13
Revised as of January 1, 2008

Business Credit and Assistance

Containing a codification of documents
of general applicability and future effect

As of January 1, 2008

With Ancillaries

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To cite the regulations in this volume use title, part and section number. Thus, 13 CFR 101.100 refers to title 13, part 101, section 100.
Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:
- Title 1 through Title 16 .............................................................. as of January 1
- Title 17 through Title 27 ................................................................. as of April 1
- Title 28 through Title 41 .............................................................. as of July 1
- Title 42 through Title 50 ............................................................. as of October 1

The appropriate revision date is printed on the cover of each volume.

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The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

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The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

To determine whether a Code volume has been amended since its revision date (in this case, January 1, 2008), consult the "List of CFR Sections Affected (LSA)," which is issued monthly, and the "Cumulative List of Parts Affected," which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

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The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to display an OMB control number with their information collection request.
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What is incorporation by reference? Incorporation by reference was established by statute and allows Federal agencies to meet the requirement to publish regulations in the Federal Register by referring to materials already published elsewhere. For an incorporation to be valid, the Director of the Federal Register must approve it. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 552(a)). This material, like any other properly issued regulation, has the force of law.

What is a proper incorporation by reference? The Director of the Federal Register will approve an incorporation by reference only when the requirements of 1 CFR part 51 are met. Some of the elements on which approval is based are:

(a) The incorporation will substantially reduce the volume of material published in the Federal Register.

(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR part 51.

Properly approved incorporations by reference in this volume are listed in the Finding Aids at the end of this volume.

What if the material incorporated by reference cannot be found? If you have any problem locating or obtaining a copy of material listed in the Finding Aids of this volume as an approved incorporation by reference, please contact the agency that issued the regulation containing that incorporation. If, after contacting the agency, you find the material is not available, please notify the Director of the Federal Register, National Archives and Records Administration, Washington DC 20408, or call 202-741-6010.

**CFR indexes and Tabular guides**

A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled *CFR Index and Finding Aids*. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I). A list of CFR titles, chapters, and parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of “Title 3—The President” is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the “Contents” entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.
REPUBLICATION OF MATERIAL

There are no restrictions on the republication of material appearing in the Code of Federal Regulations.

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For a legal interpretation or explanation of any regulation in this volume, contact the issuing agency. The issuing agency’s name appears at the top of odd-numbered pages.

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RAYMOND A. MOSLEY,
Director,
Office of the Federal Register.
January 1, 2008.
Title 13—Business Credit and Assistance is composed of one volume. This volume contains chapter I—Small Business Administration, chapter III—Economic Development Administration Department of Commerce, chapter IV—Emergency Steel Guarantee Board, and chapter V—Emergency Oil and Gas Guarantee Board. The contents of this volume represent all current regulations codified under this title of the CFR as of January 1, 2008.

For this volume, Bonnie Fritts was Chief Editor. The Code of Federal Regulations publication program is under the direction of Michael L. White, assisted by Ann Worley.
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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

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.

Source: 61 F.R. 2394, Jan. 26, 1996, unless otherwise noted.

Subpart B—Employment of Private Counsel

§ 101.200 When does SBA hire private counsel?

Subpart C—Inspector General

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

Subpart D—Intergovernmental Partnership

§ 101.400 What is the purpose of this subpart?


Source: 61 F.R. 2394, Jan. 26, 1996, unless otherwise noted.
§ 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.


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

(a) The SBA's seal shall be in a manner and form set forth as follows:

(b) The Administrator, Deputy Administrator, General Counsel, Director, Office of Business Operations, Assistant Administrator for Hearings and Appeals, Director, Office of Business Development, Regional Administrators, District Directors, Branch Managers, the Inspector General, and Disaster Area Directors are authorized to—

(1) Certify and authenticate originals and copies of any books, records, papers, or other documents on file within SBA, or extracts taken from them.
§ 101.201 What are the minimum terms of private counsel's employment?

(a) Private counsel must perform all requested work in compliance with 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.


§ 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.

§ 101.107 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.

§ 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.
Small Business Administration

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-...
§ 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 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.

PART 102—RECORD DISCLOSURE AND PRIVACY

Subpart A—Disclosure of Information

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AUTHORITY: 5 U.S.C. 301, 552, 552a; 31 U.S.C.
9701; 44 U.S.C. 3501, et seq., E.O. 12600, 52 FR

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

Subpart A—Disclosure of

Information

otherwise noted.

§ 102.1 General provisions.

This subpart describes the procedures
that the U.S. Small Business Adminis-
tration (SBA) follows for responding to
requests made under the Freedom of

§ 102.2 Public reading rooms.

(a) SBA maintains a public reading
room in the Headquarters Reference
Library at 409 3rd St., SW., Suite 5000,
Washington, DC 20416 where you may
read and copy the following:

(1) Final SBA opinions and orders
issued by the Office of Hearings and
Appeals in adjudicating a case,
(2) Official non-privileged policy
statements, opinions, or interpreta-
tions,
(3) Standard operating procedures af-
fected members of the public,
(4) Records SBA has released in re-
spose to previous FOIA requests
which, because of their subject matter,
SBA determines are likely to be re-
quested again, and
(5) An index of the records referred to
under paragraph (a)(4) of this section.

(b) The records described in para-
graph (a) of this section are available
in the SBA Online Reading Room at
http://www.sba.gov/library/.

(c) Reading room records created on
or after November 1, 1996 are available
electronically.

§ 102.3 Requirements pertaining to the
submission of requests.

(a) You may make a request for SBA
records by writing directly to the pro-
gram or field office that maintains the
records, or to the Freedom of Informa-
tion/Privacy Acts (FOI/PA) Office by
mail to 409 3rd St., SW., Washington,
DC 20416 or fax to 202-205-7059 or e-mail
to foia@sba.gov. The office receiving
your request will forward it to the cor-
rect office. The correct office will con-
sider your request to be complete only
when you:

(1) Describe the records sought in
enough detail for an Agency employee
to locate the records with a reasonable
amount of effort;
(2) Agree to pay applicable fees pur-
suant to § 102.6, unless you seek a waiv-
er of fees; and
(3) Make an advance payment if ei-
ther the correct office estimates the
fees will exceed $250 or you owe for past
FOIA fees. If you owe past due FOIA
fees, you must pay the estimated
amount, plus any past due charges and
interest.

(b) If you make a request on behalf of
another person for information per-
taining to that person, your request
must include an authorization signed
by the latter, allowing SBA to release
such information to you.

(c) To make a Privacy Act request
for records about yourself, you must
follow the procedures detailed in
§102.34(b) of Subpart B.
§ 102.4 Timing of responses to requests.

(a) In general. Subject to paragraphs (b) and (c) of this section, once the correct office receives your complete request, that office must respond within 20 working days unless that office notifies you in writing that the time is extended by an additional 10 working days for one or more of the following reasons:

(1) The need to search for and collect the requested records from field facilities or other establishments separate from the office processing the request;
(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(b) Additional time. Where an extension of more than ten working days will be necessary due to exceptional circumstances, the correct office will give the requester an opportunity to modify the request so it may be processed within the usual time limits in paragraph (a) of this section, or to arrange an alternative time period for processing the request or a modified request.

(c) Expedited processing. (1) SBA will give expedited processing to requests and appeals upon written request, if one of the following conditions is met:

(i) You demonstrate someone’s life or physical safety will be in imminent danger if SBA does not expedite its response to your request; or
(ii) You are a news media representative (as defined in §102.6(b)(8)) who demonstrates an urgent need to inform the public about an actual or alleged Federal government activity.

(2) You must provide a written statement, certified to be true and correct to the best of your knowledge and belief, explaining in detail one of these circumstances of “compelling need” and submit it to the correct office. Within 10 working days of its receipt of such a statement, or sooner, if SBA concludes that circumstances warrant, that office will notify you of its decision whether or not to grant expedited processing. If expedited processing is granted, the request shall be given priority and processed as soon as practicable. If an expedited processing request is denied, an appeal may be submitted which will be acted on expeditiously.

(d) Multiple requests. Where an office believes that multiple requests submitted by a requester, or by a group of collaborating requesters, constitute a single request that would otherwise involve unusual circumstances, and the requests involve clearly related matters, they will be aggregated for processing.

§ 102.5 Responses to requests.

Within the time limits described in §102.4, SBA will respond to your request in writing. SBA’s response will do one or more of the following:

(a) Advise you that SBA is releasing the requested documents;
(b) Explain why SBA has decided not to give you all or some of the records requested, citing specific FOIA exemptions where applicable and noting the number of pages withheld (except where noting the number of pages withheld would harm an interest protected by an exemption), and explain how to appeal that decision;
(c) Provide a cost estimate or bill you for the actual fee, less any advance payment you have made. SBA will not provide any records until payment in full is received; and/or
(d) Advise you that SBA will refer your request for records generated by another Federal agency to that agency for proper processing.

§ 102.6 Fees.

(a) In general. SBA will charge fees for processing requests as outlined in this section. Fees must be paid by check or money order made payable to SBA.

(b) Definitions and applicable fees. For purposes of this section:

(1) Direct costs means those expenses that SBA actually incurs in searching for and duplicating (and, in the case of commercial use requesters, reviewing)
documents in response to an FOIA request. Direct costs include the salary of the employee performing the work and the cost of operating duplication machinery.

(2) Search means the process of looking for and retrieving records responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. SBA may charge search fees even if they fail to locate records or if records located are determined to be exempt from disclosure. Search fees are $30 per hour.

(3) Duplication means the making of a copy of a record. Copies can take the form of paper, microfilm, audiovisual materials, or electronic records (for example, magnetic tape or disk), among others. SBA will charge $.10 per page for photocopy duplication and the actual cost for other methods. SBA will honor a requester’s specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format by the office responding to the request.

(4) Review refers to the examination of documents responsive to a request in order to determine whether any portion of it is exempt from disclosure. It includes processing any record for disclosure, e.g., all necessary redaction and preparation for disclosure. It also includes time spent considering any formal objection to disclosure made by a business submitter under §102.7, but does not include time spent resolving general legal or policy issues regarding the application of exemptions. Review costs are recoverable even if a record is ultimately not disclosed. Only commercial use requesters are assessed review costs. Review costs are $30 per hour.

(5) A commercial use request refers to a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade or profit interests, which can include furthering those interests through litigation. When it appears the requester will put the requested records to a commercial use, either because of the nature of the request itself or where SBA has reasonable cause to doubt a requester’s stated use, SBA will seek additional clarification. SBA will charge commercial use requesters the full direct costs of searching for, reviewing for release, and duplicating the records sought.

(6) Educational institution means a state-certified preschool, elementary or secondary school; an accredited college or university; an accredited institution of professional education; or any accredited or state-certified institution of vocational education that operates a program of scholarly research. An educational institution requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research. SBA will provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages.

(7) Noncommercial scientific institution means an institution that is not operated on a commercial basis, 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 noncommercial scientific institution requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research. SBA will charge noncommercial scientific institution requesters for the cost of reproduction alone after the first 100 pages.

(8) A representative of the news media is a requester actively gathering information for one or more news media who:

(i) Is employed by a news medium or

(ii) Has a reasonable expectation of selling the information obtained to one or more news media. A news medium is an entity organized and operated to distribute information to the general public. A news medium may provide information by subscription and may target its dissemination to a narrow section of the general public so long as any member of the general public may...
purchase information from it. A request for records supporting the news dissemination function of the requester shall not be considered to be for commercial use. A news media requester must show that the request is authorized by and is made under the auspices of a qualifying news medium and that the records are not sought for a commercial use but are sought to further the dissemination of information to the general public. SBA will provide documents to representatives of the news media for the cost of reproduction alone, excluding charges for the first 100 pages.

(9) A member of the general public is a requester who does not fit into any of the categories in paragraphs (b)(1) through (8) of this section. SBA will charge requesters in this category search time after the first two hours and duplication after the first 100 pages.

(c) Other charges. SBA will recover the full costs of providing special services, such as certifying that records are true copies or sending copies by other than ordinary mail, to the extent that SBA elects to provide them.

(d) Charging interest. SBA will charge interest on any unpaid bill starting on the 31st day following the date of billing. Interest charges will accrue at the maximum rate allowed under 31 U.S.C. 3717. If still unpaid by the 91st day after the billing date, SBA may notify consumer credit reporting agencies of the delinquency and/or take other appropriate action in accordance with law.

(e) Fee waivers or reductions. SBA will furnish responsive records without charge or at a reduced charge when a requester can show that disclosure of the 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.

(1) You must submit a request for a fee waiver or reduction to the initial processing office.

(2) On the basis of the information that you provide, the initial processing office will determine whether you meet the fee waiver requirements outlined in this section.

§ 102.7 Business information.

(a) In general. Business information provided to SBA from a submitter will only be disclosed in accordance with this section.

(b) Definitions. For purposes of this section:

(1) Business information is commercial or financial information obtained by SBA from a submitter that may arguably be protected from disclosure under Exemption 4 of the FOIA.

(2) Submitter is any person or entity who provides business information, directly or indirectly to SBA.

(c) Designation of business information. Submitters of business information will use reasonable, good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of their submissions that they consider to be protected from disclosure under Exemption 4 of the FOIA. Designations will expire ten years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(d) Notice to submitters. SBA will provide a submitter with written notice of a FOIA request or administrative appeal that seeks its business information whenever SBA intends to release that information. The notice will either describe the business information or include copies of the records in the form SBA proposes to release them. SBA will also advise the requester that the submitter is being given the opportunity to object to any proposed disclosure. When notification of a voluminous number of submitters is required, SBA may post or publish such a notice in a place reasonably likely to accomplish notice.

(e) Opportunity to object to disclosure. SBA will give the submitter ten working days from the date of the written notice to submit a detailed written statement specifying all grounds upon which disclosure is opposed. A reasonable extension of time may be granted by the correct office upon good cause shown by the submitter. The submitter’s statement must demonstrate why it believes information is a trade secret or commercial or financial information that is privileged or confidential. If a
§ 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;

(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
§ 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.

(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 United 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
§ 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 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.

§ 102.27 Access to records.

(a) Request for access to records. Unless the record is not subject to amendment or correction as stated in paragraph (f) of this section, any individual may request access to records about himself or herself by writing to the office that maintains the record, as described in §102.24. The request should identify each particular record in question, state the type of record sought, and state the reason(s) for the request. 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 access to 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 will be notified in a written decision and his request will be reprocessed in accordance with that appeal decision.

(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 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 as described in paragraph (d) of this section and of his or her right under the Privacy Act for court review of the decision.
(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 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 dependent 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
§ 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 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) Prevent the disclosure of investigative techniques; or
(7) 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.
4. 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 Government Operations of the House of Representatives.

§ 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.
103.1 Key definitions.
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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.

§ 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
§ 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 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 this “two master” prohibition 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.

§ 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.

PART 105—STANDARDS OF CONDUCT AND EMPLOYEE RESTRICTIONS AND RESPONSIBILITIES

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, 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 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 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) 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
§ 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.

§ 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.


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

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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 devise) 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 procedures, 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 Co-sponsored Activity;

(c) A listing of SBA’s and each Co-sponsor’s rights, duties and responsibilities with regard to the Co-sponsored 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 Co-sponsor will make to the Co-sponsored Activity; and

(2) A reasonable estimation of all anticipated expenses;

(e) A written statement that each Co-sponsor agrees that they will not make a profit on the Co-sponsored 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 Co-sponsored Activity as outlined in the budget and will be liquidated prior to other sources of funding for the Co-sponsored Activity.

§ 106.204 Who has the authority to approve and sign a Co-sponsorship 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 Co-sponsored Activity and sign each Co-sponsorship 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:
§ 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 Activity?
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;

(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 section, 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), 3(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;
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(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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107.1930 Effect of changes in this part 107 on transactions previously consummated.  

Authority: 15 U.S.C. 681 et seq., 683, 687(c), 687b, 687d, 687g, 687m, and Pub. L. 106-554, 114 Stat. 2763.  
Source: 61 FR 3189, Jan. 31, 1996, unless otherwise noted.
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 means an annual fee on Leverage issued on or after October 1, 1996 (except for Leverage issued pursuant to a commitment made by SBA before October 1, 1996), which is payable to SBA by Licensees, subject to the terms and conditions set forth in §107.1130(d).

Close Relative of an individual means:
(1) A current or former spouse;
(2) A father, mother, guardian, brother, sister, son, daughter; or

or certificate for a Partnership Licensee.

Assistant 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, a limited partner in a Partnership Licensee is not 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 partnership capital of the Licensee 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 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) through (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.
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 10 percent of a Partnership Licensee 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 Licensee;

(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.

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.

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 Securites has the meaning set forth in §107.800.

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).

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.

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. 80a-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 or Participating Securities, or the purchase of a Licensee's Preferred Securities, and any other SBA financial assistance evidenced by a security of the Licensee.

Leverageable Capital means Regulatory Capital, excluding unfunded commitments.

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.

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, for a Participating Securities issuer, each February 1, May 1, August 1, and November 1 during the term of a Participating Security.

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.

(2) Exclusion of questionable commitments. An investor’s commitment to a Licensee is excluded from Regulatory Capital if SBA determines that the collectibility of the commitment is questionable.

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 Licensee 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.

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 303(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.

Temporary Debt has the meaning set forth in §107.570.

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.
Small Business Administration

§ 107.140 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 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.

Wind-up Plan has the meaning set forth in §107.1160.


Subpart C—Qualifying for an SBIC License

§ 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 may not transfer its Leverage to a subsidiary Section 301(d) Licensee.

(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, you must show, to the satisfaction of SBA, that your current or proposed management is qualified and has the knowledge, experience, and capability necessary for investing in the types of businesses contemplated by the Act, these regulations and your business plan. You must designate at least one individual as the official responsible for contact with SBA.

§ 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 diversity requirement.

(a) 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) Except as provided in paragraph (b)(2) of this section, 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.

(2) Exception. An investor that is a traditional investment company, as determined by SBA, may own and control more than 70 percent of your Regulatory Capital and your Leverageable Capital. For purposes of this section, a traditional investment company must be a professionally managed firm organized exclusively to pool capital from more than one source for the purpose of investing in businesses that are expected to generate substantial returns to the firm’s investors. In determining whether a firm is a traditional investment company for purposes of this section, SBA will also consider:

(i) Whether the managers of the firm are unrelated to and unaffiliated with the investors in the firm;

(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;

(iii) Whether the firm benefits from the use of the SBIC only through the financial performance of the SBIC; and

(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) 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 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...
§ 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.


(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
§ 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:

(1) Licensees other than Participating Securities issuers. A Licensee that does not wish to be eligible to apply for Participating Securities must have Regulatory Capital of at least $5,000,000. As an exception to this general rule, SBA in its sole discretion and based on a showing of special circumstances and good cause 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) Participating Securities issuers. A Licensee that wishes to be eligible to apply for Participating Securities must have Regulatory Capital of at least $10,000,000, unless it demonstrates to SBA's satisfaction that it can be financially viable over the long term with a lower amount. Under no circumstances can the Licensee have Regulatory Capital of less than $5,000,000.

(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.

§ 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.

§ 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.
§ 107.250
(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.

§ 107.300 License application form and fee.
The license application must be submitted on SBA Form 415 together with a processing fee computed as follows:
(a) All license applicants will pay a base fee of $10,000.
(b) All applicants who will be Partnership Licensees will pay an additional $5,000 fee, for a total of $15,000.
(c) All applicants who will be issuing Participating Securities will pay an additional $5,000 fee, for a total of $15,000, or a total fee of $20,000 if they also intend to be Partnership Licensees.

Subpart D—Changes in Ownership, Control, or Structure of Licensee; Transfer of License

§ 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 of $10,000 must accompany any application for approval of one or more transactions or events that will result in a transfer of Control.

§ 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.

§ 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.

§ 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).

§ 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 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
§ 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 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 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 have outstanding Leverage or Ear-marked Assets, 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) 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 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 466) 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.

§ 107.504 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, by March 31, 2000, 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.

§ 107.505 Facsimile requirement.

You must be able to receive fax messages 24 hours per day at your primary office.
§ 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. 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.

(c) Deposit of funds in excess of the insured amount. You are permitted to deposit funds in a federally insured institution in excess of the institution’s 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.

BORROWING BY LICENSEES FROM NON-SBA SOURCES

§ 107.550 Prior approval of secured third-party debt of leveraged Licensees.

(a) Definition. In this § 107.550, “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, secured lines of credit, and secured Temporary Debt of a Licensee with outstanding Participating Securities.

(b) General rule. If you have outstanding Leverage, 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) Additional rule for secured lines of credit in existence on April 8, 1994. If you have outstanding Leverage and you have a secured line of credit that was created on or before April 8, 1994, you must receive SBA’s written approval of the line before you increase the amounts outstanding thereunder.

(d) Conditions for SBA approval. As a condition of granting its approval under this §107.550, 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...
Small Business Administration § 107.585

in your investor commitments in excess of 125 percent of the proposed borrowing.

(e) 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 Leverage does not exceed 150 percent of your Leverageable Capital; and
(4) 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.

§ 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.

§ 107.570 Restrictions on third-party debt of issuers of Participating Securities.

(a) General. Temporary Debt is the only debt (other than Leverage) that you are permitted to incur if you have applied to issue Participating Securities or if you have outstanding Participating Securities. For additional rules governing secured Temporary Debt, see §107.550.

(b) Definition of Temporary Debt. Temporary Debt means your short-term borrowings if:

(1) Such borrowings are for the purpose of maintaining your operating liquidity or providing funds for a particular Financing of a Small Business;
(2) The funds are borrowed from a regulated financial institution or a regulated credit company (or, if approved by SBA on a case-by-case basis, from non-regulated lenders including shareholders or partners);
(3) Your total outstanding borrowings (not including Leverage) do not exceed 50 percent of your Leverageable Capital; and
(4) All such borrowings are fully paid off for at least 30 consecutive days during your fiscal year so that you have no outstanding third-party debt for 30 days.

Voluntary Decrease in Licensee’s Regulatory Capital

§ 107.585 Voluntary decrease in Licensee’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, unless otherwise permitted under §§107.1560 and 107.1570. At all times, you must retain sufficient
Regulatory Capital to meet the minimum capital requirements in the Act and §107.210, and sufficient Leverageable Capital to avoid having excess Leverage in violation of section 303 of the Act and §§107.1150 through 107.1170.

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-up Plan” approved by SBA. “Wind-up 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.

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:
§ 107.610 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) 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
§ 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) 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.

(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 §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.

§ 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 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 paragraph (e) 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. 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) Where to file Form 468. Submit all filings of Form 468 to the Investment Division of SBA.

(e) Reporting of economic impact information on Form 468. Your annual filing
§ 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

§ 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 provision of section 315(a) of the Act, in such manner and under such conditions as SBA determines.

§ 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, 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 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.

§ 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 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.

§ 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 days of the closing date.

§ 107.630 Reporting the economic impact of each Financing.

The Small Business Administration § 107.680 of SBA Form 468 must include an assessment of the economic impact of each Financing, specifying the full-time equivalent 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.
§ 107.690 Examinations.
SBA will examine all Licensees for the purpose of evaluating regulatory compliance.

<table>
<thead>
<tr>
<th>Total assets of licensee</th>
<th>Base fee</th>
<th>Plus, percent of assets</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0 to $1,500,000</td>
<td>$3,500</td>
<td>+0%</td>
</tr>
<tr>
<td>$1,500,001 to $5,000,000</td>
<td>$3,700</td>
<td>+0.05% of the amount over $1,500,000</td>
</tr>
<tr>
<td>$5,000,001 to $10,000,000</td>
<td>6,000</td>
<td>+0.02% of the amount over $5,000,000</td>
</tr>
<tr>
<td>$10,000,001 to $15,000,000</td>
<td>7,000</td>
<td>+0.01% of the amount over $10,000,000</td>
</tr>
<tr>
<td>$15,000,001 to $25,000,000</td>
<td>7,700</td>
<td>+0.01% of the amount over $15,000,000</td>
</tr>
<tr>
<td>$25,000,001 to $50,000,000</td>
<td>9,200</td>
<td>+0.01% of the amount over $25,000,000</td>
</tr>
<tr>
<td>$50,000,001 to $60,000,000</td>
<td>13,000</td>
<td>+0.01% of the amount over $50,000,000</td>
</tr>
<tr>
<td>$60,000,001 and above</td>
<td>14,000</td>
<td>+0%</td>
</tr>
</tbody>
</table>

(c) Adjustments to base fee. Your base fee, as determined by the table in paragraph (b) of this section, will be adjusted (increased or 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;

(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;

(3) If you are organized as a partnership or limited liability company, you will pay an additional charge equal to 5% of your base fee;

(4) If you are a Licensee authorized to issue Participating Securities, you will pay an additional charge equal to 10% of your base fee; and

(5) If you maintain your records/files in multiple locations (as permitted by 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

§ 107.691 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. A base fee will be assessed based on your total assets (at cost) as of the date of your latest certified financial statement or a more recent interim statement requested by and submitted to SBA in connection with the examination. The base fee table is as follows:
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under §107.600(b)), you will pay an additional charge equal to 10% of your base fee.

(d) Fee discounts and additions table. The following table summarizes the discounts and additions noted in paragraph (c) of this section:

<table>
<thead>
<tr>
<th>Examination fee discounts</th>
<th>Amount of discount—% of base examination fee</th>
<th>Examination fee additions</th>
<th>Amount of Addition—% of base examination fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>No prior violations</td>
<td>15</td>
<td>Partnership or limited liability company</td>
<td>5</td>
</tr>
<tr>
<td>Responsiveness</td>
<td>10</td>
<td>Participating Security Licensee</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Records/files at multiple locations</td>
<td>10</td>
</tr>
</tbody>
</table>

(e) Delay fee. If, in the judgement 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 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)(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.

§ 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—(1) General rule. At the close of each of your fiscal years, for all Financings you extended since April 25, 1994, excluding Financings made in whole or in part with Leverage in excess of $90,000,000, at least 20 percent (in total dollars) must have been invested in Smaller Enterprises. If you were licensed after April 25, 1994, the 20 percent requirement applies to the Financings you extended since you were licensed, excluding Financings made in whole or in part with Leverage in excess of $90,000,000, plus any pre-licensing investments approved by SBA.
§ 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) Exception. You may provide Venture Capital Financing 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). Without SBA’s prior written approval, total Financings under this paragraph (a)(2) that are outstanding as of the close of your fiscal year must not exceed your Regulatory Capital.

(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.

(f) 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) through (e)).

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(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.

(f) 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) through (e)).
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(2) Exception for pass-through of proceeds to subsidiary. 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 Licenses. With the prior written approval of SBA, if you are a Partnership Licensee, 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 ownership of such corporation(s) will not constitute a violation of § 107.730(a)

(c) Real Estate Businesses. (1) You are not permitted to finance any business classified under Major Group 65 (Real Estate) or Industry No. 1531 (Operative Builders) of the SIC Manual, with the following exceptions:

(i) Title Abstract companies (Industry No. 6541); and

(ii) Companies listed under Industry No. 6531 (for example, real estate agents, brokers, escrow agents, managers and multiple listing services) that derive at least 80 percent of their revenue from non-Affiliate sources.

(2) You are not permitted to finance a business, regardless of SIC 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;

(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

(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; or

(2) To repay an indebtedness incurred for the purpose of investing in a Licensee.


§ 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.

(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:

(1) 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) Both you and your Associate are leveraged Licensees, and both have outstanding Participating Securities or neither has outstanding Participating Securities.

(iv) You have no outstanding Leverage and do not intend to issue Leverage in the future, and your Associate either is not a Licensee or has no outstanding Leverage and does not intend to issue Leverage in the future.

(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, you may 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 SBA grants an exemption under this §107.730, you must publish notice of the transaction in a newspaper of general circulation in the locality most directly affected by the transaction, and furnish a certified copy to SBA within 10 days of publication. SBA will publish a similar notice in the Federal Register.

§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. 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:

(1) For a Section 301(c) Licensee, 20 percent of the sum of:

(i) Your Regulatory Capital as of the date of the Financing or Commitment; plus

(ii) 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

(iii) 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)(1).

(2) For a Section 301(d) Licensee, 30 percent of a sum determined in the manner set forth in paragraph (a)(1) through (iii) of this section.

(b) Outstanding Financings. For the purposes of paragraph (a) of this section, you must measure each outstanding Financing at its current cost.
§ 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;

(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, and any other liabilities approved for exclusion by SBA.
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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.

(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.

§ 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.

§ 107.810 Financings 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.

§ 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.

§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.

§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.

§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.

§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.


§ 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
Small Business Administration § 107.855

(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) A one-time “bonus” that satisfies the requirements in paragraph (i) of this section.

(11) 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
§ 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.
Small Business Administration § 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) Rebutals 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 no more than 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).

§ 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.
§ 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.


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 for services actually performed; and

(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 Licensees without Leverage—exceptions to the regulations.

The regulatory exceptions in this section apply to Licensees with no outstanding Leverage or Earmarked Assets.

(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.

Subpart I—SBA Financial Assistance for Licensees (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.

§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.
(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) Certify, if applicable, that you will satisfy the requirement in §107.710(d) to provide Financing to Smaller Enterprises.
§ 107.1130 Leverage fees and additional charges payable by Licensee.

(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 a Charge of 1 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.

(2) Participating Securities. You must pay to SBA a Charge of 1 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.

§ 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 for a Section 301(c) Licensee.

(a) Maximum amount of Leverage—(1) Amounts before indexing. If you are a Section 301(c) Licensee, the following table shows the maximum amount of Leverage you may have outstanding at any time, subject to the indexing adjustment set forth in paragraph (a)(2) of this section:

<table>
<thead>
<tr>
<th>If your leverageable capital is:</th>
<th>Then your maximum leverage is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Not over $17,500,000 ......</td>
<td>300 percent of Leverageable Capital</td>
</tr>
<tr>
<td>(2) Over $17,500,000 but not over $35,100,000.</td>
<td>$52,500,000 + [2 \times (\text{Leverageable Capital} - $17,500,000)]</td>
</tr>
<tr>
<td>(3) Over $35,100,000 but not over $52,600,000.</td>
<td>$87,700,000 + (Leverageable Capital - $35,100,000)</td>
</tr>
<tr>
<td>(4) Over $52,600,000 ............</td>
<td>$105,200,000</td>
</tr>
</tbody>
</table>

(2) Indexing of maximum amount of Leverage. SBA will adjust the amounts in paragraph (a) of this section annually to reflect increases through September in the Consumer Price Index published by the Bureau of Labor Statistics. SBA
§ 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.

(b) Exceptions to maximum Leverage provisions—(1) Licensees under Common Control. Two or more Licensees under Common Control may have aggregate outstanding Leverage over $105,200,000 (subject to indexing as set forth in paragraph (a)(2) of this section) only if SBA gives them permission to do so. SBA may grant such permission on a case-by-case basis only. SBA may impose any terms and conditions SBA considers appropriate to minimize its risk of loss in the event of default.

(2) Licensees with excess Leverage issued before March 31, 1993. If you had outstanding Debentures on March 31, 1993 that exceeded 300 percent of your Leverageable Capital:

(i) You do not have to prepay the excess amount.

(ii) You may apply for an additional Debenture guarantee or Participating Security guarantee if you use the proceeds solely to pay the amount due at maturity on a Debenture issued before March 31, 1993. The new Debenture or Participating Security must mature on or before September 30, 2002.

(iii) You must maintain at least 65 percent of your "Total Funds Available for Investment" in "Venture Capital Financings" (as defined in §107.1160(e) and (f), respectively) until your outstanding Debentures no longer exceed 300 percent of your Leverageable Capital.

(3) Maximum amount of Participating Securities. See §107.1170.

§ 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.

(b) Exceptions to maximum Leverage provisions—(1) Licensees under Common Control. Two or more Licensees under Common Control may have aggregate outstanding Leverage over $105,200,000 (subject to indexing as set forth in paragraph (a)(2) of this section) only if SBA gives them permission to do so. SBA may grant such permission on a case-by-case basis only. SBA may impose any terms and conditions SBA considers appropriate to minimize its risk of loss in the event of default.

(2) Licensees with excess Leverage issued before March 31, 1993. If you had outstanding Debentures on March 31, 1993 that exceeded 300 percent of your Leverageable Capital:

(i) You do not have to prepay the excess amount.

(ii) You may apply for an additional Debenture guarantee or Participating Security guarantee if you use the proceeds solely to pay the amount due at maturity on a Debenture issued before March 31, 1993. The new Debenture or Participating Security must mature on or before September 30, 2002.

(iii) You must maintain at least 65 percent of your "Total Funds Available for Investment" in "Venture Capital Financings" (as defined in §107.1160(e) and (f), respectively) until your outstanding Debentures no longer exceed 300 percent of your Leverageable Capital.

(3) Maximum amount of Participating Securities. See §107.1170.
§ 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.

§ 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.

§ 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.

§ 107.1220 Requirement for Licensee to file quarterly financial statements.

As long as any part of SBA’s Leverage commitment is outstanding, you must give 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 30 days after the close of the quarter. You will not be eligible for a draw if you are not in compliance with this § 107.1220.

§ 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 regulatory or statutory 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.

§ 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.

§ 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) when you redeem the Preferred Securities.
(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.
§ 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.


§ 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.

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
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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 107.1590 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.

§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 §107.1520(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:

<table>
<thead>
<tr>
<th>Financial account</th>
<th>Amount reported on SBA form 464</th>
<th>Weight</th>
<th>Weighted amount</th>
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<tbody>
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<td>(1) Cash and invested idle funds</td>
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<td></td>
</tr>
<tr>
<td>(2) Commitments from investors</td>
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<td>x1.00</td>
<td></td>
</tr>
<tr>
<td>(3) Current maturities</td>
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</tr>
<tr>
<td>(4) Other current assets</td>
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<td></td>
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<tr>
<td>(5) Publicly Traded and Marketable Securities</td>
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<td>x1.00</td>
<td></td>
</tr>
<tr>
<td>(6) Anticipated operating revenue for next 12 months</td>
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<td>x1.00</td>
<td></td>
</tr>
<tr>
<td>(7) Total Current Funds Available</td>
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<td></td>
<td>A</td>
</tr>
<tr>
<td>(8) Current liabilities</td>
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</tr>
<tr>
<td>(9) Commitments to Small Businesses</td>
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<tr>
<td>(10) Anticipated operating expense for next 12 months</td>
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<tr>
<td>(11) Anticipated interest expense for next 12 months</td>
<td></td>
<td>x1.00</td>
<td></td>
</tr>
</tbody>
</table>

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§ 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:

\[ \text{EAR} = \left( \frac{\text{EA}}{\text{LI}} \right) \times 100 \]

where:

- \( \text{EAR} \) = Earmarked Asset Ratio.
- \( \text{EA} \) = Average Earmarked Assets (at cost) for the fiscal year or interim period.
- \( \text{LI} \) = 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):

\[ \text{EP} = \text{NI} + \text{IK} + \text{EME} \]

where:

- \( \text{EP} \) = Earmarked Profit (Loss).
- \( \text{NI} \) = Net Income (Loss), as reported on SBA Form 468 except as otherwise provided in this paragraph (d)(1).
- \( \text{IK} \) = Unrealized Appreciation (Depreciation) on Earmarked Assets that you are distributing as an In-Kind Distribution under §107.1580.
- \( \text{EME} \) = 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:

\[ \text{A} = 2.5 \% \text{ of your weighted average Combined Capital for the year, plus $125,000 if Combined Capital is below $20,000,000; or} \]

\[ \text{B} = \text{NI} \times 0.25 \]

...
(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:
      
      \[ \text{EGL} + (R \times \text{Earmarked Asset Ratio}) \]

(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.

§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.

(1) 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 Prioritized Payments, unearned Adjustments and unearned Charges.

(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.
Small Business Administration § 107.1530

(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 to your Accumulation Account.

(g) Licensee's obligation to pay Prioritized Payments after redeeming Participating Securities. This paragraph 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, uneearned Adjustments and uneearned 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.
§ 107.1530

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 non-cash 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\% \times PLC Ratio.

More than 1 ........ 9\% + (3\% \times (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.

1 or less .............. 9\% \times PLC Ratio.

More than 1 ........ 9\% + (3\% \times (PLC ratio - 1)).

90
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. 

\[
\text{Weighted average Treasury Rate} = \frac{(0.08 \times 10,000,000) + (0.10 \times 3,840,579)}{13,840,579} = 8.55\%
\]

(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. 

\[
(1.0855 - 0.08 + 1) \times 12\% = 12.83\%
\]

(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.

§ 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.

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 $35\% \times (1-.05) + 5\% = 38.25\%$.

(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 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.

§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 §107.1560.

(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:

§ 107.1570  

(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):

<table>
<thead>
<tr>
<th>SBA’s Percentage Share of Total Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>If your ratio of Leverage to Leverageable Capital as of the fiscal period end is:</td>
</tr>
<tr>
<td>Over 200%</td>
</tr>
<tr>
<td>Over 100% but not over 200%</td>
</tr>
<tr>
<td>100% or less</td>
</tr>
</tbody>
</table>

(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.


§ 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 30 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 the same way as in §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...
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(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:

\[
\frac{\text{Leverage}}{(\text{Leverage} + \text{Leverageable Capital})} \times 100
\]

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.

§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
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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 Im- pairment, and any other applicable computations required under §§ 107.1500 through 107.1570, must be:

(i) The distribution date, or

(ii) If your Distribution includes an annual Distribution 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 re- demption 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.

§ 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.


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.

§ 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.

§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.


§ 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:
§ 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
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.

Subpart J—Licensee's Noncompliance With Terms of Leverage

§ 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 §107.1800 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, satisfactorily 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 non-performance 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; and

(iii) Distributions by Participating Securities issuers as permitted under §§107.1540 through 107.1580.

(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) Non-performance. 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 §§107.1150(b)(2) and 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.

(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
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§ 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 USC 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.

(4) 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:

...
§ 107.1820

(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 107.1590.

(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...
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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.


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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 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  |
| At least 40% but under 67% ................................ | Over 100% but not over 200% ........ | 60  |
| 100% or less ...................................................... | Over 200% ................................. | 50  |
| Over 100% but not over 200% ........................... | 55  |
| Over 200% ............................................................ | 50  |
| 100% or less ...................................................... | 40  |
| Over 100% but not over 200% ........................... | 45  |
| Over 200% ............................................................ | 40  |
| Under 40% ............................................................ | 35  |
| Over 100% but not over 200% ........................... | |
| Over 200% ............................................................ | |

(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. You must determine whether you have a condition of Capital Impairment as of the end of each
§ 107.1840 Computation of Licensee’s Capital Impairment Percentage.

