FR 47246, July 18, 2002; 69 FR 25271, May 5, 2004; 69 FR 29208, May 21, 2004; 70 FR 17587, Apr. 7, 2005; 72 FR 39730, July 20, 2007; 73 FR 56954, Oct. 1, 2008; 75 FR 47438, Aug. 6, 2010; 75 FR 62292, Oct. 7, 2010; 82 FR 25506, June 2, 2017; 83 FR 13628, Mar. 30, 2018; 85 FR 14784, Mar. 16, 2020; 85 FR 52887, Aug. 27, 2020; 87 FR 73425, Nov. 29, 2022; 88 FR 21089, Apr. 10, 2023]

§ 134.103 [Reserved]

Subpart B—Rules of Practice

§ 134.201 Scope of the rules in this subpart.

(a) The rules of practice in this subpart apply to all OHA proceedings except:

(1) Where another subpart of this part, pertaining to a specific type of OHA proceeding, provides a different rule; or

(2) Where another part of this chapter, pertaining to a specific type of OHA proceeding (or SBA program allowing appeals to OHA), provides a different rule (see § 134.102).

(b) For specific types of OHA proceedings, the rules of practice are located as follows:

(1) For appeals from size determinations and NAICS code designations, in subpart C of this part (§ 134.301 *et seq.*);

(2) For 8(a) BD appeals, in subpart D of this part (§ 134.401 *et seq.*);

(3) [Reserved]

(4) For applications under the Equal Access to Justice Act, in subpart F of this part (§ 134.601 *et seq.*);

(5) For appeals from Women-Owned Small Business (WOSB) and Economically-Disadvantaged WOSB protest determinations, in subpart G of this part (§ 134.701 *et seq.*);

(6) For appeals relating to SBA employee disputes, in subpart H of this part (§ 134.801 *et seq.*);

(7) For Size Standard Petitions, in subpart I of this part (§§ 134.901 *through* 134.918);

(8) For protests of eligibility for inclusion in the Veteran Small Business Certification Program, in subpart J of this part;

(9) For appeals of denials of certification and decertification in the Veteran Small Business Certification Program, in subpart K of this part;

(10) For appeals of protest determinations regarding the status of a concern as a certified HUBZone small business concern, in subpart M of this part; and

(11) For proceedings under the Program Fraud Civil Remedies Act, in part 142 of this chapter.

(c) If a rule in this subpart conflicts with a rule pertaining to OHA in another subpart of this part or in another part of this chapter, the latter rule shall govern.

[75 FR 47438, Aug. 6, 2010, as amended at 82 FR 25506, June 2, 2017; 83 FR 13629, Mar. 30, 2018; 87 FR 73425, Nov. 29, 2022; 88 FR 21089, Apr. 10, 2023]

§ 134.202 Commencement of cases.

(a) A party other than the SBA may commence a case by filing an appeal petition.

(1) The filing deadline is contained in the SBA regulations governing the specific type of appeal.

(2) Where the SBA action or determination being appealed states a different time period (or deadline) for filing an appeal petition than does the applicable regulation, the longer time period (or later deadline) governs.

(b) The SBA may commence a case by issuing to the respondent an appropriate written order to show cause and filing the order to show cause with OHA.

(c) Cases concerning Small Business Investment Company license suspensions and revocations and cease and desist orders must be commenced with an order to show cause containing a statement of the matters of fact and law asserted by the SBA, the legal authority and jurisdiction under which a hearing is to be held, a statement that a hearing will be held, and the time and place for the hearing.

(d) *Calculation and modification of time periods and deadlines.* (1) *Calculation of a deadline when the time period is given in days.* (i) Do not count the day the time period begins, but do count the last day of the time period.

(ii) If the last day is Saturday, Sunday, or a Federal holiday, the time period ends on the next business day.

Example: On Monday, a Judge orders a party to file and serve a document within (or no later than) five days. The time period begins on Monday, so the first day to count is Tuesday. The second, third, and fourth days are Wednesday, Thursday, and Friday. The fifth day is Saturday, so the time period rolls over to the next business day, which is Monday. The deadline is Monday (or Tuesday if Monday is a Federal holiday).

(2) *Modification of a time period or deadline.* (i) A Judge may modify any time period or deadline, except:

(A) The time period governing commencement of a case (*i.e.*, when the appeal petition may be filed); and

(B) A time period established by statute.

(ii) A party may move for an extension of time pursuant to §134.211.

[67 FR 47246, July 18, 2002, as amended at 70 FR 17587, Apr. 7, 2005; 75 FR 47439, Aug. 6, 2010]

§134.203 The appeal petition.

(a) A petition must contain the following:

(1) The basis of OHA's jurisdiction (see §134.102);

(2) A copy of the SBA determination being appealed, if applicable, and the date the determination was received by the petitioner;

(3) A clear and concise statement of the factual basis of the case and applicable legal arguments;

(4) The relief being sought;

(5) The name, address, telephone number, facsimile number, e-mail address, and signature of the petitioner or its attorney; and

(6) A certificate of service (see §134.204(d)).

(b) If the applicable subpart of this part 134 (or the program regulations) requires other documents or information with the appeal petition, these must also be included.

(c) A petition which does not contain all of the information required by paragraphs (a) and (b) of this section may be dismissed, with or without prejudice, at the Judge's own initiative, or upon motion of the respondent.

(d) *Format.* (1) An appeal petition should be on 8.5″ × 11″ paper with a clear type at least 12 point in size. Preferably, double-space the main text and use 1″ margins all around. Number each page. A separate cover letter is not needed. A table of contents is optional. Hard copies of documents sent by facsimile or electronic mail are not needed unless specifically requested.

(2) The maximum length of an appeal petition (not including attachments) is 20 pages, unless prior leave is sought by the petitioner and granted by the Judge. A table of authorities is required only for petitions citing more than twenty cases, regulations, or statutes.

(3) Clearly label any exhibits and attachments. Do not include documents already submitted to SBA in connection with the matter being appealed. SBA will submit these directly to OHA.

(e) *Motion for a more definite appeal petition.* A respondent, SBA, or a contracting officer (for NAICS appeals) may, not later than five days after receiving a petition, move for an order to the petitioner to provide a more definite appeal petition or otherwise comply with this section. A Judge may order a more definite appeal petition on his or her own initiative.

(1) A motion for a more definite appeal petition stays the respondent's time for filing an answer or response. The Judge will establish the time for filing and serving an answer or response.

(2) If the petitioner does not comply with the Judge's order to provide a more definite appeal petition or otherwise fails to comply with applicable

regulations, the Judge may dismiss the petition with prejudice.

(f) *Notice and Order.* After an appeal petition is filed, OHA will issue a Notice and Order and serve it upon all known parties (or their attorneys). If a party does not receive a Notice and Order, it should contact OHA.

[67 FR 47247, July 18, 2002, as amended at 75 FR 47439, Aug. 6, 2010]

§ 134.204 Filing and service requirements.

All pleadings or other submissions must be filed with OHA and served on all other parties or their attorneys. Each submission requires a certificate of service.

(a) *Methods of filing and service.* E-mail, mail, delivery, and facsimile are all permitted unless a Judge orders otherwise.

(1) E-mail constitutes any system for sending and receiving messages electronically over a telecommunications network. The sender is responsible for ensuring that e-mail software and file formats are compatible with the recipient and for a successful, virus-free transmission.

(2) Mail includes any service provided by the U.S. Postal Service. Mail (except ''Express Mail'') is not recommended for time-sensitive filings.

(3) Delivery is personal delivery by a party, its employee, its attorney, or a commercial delivery service.

(4) Facsimile submissions should not exceed 30 pages. Contact OHA before faxing longer submissions. Follow-up originals or ''hard copies'' are not required unless OHA or another party specifically requests them.

(b) *Filing.* Filing is the receipt of pleadings and other submissions at OHA. Filers may call OHA to verify receipt. OHA's telephone number is (202) 401–8200.

(1) *OHA's address.* OHA accepts filings: by e-mail at *OHAFilings@sba.gov;* by mail or delivery at Office of Hearings and Appeals, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416; and by facsimile at (202) 205–7059.

(2) The date of filing is the date the submission is received at OHA. Any submission received at OHA after 5 p.m. eastern time is considered filed the next business day.

(3) *Exhibits.* An exhibit, whether an original or a copy, must be authenticated or identified to be what it purports to be. Parties are referred to 28 U.S.C. 1746.

(4) *Copies.* No extra copies of pleadings or other submissions need be filed. If a document is offered as an exhibit, a copy of the document will be accepted by the Judge unless—

(i) a genuine question is raised as to whether it is a true and accurate copy; or

(ii) it would be unfair, under the circumstances, to admit the copy instead of the original.

(c) *Service.* Service means sending a copy of a pleading or other submission filed with OHA to another party.

(1) Complete copies of all pleadings and other submissions filed with OHA must be served upon all other parties or, if represented, their attorneys, at their record addresses.

(2) The date of service is as follows: for e-mail and facsimile, the date the copy is sent; for personal delivery, the date the copy is given to the party, its attorney, or the commercial delivery service (if one is used). For mail, date of service is postmark date; in absence of a legible postmark, there is a rebuttable presumption that the copy was mailed five days before the served party's receipt.

(3) *SBA address.* The correct office(s) of SBA must be served, as required by the applicable program regulations, by other subparts of part 134, or by the instructions on the SBA determination being appealed. If the SBA office for service is not specified elsewhere, serve: Office of General Counsel, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

(4) *Confidential information.* If a pleading or other submission contains proprietary or confidential information, that information may be redacted (deleted) from any copies served upon non-government parties. Counsel for those parties may access the redacted information only under the protective order procedure described in § 134.205.

(d) *Certificate of service.* A certificate of service shows how, when, and to

whom service was made. Each submission to OHA must include a certificate of service. The certificate should state: ''I certify that on [date], I served the foregoing [type of submission] by [e-mail, mail, Express Mail, personal delivery, commercial delivery service, facsimile] upon the following''. List the name and address of each party served, and either the facsimile number or the e-mail address (if applicable). The individual serving the submission must sign the certificate and either print or type his or her name and title.

[75 FR 47439, Aug. 6, 2010]

§ 134.205 The appeal file, confidential information, and protective orders.

(a) *The appeal file.* The appeal file includes: all pleadings and other submissions; all admitted evidence; any recordings and transcripts of proceedings; the solicitation and amendments; in the case of an appeal of an SBA determination, the entire record on which that determination was based (*i.e.*, the administrative record, protest file, area office file); and any orders and decisions that have been issued.

(b) *Confidential business and financial information.* An appeal file usually contains confidential business and financial information pertaining to the party whose eligibility (as a small business, SDVO SBC, etc.) is at issue. A party may redact its own confidential business and financial information from the copies of its submissions it must serve on other non-government parties (usually protesters). A party served with redacted submissions must file and serve any objections to the redactions within two business days of its receipt of the submissions. The Judge then will rule on the objections and, if necessary, order the service of revised submissions.

(c) *Public access.* Except for confidential business and financial information; source selection sensitive information; income tax returns; documents and information covered under §120.1060 of this title; and other exempt information, the appeal file is available to the public pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552.

(d) *Party access.* A party in a pending appeal may examine and copy the party's own submissions as well as any information in the appeal file that is not exempt from disclosure under the FOIA. Party access to the appeal file in a pending appeal does not require a FOIA request or a protective order.

(e) *Counsel's access under a protective order.* On request, OHA will issue a protective order under which outside counsel for a non-government party in a pending appeal may be admitted, to examine and copy the appeal file (except for tax returns and privileged information). The protective order will set out the terms to which counsel must agree. The terms will restrict counsel's use of the protected information to the pending appeal and will prohibit any further disclosure. Violations of the terms of a protective order may result in sanctions to the party and referral of the attorney to bar disciplinary authorities. OHA's Web site contains detailed information on the protective order procedure.

(f) *Decisions.* OHA decisions are normally published without redactions on OHA's Web site. A decision may contain confidential business and financial information where that information is either decisionally-significant or otherwise necessary for a comprehensible decision. Where no protective order is in place, a party may request a redacted public decision by contacting OHA. Where a protective order is in place, the Judge will usually issue the unredacted decision under the protective order and then a redacted version for public release.

[75 FR 47440, Aug. 6, 2010, as amended at 85 FR 14784, Mar. 16, 2020]

§ 134.206 The answer or response.

(a)(1) Except in a case involving a petition appealing from an SBA determination, a respondent must file and serve an answer within 45 days after the filing of a petition or the service of an order to show cause, except that in debt collection cases, answers are due within 30 days.

(2) The answer must contain the following:

(i) An admission or denial of each of the factual allegations contained in the petition or order to show cause, or a statement that the respondent denies knowledge or information sufficient to

determine the truth of a particular allegation;

(ii) Any affirmative defenses; and

(iii) The name, address, telephone number, facsimile number, and signature of the respondent or its attorney.

(3) Allegations in the petition or order to show cause that are not answered in accordance with paragraph (a)(2)(i) of this section will be deemed admitted unless injustice would occur.

(b) *Appeal of an SBA determination.* (1) *Notice and order.* Upon the filing of an appeal petition, OHA will issue a notice and order informing all known parties of the appeal petition and the deadline for filing and serving any responses to the appeal. The SBA response is due 45 days after the date the appeal petition is filed, unless a rule governing the particular type of appeal provides a different deadline.

(2) *SBA response.* If SBA is the respondent, SBA need not admit or deny the allegations in the petition, but must set forth the relevant facts and the legal arguments in support of SBA's determination.

(3) *Administrative record.* If SBA is to file and serve an authenticated copy of the administrative record (or protest file), the notice and order will provide further instructions.

(4) *Claim of privilege.* If SBA asserts a claim of privilege over any portion of the administrative record, SBA must serve the petitioner a redacted version, accompanied by a ''Vaughn Index'' describing each withheld item and justifying each claim of privilege. SBA also must file an unredacted copy for *in camera* inspection by the Judge. The Judge will afford the petitioner an opportunity to object to the administrative record and to challenge any claim of privilege asserted by SBA.

(c) If a petition or order to show cause is amended or if respondent is not properly served, the Judge will order the time to file an answer or response extended and will specify the date such answer or response is due. If respondent is not properly served with a petition appealing from an SBA determination, the Judge will issue an order directing that the petitioner serve respondent within a specified time and directing respondent to file and serve a response within 45 days after petitioner timely serves respondent in accordance with the order.

(d) If the respondent fails to timely file and serve an answer or response, that failure will constitute a default. Following such a default, the Judge may prohibit the respondent from participating further in the case. If SBA, as respondent to a petition appealing from an SBA determination, fails to timely file and serve its response or the administrative record (where required), the Judge will issue an order directing SBA to file and serve the administrative record by a specified date.

(e) *Reply.* A reply to a response is not permitted unless the Judge, upon motion or on his or her own initiative, orders a reply to be filed and served. A party moving for leave to reply should file and serve the proposed reply with its motion.

[67 FR 47247, July 18, 2002, as amended at 75 FR 47440, Aug. 6, 2010]

§ 134.207 Amendments and supplemental pleadings.

(a) *Amendments.* Upon motion (*see* § 134.211), and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the filing and service of amendments to pleadings. However, an amendment will not be permitted if it would cause unreasonable delay in the determination of the matter. The proposed amendment must be filed and served with the motion. The Judge, on his or her own initiative, may order a party to file and serve an amendment to a pleading.

(b) *Supplemental pleadings.* Upon motion (*see* § 134.211), and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the filing and service of a supplemental pleading setting forth relevant transactions or occurrences that have taken place since the filing of the original pleading. The proposed supplemental pleading must be filed and served with the motion. The Judge, on his or her own initiative, may order a party to file and serve a supplemental pleading.

(c) *8(a) appeals.* In 8(a) program appeals, amendments to pleadings and supplemental pleadings will be permitted by the Judge only upon a showing of good cause.

(d) *Answer or response.* In an order permitting the filing and service of an amended or supplemented petition or order to show cause, the Judge will establish the time for filing and serving an answer or response.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47248, July 18, 2002; 75 FR 47441, Aug. 6, 2010]

§ 134.208 Representation in cases before OHA.

(a) A party may represent itself, or be represented by an attorney. A partner may represent a partnership; a member may represent a limited liability company; and an officer may represent a corporation, trust, association, or other entity.

(b) An attorney for a party who did not appear on behalf of that party in the party's first filing with OHA must file and serve a written notice of appearance.

(c) An attorney seeking to withdraw from a case must file and serve a motion for the withdrawal of his or her appearance.

[67 FR 47248, July 18, 2002]

§ 134.209 Requirement of signature.

Every written submission to OHA, other than evidence, must be signed by the party filing that submission, or by the party's attorney. By signing the submission, a party or its attorney attests that the statements and allegations in that submission are true to the best of its knowledge, and that the submission is not being filed for the purpose of delay or harassment. False statements are subject to criminal penalties. Any misconduct is subject to sanctions (*see* § 134.219).

[61 FR 2683, Jan. 29, 1996, as amended at 75 FR 47441, Aug. 6, 2010]

§ 134.210 Intervention.

(a) *By SBA.* SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first.

(b) *By interested persons.* Any interested person may move to intervene at any time until the close of record by filing and serving a motion to intervene containing a statement of the moving party's interest in the case and the necessity for intervention to protect such interest. An interested person is any individual, business entity, or governmental agency that has a direct stake in the outcome of the appeal. The Judge may grant leave to intervene upon such terms as he or she deems appropriate.

[67 FR 47248, July 18, 2002]

§ 134.211 Motions.

(a) *Contents.* All motions must state the relief being requested, as well as the grounds and any authority for that relief. A motion must be filed, served, and accompanied by a certificate of service (*see* § 134.204).

(b) *Statement of whether motion is opposed.* Except when filing a motion to dismiss or a motion for summary decision, the moving party must make reasonable efforts before filing the motion to contact any non-moving party and determine whether it will oppose the motion and must state in the motion whether each non-moving party will oppose or not oppose the motion. If the moving party cannot determine whether a non-moving party will oppose the motion, the moving party must describe in the motion the efforts made to contact that non-moving party.

(c) *Response.* All non-moving parties must file and serve a response to the motion or be deemed to have consented to the relief sought. The response is due no later than 15 days after the motion is served, unless the Judge sets a different deadline. On motion, or on his or her own initiative, the Judge may permit a reply to a response and/or oral argument on the motion.

(d) *Service of orders.* OHA will serve upon all parties any written order issued in response to a motion.

(e) *Motion to dismiss.* A respondent may file a motion to dismiss any time before a decision is issued. If an answer or response to the appeal petition has not yet been filed, the motion to dismiss stays the respondent's time to answer or respond.

(f) *Motion for an extension of time.* Except for good cause shown, a motion for an extension of time must be filed at

least two business days before the original deadline.

[61 FR 2683, Jan. 29, 1996, as amended at 63 FR 35766, June 30, 1998; 67 FR 47248, July 18, 2002; 75 FR 47441, Aug. 6, 2010]

§ 134.212 Summary judgment.

(a) *On motion by a party.* At any time before the close of record, a party may move for summary judgment as to all or any portion of the case, on the grounds that there is no genuine issue as to any material fact, and that the moving party is entitled to a decision in its favor as a matter of law.

(1) *Contents of motion.* The motion must include a statement of the material facts believed to be undisputed and the party's legal arguments. The motion may include supporting statements in accordance with 28 U.S.C. 1746. The motion must be filed, served, and accompanied by a certificate of service (*see* § 134.204).

(2) *Response.* No later than 15 days after the service of a motion for summary judgment, all non-moving parties must file and serve a response to the motion or be deemed to have consented to the motion for summary judgment.

(3) *Cross-motions.* In its response to a motion for summary judgment, a party may cross-move for summary judgment. The initial moving party must file and serve a response to any cross-motion for summary judgment within 15 days after the service of that cross-motion or be deemed to have consented to the cross-motion for summary judgment.

(4) *Stay.* If an answer or response to the appeal petition has not yet been filed, the motion for summary judgment stays the respondent's time to answer or respond. If the Judge denies the motion and an answer or response has not yet been filed, the respondent must file the answer or response within 15 days after the order deciding the motion unless otherwise ordered by the Judge.

(b) *On the Judge's own initiative.* The Judge may issue an order granting summary judgment as to all or any portion of the case in absence of a motion if there is no genuine issue to any material fact, and a party is entitled to a decision in its favor as a matter of law.

(c) *Appeal of an SBA determination.* If the SBA determination being appealed was based on multiple grounds, SBA may move for summary judgment on one or more of those grounds. If the Judge finds, as to any ground, that there is no genuine issue of material fact and that the SBA is entitled to a decision in its favor as a matter of law, the Judge will grant the motion for summary judgment and dismiss the rest of the appeal.

[75 FR 47441, Aug. 6, 2010]

§ 134.213 Discovery.

(a) *Motion.* A party may obtain discovery only upon motion, and for good cause shown.

(b) *Forms.* The forms of discovery which a Judge can order under paragraph (a) of this section include requests for admissions, requests for production of documents, interrogatories, and depositions.

(c) *Limitations.* Discovery may be limited in accordance with the terms of a protective order (see § 134.205). Further, privileged information and irrelevant issues or facts will not be subject to discovery.

(d) *Disputes.* If a dispute should arise between the parties over a particular discovery request, the party seeking discovery may file and serve a motion to compel discovery. Discovery may be opposed on the grounds of harassment, needless embarrassment, irrelevance, undue burden or expense, privilege, or confidentiality.

[61 FR 2683, Jan. 29, 1996, as amended at 63 FR 35766, June 30, 1998; 67 FR 47249, July 18, 2002; 75 FR 47441, Aug. 6, 2010]

§ 134.214 Subpoenas.

(a) *Availability.* At the request of a party, or upon his or her own initiative, a Judge may issue a subpoena requiring a witness to appear and testify, or to produce particular documents, at a specified time and place.

(b) *Requests.* A request for the issuance of a subpoena must be written, served upon all parties, and filed. The request must clearly identify the witness and any documents to be subpoenaed, and must set forth the relevance of the testimony or documents sought.

(c) *Service.* A subpoena may only be served by personal delivery. The individual making service shall prepare an affidavit stating the date, time, and place of the service. The party which obtained the subpoena must serve upon all other parties, and file with OHA, a copy of the subpoena and affidavit of service within 2 days after service is made.

(d) *Motion to quash.* A motion to limit or quash a subpoena must be filed and served within 10 days after service of the subpoena, or by the return date of the subpoena, whichever date comes first. Any response to the motion must be filed and served within 10 days after service of the motion, unless a shorter time is specified by the Judge. No oral argument will be heard on the motion unless the Judge directs otherwise.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002; 75 FR 47441, Aug. 6, 2010]

§ 134.215 Interlocutory appeals.

(a) *General.* A motion for leave to take an interlocutory appeal from a Judge's ruling will not be entertained in those proceedings in which OHA issues final decisions. In all other cases, an interlocutory appeal will be permitted only if, upon motion by a party, or upon the Judge's own initiative, the Judge certifies that his or her ruling raises a question which is immediately appealable. Interlocutory appeals will be decided by the AA/OHA or a designee.

(b) *Motion for certification.* A party must file and serve a motion for certification no later than 20 days after issuance of the ruling to which the motion applies. A denial of the motion does not preclude objections to the ruling in any subsequent request for review of an initial decision.