(a) General. This section contains the procedures you must use to determine your Capital Impairment Percentage if you have outstanding Leverage issued after April 25, 1994. You must 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 you do not have to perform any more procedures in this §107.1840. 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 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) 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 following table:

<table>
<thead>
<tr>
<th>Adjusted Unrealized Gain Before Estimated Tax Effects</th>
<th>If:</th>
<th>And:</th>
<th>Then adjusted unrealized gain before taxes is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Class 1 Appreciation ≤ Net Appreciation.</td>
<td>Class 1 Appreciation + Class 2 Appreciation ≤ Net Appreciation.</td>
<td>(80% × Class 1 Appreciation) + (50% × Class 2 Appreciation).</td>
<td></td>
</tr>
<tr>
<td>Class 1 Appreciation ≤ Net Appreciation.</td>
<td>Class 1 Appreciation + Class 2 Appreciation &gt; Net Appreciation.</td>
<td>(80% × Class 1 Appreciation) + (50% × (Net Appreciation − Class 1 Appreciation)).</td>
<td></td>
</tr>
</tbody>
</table>
(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.

§ 107.1850 Exceptions to Capital Impairment provisions for Licensees with outstanding Participating Securities.

The provisions in this § 107.1850 apply only if at least two-thirds of your outstanding Leverage consists of Participating Securities, and at least two-thirds of your Loans and Investments (at cost) consist of Equity Capital Investments.

(a) Forbearance period for Participating Securities issuers. During the first forty-eight (48) months following your first issuance of Participating Securities, you will not have a condition of Capital Impairment if your Capital Impairment Percentage is below 85 percent.

(b) Extended forbearance period for early stage investors. If at least two-thirds of your Loans and Investments (at cost) are in Start-Up Financings, the forbearance period in paragraph (a) of this section is extended to 60 months.

(c) Forbearance based on actions by Licensee. The provisions of this paragraph (c) apply only during the fifth and sixth years following your first issuance of Participating Securities. If your Capital Impairment Percentage, as determined either by you or by SBA, exceeds the maximum permitted under § 107.1830(c) but is below 85 percent, you will not have a condition of Capital Impairment if you do either of the following within thirty (30) days of such determination:

(1) Increase your Regulatory Capital by a cash contribution placed in an escrow account or other account satisfactory to SBA, for its benefit. The contribution must equal, during the fifth year, 15 percent of your outstanding Leverage or, during the sixth year, 30 percent.

(2) Provide a guarantee, satisfactory to SBA and for its benefit, for the amount of the cash contribution required in paragraph (c)(1) of this section. SBA will credit any escrowed funds or guarantee received in the fifth year toward the requirements for the sixth year.

(d) Conditions for forbearance under paragraph (c) of this section. (1) You cannot count any funds placed in an escrow or other account under paragraph (c) of this section as Leverageable Capital.

(2) Any fee and/or any claim to repayment by the party making the capital contribution or by the guarantor must be deferred and subordinate to all outstanding Leverage plus any unpaid Earned Prioritized Payments and earned Adjustments.

(3) If there is an acceleration or mandatory redemption under § 107.1810 or § 107.1820, any funds in the escrow account and/or any guarantee received under paragraph (c) of this section will be applied toward repaying any amounts due SBA.

(4) If you reduce your Capital Impairment Percentage to zero, SBA will release and return any escrowed funds and/or any guarantee received under paragraph (c) of this section.
§ 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 outstanding Leverage (including any prepayment penalties thereon), or by a plan satisfactory to SBA for the orderly liquidation of the Licensee.

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§ 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.

§ 108.50 Definition of terms.

The following definitions apply to this part 108.

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.

Associate of a NMVC Company means any of the following:

(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) through (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


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
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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 Partner-
in a limited partnership, membership interests in a limited liability company, joint venture interests.

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

1. Loan;
2. Debt Securities;
3. Equity Securities;
4. Guarantees; or
5. Purchases of securities of a Small Business through or from an underwriter (see §108.225).

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 (i)(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.
   (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 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 Small 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 (“LIArea”) 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.


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.).


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.
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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.


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...
§ 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, prior to the Applicant or Conditionally Approved NMVC Company becoming 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.

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
Small Business Administration

§ 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.
§ 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


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 timeframe 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.

§ 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:

(A) Within the specific period of time SBA gave to it when SBA conditionally approved it for participation in the NMVC program, has raised:

(i) The amount of Regulatory Capital set forth in its application, pursuant to §108.310(a)(1); and

(ii) The amount of matching resources for its Operational Assistance grant award set forth in its application, pursuant to §108.310(a)(2); and

(2) Revoke SBA’s conditional approval of the company, at which time it is no longer 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)(ii)(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.


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;
§ 108.400 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.

§ 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.

§ 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.”
§ 108.504 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.
§ 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.

§ 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.
§ 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.
(d) 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.
(e) 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 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.
§ 108.690 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 through 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. 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 (i) is acquiring an existing property and will use at least 51 percent of the usable square footage for an eligible business purpose; or

(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
§ 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:

(i) Provide Financing to any of your Associates, except for a Small Business that satisfies all of the following conditions:

(ii) Your Associate relationship with the Small Business is described by paragraph (8) or (9) of the definition of Associate in §108.50;

(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 owed through the NMVC Company.

(b) Rules applicable to Associates. Without SBA’s prior written approval, your Associates must not, directly or indirectly:

(i) Borrow money from:

(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.

(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

(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:

(i) To purchase stock in or provide capital to a NMVC Company or SBIC; or

(ii) To repay an indebtedness incurred for the purpose of investing in a NMVC Company or SBIC.

(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 owed 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; or

(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.

§ 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:

(i) Provide Financing to any of your Associates, except for a Small Business that satisfies all of the following conditions:

(ii) Your Associate relationship with the Small Business is described by paragraph (8) or (9) of the definition of Associate in §108.50;

(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 owed through the NMVC Company.

(b) Rules applicable to Associates. Without SBA’s prior written approval, your Associates must not, directly or indirectly:

(i) Borrow money from:

(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.

(c) Applicability of other laws. You are also bound by any restrictions in Federal or State laws governing conflicts of interest and fiduciary obligations.

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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 20 percent of the sum of:

(1) Your Regulatory Capital as of the date of the Financing or Commitment; plus

(2) 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.
§ 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.

§ 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.
§ 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
§ 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.

§ 108.1134 A 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
Small Business Administration § 108.1230

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 regulatory or statutory 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;

(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.

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§ 108.1240 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 transeree 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 Guarantee 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.

§ 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
§ 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.

§ 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 non-performance 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, 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
§ 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 must 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 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”):
§ 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 § 108.1910 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
§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...
§ 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 make 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.

§ 108.2006 Evaluation and selection of SSBICs.

SBA will evaluate and select an SSBIC for a 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 timeframe within which the SSBIC will be able to raise the Regulatory Capital it intends to raise and obtain the matching resources described in §108.205(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.

§ 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).

§ 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.

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.

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.

(4) 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).
§ 108.2040 Reporting and record-keeping 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.


PART 112—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OF SBA—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

§ 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;
(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.

§ 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 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.

§ 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 non-discriminatory 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
§ 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.


§ 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 prohibited by this part such information as SBA may find necessary to apprise them of their rights to such protection.


§ 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,
§ 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
§ 112.12 Effect on other regulations; forms and instructions.

(a) Effect on other regulations. All regulations, orders or like directions hereinafter 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.


Appendix A to Part 112

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**Disaster Loans**

- Physical 
- Economic injury (EIDL) 
- Federal action—economic injury. 
- Currency fluctuation—economic injury.

**Other Federal Financial Assistance**

- Women’s business enterprise 
- Small business innovation and research. 
- Procurement automated source system. 
- Business Development Program. 
- Small Business Institute Program. 
- Certificate of competency. 
- Subcontracting Assistance Program. 
- Technology Assistance Program. 
- Small business development centers. 
- International Trade Program. 
- Service Corps of Retired Executives and Active Corps of Executives. 
- Veterans affairs programs. 
- Private sector initiatives.

APPENDIX A TO SUBPART A OF PART 113

**Part 113—Nondiscrimination in Financial Assistance Programs of SBA—Effectuation of Policies of Federal Government and SBA Administrator**

**Subpart A—General Provisions**

- Sec. 113.1 Purpose. 
- 113.2 Definitions. 
- 113.3 Discrimination prohibited. 
- 113.3-1 Consideration of race, color, religion, sex, marital status, handicap, or national origin. 
- 113.3-2 Accommodations to religious observance and practice. 
- 113.3-3 Structural accommodations for handicapped clients. 
- 113.4 Assurances required. 
- 113.5 Compliance information. 
- 113.6 Conduct of investigations. 
- 113.7 Procedure for effecting compliance. 
- 113.8 Effect on other regulations, forms and instructions.

**Subpart B—Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance**

**Introduction**

- 113.100 Purpose and effective date. 
- 113.105 Definitions. 
- 113.110 Remedial and affirmative action and self-evaluation. 
- 113.115 Assurance required. 
- 113.120 Transfers of property. 
- 113.125 Effect of other requirements. 
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- 113.135 Designation of responsible employee and adoption of grievance procedures. 
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**Coverage**

- 113.200 Application. 
- 113.205 Educational institutions and other entities controlled by religious organizations. 
- 113.210 Military and merchant marine educational institutions. 
- 113.215 Membership practices of certain organizations. 
- 113.220 Admissions. 
- 113.225 Educational institutions eligible to submit transition plans. 
- 113.230 Transition plans. 
- 113.235 Statutory amendments.

**Discretion on the Basis of Sex in Admission and Recruitment Prohibited**

- 113.300 Admission.
§ 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.

§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
§ 113.3

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.
§ 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. 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.


§ 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, or 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
§ 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
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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) 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.


§ 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.


APPENDIX A TO SUBPART A OF PART 113

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<td>Currency fluctuation—economic injury</td>
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Nonfinancial Programs

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<td>Executive Order 12138, Small Business Act, sec. 9</td>
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<tr>
<td>Small business development centers</td>
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Subpart B—Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance


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, for 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 the 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.
§ 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, 1967–1970 Comp., p. 252; as amended by Executive Order 11629, 3 CFR, 1978 Comp., p. 264.

(c) Self-evaluation. Each recipient shall maintain in file for at least three years following completion of the self-evaluation required under paragraph (c)(2) 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
§ 113.125 Effect of other requirements.


(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 participate in any education program or activity operated by a recipient and that receives Federal financial assistance.

(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 of any applicant or student, on the basis of sex, to participate in any education program or activity operated by a recipient and that receives Federal financial assistance.

§ 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 transferee and the transferee shall be deemed to be recipients, subject to the provisions of §§ 113.205 through 113.225(a).
§ 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.
§ 113.200 Application.
Except as provided in §§113.205 through 113.225(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:

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(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.

§ 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 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 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, 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, or 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.
§ 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.

(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.

(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.
§ 113.505 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
§ 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.
114.100 Definitions.
114.101 What do these regulations cover?
114.102 When, where and how do I present a claim?
114.103 Who may file a claim?
114.104 Who investigates and considers my claim?
114.105 What if my claim exceeds $5,000?
114.106 What if my claim exceeds $25,000 or has other special features?
114.108 What if my claim is approved?
114.109 What if my claim is denied?

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?
114.111 Does the attorney-client privilege apply when SBA employees are represented by the Government?


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
§ 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.

§ 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.

<table>
<thead>
<tr>
<th>Claim factors</th>
<th>Claim presenters</th>
</tr>
</thead>
<tbody>
<tr>
<td>Injury to or loss of property ..........</td>
<td>The owner of the property, his or her duly authorized agent, or legal representative.</td>
</tr>
<tr>
<td>Personal injury ........................</td>
<td>The injured person, his or her duly authorized agent, or legal representative.</td>
</tr>
<tr>
<td>Death ..................................</td>
<td>The executor, administrator, or legal representative of the decedent’s estate, or any other person entitled to assert the claim under applicable state law.</td>
</tr>
<tr>
<td>Loss wholly compensated by an insurer with rights as a subrogee.</td>
<td>The parties individually, as their interests appear, or jointly.</td>
</tr>
</tbody>
</table>

(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 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.
(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.
§ 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 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 non-binding 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
§ 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. 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.
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 part 121 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.
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 requiring the furnishing of services, supplies, labor, materials, machinery, equipment, or construction. A Contract must not prohibit a Surety from performing the Contract upon default of the Principal. A Contract 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), warranty of performance or efficiency, warranty of fidelity, or release of lien (other than for claims under a guaranteed bond). It includes a maintenance agreement of 2 years or less which covers defective workmanship or materials only. With SBA's written approval, it can also include a longer maintenance agreement covering something other than defective workmanship or materials. To qualify for such approval, the agreement must be ancillary to the Contract for which SBA is guaranteeing a bond, must be required to be performed by the same Principal, and must be 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.
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.
Loss has the meaning set forth in §115.16.
Obligee means:
(1) In the case of a Bid Bond, the Person requesting bids for the performance of a Contract; or
(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.
O/S/SG 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, equipmnet and supplies for use in the performance of
§ 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

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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; 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:

(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 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.

Veteran has the meaning given the term in Section 101(2) of Title 38, United States Code.

§ 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
§ 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) Statutory ceiling. The amount of the Contract to be bonded must not exceed $2,000,000 in face value at the time of the bond's Execution.

(2) Aggregation of Contract amounts. The amounts of two or more Contracts for a "single 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 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.

(3) Service and supply contracts. A service or supply Contract covering more than a 1 year period is eligible for an SBA guaranteed bond if neither the annual Contract amount nor the penal sum of the bond exceeds $2,000,000 at any time.

(4) 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]
§ 115.14 Loss of Principal’s eligibility for future assistance.

(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 $1000.

(4) The Surety has requested reimbursement for Losses incurred under the bond.

(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. Prior Approval Sureties should refer to § 115.36(b) for provisions on reinstatement of the Principal’s eligibility. A PSB Surety may reinstate a Principal’s eligibility upon the Surety’s determination that reinstatement is appropriate.

§ 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
§ 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
§ 115.18 Refusal to issue further guarantee; suspension and termination of PSB status.

(a) Improper surety bond guarantee practices—(1) Improper 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.

(b) Regulatory violations, fraud. Acts of wrongdoing such as fraud, material misrepresentation, breach of the Prior Approval or PSB Agreement, or regulatory violations (as defined in §§115.19(d) and 115.19(h)) also constitute sufficient grounds for refusal to issue further guarantees, or in the case of a PSB Surety, termination of preferred status.

(c) 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.

(d) 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.

§ 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 not liable under a Prior Approval or PSB Agreement if any of the circumstances in paragraphs (a) through (h) of this section exist.

(a) Excess Contract or bond amount. The total Contract amount at the time of Execution of the bond exceeds $2,000,000 in face value (see §115.12(e)), or the bond amount at any time exceeds the total Contract 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
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the Contract amount or in the bond amount of at least 25% or $50,000; 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 $50,000 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 $50,000.

(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 at the job site which 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:
(3) 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.


§ 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.


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
§ 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, or on behalf of a qualified 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 increase to over $2,000,000. If the Contract amount increases above the statutory limit of $2,000,000 after Execution of the bond, SBA's share of the Loss is limited to that percentage of the increased Contract amount which the statutory limit represents, multiplied by the guarantee percentage approved by SBA. For example if a Contract amount increases to $2,100,000, SBA's share of the Loss under an 80% guarantee is limited to 76.1% [2,000,000 / 2,100,000 = 95.2% × 80% = 76.1%].

(e) Contract decrease to $100,000 or less. If the Contract 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.

§ 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 by the Surety together with the form required 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 Payment or Performance Bond on the SBA Form 990, Guarantee 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 $50,000, 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 $50,000, the prior written approval of such increase by SBA is required on a supplemental Prior Approval Agreement (Supplemental Form 990) 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.

(2) Increases; fees. Notification of increases in the Contract or bond amount under this paragraph (d) must be accompanied by the Principal’s check for the increase in the Principal’s guarantee fee, computed on the increase in the bond Premium. The Surety’s check must be submitted to SBA within 60 calendar days of SBA’s approval of the supplemental Prior Approval Agreement, unless the amount of such increased guarantee fee is less than $40. When the total amount of increase in the guarantee fee equals or exceeds $40, the Surety’s check must be submitted to SBA 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 $40, such refund or rebate will not be made until the amounts to be refunded or rebated, respectively, aggregate at least $40. Upon receipt of the refund, the Surety must promptly pay a proportionate amount of its Premium to the Principal.

§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
§ 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 an 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 submit these forms together with the Principal's payment for its guarantee fee within this time period, 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.

(b) 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.
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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 non-guaranteed 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 Record of Administrative Action" (SBA Form 994H), within 1 year from the time of each disbursement. Claims submitted after 1 year 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 90 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.
§ 115.36 Indemnity settlements and reinstatement of Principal.

(a) Indemnity settlements. (1) 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. The Sureties must not agree to any indemnity settlement proposal or enter into any such agreement without SBA’s concurrence.

(2) 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.

(3) The Surety must pay SBA its pro rata share of the settlement amount within 90 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.

(b) Conditions for reinstatement. At any time after a Principal becomes ineligible for further bond guarantees under §115.14(a), the Surety may recommend that such Principal’s eligibility be reinstated. OSG may agree to reinstate the Principal and its Affiliates if:

(1) The Principal’s guarantee fee has been paid to SBA and SBA receives evidence that the Principal has paid all delinquent amounts due to the Surety (including amounts for Imminent Breach); or

(2) The Surety has settled its claim with the Principal for an amount and on terms accepted by OSG; or

(3) The Principal contests a claim and provides collateral, acceptable to the Surety and OSG, which has a liquidation value of at least the amount of the claim including related expenses; or

(4) The Principal’s indebtedness to the Surety is discharged by operation of law (e.g., bankruptcy discharge); or

(5) OSG and the Surety determine that further bond guarantees are appropriate.

(c) Underwriting after reinstatement. A guarantee application submitted after reinstatement of the Principal’s eligibility is subject to a very stringent underwriting review.

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 $2,000,000 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 vesting of final settlement authority for claims and recovery under the PSB program only in employees of the Surety’s permanent claims department; and

(6) 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.

§ 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
§ 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 does not issue 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).

§ 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...
§ 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 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 increases aggregating 25% of the contract or bond amount or $50,000, and attach such payments to the respective monthly bordereau. If the additional Principal’s fee or Surety’s fee is less than $40, such fee is not due until all unpaid increases in such fee aggregate at least $40.

(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 $40.

§ 115.68 Guarantee percentage.

SBA reimburses a PSB Surety in an amount not to exceed 70% of the Loss incurred and paid. Where the Contract amount, after the Execution of the bond, increases beyond the statutory limit of $2,000,000, SBA’s share of the Loss is limited to that percentage of the increased Contract amount which the statutory limit represents, multiplied by the guarantee percentage approved by SBA. For an example, see §115.31(d).

§ 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 PSB Surety does not need SBA approval to make Imminent Breach payments.

(b) Amount of reimbursement. 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. In no event will SBA make any duplicate payment under any provision of these regulations in this part.

(c) Recordkeeping requirement. The PSB Surety must keep records of payments made to avoid Imminent Breach.

§ 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 1 year 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...
§ 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.
§ 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.


§ 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.


§ 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 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.

(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.

(4) Discrimination prohibited 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
§ 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 pre-award 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 Administrator, 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.


§ 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.
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§ 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.

§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. The notice shall advise the applicant or recipient of the failure to comply, 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
§ 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

(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 non-compliance or threatened noncompliance with this part, with respect to two or more forms of financial assistance to which this part applies, or non-compliance 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.
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 thereupon 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 117

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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.
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Source: 66 FR 29013, May 29, 2001, unless otherwise noted.

§119.1 What is the Program for Investment in Microentrepreneurs (“PRIME” or “the Act”)?

PRIME authorizes SBA to make grants to “qualified organizations” to fund training and technical assistance for disadvantaged entrepreneurs, build these organizations’ own capacity to give training and technical assistance, fund research and development of “best practices” in microenterprise development and technical assistance programs for disadvantaged microentrepreneurs, and to fund other undertakings the Administrator or designee deems consistent with these purposes.

§119.2 Definitions.

For the purposes of this part, the following definitions apply:
Capacity Building Grant means a grant made under the Act identified under §119.4(b).
Capacity building services means services provided to an organization or program that is currently, or is developing
as, a microenterprise development organization or program, for the purpose of enhancing its ability to provide training and technical assistance to disadvantaged microentrepreneurs.

Collaborative means two or more non-profit entities that agree to act jointly as a qualified organization under this part.

Developer means a person interested in starting or acquiring a microenterprise.

Disadvantaged entrepreneur, or disadvantaged microentrepreneur, means the owner, majority owner, or developer, of a microenterprise who is also—

(1) A low-income person;
(2) A very low-income person; or
(3) An entrepreneur who lacks adequate access to capital or other resources essential for business success, or is economically disadvantaged, as defined in this part.

Discretionary Grant means a grant made under the Act identified under §119.4(d).

Economically disadvantaged entrepreneur, or economically disadvantaged microentrepreneur, means an owner, majority owner, or developer of a microenterprise 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 industry such that his or her ownership of a small business would help to qualify the small business for assistance under section 7(j) or section 8(a) programs of the Small Business Act.

Grantee means a recipient of a grant under the Act.

Group has the same meaning as “collaborative” as defined in this section.

Indian tribe means any Indian tribe, band, pueblo, 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, which is recognized as eligible for the special programs and services the United States provides to Indians because of their status as Indians.

Indian tribe jurisdiction means Indian country, as defined in 18 U.S.C. 1151, and any other lands, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any tribe or individual subject to a restriction by the United States against alienation, and any land held by Alaska Native groups, regional corporations, and village corporations, as defined in or established under the Alaska Native Claims Settlement Act, public domain Indian allotments, and former Indian reservations in the State of Oklahoma.

Intermediary means a private, non-profit entity serving or seeking to serve microenterprise development organizations or programs identified under §119.3.

Large microenterprise development organization or program means a microenterprise development organization or program with 10 or more full time employees or equivalents, including its executive director, as of the date it files its application with SBA for a PRIME grant.

Local community means an identifiable area and population constituting a political subdivision of a state.

Low-income person means a person having an income, adjusted for family size, of not more than—

(1) For metropolitan areas, 80 percent of the median income; and
(2) For non-metropolitan areas, the greater of—

(i) 80 percent of the area median income; or
(ii) 80 percent of the statewide non-metropolitan area median income.

Microenterprise means a sole proprietorship, partnership or corporation that—

(1) Has fewer than 5 employees, including the owner; and
(2) Generally lacks access to conventional loans, equity, or other banking services.

Microenterprise development organization or program means a nonprofit entity, or a program administered by such an entity, including community development corporations or other nonprofit development organizations and social service organizations, that provides services to disadvantaged microentrepreneurs.

Qualified organization means an organization eligible for a PRIME grant identified under §119.3.
§ 119.3 What types of organizations are eligible for PRIME grants?

An organization eligible for a PRIME grant ("qualified organization") is one that is:

(a) A microenterprise development organization or program as defined in §119.2(q) (or a group or collaborative thereof) that has a demonstrated record of delivering microenterprise services to disadvantaged microentrepreneurs;

(b) An intermediary, as defined in §119.2(l);

(c) A microenterprise development organization or program as defined in §119.2(q) that is accountable to a local community, working with a State or local government or Indian tribe; or

(d) An Indian tribe acting on its own, if the Indian tribe can certify that no private organization or program referred to in paragraphs (a), (b) and (c) of this section exists within its jurisdiction.

§ 119.4 What services or activities must PRIME grant funds be used for?

A recipient of a PRIME grant ("grantee") must use PRIME grants to—

(a) Provide training and technical assistance to disadvantaged microentrepreneurs ("Technical Assistance Grant");

(b) Provide training and capacity building services to microenterprise development organizations and programs to assist them to develop microenterprise training and services ("Capacity Building Grant");

(c) Aid in researching and developing the best practices in the field of microenterprise development and technical assistance programs for disadvantaged microentrepreneurs ("Research and Development Grant"); or

(d) Conduct such other activities as the Administrator or designee determines to be consistent with the purposes of the Act ("Discretionary Grant").

§ 119.5 How are PRIME grant awards allocated?

(a) At least 50 percent of the number of grant awards made under this part will be awarded to qualified organizations that benefit very low-income persons, including those residing on Indian reservations. In general, SBA will make grant award decisions to serve diverse populations by including as recipients both large and small microenterprise development organizations, and organizations serving urban, rural, and Indian tribal communities.

(b) SBA will allocate the funding available for awards as follows:

(1) A minimum of 75 percent for Technical Assistance Grants;

(2) A minimum of 15 percent for Capacity Building Grants; and
§ 119.8 Are there matching requirements for grantees?

Applicants and grantees must match SBA funding as follows:

(a) Except as provided in paragraph (c) of this section, applicants and grantees must match Federal assistance with funds from sources other than the Federal Government in an amount not less than 50 percent of the grant amount awarded each year. Sources such as fees, grants, gifts, income from loan sources, and in-kind resources of a grant recipient from non-Federal public or private sources may be used to comply with the matching funds requirement;

(b) Grantees receiving funds in option years as described in §119.7(b) through (c) are subject to the matching requirements of this section.

(c) Applicants or grantees with severe constraints on available sources of matching funds may request that the Administrator or designee reduce or eliminate the matching requirements. Any reductions or eliminations must not exceed 10 percent of the aggregate funds available.
§ 119.9 How will a qualified organization apply for PRIME grant awards?

(a) SBA will issue Program Announcements specifying the terms, conditions, and evaluation criteria for each potential set of awards. Program Announcements will summarize the purpose of the available funds; will advise potential applicants regarding how to obtain an application packet; and will provide summary information regarding deadlines and other requirements. Program Announcements may specify any limitations, special rules, procedures, and restrictions for available funding.

(b) Applicants may submit applications in response to the Program Announcements. Each applicant shall submit an application for a grant in accordance with this part and the applicable Program Announcement.

(c) SBA reserves the right to consider at the same time multiple applications from a single applicant when appropriate.

§ 119.10 Will SBA give preferential consideration to other SBA program participants?

In making grants under this part, SBA will not give preferential consideration to an applicant that is a participant in programs established under section 7(m) of the Small Business Act.

§ 119.11 What information will be requested in an application under the PRIME program?

Each application must contain the information and documentation specified in the applicable Program Announcement including, but not limited to, the following items.

(a) For applications seeking Technical Assistance Grants:

(1) Identifying information and core documentation for the applicant including such items as the applicant’s articles of incorporation, by-laws, proof of IRS tax-exempt status, financial statements, and reference contacts.

(2) A description of past and present activities and technical qualifications of the applicant, including workshops, programs and other technical assistance services, with specific descriptions of the extent to which such services have reached low and very low-income individuals, and the success rates of clients.

(3) A list of applicant’s community partnerships and collaborations with state and local entities, and a description of how such partnerships and collaborations are serving microentrepreneurs.

(4) A description of the proposed activity for which the applicant will use PRIME grant funds, including training programming plans; a plan for outreach and delivery; applicant’s capacity to provide thorough and detailed
§ 119.12 What criteria will SBA use to evaluate applications for funding under the PRIME program?

During the first year for which funding is available for the PRIME program, SBA will give special consideration to organizations located in and serving areas of, or with a history of successful outreach to, low-income and very low-income persons, to enable the PRIME program to assist those with the greatest need first. SBA will evaluate applications for funding in accordance with the specific goals of the Act, and as more fully described in the Program Announcements. Evaluation criteria include, but are not limited to, the following:

(a) Applications for Technical Assistance Grants:

(1) Applicants will compete based on expertise and ability to fulfill the purposes of the Act.

(2) SBA will evaluate organizational structure, financial stability, financial management systems, personnel capacity, and electronic communication capabilities (or potential for same). SBA will also evaluate data collection capabilities, reporting capacities, and ability to account for performance and outcome.

(3) SBA will evaluate the applicant’s history of providing technical assistance to low-income and very low-income microentrepreneurs. This factor includes patterns of program growth, client success, outcomes of training, success in establishing new businesses,
and success in arranging micro-level financing when the client indicates financing as a goal.

(4) SBA will evaluate the applicant’s ability to use community partnerships and collaborations with state and local entities to better serve low-income and very low-income microentrepreneurs.

(b) Applications for Capacity Building Grants:

(1) SBA will evaluate the criteria set forth in paragraph (a)(2) of this section.

(2) SBA will evaluate the applicant’s history of providing capacity building services to MDOs, as an indication of the organization’s understanding of the goals and purposes of capacity building, its historical effectiveness with the microenterprise development industry, and its ability to provide quality programming to the targeted market. SBA will evaluate patterns of program growth, outcomes of training, types of services provided, delivery systems used, the number and types of clients served, and the successes realized within the client’s organizational goals.

(3) SBA will evaluate expected impact on client MDOs; expected impact on services to low-and very-low income microentrepreneurs; and a plan for service and delivery.

(c) Applications for Research and Development Grants:

(1) SBA will evaluate the criteria set forth in paragraph (a)(2) of this section.

(2) SBA will evaluate how the research potentially will enhance microenterprise-oriented technical assistance services to disadvantaged entrepreneurs. Applicants must show the method(s), scope, duration, and implementation plans of the proposed research.

(3) SBA will evaluate applicant’s plan of action incorporating original and secondary research. Applicants must show impact on improved access to microenterprise development services for disadvantaged microentrepreneurs, and the expected replicability/transferability of the finished product to the field.

(d) Applications for Discretionary Grants will be evaluated based on the goals and the viability of the project.

§ 119.13 How will an applicant make a subgrant?

(a) An applicant that wants to make subgrants using PRIME grant funds must receive written approval from SBA prior to making subgrants. The applicant must identify the subgrantee(s) and describe in detail what the subgrantee(s) will do to help the grantee implement its proposal. An applicant must submit information to SBA demonstrating that, through the subgrantee(s), the grantee’s program will:

(1) Provide expanded services to the community,

(2) Provide a method by which one or more previously unserved communities will gain access to the program, or

(3) Provide other specific benefits to the clients, such as specialized training, expanded schedules of operation, or other benefits.

(b) If an applicant has identified potential subgrantee(s) at the time it submits an application for a PRIME grant, the applicant must include the information requested in paragraph (a) of this section in the application. Otherwise, the applicant or grantee may submit the requested information at such time that approvals for subgrantee(s) are requested.

(c) A grantee may not use more than 7.5 percent of the assistance received under its PRIME grant for administrative expenses in connection with the making of subgrants.

§ 119.14 Are there limitations regarding the use of program income?

Program income, as defined in OMB Circular A-110, may only be used to further PRIME program objectives. As such, fees collected from clients, and other program income as defined, may be used to help fund the matching requirement. All program income, as defined, shall be reported on financial reports submitted to SBA and added to funds committed to the project by SBA and the recipient organization. However, any interest earned in excess of the maximum allowable amount as specified in the OMB circular incorporated into the grant must be returned to the Federal Government by the grantee.
§ 119.15 If a grantee is unable to spend the entire amount allotted for a single fiscal year, can the funds be carried over to the next year?

(a) The grantee may request approval to use unexpended funds in the next budget period. This is permissible if funds are to be used for a non-severable, non-recurring project or activity within the scope of the PRIME program. Non-severable means a project in its entirety that cannot be subdivided. The request for using unexpended funds in the next budget period must include the following:

(1) SF 424, budget pages, and justification;

(2) Explanation of why the funds were not expended during the period in which they were awarded; and

(3) Evidence of match. The match requirement for funds carried over to the next budget period can be met by using any excess of matching funds from the current budget period, new matching funds, or a combination of both.

(b) The request must be made no later than 60 days before the end of the budget/project period or the de-obligation process will begin. Approved requests will require the issuance of a revised Notice of Award. Expenditures for funds carried over to the next budget period must be tracked separately.

§ 119.16 What are the reporting, record keeping, and related requirements for grantees?

A grantee must keep records and meet the other requirements of section 115 of the Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act), as if it were a community development financial institution. (See 12 U.S.C. 4714). In addition to meeting requirements of the Riegle Act, a grantee must also maintain data allowing it to measure the impact of services provided by it and any subgrantees, and, if specifically required by the terms of the PRIME grant, measure the success rate of individual clients whom the grantees assist. SBA will detail such requirements in its Program Announcements.

§ 119.17 What types of oversight will SBA provide to grantees?

(a) In addition to reports required under the Riegle Act, SBA will require reports in accordance with applicable OMB circulars. Such reports will include the following information:

(1) For recipients of Technical Assistance and Capacity Building Grants, for the first two years of receiving grant funding, narrative performance reports and financial status reports will be required quarterly within 15 calendar days of the end of each quarter. Thereafter, grantees may request that SBA reduce the frequency of reports from quarterly to semi-annually. The frequency of reporting then will be determined at the discretion of SBA. In addition, details of expenditures will be required with each request for payment. Grantees will be required to submit audited financial statements on an annual basis, if available, or annual financial statements prepared by a licensed, independent public accountant, within 120 calendar days of the end of the grantee’s fiscal year.

(2) For recipients of Research and Development Grants, reports will be required in accordance with agreed upon milestones and as part of the disbursement process.

(3) For recipients of Discretionary Grants, reports will be required as appropriate for the project, or on a schedule as described in paragraph(a)(1) of this section, whichever is more frequent.

(b) In addition, SBA may, from time to time, make site visits to the grantee, and review all applicable books and records.

§ 119.18 What are the restrictions against lobbying?

No assistance made available under the PRIME program may be expended by a grantee or subgrantee to pay any person to influence, or attempt to influence, any agency, elected official, officer, or employee of a Federal, State, or local government in connection with its participation in the program.
§ 119.19 Is fundraising an allowable expense under the PRIME program?

Expenditures of grant funds for fundraising activities are not allowable costs under this program. Applicants must be able to raise matching funds without the assistance of grant funds. Unless the full requirement for matching funds is waived, the applicant must demonstrate that it has adequate fundraising resources to obtain the required non-Federal matching funds to perform the project.

§ 119.20 Should grantees and subgrantees raise conflict of interest matters with SBA?

Each grantee or subgrantee must provide SBA with a copy of its conflicts of interest policies prior to receipt of funding under the program. Such policies must clearly describe the grantee’s or subgrantee’s protections from conflicts of interest or the appearance thereof in the handling of grant funding and program provision under this program.

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Authority: 15 U.S.C. 634(b)(6), 634(b)(7), 634(b)(14), 633(b)(3), 636(a) and (h), 620, and 696(3) and 697(a)(2).

Source: 61 FR 3235, Jan. 31, 1996, unless otherwise noted.


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 $25,000 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.

§ 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.

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;
   (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.
Authorization is SBA’s written agreement providing the terms and conditions under which SBA will make or guarantee business loans. It is not a contract to make a loan.

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.

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.

Intermediary is the entity in the Microloan program that receives SBA financial assistance and makes loans to small businesses in amounts up to $25,000.

Lender is an institution that has executed a participation agreement with SBA under the guaranteed loan program.

Loan Instruments are the Authorization, note, instruments of hypothecation, and all other agreements and documents related to a loan.

Loan program requirements are requirements imposed upon Lenders or CDCs by statute, SBA regulations, any agreement the Lender or CDC has executed with SBA, SBA SOPs, official SBA notices and forms applicable to the 7(a) and 504 loan programs, and loan authorizations, 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.

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.

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.

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.

Service Provider is an entity that contracts with a Lender or CDC to perform management, marketing, legal or other services.

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.


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
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(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 sources. 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 sources without SBA assistance, taking into consideration the prevailing rates and terms in the community in or near where the applicant conducts business, for similar purposes and periods of time. 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.

§ 120.102 Funds not available from alternative sources, including personal resources of principals.

(a) An applicant for a business loan must show that the desired funds are not available from the personal resources of any owner of 20 percent or more of the equity of the applicant. SBA will require the use of personal resources from any such owner as an injection to reduce the SBA funded portion of the total financing package (i.e., any SBA loans and any other financing, including loans from any other source) when that owner’s liquid assets exceed the amounts specified in paragraphs (a) (1) through (3) of this section. When the total financing package:

(1) Is $250,000 or less, each 20 percent owner of the applicant must inject any personal liquid assets which are in excess of two times the total financing package or $100,000, whichever is greater;

(2) Is between $250,001 and $500,000, each 20 percent owner of the applicant must inject any personal liquid assets which are in excess of one and one-half times the total financing package or $500,000, whichever is greater;

(3) Exceeds $500,000, each 20 percent owner of the applicant must inject any personal liquid assets which are in excess of one times the total financing package or $750,000, whichever is greater.

(b) Any liquid assets in excess of the applicable amount set forth in paragraph (a) of this section must be used to reduce the SBA portion of the total financing package. These funds must be injected prior to the disbursement of the proceeds of any SBA financing.

(c) For purposes of this section, liquid assets means cash or cash equivalent, including savings accounts, CDs, stocks, bonds, or other similar assets. Equity in real estate holdings and other fixed assets are not to be considered liquid assets.

§ 120.103 Are farm enterprises eligible?

Federal financial assistance to agricultural enterprises is generally made by the United States Department of Agriculture (USDA), but may be made by SBA under the terms of a Memorandum of Understanding between SBA and USDA. Farm-related businesses which are not agricultural enterprises are eligible businesses under SBA’s business loan programs.

§ 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 illegal activity;

(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) Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting;

(l) Consumer and marketing cooperatives (producer cooperatives are eligible);

(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 has been indicted for a felony or a crime of moral turpitude;

(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).

§ 120.111 What conditions must an Eligible Passive Company satisfy?

An Eligible Passive Company must use loan proceeds 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 (references to Operating Company in paragraphs (a) and (b) of this section mean each Operating Company). 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
§ 120.120 What are eligible uses of proceeds?

A small business must use an SBA business loan for sound business purposes. The uses of proceeds are prescribed in each loan's Authorization.

(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 an Eligible Passive Company, part of the loan proceeds may be applied for working capital if used for that purpose only by the Operating Company).

(c) A Borrower may use 7(a) loan proceeds for refinancing certain outstanding debts.

§ 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);
§ 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.

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(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;

(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.


§ 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. SBA will consider:

(a) Character, reputation, and credit history of the applicant (and the Operating Company, if applicable), its Associates, and guarantors;

(b) Experience and depth of management;

(c) Strength of the business;

(d) Past earnings, projected cash flow, and future prospects;

(e) Ability to repay the loan with earnings from the business;

(f) Sufficient invested equity to operate on a sound financial basis;

(g) Potential for long-term success;

(h) Nature and value of collateral (although inadequate collateral will not be the sole reason for denial of a loan request); and

(i) The effect any affiliates (as defined in part 121 of this chapter) may have on the ultimate repayment ability of the applicant.

§ 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 §121.103 of this chapter, must not exceed a guaranty amount of $1,000,000, except as otherwise authorized by statute for a specific program. The maximum loan amount for any one 7(a) loan is $2,000,000. 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.


§ 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. SBA, in its discretion, consulting with the Participating Lender, may require other appropriate individuals to guarantee the loan as well, except SBA will not require personal guarantees from those owning less than 5% ownership.

(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 on all collateral.

(d) Taxes. The applicant may not use any of the proceeds to pay past-due Federal and state payroll taxes.

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
§ 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.

§ 120.173 Lead-based paint.

If loan proceeds are for the construction or rehabilitation of a residential structure, lead-based paint may not be used on any interior surface, or on any exterior surface that is readily accessible to children under the age of seven years.

§ 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 Lender and CDC compliance with Loan Program Requirements.

Lenders must comply and maintain familiarity with Loan Program Requirements for the 7(a) program, as such requirements are revised from time to time. CDCs must comply and maintain familiarity with Loan Program Requirements for the 504 program, as such requirements are revised from time to time. Loan Program Requirements in effect at the time that a Lender or CDC takes an action in connection with a particular loan govern that specific action. For example, although loan closing requirements in effect when a Lender or CDC closes a loan will govern the closing actions, a Lender or CDC’s liquidation actions on the same loan are subject to the liquidation requirements in effect at the time that a liquidation action is taken.

[72 FR 18360, Apr. 12, 2007]

§ 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. If a loan is approved, an Authorization will be issued.

§ 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/F/A), whose decision is final.

Computerized SBA Forms

§ 120.194 Use of computer forms.

Any Applicant or Participant may use computer generated SBA application forms, closing forms, and other forms designated by SBA if the forms are exact reproductions of SBA forms.

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 Restrictions on loans for changes in ownership.

A Borrower may not use 7(a) loan proceeds to purchase a portion of a business or a portion of another owner’s interest. One or more current owners may use loan proceeds to purchase the entire interest of another current owner, or a Borrower can purchase ownership of an entire business.

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. Effective December 21, 2000, 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.


§ 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 Director, Office of 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.

§ 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; and

(c) A maximum of 25 years, including extensions. (A portion of a loan used to acquire or improve real property may...
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§ 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, upon SBA’s approval. SBA’s maximum allowable rates apply only to the initial rate on the date SBA received the loan application. SBA shall approve the use of a variable interest rate 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 shall be the prime rate in effect on the first business day of the month, printed in a national financial newspaper published each business day, or the SBA Optional Peg Rate which SBA publishes quarterly in the Federal Register.

(d) Maturities under 7 years. For loans with maturities under seven years, the maximum interest rate shall not exceed two and one-quarter (2 1/4) percentage points over the base rate.

(e) Maturities of 7 years or more. For loans with maturities of seven or more years, the maximum interest rate shall not exceed two and three-quarters (2 3/4) percentage points over the base rate.

(f) 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.

§ 120.215 What interest rates apply to smaller loans?

For a loan over $25,000 but not exceeding $50,000, the interest rate may be one percent more than the maximum interest rate described above. For a loan of $25,000 or less, the maximum interest rate described above may be increased by two percentage points.


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 guaranty fee is not paid, SBA may terminate the guarantee. Acceptance of the guaranty fee by SBA does not waive any rights of SBA arising from a Lender’s negligence, misconduct or violation of any provision of these regulations, the guaranty agreement, or the loan authorization.

(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 guaranty fee which the Lender must pay to SBA is one-quarter (1⁄4) of one percent of the guaranteed portion of the loan. For a loan with a maturity of more than twelve (12) months, the guaranty fee is:

(i) 2 percent of the guaranteed portion of a loan if the total amount of the loan is not more than $150,000,

(ii) 3 percent of the guaranteed portion of a loan if the total amount is more than $150,000 but not more than $700,000,

(iii) 3.5 percent of the guaranteed portion of a loan if the total loan amount is more than $700,000.

(2) For loans approved October 1, 2002, through September 30, 2004. For a loan with a maturity of twelve (12) months or less, the guaranty fee which the
§ 120.221  Fees which the Lender may collect from a loan applicant.

(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.
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(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) No prepayment fee. The Lender may not charge a fee for full or partial prepayment of a loan.

§ 120.222 Fees which the Lender or Associate may not collect from the Borrower or share with third parties.

The Lender or its Associate may not:

(a) Require the applicant or Borrower to pay the Lender, an Associate, or any party designated by either, any fees or charges for goods or services, including insurance, as a condition for obtaining an SBA guaranteed loan (unless permitted by this part);

(b) Charge an applicant any commitment, bonus, broker, commission, referral or similar fee;

(c) Charge points or add-on interest;

(d) Share any premium received from the sale of an SBA guaranteed loan in the secondary market with a Service Provider, package, or other loan-referral source;

(e) Charge the Borrower for legal services, unless they are hourly charges for requested services actually rendered.

§ 120.223 Subsidy recoupment fee payable to SBA by Borrower.

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
§ 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.
§ 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) Wind energy conversion equipment;
(g) Equipment 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.

§ 120.340 What is the Export Working Capital Program (EWCP)?

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.

§ 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.

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) Upgrading facilities or equipment will improve the applicant’s competitive position.
(b) The applicant must have a business plan reasonably supporting its projected export sales.

§ 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.

§ 120.348 Amount of guarantee.

SBA can guarantee up to $1,250,000 for a combination of fixed-asset financing and working capital, supplies and EWCP assistance. The fixed-asset portion of the loan cannot exceed $1,000,000 and the non-fixed-asset portion cannot exceed $750,000.

QUALIFIED EMPLOYEE TRUSTS (ESOP)

§ 120.350 Policy.

Section 7(a)(15) of the Act authorizes SBA to guarantee a loan to a qualified employee trust (“ESOP”) to:
(a) Help finance the growth of its employer’s small business; or
(b) Purchase ownership or voting control of the employer.

§ 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 two purposes.
(a) 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.
(b) 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.

§ 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
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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.

Pollution Control Program

§ 120.370 Policy.

Section 7(a)(12) of the Act authorizes SBA to guarantee loans up to $1,000,000 to an eligible small business to plan, design or install a pollution control facility. An applicant must meet the eligibility requirements for 7(a) loans.

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 Director, Office of Business Development ("MED") 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.

§ 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.

Defense Economic Transition Assistance

§ 120.380 Program.

Section 7(a)(21) of the Act authorizes SBA to guarantee loans to help eligible small businesses transition from defense to civilian markets, or eligible individuals adversely impacted by base closures or defense cutbacks to acquire or open and operate a small business.

§ 120.381 Eligibility.

(a) Eligible small businesses. A small business is eligible if it has been detrimentally impacted by the closure (or substantial reduction) of a Department of Defense installation, or the termination (or substantial reduction) of a Department of Defense Program on which the small business was a prime contractor, subcontractor, or supplier at any tier.

(b) Eligible individual. An eligible individual, for purposes of this program, includes the following persons involuntarily separated from their position or voluntarily terminated under a program offering inducements to encourage early retirement:

(1) A member of the Armed Forces of the United States (honorably discharged);

(2) A civilian employee of the Department of Defense; or
§ 120.382  An employee of a prime contractor, sub-contractor, or supplier at any tier of a Department of Defense program.

(c) Defense loan and technical assistance (DELTA). The DELTA program provides financial and technical assistance to defense dependent small businesses which have been adversely affected by defense reductions. The goal of the program is to assist these businesses to diversify into the commercial market while remaining part of the defense industrial base. Complete information on eligibility and other rules is available from each SBA district office.

§ 120.382  Repayment ability.

SBA shall resolve reasonable doubts concerning the small business’ proposed business plan for transition to non-defense-related markets in favor of the loan applicant in determining the sound value of the proposed loan.

§ 120.383  Restrictions on loan processing.

Since greater risk may be associated with a loan to an applicant under this program, a Certified Lender or Preferred Lender shall not make a defense economic assistance loan under the PLP or CLP programs.

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. Under CapLines, SBA generally can guarantee up to $750,000.

(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.

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 home-builder 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 20 percent of the proceeds to acquire land, and up to 5 percent for community improvements such as curbs and sidewalks.
§ 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.

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 §§ 120.441(b) and 120.451(d) concerning Supplemental Guarantee Agreements.

PARTICIPATION CRITERIA
§ 120.410 Requirements for all participating Lenders.
A Lender must:
(a) Have a continuing ability to evaluate, process, close, disburse, service and liquidate small business loans;
(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 a State or Federal regulatory authority, satisfactory to SBA; and
(e) In order to make Low Documentation loans, be:
(1) A bank or thrift institution which has executed an SBA Form 750, Loan Guarantee Agreement, and which has at least 20 qualified loans outstanding as of the call report date closest to the date of its fiscal year end, or
(2) An institution other than a bank or thrift institution which has executed an SBA Form 750, Loan Guarantee Agreement, and which has at least 20 qualified loans outstanding as of its latest fiscal year end. For purposes of this paragraph (e), a qualified loan is one which was initially approved in the amount of $100,000 or less and is classified as a commercial, industrial or commercial real estate loan for purposes of call reporting. A lender may request an exception to the requirements of this paragraph (e) from the SBA Associate Administrator for Financial Assistance.

§ 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:
§ 120.414  
(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.

MISCELLANEOUS PROVISIONS

§ 120.414 SBA access to Lender files.
A Lender must allow SBA's authorized representatives, during normal business hours, access to its files to review, inspect and copy all records and documents relating to SBA guaranteed loans.


§ 120.415 Suspension or revocation of eligibility to participate.
SBA may suspend or revoke the eligibility of a Lender to participate in the 7(a) program because of a violation of SBA regulations, a breach of any agreement with SBA, a change of circumstance resulting in the Lender's inability to meet operational requirements, or a failure to engage in prudent lending practices. Proceedings for such purposes will be conducted in accordance with the provisions of part 134 of this chapter. A suspension or revocation will not invalidate a guarantee previously provided by SBA.


PARTICIPATING LENDER FINANCINGS

SOURCE: Sections 120.420 through 120.428 appear at 64 FR 6507–6509, 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) Bank Regulatory Agencies—The bank regulatory agencies are the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision.
(c) 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.
(d) 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.
(e) 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.
(f) Good Standing—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 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; and
  (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 Securitization Committee has determined that good standing exists despite the existence of such person.
(g) 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.
§ 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 the 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 as determined by the D/FA;
(b) Use a securitization structure which is satisfactory to SBA;
(c) Use documents acceptable to SBA, including SBA’s model multi-party agreement, as amended from time to time;
(d) Obtain SBA’s written consent, which it may withhold in its sole discretion, prior to executing a commitment to securitize; and
(e) 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.

§ 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 “well capitalized” 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 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 suspension 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)(3)(i) or (c)(3)(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 SBA Securitization 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
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that securitizers provide. SBA will work with a securitizer to verify the accuracy of the data used to make the Currency Rate calculation.


§ 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 SBA's Securitization 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.

§ 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. 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.

(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 provide 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
§ 120.433

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.

§ 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 as determined by the AA/FA; and

(b) In transactions requiring SBA’s consent, all documentation must be satisfactory to SBA, including, if SBA determines it to be necessary, a multi-party agreement.

§ 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 as determined by the D/FA;

(c) 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;

(d) 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;

(e) The Lender must remain the servicer of the loans and retain possession of all loan documents other than the original promissory notes;

(f) The Lender must deposit the original promissory notes at the FTA; and

(g) The Lender must retain an economic interest in and the ultimate risk of loss on the unguaranteed portion of the loans.

§ 120.435 Which loan pledges do not require notice to or consent by SBA?

Notwithstanding the provisions of §120.434(d), 7(a) loans may be pledged for the following purposes without notice to or consent by SBA:

(a) Treasury tax and loan accounts;

(b) The deposit of public funds;

(c) Uninvested trust funds;

(d) Discount borrowings at a Federal Reserve Bank; or

(e) Advances by a Federal Home Loan Bank.

CERTIFIED LENDERS PROGRAM (CLP)

§ 120.440 The Certified Lenders Program.

Under the Certified Lenders Program (CLP), designated Lenders process and close 7(a) loans and service and liquidate such loans in accordance with subpart E of this part. SBA gives priority to applications and servicing actions submitted by Lenders under this program, and will provide expedited loan processing or servicing. All other rules in this part 120 relating to the operations of Lenders apply to CLP Lenders.

§ 120.441 How does a Lender become a CLP Lender?

(a) An SBA field office may nominate a Lender or a Lender may request a field office to consider it for CLP status. SBA district directors may approve and renew a Lender’s CLP status. The district director will consider whether the Lender:

(1) Has the ability to process, close, service and liquidate loans;

(2) Has a satisfactory performance history with SBA, including the submission of complete and accurate loan guarantee application packages;

(3) Has an acceptable SBA purchase rate; and

(4) Has shown the ability to work well with the local SBA office.

(b) If the district director does not approve a request for CLP status, the Lender may appeal to the D/FA, whose decision will be final. If SBA grants CLP status, it applies only in the field office that processed the CLP designation. A CLP Lender must execute a Supplemental Guarantee Agreement that will specify a term not to exceed two years.
§ 120.442 Suspension or revocation of CLP status.

The D/FA may suspend or revoke CLP status upon written notice providing the reasons at least 10 business days prior to the effective date of the suspension or revocation. Reasons for suspension or revocation may include a loan performance record unacceptable to SBA, failure to make the required number of loans under the expedited procedures, or violations of applicable statutes, regulations or published SBA policies and procedures. A CLP Lender may appeal the suspension or revocation made under this section under procedures found in part 134 of this chapter. The action of the D/FA remains in effect pending resolution of the appeal.

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 How does a Lender become a PLP Lender?

(a) An SBA field office serving the area in which a Lender’s office is located can nominate the Lender, or a Lender can request a field office to consider it for PLP status. The SBA field office will forward its recommendation to an SBA centralized loan processing center which will submit its recommendation and supporting documentation to the D/FA for final decision.

(b) In making its decision, SBA considers whether the Lender:

1. Has the required ability to process, close, service and liquidate loans;
2. Has the ability to develop and analyze complete loan packages; and
3. Has a satisfactory performance history with SBA.

(c) If the Lender is approved, the D/FA will designate the area in which it can make PLP loans.

(d) Before it can operate as a PLP Lender, the approved Lender must execute a Supplemental Guarantee Agreement, which will specify a term not to exceed two years.

(e) When a PLP’s Supplemental Guarantee Agreement expires, SBA may recertify it as a PLP Lender for an additional term not to exceed two years. Prior to recertification, SBA will review a PLP Lender’s loans, policies and procedures. The recertification decision of the D/FA is final.

(f) A PLP Lender may request an expansion of the territory in which it can process PLP loans by submitting its request to a loan processing center. The center will obtain the recommendation of each SBA office in the area into which the PLP Lender would like to expand its PLP operations. The center will forward the recommendations to the D/FA for final decision. If a PLP Lender is not a CLP Lender in a territory into which it seeks to expand its PLP status, it automatically obtains CLP status in that territory when it is granted PLP status for the territory.

§ 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 of 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).
§ 120.453 Responsibilities of PLP Lenders for servicing and liquidating 7(a) loans.

Servicing and Liquidation responsibilities for PLP Lenders are set forth in subpart E of this part.

[72 FR 18360, Apr. 12, 2007]

§ 120.454 PLP performance review.

SBA may review the performance of a PLP Lender.

[72 FR 25194, May 4, 2007]

§ 120.455 Suspension or revocation of PLP status.

The D/FA may suspend or revoke PLP status upon written notice providing the reasons at least 10 business days prior to the effective date of the suspension or revocation. Reasons for suspension or revocation may include loan performance unacceptable to SBA, failure to make the required number of loans under the expedited procedures, or violations of applicable statutes, regulations or published SBA policies and procedures. A PLP Lender may appeal the suspension or revocation made under this section under procedures found in part 134 of this chapter. The action of the D/FA remains in effect pending resolution of the appeal.

Small Business Lending Companies (SBLC)

§ 120.470 What is an SBLC?

A Small Business Lending Company (SBLC) is a nondepository lending institution licensed by SBA. SBA supervises, examines, and regulates SBLCs. An SBLC is subject to all applicable SBA regulations, including those governing Lenders. SBA has imposed a moratorium on licensing new SBLCs since January, 1982.

(a) An SBLC may only 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 micro-Lenders in the SBA Microloan program (see subpart G of this part). Such loans are subject to the same conditions as guaranteed loans made to SBA-designated microlenders by SBA participating Lenders.

(b) In addition to complying with §§ 120.400 through 120.413, an SBLC must meet the following requirements:

1. Business structure. It must be a corporation (profit or non-profit).
2. Written agreement. It must sign a written agreement with SBA.
3. Capital structure. It must have unencumbered paid-in capital and paid-in surplus of at least $1,000,000, or ten percent of the aggregate of its share of all outstanding loans, whichever is more.
4. Capital impairment. It must avoid capital impairment at all times. Impairment exists if the retained earnings deficit of an SBLC exceeds 50 percent of combined paid-in capital and paid-in-surplus, excluding treasury stock. An SBLC must give SBA prompt written notice of any capital impairment within 30 calendar days of the month-end financial report that first reflects the impairment. Until the impairment is cured, an SBLC may not present any loans to SBA for guarantee.
5. Issuance of securities. Without prior written SBA approval, it must not issue any securities (including stock options and debt securities) except stock dividends and common stock issued for cash or direct obligations of, or obligations fully guaranteed as to principal and interest by, the United States.
6. Voluntary capital reduction. Without prior written SBA approval, it must not voluntarily reduce its capital, or purchase and hold more than 2 percent of any class or combination of classes of its stock.
7. Reserves for losses. It must maintain a reserve in the amount of anticipated losses on loans and receivables.
8. Internal control. It must adopt a plan designed to safeguard its funds.
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and other assets, to assure the reliability of its personnel, and to maintain the accuracy of its financial data.

(9) Dual control. It must maintain dual control over disbursement of funds and withdrawal of securities. 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 $1,000 or less may be signed by one bonded officer. 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 shall furnish to each depository bank, custodian, or entity providing safe deposit boxes a certified copy of the resolution implementing these control procedures.

(10) Fidelity insurance. It 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 $500,000 executed by a surety holding a certificate of authority from the Secretary of the Treasury pursuant to 31 U.S.C. 9304-9308.

(11) Common control. It must not control, be controlled by, or be under common control with, another SBLC. Without prior written SBA approval, an Associate of one SBLC shall not be an Associate of another SBLC or of any entity which directly or indirectly controls or is under common control with another SBLC.

(12) Management. An SBLC must employ full time professional management.

(13) Borrowed funds. Without SBA’s prior written approval, it must not be capitalized with borrowed funds. Shareholders owning 10 percent or more of any class of its stock shall not use borrowed funds to purchase the stock unless the net worth of the shareholders is at least twice the amount borrowed or unless the shareholders receive SBA’s prior written approval for a lower ratio.

§ 120.471 Records.

Each SBLC must comply with the following requirements concerning records:

(a) Maintenance of Records. It must maintain accurate and current financial records, including books of account, minutes of stockholder, directors, and executive committee meetings, and all documents and supporting materials relating to the SBLC’s transactions at its principal business office. Securities held by a custodian pursuant to a written agreement shall be exempt from this requirement.

(b) Preservation of records. (1) It must preserve in a manner permitting immediate retrieval the following documentation for the financial statements required by §120.472 (and of the accompanying certified public accountant’s opinion), for the following specified periods:

(i) Preserve permanently:

(A) All general and subsidiary ledgers (or other records) reflecting asset, liability, capital stock and surplus, income, and expense accounts;

(B) All general and special journals (or other records forming the basis for entries in such ledgers); and

(C) 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;

(ii) Preserve for at least 6 years following final disposition of the related loan:

(A) All applications for financing;

(B) Lending, participation, and escrow agreements;

(C) Financing instruments; and

(D) All other documents and supporting material relating to such loans, including correspondence.

(2) Records and other documents referred to in this section may be preserved electronically if the original is available for retrieval within a reasonable period.

§ 120.472 Reports to SBA.

An SBLC must submit the following to the AA/FA:

(a) An audited financial statement prepared by a certified public accountant within three months after the close of each fiscal year, and interim financial reports when requested by SBA;

(b) A report of any legal or administrative proceeding, by or against the
§ 120.473  Change of ownership or control.

(a) Any change of ownership or control without prior written approval of SBA is prohibited. An SBLC must request approval of any such change from the AA/FA. Pending the approval, the SBLC may not register the proposed new owners on its transfer books nor permit them to participate in any manner in the conduct of the SBLC’s affairs. Change of ownership or control includes:

(1) Any transfer of 10 percent or more of any class of the SBLC’s stock, and any agreement providing for such transfer;

(2) Any transfer 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 its stock, and any agreement providing for such transfer;

(3) Any merger, consolidation, or reorganization; or

(4) Any other transaction or agreement that transfers control of the SBLC.

(b) If transfer of ownership or control 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 AA/FA.

§ 120.474  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.

§ 120.475  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.

§ 120.476  Suspension or revocation.

SBA may revoke or suspend an SBLC for a violation of law, these regulations, or any agreement with SBA. An appeal can be made following the procedures set forth in part 134 of this chapter.
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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 monies 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.

§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:
§ 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 the 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 responsible for those events.

(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...
§ 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.

§ 120.532 What is a loan Moratorium?
SBA may assume a Borrower’s obligation to repay principal and interest on a loan by agreeing to make the payments to the Lender on behalf of the Borrower under terms and conditions set by SBA. This relief is called a “Moratorium.” Complete information concerning this program may be obtained from local SBA offices.

§ 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 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.

(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.

(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.

§ 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.
§ 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 AA/FA within 30 days of the decision. The AA/FA 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 AA/FA.

[72 FR 18362, Apr. 12, 2007]
§ 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 wrong 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
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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 AA/FA within 30 days of the decision. The decision of the AA/FA 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 AA/FA, and will be the final Agency decision.

[72 FR 18362, Apr. 12, 2007]

§ 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), 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.
§ 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]
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§ 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 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 a beneficial fractional interest in a Pool (Pool Certificate), or an undivided interest in the entire 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) FTA is the SBA’s fiscal and transfer agent.

(d) Note Rate is the interest rate on the Borrower’s note.

(e) Net Rate is the interest rate on an individual guaranteed portion of a loan in a Pool.

(f) Pool is an aggregation of SBA guaranteed portions of loans made by Lenders.

(g) 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.

(h) Pool Rate is the interest rate on a Pool Certificate.

(i) Registered Holder is the Certificate owner listed in FTA’s records.

(j) SBA’s Secondary Market Program Guide is an issuance from SBA which describes the characteristics of Secondary Market transactions.
§ 120.601 SBA Secondary Market.

The SBA secondary market ("Secondary Market") consists of the sale of Certificates, representing either the entire guaranteed portion of an individual 7(a) guaranteed loan or an undivided interest in a Pool consisting of the SBA guaranteed portions of a number of 7(a) guaranteed loans. By the terms of such Certificate, SBA guarantees a Registered Holder timely payment of principal and interest from the loan or loans underlying the Certificate. 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)).

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 must be equal to the lowest Net Rate on any individual guaranteed portion of a loan in the Pool.

§ 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; and
(6) A minimum weighted average maturity at Pool formation.

(b) Adjustment of Pool characteristics. SBA may adjust the Pool characteristics periodically based upon program experience and market conditions.

§ 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.


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 installment payments 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 to the Registered Holder 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 unsecured 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:


(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), 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 National Association of Securities Dealers if it is a member.

(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:
§ 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.

§ 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.

§ 120.660 Suspension or revocation.

(a) Suspension or revocation of Lender, broker, dealer, or Registered Holder for violation of Secondary Market rules and regulations. The D/FA may suspend or revoke 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 1085, 1086, 1088 and 1454; or

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

(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 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 of the D/FA will remain in effect pending resolution of the appeal. Revocation will last a minimum of five years.

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.
Small Business Administration § 120.703

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 non-profit entities to be used for marketing, management, and technical assistance to the program’s target population.

§ 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) Economically Distressed Area is a county or equivalent division of local government of a state in which, according to the most recent available data from the United States Bureau of the Census, 40 percent or more of the residents have an annual income that is at or below the poverty level.

(c) 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.

(d) Insured depository institution has the same meaning as in section 3(c) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c).

(e) Intermediary is an entity participating in the Microloan Demonstration 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.

(f) Microloan is a short-term, fixed interest rate loan of not more than $35,000 made by an Intermediary to an eligible small business.

(g) 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.

(h) Non-lending technical assistance provider (NTAP) is an entity which receives grant funds from SBA to provide technical assistance to Microloan borrowers.

(i) Specialized Intermediary is an Intermediary which maintains a portfolio of Microloans averaging $10,000 or less.

§ 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 $35,000 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 D/FA determines that it would be in the best interests of the small business community for it to operate across state lines.

§ 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:
§ 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. 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.

§ 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 $3.5 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.

§ 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 an interest-bearing 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.

§ 120.710 What is the Loan Loss Reserve Fund?

(a) General. The Loan Loss Reserve Fund ("LLRF") is an interest-bearing Deposit Account which an Intermediary must establish to pay any shortage in the MRF caused by delinquencies or losses on Microloans. An Intermediary must maintain the LLRF until it has repaid all obligations it owes SBA.

(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 Director, Office of Financial Assistance ("D/FA") to reduce the percentage of its Portfolio.
§ 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 if it makes at least 50 percent of its loans to small businesses located in or owned by residents of an Economically Distressed Area. The Intermediary must contribute, solely from non-Federal sources, an amount equal to 25 percent of the grant. The Intermediary may not enter into third party contracts for the provision of technical assistance to program clients.

(b) Limitations on grant funds. An Intermediary may not hire as technical assistance providers contractors that do not have experience in microlending.

§ 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 How are grants made to non-lending technical assistance providers (NTAP)?

SBA selects non-lending technical assistance providers (NTAP) to receive grant funds for technical assistance to Microloan borrowers.

(a) Grant procedure for non-Intermediaries. Any nonprofit entity that is not an Intermediary may apply to SBA for a grant to provide marketing, management and technical assistance to low-income individuals for the purpose of assisting them in obtaining private sector financing in amounts of $35,000 or less. To qualify, it must submit information regarding its ability to provide this assistance. If approved, the grant agreement will establish the terms and conditions for the grant.

(b) Number and amount of grants. In each year of the Microloan Program, SBA may make no more than 55 grants to non-Intermediaries for terms of up to five years. A grant may not exceed $200,000.

(c) Contribution by nonprofit entity. The nonprofit entity must contribute an amount equal to 20 percent of the grant. The contribution from the nonprofit entity must come solely from non-Federal sources, and may include direct costs or in-kind contributions paid for under non-Federal programs.


§ 120.715 Does SBA guarantee any loans an Intermediary obtains from another source?

(a) SBA may guarantee not less than 90 percent of loans made by for-profit or nonprofit entities (or an alliance of such entities) to no more than 10 Intermediaries in urban areas and 10 Intermediaries in Rural Areas (as defined in §120.10).

(b) Any loan guaranteed by SBA under this section will have a term of 10 years. If an Intermediary receives such a loan, it will not need to repay any principal or interest during the first year, although the interest will accrue. During the second through fifth years, the Intermediary will pay interest only. During the sixth through tenth years, it will pay interest and fully amortize the principal.

(c) The interest rate on any loan under this section shall be calculated as described in §120.706.


§ 120.716 Suspension or revocation of an Intermediary or NTAP.

(a) The D/FA may suspend or revoke the participation status of an Intermediary or NTAP from the Microloan Program, or may impose other sanctions in the best interests of the program, if it fails to comply with the laws, regulations, and policies governing the program or if it fails to meet any one of the following minimum performance standards.

(1) For Intermediaries only: An Intermediary must

(i) Close and fund a minimum of four microloans per year, and

(ii) Satisfactorily provide in-house technical assistance to microloan clients and prospective microloan clients.

(2) For NTAPs only: An NTAP must show that, for every thirty clients for which it provided technical assistance, one client received a loan from the private sector.

(3) For Intermediaries and NTAPs: An Intermediary and an NTAP must

(i) Cover the service territory assigned by SBA, including honoring the SBA determined boundaries of neighboring Intermediaries and NTAPs,

(ii) Fulfill reporting requirements,

(iii) Manage program funds and matching funds in a satisfactory and financially sound manner,

(iv) Communicate and file reports via the internet within six months after beginning participation in the program,

(v) Maintain a currency rate of 85% or more (that is loans that are no more than 30 days late in scheduled payments),

(vi) Maintain a default rate of 15% or less of the cumulative dollars loaned under the program, and

(vii) Attend Microloan Program training conferences offered by SBA, or such substitute training as may be approved by SBA on a case by case basis.

(b) The D/FA, on a case by case basis, may impose pre-suspension or revocation sanctions which may include, but are not limited to, the following:
§ 120.800 The purpose of the 504 program.

As authorized by Congress, SBA has established this program to foster economic development, create or preserve job opportunities, and stimulate growth, expansion, and modernization of small businesses.

§ 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 an Authorization 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.


§ 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 program (see §120.812) that SBA has approved to participate 504 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.

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.

§ 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:

(b) A single, one-year extension of probation.
§ 120.820 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.

[68 FR 57980, Oct. 7, 2003]

§ 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]

§ 120.822 CDC membership.

(a) CDC Membership. A CDC must have at least 25 members (or stockholders for for-profit CDCs approved prior to January 1, 1987). The CDC membership must meet annually. No person or entity can own or control more than 10 percent of the CDC’s voting membership (or stock). No employee or staff of the CDC can qualify as a member of the CDC for the purpose of meeting the membership requirements. The CDC membership must include representatives from all the groups listed in paragraph (b) of this section.

(b) Membership groups. Members must be responsible for actively supporting economic development in the Area of Operations and must be from one of the following groups:

(1) Government organizations responsible for economic development in the Area of Operations;

(2) Financial institutions that provide commercial long term fixed asset financing in the Area of Operations;

(3) Community organizations dedicated to economic development in the Area of Operations such as chambers of commerce, foundations, trade associations, colleges, universities, or small business development centers (as defined in section 21(a)(1) of the Act, 15 U.S.C. 648(a)(1)); and

(4) Businesses in the Area of Operations.

(c) A CDC that is incorporated in one State and is operating as a Multi-State CDC in another State must meet the membership requirements for each State.

[68 FR 57980, Oct. 7, 2003]

§ 120.823 CDC Board of Directors.

The CDC must have a Board of Directors chosen from the membership by the members, and representing at least three of the four membership groups. No single group shall control. No person who is a member of a CDC’s staff may be a voting member of the Board except for the CDC manager. The Board Members must be responsible officials of the organizations they represent and at least one member other than the CDC manager must possess commercial lending experience. The Board must meet at least quarterly and shall be responsible for CDC staff decisions and actions. A quorum shall require at least 5 Directors authorized to vote. When the Board votes on SBA loan approval or servicing actions, at least one Board Member with commercial loan experience shall be present.
Small Business Administration § 120.824

Professional management and staff.

A CDC must have full-time professional management, including an Executive Director (or the equivalent) managing daily operations. It must also have a full-time professional staff qualified by training and experience to market the 504 Program, package and process loan applications, close loans, service, and, if authorized by SBA, liquidate the loan portfolio, and sustain a sufficient level of service and activity in the Area of Operations. CDCs may obtain, under written contract, management, marketing, packaging, processing, closing, servicing or liquidation services provided by qualified individuals and entities under the following circumstances:

(a) The CDC must have at least one salaried professional employee that is employed directly (not a contractor or an Associate of a contractor) full-time 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 petition SBA to waive the requirement of the manager being employed directly if:

(1) Another non-profit entity that has the economic development of the CDC’s Area of Operations as one of its principal activities will contribute the management of the CDC, and the management contributed by the other entity also may work on and operate that entity’s economic development programs, but must be available to small businesses interested in the 504 program and to 504 loan borrowers during regular business hours; or

(2) The CDC petitioning SBA for such waiver is rural; has insufficient loan volume to justify having management employed directly by the CDC; and has contracted with another CDC located in the same general area to provide the management.

(b) SBA must pre-approve contracts the CDC makes for managing, marketing, packaging, processing, closing, servicing, or liquidation functions. CDCs may contract for legal and accounting services without SBA approval, except for legal services in connection with loan liquidation or litigation.

(c) Contracts must clearly identify terms and conditions satisfactory to SBA that permit the CDC to terminate the contract prior to its expiration date on a reasonable basis.

(d) The CDC must provide copies of these contracts to SBA for review annually.

(e) If a CDC’s Board believes that it is in the best interest of the CDC to contract for a management, marketing, packaging, processing, closing, servicing or liquidation function, the CDC’s Board must explain its reasoning to SBA. The CDC’s Board must demonstrate to SBA that:

(1) The compensation under the contract is only from the CDC, reasonable and customary for similar services in the Area of Operations, and is only for actual services performed;

(2) The full term of the contract (including options) is reasonable; and

(3) The contract does not evidence any actual or apparent conflict of interest or self-dealing on the part of any
§ 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.

§ 120.826 Basic requirements for operating a CDC.

A CDC must operate in accordance with all 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 all records and submit all reports required by SBA.

§ 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.

§ 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.

§ 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.

§ 120.830 Reports a CDC must submit.

A CDC must submit the following reports to SBA:
(a) An annual report within 180 days after the end of the CDC’s fiscal year (to include financial statements of the CDC and any affiliates or subsidiaries of the CDC), and such interim reports as SBA may require;
(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 af-
facts its eligibility to continue to par-
ticipate 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]

§ 120.835 Application to expand an 
Area of Operations.

(a) General. A CDC that has been cer-
tified to participate in the 504 program 
may apply to expand its Area of Oper-
atations 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 com-
petently fulfill its 504 program respon-
sibilities in the proposed area.
(b) Local Economic Area Expansion. A 
CDC seeking to expand its Area of Op-
erations into a Local Economic Area 
must apply in writing to the Lead SBA 
Office.
(c) Multi-State CDC 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:
(1) The State the CDC seeks to ex-
pand into is contiguous to the State of 
the CDC's incorporation;
(2) The CDC demonstrates that its 
membership meets the requirements in 
§120.822 separately for its State of in-
corporation and for each additional 
State in which it seeks to operate as a 
Multi-State CDC; and
(3) The CDC has a loan committee 
meeting the requirements of §120.823.
[68 FR 57981, Oct. 7, 2003]

§ 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 Dis-
trict 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 regu-
lations, policies, and performance 
benchmarks, including pre-approval 
and annual review by SBA of any man-
agement or staff contracts, and the 
timely submission of all annual re-
ports. In making its recommendation 
on the application, the District Office 
may consider any information pre-
mitted 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 sub-
mit the application, recommendation, 
and supporting materials within 60 
days of the receipt of a complete appli-
cation from the CDC to the D/FA, who 
will make the final decision. The D/FA 
may consider any information sub-
mitted or available related to the ap-
plicant and the application.
(b) SBA will notify the CDC of its de-
cision 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 Op-
erations to the District Office serving the 
area in which the Project will be 
located. The applicant CDC must dem-
strate that it can adequately fulfill 
its 504 program responsibilities for the 
504 loan, including proper servicing. 
The District Office may approve the 
application if:
(a) The applicant CDC has previously 
assisted the business to obtain a 504 
loan; or
§ 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 to the Lead SBA Office. The Lead SBA Office will send its recommendation and the application to the D/FA for final decision.

(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]

§ 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) Current reviews in compliance. SBA-conducted oversight reviews must be current (within past 12 months) for applicants for ALP status, and these reviews must have found the CDC to be in compliance with Loan Program Requirements.

(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.

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, which will review these materials and forward them with a recommendation to the D/FA for final decision.
(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 (h).
(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.

§ 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.


§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 (the face 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.

(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 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 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.
§ 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.

§ 120.850 Expiration of Associate Development Company designation.

The designation of Associate Development Company (ADC) will cease to exist on January 1, 2004. After that date, former ADCs may continue to contract with CDCs as Lender Service Providers (see part 103 of this chapter) or to perform other services.

§ 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 Restrictions regarding CDC participation in the Small Business Investment Company (SBIC) program and the 7(a) loan program.

(a) 7(a) loan program. A CDC must not invest in or be an Affiliate of a Lender participating in the 7(a) loan program described in §120.2(a). (For a definition of Affiliation, refer to §121.103 of this chapter.) CDCs that already are affiliated with state development companies approved by SBA under section 501 of Title V, as of November 6, 2003 may remain Affiliates.

(b) SBIC program. 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.

[68 FR 57985, Oct. 7, 2003]

SBA OVERSIGHT

§ 120.853 Oversight and evaluation of CDCs.

SBA may conduct an operational review of a CDC. 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]

SBA ENFORCEMENT ACTIONS

§ 120.854 Grounds for taking enforcement action against a CDC.

(a) General. The DFA or his or her authorized delegate may undertake one or more of the enforcement actions set forth in §§120.859(a) and (b) with respect to a CDC, based upon a determination that one or more of the following grounds exist:

(1) The CDC has failed to receive SBA approval for at least four 504 loans during two consecutive fiscal years;

(2) The CDC has failed to comply materially with any Loan Program Requirement.

(3) The CDC has made a material false statement or has failed to disclose a material fact to SBA:

(i) With respect to a 504 loan;

(ii) In applying to SBA for authority to participate in the 504 program or for any change in the CDC’s participation in the 504 program; or

(iii) In any report or other disclosure of information that SBA requires.

(4) The CDC is not performing underwriting, closing, servicing, liquidation, litigation, or other actions with respect to 504 loans in a commercially reasonable or prudent manner. Supporting evidence of a CDC’s commercially unreasonable or imprudent action may include, but is not limited to, failure to meet one or more of the portfolio benchmarks.

(5) The CDC fails to correct an underwriting, closing, servicing, liquidation, litigation, or reporting deficiency, or fails to take other corrective action, after receiving notice from SBA of a deficiency and the need to take corrective action, if any, within the time period specified in SBA’s notice of deficiency. Such a notice must give the CDC a reasonable time, as determined by SBA in its sole discretion, to correct the deficiency.

(6) The CDC has engaged in a pattern of uncooperative behavior or taken an action that SBA determines is deleterious to the 504 program, that undermines SBA’s management and administration of the 504 program, or that is
§ 120.855 Types of enforcement actions.