(c) *Basis for certification.* The Judge will certify a ruling for interlocutory appeal only if he or she determines that:

(1) The ruling involves an important question of law or policy about which there is substantial ground for a difference of opinion; and

(2) An interlocutory appeal will materially expedite resolution of the case, or denial of an interlocutory appeal would cause undue hardship to a party.

(d) *Stay of proceedings.* A stay while an interlocutory appeal is pending will be at the discretion of the Judge.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002]

§ 134.216 Alternative dispute resolution procedures.

(a) At any time during the pendency of a case, the parties may submit a joint motion requesting that the Judge permit the use of alternative dispute resolution procedures to assist in resolving the matter. If the motion is granted, the Judge will also stay the proceedings before OHA, in whole or in part, as he or she deems appropriate, pending the outcome of the alternative dispute resolution procedures.

(b) A Judge may offer alternative dispute resolution procedures to the parties at any time during the proceeding.

(c) The AA/OHA or a Judge may designate a Judge or attorney assigned to OHA to serve as a neutral in alternative dispute resolution procedures. If OHA provides the neutral and the mediation fails to resolve all issues in the case, the OHA-provided neutral will not be involved in the adjudication.

[61 FR 2683, Jan. 29, 1996, as amended at 75 FR 47441, Aug. 6, 2010]

§ 134.217 Settlement.

At any time during the pendency of a case, the parties may submit a joint motion to dismiss the appeal if they have settled the case, and may file with such motion a copy of the settlement agreement. If the Judge has express authority, under statute, SBA regulation or SBA standard operating procedures, to review the contents of a settlement agreement for legality, the Judge may order the parties to file a copy of the settlement agreement. Otherwise, upon the filing of a joint motion to dismiss, the Judge will issue an order dismissing the case. Settlement negotiations, and rejected settlement agreements, are not admissible into evidence.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002]

§ 134.218 Judges.

(a) *Assignment.* The AA/OHA will assign all cases subject to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, to an Administrative Law Judge. The AA/OHA will assign all other cases before OHA to either an Administrative Law Judge or an Administrative Judge, or, if the AA/OHA is a duly licensed attorney, to himself or herself.

(b) *Authority.* Except as otherwise limited by this part, or by statute or other regulation, a Judge has the authority to take all appropriate action to ensure the efficient, prompt, and fair determination of a case, including, but not limited to, the authority to administer oaths and affirmations and to subpoena and examine witnesses.

(c) *Recusal.* Upon the motion of a party, or upon the Judge's own initiative, a Judge will promptly recuse himself or herself from further participation in a case whenever disqualification is appropriate due to conflict of interest, bias, or some other significant reason. A denial of a motion for recusal may be appealed within 5 days to the AA/OHA, or to the Administrative Law Judge if the AA/OHA is the Judge, but that appeal will not stay proceedings in the case.

[61 FR 2683, Jan. 29, 1996, as amended at 75 FR 47441, Aug. 6, 2010]

§ 134.219 Sanctions.

(a) A Judge may impose appropriate sanctions, except for fees, costs, or monetary penalties, which he or she deems necessary to serve the ends of justice, if a party or its attorney:

(1) Fails to comply with an order of the Judge;

(2) Fails to comply with the rules set forth in this part;

(3) Acts in bad faith or for purposes of delay or harassment;

(4) Submits false statements knowingly, recklessly, or with deliberate disregard for the truth; or

(5) Otherwise acts in an unethical or disruptive manner.

(b) Appropriate sanctions may include:

(1) Ordering a pleading or evidentiary filing to be struck from the record;

(2) Dismissing an appeal with prejudice;

(3) Suspending counsel from practice before OHA;

(4) Filing a complaint with the applicable State bar; and

(5) Taking any other action that is appropriate to further the administration of justice.

[75 FR 47441, Aug. 6, 2010]

§ 134.220 Prohibition against *ex parte* communications.

No person shall consult or communicate with a Judge concerning any fact, question of law, or SBA policy relevant to the merits of a case before that Judge except on prior notice to all parties, and with the opportunity for all parties to participate. In the event of such prohibited consultation or communication, the Judge will disclose the occurrence in accordance with 5 U.S.C. 557(d)(1), and may impose such sanctions as he or she deems appropriate.

§ 134.221 Prehearing conferences.

Prior to a hearing, the Judge, at his or her own initiative, or upon the motion of any party, may direct the parties or their attorneys to appear, by telephone or in person, in order to consider any matter which may assist in the efficient, prompt, and fair determination of the case. The conference may be recorded verbatim at the discretion of the Judge, and, if so, a party may purchase a transcript, at its own expense, from the recording service.

§ 134.222 Oral hearing.

(a) *Availability.* A party may obtain an oral hearing only if:

(1) It is required by regulation; or

(2) Following the motion of a party, or at his or her own initiative, the Judge orders an oral hearing upon concluding that there is a genuine dispute as to a material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses.

(b) *Place and time.* The place and time of oral hearings is within the discretion of the Judge, who shall give due regard to the necessity and convenience of the parties, their attorneys, and witnesses. The Judge may direct that an oral hearing be conducted by telephone.

(c) *Public access.* Unless otherwise ordered by the Judge, all oral hearings are public.

(d) *Payment of subpoenaed witnesses.* A party who obtains a witness's presence at an oral hearing by subpoena must pay to that witness the fees and mileage costs to which the witness would be entitled in Federal court.

(e) *Recording.* Oral hearings will be recorded verbatim. A transcript of a recording may be purchased by a party, at its own expense, from the recording service.

[61 FR 2683, Jan. 29, 1996, as amended at 63 FR 35766, June 30, 1998; 70 FR 17587, Apr. 7, 2005; 75 FR 47442, Aug. 6, 2010]

§ 134.223 Evidence.

(a) *Federal Rules of Evidence.* Unless contrary to a particular rule in this part, or an order of the Judge, the Federal Rules of Evidence will be used as a general guide in all cases before OHA.

(b) *Hearsay.* Hearsay evidence is admissible if it is deemed by the Judge to be relevant and reliable. Weight to be afforded hearsay evidence is at the discretion of the Judge.

[61 FR 2683, Jan. 29, 1996, as amended at 75 FR 47442, Aug. 6, 2010]

§ 134.224 [Reserved]

§ 134.225 The record.

(a) *Contents.* The record of a case before OHA will consist of all pleadings, motions, and other non-evidentiary submissions, all admitted evidence, all orders and decisions, and any transcripts of proceedings in the case.

(b) *Closure.* The Judge will set the date upon which the pre-decisional record of the case will be closed, and after which no additional evidence or argument will be accepted.

[61 FR 2683, Jan. 29, 1996, as amended at 75 FR 47442, Aug. 6, 2010]

§ 134.226 The decision.

(a) *Contents.* (1) Following close of record, the Judge will issue a decision containing findings of fact and conclusions of law, the reasons for such findings and conclusions, and any relief ordered. The record will constitute the exclusive basis for a decision.

(2) An OHA decision creates precedent, unless:

(i) Another regulation in this chapter applicable to a specific type of appeal provides that the OHA decision does not create precedent; or

(ii) the decision is designated as one not to be cited as precedent.

(3) A summary decision containing only cursory findings of fact and conclusions of law may be issued only if the Judge finds a full decision will not advance understanding of Federal statutes or applicable regulations, policies, or procedures and the underlying facts and law are of a routine and non-complex nature.

(b) *Time limits.* Decisions pertaining to the collection of debts owed to SBA and the United States under the Debt Collection Act of 1982, the Debt Collection Improvement Act of 1996, and Part 140 of this chapter must be made within 60 days after a petition is filed. Time limits for decisions in other types of cases, if any, are indicated either in the applicable program regulations or in other subparts of this part 134.

(c) *Service.* OHA will serve a copy of all written decisions on:

(1) Each party, or, if represented by counsel, on its counsel; and

(2) SBA's General Counsel, or his or her designee, if SBA is not a party.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002; 70 FR 17587, Apr. 7, 2005; 75 FR 47442, Aug. 6, 2010]

§ 134.227 Finality of decisions.

(a) *Initial decisions.* Except as otherwise provided in paragraph (b) of this section, a decision by the Judge on the merits is an initial decision. However, unless a request for review is filed pursuant to §134.228(a), or a request for reconsideration is filed pursuant to paragraph (c) of this section, an initial decision shall become the final decision of the SBA 30 days after its service.

(b) *Final decisions.* A decision by the Judge on the merits shall be a final decision in the following proceedings:

(1) Collection of debts owed to SBA and the United States under the Debt Collection Act of 1982, Debt Collection Improvement Act of 1996, and part 140 of this chapter;

(2) Appeals from SBA 8(a) program determinations under the Act and part 124 of this chapter;

(3) Appeals from size determinations and NAICS code designations under part 121 of this chapter;

(4) Size Standard Petitions; and

(5) In other proceedings as provided either in the applicable program regulations or in other subparts of this part 134.

(c) *Reconsideration.* Except as otherwise provided by statute, the applicable program regulations in this chapter, or this part 134, an initial or final decision of the Judge may be reconsidered. Any party in interest, including SBA where SBA did not appear as a party during the proceeding that led to the issuance of the Judge's decision, may request reconsideration by filing with the Judge and serving a petition for reconsideration within 20 days after service of the written decision, upon a clear showing of an error of fact or law material to the decision. The Judge also may reconsider a decision on his or her own initiative.

[67 FR 47249, July 18, 2002, as amended at 70 FR 17587, Apr. 7, 2005; 81 FR 48595, July 25, 2016; 82 FR 25507, June 2, 2017]

§ 134.228 Review of initial decisions.

(a) *Request for review.* Within 30 days after the service of an initial decision or a reconsidered initial decision of a Judge, any party, or SBA's Office of General Counsel, may file and serve a request for review by the Administrator. A request for review must set forth the filing party's specific objections to the initial decision, and any alleged support for those objections in the record, or in case law, statute, regulation, or SBA policy. A party must serve its request for review upon all other parties and upon SBA's Office of General Counsel.

(b) *Response.* Within 20 days after the service of a request for review, any party, or SBA's Office of General Counsel, may file and serve a response. A party must serve its response upon all other parties and upon SBA's Office of General Counsel.

(c) *Transfer of the record.* Upon receipt of all responses, or 30 days after the filing of a request for review, whichever is earlier, OHA will transfer the record of the case to the Administrator. The Administrator, or his or her designee, will then review the record.

(d) *Standard of review.* Upon review, the Administrator, or his or her designee, will sustain the initial decision unless it is based on an erroneous finding of fact or an erroneous interpretation or application of case law, statute, regulation, or SBA policy.

(e) *Order.* The Administrator, or his or her designee, will:

(1) Affirm, reverse, or modify the initial decision, which determination will become the final decision of the SBA upon issuance; or

(2) Remand the initial decision to the Judge for appropriate further proceedings.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002]

§ 134.229 Termination of jurisdiction.

Except when the Judge reconsiders a decision or remands the case, the jurisdiction of OHA will terminate upon the issuance of a decision resolving all material issues of fact and law. If the Judge reconsiders a decision, OHA's jurisdiction terminates when the Judge issues the decision after reconsideration. If the Judge remands the case, the Judge may retain jurisdiction at his or her own discretion, and the remand order may include the terms and duration of the remand.

[67 FR 47249, July 18, 2002]

Subpart C—Rules of Practice for Appeals From Size Determinations and NAICS Code Designations

§ 134.301 Scope of the rules in this subpart C.

The rules of practice in this subpart C apply to all appeals to OHA from:

(a) Formal size determinations made by an SBA Government Contracting Area Office, under part 121 of this chapter, or by a Disaster Area Office, in connection with applications for disaster loans; and

(b) NAICS code designations, pursuant to part 121 of this chapter.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002]

§ 134.302 Who may appeal.

Appeals from size determinations and NAICS code designations may be filed with OHA by the following, as applicable:

(a) Any person adversely affected by a size determination;

(b) Any person adversely affected by a NAICS code designation. However, with respect to a particular sole source 8(a) contract, only the Director, Office of Business Development may appeal a NAICS code designation;

(c) The Associate or Assistant Administrator for the SBA program involved, through SBA's Office of General Counsel; or

(d) The procuring agency contracting officer responsible for the procurement affected by a size determination.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47249, July 18, 2002; 74 FR 45754, Sept. 4, 2009; 75 FR 47442, Aug. 6, 2010]

§ 134.303 Advisory opinions.

The Office of Hearings and Appeals does not issue advisory opinions.

[67 FR 47249, July 18, 2002]

§ 134.304 Commencement of appeals from size determinations and NAICS code designations.

(a) Size appeals must be filed within 15 calendar days after receipt of the formal size determination.

(b) NAICS code appeals must be filed within 10 calendar days after issuance of the solicitation, or amendment to the solicitation affecting the NAICS code or size standard. However, SBA may file a NAICS code appeal at any time before offers or bids are due.

(c) An untimely appeal will be dismissed.

[76 FR 5685, Feb. 2, 2011]

§ 134.305 The appeal petition.

(a) *Form.* There is no required format for an appeal petition. However, it must include the following information:

(1) In a size appeal, a copy of the size determination being appealed;

(2) The solicitation or contract number, and the name, address, and telephone number of the contracting officer;

(3) A full and specific statement as to why the size determination or NAICS code designation is alleged to be in error, together with argument supporting such allegations; and

(4) The name, address, telephone number, facsimile number, and signature of the appellant or its attorney.

(b) *Service of size determination appeals.* The appellant must serve the appeal petition upon each of the following:

(1) The SBA official who issued the size determination;

(2) The contracting officer responsible for the procurement affected by a size determination;

(3) The business concern whose size status is at issue;

(4) All persons who filed protests; and

(5) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, 409 Third Street, SW., Washington, DC 20416, facsimile (202) 205–6873, or e-mail at *OPLService@sba.gov*.

(c) *Service of NAICS appeals.* The appellant must serve:

(1) The contracting officer who made the NAICS code designation; and

(2) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, 409 Third Street, SW., Washington, DC 20416, facsimile (202) 205–6873, or e-mail at *OPLService@sba.gov*.

(d) *Certificate of service.* The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

(e) *Dismissal.* An appeal petition which does not contain all of the information required in paragraph (a) of this section may be dismissed, with or without prejudice, by the Judge at his or her own initiative, or upon motion of a respondent.

[61 FR 2683, Jan. 29, 1996, as amended at 65 FR 57542, Sept. 25, 2000; 67 FR 47250, July 18, 2002; 69 FR 29208, May 21, 2004; 75 FR 47442, Aug. 6, 2010]

§ 134.306 Transmission of the case file and solicitation.

(a) Upon receipt of an appeal petition pertaining to a size determination, the Area Office which issued the size determination must immediately send to

OHA the entire case file relating to that determination.

(b) Upon receipt of an appeal petition pertaining to a NAICS code designation, or a size determination made in connection with a particular procurement, the procuring agency contracting officer must immediately send to OHA an electronic link to or a paper copy of both the original solicitation relating to that procurement and all amendments.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002; 75 FR 47442, Aug. 6, 2010]

§ 134.307 Service and filing requirements.

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart.

§ 134.308 Limitation on new evidence and adverse inference from non-submission in appeals from size determinations.

(a) Evidence not previously presented to the Area Office which issued the size determination being appealed will not be considered by a Judge unless:

(1) The Judge, on his or her own initiative, orders the submission of such evidence; or

(2) A motion is filed and served establishing good cause for the submission of such evidence. The offered new evidence must be filed and served with the motion.

(b) If the submission of evidence is ordered by a Judge, and the party in possession of that evidence does not submit it, the Judge may draw adverse inferences against that party.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002]

§ 134.309 Response to an appeal petition.

(a) *Who may respond.* Any person served with an appeal petition, any intervenor, or any person with a general interest in an issue raised by the appeal may file and serve a response supporting or opposing the appeal. The response should present argument.

(b) *Time limits.* The Judge will issue a Notice and Order informing the parties of the filing of the appeal petition, establishing the close of record as 15 days after service of the Notice and Order, and informing the parties that OHA must receive any responses to the appeal petition no later than the close of record.

(c) *Service.* The respondent must serve its response upon the appellant and upon each of the persons identified in the certificate of service attached to the appeal petition pursuant to § 134.305.

(d) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002]

§ 134.310 Discovery.

Discovery will not be permitted in appeals from size determinations or NAICS code designations.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002]

§ 134.311 Oral hearings.

Oral hearings will not be held in appeals from NAICS code designations, and will be held in appeals from size determinations only upon a finding by the Judge of extraordinary circumstances. If such an oral hearing is ordered, the proceeding shall be conducted in accordance with those rules of subpart B of this part as the Judge deems appropriate.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002]

§ 134.312 Evidence.

To the extent the rules in this subpart permit the submission of evidence, the provisions of § 134.223 (a) and (b) apply.

§ 134.313 Applicability of subpart B provisions.

Except where inconsistent with this subpart C, the provisions of subpart B of this part apply to appeals from size determinations and NAICS code designations.

[67 FR 47250, July 18, 2002]

§ 134.314 Standard of review and burden of proof.

The standard of review is whether the size determination or NAICS code designation was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence, in both size and NAICS code appeals.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002; 69 FR 29209, May 21, 2004]

§ 134.315 The record.

Where relevant, the provisions of § 134.225 apply. In an appeal under this subpart, the contents of the record also include the case file or solicitation submitted to OHA in accordance with § 134.306.

[61 FR 2683, Jan. 29, 1996, as amended at 75 FR 47442, Aug. 6, 2010]

§ 134.316 The decision.

(a) The Judge shall issue a size appeal decision, insofar as practicable, within 60 calendar days after close of the record.

(b) The Judge shall issue a NAICS code appeal decision as soon as practicable after close of the record.

(c) *Contents.* Following closure of the record, the Judge will issue a decision containing findings of fact and conclusions of law, reasons for such findings and conclusions, and any relief ordered. The Judge will not decide substantive issues raised for the first time on appeal, or which have been abandoned or become moot.

(d) *Finality.* The decision is the final decision of the SBA and becomes effective upon issuance. Where a size appeal is dismissed, the Area Office size determination remains in effect.

(e) *Service.* OHA will serve a copy of all written decisions on:

(1) Each party, or, if represented by counsel, on its counsel; and

(2) SBA's General Counsel, or his or her designee, if SBA is not a party.

(f) *Reconsideration.* The decision in a NAICS code appeal may not be reconsidered.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47250, July 18, 2002; 69 FR 29209, May 21, 2004; 76 FR 5685, Feb. 2, 2011]

§ 134.317 [Reserved]

§ 134.318 NAICS appeals.

(a) *General.* The regulations at §§ 121.402, 121.1102, and 121.1103 of this chapter also apply to NAICS code appeals.

(b) *Effect of OHA's decision.* If OHA grants the appeal (changes the NAICS code), the contracting officer must amend the solicitation to reflect the new NAICS code. The decision will also apply to future solicitations for the same supplies or services.

(c) *Summary dismissal.* OHA may summarily dismiss a NAICS appeal either on the Judge's own initiative or on motion by a party. A summary dismissal may be with or without prejudice, and may be issued before the date set for close of record. Grounds for summary dismissal include: premature appeal, withdrawn appeal, settlement, cancellation of the procurement, and contract award.

[75 FR 47442, Aug. 6, 2010, as amended at 85 FR 66199, Oct. 16, 2020]

Subpart D—Rules of Practice for Appeals Under the 8(a) Program

SOURCE: 63 FR 35766, June 30, 1998, unless otherwise noted.

§ 134.401 Scope of the rules in this subpart D.

The rules of practice in this subpart D apply to all appeals to OHA from:

(a) Denials of 8(a) BD program admission based solely on a negative finding(s) of social disadvantage, economic disadvantage, ownership or control pursuant to § 124.206 of this title;

(b) Early graduation pursuant to §§ 124.302 and 124.304;

(c) Termination pursuant to §§ 124.303 and 124.304;

(d) Denials of requests to issue a waiver pursuant to § 124.515; and

(e) Suspensions pursuant to § 124.305(a).

§ 134.402 Appeal petition.

In addition to the requirements of § 134.203, an appeal petition must state, with specific reference to the determination and the record supporting such determination, the reasons why

the determination is alleged to be arbitrary, capricious or contrary to law. This section does not apply to suspension appeals. For suspensions, see §124.305 of this chapter.

[63 FR 35766, June 30, 1998, as amended at 67 FR 47250, July 18, 2002]

§134.403 Service of appeal petition.

Concurrent with its filing with OHA, the petitioner also must serve separate copies of the petition, including attachments, on two SBA officials.

(a) All 8(a) appeals must be served to: Director, Office of Business Development, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, facsimile (202) 205–5206, or e-mail at *8aBD2@sba.gov*.

(b)(1) Appeals of early graduation or termination also must be served to: Associate General Counsel for Litigation, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, facsimile (202) 205–7415, or e-mail at *OLITService@sba.gov*.

(2) Appeals of denial of program admission, suspension of program assistance, or denial of a request for waiver also must be served to: Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, facsimile (202) 205–6873, or e-mail at *OPLService@sba.gov*.

[75 FR 47442, Aug. 6, 2010]

§134.404 Deadline for filing appeal petition.

An 8(a) appeal petition must be filed within 45 calendar days after receipt of the SBA determination being appealed.

[75 FR 47442, Aug. 6, 2010]

§134.405 Jurisdiction.

(a) The Administrative Law Judge selected to preside over an appeal shall decline to accept jurisdiction over any matter if:

(1) The appeal does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the determination, including appeals of denials of 8(a) BD program admission based in whole or in part on grounds other than a negative finding of social disadvantage, economic disadvantage, ownership or control;

(2) The appeal is untimely filed or is not otherwise filed in accordance with the requirements of this subpart or the requirements in subparts A and B of this part; or

(3) The matter has been decided or is the subject of an adjudication before a court of competent jurisdiction over such matters.

(b) Once the Administrative Law Judge accepts jurisdiction over an appeal, subsequent initiation of an adjudication of the matter by a court of competent jurisdiction will not preclude the Administrative Law Judge from rendering a final decision on the matter.

(c) Jurisdiction of the Administrative Law Judge in a suspension case is limited to the issue of whether the protection of the Government's interest requires suspension pending resolution of the termination action, unless the Administrative Law Judge has consolidated the suspension appeal with the corresponding termination appeal.

[63 FR 35766, June 30, 1998; 75 FR 47443, Aug. 6, 2010]

§134.406 Review of the administrative record.

(a) Any proceeding conducted under §134.401(a) through (d) shall be decided solely on a review of the written administrative record, except as provided in §134.407 and in suspension appeals. For suspension appeals under §134.401(e), see §124.305(d) of this chapter.

(b) Except in suspension appeals, the Administrative Law Judge's review is limited to determining whether the Agency's determination is arbitrary, capricious, or contrary to law. As long as the Agency's determination is not arbitrary, capricious or contrary to law, the Administrative Law Judge must uphold it on appeal.

(1) The Administrative Law Judge must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

(2) If the SBA's path of reasoning may reasonably be discerned, the Administrative Law Judge will uphold a decision of less than ideal clarity.