(a) Enforcement. Upon a determination that one or more of the grounds set forth in §120.854(a) exist, the D/FA or his or her authorized delegate may undertake, in SBA's sole discretion, one or more of the following enforcement actions:

(1) Suspend or terminate the CDC's authority to participate in the 504 program or in any pilot or program within the 504 program established by SBA other than a CDC's authority to participate as an ALP CDC or PCLP CDC, which are governed by paragraphs (c) and (d) of this section.

(2) Suspend or terminate the CDC's authority to perform underwriting, closing, servicing, liquidation, or litigation on one or more 504 loans or to perform any other function in connection with the 504 program.

(3) Require the CDC to transfer some or all of its existing 504 loan portfolio and/or some 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 sole discretion.

(4) Instruct the CSA to withhold payment of servicing, late and/or other fee(s) to the CDC.

(b) Immediate suspension. If SBA determines that one or more grounds set forth in §120.854(b) exist and further determines that immediate action is necessary to prevent the risk of significant loss to SBA or to prevent significant impairment of the integrity of the 504 program, the D/FA may issue a written notice of immediate suspension to a CDC, suspending all or certain activities of a CDC pertaining to the 504 program, and such suspension will be effective as of the date of the notice. SBA may combine a notice of immediate suspension with any enforcement action set forth in paragraphs (a), (c) or (d) of this section.

(c) Suspension or termination of ALP CDC. Upon a determination that one or more of the grounds set forth in §120.854(b) exist, the D/FA or his or her authorized delegate may, in SBA's sole discretion, suspend or terminate a CDC's authority to participate as an ALP CDC.

(d) Suspension or termination of PCLP CDC. Upon a determination that one or more of the grounds set forth in §120.854(c) exist, the D/FA or his or her authorized delegate may, in SBA's sole discretion, suspend or terminate a CDC's authority to participate as a PCLP CDC.
§ 120.856 Enforcement procedures.

(a) SBA’s notice to CDC of enforcement action. (1) Prior to undertaking an enforcement action set forth in §120.855(a), (c) or (d) the D/FA or his or her authorized delegate must issue a written notice to the affected CDC identifying the proposed enforcement action, setting forth in reasonable detail the underlying facts and reasons for the proposed action and, if a suspension also is proposed, stating the term of the proposed suspension.

(2) If the D/FA or his or her authorized delegate undertakes an immediate suspension pursuant to §120.855(b), he or she must issue a written notice to the affected CDC identifying the scope and term of the suspension, and setting forth in reasonable detail the underlying facts and reasons for the proposed action.

(3) If a proposed enforcement action or immediate suspension is based upon information obtained from a party other than the CDC 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 CDC.

(b) CDC’s opportunity to object. (1) A CDC that desires to contest a proposed 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 D/FA 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 CDC can provide compelling evidence to the contrary.

(2) The objection must set forth in detail all grounds known to the CDC to contest the proposed action or immediate suspension and all mitigating factors, and must include documentation that the CDC believes is most supportive of its objection. A CDC must exhaust this administrative remedy in order to preserve its objection to a proposed enforcement action or an immediate suspension.

(3) If a CDC can show legitimate reasons why it does not understand the reasons given by SBA in its notice of the action, the CDC may request clarification from the Agency. SBA will provide the requested clarification in writing to the CDC or notify the CDC in writing that such clarification is not necessary. SBA, in its sole discretion, will further advise in writing whether the CDC may have additional time to present its objection to the notice.

(4) A CDC 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 timeframe given by the notice for response. If such a request is submitted to the Agency, SBA may, in its sole discretion, provide the CDC with additional time to respond to the notice of proposed action or immediate suspension.

(5) Prior to the issuance of a final decision by SBA under §120.856(c), if a CDC can show that there is newly discovered material evidence which, despite the CDC’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 CDC’s control why it was not able to present a material fact or argument to the D/FA or other deciding SBA official in its objection, and that the CDC has been prejudiced by not being able to present such information, the CDC may submit such information to SBA and request that the Agency consider such information in its final decision.

(c) SBA’s decision on CDC’s objection to proposed action. (1) If the affected CDC files a timely written objection to a proposed enforcement action, the D/FA or his or her authorized delegate must issue a written notice of decision to the affected CDC advising whether SBA is undertaking the proposed enforcement action setting forth the grounds for the decision. SBA will issue such a notice.
of decision whenever it deems appropriate.

(2) If the affected CDC files a timely written objection to a notice of immediate suspension, the D/FA or his or her authorized delegate must issue a written notice of final decision to the affected CDC within 90 days of receiving the CDC’s objection advising whether SBA is continuing with the immediate suspension. If the CDC submits additional information to SBA after submitting its objection pursuant to §120.856(b)(5), SBA must issue its final decision within 90 days of receiving such information.

(3) Prior to issuing a notice of decision, SBA in its sole discretion can request additional information from the affected CDC or other parties and conduct any other investigation it deems appropriate. If SBA determines, in its sole discretion, to consider an untimely objection, it must issue a notice of decision pursuant to this paragraph.

(d) SBA’s notice of final agency decision. If SBA chooses not to consider an untimely objection or if the affected CDC fails to file a written objection to a proposed enforcement action or an immediate suspension, and if SBA continues to believe that such proposed enforcement action or immediate suspension is appropriate, the D/FA or his or her authorized delegate must issue a written notice of decision to the affected CDC that SBA is undertaking one or more of the proposed enforcement actions against the CDC or that SBA will continue to pursue an immediate suspension of the CDC. Such a notice of decision need not state any grounds for the action other than to reference the CDC’s failure to file a timely objection, and represents the final agency decision. If the affected CDC fails to file a written objection to an immediate suspension, SBA need not issue any further notice to the CDC.

(e) Appeal to OHA. (1) A CDC may appeal from an SBA notice of decision issued pursuant to paragraph (c) of this section to the SBA Office of Hearings and Appeals (OHA). The rules and procedures set forth in part 134 of this chapter will govern such appeals.

(2) OHA must limit its review to a determination of whether SBA’s decision was arbitrary, capricious or contrary to law, or without procedure required by law. OHA must limit its review to the record that the D/FA or his or her authorized delegate, and any other SBA officials directly involved with the decision, considered in making the final decision. If the OHA decides that SBA’s decision was arbitrary, capricious, contrary to law, or without procedure required by law, the OHA must remand the matter to the D/FA or the original deciding official for further consideration. The CDC may appeal from a reconsidered SBA decision as set forth in this paragraph (e).

(3) OHA must not consider any argument, fact or other information presented by the affected CDC unless the CDC previously submitted that information to SBA:

(A) In or with the affected CDC’s objection;

(B) In response to a request for information from SBA; or

(C) Pursuant to paragraph (b)(5) of this section if such information was accepted by SBA.

(ii) However, if a CDC can show that there is newly discovered material evidence which, despite the CDC’s exercise of due diligence, could not have been discovered before the Agency’s final decision, or that there are compelling reasons beyond the CDC’s control why it was not able to present a material fact or argument to the D/FA or other deciding SBA official prior to such decision, and that the CDC has been prejudiced by not being able to present such information to the official, the CDC may file a motion with the OHA for a remand of the matter.

(4) A decision by OHA, other than a remand, is the final agency decision.

(f) Limit on applicability. The procedures in this section shall only apply to an action taken by SBA pursuant to §120.855.

[68 FR 57986, Oct. 7, 2003]
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.


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; or
(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.


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
§ 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.

§ 120.871(1) Leasing part of Project Property to another business.

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.

§ 120.871(2) Leasing part of Project Property to another business.

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):

(1) To acquire land used in the Project prior to applying to SBA for the 504 loan; or

(2) For any other expense toward a Project within nine months prior to receipt by SBA of a complete loan application, unless the time limit is extended or waived by SBA for good cause;

(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.

§ 120.882 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 § 120.871):

(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 $2,500; and
(f) Underwriters’ fee.


§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).
(b) Third-Party Loan fees (commitment, broker, finders, origination, processing fees of permanent financing).
(c) Ancillary business expenses, such as:
   (1) Working capital;
   (2) Counseling or management services fees;
   (3) Incorporation/organization costs;
   (4) Franchise fees; and
   (5) Advertising.
(d) 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 a business' operations and meeting the IRS definition of capital equipment).

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.

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).

§ 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.

§ 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.)

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. Third Party Loans usually are collateralized by a first lien on the Project property. The SBA cannot guarantee these loans.

§ 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. If there is a balloon payment, it must be justified in the loan report and clearly identified in the Loan Authorization.
(b) Interest rates. Interest rates must be reasonable. SBA must establish and publish in the Federal Register a
§ 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.

§ 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.

§ 120.925 Preferences.

No Third Party Lender shall establish a Preference. (See § 120.10 for a definition of Preference.)

§ 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.

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(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.

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(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.
§ 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.

§ 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.

§ 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 transferrer; 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 D/FA 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 therefore, 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 the D/FA will remain in effect pending resolution of the appeal. SBA may suspend or revoke the opportunity for a hearing under part 134 of this chapter.

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 requirement imposed by statute, regulation, SOP, policy and procedural notice, any agreement the CDC has executed with SBA, or the terms of a Debenture or loan authorization;
   (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]

§ 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.


§ 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 Authorization for the Debenture 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.

§ 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:

(1) 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]

§ 120.990 501, 502 and 503 Loans and Other Laws

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—Lender Oversight

SOURCE: 72 FR 25194, May 4, 2007, unless otherwise noted.

§ 120.1070 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) On-site examinations. The costs of conducting on-site safety and soundness examinations of an SBA-Supervised Lender, including any expenses that are incurred in relation to the examination. For purposes of this paragraph, the term “SBA-Supervised Lender” means a Small Business Lending Company or a Non-Federally Regulated Lender.

(2) On-site reviews. The costs of conducting an on-site review of a Lender, including any expenses that are incurred in relation to the review.

(3) Off-site reviews/monitoring. The costs of conducting off-site reviews/monitoring of a Lender, including any expenses that are incurred in relation to the review/monitoring activities. SBA will assess this charge based on each Lender’s portion of the total dollar amount of SBA guarantees in SBA’s portfolio. SBA may waive the assessment of this fee for all Lenders owing less than a threshold amount below which SBA determines that it is not cost effective to collect the fee.

(4) Other lender oversight activities. The costs of additional expenses that SBA incurs in carrying out 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). This charge will be based on each Lender’s portion of the total dollar amount of SBA guarantees in SBA’s portfolio.

(b) Billing process. For the on-site examinations or reviews conducted under (a)(1) and (a)(2) above, SBA will bill each Lender for the amount owed following completion of the examination or review. For the off-site reviews/monitoring conducted under (a)(3) above and the other Lender oversight expenses incurred under (a)(4) above, SBA will bill each 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.

(c) 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 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 or to limit a participant’s delegated authority.

**PART 121—SMALL BUSINESS SIZE REGULATIONS**

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S OURCE: 61 FR 3286, Jan. 31, 1996, unless otherwise noted.


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) 553-6047 or 1(703) 605-6000; or via the Internet at http://www.ntis.gov/yellowbk/Inty205.htm. 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. [61 FR 3286, Jan. 31, 1996, as amended at 67 FR 3045, Jan. 23, 2002]

§ 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.
(b) Exceptions to affiliation coverage.
(1) Business concerns owned in whole
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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, such as bookkeeping and payroll, so long as adequate payment is provided for those services. Affiliation may be found for other reasons.

(3) Business concerns which are part of an SBA approved pool of concerns for a joint program of research and development 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) Investment companies, as defined under the 1940 Act, which are not registered under the 1940 Act because they are beneficially owned by less than 100 persons, if the company's sales literature or organizational documents indicate that its principal purpose is investment in securities rather than the operation of commercial enterprises.

(6) A protege firm is not an affiliate of a mentor firm solely because the protege firm receives assistance from the mentor firm under Federal Mentor-Protege programs. Affiliation may be found for other reasons.

(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.

(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
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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.

(g) Affiliation based on the newly organized concern rule. Affiliation may arise where former 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 by way of contract, express or implied, consenting to engage in and carry out no more than three specific or limited-purpose 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 the joint venture entity cannot submit more than three offers over a two year period, starting from the date of the submission of the first offer. A joint venture may or may not be in the form of a separate legal entity. The joint venture is viewed as a business entity in determining power to control its management. SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture, and that affiliation between the two exists, pursuant to paragraph (h)(4) of this section.

(1) Parties to a joint venture are affiliates if any one of them seeks SBA financial assistance for use in connection with the joint venture.

(2) Except as provided in paragraph (h)(3) of this section, concerns submitting offers on a particular procurement or property sale as joint venturers are affiliated with each other with regard to the performance of that contract.

(3) Exception to affiliation for certain joint ventures. (i) A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement without regard to affiliation under paragraph (h) of this section so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided:

(A) The procurement qualifies as a "bundled" requirement, at any dollar value, within the meaning of §125.2(d)(1)(i) of this chapter; or

(B) The procurement is other than a "bundled" requirement within the meaning of §125.2(d)(1)(i) of this chapter, and:

(1) For a procurement having receipts based size standard, the dollar value of the procurement, including options, exceeds half the size standard corresponding to the NAICS code assigned to the contract; or

(2) For a procurement having an employee-based size standard, the dollar value of the procurement, including options, exceeds $10 million.

(ii) A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer for a competitive 8(a) procurement without regard to affiliation under paragraph (h) of this section so long as the requirements of §124.513(b)(1) of this chapter are met.

(iii) Two firms approved by SBA to be a mentor and protege under 13 CFR 124.520 may joint venture as a small business for any Federal Government procurement, provided the protege qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in 13 CFR 124.519.

(4) A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. 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, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

(5) For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, and in its total number of employees its proportionate share of joint venture employees.

(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,
§ 121.104 How does SBA calculate annual receipts?

(a) Receipts means “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 and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; 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, 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) Annual receipts of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three.

(2) 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.

(3) 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.

(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. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

(3) If the business concern or an affiliate has been in business for a period of

through other means, such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.

less than three 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 a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

(e) Unless otherwise defined in this section, all terms shall have the meaning attributed to them by the IRS.


§ 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 12 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 12 months, the average number of employees is used for each of the pay periods during which it has been in business.

4. 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.


§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.

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

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sector 11—Agriculture, Forestry, Fishing and Hunting</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Subsector 111—Crop Production</strong></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>111110</td>
<td>Soybean Farming</td>
<td>$0.75</td>
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</tr>
<tr>
<td>111120</td>
<td>Oilseed (except Soybean) Farming</td>
<td>$0.75</td>
<td></td>
</tr>
<tr>
<td>111130</td>
<td>Dry Pea and Bean Farming</td>
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</tr>
<tr>
<td>111140</td>
<td>Wheat Farming</td>
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</tr>
<tr>
<td>111150</td>
<td>Corn Farming</td>
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</tr>
<tr>
<td>111160</td>
<td>Rice Farming</td>
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</tr>
<tr>
<td>111191</td>
<td>Oilseed and Grain Combination Farming</td>
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<td></td>
</tr>
<tr>
<td>111199</td>
<td>All Other Grain Farming</td>
<td>$0.75</td>
<td></td>
</tr>
<tr>
<td>111211</td>
<td>Potato Farming</td>
<td>$0.75</td>
<td></td>
</tr>
<tr>
<td>111219</td>
<td>Other Vegetable (except Potato) and Melon Farming</td>
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<tr>
<td>111310</td>
<td>Orange Groves</td>
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</tr>
<tr>
<td>111320</td>
<td>Citrus (except Orange) Groves</td>
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</tr>
<tr>
<td>111331</td>
<td>Apple Orchards</td>
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<tr>
<td>111332</td>
<td>Grape Vineyards</td>
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<tr>
<td>111333</td>
<td>Strawberry Farming</td>
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<tr>
<td>111334</td>
<td>Berry (except Strawberry) Farming</td>
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<td>111335</td>
<td>Tree Nut Farming</td>
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<tr>
<td>111336</td>
<td>Fruit and Tree Nut Combination Farming</td>
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<tr>
<td>111339</td>
<td>Other Noncitrus Fruit Farming</td>
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<tr>
<td>111411</td>
<td>Mushroom Production</td>
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<tr>
<td>111419</td>
<td>Other Food Crops Grown Under Cover</td>
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<tr>
<td>111421</td>
<td>Nursery and Tree Production</td>
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## Small Business Size Standards by NAICS Industry—Continued

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
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<tbody>
<tr>
<td>111422</td>
<td>Floriculture Production</td>
<td>$0.75</td>
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<td>111910</td>
<td>Tobacco Farming</td>
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<tr>
<td>111920</td>
<td>Cotton Farming</td>
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<tr>
<td>111930</td>
<td>Sugarcane Farming</td>
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<tr>
<td>111940</td>
<td>Hay Farming</td>
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<td>111981</td>
<td>Sugar Beet Farming</td>
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<td>111992</td>
<td>Peanut Farming</td>
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<td>111998</td>
<td>All Other Miscellaneous Crop Farming</td>
<td>$0.75</td>
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<tr>
<td>112111</td>
<td>Beef Cattle Ranching and Farming</td>
<td>$0.75</td>
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</tr>
<tr>
<td>112112</td>
<td>Cattle Feedlots</td>
<td>$2.00</td>
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<tr>
<td>112120</td>
<td>Dairy Cattle and Milk Production</td>
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<tr>
<td>112210</td>
<td>Hog and Pig Farming</td>
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<tr>
<td>112310</td>
<td>Chicken Egg Production</td>
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<td>112320</td>
<td>Broilers and Other Meat Type Chicken Production</td>
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<tr>
<td>112330</td>
<td>Turkey Production</td>
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<tr>
<td>112340</td>
<td>Poultry hatcheries</td>
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<td>112390</td>
<td>Other Poultry Production</td>
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<tr>
<td>112410</td>
<td>Sheep Farming</td>
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<tr>
<td>112420</td>
<td>Goat Farming</td>
<td>$0.75</td>
<td>........................................</td>
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<tr>
<td>112511</td>
<td>Finfish Farming and Fish Hatcheries</td>
<td>$0.75</td>
<td>........................................</td>
</tr>
<tr>
<td>112512</td>
<td>Shellfish Farming</td>
<td>$0.75</td>
<td>........................................</td>
</tr>
<tr>
<td>112519</td>
<td>Other Aquaculture</td>
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<tr>
<td>112910</td>
<td>Agriculture</td>
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<tr>
<td>112920</td>
<td>Horse and Other Equine Production</td>
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<tr>
<td>112930</td>
<td>Fur-Bearing Animal and Rabbit Production</td>
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<tr>
<td>112990</td>
<td>All Other Animal Production</td>
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<tr>
<td>113110</td>
<td>Timber Tract Operations</td>
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<tr>
<td>113310</td>
<td>Forest Nurseries and Gathering of Forest Products</td>
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<td>........................................</td>
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<tr>
<td>113310</td>
<td>Logging</td>
<td>$6.5</td>
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</table>

### Subsector 114—Fishing, Hunting and Trapping

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
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<tbody>
<tr>
<td>114111</td>
<td>Finfish Fishing</td>
<td>$4.0</td>
<td>........................................</td>
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<tr>
<td>114112</td>
<td>Shellfish Fishing</td>
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<tr>
<td>114119</td>
<td>Other Marine Fishing</td>
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<tr>
<td>114210</td>
<td>Hunting and Trapping</td>
<td>$4.0</td>
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### Subsector 115—Support Activities for Agriculture and Forestry

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
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<tbody>
<tr>
<td>115111</td>
<td>Cotton Ginning</td>
<td>$6.5</td>
<td>........................................</td>
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<tr>
<td>115112</td>
<td>Soil Preparation, Planting, and Cultivating</td>
<td>$6.5</td>
<td>........................................</td>
</tr>
<tr>
<td>115113</td>
<td>Crop Harvesting, Primarily by Machine</td>
<td>$6.5</td>
<td>........................................</td>
</tr>
<tr>
<td>115114</td>
<td>Postharvest Crop Activities (except Cotton Ginning)</td>
<td>$6.5</td>
<td>........................................</td>
</tr>
<tr>
<td>115115</td>
<td>Farm Labor Contractors and Crew Leaders</td>
<td>$6.5</td>
<td>........................................</td>
</tr>
<tr>
<td>115116</td>
<td>Farm Management Services</td>
<td>$6.5</td>
<td>........................................</td>
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<tr>
<td>115210</td>
<td>Support Activities for Animal Production</td>
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<td>........................................</td>
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<tr>
<td>115310</td>
<td>Support Activities for Forestry</td>
<td>$6.5</td>
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</table>

### Subsector 21—Mining, Quarrying, and Oil and Gas Extraction

#### Subsector 211—Oil and Gas Extraction

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
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<tbody>
<tr>
<td>211111</td>
<td>Crude Petroleum and Natural Gas Extraction</td>
<td>..................................</td>
<td>500</td>
</tr>
<tr>
<td>211112</td>
<td>Natural Gas Liquid Extraction</td>
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#### Subsector 212—Mining (except Oil and Gas)

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>212111</td>
<td>Bituminous Coal and Lignite Surface Mining</td>
<td>..................................</td>
<td>500</td>
</tr>
<tr>
<td>212112</td>
<td>Bituminous Coal Underground Mining</td>
<td>..................................</td>
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</tr>
<tr>
<td>212113</td>
<td>Anthracite Mining</td>
<td>.................................</td>
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</tr>
<tr>
<td>212210</td>
<td>Iron Ore Mining</td>
<td>.................................</td>
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</tr>
<tr>
<td>212221</td>
<td>Gold Ore Mining</td>
<td>.................................</td>
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</tr>
<tr>
<td>212222</td>
<td>Silver Ore Mining</td>
<td>.................................</td>
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### NAICS U.S. Industry Title and Size Standards

<table>
<thead>
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<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
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<tbody>
<tr>
<td>212231</td>
<td>Lead Ore and Zinc Ore Mining</td>
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<tr>
<td>212234</td>
<td>Copper Ore and Nickel Ore Mining</td>
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<tr>
<td>212291</td>
<td>Uranium-Radium-Vanadium Ore Mining</td>
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<tr>
<td>212299</td>
<td>All Other Metal Ore Mining</td>
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<tr>
<td>212311</td>
<td>Dimension Stone Mining and Quarrying</td>
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<tr>
<td>212312</td>
<td>Crushed and Broken Limestone Mining and Quarrying</td>
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<td>212313</td>
<td>Crushed and Broken Granite Mining and Quarrying</td>
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<td>212319</td>
<td>Other Crushed and Broken Stone Mining and Quarrying</td>
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<td>212321</td>
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<td>212322</td>
<td>Industrial Sand Mining</td>
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<td>212324</td>
<td>Kaolin and Ball Clay Mining</td>
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<td>212325</td>
<td>Clay and Ceramic and Refractory Minerals Mining</td>
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<tr>
<td>212391</td>
<td>Potash, Soda, and Borate Mineral Mining</td>
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<td>212392</td>
<td>Phosphate Rock Mining</td>
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<td>212393</td>
<td>Other Chemical and Fertilizer Mineral Mining</td>
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<tr>
<td>212399</td>
<td>All Other Nonmetallic Mineral Mining</td>
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<tr>
<td>237990</td>
<td>Other Heavy and Civil Engineering Construction</td>
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<tr>
<td>238170</td>
<td>Siding Contractors</td>
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<tr>
<td>238190</td>
<td>Other Foundry, Structure, and Building Exterior Contractors</td>
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<td>238130</td>
<td>Framing Contractors</td>
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<td>Masonry Contractors</td>
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<td>221112</td>
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<td>Support Activities for Oil and Gas Operations</td>
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<td>New Single-Family Housing Construction (except Operative Builders)</td>
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### Small Business Administration

#### SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

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**EXCEPT,** Building and Property Specialty Trade Services

| Sectors 31—33—Manufacturing

**Subsector 311—Food Manufacturing**

| 311111 | Dog and Cat Food Manufacturing | ..... | 500 |
| 311119 | Other Animal Food Manufacturing | ..... | 500 |
| 311211 | Flour Milling | ..... | 500 |
| 311212 | Rice Milling | ..... | 500 |
| 311213 | Malt Manufacturing | ..... | 500 |
| 311221 | Wet Corn Milling | ..... | 750 |
| 311222 | Soybean Processing | ..... | 500 |
| 311223 | Other Oilsseed Processing | ..... | 1,000 |
| 311225 | Fats and Oils Refining and Blending | ..... | 1,000 |
| 311230 | Breakfast Cereal Manufacturing | ..... | 1,000 |
| 311311 | Sugarcane Mills | ..... | 500 |
| 311312 | Cane Sugar Refining | ..... | 750 |
| 311313 | Beet Sugar Manufacturing | ..... | 750 |
| 311320 | Chocolate and Confectionery Manufacturing from Cacao Beans | ..... | 500 |
| 311330 | Confectionery Manufacturing from Purchased Chocolate | ..... | 500 |
| 311340 | Non-Chocolate Confectionery Manufacturing | ..... | 500 |
| 311411 | Frozen Fruit, Juice and Vegetable Manufacturing | ..... | 500 |
| 311412 | Frozen Specialty Food Manufacturing | ..... | 500 |
| 311421 | Fruit and Vegetable Canning | ..... | 3,000 |
| 311422 | Specialty Canning | ..... | 1,000 |
| 311423 | Dried and Dehydrated Food Manufacturing | ..... | 500 |
| 311511 | Fluid Milk Manufacturing | ..... | 500 |
| 311512 | Creamery Butter Manufacturing | ..... | 500 |
| 311513 | Cheese Manufacturing | ..... | 500 |
| 311514 | Dry, Condensed, and Evaporated Dairy Product Manufacturing | ..... | 500 |
| 311520 | Ice Cream and Frozen Dessert Manufacturing | ..... | 500 |
| 311611 | Animal (except Poultry) Slaughtering | ..... | 500 |
| 311612 | Meat Processed from Carcasses | ..... | 500 |
| 311613 | Rendering and Meat By-product Processing | ..... | 500 |
| 311615 | Poultry Processing | ..... | 500 |
| 311711 | Seafood Canning | ..... | 500 |
| 311712 | Fresh and Frozen Seafood Processing | ..... | 500 |
| 311811 | Retail Bakeries | ..... | 500 |
| 311812 | Commercial Bakeries | ..... | 500 |
| 311813 | Frozen Cakes, Pies, and Other Pastries Manufacturing | ..... | 500 |
| 311820 | Cookie and Cracker Manufacturing | ..... | 750 |
| 311822 | Flour Mixes and Dough Manufacturing from Purchased Flour | ..... | 500 |
| 311823 | Dry Pasta Manufacturing | ..... | 500 |
| 311830 | Tortilla Manufacturing | ..... | 500 |
| 311911 | Roasted Nuts and Peanut Butter Manufacturing | ..... | 500 |
| 311919 | Other Snack Food Manufacturing | ..... | 500 |
| 311920 | Coffee and Tea Manufacturing | ..... | 500 |
| 311930 | Flavoring Syrup and Concentrate Manufacturing | ..... | 500 |
| 311941 | Mayonnaise, Dressing and Other Prepared Sauce Manufacturing | ..... | 500 |
| 311942 | Spice and Extract Manufacturing | ..... | 500 |
| 311991 | Perishable Prepared Food Manufacturing | ..... | 500 |
| 311999 | All Other Miscellaneous Food Manufacturing | ..... | 500 |

**Subsector 312—Beverage and Tobacco Product Manufacturing**

| 312111 | Soft Drink Manufacturing | ..... | 500 |
| 312112 | Bottled Water Manufacturing | ..... | 500 |
| 312113 | Ice Manufacturing | ..... | 500 |
### NAICS codes | NAICS U.S. industry title | Size standards in millions of dollars | Size standards in number of employees |
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<td>312120</td>
<td>Breweries</td>
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<td>Wineries</td>
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<td>312140</td>
<td>Distilleries</td>
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<td>Tobacco Stemming and Redrying</td>
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<td>312221</td>
<td>Cigarette Manufacturing</td>
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<td>312229</td>
<td>Other Tobacco Product Manufacturing</td>
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**Subsector 313—Textile Mills**

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<tbody>
<tr>
<td>313111</td>
<td>Yarn Spinning Mills</td>
<td>500</td>
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<tr>
<td>313112</td>
<td>Yarn Texturizing, Throwing and Twisting Mills</td>
<td>500</td>
<td></td>
</tr>
<tr>
<td>313113</td>
<td>Thread Mills</td>
<td>500</td>
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</tr>
<tr>
<td>313120</td>
<td>Broadwoven Fabric Mills</td>
<td>1,000</td>
<td></td>
</tr>
<tr>
<td>313221</td>
<td>Narrow Fabric Mills</td>
<td>500</td>
<td></td>
</tr>
<tr>
<td>313222</td>
<td>Schiffli Machine Embroidery</td>
<td>500</td>
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</tr>
<tr>
<td>313230</td>
<td>Nonwoven Fabric Mills</td>
<td>500</td>
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<td>313241</td>
<td>Welt Knit Fabric Mills</td>
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<td>313249</td>
<td>Other Knit Fabric and Lace Mills</td>
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<tr>
<td>313311</td>
<td>Broadwoven Fabric Finishing Mills (except Broadwoven Fabric Mills)</td>
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<td>313320</td>
<td>Fabric Coating Mills</td>
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**Subsector 314—Textile Product Mills**

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<tr>
<td>314110</td>
<td>Carpet and Rug Mills</td>
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<td>Curtain and Drapery Mills</td>
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<td>Other Household Textile Product Mills</td>
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<td>Textile Bag Mills</td>
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<tr>
<td>314912</td>
<td>Canvas and Related Product Mills</td>
<td>500</td>
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<tr>
<td>314991</td>
<td>Rope, Cordage and Twine Mills</td>
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<tr>
<td>314999</td>
<td>All Other Miscellaneous Textile Product Mills</td>
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**Subsector 315—Apparel Manufacturing**

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<td>Sheer Hosiery Mills</td>
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<td>Other Hosiery and Sock Mills</td>
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<td>315191</td>
<td>Outerwear Knitting Mills</td>
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<td>315192</td>
<td>Underwear and Nightwear Knitting Mills</td>
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<td>Men’s and Boys’ Cut and Sew Apparel Contractors</td>
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<td>315212</td>
<td>Women’s, Girls’, and Infants’ Cut and Sew Apparel Contractors</td>
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<tr>
<td>315221</td>
<td>Men’s and Boys’ Cut and Sew Underwear and Nightwear Manufacturing</td>
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<td>315222</td>
<td>Men’s and Boys’ Cut and Sew Suit, Coat and Overcoat Manufacturing</td>
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<td>315223</td>
<td>Men’s and Boys’ Cut and Sew Shirt (except Work Shirt) Manufacturing</td>
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<td>Men’s and Boys’ Cut and Sew Trouser, Slack and Jean Manufacturing</td>
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<td>315225</td>
<td>Men’s and Boys’ Cut and Sew Work Clothing Manufacturing</td>
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<td>315231</td>
<td>Women’s and Girls’ Cut and Sew Lingerie, Loungewear and Nightwear Manufacturing</td>
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<td>Women’s and Girls’ Cut and Sew Blouse and Shirt Manufacturing</td>
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<td>Women’s and Girls’ Cut and Sew Other Outerwear Manufacturing</td>
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<td>Fur and Leather Apparel Manufacturing</td>
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<td>All Other Cut and Sew Apparel Manufacturing</td>
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<td>Hat, Cap and Millinery Manufacturing</td>
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<td>Glove and Mitten Manufacturing</td>
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<td>Men’s and Boys’ Neckwear Manufacturing</td>
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<td>315999</td>
<td>Other Apparel Accessories and Other Apparel Manufacturing</td>
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**Subsector 316—Leather and Allied Product Manufacturing**

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<tr>
<td>316110</td>
<td>Leather and Hide Tanning and Finishing</td>
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<td>316211</td>
<td>Rubber and Plastics Footwear Manufacturing</td>
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<td>316212</td>
<td>House Slipper Manufacturing</td>
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### Small Business Administration § 121.201

**Small Business Size Standards by NAICS Industry—Continued**

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<td>Other Footwear Manufacturing</td>
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<td>316991</td>
<td>Luggage Manufacturing</td>
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<tr>
<td>316992</td>
<td>Women’s Handbag and Purse Manufacturing</td>
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<tr>
<td>316993</td>
<td>Personal Leather Good (except Women’s Handbag and Purse) Manu-</td>
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<td>All Other Leather Good and Allied Product Manufacturing</td>
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**Subsector 321—Wood Product Manufacturing**

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**Subsector 323—Printing and Related Support Activities**

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**Subsector 324—Petroleum and Coal Products Manufacturing**

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313
## Subsector 325—Chemical Manufacturing

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<tr>
<td>325110</td>
<td>Petrochemical Manufacturing</td>
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<td>325120</td>
<td>Industrial Gas Manufacturing</td>
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<tr>
<td>325131</td>
<td>Inorganic Dye and Pigment Manufacturing</td>
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<tr>
<td>325132</td>
<td>Synthetic Organic Dye and Pigment Manufacturing</td>
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<td>325181</td>
<td>Alkalies and Chlorine Manufacturing</td>
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<td>325182</td>
<td>Carbon Black Manufacturing</td>
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<td>325188</td>
<td>All Other Basic Inorganic Chemical Manufacturing</td>
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<td>325191</td>
<td>Gum and Wood Chemical Manufacturing</td>
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<td>325192</td>
<td>Cyclic Crude and Intermediate Manufacturing</td>
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<td>325211</td>
<td>Plastics Material and Resin Manufacturing</td>
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<td>325212</td>
<td>Synthetic Rubber Manufacturing</td>
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<td>325221</td>
<td>Cellulosic Organic Fiber Manufacturing</td>
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<td>Noncellulosic Organic Fiber Manufacturing</td>
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<td>Nitrogenous Fertilizer Manufacturing</td>
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<td>Phosphatic Fertilizer Manufacturing</td>
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<td>325314</td>
<td>Fertilizer (Mixing Only) Manufacturing</td>
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<td>325320</td>
<td>Pesticide and Other Agricultural Chemical Manufacturing</td>
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<td>325411</td>
<td>Medicinal and Botanical Manufacturing</td>
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<td>325412</td>
<td>Pharmaceutical Preparation Manufacturing</td>
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<td>325413</td>
<td>In-Vitro Diagnostic Substance Manufacturing</td>
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<td>Biological Product (except Diagnostic) Manufacturing</td>
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<td>325510</td>
<td>Paint and Coating Manufacturing</td>
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<td>Soap and Other Detergent Manufacturing</td>
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<td>325612</td>
<td>Polish and Other Sanitation Good Manufacturing</td>
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<td>325613</td>
<td>Surface Active Agent Manufacturing</td>
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<td>Toilet Preparation Manufacturing</td>
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<td>Printing Ink Manufacturing</td>
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<td>325920</td>
<td>Explosives Manufacturing</td>
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<td>325991</td>
<td>Custom Compounding of Purchased Resins</td>
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<tr>
<td>325992</td>
<td>Photographic Film, Paper, Plate and Chemical Manufacturing</td>
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<td>325998</td>
<td>All Other Miscellaneous Chemical Product and Preparation Manufacturing</td>
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## Subsector 326—Plastics and Rubber Products Manufacturing

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<tr>
<td>326111</td>
<td>Plastics Bag and Pouch Manufacturing</td>
<td>500</td>
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<tr>
<td>326112</td>
<td>Unsupported Plastics Packaging Film and Sheet Manufacturing</td>
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<tr>
<td>326113</td>
<td>Unsupported Plastics Film and Sheet (except Packaging) Manufac-</td>
<td>500</td>
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<tr>
<td>326121</td>
<td>Unsupported Plastics Profile Shapes Manufacturing</td>
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<td>326122</td>
<td>Plastics Pipe and Pipe Fitting Manufacturing</td>
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<tr>
<td>326130</td>
<td>Laminated Plastics Plate, Sheet and Shape Manufacturing</td>
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<td>326140</td>
<td>Polystyrene Foam Product Manufacturing</td>
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<tr>
<td>326150</td>
<td>Urethane and Other Foam Product (except Polystyrene) Manufac-</td>
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<td>326160</td>
<td>Plastics Bottle Manufacturing</td>
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<td>Plastics Plumbing Fixture Manufacturing</td>
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<td>Resilient Floor Covering Manufacturing</td>
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<td>All Other Plastics Product Manufacturing</td>
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<td>Tire Manufacturing (except Retreading)β</td>
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<td>326220</td>
<td>Rubber and Plastics Hoses and Belting Manufacturing</td>
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<td>326229</td>
<td>Rubber Product Manufacturing for Mechanical Use</td>
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<td>326299</td>
<td>All Other Rubber Product Manufacturing</td>
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## Subsector 327—Nonmetallic Mineral Product Manufacturing

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<tr>
<td>327111</td>
<td>Vitreous China Plumbing Fixture and China and Earthenware Bathroom Accessories Manufacturing</td>
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<td>327112</td>
<td>Vitreous China, Fine Earthenware and Other Pottery Product Manufacturing</td>
<td>500</td>
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<tr>
<td>327113</td>
<td>Porcelain Electrical Supply Manufacturing</td>
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<tr>
<td>327121</td>
<td>Brick and Structural Clay Tile Manufacturing</td>
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<tr>
<td>327122</td>
<td>Ceramic Wall and Floor Tile Manufacturing</td>
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<td>327123</td>
<td>Other Structural Clay Product Manufacturing</td>
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<td>327124</td>
<td>Clay Refractory Manufacturing</td>
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### Small Business Administration § 121.201

**SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued**

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<td>327125</td>
<td>Nonclay Refractory Manufacturing</td>
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<tr>
<td>327211</td>
<td>Flat Glass Manufacturing</td>
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<tr>
<td>327212</td>
<td>Other Pressed and Blown Glass and Glassware Manufacturing</td>
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<tr>
<td>327213</td>
<td>Glass Container Manufacturing</td>
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<td>327215</td>
<td>Glass Product Manufacturing Made of Purchased Glass</td>
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<td>332310</td>
<td>Cement Manufacturing</td>
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<td>332320</td>
<td>Ready-Mix Concrete Manufacturing</td>
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<td>327311</td>
<td>Concrete Block and Brick Manufacturing</td>
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<td>332312</td>
<td>Concrete Pipe Manufacturing</td>
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<td>332315</td>
<td>Other Concrete Product Manufacturing</td>
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<tr>
<td>332410</td>
<td>Lime Manufacturing</td>
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<tr>
<td>332420</td>
<td>Gypsum Product Manufacturing</td>
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<td>Abrasive Product Manufacturing</td>
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<td>332491</td>
<td>Cut Stone and Stone Product Manufacturing</td>
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<td>332521</td>
<td>Ground or Treated Mineral and Earth Manufacturing</td>
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<td>332599</td>
<td>All Other Miscellaneous Nonmetallic Mineral Product Manufacturing</td>
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**Subsector 331—Primary Metal Manufacturing**

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<tbody>
<tr>
<td>331211</td>
<td>Iron and Steel Mills</td>
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<tr>
<td>331212</td>
<td>Electrometallurgical Ferroalloy Product Manufacturing</td>
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<tr>
<td>331213</td>
<td>Iron and Steel Pipe and Tube Manufacturing from Purchased Steel</td>
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<tr>
<td>331221</td>
<td>Cold-Rolled Steel Shape Manufacturing</td>
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<tr>
<td>331222</td>
<td>Steel Wire Drawing</td>
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<tr>
<td>331311</td>
<td>Alumina Refining</td>
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<tr>
<td>331312</td>
<td>Primary Aluminum Production</td>
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<tr>
<td>331314</td>
<td>Secondary Smelting and Alloying of Aluminum</td>
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<tr>
<td>331315</td>
<td>Aluminum Sheet, Plate and Foil Manufacturing</td>
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<td>331316</td>
<td>Aluminum Extruded Product Manufacturing</td>
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<td>331319</td>
<td>Other Aluminum Rolling and Drawing</td>
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<td>331411</td>
<td>Primary Smelting and Refining of Copper</td>
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<td>331419</td>
<td>Primary Smelting and Refining of Nonferrous Metal (except Copper and Aluminum)</td>
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<td>331421</td>
<td>Copper Rolling, Drawing and Extruding</td>
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<td>331422</td>
<td>Copper Wire (except Mechanical) Drawing</td>
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<td>Secondary Smelting, Refining, and Alloying of Copper</td>
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<td>Nonferrous Metal (except Copper and Aluminum) Rolling, Drawing and Extruding</td>
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<td>Secondary Smelting, Refining, and Alloying of Nonferrous Metal (except Copper and Aluminum)</td>
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<tr>
<td>331511</td>
<td>Iron Foundries</td>
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<td>Steel Investment Foundries</td>
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<td>331513</td>
<td>Steel Foundries (except Investment)</td>
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<td>331521</td>
<td>Aluminum Die-Casting Foundries</td>
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<td>Nonferrous (except Aluminum) Die-Casting Foundries</td>
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<td>331524</td>
<td>Aluminum Foundries (except Die-Casting)</td>
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<td>331525</td>
<td>Copper Foundries (except Die-Casting)</td>
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<td>331528</td>
<td>Other Nonferrous Foundries (except Die-Casting)</td>
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**Subsector 332—Fabricated Metal Product Manufacturing**

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<th>Size standards in millions of dollars</th>
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<tbody>
<tr>
<td>332111</td>
<td>Iron and Steel Forging</td>
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<tr>
<td>332112</td>
<td>Nonferrous Forging</td>
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<td>332114</td>
<td>Custom Roll Forming</td>
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<td>332115</td>
<td>Crown and Closure Manufacturing</td>
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<td>Metal Stamping</td>
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<td>Powder Metallurgy Part Manufacturing</td>
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<td>332211</td>
<td>Cutlery and Flatware (except Precious) Manufacturing</td>
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<td>Hand and Edge Tool Manufacturing</td>
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<td>Saw Blade and Handsaw Manufacturing</td>
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<td>Kitchen Utensil, Pot and Pan Manufacturing</td>
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<td>Prefabricated Metal Building and Component Manufacturing</td>
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<td>Plate Work Manufacturing</td>
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<td>332410</td>
<td>Power Boiler and Heat Exchanger Manufacturing</td>
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<td>332420</td>
<td>Metal Tank (Heavy Gauge) Manufacturing</td>
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<td>332431</td>
<td>Metal Can Manufacturing</td>
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### Subsector 333—Machinery Manufacturing

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<td>Other Fabricated Wire Product Manufacturing</td>
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<td>Precision Turned Product Manufacturing</td>
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<td>Bolt, Nut, Screw, Rivet and Washer Manufacturing</td>
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<td>Electroplating, Plating, Polishing, Anodizing and Coloring</td>
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<td>Fluid Power Valve and Hose Fitting Manufacturing</td>
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Subsector 333—Machinery Manufacturing

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<td>Other Commercial and Service Industry Machinery Manufacturing</td>
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<td>Turbine and Turbine Generator Set Unit Manufacturing</td>
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<td>Speed Changer, Industrial High-Speed Drive and Gear Manufacturing</td>
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<td>Mechanical Power Transmission Equipment Manufacturing</td>
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<td>Other Engine Equipment Manufacturing</td>
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<td>Pump and Pumping Equipment Manufacturing</td>
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<td>Air and Gas Compressor Manufacturing</td>
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<td>Elevator and Moving Stairway Equipment Manufacturing</td>
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Small Business Administration § 121.201

SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

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<td>Audio and Video Equipment Manufacturing</td>
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<td>Bare Printed Circuit Board Manufacturing</td>
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<td>Electronic Capacitor Manufacturing</td>
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<td>Electronic Coil, Transformer, and Other Inductor Manufacturing</td>
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<td>Electronic Connector Manufacturing</td>
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<td>Printed Circuit Assembly (Electronic Assembly) Manufacturing</td>
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<td>Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing</td>
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<td>Automatic Environmental Control Manufacturing for Residential, Commercial and Appliance Use.</td>
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<td>Instruments and Related Products Manufacturing for Measuring, Displaying, and Controlling Industrial Process Variables.</td>
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<td>Totalizing Fluid Meter and Counting Device Manufacturing</td>
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<td>Instrument Manufacturing for Measuring and Testing Electricity and Electrical Signals.</td>
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<td>Analytical Laboratory Instrument Manufacturing</td>
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<td>Irradiation Apparatus Manufacturing</td>
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<td>Watch, Clock, and Part Manufacturing</td>
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<td>Other Measuring and Controlling Device Manufacturing</td>
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<td>Software Reproducing</td>
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<td>Prerecorded Compact Disc (except Software), Tape, and Record Reproducing.</td>
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<td>Magnetic and Optical Recording Media Manufacturing</td>
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Subsector 335—Electrical Equipment, Appliance and Component Manufacturing *

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<td>335121</td>
<td>Residential Electric Lighting Fixture Manufacturing</td>
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<td>335122</td>
<td>Commercial, Industrial and Institutional Electric Lighting Fixture Manufacturing.</td>
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<tr>
<td>335129</td>
<td>Other Lighting Equipment Manufacturing</td>
<td>........................................... 500</td>
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<tr>
<td>335211</td>
<td>Electric Housewares and Household Fan Manufacturing</td>
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<td>335221</td>
<td>Household Vacuum Cleaner Manufacturing</td>
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<td>Household Refrigerator and Home Freezer Manufacturing</td>
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<td>335223</td>
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<td>335228</td>
<td>Other Major Household Appliance Manufacturing</td>
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<td>335311</td>
<td>Power, Distribution and Specialty Transformer Manufacturing</td>
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<td>Motor and Generator Manufacturing</td>
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<td>Switchgear and Switchboard Apparatus Manufacturing</td>
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<td>Relay and Industrial Control Manufacturing</td>
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<td>335911</td>
<td>Storage Battery Manufacturing</td>
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## SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

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<td>Fiber Optic Cable Manufacturing</td>
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<td>335922</td>
<td>Other Communication and Energy Wire Manufacturing</td>
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<td>335931</td>
<td>Current-Carrying Wiring Device Manufacturing</td>
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<td>Noncurrent-Carrying Wiring Device Manufacturing</td>
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<td>Carbon and Graphite Product Manufacturing</td>
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<td>335999</td>
<td>All Other Miscellaneous Electrical Equipment and Component Manufacturing</td>
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Subsector 336—Transportation Equipment Manufacturing

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<td>Automobile Manufacturing</td>
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<td>336112</td>
<td>Light Truck and Utility Vehicle Manufacturing</td>
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<tr>
<td>336120</td>
<td>Heavy Duty Truck Manufacturing</td>
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<tr>
<td>336211</td>
<td>Motor Vehicle Body Manufacturing</td>
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<td>Truck Trailer Manufacturing</td>
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<td>Motor Home Manufacturing</td>
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<td>Travel Trailer and Camper Manufacturing</td>
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<td>336311</td>
<td>Carburetor, Piston, Piston Ring and Valve Manufacturing</td>
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<td>336312</td>
<td>Gasoline Engine and Engine Parts Manufacturing</td>
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<td>336321</td>
<td>Vehicular Lighting Equipment Manufacturing</td>
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<td>336322</td>
<td>Other Motor Vehicle Electrical and Electronic Equipment Manufacturing</td>
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<td>336330</td>
<td>Motor Vehicle Steering and Suspension Components (except Spring) Manufacturing</td>
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<td>Motor Vehicle Brake System Manufacturing</td>
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<td>Motor Vehicle Transmission and Power Train Parts Manufacturing</td>
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<td>Motor Vehicle Seating and Interior Trim Manufacturing</td>
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<td>Motor Vehicle Air-Conditioning Manufacturing</td>
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<td>Aircraft Manufacturing</td>
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<td>Aircraft Engine and Engine Parts Manufacturing</td>
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<td>Ship Building and Repairing</td>
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Subsector 337—Furniture and Related Product Manufacturing

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<tr>
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<td>Wood Kitchen Cabinet and Counter Top Manufacturing</td>
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<td>337121</td>
<td>Upholstered Household Furniture Manufacturing</td>
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<td>337122</td>
<td>Nonupholstered Wood Household Furniture Manufacturing</td>
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<td>337125</td>
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<td>337127</td>
<td>Institutional Furniture Manufacturing</td>
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<td>Wood Television, Radio, and Sewing Machine Cabinet Manufacturing</td>
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<td>Wood Office Furniture Manufacturing</td>
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<td>Custom Architectural Woodwork and Millwork Manufacturing</td>
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<td>Office Furniture (Except Wood) Manufacturing</td>
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<td>Showcase, Partition, Shelving, and Locker Manufacturing</td>
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<td>Blind and Shade Manufacturing</td>
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Subsector 339—Miscellaneous Manufacturing

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<td>Surgical and Medical Instrument Manufacturing</td>
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<td>339114</td>
<td>Dental Equipment and Supplies Manufacturing</td>
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<td>Ophthalmic Goods Manufacturing</td>
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<td>339116</td>
<td>Dental Laboratories</td>
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<td>Jewelry (except Costume) Manufacturing</td>
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**SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued**

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<td>Silverware and Hollowware Manufacturing</td>
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<td>Jeweler’s Material and Lapidary Work Manufacturing</td>
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<td>339914</td>
<td>Costume Jewelry and Novelty Manufacturing</td>
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<tr>
<td>339920</td>
<td>Sporting and Athletic Goods Manufacturing</td>
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<td>339931</td>
<td>Doll and Stuffed Toy Manufacturing</td>
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<td>339932</td>
<td>Game, Toy, and Children’s Vehicle Manufacturing</td>
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<td>339941</td>
<td>Pen and Mechanical Pencil Manufacturing</td>
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</tr>
<tr>
<td>339942</td>
<td>Lead Pencil and Art Good Manufacturing</td>
<td>500</td>
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<tr>
<td>339943</td>
<td>Marking Device Manufacturing</td>
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</tr>
<tr>
<td>339944</td>
<td>Carbon Paper and Inked Ribbon Manufacturing</td>
<td>500</td>
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<tr>
<td>339950</td>
<td>Sign Manufacturing</td>
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<tr>
<td>339991</td>
<td>Gasket, Packing, and Sealing Device Manufacturing</td>
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<tr>
<td>339992</td>
<td>Musical Instrument Manufacturing</td>
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<tr>
<td>339993</td>
<td>Fastener, Button, Needle and Pin Manufacturing</td>
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<td>339994</td>
<td>Broom, Brush and Mop Manufacturing</td>
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<td>339995</td>
<td>Burial Casket Manufacturing</td>
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<td>339999</td>
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<td>Sector 42—Wholesale Trade</td>
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<td>Automobile and Other Motor Vehicle Merchant Wholesalers</td>
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<td>423120</td>
<td>Motor Vehicle Supplies and New Parts Merchant Wholesalers</td>
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<td>423130</td>
<td>Tire and Tube Merchant Wholesalers</td>
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<td>Motor Vehicle Parts (Used) Merchant Wholesalers</td>
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<td>423210</td>
<td>Furniture Merchant Wholesalers</td>
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<td>Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers</td>
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<td>423320</td>
<td>Brick, Stone, and Related Construction Material Merchant Wholesalers</td>
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<td>423330</td>
<td>Roofing, Siding, and Insulation Material Merchant Wholesalers</td>
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<td>423390</td>
<td>Other Construction Material Merchant Wholesalers</td>
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<td>Photographic Equipment and Supplies Merchant Wholesalers</td>
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<td>Office Equipment Merchant Wholesalers</td>
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<td>Computer and Computer Peripheral Equipment and Software Merchant Wholesalers</td>
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<td>423440</td>
<td>Other Commercial Equipment Merchant Wholesalers</td>
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<td>Medical, Dental, and Hospital Equipment and Supplies Merchant Wholesalers</td>
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<td>423460</td>
<td>Ophthalmic Goods Merchant Wholesalers</td>
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<td>423490</td>
<td>Other Professional Equipment and Supplies Merchant Wholesalers</td>
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<td>Metal Service Centers and Other Metal Merchant Wholesalers</td>
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<td>Coal and Other Mineral and Ore Merchant Wholesalers</td>
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<td>Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers</td>
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<td>Electrical and Electronic Appliance, Television, and Radio Set Merchant Wholesalers</td>
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<td>423690</td>
<td>Other Electronic Parts and Equipment Merchant Wholesalers</td>
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<td>Hardware Merchant Wholesalers</td>
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<td>Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers</td>
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<td>Warm Air Heating and Air-Conditioning Equipment and Supplies Merchant Wholesalers</td>
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<td>Refrigeration Equipment and Supplies Merchant Wholesalers</td>
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<tr>
<td>423810</td>
<td>Construction and Mining (except Oil Well) Machinery and Equipment Merchant Wholesalers</td>
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<tr>
<td>423820</td>
<td>Farm and Garden Machinery and Equipment Merchant Wholesalers</td>
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<td>423830</td>
<td>Industrial Machinery and Equipment Merchant Wholesalers</td>
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<td>423840</td>
<td>Industrial Supplies Merchant Wholesalers</td>
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<td>423850</td>
<td>Service Establishment Equipment and Supplies Merchant Wholesalers</td>
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<td>423860</td>
<td>Transportation Equipment and Supplies (except Motor Vehicle) Merchant Wholesalers</td>
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<td>423910</td>
<td>Sporting and Recreational Goods and Supplies Merchant Wholesalers</td>
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<td>423920</td>
<td>Toy and Hobby Goods and Supplies Merchant Wholesalers</td>
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<td>423930</td>
<td>Recyclable Material Merchant Wholesalers</td>
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### Small Business Size Standards by NAICS Industry—Continued

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<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
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<tbody>
<tr>
<td>423940</td>
<td>Jewelry, Watch, Precious Stone, and Precious Metal Merchant Wholesalers</td>
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<td>Other Miscellaneous Durable Goods Merchant Wholesalers</td>
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**Subsector 424—Merchant Wholesalers, Nondurable Goods**

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<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
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<tr>
<td>424110</td>
<td>Printing and Writing Paper Merchant Wholesalers</td>
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<td>424120</td>
<td>Stationery and Office Supplies Merchant Wholesalers</td>
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<td>424130</td>
<td>Industrial and Personal Service Paper Merchant Wholesalers</td>
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<tr>
<td>424210</td>
<td>Drugs and Druggists’ Sundries Merchant Wholesalers</td>
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<tr>
<td>424310</td>
<td>Piece Goods, Notions, and Other Dry Goods Merchant Wholesalers</td>
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<tr>
<td>424320</td>
<td>Men’s and Boys’ Clothing and Furnishings Merchant Wholesalers</td>
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<tr>
<td>424330</td>
<td>Women’s, Children’s, and Infants’ Clothing and Accessories Merchant Wholesalers</td>
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</tr>
<tr>
<td>424340</td>
<td>Footwear Merchant Wholesalers</td>
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<tr>
<td>424410</td>
<td>General Line Grocery Merchant Wholesalers</td>
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<td>424420</td>
<td>Packaged Frozen Food Merchant Wholesalers</td>
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<td>424430</td>
<td>Dairy Product (except Dried or Canned) Merchant Wholesalers</td>
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<tr>
<td>424440</td>
<td>Poultry and Poultry Product Merchant Wholesalers</td>
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<tr>
<td>424450</td>
<td>Confectionery Merchant Wholesalers</td>
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<tr>
<td>424460</td>
<td>Fish and Seafood Merchant Wholesalers</td>
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<tr>
<td>424470</td>
<td>Meat and Meat Product Merchant Wholesalers</td>
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<td>424480</td>
<td>Fresh Fruit and Vegetable Merchant Wholesalers</td>
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<td>424490</td>
<td>Other Grocery and Related Products Merchant Wholesalers</td>
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</tr>
<tr>
<td>424510</td>
<td>Grain and Field Bean Merchant Wholesalers</td>
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<td>424520</td>
<td>Livestock Merchant Wholesalers</td>
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<td>424590</td>
<td>Other Farm Product Raw Material Merchant Wholesalers</td>
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<tr>
<td>424610</td>
<td>Plastics Materials and Basic Forms and Shapes Merchant Wholesalers</td>
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<tr>
<td>424690</td>
<td>Other Chemical and Allied Products Merchant Wholesalers</td>
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<tr>
<td>424710</td>
<td>Petroleum Bulk Stations and Terminals</td>
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<tr>
<td>424720</td>
<td>Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals)</td>
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<tr>
<td>424810</td>
<td>Beer and Ale Merchant Wholesalers</td>
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<tr>
<td>424820</td>
<td>Wine and Distilled Alcoholic Beverage Merchant Wholesalers</td>
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<tr>
<td>424910</td>
<td>Farm Supplies Merchant Wholesalers</td>
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<tr>
<td>424920</td>
<td>Book, Periodical, and Newspaper Merchant Wholesalers</td>
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<tr>
<td>424930</td>
<td>Flower, Nursery Stock, and Florists’ Supplies Merchant Wholesalers</td>
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<tr>
<td>424940</td>
<td>Tobacco and Tobacco Product Merchant Wholesalers</td>
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<tr>
<td>424950</td>
<td>Paint, Varnish, and Supplies Merchant Wholesalers</td>
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<tr>
<td>424990</td>
<td>Other Miscellaneous Nondurable Goods Merchant Wholesalers</td>
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</table>

**Subsector 425—Wholesale Electronic Markets and Agents and Brokers**

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
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<tbody>
<tr>
<td>425110</td>
<td>Business to Business Electronic Markets</td>
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<tr>
<td>425120</td>
<td>Wholesale Trade Agents and Brokers</td>
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**Sectors 44–45—Retail Trade**

(Not applicable to Government procurement of supplies. The nonmanufacturer size standard of 500 employees shall be used for purposes of Government procurement of supplies.)

**Subsector 441—Motor Vehicle and Parts Dealers**

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
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<tr>
<td>44110</td>
<td>New Car Dealers</td>
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<tr>
<td>441120</td>
<td>Used Car Dealers</td>
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<td>44120</td>
<td>Recreational Vehicle Dealers</td>
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<tr>
<td>441210</td>
<td>Motorcycle, ATV, and Personal Watercraft Dealers</td>
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<tr>
<td>441220</td>
<td>Boat Dealers</td>
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<td>441221</td>
<td>All Other Motor Vehicle Dealers</td>
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<td>441222</td>
<td>Except, Aircraft Dealers, Retail</td>
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<td>441310</td>
<td>Automotive Parts and Accessories Stores</td>
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<td>441320</td>
<td>Tire Dealers</td>
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**Subsector 442—Furniture and Home Furnishings Stores**

<table>
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<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
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<tr>
<td>44210</td>
<td>Furniture Stores</td>
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<tr>
<td>442110</td>
<td>Floor Covering Stores</td>
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<tr>
<td>442291</td>
<td>Window Treatment Stores</td>
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<td>442399</td>
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<tr>
<td>NAICS codes</td>
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<td>Size standards in millions of dollars</td>
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<td>Subsector 443—Electronics and Appliance Stores</td>
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<td>Household Appliance Stores</td>
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<td>Radio, Television and Other Electronics Stores</td>
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<td>Computer and Software Stores</td>
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<td>443130</td>
<td>Camera and Photographic Supplies Stores</td>
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<td>Subsector 444—Building Material and Garden Equipment and Supplies Dealers</td>
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<td>444120</td>
<td>Paint and Wallpaper Stores</td>
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<td>Hardware Stores</td>
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<td>Other Building Material Dealers</td>
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<td>444210</td>
<td>Outdoor Power Equipment Stores</td>
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<td>Nursery and Garden Centers</td>
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<td>Convenience Stores</td>
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<td>Confectionery and Nut Stores</td>
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<td>Optical Goods Stores</td>
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<td>News Dealers and Newspstands</td>
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<td>Directory and Mailing List Publishers</td>
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**Small Business Size Standards by NAICS Industry—Continued**

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#### Subsector 515—Broadcasting (except Internet)

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#### Subsector 517—Telecommunications

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#### Subsector 518—Data Processing, Hosting, and Related Services

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#### Subsector 519—Other Information Services

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#### Sector 52—Finance and Insurance

#### Subsector 522—Credit Intermediation and Related Activities

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<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>522110</td>
<td>Commercial Banking$</td>
<td>$165 million in assets</td>
<td></td>
</tr>
<tr>
<td>522120</td>
<td>Savings Institutions$</td>
<td>$165 million in assets</td>
<td></td>
</tr>
<tr>
<td>522130</td>
<td>Credit Unions$</td>
<td>$165 million in assets</td>
<td></td>
</tr>
<tr>
<td>522190</td>
<td>Other Depository Credit Intermediation$</td>
<td>$165 million in assets</td>
<td></td>
</tr>
<tr>
<td>522210</td>
<td>Credit Card Issuing$</td>
<td>$165 million in assets</td>
<td></td>
</tr>
<tr>
<td>522220</td>
<td>Sales Financing</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>522291</td>
<td>Consumer Lending</td>
<td>$6.5</td>
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</tr>
<tr>
<td>522292</td>
<td>Real Estate Credit</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>522293</td>
<td>International Trade Financing$</td>
<td>$165 million in assets</td>
<td></td>
</tr>
<tr>
<td>522294</td>
<td>Secondary Market Financing</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>522298</td>
<td>All Other Non-Depository Credit Intermediation</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>522310</td>
<td>Mortgage and Nonmortgage Loan Brokers</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>522320</td>
<td>Financial Transactions Processing, Reserve, and Clearing House Activities.</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>522390</td>
<td>Other Activities Related to Credit Intermediation</td>
<td>$6.5</td>
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</tr>
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</table>

#### Subsector 523—Securities, Commodity Contracts, and Other Financial Investments and Related Activities

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>523110</td>
<td>Investment Banking and Securities Dealing</td>
<td>$6.5</td>
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</tr>
<tr>
<td>523120</td>
<td>Securities Brokerage</td>
<td>$6.5</td>
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</tr>
<tr>
<td>523130</td>
<td>Commodity Contracts Dealing</td>
<td>$6.5</td>
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</tr>
<tr>
<td>523140</td>
<td>Commodity Contracts Brokerage</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>523210</td>
<td>Securities and Commodity Exchanges</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>523212</td>
<td>Miscellaneous Intermediation</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>523220</td>
<td>Portfolio Management</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>523230</td>
<td>Investment Advice</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>523291</td>
<td>Trust, Fiduciary and Custody Activities</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>523399</td>
<td>Miscellaneous Financial Investment Activities</td>
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</tr>
</tbody>
</table>

#### Subsector 524—Insurance Carriers and Related Activities

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>524111</td>
<td>Direct Life Insurance Carriers</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>524114</td>
<td>Direct Health and Medical Insurance Carriers</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>NAICS codes</td>
<td>NAICS U.S. industry title</td>
<td>Size standards in millions of dollars</td>
<td>Size standards in number of employees</td>
</tr>
<tr>
<td>-------------</td>
<td>---------------------------</td>
<td>--------------------------------------</td>
<td>--------------------------------------</td>
</tr>
<tr>
<td>524126</td>
<td>Direct Property and Casualty Insurance Carriers</td>
<td>$6.5</td>
<td>1,500</td>
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<tr>
<td>524127</td>
<td>Direct Title Insurance Carriers</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>524128</td>
<td>Other Direct Insurance (except Life, Health and Medical) Carriers</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>524130</td>
<td>Reinsurance Carriers</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>524210</td>
<td>Insurance Agencies and Brokerages</td>
<td>$6.5</td>
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</tr>
<tr>
<td>524291</td>
<td>Claims Adjusting</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>524292</td>
<td>Third Party Administration of Insurance and Pension Funds</td>
<td>$6.5</td>
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</tr>
<tr>
<td>524298</td>
<td>All Other Insurance Related Activities</td>
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</table>

Subsector 525—Funds, Trusts and Other Financial Vehicles

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>525110</td>
<td>Pension Funds</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>525120</td>
<td>Health and Welfare Funds</td>
<td>$6.5</td>
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<tr>
<td>525190</td>
<td>Other Insurance Funds</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>525910</td>
<td>Open-End Investment Funds</td>
<td>$6.5</td>
<td></td>
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<tr>
<td>525920</td>
<td>Trusts, Estates, and Agency Accounts</td>
<td>$6.5</td>
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<tr>
<td>525930</td>
<td>Real Estate Investment Trusts</td>
<td>$6.5</td>
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<tr>
<td>525990</td>
<td>Other Financial Vehicles</td>
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</table>

Sector 53—Real Estate and Rental and Leasing

Subsector 531—Real Estate

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>531110</td>
<td>Lessors of Residential Buildings and Dwellings</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>531120</td>
<td>Lessors of Nonresidential Buildings (except Miniwarehouses)</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>531130</td>
<td>Lessors of Miniwarehouses and Self Storage Units</td>
<td>$23.5</td>
<td></td>
</tr>
<tr>
<td>531190</td>
<td>Lessors of Other Real Estate Property</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>531210</td>
<td>Offices of Real Estate Agents and Brokers</td>
<td>$10.0</td>
<td></td>
</tr>
<tr>
<td>531311</td>
<td>Residential Property Managers</td>
<td>$2.0</td>
<td></td>
</tr>
<tr>
<td>531312</td>
<td>Nonresidential Property Managers</td>
<td>$2.0</td>
<td></td>
</tr>
<tr>
<td>531320</td>
<td>Offices of Real Estate Appraisers</td>
<td>$2.0</td>
<td></td>
</tr>
<tr>
<td>531390</td>
<td>Other Activities Related to Real Estate</td>
<td>$2.0</td>
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</table>

Subsector 532—Rental and Leasing Services

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>532111</td>
<td>Passenger Car Rental</td>
<td>$23.5</td>
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</tr>
<tr>
<td>532112</td>
<td>Passenger Car Leasing</td>
<td>$23.5</td>
<td></td>
</tr>
<tr>
<td>532120</td>
<td>Truck, Utility Trailer, and RV (Recreational Vehicle) Rental and Leasing</td>
<td>$23.5</td>
<td></td>
</tr>
<tr>
<td>532210</td>
<td>Consumer Electronics and Appliances Rental</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>532220</td>
<td>Formal Wear and Costume Rental</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>532230</td>
<td>Video Tape and Disc Rental</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>532291</td>
<td>Home Health Equipment Rental</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>532292</td>
<td>Recreational Goods Rental</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>532299</td>
<td>All Other Consumer Goods Rental</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>532310</td>
<td>General Rental Centers</td>
<td>$6.5</td>
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</tr>
<tr>
<td>532411</td>
<td>Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>532412</td>
<td>Construction, Mining and Forestry Machinery and Equipment Rental and Leasing</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>532420</td>
<td>Office Machinery and Equipment Rental and Leasing</td>
<td>$23.0</td>
<td></td>
</tr>
<tr>
<td>532490</td>
<td>Other Commercial and Industrial Machinery and Equipment Rental and Leasing</td>
<td>$6.5</td>
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</table>

Subsector 533—Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>533110</td>
<td>Lessors of Nonfinancial Intangible Assets (except Copyrighted Works)</td>
<td>$6.5</td>
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</table>

Sector 54—Professional, Scientific and Technical Services

Subsector 541—Professional, Scientific and Technical Services

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>541110</td>
<td>Offices of Lawyers</td>
<td>$6.5</td>
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</tr>
<tr>
<td>541191</td>
<td>Title Abstract and Settlement Offices</td>
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</tr>
<tr>
<td>541199</td>
<td>All Other Legal Services</td>
<td>$6.5</td>
<td></td>
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<tr>
<td>541211</td>
<td>Offices of Certified Public Accountants</td>
<td>$7.5</td>
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<tr>
<td>541213</td>
<td>Tax Preparation Services</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>541214</td>
<td>Payroll Services</td>
<td>$7.5</td>
<td></td>
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<tr>
<td>541219</td>
<td>Other Accounting Services</td>
<td>$7.5</td>
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### SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY—Continued

<table>
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<tr>
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<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
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<tbody>
<tr>
<td>541310</td>
<td>Architectural Services</td>
<td>$4.5</td>
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<tr>
<td>541320</td>
<td>Landscape Architectural Services</td>
<td>$6.5</td>
<td></td>
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<tr>
<td>541330</td>
<td>Engineering Services</td>
<td>$4.5</td>
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</tr>
<tr>
<td>541340</td>
<td>Drafting Services</td>
<td>$6.5</td>
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</tr>
<tr>
<td>541350</td>
<td>Building Inspection Services</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>541360</td>
<td>Geophysical Surveying and Mapping Services</td>
<td>$4.5</td>
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</tr>
<tr>
<td>541370</td>
<td>Surveying and Mapping (except Geophysical) Services</td>
<td>$4.5</td>
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<tr>
<td>541380</td>
<td>Testing Laboratories</td>
<td>$11.0</td>
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</tr>
<tr>
<td>541410</td>
<td>Interior Design Services</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>541420</td>
<td>Industrial Design Services</td>
<td>$6.5</td>
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<tr>
<td>541430</td>
<td>Graphic Design Services</td>
<td>$6.5</td>
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<tr>
<td>541450</td>
<td>Custom Computer Programming Services</td>
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<tr>
<td>541511</td>
<td>Computer Systems Design Services</td>
<td>$23.0</td>
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</tr>
<tr>
<td>541512</td>
<td>Computer Facilities Management Services</td>
<td>$23.0</td>
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<tr>
<td>541513</td>
<td>Computer Related Services</td>
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<tr>
<td>541514</td>
<td>Other Information Technology Value Added Resellers</td>
<td>$100,000</td>
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<tr>
<td>541515</td>
<td>Administrative Management and General Management Consulting Services</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>541516</td>
<td>Human Resources Consulting Services</td>
<td>$6.5</td>
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<tr>
<td>541517</td>
<td>Marketing Consulting Services</td>
<td>$6.5</td>
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<tr>
<td>541518</td>
<td>Process, Physical Distribution and Logistics Consulting Services</td>
<td>$6.5</td>
<td></td>
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<tr>
<td>541519</td>
<td>Other Management Consulting Services</td>
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<tr>
<td>541520</td>
<td>Environmental Consulting Services</td>
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<tr>
<td>541521</td>
<td>Other Scientific and Technical Consulting Services</td>
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<tr>
<td>541522</td>
<td>Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology).</td>
<td>$1,500</td>
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<tr>
<td>541523</td>
<td>Research and Development in Biotechnology</td>
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<tr>
<td>541524</td>
<td>Research and Development in the Social Sciences and Humanities</td>
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<tr>
<td>541525</td>
<td>Advertising Agencies</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>541526</td>
<td>Public Relations Agencies</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>541527</td>
<td>Media Buying Agencies</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>541528</td>
<td>Media Representatives</td>
<td>$6.5</td>
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<tr>
<td>541529</td>
<td>Display Advertising</td>
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<tr>
<td>541530</td>
<td>Direct Mail Advertising</td>
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</tr>
<tr>
<td>541531</td>
<td>Advertising Material Distribution Services</td>
<td>$8.5</td>
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<tr>
<td>541532</td>
<td>Other Services Related to Advertising</td>
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<td></td>
</tr>
<tr>
<td>541533</td>
<td>Photography Studios, Portrait</td>
<td>$6.5</td>
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</tr>
<tr>
<td>541534</td>
<td>Commercial Photography</td>
<td>$6.5</td>
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<tr>
<td>541535</td>
<td>Translation and Interpretation Services</td>
<td>$6.5</td>
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<tr>
<td>541536</td>
<td>Veterinary Services</td>
<td>$6.5</td>
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<tr>
<td>541537</td>
<td>All Other Professional, Scientific and Technical Services</td>
<td>$6.5</td>
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</table>

### Sector 55—Management of Companies and Enterprises

**Subsector 551—Management of Companies and Enterprises**

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>551111</td>
<td>Offices of Bank Holding Companies</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>551112</td>
<td>Offices of Other Holding Companies</td>
<td>$6.5</td>
<td></td>
</tr>
</tbody>
</table>

### Sector 56—Administrative and Support, Waste Management and Remediation Services

**Subsector 561—Administrative and Support Services**

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>561110</td>
<td>Office Administrative Services</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>561120</td>
<td>Facilities Support Services</td>
<td>$12.5</td>
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</tr>
<tr>
<td>561130</td>
<td>Employment Placement Agencies</td>
<td>$6.5</td>
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</tr>
</tbody>
</table>
## 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
--- | --- | --- | ---
561312 | Executive Search Services | $6.5 | 
561320 | Temporary Help Services | $12.5 | 
561330 | Employee Leasing Services | $12.5 | 
561410 | Document Preparation Services | $6.5 | 
561421 | Telephone Answering Services | $6.5 | 
561422 | Telemarketing Bureaus and Other Contact Centers | $6.5 | 
561431 | Private Mail Centers | $6.5 | 
561439 | Other Business Service Centers (including Copy Shops) | $6.5 | 
561440 | Collection Agencies | $6.5 | 
561450 | Credit Bureaus | $6.5 | 
561491 | Repossession Services | $6.5 | 
561492 | Court Reporting and Stenotype Services | $6.5 | 
561499 | All Other Business Support Services | $6.5 | 
561510 | Travel Agencies | $23.5 | 
561520 | Tour Operators | $6.5 | 
561591 | Convention and Visitors Bureaus | $6.5 | 
561599 | All Other Travel Arrangement and Reservation Services | $6.5 | 
561611 | Investigation Services | $11.5 | 
561612 | Security Guards and Patrol Services | $17.0 | 
561613 | Armored Car Services | $11.5 | 
561621 | Security Systems Services (except Locksmiths) | $11.5 | 
561622 | Locksmiths | $6.5 | 
561710 | Exterminating and Pest Control Services | $6.5 | 
561720 | Janitorial Services | $15.0 | 
561730 | Landscaping Services | $6.5 | 
561740 | Carpet and Upholstery Cleaning Services | $4.5 | 
561790 | Other Services to Buildings and Dwellings | $6.5 | 
561910 | Packaging and Labeling Services | $6.5 | 
561920 | Convention and Trade Show Organizers | $6.5 | 
561990 | All Other Support Services | $6.5 | 
562111 | Solid Waste Collection | $11.5 | 
562112 | Hazardous Waste Collection | $11.5 | 
562119 | Other Waste Collection | $11.5 | 
562211 | Hazardous Waste Treatment and Disposal | $11.5 | 
562212 | Solid Waste Landfill | $11.5 | 
562213 | Solid Waste Combustors and Incinerators | $11.5 | 
562219 | Other Nonhazardous Waste Treatment and Disposal | $11.5 | 
562910 | Remediation Services | $13.0 | 
562920 | Environmental Remediation Services | $14,500 | 
562991 | Sepic Tank and Related Services | $6.5 | 
562998 | All Other Miscellaneous Waste Management Services | $6.5 | 

### Subsector 562—Waste Management and Remediation Services

#### Sector 61—Educational Services

| NAICS codes | NAICS U.S. Industry Title | Size Standards in Millions of Dollars | Size Standards in Number of Employees |
--- | --- | --- | ---
611110 | Elementary and Secondary Schools | $6.5 | 
611210 | Junior Colleges | $6.5 | 
611310 | Colleges, Universities and Professional Schools | $6.5 | 
611410 | Business and Secretarial Schools | $6.5 | 
611420 | Computer Training | $6.5 | 
611430 | Professional and Management Development Training | $6.5 | 
611510 | Cosmetology and Barber Schools | $6.5 | 
611512 | Flight Training | $23.5 | 
611513 | Apprenticeship Training | $6.5 | 
611519 | Other Technical and Trade Schools | $6.5 | 

**Except:** Job Corps Centers 16

| NAICS codes | NAICS U.S. Industry Title | Size Standards in Millions of Dollars | Size Standards in Number of Employees |
--- | --- | --- | ---
611610 | Fine Arts Schools | $6.5 | 
611620 | Sports and Recreation Instruction | $6.5 | 
611630 | Language Schools | $6.5 | 
611691 | Exam Preparation and Tutoring | $6.5 | 
611692 | Automobile Driving Schools | $6.5 | 
611699 | All Other Miscellaneous Schools and Instruction | $6.5 | 
611710 | Educational Support Services | $6.5 |
## Subsector 711—Performing Arts, Spectator Sports and Related Industries

### Sector 71—Arts, Entertainment and Recreation

### Subsector 711—Performing Arts, Spectator Sports and Related Industries

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>71111</td>
<td>Offices of Physicians (except Mental Health Specialists)</td>
<td>$9.0</td>
<td></td>
</tr>
<tr>
<td>71112</td>
<td>Offices of Physicians, Mental Health Specialists</td>
<td>$9.0</td>
<td></td>
</tr>
<tr>
<td>71120</td>
<td>Offices of Dentists</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71130</td>
<td>Offices of Chiropractors</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71132</td>
<td>Offices of Optometrists</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71133</td>
<td>Offices of Medical Health Practitioners (except Physicians)</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71134</td>
<td>Offices of Physical, Occupational and Speech Therapists and Audiologists</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71139</td>
<td>Offices of Podiatrists</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>711399</td>
<td>Offices of All Other Miscellaneous Health Practitioners</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71141</td>
<td>Family Planning Centers</td>
<td>$9.0</td>
<td></td>
</tr>
<tr>
<td>71142</td>
<td>Outpatient Mental Health and Substance Abuse Centers</td>
<td>$9.0</td>
<td></td>
</tr>
<tr>
<td>711491</td>
<td>HMO Medical Centers</td>
<td>$9.0</td>
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</tr>
<tr>
<td>711492</td>
<td>Kidney Dialysis Centers</td>
<td>$31.5</td>
<td></td>
</tr>
<tr>
<td>711493</td>
<td>Freestanding Ambulatory Surgical and Emergency Centers</td>
<td>$31.5</td>
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</tr>
<tr>
<td>711494</td>
<td>All Other Outpatient Care Centers</td>
<td>$31.5</td>
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</tr>
<tr>
<td>71151</td>
<td>Medical Laboratories</td>
<td>$12.5</td>
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</tr>
<tr>
<td>711512</td>
<td>Diagnostic Imaging Centers</td>
<td>$12.5</td>
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</tr>
<tr>
<td>711511</td>
<td>Medical Laboratories</td>
<td>$12.5</td>
<td></td>
</tr>
<tr>
<td>71161</td>
<td>Home Health Care Services</td>
<td>$12.5</td>
<td></td>
</tr>
<tr>
<td>711610</td>
<td>Home Health Care Services</td>
<td>$12.5</td>
<td></td>
</tr>
<tr>
<td>711611</td>
<td>Home Health Care Services</td>
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</tr>
<tr>
<td>71191</td>
<td>Blood and Organ Banks</td>
<td>$9.0</td>
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</tr>
<tr>
<td>71199</td>
<td>All Other Miscellaneous Ambulatory Health Care Services</td>
<td>$9.0</td>
<td></td>
</tr>
</tbody>
</table>