(c) *The administrative record.* (1) The administrative record must contain all

documents that are relevant to the determination on appeal before the Administrative Law Judge and upon which the SBA decision-maker, and those SBA officials that recommended either for or against the decision, relied. The administrative record, however, need not contain all documents pertaining to the petitioner. For example, the administrative record in a termination proceeding need not include the Participant's entire business plan file, documents pertaining to specific 8(a) contracts, or the firm's application for participation in the 8(a) BD program if they are unrelated to the termination action. The SBA may claim privilege as to certain materials.

(2) The petitioner may object to the absence of a document, previously submitted to, or sent by, SBA, which the petitioner believes was erroneously omitted from the administrative record. The petitioner also may object to a claim of privilege made by the SBA. The petitioner's objections must be filed and served no later than 10 days of its receipt of the administrative record.

(3) In the absence of any objection by the petitioner or a finding by the Judge pursuant to paragraph (e) of this section that the record is insufficiently complete to decide whether the determination was arbitrary, capricious, or contrary to law, the administrative record submitted by SBA shall be deemed complete.

(d) Where the Agency files its response to the appeal petition after the date specified in §134.206, the Administrative Law Judge may decline to consider the response and base his or her decision solely on a review of the administrative record.

(e) *Remand.* (1) The Administrative Law Judge may remand a case to the Director, Office of Business Development (or, in the case of a denial of a request for waiver under §124.515 of this chapter, to the Administrator) for further consideration if he or she determines that, due to the absence in the written administrative record of the reasons upon which the determination was based, the administrative record is insufficiently complete to decide whether the determination is arbitrary, capricious, or contrary to law. In the event of such a remand, the Judge will not require the SBA to supplement the administrative record other than to supply the reason or reasons for the determination and any documents submitted to, or considered by, SBA in connection with any reconsideration permitted by regulation that occurs during the remand period. After such a remand, in the event the Judge finds that the reasons upon which the determination is based are absent from any supplemented record, the Judge will find the SBA determination to be arbitrary, capricious, or contrary to law.

(2) The Administrative Law Judge may also remand a case to the Director, Office of Business Development (or, in the case of a denial of a request for waiver under §124.515 of this chapter, to the Administrator) for further consideration where it is clearly apparent from the record that SBA made an erroneous factual finding (*e.g.*, SBA double counted an asset of an individual claiming disadvantaged status) or a mistake of law (*e.g.*, SBA applied the wrong regulatory provision in evaluating the case).

(3) The Administrative Law Judge may remand an eligibility, early graduation, or termination appeal to the Director, Office of Business Development, where the determination raises a new ground that was not in the initial SBA determination.

(4) A remand under this section will be for a reasonable period.

[63 FR 35766, June 30, 1998, as amended at 67 FR 47250, July 18, 2002; 74 FR 45754, Sept. 4, 2009; 75 FR 47443, Aug. 6, 2010; 81 FR 48595, July 25, 2016]

§134.407 Evidence beyond the record and discovery.

(a) Except in suspension appeals, the Administrative Law Judge may not admit evidence beyond the written administrative record nor permit any form of discovery unless he or she first determines that the petitioner, upon written submission, has made a substantial showing, based on credible evidence and not mere allegation, that the Agency determination in question may have resulted from bad faith or improper behavior.

(1) Prior to any such determination, the Administrative Law Judge must permit SBA to respond in writing to any allegations of bad faith or improper behavior.

(2) Upon a determination by the Administrative Law Judge that the petitioner has made such a substantial showing, the Administrative Law Judge may permit appropriate discovery, and accept relevant evidence beyond the written administrative record, which is specifically limited to the alleged bad faith or improper behavior.

(b) A determination by the Administrative Law Judge that the required showing set forth in paragraph (a) of this section has been made does not shift the burden of proof, which continues to rest with the petitioner.

[63 FR 35766, June 30, 1998, as amended at 67 FR 47251, July 18, 2002]

§ 134.408 Summary decision.

(a) *Generally.* In any appeal under this subpart D, either party may move or cross-move for summary decision, as provided in § 134.212.

(b) *Summary decision based on fewer than all grounds.* If SBA has provided multiple grounds for the 8(a) determination being appealed, SBA may move for summary decision on one or more grounds.

(1) *Non-suspension cases.* Except in suspension appeals, if the Judge finds that there is no genuine issue of material fact as to whether SBA acted arbitrarily, capriciously, or contrary to law as to any such ground or grounds, and that the SBA is entitled to a decision in its favor as a matter of law, the Judge will grant the motion for summary decision and dismiss the appeal.

(2) *Suspension cases.* In suspension appeals, if the Judge finds that there is no genuine issue of material fact as to whether adequate evidence exists that protection of the Federal Government's interest requires suspension, as to any such ground or grounds for the proposed suspension, the SBA is entitled to a decision in its favor as a matter of law, and the Judge will grant the motion for summary decision and dismiss the appeal.

[67 FR 47251, July 18, 2002]

§ 134.409 Decision on appeal.

(a) A decision of the Administrative Law Judge under this subpart is the final agency decision, and is binding on the parties.

(b) The Administrative Law Judge shall issue a decision, insofar as practicable, within 90 days after an appeal petition is filed.

(c) The Administrative Law Judge may reconsider an appeal decision within 20 days of the decision if there is a clear showing of an error of fact or law material to the decision.

[63 FR 35766, June 30, 1998. Redesignated and amended at 67 FR 47251, July 18, 2002]

Subpart E—[Reserved]

Subpart F—Implementation of the Equal Access to Justice Act

SOURCE: 61 FR 2683, Jan. 29, 1996, unless otherwise noted. Redesignated at 63 FR 35766, June 30, 1998, and 70 FR 8927, Feb. 24, 2005.

§ 134.601 What is the purpose of this subpart?

The Equal Access to Justice Act, 5 U.S.C. 504, establishes procedures by which prevailing parties in certain administrative proceedings may apply for reimbursement of fees and other expenses. Eligible parties may receive awards when they prevail over SBA, unless SBA's position in the proceeding was ''substantially justified'' or, as provided in § 134.605(b), special circumstances make an award unjust. The rules of this subpart explain which OHA proceedings are covered, who may be eligible for an award of fees and expenses, and how to apply for such an award.

[61 FR 2683, Jan. 29, 1996. Redesignated at 63 FR 35766, June 30, 1998, and 70 FR 8927, Feb. 24, 2005, as amended at 75 FR 47443, Aug. 6, 2010]

§ 134.602 Under what circumstances may I apply for reimbursement?

You may apply for reimbursement under this subpart if you meet the eligibility requirements in § 134.606 and you prevail over SBA in a final decision in:

(a) The type of administrative proceeding which qualifies as an ''adversary adjudication'' under § 134.603; or

(b) An ancillary or subsidiary issue in that administrative proceeding that is sufficiently significant and discrete to merit treatment as a separate unit; or

(c) A matter which the agency orders to be determined as an ''adversary adjudication'' under 5 U.S.C. 554.

[61 FR 2683, Jan. 29, 1996. Redesignated at 63 FR 35766, June 30, 1998, and 70 FR 8927, Feb. 24, 2005, as amended at 75 FR 47443, Aug. 6, 2010]

§ 134.603 What is an adversary adjudication?

For purposes of this subpart, adversary adjudications are administrative proceedings before OHA which involve SBA as a party and which are required to be conducted by an Administrative Law Judge (''ALJ''). These adjudications (''administrative proceedings'') include those proceedings listed in § 134.102 (a), (i), and (j)(1), but do not include other OHA proceedings such as those listed in § 134.102(k). In order for an administrative proceeding to qualify, SBA must have been represented by counsel or by another representative who enters an appearance and participates in the proceeding.

§ 134.604 What benefits may I claim?

You may seek reimbursement for certain reasonable fees and expenses incurred in prosecuting or defending a claim in an administrative proceeding.

§ 134.605 Under what circumstances are fees and expenses reimbursable?

(a) If you are a prevailing eligible party, you may receive an award for reasonable fees and expenses unless the position of the agency in the proceeding is found by the ALJ to be ''substantially justified'', or special circumstances exist which make an award unjust. The ''position of the agency'' includes not only the position taken by SBA in the administrative proceeding, but also the position which it took in the action which led to the administrative proceeding. No presumption arises that SBA's position was not substantially justified simply because it did not prevail in a proceeding. However, upon your assertion that the position of SBA was not substantially justified, SBA will be required to establish that its position was reasonable in fact and law.

(b) The ALJ may reduce or deny an award for reimbursement if you have unreasonably protracted the administrative proceeding or if other special circumstances would make the award unjust.

(c) Awards for fees and expenses incurred before the date on which an administrative proceeding was initiated are allowable only if you can demonstrate that they were reasonably incurred in preparation for the proceeding.

§ 134.606 Who is eligible for possible reimbursement?

(a) You are eligible for possible reimbursement if:

(1) You are an individual, owner of an unincorporated business, partnership, corporation, association, organization, or unit of local government; and

(2) You are a party, as defined in 5 U.S.C. 551(3); and

(3) You are the prevailing party; and

(4) You meet certain net worth and employee eligibility requirements set forth in § 134.607.

(b) You are not eligible for possible reimbursement if you participated in the administrative proceeding only on behalf of persons or entities that are ineligible.

[61 FR 2683, Jan. 29, 1996. Redesignated at 63 FR 35766, June 30, 1998, and 70 FR 8927, Feb. 24, 2005, as amended at 75 FR 47443, Aug. 6, 2010]

§ 134.607 How do I know which eligibility requirement applies to me?

Follow this chart to determine your eligibility. You should calculate your net worth and the number of your employees as of the date the administrative proceeding was initiated.

If your participation in the proceeding was:	Eligibility requirements:
(1) As an individual rather than a business owner.	(1) Personal net worth may not exceed 2 million dollars.
(2) As owner of an unincorporated business.	(2) Personal net worth may not exceed 7 million dollars, and No more than 500 employees.

If your participation in the proceeding was:	Eligibility requirements:
(3) As a partnership, corporation, association, organization, or unit of local government.	(3) Business net worth may not exceed 7 million dollars, and No more than 500 employees.
(4) As a charitable or other tax-exempt organization described in 26 U.S.C. 501(c)(3) or a cooperative association as defined in 12 U.S.C. 1141j(a).	(4) No net worth limitations, and No more than 500 employees.

§ 134.608 What are the special rules for calculating net worth and number of employees?

(a) Your net worth must include the value of any assets disposed of for the purpose of meeting an eligibility standard, and must exclude any obligation incurred for that purpose. Transfers of assets, or obligations incurred, for less than reasonably equivalent value will be presumed to have been made for the purpose of meeting an eligibility standard.

(b) If you are an owner of an unincorporated business, or a partnership, corporation, association, organization, or unit of local government, your net worth must include the net worth of all of your affiliates. ''Affiliates'' are:

(1) Corporations or other business entities which directly or indirectly own or control a majority of the voting shares or other ownership interests in the applicant concern; and

(2) Corporations or other business entities in which the applicant concern directly or indirectly owns or controls a majority of the voting shares or other ownership interests.

(c) Your employees include all those persons regularly working for you at the time the administrative proceeding was initiated, whether or not they were at work on that date. Part-time employees must be included on a proportional basis. You must include the employees of all your affiliates in your total number of employees.

§ 134.609 What is the difference between a fee and an expense?

A fee is a charge to you for the professional services of attorneys, agents, or expert witnesses rendered in connection with your case. An expense is the cost to you of any study, analysis, engineering report, test, project, or similar matter prepared in connection with your case.

§ 134.610 Are there limitations on reimbursement for fees and expenses?

(a) Awards will be calculated on the basis of fees and expenses actually incurred. If services were provided by one or more of your employees, or were made available to you free, you may not seek an award for those services. If services were provided at a reduced rate, fees and expenses will be calculated at that reduced rate.

(b) In determining the reasonableness of the fees for attorneys, agents or expert witnesses, the ALJ will consider at least the following:

(1) That provider's customary fee for like services;

(2) The prevailing rate for similar services in the community in which that provider ordinarily performs services;

(3) The time actually spent in representing you; and

(4) The time reasonably spent in light of the difficulty and complexity of the issues.

(c) An award for the fees of an attorney or agent may not exceed $75 per hour, and an award for the fees of an expert witness may not exceed $25 per hour, regardless of the rate charged.

(d) An award for the reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on your behalf may not exceed the prevailing rate payable for similar services, and you may be reimbursed only if the study or other matter was necessary to the preparation of your case.

§ 134.611 What should I include in my application for an award?

(a) Your application must be in the form of a written petition which is served and filed in accordance with § 134.204. It must contain the following information:

(1) A statement that OHA has jurisdiction over the case pursuant to § 134.102(g);

(2) Identification of the administrative proceeding for which you are seeking an award;

(3) A statement that you have prevailed, and a list of each issue in which

you claim the position of SBA was not substantially justified;

(4) Your status as an individual, owner of an unincorporated business, partnership, corporation, association, organization, or unit of local government;

(5) Your net worth and number of employees as of the date the administrative proceeding was initiated, or a statement that one or both of these eligibility requirements do not apply to you;

(6) The amount of fees and expenses you are seeking, along with the invoice or billing statement from each service provider;

(7) A description of any affiliates (as that term is defined in §134.608), or a statement that no affiliates exist;

(8) A statement that the application and any attached statements and exhibits are true and complete to the best of your knowledge and that you understand a false statement on these documents is a felony punishable by fine and imprisonment under 18 U.S.C. 1001; and

(9)(i) Your name and address;

(ii) Your signature, or the signature of either a responsible official or your attorney; and

(iii) The address and telephone number of the person who signs the application.

(b) You should follow this chart to determine which further documents must be included with your application:

Party	Required documents
(1) Individual, owner of unincorporated business, partnership, corporation, association, organization, or unit of local government.	(1) Net worth exhibit.
(2) Organization qualified as tax-exempt under 26 U.S.C. 501(c)(3).	(2) Copy of a ruling by the Internal Revenue Service that you qualify as a 501(c)(3) organization or Statement that you were listed in the current edition of IRS Bulletin 78 as of the date the administrative proceeding was initiated.
(3) Tax-exempt religious organization not required to obtain a ruling from the Internal Revenue Service on its exempt status.	(3) Description of your organization and the basis for your belief you are exempt.
(4) Cooperative association as defined in 12 U.S.C. 1141j(a).	(4) Copy of your charter or articles of incorporation, and Copy of your bylaws.

[61 FR 2683, Jan. 29, 1996. Redesignated at 63 FR 35766, June 30, 1998, and 70 FR 8927, Feb. 24, 2005, as amended at 75 FR 47443, Aug. 6, 2010]

§ 134.612 What must a net worth exhibit contain?

(a) A net worth exhibit may be in any format, but it must contain:

(1) List of all assets and liabilities for you and each affiliate in detail sufficient to show your eligibility;

(2) Aggregate net worth for you and all affiliates; and

(3) Description of any transfers of assets from, or obligations incurred by, you or your affiliates within one year prior to the initiation of the administrative proceeding which reduced your net worth below the eligibility ceiling, or a statement that no such transfers occurred.

(b) The net worth exhibit must be filed with your application, but will not be part of the public record of the proceeding. Further, in accordance with the provisions of §134.204(g), you need not serve your net worth exhibit on other parties.

§ 134.613 What documentation do I need for fees and expenses?

You must submit a separate itemized statement or invoice for the services of each provider for which you seek reimbursement. Each separate statement or invoice must contain:

(a) The hours worked in connection with the proceeding by each provider supplying a billable service;

(b) A description of the specific services performed by each provider;

(c) The rate at which fees were computed for each provider;

(d) The total charged by the provider on that statement or invoice; and

(e) The provider's verification that the statement or invoice is true to the best of his or her knowledge and that he or she understands that a false statement is punishable by fine and imprisonment under 18 U.S.C. 1001.

§ 134.614 What deadlines apply to my application for an award and where do I send it?

After you have prevailed in an administrative proceeding or in a discrete issue therein, you must serve,

and file with OHA, your written application for an award, and its attachments, no later than 30 days after the decision in the administrative proceeding becomes final under §134.227. The deadline for filing an application for an award may not be extended. If SBA or another party requests review of the decision in the underlying administrative proceeding, your request for an award for fees and expenses may still be filed, but it will not be considered by the ALJ until a final decision is rendered.

§134.615 How will proceedings relating to my application for fees and expenses be conducted?

Proceedings will be conducted in accordance with the provisions in subpart B of this part.

§134.616 How will I know if I receive an award?

The ALJ will issue an initial decision on the merits of your request for an award which will become final in 30 days unless a request for review is filed under §134.228. The decision will include findings on your eligibility, on whether SBA's position was substantially justified, and on the reasonableness of the amount you requested. Where applicable, there will also be findings on whether you have unduly protracted the proceedings or whether other circumstances make an award unjust, and an explanation of the reason for the difference, if any, between the amount requested and the amount awarded. If you have sought an award against more than one federal agency, the decision will allocate responsibility for payment among the agencies with appropriate explanation.

§134.617 May I seek review of the ALJ's decision on my award?

You may request review of the ALJ's decision on your award by filing a request for review in accordance with §134.228. You may seek judicial review of a final decision as provided in 5 U.S.C. 504(c)(2).

§134.618 How are awards paid?

If you are seeking payment of an award, you must submit a copy of the final decision, along with your certification that you are not seeking judicial review of either the decision in the adversary adjudication, or of the award, to the following address: Chief Financial Officer, Office of Financial Operations, SBA, P.O. Box 205, Denver, CO 80201–0205. SBA will pay you the amount awarded within 60 days of receipt of your request unless it is notified that you or another party has sought judicial review of the underlying decision or the award.

Subpart G—Rules of Practice for Appeals From Women-Owned Small Business Concern (WOSB) and Economically Disadvantaged WOSB Concern (EDWOSB) Protests

SOURCE: 75 FR 62292, Oct. 7, 2010, unless otherwise noted.

§134.701 What is the scope of the rules in this subpart G?

(a) The rules of practice in this subpart G apply to all appeals to OHA from formal protest determinations made by the Director for Government Contracting (D/GC) in connection with a Women-Owned Small Business Concern (WOSB) or Economically Disadvantaged WOSB Concern (EDWOSB) protest. Appeals under this subpart include issues related to whether the concern is owned and controlled by one or more women who are United States citizens and, if the appeal is in connection with an EDWOSB contract, that the concern is at least 51 percent owned and controlled by one or more women who are economically disadvantaged. This includes appeals from determinations by the D/GC that the protest was premature, untimely, nonspecific, or not based upon protestable allegations.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Appeals relating to formal size determinations and NAICS Code designations are governed by subpart C of this part.

§ 134.702 Who may appeal?

Appeals from WOSB or EDWOSB protest determinations may be filed with OHA by the protested concern, the protestor, or the contracting officer responsible for the procurement affected by the protest determination.

§ 134.703 When must a person file an appeal from an WOSB or EDWOSB protest determination?

Appeals from a WOSB or EDWOSB protest determination must be commenced by filing and serving an appeal petition within ten (10) business days after the appellant receives the WOSB or EDWOSB protest determination (see § 134.204 for filing and service requirements). An untimely appeal must be dismissed.

§ 134.704 What are the effects of the appeal on the procurement at issue?

Appellate decisions apply to the procurement in question. If a timely OHA appeal has been filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered. If OHA affirms the D/GC's determination finding that the protested concern is ineligible, the contracting officer shall either terminate the contract, not exercise the next option or not award further task or delivery orders. If OHA overturns the D/GC's dismissal or determination that the concern is an eligible EDWOSB or WOSB, the contracting officer may apply the OHA decision to the procurement in question.

§ 134.705 What are the requirements for an appeal petition?

(a) *Format.* There is no required format for an appeal petition. However, it must include the following information:

(1) The solicitation or contract number, and the name, address, and telephone number of the contracting officer;

(2) A statement that the petitioner is appealing a WOSB or EDWOSB protest determination issued by the D/GC and the date that the petitioner received it;

(3) A full and specific statement as to why the WOSB or EDWOSB protest determination is alleged to be based on a clear error of fact or law, together with an argument supporting such allegation; and

(4) The name, address, telephone number, facsimile number, and signature of the appellant or its attorney.

(b) *Service of appeal.* The appellant must serve the appeal petition upon each of the following:

(1) The D/GC at U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile (202) 205–6390;

(2) The contracting officer responsible for the procurement affected by a WOSB or EDWOSB determination;

(3) The protested concern (the business concern whose WOSB or EDWOSB status is at issue) or the protester; and

(4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile number (202) 205–6873.

(c) *Certificate of Service.* The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

§ 134.706 What are the service and filing requirements?

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart unless otherwise indicated in this subpart.

§ 134.707 When does the D/GC transmit the protest file and to whom?

Upon receipt of an appeal petition, the D/GC will send to OHA a copy of the protest file relating to that determination. The D/GC will certify and authenticate that the protest file, to the best of his or her knowledge, is a true and correct copy of the protest file.

§ 134.708 What is the standard of review?

The standard of review for an appeal of a WOSB or EDWOSB protest determination is whether the D/GC's determination was based on clear error of fact or law.

§ 134.709 When will a Judge dismiss an appeal?

(a) The presiding Judge must dismiss the appeal if the appeal is untimely filed under § 134.703.

(b) The matter has been decided or is the subject of adjudication before a court of competent jurisdiction over such matters. However, once an appeal has been filed, initiation of litigation of the matter in a court of competent jurisdiction will not preclude the Judge from rendering a final decision on the matter.

§ 134.710 Who can file a response to an appeal petition and when must such a response be filed?

Although not required, any person served with an appeal petition may file and serve a response supporting or opposing the appeal if he or she wishes to do so. If a person decides to file a response, the response must be filed within seven (7) business days after service of the appeal petition. The response should present argument.

§ 134.711 Will the Judge permit discovery and oral hearings?

Discovery will not be permitted, and oral hearings will not be held.

§ 134.712 What are the limitations on new evidence?

The Judge may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals under this subpart will be decided solely on a review of the evidence in the written protest file, arguments made in the appeal petition, and response(s) filed thereto.

§ 134.713 When is the record closed?

The record will close when the time to file a response to an appeal petition expires pursuant to § 134.710.

§ 134.714 When must the Judge issue his or her decision?

The Judge shall issue a decision, insofar as practicable, within fifteen (15) business days after close of the record. The Judge's decision is the final agency decision and becomes effective upon issuance.

[75 FR 62292, Oct. 7, 2010, as amended at 85 FR 63193, Oct. 7, 2020]

§ 134.715 Can a Judge reconsider his decision?

(a) The Judge may reconsider an appeal decision within twenty (20) calendar days after issuance of the written decision. Any party who has appeared in the proceeding, or SBA, may request reconsideration by filing with the Judge and serving a petition for reconsideration on all the parties to the appeal within twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative.

(b) The Judge may remand a proceeding to the D/GC for a new WOSB or EDWOSB determination if the D/GC fails to address issues of decisional significance sufficiently, does not address all the relevant evidence, or does not identify specifically the evidence upon which it relied. Once remanded, OHA no longer has jurisdiction over the matter, unless a new appeal is filed as a result of the new WOSB or EDWOSB determination.

Subpart H—Rules of Practice for Employee Disputes

SOURCE: 75 FR 47443, Aug. 6, 2010, unless otherwise noted.

§ 134.801 Scope of rules.

(a) The rules of practice in this subpart H apply to the OHA appeal under the Employee Dispute Resolution Process (EDRP). Standard Operating Procedure (SOP) 37 71 sets out the EDRP. It is available at *http://www.sba.gov/tools/resourcelibrary/sops/index.html* or through OHA's Web site *http://www.sba.gov/oha*).

(b) The following rules, located in subparts A and B of this part, also apply to OHA appeals under the EDRP:

(1) Definitions (§ 134.101);

(2) Jurisdiction of OHA (§ 134.102(r) only);

(3) Scope of the rules in this subpart B (§ 134.201(a), (b)(6), and (c) only);

(4) Commencement of cases (§ 134.202(d) only, on deadlines and how to count days);

(5) Filing and service requirements (§ 134.204);
(6) Amendments and supplemental pleadings (§ 134.207);
(7) Requirement of signature (§ 134.209);
(8) Motions (§ 134.211);
(9) Summary decision (§ 134.212); and
(10) Sanctions (§ 134.219).

[75 FR 47443, Aug. 6, 2010, as amended at 82 FR 25507, June 2, 2017]

§ 134.802 [Reserved]

§ 134.803 Commencement of appeals from SBA Employee Dispute Resolution Process cases (Employee Disputes).

(a) An appeal from a Step Two decision must be commenced by filing an appeal petition within 15 calendar days from the date the Employee receives the Step Two decision.
(b) If the Step Two Official does not issue a decision within 15 calendar days of receiving the SBA Dispute Form from the Employee, the Employee must file his/her appeal petition at OHA no later than 15 calendar days from the date the Step Two decision was due.
(c) The rule for counting days is in § 134.202(d).
(d) OHA will dismiss an untimely appeal.

[75 FR 47443, Aug. 6, 2010, as amended at 82 FR 25507, June 2, 2017]

§ 134.804 The appeal petition.

(a) *Form.* There is no required format for an appeal petition. However, it must include the following:
(1) The completed SBA Dispute Form;
(2) A copy of the Step One and Step Two decisions, if any;
(3) Statement of why the Step Two decision (or Step One decision, if no Step Two decision was received), is alleged to be in error;
(4) Any other pertinent information the OHA Judge should consider;
(5) A request for mediation, if applicable; and
(6) If represented by an attorney, the attorney's contact information and signature.
(b) *Service of the appeal petition upon the SBA.* The Employee must serve copies of the entire appeal petition upon three SBA officials:
(1) The Step Two Official;
(2) Chief Human Capital Officer, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416; and
(3) Associate General Counsel for General Law, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, e-mail: *OGLService@sba.gov*, except that an employee of the Office of Inspector General (OIG) must serve it upon the Counsel to the Inspector General, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, e-mail: *ig.counseldiv@sba.gov*.
(c) The rules governing filing and service are in § 134.204.
(d) *Dismissal.* An appeal petition that does not meet all the requirements of this section may be dismissed by the Judge at his or her own initiative or upon motion of the SBA.

[75 FR 47443, Aug. 6, 2010, as amended at 82 FR 25507, June 2, 2017]

§ 134.805 After the appeal petition is filed.

(a) The AA/OHA will assign a Judge to adjudicate the case. If mediation is requested or offered, the AA/OHA will assign a different person to mediate the case.
(b) OHA will issue and serve upon the Employee and the SBA a notice and order informing the parties that an appeal has been filed, and setting the date for SBA's response and the close of record.
(c) The rules for amendments to pleadings and supplemental pleadings are in § 134.207.
(d) Unless otherwise instructed, OHA will serve all orders and the decision by email upon the Employee, or upon the attorney if represented by an attorney.

[75 FR 47443, Aug. 6, 2010, as amended at 82 FR 25507, June 2, 2017]

§ 134.806 Mediation.

Either the Employee or the SBA may request mediation, or OHA may offer mediation. OHA may designate a Judge or an OHA attorney to serve as a mediator. If the parties reach a settlement through mediation, they may file a joint motion to dismiss the appeal

based on that settlement. If the parties do not reach a settlement, the mediation will conclude and the appeal will go to adjudication. An OHA-provided mediator will not be involved in a subsequent adjudication.

§ 134.807 SBA response.

(a) If the appeal goes to adjudication, SBA will file and serve the SBA's response to the appeal and any documentation, not already filed by the Employee, that SBA wishes OHA to consider.

(b) Unless the Judge orders a different date (either on his or her own initiative or on motion by a party), the SBA must file any response to the appeal petition no later than 15 calendar days from the conclusion of mediation or 15 calendar days from the filing of the appeal petition, whichever is later.

(c) The SBA's response is normally the last submission in an appeal, although the Judge may order or permit additional submissions. If a party wishes to file an additional submission, the party must file and serve a motion (see § 134.211) accompanied by the proposed submission.

[75 FR 47443, Aug. 6, 2010, as amended at 82 FR 25507, June 2, 2017]

§ 134.808 The decision.

(a) The Judge will decide the appeal within 45 calendar days (if practicable) from close of record. The decision will affirm, modify, remand, or reverse the Step One or Step Two decision.

(b) The standard of review and burden of proof will be determined by the specific issue presented.

(c) OHA's decision is an initial decision which becomes the final decision of the SBA 30 calendar days after issuance, unless a party files a request for review pursuant to § 134.809.

(d) OHA's decision is not precedential and it will not be published.

[75 FR 47443, Aug. 6, 2010, as amended at 82 FR 25507, June 2, 2017]

§ 134.809 Review of initial decision.

(a) If the Chief Human Capital Officer, General Counsel for SBA, or Counsel to the Inspector General (IG) believes OHA's decision is contrary to law, rule, regulation, or SBA policy, that official may file a Petition for Review (PFR) of the decision with the Deputy Administrator (or IG for disputes by OIG employees) for a final SBA Decision. Only the Chief Human Capital Officer, General Counsel, or Counsel to the IG may file a PFR of an OHA decision; the Employee may not.

(b) To file a PFR, the official must request a complete copy of the dispute file from the Assistant Administrator for OHA (AA/OHA) within five calendar days of receiving the decision. The AA/OHA will provide a copy of the dispute file to the official, the Employee, and the Employee's representative within five calendar days of the official's request. The official's PFR is due no later than 15 calendar days from the date the official receives the dispute file. The PFR must specify the objections to OHA's decision.

[82 FR 25507, June 2, 2017]

Subpart I—Rules of Practice for Petitions for Reconsideration of Size Standards

SOURCE: 82 FR 25507, June 2, 2017, unless otherwise noted.

§ 134.901 Scope of the rules in this subpart.

(a) The rules of practice in this subpart apply to Size Standard Petitions.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to Size Standard Petitions listed in paragraph (a) of this section.

§ 134.902 Standing.

(a) A Size Standard Petition may be filed with OHA by any person that is adversely affected by the Administrator's decision to revise, modify, or establish a size standard.

(b) A business entity is not adversely affected unless it conducts business in the industry associated with the size standard that is being challenged and:

(1) The business entity qualified as a small business concern before the size standard was revised or modified; or

(2) The business entity qualifies as a small business under the size standard as revised or modified.

§ 134.903 Commencement of cases.

(a) A Size Standard Petition must be filed at OHA not later than 30 calendar days after the publication in the FEDERAL REGISTER of the final rule that revises, modifies, or establishes the challenged size standard. An untimely Size Standard Petition will be dismissed.

(b) A Size Standard Petition filed in response to a notice of proposed rulemaking is premature and will be dismissed.

(c) A Size Standard Petition challenging a size standard that has not been revised, modified, or established through publication in the FEDERAL REGISTER will be dismissed.

§ 134.904 Requirements for the Size Standard Petition.

(a) *Form.* There is no required form for a Size Standard Petition. However, it must include the following information:

(1) A copy of the final rule published in the FEDERAL REGISTER to revise, modify, or establish a size standard, or an electronic link to the final rule;

(2) A full and specific statement as to which size standard(s) in the final rule the Petitioner is challenging and why the process that was used to revise, modify, or establish each challenged size standard is alleged to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, together with argument supporting such allegation;

(3) A copy of any comments the Petitioner submitted in response to the proposed notice of rulemaking that pertained to the size standard(s) in question, or a statement that no such comments were submitted; and

(4) The name, mailing address, telephone number, facsimile number, email address, and signature of the Petitioner or its attorney.

(b) *Multiple size standards.* A Petitioner may challenge multiple size standards that were revised, modified, or established in the same final rule in a single Size Standard Petition, provided that the Petitioner demonstrates standing for each of the challenged size standards.

(c) *Format.* The formatting provisions of § 134.203(d) apply to Size Standard Petitions.

(d) *Service.* In addition to filing the Size Standard Petition at OHA, the Petitioner must serve a copy of the Size Standard Petition upon each of the following:

(1) SBA's Office of Size Standards, U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416; facsimile number (202) 205–6390; or *sizestandards@sba.gov;* and

(2) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416; facsimile number (202) 205–6873; or *OPLService@sba.gov.*

(e) *Certificate of service.* The Petitioner must attach to the Size Standard Petition a signed certificate of service meeting the requirements of § 134.204(d).

§ 134.905 Notice and order.

Upon receipt of a Size Standard Petition, OHA will assign the matter to a Judge in accordance with § 134.218. Unless it appears that the Size Standard Petition will be dismissed under § 134.910, the presiding Judge will issue a notice and order initiating the publication required by § 121.102(f) of this chapter; specifying a date for the Office of Size Standards to transmit to OHA a copy of the administrative record supporting the revision, modification, or establishment of the challenged size standard(s); and establishing a date for the close of record. Typically, the administrative record will be due seven calendar days after issuance of the notice and order, and the record will close 45 calendar days from the date of OHA's receipt of the Size Standard Petition.

§ 134.906 Intervention.

In accordance with § 134.210(b), interested persons with a direct stake in the outcome of the case may contact OHA to intervene in the proceeding and obtain a copy of the Size Standard Petition. In the event that the Size Standard Petition contains confidential information and the intervener is not a governmental entity, the Judge may require that the intervener's attorney be admitted to a protective order before obtaining a complete copy of the Size Standard Petition.

§ 134.907 Filing and service.

The provisions of §134.204 apply to the filing and service of all pleadings and other submissions permitted under this subpart unless otherwise indicated in this subpart.

§ 134.908 The administrative record.

The Office of Size Standards will transmit to OHA a copy of the documentation and analysis supporting the revision, modification, or establishment of the challenged size standard by the date specified in the notice and order. The Chief, Office of Size Standards, will certify and authenticate that the administrative record, to the best of his or her knowledge, is complete and correct. The Petitioner and any interveners may, upon request, review the administrative record submitted to OHA. The administrative record will include the documentation and analysis supporting the revision, modification, or establishment of the challenged size standard.

§ 134.909 Standard of review.

The standard of review for deciding a Size Standard Petition is whether the process employed by the Administrator to revise, modify, or establish the size standard was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. OHA will not adjudicate arguments that a different size standard should have been selected. The Petitioner bears the burden of proof.

§ 134.910 Dismissal.

The Judge must dismiss the Size Standard Petition if:

(a) The Size Standard Petition does not, on its face, allege specific facts that if proven to be true, warrant remand of the size standard;

(b) The Petitioner is not adversely affected by the final rule revising, modifying, or establishing a size standard;

(c) The Size Standard Petition is untimely or premature pursuant to §134.903 or is not otherwise filed in accordance with the requirements in subparts A and B of this part; or

(d) The matter has been decided or is the subject of adjudication before a court of competent jurisdiction over such matters.

§ 134.911 Response to the Size Standard Petition.

Although not required, any intervener may file and serve a response supporting or opposing the Size Standard Petition at any time prior to the close of record. SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first. The response must present argument.

§ 134.912 Discovery and oral hearings.

Discovery will not be permitted. Oral hearings will not be held unless the Judge determines that the dispute cannot be resolved except by the taking of live testimony and the confrontation of witnesses.

§ 134.913 New evidence.

Disputes under this subpart ordinarily will be decided based on the pleadings and the administrative record. The Judge may admit additional evidence upon a motion establishing good cause.

§ 134.914 The decision.

The Judge will issue his or her decision within 45 calendar days after close of record, as practicable. The Judge's decision is final and will not be reconsidered.

§ 134.915 Remand.

If OHA grants a Size Standard Petition, OHA will remand the matter to the Office of Size Standards for further analysis. Once remanded, OHA no longer has jurisdiction over the matter unless a new Size Standard Petition is filed as a result of a new final rule published in the FEDERAL REGISTER.

§ 134.916 Effects of OHA's decision.

(a) If OHA grants a Size Standard Petition of a modified or revised size standard, SBA will take appropriate action to rescind that size standard and to restore the one that was in effect before the one challenged in the Size Standard Petition. The restored size standard will remain in effect until SBA issues a new size standard. The

OHA decision does not affect the validity of a concern's size representation made under the challenged size standard prior to the effective date of the SBA action rescinding that challenged size standard. Such a concern remains eligible for award as a small business, and the procuring agency may count the award towards its small business goals. If the procuring agency amends the solicitation and requires new self-certifications, those self-certifications will be based on the size standard in effect on the day those self-certifications are made. If the size standard in question was newly established, the challenged size standard remains in effect while SBA conducts its further analysis on remand.

(b) If OHA denies a Size Standard Petition, the size standard remains as published in the Code of Federal Regulations.

§ 134.917 Equal Access to Justice Act.

A prevailing Petitioner is not entitled to recover attorney's fees. Size Standard Petitions are not proceedings that are required to be conducted by an Administrative Law Judge under § 134.603.

§ 134.918 Judicial review.

The publication of a final rule in the FEDERAL REGISTER is considered the final agency action for purposes of seeking judicial review.

Subpart J—Rules of Practice for Protests of Eligibility for Inclusion in the SBA Veteran Small Business Certification Program Database (VOSB or SDVOSB Status Protests)

SOURCE: 87 FR 73425, Nov. 29, 2022, unless otherwise noted.

§ 134.1001 Scope of rules.

(a) The rules of practice in this subpart apply to VOSB or SDVOSB status protests. A VOSB or SDVOSB status protest is the process by which an interested party (*see* § 134.1002(b)) may challenge a concern's inclusion in the SBA Veteran Small Business Certification Program database or the VOSB or SDVOSB status of an apparent successful offeror on a VOSB or SDVOSB contract, including a joint venture submitting an offer under § 128.402 of this chapter. OHA will also consider a protest challenging whether a prime contractor is unduly reliant on a small, non-similarly situated entity subcontractor or if such subcontractor performs the primary and vital requirements of the contract.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to protests listed in paragraph (a) of this section.

(c) The protest procedures described in this subpart are separate from those governing size protests and size appeals. All protests relating to whether a VOSB or SDVOSB is a ''small'' business for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of a VOSB or SDVOSB and the concern's eligibility for the SBA Veteran Small Business Certification Program, SBA will process each protest concurrently, under the procedures set forth in part 121 of this chapter and this part. SBA does not review issues concerning the administration of a VOSB or SDVOSB contract.

(d) Appeals of denials and cancellations of certification for inclusion in the Veteran Small Business Certification Program are governed by subpart K of this part.

§ 134.1002 Who may file a VOSB or SDVOSB status protest?

(a) For sole source procurements, SBA, VA, or the contracting officer may protest the proposed awardee's VOSB or SDVOSB status.

(b) For all other procurements, any interested party may protest the apparent successful offeror's VOSB or SDVOSB status. An interested party means the contracting officer, SBA, VA, any concern that submits an offer for a specific set-aside VOSB or SDVOSB contract (including Multiple Award Contracts) or order, or any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a reserve of an award given to a VOSB or SDVOSB.

(c) SBA and VA may file a VOSB or SDVOSB status protest at any time.

§ 134.1003 Grounds for filing a VOSB or SDVOSB status protest.

(a) *Veteran status.* In cases where the protest is based on service-connected disability, permanent and severe disability, or veteran status, the Judge will only consider a protest that presents specific allegations supporting the contention that the owner(s) cannot provide documentation from the VA, Department of Defense, or the U.S. National Archives and Records Administration to show that they meet the definition of veteran, service-disabled veteran, or service-disabled veteran with a permanent and severe disability.

(b) *Ownership and control.* In cases where the protest is based on ownership and/or control, the Judge will consider a protest only if the protester presents credible evidence that the concern is not 51% owned and controlled by one or more veterans or service-disabled veterans.

(c) *Ostensible subcontractor.* In cases where the protest is based on an allegation that the prime contractor appears unduly reliant on one or more, non-VOSB or non-SDVOSB subcontractors, or the non-VOSB or non-SDVOSB subcontractor is performing the primary and vital requirements of the contract, OHA will consider a protest only if the protester presents credible evidence of the alleged undue reliance or credible evidence that the primary and vital requirements will be performed by the subcontractor(s).

(d) *Joint ventures.* A VOSB or SDVOSB joint venture may be protested regarding the status of the managing VOSB or SDVOSB joint venture partner or for failure to meet the requirements of §128.402 of this chapter. If the joint venture is found to be ineligible solely based on failure to meet the requirements of that section, the joint venture will be ineligible for the contract at issue. The finding of ineligibility is limited to that contract and will not affect the underlying eligibility of the VOSB or SDVOSB joint venture partner.

(e) *Date for determining eligibility.* (1) If the VOSB or SDVOSB status protest pertains to a procurement, the Judge will determine a protested concern's eligibility as a VOSB or SDVOSB as of the date of its initial offer or response which includes price. For a protest challenging an ostensible subcontractor or a joint venture's compliance with the joint venture agreement requirements set forth in §128.402(c), the Judge will determine eligibility as of the date of the final proposal revision for negotiated acquisitions or as of final bid for sealed bidding.

(2) If the VOSB or SDVOSB status protest does not pertain to a procurement, the Judge will determine a protested concern's eligibility as a VOSB or SDVOSB as of the date the VOSB or SDVOSB status protest was filed.

§ 134.1004 Commencement of VOSB or SDVOSB status protests.

(a) *Timeliness.* (1) The Secretary of the VA (or designee) or SBA may file a VOSB or SDVOSB status protest at any time.

(2) The contracting officer, SBA, or VA may file a VOSB or SDVOSB status protest at any time after the apparent awardee has been identified or after bid opening, whichever applies.

(3) For negotiated acquisitions, an interested party (*see* §134.1002(b)) must submit its protest by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror.

(i) Except for an order or Blanket Purchase Agreement issued under a Federal Supply Schedule contract, for an order or Agreement that is set-aside for VOSBs or SDVOSBs under a multiple award contract that was not itself set aside or reserved for VOSBs or SDVOSBs, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order or Agreement.

(ii) Where a contracting officer has required offerors for a specific order under a multiple award VOSB or SDVOSB contract to recertify their VOSB or SDVOSB status, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the intended awardee of the order.

(4) For sealed bid acquisitions, a protest from an interested party (*see* §134.1002(b)) must be received by close of business on the fifth business day after bid opening. Where the identified low bidder is determined to be ineligible for award, a protest of any other identified low bidder must be received prior to the close of business on the 5th business day after the contracting officer has notified interested parties of the identity of that low bidder.

(5) The rule for counting days is in §134.202(d).

(6) Any protest received after the time limit is untimely, unless it is from SBA, VA, or the contracting officer. An untimely protest will be dismissed.

(b) *Filing*. (1) An interested party, other than SBA, VA, or the contracting officer, must deliver a VOSB or SDVOSB status protest to the contracting officer in person, by email, facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period) to the contracting officer.

(2) VA, SBA, or the contracting officer must submit a VOSB or SDVOSB status protest directly to OHA in accordance with the procedures in §134.204. The protest should include in the referral letter the information set forth in paragraph (c) of this section.

(3) SBA must submit a VOSB or SDVOSB status protest directly to OHA in accordance with the procedures in §134.204.

(c) *Referral to OHA*. The contracting officer must forward to OHA any VOSB or SDVOSB status protest received, notwithstanding whether the contracting officer believes it is premature, sufficiently specific, or timely. The contracting officer must send all VOSB or SDVOSB status protests, along with a referral letter, directly to OHA, addressed to Office of Hearings and Appeals, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416, or by email at *OHAfilings@sba.gov*, marked ''Attn: VOSB Status Protest'' or ''Attn: SDVOSB Status Protest''. The referral letter must include information pertaining to the solicitation that may be necessary for OHA to determine timeliness and standing, including:

(1) The solicitation number;

(2) The name, address, telephone number, and email address of the contracting officer;

(3) Whether the contract was a sole source or set-aside VOSB or SDVOSB procurement;

(4) Whether the protester submitted an offer;

(5) Whether the protested concern was the apparent successful offeror;

(6) Whether the procurement was conducted using sealed bid or negotiated procedures;

(7) The bid opening date, if applicable;

(8) When the protested concern submitted its initial offer which included price;

(9) When the protest was submitted to the contracting officer;

(10) When the protester received notification of the apparent successful offeror, if applicable; and

(11) Whether a contract has been awarded.

§134.1005 Contents of the VOSB or SDVOSB status protest.

(a) VOSB and SDVOSB status protests must be in writing. There is no required format for a VOSB or SDVOSB status protest, but it must include the following:

(1) The solicitation or contract number, if applicable;

(2) Specific allegations supported by credible evidence that the concern (or joint venture) does not meet the VOSB or SDVOSB eligibility requirements listed in part 128 of this chapter. A protest merely asserting that the protested concern is not an eligible VOSB or SDVOSB, without setting forth specific facts or allegations, is insufficient;

(3) Any other pertinent information the Judge should consider; and

(4) The name, address, telephone number, and email address, if available, and signature of the protester or its attorney.

(b) If the protester intends to seek access to the SBA case file under §134.205, the protester should include in its protest a request for a protective order. Unless good cause is shown, a protester must request a protective

order within five days of filing the protest.

[87 FR 73425, Nov. 29, 2022, as amended at 88 FR 42593, July 3, 2023]

§ 134.1006 Service and filing requirements.

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart.

§ 134.1007 Processing a VOSB or SDVOSB status protest.

(a) *Notice and order.* If the Judge determines that the protest is timely, sufficiently specific, and based upon protestable allegations, the Judge will issue a notice and order, notifying the protester, the protested concern, the Director, Office of Government Contracting (D/GC), SBA Counsel, and, if applicable, the contracting officer of the date OHA received the protest, and order a due date for responses.

(b) *Dismissal of protest.* If the Judge determines that the protest is premature, untimely, nonspecific, or is based on non-protestable allegations, the Judge will dismiss the protest and will send the contracting officer, D/GC, SBA's Associate General Counsel for Procurement Law, and the protester a notice of dismissal, citing the reason(s) for the dismissal. The dismissal is a final agency action.

(c) *Transmission of the case file.* Upon receipt of a notice and order, the D/GC must deliver to OHA the entire case file relating to the protested concern's inclusion in the certification database. The notice and order will establish the timetable for transmitting the case file to OHA. The D/GC must certify and authenticate that the case file, to the best of his/her knowledge, is a true and correct copy of the case file.

(d) *Protective order.* A protester seeking access to the SBA case file must file a timely request for a protective order under § 134.205. Except for good cause shown, a protester must request a protective order within five days of filing the protest. Even after issuance of a protective order, OHA will not disclose income tax returns or privileged information.