### Subsector 712—Events

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in millions of dollars</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>71211</td>
<td>Theater Companies and Dinner Theaters</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71212</td>
<td>Dance Companies</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71213</td>
<td>Musical Groups and Artists</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71219</td>
<td>Other Performing Arts Companies</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71211</td>
<td>Sports Teams and Clubs</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71212</td>
<td>Race Tracks</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71219</td>
<td>Other Spectator Sports</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71213</td>
<td>Promoters of Performing Arts, Sports and Similar Events with Facilities</td>
<td>$6.5</td>
<td></td>
</tr>
<tr>
<td>71232</td>
<td>Promoters of Performing Arts, Sports and Similar Events without Facilities</td>
<td>$6.5</td>
<td></td>
</tr>
</tbody>
</table>
### Small Business Administration

#### § 121.201

**Small Business Size Standards by NAICS Industry—Continued**

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>711410</td>
<td>Agents and Managers for Artists, Athletes, Entertainers and Other Public Figures</td>
<td>$6.5</td>
</tr>
<tr>
<td>711510</td>
<td>Independent Artists, Writers, and Performers</td>
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</tr>
</tbody>
</table>

#### Subsector 712—Museums, Historical Sites and Similar Institutions

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>712110</td>
<td>Museums</td>
<td>$6.5</td>
</tr>
<tr>
<td>712120</td>
<td>Historical Sites</td>
<td>$6.5</td>
</tr>
<tr>
<td>712130</td>
<td>Zoos and Botanical Gardens</td>
<td>$6.5</td>
</tr>
<tr>
<td>712190</td>
<td>Nature Parks and Other Similar Institutions</td>
<td>$6.5</td>
</tr>
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</table>

#### Subsector 713—Amusement, Gambling and Recreation Industries

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>713110</td>
<td>Amusement and Theme Parks</td>
<td>$6.5</td>
</tr>
<tr>
<td>713120</td>
<td>Amusement Arcades</td>
<td>$6.5</td>
</tr>
<tr>
<td>713130</td>
<td>Casinos (except Casino Hotels)</td>
<td>$6.5</td>
</tr>
<tr>
<td>713290</td>
<td>Other Gambling Industries</td>
<td>$6.5</td>
</tr>
<tr>
<td>713910</td>
<td>Golf Courses and Country Clubs</td>
<td>$6.5</td>
</tr>
<tr>
<td>713920</td>
<td>Skiing Facilities</td>
<td>$6.5</td>
</tr>
<tr>
<td>713930</td>
<td>Marinas</td>
<td>$6.5</td>
</tr>
<tr>
<td>713940</td>
<td>Fitness and Recreational Sports Centers</td>
<td>$6.5</td>
</tr>
<tr>
<td>713950</td>
<td>Bowling Centers</td>
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</tr>
<tr>
<td>713990</td>
<td>All Other Amusement and Recreation Industries</td>
<td>$6.5</td>
</tr>
</tbody>
</table>

#### Sector 72—Accommodation and Food Services

##### Subsector 721—Accommodation

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>721110</td>
<td>Hotels (except Casino Hotels) and Motels</td>
<td>$6.5</td>
</tr>
<tr>
<td>721120</td>
<td>Casino Hotels</td>
<td>$6.5</td>
</tr>
<tr>
<td>721190</td>
<td>Bed and Breakfast Inns</td>
<td>$6.5</td>
</tr>
<tr>
<td>721199</td>
<td>All Other Traveler Accommodation</td>
<td>$6.5</td>
</tr>
<tr>
<td>721214</td>
<td>Recreational and Vacation Camps (except Campgrounds)</td>
<td>$6.5</td>
</tr>
<tr>
<td>721310</td>
<td>Rooming and Boarding Houses</td>
<td>$6.5</td>
</tr>
</tbody>
</table>

##### Subsector 722—Food Services and Drinking Places

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>722110</td>
<td>Full-Service Restaurants</td>
<td>$6.5</td>
</tr>
<tr>
<td>722111</td>
<td>Limited-Service Restaurants</td>
<td>$6.5</td>
</tr>
<tr>
<td>722120</td>
<td>Cafeterias, Grill Buffets, and Buffets</td>
<td>$6.5</td>
</tr>
<tr>
<td>722121</td>
<td>Snack and Nonalcoholic Beverage Bars</td>
<td>$6.5</td>
</tr>
<tr>
<td>722310</td>
<td>Food Service Contractors</td>
<td>$19.0</td>
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<tr>
<td>722320</td>
<td>Caterers</td>
<td>$6.5</td>
</tr>
<tr>
<td>722330</td>
<td>Mobile Food Services</td>
<td>$6.5</td>
</tr>
<tr>
<td>722410</td>
<td>Drinking Places (Alcoholic Beverages)</td>
<td>$6.5</td>
</tr>
</tbody>
</table>

#### Sector 81—Other Services (except Public Administration)

##### Subsector 811—Repair and Maintenance

<table>
<thead>
<tr>
<th>NAICS codes</th>
<th>NAICS U.S. industry title</th>
<th>Size standards in number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>811111</td>
<td>General Automotive Repair</td>
<td>$6.5</td>
</tr>
<tr>
<td>811112</td>
<td>Automotive Exhaust System Repair</td>
<td>$6.5</td>
</tr>
<tr>
<td>811113</td>
<td>Automotive Transmission Repair</td>
<td>$6.5</td>
</tr>
<tr>
<td>811118</td>
<td>Other Automotive Mechanical and Electrical Repair and Maintenance</td>
<td>$6.5</td>
</tr>
<tr>
<td>811121</td>
<td>Automotive Body, Paint and Interior Repair and Maintenance</td>
<td>$6.5</td>
</tr>
<tr>
<td>811122</td>
<td>Automotive Glass Replacement Shops</td>
<td>$6.5</td>
</tr>
<tr>
<td>811191</td>
<td>Automotive Oil Change and Lubrication Shops</td>
<td>$6.5</td>
</tr>
<tr>
<td>811192</td>
<td>Car Washes</td>
<td>$6.5</td>
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<tr>
<td>811198</td>
<td>All Other Automotive Repair and Maintenance</td>
<td>$6.5</td>
</tr>
<tr>
<td>811211</td>
<td>Consumer Electronics Repair and Maintenance</td>
<td>$6.5</td>
</tr>
<tr>
<td>811212</td>
<td>Computer and Office Machine Repair and Maintenance</td>
<td>$23.0</td>
</tr>
<tr>
<td>811213</td>
<td>Communication Equipment Repair and Maintenance</td>
<td>$6.5</td>
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<tr>
<td>811219</td>
<td>Other Electronic and Precision Equipment Repair and Maintenance</td>
<td>$6.5</td>
</tr>
<tr>
<td>811310</td>
<td>Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance</td>
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</tr>
<tr>
<td>811411</td>
<td>Home and Garden Equipment Repair and Maintenance</td>
<td>$6.5</td>
</tr>
<tr>
<td>811412</td>
<td>Appliance Repair and Maintenance</td>
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<tr>
<td>811420</td>
<td>Upholstery and Furniture Repair</td>
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<tr>
<td>811430</td>
<td>Footwear and Leather Goods Repair</td>
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<tr>
<td>811490</td>
<td>Other Personal and Household Goods Repair and Maintenance</td>
<td>$6.5</td>
</tr>
</tbody>
</table>
### Footnotes

1. NAICS codes 221111, 221112, 221113, 221119, 221121, and 221122—A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.

2. NAICS code 237900—Dredging: To be considered small for purposes of Government procurement, a firm must perform at least 40 percent of the volume dredged with its own equipment or equipment owned by another small dredging concern.

3. NAICS code 314411—For purposes of Government procurement for food canning and preserving, the standard of 500 employees excludes agricultural labor as defined in 3306(k) of the Internal Revenue Code, 26 U.S.C. 3306(k).

4. NAICS code 334110—For purposes of Government procurement, the petroleum refiner must be a concern that has no more than 1,500 employees nor more than 125,000 barrels per calendar day total Operable Atmospheric Crude Oil Distillation capacity. Capacity includes owned or leased facilities as well as facilities under a processing agreement or a throughput. The total product to be delivered under the contract must be at least 90 percent refined by the successful bidder from either crude oil or bona fide feedstocks.

5. NAICS code 326221—For Government procurement, a firm is small for bidding on a contract for pneumatic tires within Census Classification codes 30111 and 30112, provided that:

(a) The value of tires within Census Classification codes 30111 and 30112 which it manufactured in the United States during the previous calendar year is more than 50 percent
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of the value of its total worldwide manufacture.
(b) The value of pneumatic tires within Census Classification codes 30111 and 30112 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 which it manufactured or otherwise 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, 522120, 522130, 522140, 522150 and 522190—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 (FFIEC) call report form.
9. NAICS code 531190—Leasing of building space to the Federal Government by Owners: For Government procurement, a size standard of $19.0 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 (part) 531210, 541110, 561510, 561520, and 561520—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 revenues.
11. NAICS code 541711 and 541712—For research and development contracts requiring the delivery of a manufactured product, the appropriate size standard is that of the manufacturing industry.
(a) "Research and Development" means laboratory or other physical research and development, but 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 purposes of the Small Business Innovation Research (SBIR) program only, a different definition has been established by law. See §121.203 of these regulations.
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% 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% 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.
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is that of the particular industry and not the Environmental Remediation Services Industry.

(b) For purposes of classifying a Government procurement as an 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. Subsector 483—Water Transportation—Offshore Marine Services: The applicable size standard shall be $25.5 million for firms furnishing specific transportation services to concerns engaged in offshore oil and natural gas exploration, drilling production, or marine research; such services encompass passenger and freight transportation, anchor handling, and related logistical services to and from the work site or at sea.

16. NAICS code 615310—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 code 115310 (Support Activities for Forestry)—Forest Fire Suppression and Fuel Management Services are two components of Support Activities for Forestry. Forest Fire Suppression Services firms provide services to fight forest fires. These firms usually have fire-fighting crews and equipment. Fuel 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.

18. NAICS code 541519—An Information Technology Value Added Reseller provides a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant 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 industry category must consist of at least 15% and not more than 50% of value added services measured by the total price less the cost of information technology hardware, computer software, and profit. 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. To qualify as an Information Technology Value Added Reseller for purposes of SBA assistance, other than for Government procurement, a concern must be primarily engaged in providing information technology equipment and computer software and provide value added services which account for at least 15% of its receipts but not more than 50% of its receipts.

19. 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...
§ 121.301 What size standards are applicable to financial assistance programs?

(a) For Business Loans and 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, whichever is higher. These size standards are set forth in §121.201.

(b) For Development Company programs, 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 $7.5 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 $2.5 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 $18 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 $6 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—

(1) Any construction (general or special trade) concern or concern performing a contract for services is small if, together with its affiliates, its average annual receipts do not exceed $6.5
million, except as provided in §121.301(d)(3).

(2) Any concern not specified in paragraph (d)(1) of this section must meet the size standard for the primary industry in which it, combined with its affiliates, is engaged.

(3) For any contract or subcontract, public or private, to be performed in the Presidentially-declared disaster areas resulting from the 2005 Hurricanes Katrina, Rita, or Wilma, a construction (general or special trade) concern or concern performing a contract for services is small if, together with its affiliates, it meets the size standard for the primary industry in which it, together with its affiliates, is engaged, or if it meets the size standard set forth in paragraph (d)(1), whichever is higher.

(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.”

§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 (NMVC) 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 economic injury disaster loan assistance under disaster declarations for Hurricanes Katrina, Rita, and Wilma, size status is determined as of the date SBA accepts the application for processing, and for applications submitted before December 6, 2005, whether denied because of size status or pending, such applications shall be deemed resubmitted on December 6, 2005. 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.

§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.
§ 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 size standard in a solicitation, selecting the NAICS code which best describes the principal purpose of the product or service being acquired. Primary consideration is given to the industry descriptions in the NAICS United States 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. Other factors considered include previous Government procurement classifications of the same or similar products or services, and the classification which would best serve the purposes of the Small Business Act.
§ 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.

§ 121.404 When does SBA determine the size status of a business concern?

(a) 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 other formal response to a solicitation) which includes price. Where an agency modifies a solicitation so that initial offers are no longer responsive to the solicitation, a concern must recertify that it is a small business at the time it submits a responsive offer, which includes price, to the modified solicitation.

(b) 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 small disadvantaged business (under part 124, subpart B, of this chapter), or as a HUBZone small business (under part 126 of this chapter) must qualify as a small business for its primary industry classification as of the date of its application and the date of certification by SBA.

(c) 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) Size status for purposes of compliance with the nonmanufacturer rule set forth in §121.406(b)(1) and the ostensible subcontractor rule set forth in §121.103(h)(4) is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.

(e) 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.

(f) For purposes of two-step sealed bidding under subpart 14.5 of the FAR, 48 CFR, a concern must qualify as small as of the date that it certifies that it is small as part of its step one proposal.

(g) A concern that qualified as a small business at the time it receives a contract is considered 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. However, the following exceptions apply:

(1) Within 30 days of an approved contract novation, a contractor must re-certify 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
§ 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 under small business set-aside or 8(a) contracts?

(a) General. In order to qualify as a small business concern for a small business set-aside or 8(a) contract to provide manufactured products, an offeror must either:

(1) Be the manufacturer 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 concern may qualify for a requirement to provide manufactured products as a nonmanufacturer if it:

(i) Does not exceed 500 employees;

(ii) Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied; and

(iii) Will supply the end item of a small business manufacturer or processor made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(3) 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 Administrator or designee may waive the requirement set forth in paragraph (b)(1)(iii) 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.

(4) The two waiver possibilities identified in paragraph (b)(3) of this section are called “individual” and “class” waivers respectively, and the procedures for them are contained in §121.1204.

(5) Any SBA 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.
§ 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
§ 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 Central Contractor Registration (CCR), or equivalent data base 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. Even though 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) subcontract.

(b) Upon determination of the successful subcontract offeror for a competitive subcontract, 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.

(c) 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.

§ 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.

§ 121.413 [Reserved]

§ 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 $6.5 million.

(b) Size status for such sales and leases is determined by the primary industry of the applicant business concern.

§ 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
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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) 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.
(b) Logging of timber means felling and bucking, yarding, and/or loading. It does not mean hauling.
(c) Manufacture of logs means, at a minimum, breaking down logs into rough cuts of the finished product.
(d) Sell means, in addition to its usual and customary meaning, the exchange of sawlogs for sawlogs or other products or services 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.
(e) 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.

§ 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;
      (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:
§ 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 $51.5 million.


§ 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.


§ 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
§ 121.701 What SBIR programs are subject to size determinations?

(a) These sections apply to size status for award of a funding agreement pursuant to the Small Business Innovation Development Act of 1982 (Pub. L. 97-219, 15 U.S.C. 638(e) through (k)).

(b) Funding agreement officer means a contracting officer, a grants officer, or a cooperative agreement officer.

(c) Funding agreement means any contract, grant or cooperative agreement entered into between any Federal agency and any small business for the performance of experimental, developmental, or research work funded in whole or in part by the Federal Government. Such work includes:

(1) A systematic, intensive study directed toward greater knowledge or understanding of the subject studied;

(2) A systematic study directed specifically toward applying new knowledge to meet a recognized need; or

(3) 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.

§ 121.702 What size standards are applicable to the SBIR program?

To be eligible for award of funding agreements in the SBA’s Small Business Innovation Research (SBIR) program, a business concern must meet the requirements of paragraphs (a) and (b) below:

(a) Ownership and control. (1) An SBIR awardee must (i) be a concern which is at least 51% owned and controlled by one or more individuals who are citizens of the United States, or permanent resident aliens in the United States; or

(ii) Be a concern which is at least 51% owned and controlled by another business concern that is itself at least 51% owned and controlled by individuals who are citizens of, or permanent resident aliens in the United States; or

(iii) Be a joint venture in which each entity to the venture must meet the requirements set forth in either paragraphs (a)(1)(i) or (a)(1)(ii) of this section.

(2) 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.

(3) If a trust owns all or part of the concern, SBA considers each trustee and trust beneficiary to be an owner.

(b) Size. An SBIR awardee, together with its affiliates, not have more than 500 employees.

§ 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 status of a business concern?

The size status of a concern for the purpose of a funding agreement under the SBIR program is determined as of the date of the award for both Phase I and Phase II SBIR awards or on the date of the request for a size determination, if an award is pending.

§ 121.705 Must a business concern self-certify its size status?

(a) A firm must self-certify that it currently meets the eligibility requirements set forth in §121.702 of this title or will meet those eligibility requirements on the date of award of a funding agreement for a Phase I or Phase II SBIR award.

(b) 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 by other offerors or other credible information which would cause the funding agreement officer or SBA to question the size of the concern.

(c) Procedures for protesting an offeror’s self-certification are set forth in §§121.1001 through 121.1009.

§ 121.706 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.

§ 121.707 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
§ 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.

§ 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 twelve 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 three years, determined according to § 121.104;
      (iii) The size of other concerns on data over a period of at least three years; 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
§ 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]
(iv) The responsible SBA Government Contracting Area Director or the Director, Office of Government Contracting; and
(v) Other interested parties.

(4) For SBA's Small Business Innovation Research (SBIR) Program, the following entities may protest:
(i) A prospective offeror;
(ii) The funding agreement officer;
(iii) The responsible SBA Government Contracting Area Director or the Division Chief, Office of Technology; and
(iv) Other interested parties.

(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 Director, Office of Business Development;

(6) For SBA's HUBZone program, the following entities may protest in connection with a particular HUBZone procurement:
(i) Any concern that submits an offer for a specific HUBZone set-aside procurement that the contracting officer has not eliminated for reasons unrelated to size;
(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 a qualified HUBZone SBC;
(iii) The contracting officer; and
(iv) The SBA Director, Office of HUBZone, or designee.

(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, or the Director, Office of Business Development.

(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 concern that submits an offer for a specific service-disabled veteran-owned small business set-aside contract;
(ii) The contracting officer;
(iii) The SBA Government Contracting Area Director; and
(iv) The Director, Office of Government Contracting, or designee.

(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 Assistant Administrator of the Division of Program Certification and Eligibility or the Director, Office of Business Development.
(ii) Concerning individual sole source 8(a) contract awards, the following entities may request a formal size determination:

(A) The Participant nominated for award of the particular sole source contract;

(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, or the Director, Office of Business Development.

(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


(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 Small Disadvantaged Business (SDB) program, the following may request a formal size determination:

(i) The applicant or SDB concern; or

(ii) The Assistant Administrator of the Division of Program Certification and Eligibility or the Director, Office of Business Development.

(8) In connection with initial or continued eligibility for the HUBZone program, the following may request a formal size determination:

(i) The applicant or qualified HUBZone business concern; or

(ii) The Director, Office of HUBZone, or designee.

(9) For purposes of validating that firms listed in the Central Contractor Registration 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.

§ 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) Non-negotiated procurement or sale. 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 or proposal opening.

(2) Negotiated procurement. 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.

(3) Long-term contracts. For contracts with durations greater than five years (including options), including all existing long-term contracts, Multiple Award Schedule (MAS) Contracts, Multiple Agency Contracts (MACs), and Government-wide Acquisition Contracts (GWACs):

(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 contractor.

(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 or SBA. The time limitations in paragraph (a) of this section do not apply to contracting officers or SBA, and they may file protests before or after awards, except to the extent set forth in paragraph (e) of this section. Notwithstanding paragraph (e), for purposes of the SBIR program the contracting officer and SBA may file a protest in anticipation of 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.

§ 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.

§ 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.

§ 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 involving SBA’s SBIR Program, the Area Director will also notify the Division Chief, Office of Technology. If the protest involves the size status of a concern that SBA has
§ 121.1009 What are the procedures for making the size determination?

(a) Time frame for making size determination. After receipt of a protest or a request for a formal size determination, SBA will make a formal size determination within 10 working days, if possible.

(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 protestor, and the protested offeror, as well as each affiliate or alleged affiliate, of the size determination. The notification will be by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt.
§ 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.

§ 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.
§ 121.1103 What are the procedures for appealing a NAICS code designation?

(a) Any interested party adversely affected by a NAICS code designation may appeal the designation 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.

(b) OHA will not review a formal size determination where the contract has been awarded and the issue(s) raised in a petition for review are contract specific, such as compliance with the nonmanufacturer rule (see §121.406(b)), or joint venture or ostensible subcontractor rule (see §121.103(h)).

[69 FR 29207, May 21, 2004]
§ 121.1201

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.


§ 121.1203 When will a waiver of the Nonmanufacturer Rule be granted for an individual contract?

An individual waiver for a product in a specific 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.

§ 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.
Small Business Administration § 121.1204

(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 the specific item to be waived and justification as to why the specific item is required;

(ii) The solicitation number, NAICS code, dollar amount of the procurement, and a brief statement of the procurement history;

(iii) A determination by the contracting officer that there are no known small business manufacturers or processors for the requested items (the determination must contain a narrative statement of the contracting officer's efforts to search for small business manufacturers or processors of the item and the results of those efforts, and a statement by the contracting officer that there are no known small business manufacturers for the items
§ 121.1205 How is a list of previously granted class waivers obtained?

A list of classes of products for which waivers of the Nonmanufacturer Rule have been granted is maintained in SBA’s Web site at www.sba.gov/GC/approved.html. 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]

PART 123—DISASTER LOAN PROGRAM

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§ 123.2 What are disaster loans and disaster declarations?

This part covers the disaster loan programs authorized under the Small Business Act, 15 U.S.C. 638(b), (c), and (f). 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.
by such disasters. 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 physical 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.


§ 123.3 How are disaster declarations made?

(a) There are four ways in which disaster declarations are issued which make SBA disaster loans possible:

(1) The President declares a Major Disaster, or declares an emergency, 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 pre-disaster 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 workforce 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.

(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.

§ 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 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 loans in counties contiguous to the disaster area. Disaster declarations issued by the Administrator of SBA include contiguous counties for both physical and economic injury assistance. 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.

§ 123.5 What kinds of loans are available?

SBA offers three kinds of disaster loans: physical disaster home loans, physical disaster business loans, and economic injury business loans. SBA makes these loans directly or in participation with a financial institution. If a loan is made in participation with a financial institution, SBA’s share in that loan may not exceed 90 percent.

§ 123.6 What does SBA look for when considering a disaster loan applicant?

There must be reasonable assurance that you can repay your loan out of your personal or business cash flow, and you must have satisfactory credit and 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.

§ 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 similar disasters.
§ 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. You will be responsible for payment of any closing costs owed to third parties, such as recording fees and title insurance premiums. If your loan is made 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.

§ 123.9 What happens if I don’t use loan proceeds for the intended purpose?

(a) When SBA approves each loan 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 these proceeds, 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, 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. You may also face criminal prosecution or civil or administrative action.

§ 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?

Generally, SBA will not require that you pledge collateral to secure a disaster home loan or a physical disaster business loan of $20,000 or less, or an economic injury disaster loan of $5,000 or less. For loans larger than these amounts, you will be required to provide available collateral such as a lien on the damaged or replacement property, a security interest in personal property, or both.

(a) 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 $10,000 and all economic injury disaster loans to see if they exceed $5,000.

(b) 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.

§ 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. (OMB Approval No. 3245–0122.)

(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. Your request for reconsideration of a business loan application must also be accompanied by current business financial statements.

(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. 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, is final unless:

1. The Director, DAPDC, does not have the authority to approve the requested loan;

2. The Director, DAPDC, refers the matter to the AA/DA; or

3. The AA/DA, upon a showing of special circumstances, requests that the Director, DAPDC, forward the matter to him or her for final consideration. Special circumstances may include, but are not limited to, policy considerations or alleged improper acts by SBA personnel or others in processing the application.

§ 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 physical and economic injury disaster loans. The SBA Associate Administrator for Disaster Assistance, or designee, may waive this restriction as to disaster 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, non-appealable decision. The granting of a waiver does not include loan approval; a waiver recipient must then follow normal loan application procedures.

§ 123.15 What if I change my mind?

If SBA required you to pledge collateral for your loan, you may change
§ 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 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.

§ 123.17 Do other Federal requirements apply?

As a condition of disbursement, you must be in compliance with certain requirements relating to flood insurance, lead-based paint, earthquake hazards, coastal barrier islands, and child support obligations, as set forth in §§120.170 through 120.175 of this chapter.

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

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.

§ 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.

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

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.

§ 123.21 What is a mitigation measure?

A mitigation measure is something done for the purpose of protecting real and personal property 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, or retrofitting structures to protect against high winds, earthquakes, floods, wildfires, or other physical disasters.
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Section 123.107 specifically addresses post-disaster mitigation for home disaster loans, and §123.204 specifically addresses post-disaster mitigation for businesses. Sections 123.400 through 123.412 specifically address pre-disaster mitigation.

[67 FR 62337, Oct. 7, 2002]

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...
§ 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) For all disasters occurring on or after October 26, 1993, there are limits on how much you can borrow for particular purposes:

(1) $40,000 for repair or replacement of household and personal effects;
(2) $200,000 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). Repair or replacement of landscaping and/or recreational facilities cannot exceed $5,000;
(3) $200,000 for eligible refinancing purposes; and
(4) 20 percent of the loan amount (not including refinancing) up to a maximum of $48,000 for mitigation (see §123.107).

(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 equal monthly installments of principal and interest, beginning five months from the date of the loan, as shown on the Note securing the loan. SBA will consider other payment terms if you have seasonal or fluctuating income, and SBA may allow installment payments of varying amounts over the first two years of the loan. The maximum maturity for a home disaster loan is 30 years. There is no penalty for prepayment of home disaster loans.

§ 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
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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 $200,000, or the physical damage to your primary residence after reductions for any insurance or other recovery.

§ 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 borrow the lesser of the cost of the mitigation measure, or up to 20 percent of the amount of your approved home disaster loan to repair or replace your damaged primary residence and personal property.

[67 FR 62337, Oct. 7, 2002]

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
§ 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 $1.5 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 $1.5 million limitation. A major source of employment is a business concern which has one or more locations in the disaster area 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 $1.5 million loan limit 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 $1.5 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, but for an amount reduced by insurance or other compensation. To do so, your business

§ 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) when the declared disaster commenced (except disaster declarations for Hurricanes Katrina, Rita, and Wilma, for which size status is determined as of the date SBA accepts the application for processing, and for applications submitted before December 6, 2005, whether denied because of size status or pending, such applications shall be deemed resubmitted on December 6, 2005), 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);
§ 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;
(c) A consumer or marketing cooperative;
(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.

§ 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.
(b) Loan proceeds may not be used to:

(1) Refinance indebtedness which you incurred prior to the disaster event;
(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) Repair physical damage; or
(5) Pay dividends or other disbursements to owners, partners, officers or stockholders, except for reasonable renumeration directly related to their performance of services for the business.

Subpart E—Pre-Disaster Mitigation Loans

SOURCE: 67 FR 62337, Oct. 7, 2002, unless otherwise noted.

§ 123.400 What is the Pre-Disaster Mitigation Loan Program?

The Pre-Disaster Mitigation Loan Program allows SBA to make low interest, fixed rate loans to small businesses for the purpose of implementing mitigation measures to protect their commercial real property (building) or leasehold improvements or contents from disaster related damage. This program supports the Federal Emergency Management Agency (FEMA’s) Pre-Disaster Mitigation Program. This pilot program is authorized for 5 fiscal years (October—September), from 2000 through 2004, and has only been approved for limited funding. Therefore, approved loan requests are funded on a first come, first served basis up to the limit of program funds available (see §123.411).

§ 123.401 What types of mitigation measures can your business include in an application for a pre-disaster mitigation loan?

To be included in a pre-disaster mitigation loan application, each of your business’ mitigation measures must satisfy the following criteria:
§ 123.404 When is your business ineligible to apply for a pre-disaster mitigation loan?

Your business is ineligible to apply for a pre-disaster mitigation loan if your business (including its affiliates) satisfies any of the following conditions:

(a) Any of your business' principal owners is presently incarcerated, or on

(b) If your business is proposing a mitigation measure that protects against a flood hazard, the location of your business which is the subject of the mitigation measure must be located in a Special Flood Hazard Area (SFHA). Contact your FEMA regional office to find out the locations of SFHAs or visit the FEMA Web site at http://www.fema.gov.

(c) As of the date your business submits a complete Pre-Disaster Mitigation Small Business Loan Application to SBA (see §123.408 for what SBA’s considers to be a complete application), your business, along with its affiliates, must be a small business concern as defined in part 121 of this chapter. The definition of small business concern encompasses sole proprietorships, partnerships, corporations, limited liability entities, and other legal entities recognized under State law;

(d) Your business, which is the subject of the mitigation measure, must have operated as a business in its present location for at least one year before submitting its application;

(e) Your business, along with its affiliates and owners, must not have the financial resources to fund the proposed mitigation measures without undue hardship. SBA makes this determination based on the information your business submits as a part of its application; and

(f) If your business is owning and leasing out real property, the mitigation measures must be for protection of a building leased primarily for commercial rather than residential purposes (SBA will determine this based upon a comparative square footage basis).
§ 123.405 How much can your business borrow with a pre-disaster mitigation loan?

Your business, together with its affiliates, may borrow up to $50,000 each fiscal year. This loan amount may be used to fund only those projects that were a part of your business’ approved loan request. SBA will consider mitigation measures costing more than $50,000 per year if your business can identify, as a part of its Pre-Disaster Mitigation Small Business Loan Application, sources that will fund the cost above $50,000.

§ 123.406 What is the interest rate on a pre-disaster mitigation loan?

The interest rate on a pre-disaster mitigation loan will be fixed at 4 percent per annum or less. The exact interest rate will be stated in the FEDERAL REGISTER notice announcing each filing period (see §123.407).

§ 123.407 When does your business apply for a pre-disaster mitigation loan and where does your business get an application?

SBA will publish a notice in the FEDERAL REGISTER announcing the availability of pre-disaster mitigation loans. The notice will designate a 30-day application filing period with a specific opening date and filing deadline, as well as the locations for obtaining and filing loan applications. In addition to the FEDERAL REGISTER, SBA will coordinate with FEMA, and will issue press releases to the local media to inform potential loan applicants where to obtain loan applications. SBA will not accept any applications postmarked after the filing deadline; however, SBA may announce additional application periods each year depending on the availability of program funds.
§ 123.408 How does your business apply for a pre-disaster mitigation loan?

To apply for a pre-disaster mitigation loan your business must submit a complete Pre-Disaster Mitigation Small Business Loan Application (application) within the announced filing period. Complete applications mailed to SBA and postmarked within the announced filing period will be accepted. The complete application serves as your business' loan request. A complete application supplies all of the filing requirements specified on the application form including a written statement from the local or State coordinator confirming:

(a) The business that is the subject of the mitigation measure is located within the participating pre-disaster mitigation community; and

(b) The mitigation measure is in accordance with the specific priorities and goals of the local participating pre-disaster mitigation community in which the business is located. (The local or State coordinator’s written statement does not constitute an endorsement or technical approval of the project and is not a guarantee that the project will prevent damage in future disasters).

§ 123.409 Which pre-disaster mitigation loan requests will SBA consider for funding?

(a) SBA will consider a loan request for funding if, after reviewing a complete application, SBA determines that it meets the following selection criteria:

1. Your business satisfies the requirements of §§ 123.401, 123.402 and 123.403;

2. None of the conditions specified in §123.404 apply to your business, its affiliates, or principal owners;

3. Your business has submitted a reasonable cost estimate for the proposed mitigation measure and has chosen to undertake a mitigation measure that is likely to accomplish the desired mitigation result (SBA’s determination of this point is not a guaranty that the project will prevent damage in future disasters);

4. Your business is creditworthy; and

5. There is a reasonable assurance of loan repayment in accordance with the terms of a loan agreement.

(b) SBA will notify you in writing if your loan request does not meet the criteria in this section.

§ 123.410 Which loan requests will SBA fund?

SBA will date stamp each application (loan request) as it is received. SBA will fund loan requests which meet the selection criteria specified in §123.409 on a first come, first served basis using this date stamp, until it has allocated all available program funds. Multiple applications received on the same day will be ranked by a computer based random selection system to determine their funding order. SBA will notify you in writing of its funding decision.

§ 123.411 What if SBA determines that your business loan request meets the selection criteria of §123.409 but SBA is unable to fund it because SBA has already allocated all program funds?

If SBA determines that your business’ loan request meets the selection criteria of §123.409 but we are unable to fund it because we have already allocated all available program funds, your request will be given priority status, based on the original acceptance date, once more program funds become available. However, if more than 6 months pass since SBA determined to fund your request, SBA may request updated or additional financial information.

§ 123.412 What happens if SBA declines your business’ pre-disaster mitigation loan request?

If SBA declines your business’ loan request, SBA will notify your business in writing giving specific reasons for decline. If your business disagrees with SBA’s decision, it may respond in accordance with §123.13. If SBA reverses its decision, SBA will use the date it received your business’ last request for reconsideration or appeal as the basis for determining the order of funding.
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 duty during a period of military conflict.

(c) Period of military conflict means:

1. A period of war declared by the Congress,
2. A period of national emergency declared by the Congress or by the President, or
3. A period of contingency operation, as defined in 10 U.S.C. 101(a).

(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.

§ 123.501 When is your business eligible to apply 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 duty,

(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 military duty during a period of military conflict existing on or after March 24, 1999,

(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).


§ 123.502 When is your business ineligible to apply for a Military Reservist EIDL?

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;
§ 123.507 Under what circumstances will SBA consider waiving the $1.5 million loan limit?

SBA will consider waiving the $1.5 million dollar limit if you can certify to the following conditions and SBA approves of such certification based on known, the date of release from active duty;
(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 duty.

§ 123.505 What if you are both an essential employee and the owner of the small business and you started active duty 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 duty before applying for a 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.

§ 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 duty, up to a maximum of $1.5 million.

§ 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 duty showing the date of call up, and if

§ 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 official call-up orders and ending 90 days after the date the essential employee is discharged or released from active duty.

Small Business Administration
§ 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?

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.

§ 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.
§ 123.600 Are economic injury disaster loans under this subpart limited to the geographic areas contiguous to the declared disaster areas?

No. Notwithstanding §123.4, SBA may make economic injury disaster loans outside the declared disaster areas and the contiguous geographic areas to small business concerns that have suffered substantial economic injury as a direct result of the destruction of the World Trade Center or the damage to the Pentagon on September 11, 2001, or as a direct result of any related federal action taken between September 11, 2001 and October 22, 2001.

§ 123.601 Is my business eligible to apply for an economic injury disaster loan under this subpart?

(a) If your business has suffered substantial economic injury as a direct result of the destruction of the World Trade Center or the damage to the Pentagon on September 11, 2001, or as a direct result of any related federal action taken between September 11, 2001 and October 22, 2001, you are eligible to apply for an economic injury disaster loan under this subpart.

(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 under this subpart only if you were a small business (as defined in part 121 of this chapter) on the date SBA accepts your application for processing (and for applications submitted before March 15, 2002, whether denied or pending, such applications shall be deemed resubmitted on March 15, 2002) and if you and your affiliates and principal owners (20% or more ownership interest) have used all reasonable available funds, and you are unable to obtain credit elsewhere (see §123.104).

(c) Eligible businesses do not include agricultural enterprises, but do include small agricultural cooperatives and producer cooperatives.

§ 123.602 When would my business not be eligible to apply for an economic injury disaster loan under this subpart?

Your business is not eligible for an economic injury disaster loan under this subpart 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 on September 11, 2001);

(b) A non-profit or charitable concern;

(c) A consumer or marketing cooperative;

(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.

§ 123.603 What is the interest rate on an economic injury disaster loan under this subpart?

Your economic injury disaster loan under this subpart will have an interest rate of 4 percent per annum or less.

§ 123.604 How can my business spend my economic injury disaster loan under this subpart?

(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.

(b) Loan proceeds may not be used to:

(1) Refinance indebtedness which you incurred prior to September 11, 2001;

(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) 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.

§ 123.605 How long do I have to apply for a loan under this subpart?

You have until January 22, 2002 to apply for a loan under this subpart. Your application must be postmarked no later than this date. SBA has the discretion, for good cause, to extend the application deadline by publication of a notice in the FEDERAL REGISTER.

§ 123.606 May I request an increase in the amount of an economic injury disaster loan under this subpart?

Yes. Notwithstanding §123.20, you may request an increase in the amount of an economic injury disaster loan under this subpart not later than one year after the date SBA approves your initial request.
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Subpart A—8(a) Business Development

SOURCE: 63 FR 35739, June 30, 1998, unless otherwise noted.


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 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. A firm that completes its nine year term of participation in the 8(a) BD program is deemed to graduate from the program. The nine year program term may be shortened only by termination, early graduation or voluntary graduation as provided for in this subpart.

§ 124.3 What definitions are important in the 8(a) BD program?

Alaska Native 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 Metlakatla 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 which employs at least one full-time individual within the appropriate geographical boundary. 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.

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.

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.”

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 four digit Standard Industrial Classification (SIC) code designation which best describes the primary business activity of the 8(a) BD applicant or Participant. The SIC code designations are described in the Standard Industrial Classification Manual published by the U.S. Office of Management and Budget.

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.

Same or similar line of business means business activities within the same two-digit “Major Group” of the SIC 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.

§ 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 the United States, and which demonstrates potential for success.
§ 124.102 What size business is eligible to participate in the 8(a) BD program?