(e) *Supplemental allegations.* If, after viewing documents in the SBA case file for the first time under a protective order, a protester wishes to supplement its protest with additional argument, the protester may do so. Any such supplement is due at OHA no later than 15 days from the date the protester receives or reviews the SBA case file.

(f) *Response*—(1) *Timing.* The protested concern, the D/GC, the contracting officer, and any other interested party (*see* § 134.1002(b)) may respond to the protest and supplemental protest, if one is filed. The response is due no later than 15 days from the date the protest or supplemental protest was filed with OHA. The record closes the date the final response is due.

(2) *Service.* The respondent must serve its response upon the protester or its counsel and upon each of the persons identified in the certificate of service attached to the notice and order or, if a protective order is issued, in accordance with the terms of the protective order.

(3) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

(g) *Basis for decision.* The decision will be based primarily on the case file and information provided by the protester, the protested concern, and any other parties. However, the Judge may investigate issues beyond those raised in the protest and may use other information or make requests for additional information to the protester, the protested concern, or SBA.

(h) *Award of contract.* The contracting officer may award a contract before the Judge issues a decision only if the contracting officer determines that an award must be made to protect the public interest and notifies the Judge and D/GC in writing of such determination. Notwithstanding such a determination, the provisions of paragraph (j) of this section shall apply to the procurement in question.

(i) *Decision.* OHA will serve a copy of the written decision on each party, or, if represented by counsel, on its counsel. The decision is considered the final agency action, and it becomes effective upon issuance.

(j) *Effect of decision.* (1) A contracting officer may award a contract to a protested concern after the Judge has determined either that the protested concern is eligible for inclusion in SBA's certification database or has dismissed all protests against it.

(2) A contracting officer shall not award a contract to a protested concern that the Judge has determined is not an eligible VOSB or SDVOSB. If the contract has already been awarded, the contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders.

(3) The contracting officer must update the Federal Procurement Data System (or successor system) and other procurement reporting databases to reflect the Judge's decision.

(4) If the Judge finds the protested concern is not an eligible VOSB or SDVOSB, the D/GC must immediately remove the protested concern from the certification database.

(5) A concern found to be ineligible may not submit an offer on a future VOSB or SDVOSB procurement until the protested concern reapplies to the Veteran Small Business Certification Program and has been designated by SBA as a VOSB or SDVOSB into the certification database.

[87 FR 73425, Nov. 29, 2022, as amended at 88 FR 42593, July 3, 2023]

§ 134.1008 Discovery.

Discovery will not be permitted in SBA VOSB or SDVOSB status protest proceedings.

§ 134.1009 Oral hearings.

Oral hearings will be held in VOSB or SDVOSB status protest proceedings only upon a finding by the Judge of extraordinary circumstances. If such an oral hearing is ordered, the proceeding shall be conducted in accordance with those rules of subpart B of this part as the Judge deems appropriate.

§ 134.1010 Standard of review and burden of proof.

The protested concern has the burden of proving its eligibility, by a preponderance of the evidence.

§ 134.1011 Weight of evidence.

The Judge will give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions. In the case of refusal or failure to furnish requested information within a required time period, the Judge may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

§ 134.1012 The record.

Where relevant, the provisions of § 134.225 apply. In a protest under this subpart, the contents of the record also include the case file or solicitation submitted to OHA in accordance with § 134.1007.

§ 134.1013 Request for reconsideration.

The decision on a VOSB or SDVOSB status protest may not be appealed. However:

(a) The Judge may reconsider a VOSB or SDVOSB status protest decision. Any party that has appeared in the proceeding, or the SBA, may request reconsideration by filing with OHA and serving a petition for reconsideration on all the parties to the VOSB or SDVOSB status protest within twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative.

(b) If the Judge reverses his or her initial decision on reconsideration, the contracting officer must follow § 134.1007(j) in applying the new decision's results.

Subpart K—Rules of Practice for Appeals of Denials of Certification and Decertification in the SBA Veteran Small Business Certification Program (VOSB or SDVOSB Appeals)

SOURCE: 87 FR 73425, Nov. 29, 2022, unless otherwise noted.

§ 134.1101 Scope of rules.

(a) The rules of practice in this subpart apply to appeals of denial of certification and decertification for inclusion in the SBA Veteran Small Business Certification Program certification database (VOSB or SDVOSB Appeals).

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Protests of a concern's eligibility for inclusion in the SBA Veteran Small Business Certification Program Database (VOSB or SDVOSB Status Protests) are governed by subpart J of this part.

§ 134.1102 Who may file a VOSB or SDVOSB Appeal?

A concern that has been denied certification as a VOSB or SDVOSB or has had its VOSB or SDVOSB status decertified may appeal the decision to OHA.

§ 134.1103 Grounds for filing a VOSB or SDVOSB Appeal.

Denial of certification and decertification of VOSB or SDVOSB status may be appealed to OHA. A denial or decertification based on the failure to provide sufficient evidence of the qualifying individual's status as a veteran or a service-disabled veteran are final VA decisions and not subject to appeal to OHA.

§ 134.1104 Commencement of VOSB or SDVOSB Appeal.

(a) A concern whose application for VOSB or SDVOSB certification has been denied or whose status has been decertified must file its appeal within 10 business days of receipt of the denial or decertification.

(b) The rule for counting days is in § 134.202(d).

(c) OHA will dismiss an untimely appeal.

§ 134.1105 The appeal petition.

(a) *Format.* VOSB or SDVOSB appeals must be in writing. There is no required format for an appeal petition; however, it must include the following:

(1) A copy of the denial or decertification and the date the appellant received it;

(2) A statement of why the denial or decertification is in error;

(3) Any other pertinent information the Judge should consider; and

(4) The name, address, telephone number, and email address, if available, and signature of the appellant or its attorney.

(b) *Service.* The appellant must serve copies of the entire appeal petition upon the Director, Office of Government Contracting (D/GC) and SBA Counsel at *OPLservice@sba.gov*.

(c) *Certificate of service.* The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

(d) *Dismissal.* An appeal petition that does not meet all the requirements of this section may be dismissed by the Judge at his/her own initiative or upon motion of a respondent.

§ 134.1106 Service and filing requirements.

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart.

§ 134.1107 Transmission of the case file.

Once a VOSB or SDVOSB appeal is filed, the D/GC must deliver to OHA the entire case file relating to the denial or decertification. The Judge will issue a notice and order establishing the timetable for transmitting the case file to OHA. The D/GC must certify and authenticate that the case file, to the best of his/her knowledge, is a true and correct copy of the case file.

§ 134.1108 Response to an appeal petition.

(a) *Who may respond.* The D/GC (or designee) or counsel for SBA may respond to the VOSB or SDVOSB appeal.

The response should present arguments to the issues presented on appeal.

(b) *Time limits*. The notice and order will inform the parties of the filing of the appeal petition, establish the close of record as 15 days after service of the notice and order, and inform the parties that OHA must receive any responses to the appeal petition no later than the close of record.

(c) *Service*. The respondent must serve its response upon the appellant and upon each of the persons identified in the certificate of service attached to the appeal petition pursuant to § 134.1105.

(d) *Reply to a response*. No reply to a response will be permitted unless the Judge directs otherwise.

§ 134.1109 Discovery and oral hearings.

Discovery will not be permitted and oral hearings will not be held.

§ 134.1110 New evidence.

Except for good cause shown, evidence beyond the case file will not be admitted.

§ 134.1111 Standard of review and burden of proof.

The standard of review is whether the D/GC denial or decertification was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence.

§ 134.1112 The decision.

(a) *Timing*. The Judge shall decide a VOSB or SDVOSB Appeal, insofar as practicable, within 60 calendar days after close of the record.

(b) *Contents*. Following closure of the record, the Judge will issue a decision containing findings of fact and conclusions of law, reasons for such findings and conclusions, and any relief ordered.

(c) *Basis for decision*. Decisions under this subpart will be based primarily on the evidence in the SBA case file, arguments made on appeal, and any response(s) thereto. However, the Judge, in his/her sole discretion, may consider issues beyond those raised in the pleadings and the denial or cancellation letter.

(d) *Finality*. The decision is the final agency decision and becomes effective upon issuance. Where OHA dismisses an appeal of a D/GC denial or decertification, the D/GC determination remains in effect.

(e) *Service*. OHA will serve a copy of all written decisions on each party, or, if represented by counsel, on its counsel.

(f) *Effect*. If the Judge grants the appeal and finds the appellant eligible for inclusion in the SBA certification database, the D/GC must immediately include in the SBA certification database.

(g) *Reconsideration*. A decision of the Judge may be reconsidered. Any party that has appeared in the proceeding, or the SBA Administrator or his or her designee, may request reconsideration by filing with OHA and serving a petition for reconsideration on all parties to the VOSB or SDVOSB Appeal within twenty (20) calendar days after service of the written decision, upon a clear showing of an error of fact or law material to the decision. The Judge also may reconsider a decision on his or her own initiative.

Subpart L—Borrower Appeals of Final SBA Loan Review Decisions

SOURCE: 86 FR 51595, Sept. 16, 2021, unless otherwise noted.

§ 134.1201 Scope of the rules in this subpart.

(a) The rules of practice in this subpart apply to appeals to OHA from certain final SBA loan review decisions under the Paycheck Protection Program (PPP) as described in paragraph (b) of this section, and to any other PPP matter referred to OHA by the Administrator of SBA. The PPP was established as a temporary program under section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116–136), as amended. PPP loans include first draw PPP loans made under Section 7(a)(36) of the Small Business Act and second draw PPP loans made under Section 7(a)(37) of the Small Business Act.

(b) A final SBA loan review decision that is appealable under this subpart is an official written decision by SBA, after SBA completes a review of a PPP loan, that finds a borrower:

(1) Was ineligible for a PPP loan;

(2) Was ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses;

(3) Is ineligible for PPP loan forgiveness in the amount determined by the lender in its full approval or partial approval decision issued to SBA; and/or

(4) Is ineligible for PPP loan forgiveness in any amount when the lender has issued a full denial decision to SBA.

(c) A borrower cannot directly file an appeal of a decision made by a lender concerning a PPP loan with OHA.

(d) An appeal to OHA is an administrative remedy that must be exhausted before judicial review of a final SBA loan review decision may be sought in a Federal district court.

(e) Any determination by SBA's Office of Inspector General concerning a PPP loan is not appealable to OHA.

(f) This subpart does not create any right to appeal any SBA decision on any 7(a) loans (*see* part 120 of this chapter) other than PPP loans.

(g) The Rules of Practice for Appeals From Size Determinations and NAICS Code Designations in subpart C of this part do not apply to appeals of final SBA loan review decisions or to the PPP.

(h) In addition to the provisions in subpart B of this part specifically referenced in this subpart, the following regulations from subpart B of this part also apply to this subpart: §§ 134.207 (Amendments and supplemental pleadings); 134.208 (Representation in cases before OHA); 134.209 (Requirement of signature); 134.211 (Motions); 134.212 (Summary judgment); 134.217 (Settlement); 134.218 (Judges); 134.219 (Sanctions); and 134.220 (Prohibition on ex parte communications). Other provisions from subpart B of this part that are not specifically referenced in this subpart do not apply to this subpart.

§ 134.1202 Commencement of appeals of final SBA loan review decisions.

(a) An appeal petition must be filed with OHA within 30 calendar days after the appellant's receipt of the final SBA loan review decision. To file and manage an appeal of a final SBA loan review decision with OHA, refer to the OHA Case Portal at *https://appeals.sba.gov*. An appellant is required to use the OHA Case Portal to file and manage their appeal.

(b) Appellant must provide their lender with a copy of the timely appeal petition upon filing in order for the lender to extend the deferment period of the PPP loan until a final decision is issued under § 134.1211.

(c)(1) Do not count the day the time period begins, but do count the last day of the time period.

(2) If the last day is Saturday, Sunday, or a Federal holiday, the time period ends on the next business day.

Example: On a Thursday, a borrower receives a final SBA loan review decision. The time period begins on Thursday, so the first day to count is Friday. Because the 30th calendar day after receipt of the decision is a Saturday, the appeal deadline extends to the next business day, which is Monday.

(3)(i) A Judge may modify any time period or deadline, except:

(A) The time period governing commencement of a case (*i.e.*, when the appeal petition may be filed); and

(B) A time period established by statute.

(ii) A party may move for an extension of time pursuant to § 134.211.

(d) A timely appeal by a PPP borrower of a final SBA loan review decision extends the deferment period of the PPP loan until a final decision is issued under § 134.1211.

§ 134.1203 Standing.

Only the borrower on a loan, or its legal successor in interest, for which SBA has issued a final SBA loan review decision that makes a finding in § 134.1201(b)(1) through (4) has standing to appeal the final SBA loan review decision to OHA. Lenders and individual owners of a borrower entity do not have standing to appeal a final SBA loan review decision.

§ 134.1204 The appeal petition.

(a) *Content.* The appeal petition must include the following information:

(1) A copy of the final SBA loan review decision that is being appealed and the date it was received by the borrower. A Notice of Paycheck Protection Program Forgiveness Payment

does not provide a borrower with a right to appeal to OHA.

(2) A full and specific statement as to why the final SBA loan review decision is alleged to be erroneous, together with all factual information and legal arguments supporting the allegations. There is no required format for an appeal petition. However, the appeal petition must meet the following requirements:

(i) The maximum length of an appeal petition (not including attachments) is 20 pages. A table of authorities is required only for petitions citing more than twenty cases, regulations, or statutes.

(ii) Clearly label any exhibits and attachments.

(3) The name, address, telephone number, email address, and signature of the appellant or its attorney.

(b) *Dismissal.* An appeal petition that does not contain all of the information required by paragraph (a) of this section may be dismissed, with or without prejudice, at the Judge's own initiative, or upon motion of SBA.

(c) *Motion for more definite statement.* (1) SBA may, no later than five calendar days after receiving a Notice and Order on an appeal petition, move for an order to the appellant to provide a more definite appeal petition or otherwise comply with this section. A Judge may order a more definite appeal petition on his or her own initiative.

(2) A motion for a more definite appeal petition stays SBA's time for filing a response. The Judge will establish the time for filing and serving a response and will extend the close of the record as appropriate.

(3) If the appellant does not comply with the Judge's order to provide a more definite appeal petition or otherwise fails to comply with applicable regulations in this subpart, the Judge may dismiss the petition with prejudice.

§ 134.1205 Dismissal.

(a) The Judge must dismiss the appeal if:

(1) The appeal is beyond OHA's jurisdiction as set forth under § 134.1201;

(2) The appeal is untimely under § 134.1202;

(3) The appellant lacks standing to appeal under § 134.1203; or

(4) The appeal is premature because SBA has not yet made a final SBA loan review decision.

(b) The Judge may dismiss the appeal in accordance with § 134.1204(b) or (c)(3), or if the appeal does not, on its face, allege specific facts that if proven to be true, warrant reversal or remand of the final SBA loan review decision.

§ 134.1206 Notice and Order.

Upon receipt of an appeal challenging a final SBA loan review decision, OHA will assign the matter to either an Administrative Law Judge or an Administrative Judge in accordance with § 134.218. Unless the appeal is dismissed under § 134.1205, the Judge will issue a Notice and Order, utilizing the OHA Case Portal, establishing a deadline for production of the administrative record and specifying a date by which SBA may respond to the appeal.

§ 134.1207 The administrative record.

(a) *Time limits.* The administrative record will be due 20 calendar days after issuance of the Notice and Order unless additional time is requested and granted.

(b) *Contents.* The administrative record shall include non-privileged, relevant documents that SBA considered in making its final loan review decision or that were before SBA at the time of the final loan review decision. The administrative record need not, however, contain all documents pertaining to the appellant.

(c) *Non-waiver.* In the event that privileged or confidential information is disclosed in the administrative record, such disclosure shall not operate as a waiver of any claim of privilege or confidentiality by SBA.

(d) *Filing.* SBA will file the administrative record with OHA and serve it on appellant utilizing the OHA Case Portal.

(e) *Objections.* (1) Any objection to the administrative record must be filed with OHA and served on SBA no later than 30 calendar days after the issuance of the Notice and Order, utilizing the OHA Case Portal. If additional time to file the administrative record was requested and granted by a

Judge, appellant will have 10 calendar days from the date SBA is required to file the administrative record under the judge's order granting an extension in which to file an objection to the administrative record.

(2) The appellant may object to the absence of any document from the administrative record that the appellant believes should have been included in the administrative record.

(3) The Judge will rule upon such objections and may direct or permit that the administrative record be supplemented.

§ 134.1208 Response to an appeal petition.

(a) *Who may respond.* SBA may respond to an appeal as determined in its discretion, but SBA is not required to respond. If SBA elects not to respond, such election shall not be interpreted as an admission or waiver of any allegation of law or fact. In addition, after review of the appeal petition, OHA may request SBA to respond for good cause shown by OHA. Only SBA may respond. If filed, the response should set forth the relevant facts and legal arguments to the issues presented on appeal.

(b) *Time limit.* If an SBA response is filed, it must be filed within 45 calendar days after issuance of the Notice and Order.

(c) *Close of record.* The record will close 45 calendar days from the issuance of the Notice and Order, unless the Judge decides otherwise. Generally, filings after the close of record will not be considered.

(d) *Service.* If a response is filed, the SBA must file its response with OHA, and serve a copy of the response upon the appellant or its attorney, as applicable by utilizing the OHA Case Portal.

(e) *Reply to response.* Generally, a reply to a response is not permitted unless the Judge directs otherwise. *See* § 134.206(e). However, upon motion (*see* § 134.211), and under terms needed to avoid prejudice to any non-moving party, the Judge may permit the filing and service of a supplemental pleading after review of SBA's response and/or the administrative record. The proposed supplemental pleading must be filed and served with the motion utilizing the OHA Case Portal.

§ 134.1209 Evidence beyond the record, discovery, and oral hearings.

(a) Generally, the Judge may not admit evidence beyond the administrative record.

(b) Neither discovery nor oral hearings will be permitted in appeals from final SBA loan review decisions.

(c) All appeals under this subpart will be decided solely on a review of the administrative record, the appeal petition, any response, any reply or supplemental pleading, and filings related to objection to the administrative record.

§ 134.1210 Standard of review.

The standard of review is whether the final SBA loan review decision was based on clear error of fact or law. The appellant has the burden of proof.

§ 134.1211 Decision on appeal.

(a) *Time limits and contents.* The Judge will issue his or her decision within 45 calendar days after the close of record, as practicable. The decision will contain findings of fact and conclusions of law, the reasons for such findings and conclusions, and any relief ordered. The decision will be served upon appellant and SBA utilizing the OHA Case Portal.

(b) *Initial decision.* The Judge's decision on the appeal is an initial decision. However, unless a request for reconsideration is filed pursuant to paragraph (c) of this section or the SBA Administrator, solely within the Administrator's discretion, decides to review or reverse the initial decision pursuant to paragraph (d) of this section, an initial decision shall become the final decision of SBA 30 calendar days after its service. The discretionary authority of the Administrator does not create any additional rights of appeal on the part of an appellant not otherwise specified in SBA regulations in this chapter. Any decision pursuant to this subpart applies only to the PPP and does not apply to SBA's 7(a) Loan Program generally or to any interpretation or application of the regulations in part 120 or 121 of this chapter.

(c) *Reconsideration.* An initial decision of the Judge may be reconsidered. If a request for reconsideration is filed and the SBA Administrator does not exercise discretion to review or reverse

the initial decision under paragraph (d) of this section, OHA will decide the request for reconsideration and OHA's decision on the request for reconsideration is a reconsidered initial OHA decision.

(1) Either SBA or appellant may request reconsideration by filing with the Judge and serving a petition for reconsideration within 10 calendar days after service of the Judge's decision. The request for reconsideration must clearly show an error of fact or law material to the decision. SBA does not have to have filed a response to the borrower's appeal petition to request reconsideration of the initial decision of the Judge.

(2) The Judge may also reconsider a decision on his or her own initiative within 20 calendar days after service of the Judge's decision.

(3) A reconsidered initial OHA decision becomes the final decision of SBA 30 calendar days after its service unless the SBA Administrator, solely within the Administrator's discretion, decides to review or reverse the reconsidered initial OHA decision under paragraph (d) of this section. The discretionary authority of the Administrator does not create any additional rights of appeal on the part of an appellant not otherwise specified in SBA regulations in this chapter.

(d) *Administrator review.* Within 30 calendar days after the service of an initial OHA decision or a reconsidered initial OHA decision of a Judge, the SBA Administrator, solely within the Administrator's discretion, may elect to review and/or reverse an initial OHA decision or a reconsidered initial OHA decision. In the event that the Administrator elects to review and/or reverse an initial OHA decision and a timely request for reconsideration of a Judge's initial decision is also filed by an appellant pursuant to paragraph (c) of this section, the Administrator will consider such request for reconsideration. The Administrator's decision will become the final decision of the SBA upon issuance.

(e) *Precedent.* Neither initial nor final decisions rendered by OHA under this subpart are precedential.

(f) *Publication.* Final decisions are normally published without redactions on OHA's website. PPP decisions will likely contain confidential business and financial information and/or personally identifiable information. Therefore, OHA, within its full discretion, may publish final decisions issued under this section with any necessary redactions.

(g) *Appeal to Federal district court.* Final decisions may be appealed to the appropriate Federal district court only.

§ 134.1212 Effects of the decision.

OHA may affirm, reverse, or remand a final SBA loan review decision. If remanded, OHA no longer has jurisdiction over the matter unless a new appeal is filed as a result of a new final SBA loan review decision.

§ 134.1213 Equal Access to Justice Act.

A prevailing appellant is not entitled to recover attorney's fees. Appeals to OHA from final SBA loan review decisions under the PPP are not proceedings that are required to be conducted by an Administrative Law Judge under § 134.603.

§ 134.1214 Confidential information.

If a filing or other submission made pursuant to an appeal in this subpart contains confidential business and financial information; personally identifiable information; source selection sensitive information; income tax returns; documents and information covered under § 120.1060 of this chapter; or any other exempt information, that information is not available to the public pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552.

Subpart M—Rules of Practice for Appeals of Protest Determinations Regarding the Status of a Concern as a Certified HUBZone Small Business Concern

SOURCE: 88 FR 21089, Apr. 10, 2023, unless otherwise noted.

§ 134.1301 What is the scope of the rules in this subpart?

(a) The rules of practice in this subpart apply to all appeals to OHA from formal protest determinations made by

the Director of SBA's Office of HUBZone (D/HUB) in connection with a HUBZone status protest. Appeals under this subpart include any of the grounds for a HUBZone status protest specified in §126.801 of this chapter, as well as appeals from dismissals of HUBZone status protests by the D/HUB based on a finding that the protest was premature, untimely, nonspecific, not based upon protestable allegations, moot, or not filed by an interested party.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Appeals relating to formal size determinations and NAICS Code designations are governed by subpart C of this part.

§ 134.1302 Who may appeal a HUBZone status protest determination?

Appeals from HUBZone status protest determinations may be filed with OHA by the protested concern, the protester, or the contracting officer responsible for the procurement affected by the protest determination.

§ 134.1303 What time limits apply to filing an appeal from a HUBZone status protest determination?

Appeals from a HUBZone status protest determination must be commenced by filing and serving an appeal petition within ten (10) business days after the appellant receives the HUBZone status protest determination (*see* §134.204 for filing and service requirements). OHA shall dismiss any untimely appeal.

§ 134.1304 What are the effects of the filing of an appeal on the procurement at issue?

(a) If a timely appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(b) If a timely appeal is filed before contract award, the contracting officer must withhold award until the appellate decision is rendered, unless the contracting officer has determined that award and performance of the contract is in the best interests of the government.

§ 134.1305 What are the requirements for an appeal petition?

(a) *Format.* An appeal from a HUBZone status protest determination must be in writing. There is no required format for an appeal petition. However, it must include the following information:

(1) A copy of the protest determination;

(2) The date the appellant received the protest determination;

(3) A statement that the petitioner is appealing a HUBZone status protest determination issued by the D/HUB;

(4) A full and specific statement as to why the HUBZone status protest determination is alleged to be based on a clear error of fact or law, together with argument supporting such allegation;

(5) The solicitation number, the contract number (if applicable), and the name, address, and telephone number of the contracting officer; and

(6) The name, address, telephone number, facsimile number, and signature of the appellant or its attorney.

(b) *Service of appeal.* Concurrent with filing the appeal with OHA (*OHAFilings@sba.gov*), the appellant must serve copies of the entire appeal petition upon each of the following:

(1) The D/HUB at *hzappeals@sba.gov;*

(2) The contracting officer responsible for the procurement affected by a HUBZone determination;

(3) The protested concern (the business concern whose HUBZone status is at issue) or the protester; and

(4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law at *OPLservice@sba.gov*.

(c) *Certificate of service.* The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of §134.204(d).

(d) *Dismissal.* An appeal petition that does not meet all the requirements of this section may be dismissed by the Judge on the Judge's own initiative or upon motion of a respondent.

§ 134.1306 What are the service and filing requirements?

The provisions of §134.204 apply to the service and filing of all pleadings

and other submissions permitted under this subpart, unless otherwise indicated in this subpart.

§ 134.1307 What are the requirements for transmitting the protest file?

Upon receipt of an appeal petition, the D/HUB will send to OHA a copy of the protest file relating to that determination. The D/HUB will certify and authenticate that the protest file, to the best of the D/HUB's knowledge, is a true and correct copy of the protest file.

§ 134.1308 What is the standard of review?

The standard of review for an appeal of a HUBZone status protest determination is whether the D/HUB's determination was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence.

§ 134.1309 When will a Judge dismiss an appeal?

The presiding Judge must dismiss the appeal if:

(a) The appeal is untimely filed under § 134.1303;

(b) The appeal does not, on its face, allege facts that if proven to be true, warrant reversal or modification of the determination; or

(c) The matter has been decided or is the subject of adjudication before a court of competent jurisdiction over such matters; however, once an appeal has been filed, initiation of litigation of the matter in a court of competent jurisdiction will not preclude the Judge from rendering a final decision on the matter.

§ 134.1310 Who can file a response to an appeal petition and when must such a response be filed?

(a) *Who may respond.* Although not required, any person served with an appeal petition may file and serve a response supporting or opposing the appeal if he or she wishes to do so. The response should present arguments related to the issues presented on appeal.

(b) *Time limits.* If a person decides to file a response, the response must be filed within fifteen (15) business days after service of the appeal petition.

(c) *Service.* The respondent must serve its response upon the appellant and upon each of the persons identified in the certificate of service attached to the appeal petition pursuant to § 134.1305.

(d) *Reply to a response.* No reply to a response will be permitted unless the Judge directs otherwise.

§ 134.1311 Will the Judge permit discovery and oral hearings?

Discovery will not be permitted, and oral hearings will not be held.

§ 134.1312 What are the limitations on the introduction of new evidence?

The Judge may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals under this subpart will be decided solely on a review of the evidence in the written protest file, arguments made in the appeal petition, and response(s) filed thereto.

§ 134.1313 When is the record closed?

The record will close when the time to file a response to an appeal petition expires pursuant to § 134.1310.

§ 134.1314 When must the Judge issue the decision?

The Judge shall issue a decision, insofar as practicable, within forty-five (45) calendar days after close of the record.

§ 134.1315 What are the effects of the Judge's decision on the procurement at issue?

The Judge's decision is the final agency decision and becomes effective upon issuance. For the effects of the decision on the procurement at issue, *see* § 126.803(e) of this chapter.

§ 134.1316 Can a Judge reconsider an appeal decision?

(a) Any party who has appeared in the proceeding, or SBA, may request reconsideration of the OHA appeal decision by filing with the Judge and serving a petition for reconsideration on all the parties to the appeal within twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an

error of fact or law material to the decision. The Judge may also reconsider a decision on the Judge's own initiative, within twenty (20) calendar days after issuance of the written decision.

(b) The Judge may remand a proceeding to the D/HUB for a new HUBZone status protest determination if the D/HUB fails to address issues of decisional significance sufficiently, does not address all the relevant evidence, or does not identify specifically the evidence upon which it relied. Once remanded, OHA no longer has jurisdiction over the matter, unless a new appeal is filed as a result of the new HUBZone status protest determination.

PART 136—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE SMALL BUSINESS ADMINISTRATION

Sec.

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AUTHORITY: 29 U.S.C. 794.

SOURCE: 53 FR 19760, May 31, 1988, unless otherwise noted.

§ 136.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 136.102 Application.

This part applies to all programs or activities conducted by the Small Business Administration except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 136.103 Definitions.

For purposes of this part, the term—

Agency means the Small Business Administration.

Assistant Attorney General. Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the Agency's alleged discriminatory actions in sufficient detail to inform the Agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the Agency as having such an impairment.

Qualified individual with handicaps means—

(1) With respect to any Agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the Agency can demonstrate would result in a fundamental alteration in its nature;

(2) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(3) For purposes of employment, a person who qualifies under the definition contained at 29 CFR 1613.702(f), which is made applicable to this part by § 136.140.

Respondent means the organizational unit in which a complainant alleges that discrimination occurred.

Section 504 means section 504 of the Rehabilitation Act of 1973 ((Pub. L. 93–112, 87 Stat. 394) (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955) and the Rehabilitation Act Amendments of 1986 (Pub. L. 99–506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by SBA and not to activities of recipients of assistance from SBA.

§§ 136.104–136.109 [Reserved]

§ 136.110 Self-evaluation.

(a) The Agency shall, by July 17, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the Agency shall proceed to make the necessary modifications.

(b) The Agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The Agency shall, for at least three years following the self-evaluation, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

§ 136.111 Notice.

The Agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the Agency, and make such information available to them in such manner as the Administrator finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

§§ 136.112–136.129 [Reserved]

§ 136.130 General prohibition against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Agency.

(b) The Agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(1) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(2) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(3) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(4) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(5) Deny a qualified individual with handicaps the opportunity to participate as a member of planning, voluntary (such as SCORE or Ace) or advisory boards; or

(6) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(c) The Agency shall permit a qualified individual with handicaps the opportunity to participate in any of the Agency's programs or activities, despite the existence of permissibly separate or different programs or activities especially designed to accommodate qualified individuals with handicaps.

(d) The Agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose of effect of which would—

(1) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(2) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(e) The Agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would:

(1) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the Agency; or

(2) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(f) The Agency, in the selection of procurement contactors, may not use

criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(g) The Agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the Agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the Agency are not, themselves, covered by this part.

(h) The exclusion of individuals without handicaps from the benefits of a program limited by Federal statute or Executive Order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive Order to a different class of individuals with handicaps is not prohibited by this part.

(i) The Agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 136.131–136.139 [Reserved]

§ 136.140 Employment.

(a) No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program, or activity conducted by the Agency.

(b) The definitions, requirements and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) as established by the EEOC in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 136.141–136.148 [Reserved]

§ 136.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 136.150, no qualified individual with handicaps shall, because the Agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Agency.

§ 136.150 Program accessibility: Existing facilities.

(a) *General.* The Agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the Agency to make each of its existing facilities accessible to and usable by individuals with handicaps; or

(2) Require the Agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Agency has the burden of proving that compliance with § 136.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Administrator or Deputy Administrator after considering all Agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. The Administrator or Deputy Administrator's decision shall be made within 30 days of the initial decision by Agency personnel that an action would result in such an alteration or burdens. If an action would result in such an alteration or such burdens, the Agency shall take any other action that would not result in such an alteration or such burdens but would, nevertheless, ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* The Agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aids to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and

construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The Agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The Agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the Agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The Agency shall comply with the obligations established under this section by September 13, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by July 15, 1991, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Agency shall develop, by January 16, 1989, a transition plan setting forth the steps necessary to complete such changes. The Agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the Agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 136.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf if, or for the use of the Agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600—101–19.607, apply to buildings covered by this section.

§§ 136.152–136.159 [Reserved]

§ 136.160 Communications.

(a) The Agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The Agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Agency.

(i) In determining what type of auxiliary aid is necessary, the Agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The Agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the Agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The Agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Agency shall provide a sign at each primary entrance to each of its inaccessible facilities, directing users

to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the Agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Agency has the burden of proving that compliance with § 136.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Administrator or Deputy Administrator after considering all Agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. The Administrator or Deputy Administrator's decision shall be made within 30 days of the initial decision by Agency personnel that an action would result in such an alteration or burdens. If an action required to comply with this section would result in such as alteration or such burdens, the Agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 136.161–136.169 [Reserved]

§ 136.170 Compliance procedures.

(a) *Applicability*. Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the Agency.

(b) *Employment complaints*. The Agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by EEOC in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) *Filing a complaint*—(1) *Who may file*. Any person who believes that he or she has been subjected to discrimination prohibited by this part may file a complaint. An authorized representative of such person may file a complaint on his or her behalf. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class, or the authorized representative of a member of that class, may file a complaint.

(2) *Confidentiality*. The Chief, Assistant Administrator, Office of Equal Employment Opportunity & Civil Rights Compliance (AA/EEOCCR), shall hold in confidence the identity of any person submitting a complaint, unless the person submits written authorization otherwise, except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or proceeding under this part, or to cooperate with the Office of Inspector General in the performance of its responsibilities under the Inspector General Act of 1978, as amended.

(3) *When to file*. Complaints shall be filed within 180 days of the alleged act of discrimination, except when this deadline is extended by the AA/EEOCCR for good cause shown. For purposes of determining when a complaint is timely filed under this paragraph, a complaint mailed to the Agency shall be deemed filed on the date it is postmarked. Any other complaint shall be deemed filed on the date it is received by the Agency.

(4) *How to file*. Complaints may be delivered or mailed to the AA/EEOCCR Small Business Administration, 1441 L Street NW.—Room 501, Washington, DC 20416. Any other SBA official receiving a complaint under this part shall forward such complaint immediately to the AA/EEOCCR.

(d) *Notification to the Architectural and Transportation Barriers Compliance Board*. The agency shall promptly send to the Architectural and Transportation Barriers Compliance Board a copy of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968,

as amended, 42 U.S.C. 4151–4157 is not readily accessible to and usable by individuals with handicaps.

(e) *Acceptance of complaint.* (1) The AA/EEOCCR shall accept a complete complaint that is filed in accordance with paragraph (c) of this section and over which the Agency has jurisdiction. The AA/EEOCCR shall notify the complainant and the respondent of receipt and acceptance of the complaint.

(2) If the AA/EEOCCR receives a complaint that is not complete, he or she shall notify the complainant, within 30 days of receipt of the incomplete complaint, that additional information is needed. If the complainant fails to furnish the necessary information within 30 days of receipt of this notice, the AA/EEOCCR shall dismiss the complaint without prejudice.

(3) If the AA/EEOCCR receives a complaint over which the Agency does not have jurisdiction, he or she shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) *Investigation/Conciliation.* (1) Within 180 days of the receipt of a complete complaint the AA/EEOCCR shall complete the investigation of the complaint and attempt informal resolution. If no informal resolution is achieved, the AA/EEOCCR shall issue a letter of findings.

(2) The AA/EEOCCR may require Agency employees to cooperate in the investigation and attempted resolution of complaints. Employees who are required to participate in any investigation under this section shall do so as part of their official duties and during regular duty hours.

(3) The AA/EEOCCR shall furnish the complainant and the respondent with a copy of the investigative report and provide the complainant and respondent with an opportunity for informal resolution of the complaint.

(4) If a complaint is resolved informally, the terms of the agreement shall be reduced to writing and made part of the complaint file, with a copy of the agreement provided to the complainant and respondent. The written agreement may include a finding on the issue of discrimination and shall describe any corrective action to which the complainant and respondent have agreed.

(g) *Letter of findings.* If an informal resolution of the complaint is not reached, the AA/EEOCCR shall, within 180 days of receipt of the complete complaint, notify the complainant, the respondent and the Director, Office of Equal Employment Opportunity and Compliance (OEEOC), of the results of the investigation in a letter sent by certified mail, return receipt requested, and containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found;

(3) A notice of the right of the complainant and respondent to appeal to the Director, OEEOC; and

(4) A notice of the right of the complainant and respondent to request a hearing.

The letter of findings becomes the final Agency decision if neither party files an appeal within the time prescribed in paragraph (h)(1) of this section. The AA/EEOCCR shall certify that the letter of findings is the final Agency decision on the complaint at the expiration of that time.

(h) *Filing an appeal.* (1) Any notice of appeal to the AA/EEOCCR, with or without a request for hearing, shall be filed by the complainant or the respondent in writing with the AA/EEOCCR within 30 days of receipt from him or her of the letter required by paragraph (g) of this section. The notice shall be accompanied by a certificate of service attesting that the party has served a copy of his or her notice of appeal on all other parties to the proceeding. The AA/EEOCCR may extend this time limit for good cause shown pursuant to the procedure in paragraph (h)(3) of this section.

(2) If a timely notice of appeal without a request for hearing is filed, any other party may file a written request for hearing within the time limit specified in paragraph (h)(1) of this section or within 10 days of his or her receipt of such notice of appeal, whichever is later.

(3) A party may appeal to the AA/EEOCCR from a decision of the AA/EEOCCR that an appeal is untimely. This appeal shall be filed with the AA/

EEOCCR within 15 days of receipt of the decision from the AA/EEOCCR.

(4) Any request for hearing will be construed as a request for an oral hearing. The complainant's failure to file a timely request for a hearing in accordance with this part shall constitute waiver of the right to a hearing, but shall not preclude his or her submitting written information and argument to the AA/EEOCCR in connection with his or her notice of appeal.

(i) *Acceptance of appeal.* The AA/EEOCCR shall accept and process any timely filed appeal.

(1) If a notice of appeal is filed but no party requests a hearing, the AA/EEOCCR shall promptly transmit the complaint file, the letter of findings and the notice of appeal to the AA/EEOCCR.

(2) If a notice of appeal if filed and a party makes a timely request for a hearing, the AA/EEOCCR will transmit the notice of appeal, the request for hearing and the investigative file to the Office of Hearings and Appeals which office will assign the case to an administrative judge who will conduct a hearing in accordance with the procedures contained in 13 CFR part 134.

(j) *Decision.* (1) Where no request for a hearing is made, the AA/EEOCCR shall make the final Agency decision based on the contents of the complaint file, the letter of findings, the notice of appeal, and any responses to the notice of appeal filed by other parties. The decision shall be made within 60 days of receipt of the appeal or any response to the notice of appeal, whichever is applicable. If the AA/EEOCCR, determines that he or she needs additional information from any party, he or she shall request the information and provide the other party or parties an opportunity to respond to that information. The AA/EEOCCR shall have 60 days from receipt of the additional information or responses to such additional information, whichever is later, to make the decision. The AA/EEOCCR shall transmit his or her decision in writing to the parties. The decision shall set forth the findings, remedial actions, and reasons for the decision.

(2) Where a request for a hearing has been made, the administrative judge shall issue an initial decision, in writing, based on the hearing record, composed of the proposed findings of fact, conclusions of law, and remedies, to the parties and to the AA/EEOCCR within 30 days after receipt of the hearing transcripts, or within 30 days after the conclusion of the hearing if no transcript is made. This time limit may be extended with the permission of the AA/EEOCCR. The decision of the administrative judge shall be deemed to be the final decision of the Agency after 30 days, unless a party files a petition for review with the AA/EEOCCR, pursuant to 13 CFR 134.228(a) or the AA/EEOCCR issues an order stating his or her decision to review the initial decision, pursuant to 13 CFR 134.228(a). *See* 13 CFR 134.227(b).

(3) Where a petition for review is filed or a review is ordered by the AA/EEOCCR the AA/EEOCCR shall make the final decision of the Agency based on information in the complaint file, the letter of findings, the hearing record, the initial decision, the petition for review, and any responses to the petition or order. The decision shall be made within 60 days of receipt of the petition for review, the order, or any responses to such petition or order, whichever is later. If the AA/EEOCCR determines that he or she needs additional information from any party, he or she shall request the information and provide the other party or parties an opportunity to respond to that information. The AA/EEOCCR shall have 60 days from receipt of the additional information or responses to such additional information, whichever is later, to make the decision. The AA/EEOCCR shall transmit his or her decision by letter to the parties. The decision shall set forth the findings, recommended remedial actions, and reasons for the decision. The decision shall adopt, reject, or modify the initial decision of the administrative judge. If the decision is to reject or modify the initial decision, the decision letter shall set forth in detail the specific reasons for the rejection or modification.

(4) Any respondent required to take action under the terms of the decision of the Agency shall do so promptly. The AA/EEOCCR may require periodic compliance reports specifying:

(i) The manner in which compliance with the provisions of the decision has been achieved;

(ii) The reasons any action required by the final decision has not been taken; and

(iii) The steps being taken to ensure full compliance.

(k) The time limit cited in paragraph (f) of this section may be extended with the permission of the Assistant Attorney General.

(l) The Agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[53 FR 19760, May 31, 1988, as amended at 61 FR 2691, Jan. 29, 1996; 72 FR 50042, Aug. 30, 2007]

PART 140—DEBT COLLECTION

Subpart A—Overview

Sec.

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AUTHORITY: 5 U.S.C. 5514; 15 U.S.C. 634(b)(6); 31 U.S.C. 3711, 3716, 3720, 3720A and 3720D.

SOURCE: 60 FR 62191, Dec. 5, 1995, unless otherwise noted.

Subpart A—Overview

§ 140.1 What does this part cover?

This part establishes procedures which SBA may use in the collection, through offset or administrative wage garnishment, of delinquent debts owed to the United States. SBA's failure to comply with any provision of the regulations in this part is not available to any debtor as a defense against collection of the debt through judicial process or otherwise.

[70 FR 17587, Apr. 7, 2005]

Subpart B—Offset

§ 140.2 What is a debt and how can the SBA collect it through offset?

(a) A debt means an amount owed to the United States from loans made or guaranteed by the United States, and from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, fines, penalties, damages, interest, forfeitures, or any other source. You are a debtor if you owe an amount to the United States from any of these sources.

(b) SBA may collect past-due debts through offset by using any of three procedures: administrative offset, salary offset, or IRS tax refund offset. A past-due debt is one which has been reduced to judgment, has been accelerated, or has been due for at least 90 days.

(1) *Administrative offset.* SBA may withhold money it owes to the debtor in order to satisfy the debt. This procedure is an ''administrative offset'' and is authorized by 31 U.S.C. 3716.

(2) *Salary offset.* If the debtor is a federal employee (a civilian employee as defined by 5 U.S.C. 2105, an employee of the U.S. Postal Service or Postal Rate Commission, or a member of the Uniformed Services or Reserve of the Uniformed Services), SBA may deduct payments owed to SBA or another federal agency from the debtor's paycheck. This procedure is a ''salary offset'' and is authorized by 5 U.S.C. 5514.

(i) Any amount deducted from salary in any one pay period will not exceed 15 percent of a debtor's disposable pay, unless the debtor agrees in writing to a greater percentage.

(ii) SBA also may collect against travel advances, training expenses, disallowed payments, retirement benefits, or any other amount due the employee, including lump-sum payments.

(iii) If an employee has terminated employment after salary offset has been initiated, there are no limitations on the amount that can be withheld or offset.

(3) *IRS tax refund offset.* SBA may request that IRS reduce a debtor's tax refund by the amount of the debt, as authorized by 31 U.S.C. 3720A. Where available, administrative and salary offsets must be used before collection is attempted through income tax offset. SBA may refer a debt to the IRS for a tax refund offset and take additional action against the debtor to collect the debt at the same time or in sequence. When SBA makes simultaneous or sequential referrals (within six months of the initial notice), only one review pursuant to the rules in this part and the statutes authorizing them is required.

§ 140.3 What rights do you have when SBA tries to collect a debt from you through offset?

(a) SBA must write to you and tell you that it proposes to collect the debt by reducing your federal paycheck, withholding money the Government owes you, and/or reducing your tax refund.

(b) In its written notice to you, SBA must tell you the nature and amount of the debt; that SBA will begin procedures to collect the debt through reduction of your federal paycheck, administrative offset, or reduction of your tax refund; that you have an opportunity to inspect and copy Government records relating to the debt at your expense; and that, before collection begins, you have an opportunity to agree with SBA on a schedule for repayment of your debt.

(c) SBA also must tell you that unless you respond within 60 days from the date of the notice, it will disclose to consumer reporting agencies (also known as credit bureaus or credit agencies) that you are responsible for the debt and the specific information it intends to disclose in order to establish your identity. The amount, status, history of the debt, and agency program under which it arose also will be disclosed.

(d) If you respond to SBA within 60 days from the date of the notice, SBA will not disclose the information to consumer reporting agencies until it considers your response and determines that you owe a past-due, legally enforceable debt.

(e) Within 60 days of the notice you may present evidence that all or part of the debt is not past due or not legally enforceable.

(1) Where a salary offset or administrative offset is proposed, you will have the opportunity to present your evidence to SBA's Office of Hearings and Appeals (''OHA''). The rules in part 134 of this title govern the procedural rights to which you are entitled. In order to have a hearing before OHA, you must request a hearing within 15 days of receipt of the written notice described in this section. An OHA judge will issue a decision within 60 days of the date you filed your petition/request for a review or hearing with OHA, unless you were granted additional time within which to file your request for review.

(2) Where an income tax refund offset is proposed, you will have the opportunity to request a review and present your evidence to the appropriate SBA Commercial Loan Servicing Center at the address provided in the notice.

(f) SBA must consider any evidence you present and must first decide that a debt is past due and legally enforceable. A debt is legally enforceable if there is any forum, including a State or Federal Court or administrative agency, in which SBA's claim would not be barred on the date of offset. Non-judgment debts are enforceable for ten years; judgment debts are enforceable beyond ten years. You will be notified of SBA's decision at least 30 days before any offset deduction is made. You also will be notified of the amount, frequency, proposed beginning date, and duration of the deductions, as well as any obligation to pay interest, penalties, and administrative costs.

(g) If there is any substantial change in the status or amount of your debt, SBA will promptly report that change to each consumer reporting agency it originally contacted.

(h) SBA will obtain satisfactory assurances from each consumer reporting agency that the consumer reporting agency has complied with all federal laws relating to provision of consumer credit information.