(a) 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.

(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 8(a) BD program officials may request a formal size determination under part 121 of this title. A favorable determination will enable the firm to immediately submit a new 8(a) BD application without waiting one year.

§ 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 (American Indians, Eskimos, Aleuts, or Native Hawaiians); 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 Marianas, 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 Director, Office of Business Development 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.

(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, physical handicap, 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) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(iii) Negative impact on entry into or advancement in the business world because of the disadvantage. SBA will consider any relevant evidence in assessing this element. In every case, however, SBA will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage.
Small Business Administration

§ 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 describe it in a narrative statement, and must submit personal financial information.

(2) When married, an individual claiming economic disadvantage also

in entering into or advancing in the business world.

(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.

(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.
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must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

(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 personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. SBA will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual’s access to credit and capital. The financial profiles that SBA compares include total assets, net sales, pre tax profit, sales/working capital ratio, and net worth.

(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. For initial 8(a) BD eligibility, the net worth of an individual claiming disadvantaged status must be less than $250,000. For continued 8(a) BD eligibility after admission to the program, net worth must be less than $750,000. 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) 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.

§ 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, 124.109.
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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 Participant. The individuals determined to be disadvantaged for purposes of one Participant, their immediate family members, and the Participant itself, may not hold, in the aggregate, more than a 20 percent equity ownership interest in any other single Participant.

(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 a Participant in a 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 may 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 a former Participant or a principal of 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.
§ 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.) 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.

(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
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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 such 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 any individual or immediate family member within two years prior to the application and remain involved in the firm 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 Director, Office of Business Development 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.
§ 124.107 What is potential for success?

The applicant concern must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. To do so, it must be in business 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 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.
§ 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, adverse information is obtained from the applicant or a credible source regarding possible criminal conduct by the applicant or any of its principals, no further action will be taken on the application until SBA’s Inspector General has collected relevant information and has advised the Director, Office of Business Development of his or her findings. The AA/8(a)BD will consider those findings 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 Director, Office of Business Development 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 10 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.

(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 another concern or business, the applicant must hold all requisite licenses if the concern is engaged in an industry requiring professional licensing (e.g., public accounting, 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.
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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.

(f) Achievement of benchmarks. Where actual participation by disadvantaged businesses in a particular SIC Major Group exceeds the benchmark limitations established by the Department of Commerce, SBA, in its discretion, may decide not to accept an application for 8(a) BD participation from a concern whose primary industry classification falls within that Major Group.

§124.109 Do Indian tribes and Alaska Native Corporations have any special rules for applying to 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.

(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. Thereafter, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) BD program participation, unless specifically required to do so by the Director, Office of Business Development or designee. 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. The concern’s articles of incorporation, partnership agreement or limited liability company articles of organization 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.

(3) Ownership. (i) For corporate entities, a tribe must 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 own at least a 51 percent interest.

(ii) A tribe 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 SIC code as the applicant. A tribe may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same SIC code that a current Participant owned by the tribe operates in the 8(a) BD program as its primary SIC code.

(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.

(4) Control and management. (i) The management and daily business operations of a tribally-owned concern must be controlled by the tribe, through one or more disadvantaged individual members 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 SBA determines that such management is required to assist the concern’s development, that the tribe 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 disadvantaged 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.

(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. (i) A tribally-owned applicant concern must be in business for at least two years, as evidenced by income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification, or demonstrate potential for success as set forth in paragraph (c)(6)(ii) of this section.

(ii) In determining whether a tribally-owned concern has the potential for success, SBA will look at a number of factors including, but not limited to:
(A) The technical and managerial experience and competency of the individual(s) who will manage and control the daily operation of the concern;
(B) The financial capacity of the concern; and
(C) The concern’s record of performance on any previous Federal or private sector contracts in the primary industry in which the concern is seeking 8(a) certification.

(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) Except for the tribe itself, the concern’s officers, directors, and all shareholders owning an interest of 20% or more must demonstrate good character. See §124.108(a).

§124.110 Do Native Hawaiian Organizations have any special rules for applying to 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 124.106 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.

(c) A Native Hawaiian Organization 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 SIC code as the applicant. A Native Hawaiian Organization may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same SIC code that a current Participant owned by the Native Hawaiian Organization operates in the 8(a) BD program as its primary SIC code.

(d) 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).

(e)(1) An applicant concern owned by a Native Hawaiian Organization must be in business for at least two years, as evidenced by income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification, or demonstrate potential for success as set forth in paragraph (e)(2) of this section.

(2) In determining whether a concern owned by a Native Hawaiian Organization has the potential for success, SBA will look at a number of factors including, but not limited to:
   (i) The technical and managerial experience and competency of the individual(s) who will manage and control the daily operation of the concern.
   (ii) The financial capacity of the concern; and
   (iii) The concern’s record of performance on any previous Federal or private sector contracts in the primary industry in which the concern is seeking 8(a) certification.

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§ 124.111 Do Community Development Corporations (CDCs) have any special rules for applying to 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.

(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 SIC code as the applicant. 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 SIC code that a current Participant owned by the CDC operates in the 8(a) BD program as its primary SIC code.

(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(d).

(f)(1) A CDC-owned applicant concern must be in business for at least two years, as evidenced by income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification, or demonstrate potential for success as set forth in paragraph (e)(2) of this section.

(2) In determining whether a CDC-owned concern has the potential for success, SBA will look at a number of factors including, but not limited to:

(i) The technical and managerial experience and competence of the individual(s) who will manage and control the daily operation of the concern;

(ii) The financial capacity of the concern; and

(iii) The concern’s record of performance on any previous Federal or private sector contracts in the primary industry in which the concern is seeking 8(a) certification.

(g) A CDC-owned applicant and all of its principals must have good character as set forth in § 124.108(a).

§ 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 protege, a narrative report detailing the contacts it has had with its mentor and benefits it has received from the mentor/protege relationship. See § 124.520(b)(4) for additional annual requirements;

(7) IRS Form 4506, Request for Copy or Transcript of Tax Form; and

(8) 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: officer's salary; cash dividends; distributions in excess of amounts needed to pay 8 Corporation taxes; cash and property withdrawals; bonuses; loans; advances; payments to immediate family members; investments on behalf of an owner, officer, or key employee; acquisition of a business not merged with the 8(a) Participant; charitable contributions; and speculative ventures.

(2) If SBA determines that excessive funds or other assets have been withdrawn from the Participant, 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.
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(3) Withdrawals are excessive if during any fiscal year of the Participant they exceed (i) $150,000 for firms with sales up to $1,000,000; (ii) $200,000 for firms with sales between $1,000,000 and $2,000,000; and (iii) $300,000 for firms with sales over $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.

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 Where must an application be filed?

An application for 8(a) BD program admission must be filed in the SBA Division of Program Certification and Eligibility (DPCE) field office serving the territory in which the principal place of business is located. The SBA district office will provide an applicant concern with information regarding the 8(a) BD program and with all required application forms.

§ 124.203 What must a concern submit to apply to the 8(a) BD program?

Each 8(a) BD applicant concern must submit those forms and attachments required by SBA when applying for admission to the 8(a) BD program. These forms and attachments will include, but not be limited to, financial statements, Federal personal and business tax returns, and personal history statements. An applicant must also submit IRS Form 4506, Request for Copy or Transcript of Tax Form, to SBA. The application package may be in the form of an electronic application.

§ 124.204 How does SBA process applications for 8(a) BD program admission?

(a) The Director, Office of Business Development is authorized to approve or decline applications for admission to the 8(a) BD program. The appropriate DPCE field office will receive, review and evaluate all 8(a) BD applications except those from ANC-owned applicants. SBA’s Anchorage District Office will receive all applications from ANC-owned applicants and review them for completeness before sending them to the Director, Office of Business Development for further processing. The appropriate field office 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. SBA will process an application for 8(a) BD program participation within 90 days of receipt of a complete application package by the DPCE field office. Incomplete application packages will not be processed.

(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) An applicant concern’s eligibility will be based on circumstances existing on the date of application, except where clarification is made pursuant to paragraph (b) of this section or as provided in paragraph (d) of this section.

(d) 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.

(e) The decision of the Director, Office of Business Development to approve or deny an application will be in writing. A decision to deny admission
§ 124.205 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?

(a) An applicant may request the AA/8(a)BD to reconsider his or her initial decline decision by filing a request for reconsideration with the SBA field office that originally processed its application. Filing means submission by personal delivery, first-class mail, express mail, facsimile transmission followed by first-class mail, or commercial delivery service. The applicant must submit its request for reconsideration within 45 days of receiving notice that its application was declined. The applicant must provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline.

(b) The AA/8(a)BD will issue a written decision within 45 days of the regional DPCE's receipt of the applicant's request. The AA/8(a)BD may either approve the application, deny it on the same grounds as the original decision, or deny it on other grounds. If denied, the AA/8(a)BD will explain why the applicant is not eligible for admission to the 8(a) BD program and give specific reasons for the decline.

(c) If the AA/8(a)BD declines the application solely on issues not raised in the initial decline, the applicant can ask for reconsideration as if it were an initial decline.

§ 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) The applicant may appeal an initial decision of the Director, Office of Business Development without requesting reconsideration, or may appeal the decision of the Director, Office of Business Development on reconsideration.

(c) 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.

(d) 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 Director, Office of Business Development is the final Agency decision.


§ 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 admission may submit a new application for admission to the program 12 months after the date of the final Agency decision to decline.

EXITING THE 8(a) BD PROGRAM

§ 124.301 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) Graduation upon the expiration of the program term established pursuant to §124.2;

(b) Voluntary early graduation;

(c) Early graduation pursuant to the provisions of §§124.302 and 124.304;

(d) Termination pursuant to the provisions of §§124.303 and 124.304.

§ 124.302 What is early graduation?

(a) General. SBA may graduate a firm from the 8(a) BD program prior to the expiration of its Program Term 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 prior to the expiration of its program term, and has demonstrated the ability
§ 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.

(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.

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 operate successfully without 8(a) contracts.

SBA may graduate a Participant prior to the expiration of its program term where the Participant has substantially achieved the targets, objectives and goals of its business plan as adjusted under § 124.403(d) and its primary industry classification falls within a SIC Major Group in which the benchmarks described in § 124.403(d) have been achieved.

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(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, including transfers of funds or other business assets, from the concern for the personal benefit of any of its owners or any person or entity affiliated with the owners that hinder the development of the concern (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 §124.507 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 part 345 of this title 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.
the final agency decision effective on the date the appeal right expired.

(f) Effect of early graduation or termination. 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.

§ 124.305 What is suspension and how is a Participant suspended from the 8(a) BD program?

(a) At any time after SBA issues a Letter of Intent to Terminate pursuant to § 124.304, the Director, Office of Business Development may suspend 8(a) contract support and all other forms of 8(a) BD program assistance to that concern until the issue of the concern's termination from the program is finally decided. The Director, Office of Business Development 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 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.

(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 before OHA or the Director, Office of Business Development makes a final determination regarding the termination action.

(1) The term "adequate evidence" means information contained in the record before the Director, Office of Business Development 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) Unless the Administrative Law Judge consolidates the suspension and termination proceedings, OHA's review is limited to determining whether the Government's interests need to be protected, and will not consider the merits of the termination action.

(e) If there is a timely appeal, the decision of the Administrative Law Judge is the final OHA decision. If there is not a timely appeal, the decision of the Director, Office of Business Development 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) SBA may suspend a Participant from program benefits where a change of ownership or business structure has been requested if ownership or control of the participant changed prior to SBA's approval pending resolution of the request to change its ownership or control. If the change of ownership is approved, the length of the suspension will be added to the firm's program term where the change in ownership results from the death or incapacity of a disadvantaged individual or where the firm requested prior approval and waited 60 days for SBA approval before making the change. The suspension 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 change of ownership suspension is not appealable.

(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.


§ 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. The Participant will not be eligible for 8(a) BD program benefits, including 8(a) contracts, until SBA approves its business plan.

(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;
§ 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. 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:

§ 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.

(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.

§ 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 101-44 and this section will be used to transfer surplus property to eligible Participants.

(2) The property which may be transferred to SASPs for further transfer to eligible Participants includes all personal property which has been determined to be "donable" as defined in 41 CFR 101–44.001–3.

(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 part 9, subpart 9.4 of the Federal Acquisition Regulations, 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.

(c) Use of acquired surplus property. (1) Eligible Participants may acquire surplus Federal property from any SASP located in any state, provided the concern represents and agrees 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 other 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 property. (1) Participants may participate in the surplus property distribution program administered by the SASPs to the same extent, but with no special priority over, other authorized transferees. See 41 CFR subpart 101-44.2.
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(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. The title to surplus property acquired from a SASP will pass to the Participant when the Participant executes the applicable SASP distribution documents and takes possession of the property.

(5) 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 or 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.

(5) Any funds received by SBA in enforcement of this section will be remitted promptly to the Treasury of the United States as miscellaneous receipts.

**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, 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. 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.

(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) A concern must be a current Participant in the 8(a) BD program at the time of award, except as provided in §124.507(d).

(h) A Participant must certify that it is a small business under the size standard corresponding to the SIC 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.

(i) 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).

§ 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. 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
Small Business Administration

§ 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 working days of receipt of the written offering letter if the contract is valued at more than the simplified acquisition threshold, and within two 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 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.

(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.

(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 complies with the requirements of this section.

(ii) The acquisition is a follow-on or renewal contract and the nominated concern is the incumbent;

(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 SIC 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;

(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; and

(17) Any other information that the procuring activity deems relevant or which SBA requests.
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, SBA may authorize the procuring activity to award an 8(a) contract without requiring an offer and acceptance of the requirement for the 8(a) program. In such a case, the procuring activity must notify SBA of all 8(a) awards made under this authority.

(5) Where SBA does not respond to an offering letter within the normal 10-day time period, the procuring activity may seek SBA's acceptance through the Director, Office of Business Development. The procuring activity may assume that SBA accepts its offer for the 8(a) program if it does not receive a reply from the Director, Office of Business Development within 5 days of his or her receipt of the procuring activity request.

(b) Verification of SIC code. As part of the acceptance process, SBA will verify the appropriateness of the SIC code designation assigned to the requirement by the procuring activity contracting officer.

(1) SBA will accept the SIC code assigned to the requirement by the procuring activity contracting officer as long as it is reasonable, even though other SIC codes may also be reasonable.

(2) If SBA and the procuring activity are unable to agree as to the proper SIC 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 SIC 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 SIC code assigned to the requirement by the procuring activity contracting officer; and

(iv) The Participant has submitted required financial statements to SBA.

(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
Small Business Administration § 124.503

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) 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.

(f) 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. This enables SBA to determine:

(1) Whether the requirement should be a competitive 8(a) award;

(2) A nominated firm’s eligibility, whether or not it is the same firm that performed the previous contract;

(3) The impact that contract award would have on the equitable distribution of 8(a) contracts; and

(4) Whether the requirement should continue under the 8(a) BD program.

(g) Basic Ordering Agreements (BOAs). A Basic Ordering Agreement (BOA) is not a contract under the FAR. See 48 CFR 16.703(a). Each order to be issued under the BOA is an individual contract. As such, the procuring activity must offer, and SBA must accept, each task order under a BOA in addition to offering and accepting the BOA itself.

(1) SBA will not accept for award on a sole source basis any task order under a BOA 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 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 SIC code assigned under the BOA, new orders will not be accepted for the concern.

(h) Task and delivery order contracts. If a task or delivery order contract was previously offered to and accepted into the 8(a) BD program, task and delivery orders under the contract are not to be offered to or accepted into the 8(a) BD program. See §121.404(g)(3) for rules concerning size re-certifications in connection with long-term contracts.

(i) 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.

(j) The contracting officer should consider setting aside the requirement for HUBZone, 8(a) or SDVO SBC participation before considering to set aside the requirement as a small business set-aside.

§ 124.504 What circumstances limit SBA’s ability to accept a procurement for award as an 8(a) contract?

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) Reservation as small business or SDB set-aside. The procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a small business or small disadvantaged business (SDB) set-aside prior to offering the requirement to SBA for award as an 8(a) contract. The Director, Office of Business Development may permit the acceptance of the requirement, however, under extraordinary circumstances.

Example to paragraph (a). SBA may accept a requirement where a procuring activity made a decision to offer the requirement to the 8(a) BD program before the solicitation was sent out and the procuring activity acknowledges and documents that the solicitation was in error.

(b) Competition prior to offer and acceptance. The procuring activity competed a requirement among Participants prior to offering the requirement to SBA and receiving SBA’s formal acceptance of the requirement.

(1) Any competition conducted without first obtaining SBA’s formal acceptance of the procurement for the 8(a) BD program will not be considered an 8(a) competitive requirement.

(2) SBA may accept the requirement for the 8(a) BD program as a competitive 8(a) requirement, but only if the procuring activity agrees to resolicit the requirement using appropriate competitive 8(a) procedures.

(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 Simplified Acquisition Procedures.

(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 multi-year 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) Construction contracts, by their very nature (e.g., the building of a specific structure), are deemed new requirements.

(C) The expansion or modification of an existing requirement will 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
§ 124.505 When will SBA appeal the terms or conditions of a particular 8(a) contract or a procuring activity decision not to reserve a requirement for 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; and

(3) The terms and conditions of a proposed 8(a) contract, including the procuring activity’s SIC 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...
§ 124.506 At what dollar threshold must an 8(a) procurement be competed among eligible Participants?

(a) Competitive thresholds.

(1) 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 $5,000,000 for contracts assigned manufacturing SIC codes and $3,000,000 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.

(2) 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. For indefinite delivery or indefinite quantity type contracts, the thresholds are applied to the maximum order amount authorized.

(3) 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.

Example to paragraph (a)(3). If the anticipated award price for a professional services requirement is determined to be $2.7 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 $3.1 million.

(4) 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.

SBA may award a sole source 8(a) contract to a Participant concern owned and controlled by an Indian tribe or an ANC 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. 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, but a procurement may not be removed from competition to award it to a tribally-owned or ANC-owned concern on a sole source basis.

(c) Competition below thresholds.

The Director, Office of Business Development, 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 Director, Office of Business Development 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 Director, Office of Business Development 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 Director, Office of Business Development 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.

§ 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) Eligibility is based on 8(a) BD program criteria, including whether the Participant is:

(i) A small business under the SIC code assigned to the requirement;

(ii) In compliance with any applicable competitive business mix target established or remedial measure imposed by §124.509 that does not include the denial of future 8(a) contracts;

(iii) In the developmental stage of program participation if the solicitation restricts offerors to the developmental stage of participation; and

(iv) A concern with a bona fide place of business in the applicable geographic area if the procurement is for construction.

(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) Competition within stages of program participation. SBA may accept a competitive 8(a) requirement that is limited to Participants in the developmental stage of program participation, or may accept a requirement to be competed among firms both in the developmental and transitional stages of program participation.

(2) 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.

(3) 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
§ 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 maximum efforts to obtain business outside the 8(a) BD program.
(2) During both the developmental and transitional stages of the 8(a) BD program, a Participant must make substantial and sustained 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. During their transitional stage of program participation, Participants must meet the following non-8(a) business activity targets each year:

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<th>Participant’s year in the transitional stage</th>
<th>Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)</th>
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(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 based on the Participant's latest fiscal year-end total revenue. 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
§ 124.509

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) Once admitted to the 8(a) BD program, a Participant must provide to SBA as part of its annual review:

(i) Annual financial statements with a breakdown of 8(a) and non-8(a) revenue in accord with § 124.602; and

(ii) An annual report within 30 days from the end of the program year of all non-8(a) contracts, options, and modifications affecting price executed during the program year.

(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) Except as set forth in paragraph (e) of this section, 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 will be ineligible for sole source 8(a) contracts in the current program year, unless and until the Participant corrects the situation as described in paragraph (d)(2) of this section.

(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 may increase its monitoring of the Participant’s contracting activity during the ensuing program year. SBA will also 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)(2)(i) and (d)(2)(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 (d)(2)(ii)(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)(2). 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)
§ 124.510 What percentage of work must a Participant perform on an 8(a) contract?

(a) To assist the business development of Participants in the 8(a) BD program, an 8(a) contractor must perform certain percentages of work with its own employees. These percentages and the requirements relating to them are the same as those established for small business set-aside prime contractors, and are set forth in §125.6 of this title.

(b) A Participant must certify in its offer that it will meet the applicable percentage of work requirement. SBA will determine whether the firm will be in compliance as of the date of award.
§ 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).

(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, notify SBA of all modifications and options exercised.

§ 124.513 Under what circumstances can a joint venture be awarded an 8(a) contract?

(a) General. (1) If approved by SBA, 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) concern 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 arrangement.

(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 so long as each concern is small under the size standard corresponding to the SIC code assigned to the contract, provided:

(i) The size of at least one 8(a) Participant to the joint venture is less than one half the size standard corresponding to the SIC code assigned to the contract; and

(ii)(A) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the SIC code assigned to the contract; or

(B) For a procurement having an employee-based size standard, the procurement exceeds $10 million;

(2) For sole source and competitive 8(a) procurements that do not exceed the dollar levels identified in paragraph (b)(1) of this section, an 8(a) Participant entering into a joint venture agreement with another concern is considered to be affiliated for size purposes with the other concern with respect to performance of the 8(a) contract. The combined annual receipts or employees of the concerns entering into the joint venture must meet the size standard for the SIC code assigned to the 8(a) contract.

(3) Notwithstanding the provisions of paragraphs (b)(1) and (b)(2) of this section, a joint venture between a protege firm and its approved mentor (see §124.520) will be deemed small provided the protege qualifies as small for the size standard corresponding to the SIC code assigned to the procurement and has not reached the dollar limit set forth in §124.519.

(c) Contents of joint venture agreement. Every joint venture agreement to perform an 8(a) contract, including those between mentors and proteges 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 an employee of the managing venturer as the project manager responsible for performance of the 8(a) contract;

(3) Stating that not less than 51 percent of the net profits earned by the joint venture will be distributed to the 8(a) Participant(s);

(4) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. 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;

(5) 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;

(6) Specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the 8(a) contract;

(7) 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;

(8) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(9) Requiring the final original records be retained by the managing venturer upon completion of the 8(a) contract performed by the joint venture;

(10) 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 90 days after completion of the contract.

(d) Performance of work. For any 8(a) contract, including those between mentors and proteges authorized by §124.520, the joint venture must perform the applicable percentage of work required by §124.510, and the 8(a) partner(s) to the joint venture must perform a significant portion of the contract.

(e) Prior approval by SBA. SBA must approve a joint venture agreement prior to the award of an 8(a) contract on behalf of the joint venture.

(f) Contract execution. Where SBA has approved a joint venture, the procuring activity will execute an 8(a) contract in the name of the joint venture entity.

(g) Amendments to joint venture agreement. All amendments to the joint venture agreement must be approved by SBA.

(h) Inspection of records. SBA may inspect the records of the joint venture without notice at any time deemed necessary.


§ 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 SIC 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.
§ 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 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, whether in the base or an option year, must be terminated for the convenience of the Government if:
   (i) 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; or
   (ii) The contract is transferred or novated for any reason to another firm.

(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 days after such occurrence. 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.

(d) SBA determines the eligibility of an acquiring Participant under paragraph (b)(2) of this section by referring to the items identified in §124.507(b)(2) and deciding whether at the time of the request for waiver (and prior to the transaction) the acquiring Participant is a responsible and eligible concern with respect to each contract for which a waiver is sought. As part of the waiver request, the acquiring firm must certify that it is a small business for the size standard corresponding to the
Small Business Administration

§ 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

§ 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 SIC 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 Director, Office of Business Development may appeal a SIC 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 SIC 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).

§ 124.516 Who decides contract disputes arising between a Participant and a procuring activity after the award of an 8(a) contract?

For purposes of the Disputes Clause of a specific 8(a) contract, the contracting officer is that of the procuring activity. A dispute arising between an 8(a) contractor and the procuring activity contracting officer will be decided by the procuring activity, and appeals may be taken by the 8(a) contractor without SBA involvement.

§ 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

SIC 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.

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. Where a procuring activity contracting officer demonstrates to SBA that an 8(a) contract will otherwise be terminated for default, SBA may authorize another Participant to complete performance and, in conjunction with the procuring activity, permit novation of the contract without invoking the termination for convenience or waiver provisions of §124.515.

§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 or an ANC) 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 the dollar amount set forth in this section during its participation in the 8(a) BD program.

(1) For a firm having a revenue-based primary SIC code at time of program entry, the limit above which it can no longer receive sole source 8(a) contracts is $100,000,000.

(2) For a firm having an employee-based primary SIC code at time of program entry, the limit above which it can no longer receive sole source 8(a) contracts is $100,000,000.

(3) SBA will not consider 8(a) contracts awarded under $100,000 in determining whether a Participant has reached the limit identified in paragraphs (a)(1) and (a)(2) of this section.

(b) 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.

(c) The limitation set forth in paragraph (a) of this section will not apply for firms that are current Participants in the 8(a) BD program as of December 31, 1997.

(d) SBA includes the dollar value of 8(a) options and modifications in determining whether a Participant has reached the limit identified in paragraph (a) of this section. If an option is not exercised or the contract value is reduced by modification, SBA will deduct those values.

(e) 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.

(f) The SBA Administrator on a nondelegable basis 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 to the SBA Administrator that award of a sole source 8(a) contract to the Participant is needed to achieve significant interests of the Government.

§124.520 Mentor/protege program.

(a) General. The mentor/protege program is designed to encourage approved mentors to provide various forms of assistance to eligible Participants. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans;
subcontracts; and/or assistance in performing prime contracts with the Government in the form of joint venture arrangements. The purpose of the mentor/protege relationship is to enhance the capabilities of the protege and to improve its ability to successfully compete for contracts.

(b) Mentors. Any concern that demonstrates a commitment and the ability to assist developing 8(a) Participants may act as a mentor and receive benefits as set forth in this section. This includes businesses that have graduated from the 8(a) BD program, firms that are in the transitional stage of program participation, other small businesses, and large businesses.

(1) In order to qualify as a mentor, a concern must demonstrate that it:
   (i) Possesses favorable financial health, including profitability for at least the last two years;
   (ii) Possesses good character;
   (iii) Does not appear on the federal list of debarred or suspended contractors; and
   (iv) Can impart value to a protege firm due to lessons learned and practical experience gained because of the 8(a) BD program, or through its general knowledge of government contracting.

(2) Generally, a mentor will have no more than one protege at a time. However, the Director, Office of Business Development may authorize a concern to mentor more than one protege at a time where the concern can demonstrate that the additional mentor/protege relationship will not adversely affect the development of either protege firm (e.g., the second firm cannot be a competitor of the first firm).

(3) In order to demonstrate its favorable financial health, a firm seeking to be a mentor must submit its federal tax returns for the last two years to SBA for review.

(4) Once approved, a mentor must annually certify that it continues to possess good character and a favorable financial position.

(c) Proteges. (1) In order to initially qualify as a protege firm, a Participant must:
   (i) Be in the developmental stage of program participation;
   (ii) Have never received an 8(a) contract; or
   (iii) Have a size that is less than half the size standard corresponding to its primary SIC code.

(2) Only firms that are in good standing in the 8(a) BD program (e.g., firms that do not have termination or suspension proceedings against them, and are up to date with all reporting requirements) may qualify as a protege.

(3) A protege firm may have only one mentor at a time.

(d) Benefits. (1) A mentor and protege may joint venture as a small business for any government procurement, including procurements with a dollar value less than half the size standard corresponding to the assigned NAICS code and 8(a) sole source contracts, provided the protege qualifies as small for the procurement and, for purposes of 8(a) sole source requirements, the protege has not reached the dollar limit set forth in §124.519.

(2) Notwithstanding the requirements set forth in §§124.105(g) and (h), in order to raise capital for the protege firm, the mentor may own an equity interest of up to 40% in the protege firm.

(3) Notwithstanding the mentor/protege relationship, a protege 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 protege firm and its mentor based on the mentor/protege agreement or any assistance provided pursuant to the agreement.

(e) Written agreement. (1) The mentor and protege firms must enter a written agreement setting forth an assessment of the protege’s needs and describing the assistance the mentor commits to provide to address those needs (e.g., management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor). The agreement must also provide that the mentor will provide such assistance to the protege firm for at least one year.

(2) The written agreement must be approved by the Director, Office of Business Development. The agreement will not be approved if SBA determines that the assistance to be provided is...
§ 124.601 What reports does SBA require concerning parties who assist Participants in obtaining federal contracts?

(a) Each Participant must submit 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 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.

§ 124.602 What kind of annual financial statement must a Participant submit to SBA?

(a) Participants with gross annual receipts of more than $5,000,000 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) The servicing SBA District Director may waive the requirement for audited financial statements for good cause shown by the Participant.

(2) 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) Participants with gross annual receipts between $1,000,000 and $5,000,000 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.

(c) Participants with gross annual receipts of less than $1,000,000 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.

§ 124.703 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 graduates or is terminated from the program. 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.

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 General applicability.

(a) This subpart defines a Small Disadvantaged Business (SDB). It also sets forth procedures by which a firm can apply to be recognized as an SDB, including procedures to be used by private sector entities approved by SBA for determining whether a particular concern is owned and controlled by one or more disadvantaged individuals or Alaska Native Corporations (ANCs), Community Development Corporations (CDCs), Indian tribes (tribes) or Native Hawaiian Organizations (NHOs). Finally, this subpart establishes procedures by which SBA determines whether a particular concern qualifies as an SDB in response to a protest challenging the concern's status as disadvantaged. Unless specifically stated otherwise, the phrase “socially and economically disadvantaged individuals” in this subpart includes tribes, ANCs, CDCs, and NHOs.

(b) Only small firms that are owned and controlled by socially and economically disadvantaged individuals are eligible to participate in Federal SDB price evaluation adjustment, evaluation factor or subfactor, monetary subcontracting incentive, or set-aside programs, or SBA's section 8(d) subcontracting program.

(c) In order for a concern to represent that it is an SDB as a prime contractor for purposes of a Federal Government procurement, it must have:
(1) Received a certification from SBA that it qualifies as an SDB; or
(2) Submitted an application for SDB certification to SBA or a Private Certifier, and must not have received a negative determination regarding that application from SBA or the Private Certifier.

(d) A firm cannot represent itself to be an SDB concern in order to receive a preference as an SDB for any Federal subcontracting program if it is not on the SBA-maintained list of qualified SDBs.

§ 124.1002 What is a Small Disadvantaged Business (SDB)?

(a) 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. Qualified Private Certifiers must use the 8(a) criteria applicable to ownership and control in determining whether a particular firm is actually owned and controlled by one or more individuals claiming disadvantaged status.

(b) SDB eligibility criteria. A small disadvantaged business (SDB) is a concern:
(1) Which qualifies as small under part 121 of this title for the size standard corresponding to the applicable four digit Standard Industrial Classification (SIC) code.
   (i) For purposes of SDB certification, the applicable SIC code is that which relates to the primary business activity of the concern;
   (ii) For purposes related to a specific Federal Government contract, the applicable SIC code is that assigned by the contracting officer to the procurement at issue;
(2) Which is at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals as set forth in §124.105. For the requirements relating to tribes and ANCs, NHOs, or CDCs, see §§124.109, 124.110, and 124.111, respectively.

(3) Except for tribes, ANCs, NHOs, and CDCs, whose management and daily business operations are controlled by one or more socially and economically disadvantaged individuals. For the requirements relating to tribes and ANCs, NHOs, or CDCs, see §§124.109, 124.110, and 124.111, respectively.

(4) Which, for purposes of SDB procurement mechanisms authorized by 10 U.S.C. 2323 (such as price evaluation adjustments, evaluation factors or sub-factors, monetary subcontracting incentives, or SDB set-asides) relating to the Department of Defense, NASA and the Coast Guard only, has the majority of its earnings accruing directly to the socially and economically disadvantaged individuals.

(c) Disadvantaged status. In assessing the personal financial condition of an individual claiming economic disadvantage, his or her net worth must be less than $750,000 after taking into account the exclusions set forth in §124.104(c)(2).

(d) Additional eligibility criteria. Except for tribes, ANCs, CDCs and NHOs, each individual claiming disadvantaged status must be a citizen of the United States.

(e) Potential for success not required. The potential for success requirement set forth in §124.107 does not apply as an eligibility requirement for an SDB.

(f) Joint ventures. Joint ventures are permitted for SDB procurement mechanisms (such as price evaluation adjustments, evaluation factors or sub-factors, monetary subcontracting incentives, or SDB set-asides) provided that the requirements set forth in this paragraph are met.

(i) The disadvantaged participant(s) to the joint venture must have:

(1) Received an SDB certification from SBA; or

(ii) Submitted an application for SDB certification to SBA or a Private Certifier, and must not have received a negative determination regarding that application.

(2) For purposes of this paragraph, the term joint venture means two or more concerns forming an association to engage in and carry out a single, specific business venture for joint profit. Two or more concerns that form an ongoing relationship to conduct business would not be considered "joint venturers" within the meaning of this paragraph, and would also not be eligible to be certified as an SDB. The entity created by such a relationship would not be owned and controlled by one or more socially and economically disadvantaged individuals. Each contract for which a joint venture submits an offer will be evaluated on a case by case basis.

(3) Except as set forth in 13 CFR 121.103(h)(3), a concern that is owned and controlled by one or more socially and economically disadvantaged individuals entering into a joint venture agreement with one or more other business concerns is considered to be affiliated with such other concern(s) for size purposes. If the exception does not apply, the combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the SIC code designated for the contract.

(4) An SDB must be the managing venturer of the joint venture, and an employee of the managing venturer must be the project manager responsible for performance of the contract.

(5) The joint venture must perform any applicable percentage of work required of SDB offerors, and the SDB joint venturer(s) must perform a significant portion of the contract.

(g) Ownership restrictions for non-disadvantaged individuals. The ownership restrictions set forth in §124.105 (g) and (h) for non-disadvantaged individuals and concerns do not apply for purposes of determining SDB eligibility.


§ 124.1003 What is a Private Certifier?

A Private Certifier is an organization or business concern approved by SBA to determine whether firms are owned and controlled by one or more individuals claiming disadvantaged status. SBA may elect to arrange for one or
§ 124.1004 How does an organization or business concern become a Private Certifier?

(a) SBA may execute contracts or agreements with organizations or business concerns seeking to become Private Certifiers. Any such contract or agreement will include provisions for the oversight, monitoring, and evaluation of all certification activities by SBA.

(b) The organization or business concern must demonstrate a knowledge of SBA’s regulations regarding ownership and control, as well as business organizations and the legal principles affecting their ownership and control generally, including stock issuances, voting rights, convertability of debt to equity, options, and powers and responsibilities of officers and directors, general and limited partners, and limited liability members.

(c) The organization or concern must also, along with its principals, demonstrate good character. Good character does not exist for these purposes if the organization or concern or any of its principals:

(1) Is debarred or suspended under any Federal procurement or non-procurement debarment and suspension regulations; or

(2) Has been indicted or convicted for any criminal offense or suffered a civil judgment indicating a lack of business integrity.

(d) As a condition of approval, SBA may require that appropriate officers and/or key employees of the concern attend a training session on SBA’s rules and requirements.

(e) An organization or concern seeking to become a Private Certifier must agree to provide access to SBA of its books and records when requested, including records pertaining to its certification activities. Once SBA approves the organization or concern to be a Private Certifier, SBA may review this information, as well as the decisions of the Private Certifier, in determining whether it will renew or extend the term of the Private Certifier, or terminate the Private Certifier for cause.

(f) SBA will include in any contract or agreement document authorizing an entity to act as a Private Certifier appropriate conditions to prohibit conflicts of interests between the Private Certifier and the firms for which it processes SDB applications and to protect the integrity of the decision-making process.

§ 124.1005 Can a fee be charged to a firm to process the firm’s application for SDB certification?

(a) With SBA’s approval, a Private Certifier may charge a reasonable fee to a firm in order to screen the firm’s application for completeness and to process a determination of ownership and control. The fee must be for actual services rendered and must not be related to whether or not the business concern is found to be owned and controlled by one or more individuals or entities claiming disadvantaged status.

(b) Where SBA makes the determination of ownership and control, SBA may collect a fee comparable to that which would be charged by a Private Certifier. From time to time, SBA will publish a Notice in the FEDERAL REGISTER identifying any fee that SBA will charge to process a firm’s determination of ownership and control. SBA will promptly remit any funds received pursuant to this section to the Treasury of the United States as miscellaneous receipts.

§ 124.1006 Is there a list of Private Certifiers?

SBA will maintain a list of approved Private Certifiers on SBA’s Home Page on the Internet. Any interested person may also obtain a copy of the list from the local SBA district office.

§ 124.1007 How long may an organization or business concern be a Private Certifier?

(a) SBA’s approval document will specify how long the organization or
§ 124.1008 How does a firm become certified as an SDB?

Any firm may apply to be certified as an SDB. SBA's field offices will provide further information and required application forms to any firm interested in SDB certification. In order to become certified as an SDB, a firm must apply to SBA or, if directed by SBA, to a Private Certifier. The application must include evidence demonstrating that the firm is owned and controlled by one or more individuals claiming disadvantaged status, along with certifications or narratives regarding the disadvantaged status of such individuals. See paragraph (e)(1) of this section. The firm also must submit information necessary for a size determination. See §121.1008. Current 8(a) BD Participants do not need to submit applications for SDB status. These concerns automatically qualify as SDBs by virtue of their status as 8(a) BD concerns. An 8(a) Participant's continuing eligibility as an SDB will be reviewed as part of the concern's 8(a) annual review.

(a) Filing an SDB application. (1) An interested firm must first submit a complete application to SBA's Division Chief, Small Disadvantaged Business Certification and Eligibility (DC/ SDBCE), Small Business Administration, 409 3rd Street, SW, Washington, DC 20416, or to a specific SBA field office or an approved Private Certifier if directed by SBA.

(2) The firm must identify which individual(s) or entities are claiming disadvantaged status.

(b) Required forms. Each firm seeking to be certified as an SDB must submit those forms and attachments required by SBA when applying for admission to the 8(a) BD program. These forms and attachments may include, but not be limited to, financial statements, Federal personal and business tax returns and personal history statements. The application package may be in the form of an electronic application.

(c) Application processing. (1) SBA or a Private Certifier will advise each applicant generally 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. If the application is not complete, SBA or the Private Certifier will return the application to the firm, and will notify the firm that it may reapply when its application is complete.

(2) The burden is on the applicant to demonstrate that those individuals claiming disadvantaged status own and control the concern.

(d) Ownership and control decision. SBA or a Private Certifier will determine whether those individuals claiming disadvantaged status own and control the applicant firm within 30 days of receipt of a complete application package, whenever practicable.