(i) If your debt is being repaid by reduction of your income tax refund and you make any additional payments to

SBA, SBA will notify the IRS of these payments and your new balance within 10 business days of receiving your payment.

(j) When the debt of a federal employee is reduced to court judgment, the employee is not entitled to further review by SBA, but is only entitled to notice of a proposed salary offset resulting from the judgment. The amount deducted may not exceed 15% of disposable pay, except when the deduction of a greater amount is necessary to completely collect the debt within the employee's remaining period of employment.

(k) When another federal agency asks SBA to offset a debt for it, SBA will not initiate the requested offset until it has received from the creditor agency a written certification that the debtor owes a debt, its amount, and that the provisions of all applicable statutes and regulations have been complied with fully.

(l) SBA may make an offset prior to completion of the procedures described in this part, if:

(1) Failure to make an offset would substantially prejudice the government's ability to collect the debt; and

(2) The time before the payment would otherwise be made to you does not reasonably permit the completion of the procedures.

(3) Such prior offset then must be followed by the completion of the procedures described in this part.

(m) Where an IRS tax refund offset is sought, SBA must follow the Department of the Treasury's regulations governing offset of a past-due, legally enforceable debt against tax overpayment.

Subpart C—Administrative Wage Garnishment

§ 140.11 What type of debt is subject to administrative wage garnishment, and how can SBA administratively garnish your pay?

(a) *General.* SBA may order your employer to pay SBA a portion of your disposable pay to satisfy delinquent non-tax debt you owe to the United States. This process is called ''administrative wage garnishment'' and is authorized by 31 U.S.C. 3720D.

(b) *Scope.* (1) This section provides procedures for SBA to collect delinquent non-tax debts through administrative wage garnishment.

(2) This section applies despite any State law.

(3) Nothing in this section prevents SBA from settling for less than the full amount of a debt. See, for example, the Federal Claims Collection Standards (FCCS), 31 CFR parts 900–904.

(4) SBA's receipt of payments under this section does not prevent SBA from pursuing other debt collection remedies. SBA may pursue debt collection remedies separately or together with administrative wage garnishment.

(5) This section does not apply to the collection of delinquent non-tax debt owed to the United States from the wages of Federal employees. Federal pay is subject to the Federal salary offset procedures set forth in 5 U.S.C. 5514 and other laws, including subpart B of this part.

(6) Nothing in this section requires SBA to duplicate notices or administrative proceedings required by contract, other laws, or regulations.

(c) *Definitions.* In this section the following definitions apply:

Agency means the SBA or any entity, public or private, that pursues recovery of the debt on SBA's behalf.

Business day means Monday through Friday excluding Federal legal holidays.

Day means calendar day. For purposes of computation, the last day of the period will be included unless it is a Saturday, a Sunday, or a Federal legal holiday.

Debt or *claim* means any amount of money, funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by an individual, including debt administered by a third party as an agent for the Federal Government. Debt also includes accrued interest, administrative costs incurred in collection efforts by SBA or a lender participating in an SBA loan program, and penalties imposed pursuant to law or contract.

Debtor or you means an individual who owes a delinquent non-tax debt to the United States.

Delinquent non-tax debt means any debt not related to an obligation under the Internal Revenue Code of 1986, as amended, that has not been paid by the date specified in SBA's initial written demand for payment, or applicable agreement, unless other satisfactory payment arrangements have been made. For purposes of this section, the terms ''debt'' and ''claim'' are synonymous and refer to delinquent non-tax debt.

Disposable pay means that part of the debtor's compensation (including, but not limited to, salary, bonuses, commissions, and vacation pay) from an employer remaining after the deduction of health insurance premiums and any amounts required by law to be withheld. For purposes of this section, ''amounts required by law to be withheld'' include amounts for deductions such as social security taxes and withholding taxes, but do not include any amount withheld pursuant to a court order.

Employer means a person or entity that employs the services of others and that pays their wages or salaries. The term employer includes, but is not limited to, State and local Governments, but does not include an agency of the Federal Government.

Evidence of service means information retained by the Agency indicating the nature of the document to which it pertains, the date of mailing of the document, and to whom the document is being sent. Evidence of service may be retained electronically so long as the manner of retention is sufficient for evidentiary purposes.

Garnishment means the process of withholding amounts from an employee's disposable pay and the paying of those amounts to a creditor in satisfaction of a withholding order.

Withholding order means any order for withholding or garnishment of pay issued by an agency, or judicial or administrative body. For purposes of this section, the terms ''wage garnishment order'' and ''garnishment order'' have the same meaning as ''withholding order.''

(d) *When may the Agency initiate administrative wage garnishment proceedings?* Whenever the Agency determines you owe a delinquent non-tax debt, the Agency may initiate administrative wage garnishment proceedings to withhold a portion of your wages to satisfy the debt.

(e) *Notice Requirements.* (1) The Agency will send a written notice by first-class mail to your last known address at least 30 days before initiating garnishment. This pre-garnishment notice will inform you of:

(i) The type and amount of the debt;

(ii) The Agency's intent to collect the debt by making deductions from your pay until the debt is paid in full;

(iii) An explanation of your rights, including those listed below, and the timeframe within which you may exercise your rights.

(2) You have the right to:

(i) Inspect and copy non-privileged SBA records related to the debt;

(ii) Enter into a written repayment agreement with SBA under terms agreeable to SBA; and

(iii) Have a hearing before an SBA hearing official in accordance with paragraph (f) of this section concerning the existence or the amount of the debt or the terms of the proposed repayment schedule under the garnishment order. However, you are not entitled to a hearing concerning the terms of the proposed repayment schedule if those terms have been established by written agreement under paragraph (e)(2)(ii) of this section.

(3) The Agency will retain evidence of service showing when the Agency mailed the pre-garnishment notice.

(f) *What type of hearing must SBA give me?*—(1) *Procedural rules.* Procedural rules for the conduct of administrative wage garnishment hearings are established in this section.

(2) *Request for hearing.* You will be provided with a hearing, if you request one in writing disputing either the existence or amount of the debt or the terms of the repayment schedule (except a repayment schedule you and SBA agreed to in writing).

(3) *Type of hearing or review.* (i) You will have the right to an oral hearing only if the Hearing Official determines that the issues in dispute cannot be resolved solely by review of the documentary evidence, for example, when

the Hearing Official finds that the validity of the claim turns on the issue of credibility or veracity.

(ii) If the Hearing Official determines an oral hearing is needed, he or she will set the time and location. You may choose whether the oral hearing is conducted in person or by telephone. You must pay all travel expenses for yourself and your witnesses to attend an in-person hearing. SBA will pay telephone charges for telephone hearings.

(iii) If no oral hearing is needed, the Hearing Official will accord you a ''paper hearing,'' that is, the Hearing Official will decide the issues in dispute based upon a review of the written record. The Hearing Official will set a reasonable deadline for the submission of evidence.

(4) *Effect of timely request for hearing*. Subject to paragraph (f)(13) of this section (failure to appear), if the Hearing Official determines your written request for a hearing was received by the Hearing Official by the 15th business day after the Agency mailed the pre-garnishment notice, the Agency will not issue a garnishment order before the Hearing Official renders a decision.

(5) *Untimely request for hearing*. If the Hearing Official determines your written request for a hearing was not received by the Hearing Official by the 15th business day after the Agency mailed the pre-garnishment notice, the Agency will provide a hearing to you. However, the Agency may proceed with the issuance of a garnishment order and acceptance of payments unless the Hearing Official determines that the delay in filing the request was caused by factors over which you had no control, or that information received justifies a delay or cancellation of the garnishment order.

(6) *Hearing official*. A hearing official may be any qualified individual designated in the pre-garnishment notice.

(7) *Procedure*. After you request a hearing, the Hearing Official will decide what type of hearing to hold and will notify you and the SBA of:

(i) The date and time of a telephonic hearing;

(ii) The date, time, and location of an in-person oral hearing; or

(iii) The deadline for the submission of evidence for a written hearing.

(8) *Burden of proof*. (i) The SBA will have the burden of going forward to prove the existence or amount of the debt.

(ii) Thereafter, if you dispute the existence or amount of the debt, you must establish by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect. In addition, you may present evidence that the terms of the repayment schedule are unlawful, would cause you a financial hardship, or that collection of the debt may not be pursued due to operation of law.

(9) *Record*. The Hearing Official must maintain a summary record of any hearing provided under this section. A hearing is not required to be a formal evidentiary-type hearing; however, witnesses who testify in oral hearings will do so under oath or affirmation.

(10) *Date of decision*. The Hearing Official must render a written decision within 60 days of the date on which your request for a hearing was received by OHA. If the Hearing Official's decision is not rendered within that time, and the Agency had previously issued a garnishment order, the Agency must suspend garnishment beginning on the 61st day. This suspension must continue until the Hearing Official renders a decision.

(11) *Content of decision*. The written decision shall include:

(i) A summary of the facts presented;

(ii) The Hearing Official's findings, analysis and conclusions; and

(iii) The terms of any repayment schedule, if applicable.

(12) *Final agency action*. The decision of the hearing official is the final agency decision for the purposes of judicial review under the Administrative Procedure Act (5 U.S.C. 701 *et seq.*).

(13) *Failure to appear*. In the absence of good cause shown, a debtor who fails to appear at an oral hearing will be deemed as not having timely filed a request for a hearing.

(g) *Garnishment order*. (1) Unless the Agency receives an adverse decision from the Hearing Official or information it believes justifies delaying or canceling garnishment, the Agency will send the garnishment order to your employer by first-class mail, within the following time frames:

(i) If you did not make a timely request for a pre-garnishment hearing, within 30 days following the 15th business day after the Agency mailed the pre-garnishment notice;

(ii) If you did make a timely request for a pre-garnishment hearing, within 30 days after the final agency decision to proceed with garnishment; or,

(iii) As soon as reasonably possible thereafter.

(2) The garnishment order will be in a form prescribed by the Secretary of the Treasury, and will contain the signature of, or the image of the signature of, SBA's Administrator or his/her delegatee. The garnishment order will contain only the information necessary for compliance, including your name, address, and social security number, the instructions for garnishing your pay, and the address for sending payments.

(3) The Agency will retain evidence of service showing when it mailed the garnishment order.

(h) *Certification by employer.* Along with the garnishment order, the Agency will send your employer a certification, in a form determined by the Secretary of the Treasury. Your employer must complete and return this certification to us within the time stated in the certification instructions. The certification will include information about your employment status and the amount of your disposable pay available for garnishment.

(i) *Amounts withheld.* (1) Your employer must deduct the garnishment amount from your disposable pay during each pay period.

(2) Except as shown in paragraphs (i)(3) and (i)(4) of this section, the amount of garnishment will be the lesser of:

(i) The amount stated on the garnishment order, not to exceed 15% of your disposable pay; or,

(ii) The amount in 15 U.S.C. 1673(a)(2) (Restriction on Garnishment). This is the amount by which your disposable pay exceeds an amount equivalent to thirty times the minimum wage. See 29 CFR 870.10.

(3) If your pay is subject to other garnishment orders, the following applies:

(i) Unless otherwise provided by Federal law, the Agency garnishment orders must be paid in the amounts in paragraph (i)(2) of this section, and will have priority over other garnishment orders issued later. However, withholding orders for family support have priority over the Agency garnishment orders.

(ii) If amounts are being withheld from your pay because of a garnishment order issued before the Agency's garnishment order, or because of a garnishment order for family support issued at any time, the earlier or family support order will have priority, and the amount withheld because of the Agency garnishment order will be the lesser of:

(A) The amount calculated under paragraph (i)(2) of this section, or

(B) An amount equal to 25% of your disposable pay minus the amount withheld under the garnishment order(s) with priority.

(iii) If you owe more than one delinquent non-tax debt, the Agency may issue multiple garnishment orders if the amount withheld from your pay does not exceed the amount in paragraph (i)(2) of this section.

(4) You may give written consent for the Agency to garnish from your pay an amount greater than that in paragraphs (i)(2) and (i)(3) of this section.

(5) Your employer must promptly pay to the Agency all amounts withheld under a withholding order.

(6) Your employer is not required to change normal pay cycles to comply with the garnishment order.

(7) No assignment or allotment of your earnings that you have requested may interfere with or prohibit execution of the Agency 's garnishment order. The one exception to this rule is that you may assign or allot earnings because of a family support judgment or order.

(8) The garnishment order will state a reasonable time period within which your employer must begin wage garnishment. Your employer must withhold the designated amount from your wages each pay period until the Agency notifies your employer to stop wage garnishment.

(j) *Exclusions from garnishment.* The Agency may not garnish your wages if

the Agency knows you have been involuntarily unemployed at any time during the last 12 months. You are responsible for informing the Agency of the facts and circumstances of your unemployment.

(k) *Financial hardship.* (1) If your wages are subject to a garnishment order issued by the Agency, you may, at any time, request a review of the amount being withheld from your wages based on a material change in circumstances that causes you financial hardship, such as disability, divorce, or catastrophic illness. You may send your request to the Director of SBA's loan servicing center in Birmingham, Alabama.

(2) If you request review under paragraph (k)(1) of this section, you must specifically state why the current amount of garnishment causes you financial hardship and you must send documentation supporting your claim.

(3) If the Agency finds financial hardship, the Agency will decide how much and how long to reduce the amount garnished from your pay. The Agency will notify your employer of any reductions.

(l) *Ending garnishment.* (1) After the Agency has recovered the amount you owe, including interest, penalties, and administrative costs consistent with the FCCS, the Agency will send a notice to your employer to stop wage garnishment with a copy to you.

(2) The Agency will review your account to ensure that garnishment has stopped if you have paid your debt in full.

(m) *Prohibited actions.* No employer may fire, refuse to employ, or take disciplinary action against you because of a withholding order issued by the Agency.

(n) *Refunds.* (1) The Agency must promptly refund any amount collected by administrative wage garnishment if either—

(i) A Judge, after a hearing held under paragraph (f) of this section, determines you do not owe a debt to the United States; or

(ii) The Agency determines that your employer continued submitting to the Agency withheld wages after you had paid your debt in full.

(2) Refunds of amounts collected will not earn interest unless required by federal law or contract.

(o) *Right of action.* The Agency may sue your employer for any amount that the employer fails to withhold from wages owed and payable to you in accordance with paragraphs (g) and (i) of this section. However, the Agency may not file such a suit until the collection action involving you has ended unless earlier filing is necessary to avoid expiration of any applicable statute of limitations period. For purposes of this section, the collection action involving you ends when the Agency stops the collection action in accordance with the FCCS or other applicable standards. In any event, the collection action involving you will be deemed ended if the Agency has not received any payments from you to satisfy your debt, in whole or in part, for a period of one (1) year.

[70 FR 17587, Apr. 7, 2005, as amended at 73 FR 63628, Oct. 27, 2008]

PART 142—PROGRAM FRAUD CIVIL REMEDIES ACT REGULATIONS

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AUTHORITY: 15 U.S.C. 634(b); 31 U.S.C. 3803(g)(2).

SOURCE: 61 FR 2691, Jan. 29, 1996, unless otherwise noted.

OVERVIEW AND DEFINITIONS

§ 142.1 Overview of regulations.

(a) *Statutory basis.* This part implements the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801–3812 (''the Act''). The Act provides SBA and other federal agencies with an administrative remedy to impose civil penalties and assessments against persons making false claims and statements. The Act also provides due process protections to all persons who are subject to administrative proceedings under this part.

(b) *Possible remedies for program fraud.* In addition to any other penalty which may be prescribed by law, a person who submits, or causes to be submitted, a false claim or a false statement to SBA is subject to a civil penalty of not more than $13,508 for each statement or claim, regardless of whether property, services, or money is actually delivered or paid by SBA. If SBA has made any payment, transferred property, or provided services in reliance on a false claim, the person submitting it is also subject to an assessment of not more than twice the amount of the false claim. This assessment is in lieu of damages sustained by SBA because of the false claim.

[61 FR 2691, Jan. 29, 1996, as amended at 81 FR 31492, May 19, 2016; 82 FR 9969, Feb. 9, 2017; 83 FR 7363, Feb. 21, 2018; 84 FR 12061, Apr. 1, 2019; 85 FR 13727, Mar. 10, 2020; 86 FR 52957, Sept. 24, 2021; 87 FR 28758, May 11, 2022; 88 FR 50005, Aug. 1, 2023]

§ 142.2 What kind of conduct will result in program fraud enforcement?

(a) Any person who makes, or causes to be made, a false, fictitious, or fraudulent claim or written statement to SBA is subject to program fraud enforcement. A ''person'' means any individual, partnership, corporation, association, or other legal entity.

(b) If more than one person makes a false claim or statement, each person is liable for a civil penalty. If more than one person makes a false claim which has induced SBA to make payment, an assessment is imposed against each person. The liability of each such person to pay the assessment is joint and several, that is, each is responsible for the entire amount.

(c) No proof of specific intent to defraud is required to establish liability under this part.

§ 142.3 What is a claim?

(a) Claim means any request, demand, or submission:

(1) Made to SBA for property, services, or money;

(2) Made to a recipient of property, services, or money from SBA or to a party to a contract with SBA for property or services, or for the payment of

money. This provision applies only when the claim is related to the property, services or money from SBA or to the contract with SBA; or

(3) Made to SBA which decreases an obligation to pay or account for property, services, or money.

(b) A claim can relate to grants, loans, insurance, or other benefits, and includes SBA guaranteed loans made by participating lenders. A claim is made when it is received by SBA, an agent, fiscal intermediary, or other entity acting for SBA, or when it is received by the recipient of property, services, or money, or the party to the contract.

(c) Each voucher, invoice, claim form, or individual request or demand for property, services, or money constitutes a separate claim.

§ 142.4 What is a statement?

A ''statement'' means any written representation, certification, affirmation, document, record, or accounting or bookkeeping entry made with respect to a claim or with respect to a contract, bid or proposal for a contract, grant, loan or other benefit from SBA. ''From SBA'' means that SBA provides some portion of the money or property in connection with the contract, bid, grant, loan, or benefit, or is potentially liable to another party for some portion of the money or property under such contract, bid, grant, loan, or benefit. A statement is made, presented, or submitted to SBA when it is received by SBA or an agent, fiscal intermediary, or other entity acting for SBA.

§ 142.5 What is a false claim or statement?

(a) A claim submitted to SBA is a ''false'' claim if the person making the claim, or causing the claim to be made, knows or has reason to know that the claim:

(1) Is false, fictitious or fraudulent;

(2) Includes or is supported by a written statement which asserts or contains a material fact which is false, fictitious, or fraudulent;

(3) Includes or is supported by a written statement which is false, fictitious or fraudulent because it omits a material fact that the person making the statement has a duty to include in the statement; or

(4) Is for payment for the provision of property or services which the person has not provided as claimed.

(b) A statement submitted to SBA is a false statement if the person making the statement, or causing the statement to be made, knows or has reason to know that the statement:

(1) Asserts a material fact which is false, fictitious, or fraudulent; or

(2) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in the statement. In addition, the statement must contain or be accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement.

§ 142.6 What does the phrase "know or have reason to know" mean?

A person knows or has reason to know (that a claim or statement is false) if the person:

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent; or

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Procedures Leading to Issuance of a Complaint

§ 142.7 Who investigates program fraud?

The Inspector General, or his designee, is responsible for investigating allegations that a false claim or statement has been made. In this regard, the Inspector General has authority under the Program Fraud Civil Remedies Act and the Inspector General Act of 1978 (5 U.S.C. App. 3), as amended, to issue administrative subpoenas for the production of records and documents. The methods for serving a subpoena are set forth in part 101 of this chapter.

§ 142.8 What happens if program fraud is suspected?

(a) If the investigating official concludes that an action under this part is warranted, the investigating official submits a report containing the findings and conclusions of the investigation to a reviewing official. The reviewing official is the General Counsel or his designee. If the reviewing official determines that the report provides adequate evidence that a person submitted a false claim or statement, the reviewing official transmits to the Attorney General written notice of an intention to refer the matter for adjudication, with a request for approval of such referral. This notice will include the reviewing official's statements concerning:

(1) The reasons for the referral;

(2) The claims or statements upon which liability would be based;

(3) The evidence that supports liability;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in the false claim or statement;

(5) Any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) The likelihood of collecting the proposed penalties and assessments.

(b) If at any time, the Attorney General or designee requests in writing that this administrative process be stayed, the Administrator must stay the process immediately. The Administrator may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 142.9 When will SBA issue a complaint?

SBA will issue a complaint:

(a) If the Attorney General (or designee) approves the referral of the allegations for adjudication; and

(b) In a case of submission of false claims, if the amount of money or the value of property or services demanded or requested in a false claim, or a group of related claims submitted at the same time, does not exceed $150,000. A group of related claims submitted at the same time includes only those claims arising from the same transaction (such as a grant, loan, application, or contract) which are submitted together as part of a single request, demand, or submission.

§ 142.10 What is contained in a complaint?

(a) A complaint is a written statement giving notice to the person alleged to be liable under 31 U.S.C. 3802 of the specific allegations being referred for adjudication and of the person's right to request a hearing with respect to those allegations. The person alleged to have made false statements or to have submitted false claims to SBA is referred to as the ''defendant.''

(b) The reviewing official may join in a single complaint false claims or statements that are unrelated or were not submitted simultaneously, regardless of the amount of money or the value of property or services demanded or requested.

(c) The complaint will state that SBA seeks to impose civil penalties, assessments, or both, against each defendant and will include:

(1) The allegations of liability against each defendant, including the statutory basis for liability, identification of the claims or statements involved, and the reasons liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which each defendant may be held liable;

(3) A statement that each defendant may request a hearing by filing an answer and may be represented by a representative;

(4) Instructions for filing such an answer;

(5) A warning that failure to file an answer within 30 days of service of the complaint will result in imposition of the maximum amount of penalties and assessments.

(d) The reviewing official must serve any complaint on the defendant and provide a copy to the Office of Hearings and Appeals (OHA). If a hearing is requested, an Administrative Law Judge (ALJ) from OHA will serve as the Presiding Officer.

§ 142.11 How will the complaint be served?

(a) The complaint must be served on individual defendants directly, a partnership through a general partner, and on corporations or on unincorporated associations through an executive officer or a director, except that service also may be made on any person authorized by appointment or by law to receive process for the defendant.

(b) The complaint may be served either by:

(1) Registered or certified mail (return receipt requested) addressed to the defendant at his or her residence, usual dwelling place, principal office or place of business; or by

(2) Personal delivery by anyone 18 years of age or older.

(c) The date of service is the date of personal delivery or, in the case of service by registered or certified mail, the date of postmark.

(d) Proof of service—

(1) When service is made by registered or certified mail, the return postal receipt will serve as proof of service.

(2) When service is made by personal delivery, an affidavit of the individual serving the complaint, or written acknowledgment of receipt by the defendant or a representative, will serve as proof of service.

(e) When served with the complaint, the defendant also should be served with a copy of this part 142 and 31 U.S.C. 3801–3812.

PROCEDURES FOLLOWING SERVICE OF A COMPLAINT

§ 142.12 How does a defendant respond to the complaint?

(a) A defendant may file an answer with the reviewing official and the Office of Hearings and Appeals within 30 days of service of the complaint. An answer will be considered a request for an oral hearing.

(b) In the answer, a defendant—

(1) Must admit or deny each of the allegations of liability contained in the complaint (a failure to deny an allegation is considered an admission);

(2) Must state any defense on which the defendant intends to rely;

(3) May state any reasons why he or she believes the penalties, assessments, or both should be less than the statutory maximum; and

(4) Must state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer which meets the requirements set forth in paragraph (b) of this section, the defendant may file with the reviewing official a general answer denying liability, requesting a hearing, and requesting an extension of time in which to file a complete answer. A general answer must be filed within 30 days of service of the complaint.

(d) If the defendant initially files a general answer requesting an extension of time, the reviewing official must promptly file with the ALJ the complaint, the general answer, and the request for an extension of time.

(e) For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section. Such answer must be filed with OHA and a copy must be served on the reviewing official.

§ 142.13 What happens if a defendant fails to file an answer?

(a) If a defendant does not file any answer within 30 days after service of the complaint, the reviewing official will refer the complaint to the ALJ.

(b) Once the complaint is referred, the ALJ will promptly serve on the defendant a notice that an initial decision will be issued.

(c) The ALJ will assume the facts alleged in the complaint to be true and, if such facts establish liability under the statute, the ALJ will issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, when a defendant fails to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed in the initial decision.

(e) The initial decision becomes final 30 days after it is issued.

(f) If, at any time before an initial decision becomes final, a defendant files a motion with the ALJ asking that the case be reopened and describing the extraordinary circumstances that prevented the defendant from filing an answer, the initial decision will be stayed until the ALJ makes a decision on the motion. The reviewing official may respond to the motion.

(g) If, in his motion to reopen, a defendant demonstrates extraordinary circumstances excusing his failure to file a timely answer, the ALJ will withdraw the initial decision, and grant the defendant an opportunity to answer the complaint.

(h) A decision by the ALJ to deny a defendant's motion to reopen a case is not subject to review or reconsideration.

§ 142.14 What happens once an answer is filed?

(a) When the reviewing official receives an answer, he must file concurrently, the complaint and the answer with the ALJ, along with a designation of an SBA representative.

(b) When the ALJ receives the complaint and the answer, the ALJ will promptly serve a notice of oral hearing upon the defendant and the representative for SBA, in the same manner as the complaint, service of which is described in §142.11. The notice of oral hearing must be served within six years of the date on which the claim or statement is made.

(c) The notice must include:

(1) The tentative time, place and nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the defendant's representative and the representative for SBA; and

(6) Such other matters as the ALJ deems appropriate.

HEARING PROVISIONS

§ 142.15 What kind of hearing is contemplated?

The hearing is a formal proceeding conducted by the ALJ during which a defendant will have the opportunity to cross-examine witnesses, present testimony, and dispute liability.

§ 142.16 At the hearing, what rights do the parties have?

(a) The parties to the hearing shall be the defendant and SBA. Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff in an action under the False Claims Act may participate in the hearing to the extent authorized by the provisions of that Act.

(b) Each party has the right to:

(1) Be represented by a representative;

(2) Request a pre-hearing conference and participate in any conference held by the ALJ;

(3) Conduct discovery;

(4) Agree to stipulations of fact or law which will be made a part of the record;

(5) Present evidence relevant to the issues at the hearing;

(6) Present and cross-examine witnesses;

(7) Present arguments at the hearing as permitted by the ALJ; and

(8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing, as permitted by the ALJ.

§ 142.17 What is the role of the ALJ?

An ALJ from OHA serves as the Presiding Officer at all hearings, with authority as set forth in §134.218(b) of this chapter.

§ 142.18 Can the reviewing official or ALJ be disqualified?

(a) A reviewing official or an ALJ may disqualify himself or herself at any time.

(b) Upon motion of any party, the reviewing official or ALJ may be disqualified as follows:

(1) The motion must be supported by an affidavit containing specific facts establishing that personal bias or other

reason for disqualification exists, including the time and circumstances of the discovery of such facts;

(2) The motion must be filed promptly after discovery of the grounds for disqualification, or the objection will be deemed waived; and

(3) The party, or representative of record, must certify in writing that the motion is made in good faith.

(c) Once a motion has been filed to disqualify the reviewing official, the ALJ will halt the proceedings until resolving the matter of disqualification. If the ALJ determines that the reviewing official is disqualified, the ALJ will dismiss the complaint without prejudice. If the ALJ disqualifies himself or herself, the case will be promptly reassigned to another ALJ.

§ 142.19 How are issues brought to the attention of the ALJ?

All applications to the ALJ for an order or ruling are made by motion, stating the relief sought, the authority relied upon, and the facts alleged. Procedures for filing motions under this section are governed by § 134.211 of this chapter.

§ 142.20 How are papers served?

Except for service of a complaint or a notice of hearing under §§ 142.11 and 142.14(b) respectively, service of papers must be made as prescribed by § 134.204 of this chapter.

§ 142.21 How will the hearing be conducted and who has the burden of proof?

(a) The ALJ conducts a hearing in order to determine whether a defendant is liable for a civil penalty, assessment, or both and, if so, the appropriate amount of the civil penalty and/or assessment. The hearing will be recorded and transcribed, and the transcript of testimony, exhibits admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for a decision by the ALJ.

(b) SBA must prove a defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) A defendant must prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing will be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 142.22 How is evidence presented at the hearing?

(a) Witnesses at the hearing must testify orally under oath or affirmation unless otherwise ordered by the ALJ. At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition, a copy of which must be provided to all other parties, along with the last known address of the witness, in a manner which allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing.

(b) The ALJ determines the admissibility of evidence in accordance with § 134.223 (a) and (b) of this chapter.

§ 142.23 Are there limits on disclosure of documents or discovery?

(a) Upon written request to the reviewing official, the defendant may review all non-privileged, relevant and material documents, records and other material related to the allegations contained in the complaint. After paying SBA a reasonable fee for duplication, the defendant may obtain a copy of the records described.

(b) Upon written request to the reviewing official, the defendant may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint. If the document would otherwise be privileged, only the portion of the document containing exculpatory information must be disclosed. As used in this section, the term ''information'' does not include legal materials such as statutes or case law obtained through legal research.

(c) The notice sent to the Attorney General from the reviewing official is not discoverable under any circumstances.

(d) Other discovery is available only as ordered by the ALJ and includes only those methods of discovery allowed by § 134.213 of this chapter.

§ 142.24 Can witnesses be subpoenaed?

A party seeking the appearance and testimony of any individual or the production of documents or records at a hearing may request in writing that the ALJ issue a subpoena. Any such request must be filed with the ALJ not less than 15 days before the scheduled hearing date unless otherwise allowed by the ALJ for good cause. A subpoena shall be issued by the ALJ in the manner specified by §134.214 of this chapter.

§ 142.25 Can a party or witness object to discovery?

Any party or prospective witness may file a motion to quash a subpoena or to limit discovery or the disclosure of evidence. Motions to limit discovery or to object to the disclosure of evidence are governed by §134.213 of this chapter. Motions to limit or quash subpoenas are governed by §134.214(d) of this chapter.

§ 142.26 Can a party informally discuss the case with the ALJ?

No. Such discussions are forbidden as *ex parte* communications with the ALJ as set forth in §134.220 of this chapter. This does not prohibit a party from communicating with other employees of OHA to inquire about the status of a case or to ask routine questions concerning administrative functions and procedures.

§ 142.27 Are there sanctions for misconduct?

The ALJ may sanction a party or representative, as set forth in §134.219 of this chapter.

§ 142.28 Where is the hearing held?

The ALJ will hold the hearing in any judicial district of the United States:

(a) In which the defendant resides or transacts business; or

(b) In which the claim or statement on which liability is based was made, presented or submitted to SBA; or

(c) As agreed upon by the defendant and the ALJ.

§ 142.29 Are witness lists exchanged before the hearing?

(a) At least 15 days before the hearing or at such other time as ordered by the ALJ, the parties must exchange witness lists and copies of proposed hearing exhibits, including copies of any written statements or transcripts of deposition testimony that the party intends to offer in lieu of live testimony.

(b) If a party objects, the ALJ will not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to an opposing party unless the ALJ finds good cause for the omission or concludes that there is no prejudice to the objecting party.

(c) Unless a party objects within the time set by the ALJ, documents exchanged in accordance with this section are deemed to be authentic for the purpose of admissibility at the hearing.

Decisions and Appeals

§ 142.30 How is the case decided?

(a) The ALJ will issue an initial decision based only on the record. It will contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The ALJ will serve the initial decision on all parties within 90 days after close of the hearing or expiration of any allowed time for submission of post-hearing briefs. If the ALJ fails to meet this deadline, he or she shall promptly notify the parties of the reason for the delay and set a new deadline.

(c) The findings of fact must include a finding on each of the following issues:

(1) Whether any one or more of the claims or statements identified in the complaint violate this part; and

(2) If the defendant is liable for penalties or assessments, the appropriate amount of any such penalties or assessments, considering any mitigating or aggravating factors.

(d) The initial decision will include a description of the right of a defendant found liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the Administrator.

§ 142.31 Can a party request reconsideration of the initial decision?

(a) Any party may file a motion for reconsideration of the initial decision

with the ALJ within 20 days of receipt of the initial decision. If the initial decision was served by mail, there is a rebuttable presumption that the initial decision was received by the party 5 days from the date of mailing.

(b) A motion for reconsideration must be accompanied by a supporting brief and must describe specifically each allegedly erroneous decision.

(c) Any response to a motion for reconsideration must be filed within 20 days of receipt of such motion.

(d) The ALJ will dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(e) If the ALJ issues a revised initial decision upon motion of a party, that party may not file another motion for reconsideration.

§ 142.32 When does the initial decision of the ALJ become final?

(a) The initial decision of the ALJ becomes the final decision of SBA, and shall be binding on all parties 30 days after it is issued, unless any party timely files a motion for reconsideration or any defendant adjudged to have submitted a false claim or statement timely appeals to the SBA Administrator, as set forth in §142.33.

(b) If the ALJ disposes of a motion for reconsideration by denying it or by issuing a revised initial decision, the ALJ's order on the motion for reconsideration becomes the final decision of SBA 30 days after the order is issued, unless a defendant adjudged to have submitted a false claim or statement timely appeals to the Administrator, within 30 days of the ALJ's order, as set forth in §142.33.

§ 142.33 What are the procedures for appealing the ALJ decision?

(a) Any defendant who submits a timely answer and is found liable for a civil penalty or assessment in an initial decision may appeal the decision.

(b) The defendant may file a notice of appeal with the Administrator within 30 days following issuance of the initial decision, serving a copy of the notice of appeal on all parties and the ALJ. The Administrator may extend this deadline for up to thirty additional days if an extension request is filed within the initial 30 day period and shows good cause.

(c) The defendant's appeal will not be considered until all timely motions for reconsideration have been resolved.

(d) If a timely motion for reconsideration is denied, a notice of appeal may be filed within 30 days following such denial or issuance of a revised initial decision, whichever applies.

(e) A notice of appeal must be supported by a written brief specifying why the initial decision should be reversed or modified.

(f) SBA's representative may file a brief in opposition to the notice of appeal within 30 days of receiving the defendant's notice of appeal and supporting brief.

(g) If a defendant timely files a notice of appeal, and the time for filing motions for reconsideration has expired, the ALJ will forward the record of the proceeding to the Administrator.

§ 142.34 Are there any limitations on the right to appeal to the Administrator?

(a) A defendant has no right to appear personally, or through a representative, before the Administrator.

(b) There is no right to appeal any interlocutory ruling.

(c) The Administrator will not consider any objection or evidence that was not raised before the ALJ unless the defendant demonstrates that the failure to object was caused by extraordinary circumstances. If the appealing defendant demonstrates to the satisfaction of the Administrator that extraordinary circumstances prevented the presentation of evidence at the hearing, and that the additional evidence is material, the Administrator may remand the matter to the ALJ for consideration of the additional evidence.

§ 142.35 How does the Administrator dispose of an appeal?

(a) The Administrator may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment imposed by the ALJ in the initial decision or reconsideration decision.

(b) The Administrator will promptly serve each party to the appeal and the ALJ with a copy of his or her decision.

This decision must contain a statement describing the right of any person, against whom a penalty or assessment has been made, to seek judicial review.

§ 142.36 Can I obtain judicial review?

If the initial decision is appealed, the decision of the Administrator is the final decision of SBA and is not subject to judicial review unless the defendant files a petition for judicial review within 60 days after the Administrator serves the defendant with a copy of the final decision.

§ 142.37 What judicial review is available?

31 U.S.C. 3805 authorizes judicial review by the appropriate United States District Court of any final SBA decision imposing penalties or assessments, and specifies the procedures for such review. To obtain judicial review, a defendant must file a petition in a timely fashion.

§ 142.38 Can the administrative complaint be settled voluntarily?

(a) Parties may make offers of compromise or settlement at any time. Any compromise or settlement must be in writing.

(b) The reviewing official has the exclusive authority to compromise or settle the case from the date on which the reviewing official is permitted to issue a complaint until the ALJ issues an initial decision.

(c) The Administrator has exclusive authority to compromise or settle the case from the date of the ALJ's initial decision until initiation of any judicial review or any action to collect the penalties and assessments.

(d) The Attorney General has exclusive authority to compromise or settle the case while any judicial review or any action to recover penalties and assessments is pending.

(e) The investigating official may recommend settlement terms to the reviewing official, the Administrator, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Administrator or the Attorney General, as appropriate.

§ 142.39 How are civil penalties and assessments collected?

31 U.S.C. 3806 and 3808(b) authorize the Attorney General to bring specific actions for collection of such civil penalties and assessments including administrative offset under 31 U.S.C. 3716. The penalties and assessments may not, however, be administratively offset against an overpayment of federal taxes (then or later owed) to the defendant by the United States.

§ 142.40 What if the investigation indicates criminal misconduct?

(a) Any investigating official may:

(1) Refer allegations of criminal misconduct directly to the Department of Justice for prosecution or for suit under the False Claims Act or other civil proceeding;

(2) Defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution; or

(3) Issue subpoenas under other statutory authority.

(b) Nothing in this part limits the requirement that SBA employees report suspected violations of criminal law to the SBA Office of Inspector General or to the Attorney General.

§ 142.41 How does SBA protect the rights of defendants?

These procedures separate the functions of the investigating official, reviewing official, and the ALJ, each of whom report to a separate organizational authority in accordance with 31 U.S.C. 3801. Except for purposes of settlement, or as a witness or a representative in public proceedings, no investigating official, reviewing official, or SBA employee or agent who helps investigate, prepare, or present a case may (in such case, or a factually related case) participate in the initial decision or the review of the initial decision by the Administrator. This separation of functions and organization is designed to assure the independence and impartiality of each government official during every stage of the proceeding. The representative for SBA may be employed in the offices of either the investigating official or the reviewing official.

PART 143 [RESERVED]

PART 146—NEW RESTRICTIONS ON LOBBYING

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APPENDIX A TO PART 146—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 146—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: 31 U.S.C. 1352 and 15 U.S.C. 634(b)(6).

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

SOURCE: 55 FR 6737. 6747, Feb. 26, 1990, unless otherwise noted.

Subpart A—General

§ 146.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 146.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer

or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 146.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either Subpart B or C.

Subpart B—Activities by Own Employees

§ 146.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in §146.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 146.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §146.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal,

amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, *professional and technical services* shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 146.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 146.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §146.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in §146.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, *professional and technical services* shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a

professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ 146.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $23,727 and not more than $237,268 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $23,727 and not more than $237,268 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $23,727, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $23,727 and $237,268, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

[55 FR 6737. 6747, Feb. 26, 1990, as amended at 81 FR 31492, May 19, 2016; 82 FR 9969, Feb. 9, 2017; 83 FR 7363, Feb. 21, 2018; 84 FR 12061, Apr. 1, 2019; 85 FR 13727, Mar. 10, 2020; 86 FR 52957, Sept. 24, 2021; 87 FR 28758, May 11, 2022; 88 FR 50005, Aug. 1, 2023]

§ 146.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 146.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 146.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 146.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 146.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 146—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 146—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. **Type of Federal Action:** ☐ a. contract b. grant c. cooperative agreement d. loan e. loan guarantee f. loan insurance	2. **Status of Federal Action:** ☐ a. bid/offer/application b. initial award c. post-award	3. **Report Type:** ☐ a. initial filing b. material change **For Material Change Only:** year _____ quarter _____ date of last report _____

4. **Name and Address of Reporting Entity:** ☐ Prime ☐ Subawardee Tier _____, *if known*: **Congressional District,** *if known*:	5. **If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:** **Congressional District,** *if known*:
6. **Federal Department/Agency:**	7. **Federal Program Name/Description:** CFDA Number, *if applicable*: _____
8. **Federal Action Number,** *if known*:	9. **Award Amount,** *if known*: $
10. **a. Name and Address of Lobbying Entity** *(if individual, last name, first name, MI)*:	**b. Individuals Performing Services** *(including address if different from No. 10a) (last name, first name, MI)*:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. **Amount of Payment** *(check all that apply)*: $ _____ ☐ actual ☐ planned	13. **Type of Payment** *(check all that apply)*: ☐ a. retainer ☐ b. one-time fee ☐ c. commission ☐ d. contingent fee ☐ e. deferred ☐ f. other; specify: _____
12. **Form of Payment** *(check all that apply)*: ☐ a. cash ☐ b. in-kind; specify: nature _____ value _____	

14. **Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:**

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. **Continuation Sheet(s) SF-LLL-A attached:** ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.	**Signature:** _____ **Print Name:** _____ **Title:** _____ **Telephone No.:** _____ **Date:** _____
Federal Use Only:	**Authorized for Local Reproduction Standard Form - LLL**

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.

2. Identify the status of the covered Federal action.

3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.

4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.

5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.

6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.

7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.

8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."

9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.

10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).

11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.

12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.

13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.

14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.

15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.

16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ **Page** _____ **of** _____

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Standard Form - LLL-A

PART 147—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (NONPROCUREMENT)

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AUTHORITY: 41 U.S.C. 701–707.

SOURCE: 68 FR 66557, 66572, Nov. 26, 2003, unless otherwise noted.

Subpart A—Purpose and Coverage

§ 147.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

§ 147.105 Does this part apply to me?

(a) Portions of this part apply to you if you are either—

(1) A recipient of an assistance award from the SBA; or

(2) A(n) SBA awarding official. (See definitions of award and recipient in §§ 147.605 and 147.660, respectively.)

(b) The following table shows the subparts that apply to you:

If you are . . .	see subparts . . .
(1) A recipient who is not an individual	A, B and E.
(2) A recipient who is an individual	A, C and E.
(3) A(n) SBA awarding official	A, D and E.

§ 147.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the SBA Administrator or designee determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

§ 147.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in § 147.510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

Subpart B—Requirements for Recipients Other Than Individuals

§ 147.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

(a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

(1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§ 147.205 through 147.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 147.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 147.230).

§ 147.205 What must I include in my drug-free workplace statement?

You must publish a statement that—

(a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

(b) Specifies the actions that you will take against employees for violating that prohibition; and

(c) Lets each employee know that, as a condition of employment under any award, he or she:

(1) Will abide by the terms of the statement; and

(2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

§ 147.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 147.205 be given to each employee who will be engaged in the performance of any Federal award.

§ 147.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) Your policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

§ 147.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 147.205 and an ongoing awareness program as described in § 147.215, you must publish the statement and establish the program by the time given in the following table:

If . . .	then you . . .
(a) The performance period of the award is less than 30 days.	must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed.
(b) The performance period of the award is 30 days or more.	must have the policy statement and program in place within 30 days after award.

If . . .	then you . . .
(c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program.	may ask the SBA awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official.

§ 147.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by §147.205(c)(2), or you otherwise learn of the conviction. Your notification to the Federal agencies must—

(1) Be in writing;

(2) Include the employee's position title;

(3) Include the identification number(s) of each affected award;

(4) Be sent within ten calendar days after you learn of the conviction; and

(5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either—

(1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or

(2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

§ 147.230 How and when must I identify workplaces?

(a) You must identify all known workplaces under each SBA award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces—

(1) To the SBA official that is making the award, either at the time of application or upon award; or

(2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by SBA officials or their designated representatives.

(b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the SBA awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the SBA awarding official.

Subpart C—Requirements for Recipients Who Are Individuals

§ 147.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a(n) SBA award, if you are an individual recipient, you must agree that—

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

(1) In writing.

(2) Within 10 calendar days of the conviction.

(3) To the SBA awarding official or other designee for each award that you currently have, unless §147.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point,

it must include the identification number(s) of each affected award.

§ 147.301 [Reserved]

Subpart D—Responsibilities of SBA Awarding Officials

§ 147.400 What are my responsibilities as a(n) SBA awarding official?

As a(n) SBA awarding official, you must obtain each recipient's agreement, as a condition of the award, to comply with the requirements in—

(a) Subpart B of this part, if the recipient is not an individual; or

(b) Subpart C of this part, if the recipient is an individual.

Subpart E—Violations of this Part and Consequences

§ 147.500 How are violations of this part determined for recipients other than individuals?

A recipient other than an individual is in violation of the requirements of this part if the SBA Administrator or designee determines, in writing, that—

(a) The recipient has violated the requirements of subpart B of this part; or

(b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

§ 147.505 How are violations of this part determined for recipients who are individuals?

An individual recipient is in violation of the requirements of this part if the SBA Administrator or designee determines, in writing, that—

(a) The recipient has violated the requirements of subpart C of this part; or

(b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

§ 147.510 What actions will the Federal Government take against a recipient determined to have violated this part?

If a recipient is determined to have violated this part, as described in §147.500 or §147.505, the SBA may take one or more of the following actions—

(a) Suspension of payments under the award;

(b) Suspension or termination of the award; and

(c) Suspension or debarment of the recipient under 13 CFR Part 145, for a period not to exceed five years.

§ 147.515 Are there any exceptions to those actions?

The SBA Administrator may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the SBA Administrator determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

Subpart F—Definitions

§ 147.605 Award.

Award means an award of financial assistance by the SBA or other Federal agency directly to a recipient.

(a) The term award includes:

(1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.

(2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule 13 CFR Part 147 that implements OMB Circular A–102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

(1) Technical assistance that provides services instead of money.

(2) Loans.

(3) Loan guarantees.

(4) Interest subsidies.

(5) Insurance.

(6) Direct appropriations.

(7) Veterans' benefits to individuals (*i.e.*, any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

§ 147.610 Controlled substance.

Controlled substance means a controlled substance in schedules I through V of the Controlled Substances

Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

§ 147.615 Conviction.

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

§ 147.620 Cooperative agreement.

Cooperative agreement means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in §147.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

§ 147.625 Criminal drug statute.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

§ 147.630 Debarment.

Debarment means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

§ 147.635 Drug-free workplace.

Drug-free workplace means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

§ 147.640 Employee.

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

§ 147.645 Federal agency or agency.

Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

§ 147.650 Grant.

Grant means an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

§ 147.655 Individual.

Individual means a natural person.

§ 147.660 Recipient.

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

§ 147.665 State.

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 147.670 Suspension.

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Governmentwide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

PARTS 148–199 [RESERVED]