(1) Where a Private Certifier determines ownership and control, the Private Certifier will issue a written decision as to whether the applicant is owned and controlled by the individuals identified as claiming disadvantaged status.

(i) If the Private Certifier finds that the applicant is owned and controlled by the individuals claiming disadvantaged status, the Private Certifier will forward the application to SBA along with a copy of its ownership and control determination and the information required by paragraph (e)(2)(ii) of this section, where appropriate.
(ii) If the Private Certifier finds that the applicant is not owned and controlled by the individuals claiming disadvantaged status, its decision must state the specific reasons for the finding, and inform the applicant of its right to appeal the decision to SBA pursuant to §124.1009.

(2) Where SBA determines ownership and control, SBA will first determine whether the applicant is owned and controlled by the individual(s) claiming to be disadvantaged. If SBA determines that the applicant is not owned and controlled by the individual(s) claiming disadvantaged status, SBA will issue a written decision addressing only the ownership and control issues. If SBA determines that the applicant is owned and controlled by the individual(s) claiming disadvantaged status, SBA will issue a written decision as to whether the applicant qualifies as an SDB. Such a determination will include the ownership and control of the firm, the size status of the firm, and the disadvantaged status of those individuals claiming to be disadvantaged.

(3) In its sole discretion, SBA may analyze and determine whether a firm is owned and controlled by one or more individuals claiming disadvantaged status notwithstanding the availability of a Private Certifier to make such a decision.

(4) SBA reserves the right to re-evaluate an approved decision on ownership and control by a Private Certifier in a case where it has credible evidence that the Private Certifier has substantially disregarded the eligibility criteria.

(e) Disadvantaged determination. Once the applicant receives a decision finding that it is owned and controlled by those individuals or entities claiming disadvantaged status (either through an initial determination or on appeal), SBA will determine whether the other eligibility criteria are met, and, if so, will include the SDB on the SBA-maintained list of qualified SDBs. SBA will make this determination within 30 days of receiving an SDB application, if practicable.

(1) Members of designated groups. (i) Those individuals claiming disadvantaged status that are members of the same designated groups that are presumed to be socially disadvantaged for purposes of SBA’s 8(a) BD program (see §124.103(b)) are presumed to be socially and economically disadvantaged for purposes of SDB certification. These individuals must represent that they are members of one of the designated groups, that they are identified as a member of one of the designated groups, that their net worth is less than $750,000 after taking into account the exclusions set forth in §124.104(c)(2), and that they are citizens of the United States.

(ii) Absent credible evidence to the contrary, SBA may accept these representations as true and certify the firm as an SDB.

(2) Individuals not members of designated groups. (i) Each individual claiming disadvantaged status who is not a member of one of the designated groups must submit a statement identifying personally how his or her entry into or advancement in the business world has been impaired because of personally specific factors (see §124.103(c)), and how his or her ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities (see §§ 124.103(c) and 124.104).

(ii) Where a Private Certifier determines ownership and control, the Private Certifier must also review the disadvantaged status submission and any other required information, and send to SBA the following:

(A) An executive summary and analysis of the disadvantaged status submission;

(B) The application and all supporting documentation; and

(C) A certification that the application is complete and suitable for evaluation.

(3) Concerns owned by tribes, ANCs, CDCs, or NHOs: SBA will process SDB applications from concerns owned and controlled by tribes, ANCs, CDCs, or NHOs in the same way as those from concerns owned by individuals who are members of designated groups.

(f) SDB Determination. (1) If SBA’s DC/SDBCE determines that the individual(s) claiming disadvantage are
Small Business Administration § 124.1009

disadvantaged and other eligibility criteria are met, he or she will certify the firm as an SDB.

(2) If SBA’s DC/SDBCE determines that one or more of the individuals claiming to be disadvantaged is not disadvantaged and their disadvantaged status is required to establish disadvantaged ownership and control of the applicant, or any of the other eligibility criteria are not met, he or she will reject the firm’s application for SDB certification. The DC/SDBCE will issue a written decision setting forth SBA’s reasons for decline.

(3)(i) If the DC/SDBCE declines the firm’s application for SDB certification, the firm may request that the DC/SDBCE reconsider his or her initial decision by submitting a written request to the DC/SDBCE within 45 days of the date of the DC/SDBCE’s decision. The applicant may provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline.

(ii) The DC/SDBCE will issue a written decision within 30 days of receiving the applicant’s request for reconsideration, if practicable. The DC/SDBCE may either approve the application, deny it on one or more of the same grounds as the initial decision, or deny it on other grounds. If the application is denied, the DC/SDBCE will explain why the applicant is not eligible for SDB certification and give specific reasons for the decline.

(4) Pursuant to part 134 of this title, a firm may appeal to OHA the DC/SDBCE’s decision that one or more of the individuals claiming disadvantaged status is not disadvantaged, or, where SBA determines ownership and control, that those claiming disadvantaged status do not own and control the applicant. (See §124.1008 for appeals from decisions by Private Certifiers.)

(i) The firm must serve SBA’s Associate General Counsel for Procurement Law with a copy of the appeal.

(ii) OHA will determine whether SBA’s decision in either case was arbitrary, capricious, or contrary to law. OHA’s review is limited to the facts that were before SBA at the time of its decision and any arguments submitted in or in response to the appeal. OHA will not consider any facts beyond those that were already presented to SBA unless the administrative judge determines that manifest injustice would occur if the appeal were limited to the record.

(5) A firm may also request a formal size determination pursuant to part 121 of this title where SBA finds that the firm is not small.

(g) Current 8(a) BD program participants. Any firm that is currently a Participant in SBA’s 8(a) BD program need not seek an ownership and control determination or apply to SBA for a separate certification as an SDB. SBA will certify current 8(a) BD Participants as SDBs, and automatically include them on the list of qualified SDBs.

(h) 8(a) BD graduates. SBA will automatically certify a firm that has graduated from the SBA’s 8(a) BD program to be an SDB, provided SBA determined that the firm continued to be eligible for the 8(a) BD program as part of an annual review within the last three years. (See §124.1014(b)).

(i) Certification by DOT recipient. If a firm applying for SDB certification has a current, valid certification as a disadvantaged business enterprise (DBE) from a Department of Transportation (DOT) recipient, SBA may adopt the DBE certification as an SDB certification when determined by the AA/SDBCE or designee to be appropriate.


§124.1009 How does a firm appeal a decision of a Private Certifier?

Where a Private Certifier performs an ownership and control determination and finds that a firm is not owned and controlled by the individual(s) claiming disadvantaged status, the firm may appeal that decision to OHA pursuant to part 134 of this title. The
§ 124.1010 Can a firm represent itself to be an SDB if it has not yet been certified as an SDB?

(a) General rule. Except as set forth in paragraph (d) of this section, a firm may represent itself to be an SDB concern in order to receive a preference as an SDB for any Federal procurement program if it has submitted a complete application for SDB certification to SBA or a Private Certifier and it has not received a negative determination regarding that application from SBA or the Private Certifier. A firm that has received a negative determination of ownership and control or a negative determination regarding its disadvantaged status and is awaiting the resolution of its appeal of that determination may not represent itself to be an SDB.

(b) Where applicant becomes successful offeror. If a concern becomes the apparent successful offeror on a contract for which it would receive a benefit for being an SDB while its application for SDB certification is pending, either at SBA or a Private Certifier, the contracting officer for the particular contract must immediately inform SBA’s DC/SDBC. SBA will then prioritize the firm’s SDB application and make a determination regarding the firm’s status as an SDB within 15 days from the date that SBA received the contracting officer’s notification.

(1) Where the apparent successful offeror’s completed application is pending an ownership and control determination with a Private Certifier, the concern must inform SBA which Private Certifier has its application. SBA will immediately contact the Private Certifier to require the Private Certifier to complete its ownership and control determination within 5 days of SBA’s notification. In appropriate circumstances, SBA may undertake to make the determination itself, and may recoup the cost of the determination from the Private Certifier.

(2) If requested to do so by the procuring activity contracting officer, SBA will determine whether other offerors are SDBs where they have represented that their completed applications for SDB status are pending at SBA or a Private Certifier and they could receive the award if SBA determines that the apparently successful offeror is not an SDB.

(3) If the contracting officer does not receive an SBA determination within 15 calendar days after the SBA’s receipt of the notification, the contracting officer will presume that the apparently successful offeror, and any other offerors referred to SBA in connection with the same procurement by
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the contracting officer, are not disadvantaged, and will make award accordingly, unless the contracting officer grants an extension to the 15-day response period.

(c) Representation as SDB for statistical purposes. A firm may represent itself as an SDB concern for general statistical purposes without regard to any application for SDB certification or its inclusion on the SBA-maintained list of qualified SDB's.

(d) Subcontracting programs. Only firms that are on the SBA-maintained list of qualified SDBs may represent themselves as SDB concerns in order to receive a preference as an SDB for any Federal subcontracting program.

§ 124.1011 What is a misrepresentation of SDB status?

(a) Any person or entity that misrepresents a firm's status as a ''small business concern owned and controlled by socially and economically disadvantaged individuals'' ("SDB status") in order to obtain an 8(d) or SDB contracting opportunity or preference will be subject to the penalties imposed by section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as well as any other penalty authorized by law.

(b) A representation of SDB status by any firm that SBA has found not to be an SDB (either in connection with an SDB application or protest) will be deemed a misrepresentation of SDB status, unless and until the firm re-applies for and obtains SDB certification.

§ 124.1012 Can a firm reapply for SDB certification?

(a) A concern which has been denied SDB certification may reapply for certification at any time 12 months or more after the date of the most recent final decision of SBA to decline its application (either on appeal of an ownership and control determination, or a negative finding of disadvantaged status).

(b) A concern which received a decision that it was not owned and controlled by the individual(s) claiming disadvantaged status from a Private Certifier and does not appeal that decision to OHA may apply for a new ownership and control determination at any time.

§ 124.1013 Is there a list of certified SDBs?

(a) If SBA certifies a firm to be an SDB, SBA will enter the name of the firm into an SBA-maintained central on-line register, such as PRO-Net.

(b) The register of SDBs will contain the names of all firms that are currently certified to be SDBs, including the names of all firms currently participating in SBA's 8(a) BD program.

(c) On a continuing basis, SBA will delete from the on-line register those firms that have:

(1) Graduated or been terminated from SBA's 8(a) BD program for any reason and have not otherwise received SDB certification (see, §§124.1008(h) and 124.1014(b) for treatment of 8(a) graduates);

(2) Been determined not to be an SDB in response to an SDB protest brought under §124.1017; or

(3) Other than current 8(a) Participants, not received a renewed SDB certification after being on the register for three years (see §124.1014(c)).

§ 124.1014 How long does an SDB certification last?

(a) Once SBA certifies a firm to be an SDB by placing it on the list of qualified SDBs, the firm will generally remain on the SBA-maintained list of certified SDBs for a period of three years from the date of its certification.

(1) A firm's SDB certification will extend beyond three years where SBA finds the firm to be an SDB:

(i) On the merits in connection with a particular protest (see §124.1023(h)(2));

(ii) In connection with an SBA-initiated SDB determination (see §124.1016(a)(2)); or

(iii) As part of an 8(a) BD annual review.

(2) Where SBA finds a firm not to be an SDB in connection with an SDB protest, an SBA-initiated SDB determination, or an 8(a) BD annual review, SBA will immediately decertify the firm as an SDB and remove it from the qualified list of SDBs.

(b) A firm that graduates from the 8(a) BD program will remain on the list of certified SDBs for a period of three
§ 124.1015 What is the effect of receiving an SDB certification?

(a) A firm that is certified to be an SDB may represent itself as an SDB for such purposes as Federal price evaluation adjustments, evaluation factors or subfactors, monetary subcontracting incentive programs, section 8(d) subcontracts, SDB set-asides, or any other programs which accept an SBA certification. A contracting officer may award a contract based on a firm's representation that it is a certified SDB absent a protest that the protested concern's circumstances have materially changed since SBA certified it as an SDB, or that the firm's SDB application contained false or misleading information (see §124.1018(d)).

(b) For purposes of a particular Federal procurement, the firm must represent that it is both disadvantaged and small at the time it submits its initial offer including price (see part 121 of this title). At the same time, the firm must also represent that no material change has occurred in its SDB status since its SDB certification, or from the date of its application for SDB certification if its application has not yet been processed, and must specifically represent that the net worth of the disadvantaged individuals (not including concerns owned by tribes, ANCs, CDCs, or NHOs) upon whom the SDB certification was based still does not exceed $750,000.

(c) A firm's status as "disadvantaged" or "small" may be protested pursuant to §§ 124.1017 through 124.1021 and §§121.1001 through 121.1005, respectively, despite the presence of the firm on the SDB register, provided the protest contains specific allegations that the firm's circumstances have materially changed since SBA certified it as an SDB, or that the firm's SDB application contained false or misleading information.

§ 124.1016 Can SBA re-evaluate the SDB status of a firm after SBA certifies it to be SDB?

(a) SBA may initiate an SDB determination whenever it receives credible information calling into the question a firm's eligibility as an SDB, including an adverse determination from a DOT recipient of the firm's status as a DBE. Upon its completion of an SDB determination, SBA will issue a written decision regarding the SDB status of the questioned firm.

(1) If SBA finds that the firm does not qualify as an SDB, SBA will decertify the firm as an SDB, and immediately remove the firm from the list of qualified SDBs. The firm may appeal SBA's decision to OHA consistent with the provisions of §124.1008(f) and part 134 of this chapter.

(2) If SBA finds that the firm continues to qualify as an SDB, the determination remains in effect for three years from the date of the decision under the same conditions as if the concern had been granted SDB certification under §124.1008.

(b) An SDB firm must report within 10 days to the DC/SDBCE any changes in ownership and control or any other circumstances which could adversely affect its eligibility as an SDB.

§ 124.1017 Who may protest the disadvantaged status of a concern?

(a) In connection with a requirement for which the apparent successful offeror has invoked an SDB evaluation adjustment or an SDB set-aside, the following entities may protest the disadvantaged status of the apparent successful offeror:

(1) Any other concern which submitted an offer for that requirement, unless the contracting officer has found the concern to be non-responsive or outside the competitive range, or SBA has previously found the testing concern to be ineligible for the requirement at issue;

(2) The procuring activity contracting officer;

(3) SBA.
(b) In connection with an 8(d) subcontract, or a requirement for which the apparent successful offeror received an evaluation adjustment for proposing one or more SDB subcontractors, the procuring activity contracting officer or SBA may protest the disadvantaged status of a proposed subcontractor. Other interested parties may submit information to the contracting officer or SBA in an effort to persuade the contracting officer or SBA to initiate a protest.

(c) An interested party seeking to protest both the disadvantaged status and size of an apparent successful SDB offeror must submit two separate protests, one as to disadvantaged status pursuant to this subpart, and one as to size pursuant to part 121 of this title. An interested party seeking to protest only size of an apparent successful SDB offeror must submit a size protest to the contracting officer pursuant to part 121.

§ 124.1018 When will SBA not decide an SDB protest?

(a) SBA will not decide a protest as to disadvantaged status of any concern other than the apparent successful offeror.

(b) SBA will not normally consider a post award protest. SBA may consider a post award protest in its discretion where it determines that a protest decision after award would have a practical effect (e.g., where the contracting officer agrees to terminate the contract if the protest is sustained).

(c) SBA will not decide an untimely protest (see §124.1020(c)).

(d) SBA will not decide a non-specific protest or one that does not present credible evidence that the protested concern's circumstances have materially changed since SBA certified it as an SDB, or that the protested concern's SDB application contained false or misleading information (see §124.1021).

(e) An interested party may appeal SBA's dismissal of a protest for lack of specificity, timeliness, or a basis upon which SBA will consider a protest to Associate Administrator for Government and Business Development (AA/GC&BD) pursuant to §124.1024.

§ 124.1019 Who decides disadvantaged status protests?

In response to a protest challenging the disadvantaged status of a concern, the SBA’s AA/SDBCE will determine whether the concern is disadvantaged.

§ 124.1020 What procedures apply to disadvantaged status protests?

(a) General. The protest procedures described in this section are separate and distinct from those governing size protests and appeals. All protests relating to whether a concern is a “small” business for purposes of any Federal program, including SDB set-asides and SDB evaluation adjustments, must be filed and processed pursuant to part 121 of this title.

(b) Filing. (1) All protests challenging the disadvantaged status of a concern with respect to a particular Federal procurement requirement must be submitted in writing to the contracting officer or SBA that initiated the protest

(c) Timeliness of protest—(1) SDB evaluation adjustment and set-aside protests—

(i) General. In order for a protest to be timely, it must be received by the contracting officer prior to the close of business on the fifth day, exclusive of Saturdays, Sundays and legal holidays, after the bid opening date for sealed bids, or after the receipt from the contracting officer of notification of the identity of the prospective awardee in negotiated acquisitions.

(ii) Oral protests. An oral protest relating to an SDB set-aside or SDB evaluation adjustment made to the contracting officer within the allotted 5-day period will be considered a timely protest only if the contracting officer receives a confirming letter post-marked, FAXed, or delivered no later than one calendar day after the date of such oral protest.
§ 124.1021 What format, degree of specificity, and basis does SBA require to consider an SDB protest?

(a) Format. An SDB protest need not be in any specific format in order for SBA to consider it.

(b) Specificity. A protest must be sufficiently specific to provide reasonable notice as to all grounds upon which the protested concern’s disadvantaged status is challenged.

(1) SBA will dismiss a protest that merely asserts that the protested concern is not disadvantaged, without setting forth specific facts or allegations.

(2) The contracting officer must forward to SBA any non-premature protest received, notwithstanding whether he or she believes it is sufficiently specific or timely.

(c) Basis. SBA will consider a protest challenging whether the apparent successful offeror is owned and controlled by one or more socially and economically disadvantaged individuals, including whether one or more of the individuals claiming disadvantaged status is in fact socially or economically disadvantaged, only if the protest presents credible evidence that the firm’s circumstances have materially changed since SBA certified it as an SDB, or that the firm’s SDB application contained false or misleading information.

§ 124.1022 What will SBA do when it receives an SDB protest?

(a) Upon receipt of a protest challenging the disadvantaged status of a concern, the DC/SDBCE, or designee, will immediately notify the protestor and the contracting officer of the date the protest was received and whether it will be processed or dismissed for lack of timeliness or specificity.

(b) In cases where the protest is timely and sufficiently specific, the DC/SDBCE, or designee, will also immediately advise the protested concern of the protest and forward a copy of it to the protesting concern.

(1) The DC/SDBCE, or designee, is authorized to ask the protested concern to provide any or all of the following information and documentation, completed so as to show the circumstances existing on the date of self-representation: SBA Form 1010A, “Statement of Personal Eligibility” for each individual claiming disadvantaged status; SBA Form 1010B, “Statement of Business Eligibility;” SBA Form 413, “Personal Financial Statement,” for each
§ 124.1023 How does SBA make disadvantaged status determinations in considering an SDB protest?

(a) General. The DC/SDBCE, or designee, will determine a protested concern’s disadvantaged status within 15 working days after receipt of a protest. If the procuring activity contracting officer does not receive an SBA determination within 15 working days after the SBA’s receipt of the protest, the contracting officer may presume that the challenged offeror is disadvantaged, unless the SBA requests and the contracting officer grants an extension to the 15-day response period.

(b) Award after protest. (1) After receiving a protest involving an offeror being considered for award, the contracting officer shall not award the contract until:

(1) SBA will consider only materials submitted timely, and the late or non-submission of materials needed to make a disadvantaged status determination may result in sustaining the protest.

(2) The burden is on the protested concern to demonstrate its disadvantaged status, whether or not it is currently shown on the list of qualified SDBs.

(3) The protested concern must timely submit to SBA any information it deems relevant to a determination of its disadvantaged status.
§ 124.1024 Appeals of disadvantaged status determinations.

(a) Who may appeal. Appeals of protest determinations may be filed with the SBA’s AA/GC&BD by the protested concern, the protestor, or the contracting officer.

(b) Timeliness of appeal. An appeal must be in writing and must be received by the AA/GC&BD no later than 5 working days after the date of receipt of the protest determination. SBA will dismiss any appeal received after the five-day time period.

(c) Notice of appeal. Notice of the appeal must be provided by the party bringing an appeal to the procuring activity contracting officer and either the protested concern or original protestor, as appropriate.

(d) Grounds for appeal. SBA will reexamine a protest determination only if

(i) The SBA has made an SDB determination, or

(ii) 15 working days have expired since SBA’s receipt of a protest and the contracting officer has not agreed to an extension of the 15-day response period.

(2) Notwithstanding paragraph (b)(1) of this section, the contracting officer may award a contract after the receipt of an SDB protest where he or she determines in writing that an award must be made to protect the public interest.

(c) Withdrawal of protest. If a protest is withdrawn, SBA will not complete a new disadvantaged status determination, and a previous SDB certification will stand.

(d) Basis for determination. (1) Except with respect to a concern which is a current Participant in SBA’s 8(a) BD program and is authorized under § 124.1022(b)(3) to submit an affidavit concerning its disadvantaged status, the disadvantaged status determination will be based on the protest record, including reasonable inferences therefrom, as supplied by the protestor, protested concern, SBA or others.

(2) SBA may in its discretion make a part of the protest record information already in its files, and information submitted by the protestor, the protested concern, the contracting officer, or other persons contacted for additional specific information.

(e) Disadvantaged status. In evaluating the social and economic disadvantage of individuals claiming disadvantaged status, SBA will consider the same information and factors set forth in §§ 124.103 and 124.104. As provided in § 124.1002(c), individuals claiming disadvantaged status must have a net worth that is less than $750,000, after taking into account the exclusions set forth in § 124.104(c)(2).

(f) Disadvantaged status determination. SBA will render a written determination including the basis for its findings and conclusions.

(g) Notification of determination. After making its disadvantaged status determination, the SBA will immediately notify the contracting officer, the protestor, and the protested concern of its determination. SBA will promptly provide by certified mail, return receipt requested, a copy of its written determination to the same entities, consistent with law.

(h) Results of an SBA disadvantaged status determination. A disadvantaged status determination becomes effective immediately.

(1) If the concern is found not to be disadvantaged, the determination remains in full force and effect unless reversed upon appeal by SBA’s AA/GC&BD, or designee, pursuant to § 124.1024, or the concern is certified to be an SDB under § 124.1008. The concern is precluded from applying for SDB certification for 12 months from the date of the final agency decision (whether by the AA/SDBCE, or designee, without an appeal, or by the AA/GC&BD, or designee, on appeal).

(2) If the concern is found to be disadvantaged, the determination remains in full force and effect unless and until reversed upon appeal by SBA’s AA/GC&BD, or designee, pursuant to § 124.1024. A final Agency decision (whether by the AA/SDBCE, or designee, without an appeal, or by the AA/GC&BD, or designee, on appeal) finding the protested concern to be an SDB remains in effect for three years from the date of the decision under the same conditions as if the concern had been granted SDB certification under § 124.1008.
there was a clear and significant error in the processing of the protest, or if the DC/SDBCE, or designee, failed to consider a significant material fact contained within the information supplied by the protestor or the protested concern. SBA will not consider protest determination appeals based on additional information or changed circumstances which were not disclosed at the time of the decision of the DC/SDBCE or designee, or which are based on disagreement with the findings and conclusions contained in the determination.

(e) Contents of appeal. No specific format is required for the appeal. However, the appeal must identify the protest determination which is appealed, and set forth a full and specific statement as to why the determination is erroneous under paragraph (c) of this section.

(f) Completion of appeal after award. An appeal may proceed to completion even though an award of the SDB acquisition or other procurement requirement which prompted the protest has been made, if so desired by the protested concern, or where SBA determines that a decision on appeal would have a material impact on contracting decisions, such as where the contracting officer agrees:

(1) In the case where an award is made to a concern other than the protested concern, to terminate the contract and award to the protested concern if the appeal finds that the protested concern is disadvantaged; or

(2) In the case where an award is made to the protested concern, to terminate the contract if the appeal finds that the protested concern is not disadvantaged.

(g) The appeal will be decided by the AA/GC&BD, within 5 working days of its receipt, if practicable.

(h) The appeal decision will be based only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the contracting officer, the protestor, and the protested concern, consistent with law.

(i) The decision of the AA/GC&BD, is the final decision of the SBA, and cannot be further appealed to OHA.
Subpart D—Protests Concerning SDVO SBCs

125.24 Who may protest the status of an SDVO SBC?
125.25 How does one file a service disabled veteran-owned status protest?
125.26 What are the grounds for filing an SDVO SBC protest?
125.27 How will SBA process an SDVO protest?
125.28 What are the procedures for appealing an SDVO status protest?

Subpart E—Penalties and Retention of Records

125.29 What penalties may be imposed under this part?

Authority: 15 U.S.C. 632(p), (q); 634(b)(6); 637; 644 and 657(f).

Source: 61 FR 3312, Jan. 31, 1996, unless otherwise noted.

§ 125.1 Programs included.
The regulations in this part relate to the Government contracting assistance programs of SBA. There are five main programs: Prime contracting assistance; Subcontracting assistance; Government property sales assistance; the Certificate of Competency program; and Service-Disabled Veteran-Owned Small Business Concern contracting assistance. The objective of the programs is to assist small businesses in obtaining a fair share of Federal Government contracts, subcontracts, and property sales.

§ 125.2 Prime contracting assistance.
(a) General. Small business concerns must receive any award or contract, or any contract for the sale of Government property, that SBA and the procuring or disposal agency determine to be in the interest of:
   (1) Maintaining or mobilizing the Nation's full productive capacity;
   (2) War or national defense programs;
   (3) 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
   (4) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.

(b) Responsibilities in the acquisition planning process. (1) SBA Procurement Center Representatives (PCRs) are generally located at Federal agencies and buying activities which have major contracting programs. PCRs are responsible for reviewing all acquisitions not set-aside for small businesses to determine whether a set-aside is appropriate and to identify alternative strategies to maximize the participation of small businesses in the procurement.
   (2) 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 Small Business Specialist (SBS) when the acquisition strategy contemplates an acquisition meeting the dollar amounts in paragraph (b)(2)(i) of this section, unless the contract or order is entirely reserved or set-aside for small business concerns as authorized under the Small Business Act. The SBS must notify the agency Office of Small and Disadvantaged Business Utilization (OSDBU) if the strategy or plan includes bundled 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 shall assist in identifying alternative strategies that would reduce or minimize the scope of the bundling.
   (i) The procuring activity must coordinate the acquisition strategy with the cognizant SBS in accordance with paragraph (b)(2) of this section if the estimated acquisition, contract or order value is:
      (A) $7 million or more for the Department of Defense;
      (B) $5 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; and
      (C) $2 million or more for all other agencies.
   (ii) If the strategy contemplates multiple award contracts or multiple award orders under the Federal Supply Schedule or a task or delivery order contract awarded by another agency, the thresholds in paragraph (b)(2)(i) of
this section apply to the cumulative estimated value of the multiple award contracts or orders, including options.  
(3) A procuring activity must provide a copy of a proposed acquisition strategy (e.g., Department of Defense Form 2579, or equivalent) 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 whenever a proposed acquisition strategy:

(i) Includes in its description 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;
(ii) Seeks to package or consolidate discrete construction projects; or
(iii) Meets the definition of a bundled requirement as defined in paragraph (d)(1)(i) of this section.

(4) Whenever any of the circumstances identified in paragraph (b)(2) of this section exist, the procuring activity must also submit 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) a written statement explaining why:

(i) If the proposed acquisition strategy involves a bundled requirement, the procuring activity believes that the bundled requirement is necessary and justified under the analysis required by paragraph (d)(3)(iii) of this section; or
(ii) 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 as separate discrete projects.

(5) In conjunction with their duties to promote the set-aside of procurements for small business, PCRs will identify small businesses that are capable of performing particular requirements, including teams of small business concerns for larger or bundled requirements (see §121.103(f)(3) of this chapter).

(b)(1)(i) If a PCR believes that a proposed procurement will render small business prime contract participation unlikely, or if a PCR does not believe a bundled requirement to be necessary and justified, the PCR shall recommend to the procurement 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;
(B) Breaking out one or more discrete components, for which a small business set-aside may be appropriate; and
(C) Reserving one or more awards for small companies when issuing multiple awards under task order contracts.

(ii) Where bundling is necessary and justified, the PCR will work with the procuring activity to tailor a strategy that preserves small business prime contract participation to the maximum extent practicable.

(iii) The PCR will also work to ensure that small business participation is maximized through teaming arrangements and subcontracting opportunities. This may include:

(A) Recommending that the solicitation and resultant contract specifically state the small business subcontracting goals, which are expected of the contractor awardee;
(B) Recommending that the small business subcontracting goals be based on total contract dollars instead of subcontract dollars;
(C) 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; and

(D) Recommending that a separate evaluation factor with significant weight is established for the extent to which offerors attained their subcontracting goals on previous contracts.

(7) 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, whether or not the acquisition is a bundled or substantially bundled requirement within the meaning of paragraph (d) of this section, 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 19.505 of the Federal Acquisition Regulation (FAR) (48 CFR 19.505).

(8) PCRs will work with the cognizant SBS and agency OSDBU 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, as prime contractors. If small business participation as prime contractors appears unlikely, the SBS and PCR will facilitate small business participation as subcontractors or suppliers.

(c) BPCR responsibilities. (1) SBA is required by section 403 of Public Law 98-577 (15 U.S.C. 644(l)) to assign a breakout PCR (BPCR) to major contracting centers. A major contracting center is a center that, as determined by SBA, purchases substantial dollar amounts of other than commercial items, and which has the potential to achieve significant savings as a result of the assignment of a BPCR.

(2) BPCRs advocate full and open competition in the Federal contracting process and recommend the breakout for competition of items and requirements which previously have not been competed. They may appeal the failure by the buying activity to act favorably on a recommendation in accord with the appeal procedures set forth in §19.505 of the FAR (48 CFR 19.505). BPCRs also review restrictions and obstacles to competition and make recommendations for improvement. Other authorized functions of a BPCR are set forth in 48 CFR 19.403(c) of the FAR and Section 15(l) of the Act (15 U.S.C. 644(l)).

(d) Contract bundling—(1) Definitions—(i) Bundled requirement or bundling. The term bundled requirement or bundling refers to 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 that is likely to be unsuitable for award to a small business concern due to:

(A) The diversity, size, or specialized nature of the elements of the performance specified;

(B) The aggregate dollar value of the anticipated award;

(C) The geographical dispersion of the contract performance sites; or

(D) Any combination of the factors described in paragraphs (d)(1)(i) (A), (B), and (C) of this section.

(ii) Separate smaller contract. A separate smaller contract is 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.

(iii) Single contract, as used in this definition, includes:

(A) Multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources; and

(B) An order placed against an indefinite quantity contract under a Federal Supply Schedule contract or a task or delivery order contract awarded by another agency (i.e., Government-wide acquisition contract or multi-agency contract).

(iv) Substantial bundling means any bundling that meets the dollar
Small Business Administration § 125.2

The Small Business Administration § 125.2 requires each Federal agency to foster the participation of small business concerns as prime contractors, subcontractors, and suppliers in the contracting opportunities of the Government. To comply with this requirement, 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 veterans, small business concerns owned and controlled by service-disabled veterans, qualified 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; and

(ii) Avoid unnecessary and unjustified bundling of contract requirements that inhibits or precludes small business participation in procurements as prime contractors.

(3) Requirement for market research. In addition to the requirements of paragraph (b)(2) of this section and before proceeding with an acquisition strategy that could lead to a contract containing bundled or substantially bundled requirements, an agency must conduct market research to determine whether bundling of the requirements is necessary and justified. During the market research phase, the acquisition team should consult with 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).

(i) The procuring activity may determine a consolidated requirement to be necessary and justified if, as compared to the benefits that it would derive from contracting to meet those requirements if not consolidated, it would derive measurably substantial benefits. The procuring activity must quantify the identified benefits and explain how their impact would be measurably substantial. The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve 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 $75 million or less; or

(B) Benefits equivalent to 5 percent of the contract or order value (including options) or $7.5 million, whichever is greater, where the contract or order value exceeds $75 million.

(ii) Notwithstanding paragraph (d)(5)(i) of this section, the Assistant Secretaries with responsibility for acquisition matters (Service Acquisition 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 consolidated requirement is necessary and justified when:

(A) The Assistant Secretary or Under Secretary has determined that the contract or order is of significant importance to the national defense or national security or has been determined to be critical to the continuity of defense operations;

(B) The benefits of a consolidated requirement exceed the statutory requirements of paragraphs (d)(5)(i)(A) and (B) of this section.

(4) Requirement to notify 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).

(5) Determining requirements to be necessary and justified. 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.

(i) The procuring activity must determine a consolidated requirement to be necessary and justified if, as compared to the benefits that it would derive from contracting to meet those requirements if not consolidated, it would derive measurably substantial benefits. The procuring activity must quantify the identified benefits and explain how their impact would be measurably substantial. The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve 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 $75 million or less; or

(B) Benefits equivalent to 5 percent of the contract or order value (including options) or $7.5 million, whichever is greater, where the contract or order value exceeds $75 million.

(ii) Notwithstanding paragraph (d)(5)(i) of this section, the Assistant Secretaries with responsibility for acquisition matters (Service Acquisition 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 consolidated requirement is necessary and justified when:

(A) The Assistant Secretary or Under Secretary has determined that the contract or order is of significant importance to the national defense or national security or has been determined to be critical to the continuity of defense operations;

(B) The benefits of a consolidated requirement exceed the statutory requirements of paragraphs (d)(5)(i)(A) and (B) of this section.
(A) There are benefits that do not meet the thresholds set forth in paragraph (d)(5)(i) of this section but, in the aggregate, are critical to the agency's mission success; and

(B) Procurement strategy provides for maximum practicable participation by small business.

(iii) The reduction of administrative or personnel costs alone shall 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 consolidated (including options). To be substantial, such cost savings must be at least 10 percent of the contract value (including options).

(iv) 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.

(6) OMB Circular A–76 Cost Comparison Analysis. The substantial benefit analysis set forth in paragraph (d)(5)(i) of this section is not required where a requirement is subject to a Cost Comparison Analysis under OMB Circular A–76 (See 5 CFR 1300.3 for availability).

(7) Substantial bundling. (i) 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:

(A) The analysis for bundled requirements set forth in paragraph (d)(5)(i) of this section;

(B) An assessment of the specific impediments to participation by small business concerns as prime contractors that will result from the substantial bundling;

(C) Actions designed to maximize small business participation as prime contractors, including provisions that encourage small business teaming for the substantially bundled requirement;

(D) 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

(E) 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 paragraphs (b)(6) (i) and (d) of this section).

(ii) At least 30 days prior to the solicitation release, the procuring activity shall provide the PCR and the agency OSDBU a copy of the proposed acquisition, including the analysis required by paragraph (d)(7) of this section, the acquisition plan, any bundling information required under paragraph (b)(3) of this section, and any other relevant information. The PCR and agency OSDBU or SBS, as applicable, shall work together to develop alternative acquisition strategies identified in paragraph (b)(6) of this section to enhance small business participation.

(8) Significant subcontracting opportunity. (i) Where a 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 bundled contract qualifies as a small business concern, the procuring agency must give to the offeror the highest score possible for the evaluation factors identified in paragraph (d)(5)(i) of this section.

(e) OSDBU Oversight Functions. The Agency OSDBU must:

(1) Conduct annual reviews to assess the:

(i) Extent to which small businesses are receiving their fair share of Federal
procurements, including contract opportunities under programs administered under the Small Business Act;
(ii) Adequacy of the bundling documentation and justification; and
(iii) Adequacy of actions taken to mitigate the effects of necessary and justified contract bundling on small businesses (e.g., review agency oversight of prime contractor subcontracting plan compliance under the subcontracting program).
(2) Provide a copy of the assessment under paragraph (e)(1) of this section to the Agency Head and SBA Administrator.

§ 125.3 Subcontracting assistance.

(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 $500,000, or in excess of $1,000,000 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.

(b) Responsibilities of prime contractors. (1) Prime contractors (including small business prime contractors) selected to receive a Federal contract that exceeds the traditional simplified acquisition threshold of $100,000, 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.
(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 on-line searches on the Central Contractor Registration (NCR), 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;

(vi) 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 large prime 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 $500,000, or $1,000,000 in the case of construction of a public facility, is responsible for:

(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. A prime contractor may submit a commercial plan, described in paragraph (c)(2) of this section, when the product or service being furnished to the Government meets the definition of a commercial item under 48 CFR 2.101;

(iii) Making a good-faith effort to achieve the dollar and percentage goals and other elements in its subcontracting plan;

(iii) Submitting a timely, accurate, and complete SF–294, Subcontracting Report for Individual Contract, and SF–295, Summary Subcontract Report; or entering the same information into an electronic database approved by SBA;

(iv) Cooperating 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;

(v) Providing pre-award written notification to unsuccessful small business offerors on all subcontracts over $100,000 for which a small business concern received a preference. 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; and

(vi) As a best practice, providing the pre-award written notification cited in paragraph (c)(1)(v) of this section to unsuccessful and small business offerors on subcontracts at or below $100,000 whenever it is practical to do so.

(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 items. A commercial plan covers the offeror's fiscal year and applies to the entire production of commercial items 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 contractor's 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) 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 service 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.

(d) Determination of good-faith efforts. 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:

(1) The contractor performed one or more of the actions described in paragraph (b) of this section, as appropriate for the procurement;

(2) Although the contractor may have failed to achieve its goal in one socio-economic category, it over-achieved its goal by an equal or greater amount in one or more of the other categories; or

(3) The contractor fulfilled all of the requirements of its subcontracting plan.

(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 the CCR, 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. A prime contractor’s performance under its subcontracting plan is evaluated by means of on-site compliance reviews and follow-up reviews. 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 contractor’s most recent SF–295, Summary Subcontract Report, and SF–294, Subcontracting Report for Individual Contracts, if applicable. The validation includes a review of the contractor’s methodology for completing these reports and a sampling of specific documentation to substantiate small business status.

(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: Outstanding, Highly Successful, Acceptable, 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, may be considered for liquidated damages under the procedures in 48 CFR 19.705-7 and the clause at 52.219-16. 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
§ 125.4 Government property sales assistance.

(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 set-asides 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) Sales of surplus real and personal property.

(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.

§ 125.5 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. A COC is a written instrument issued by SBA to a Government contracting officer, certifying,...
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that one or more named small business concerns possess the responsibility to perform a specific Government procurement (or sale) contract. The COC Program is applicable to all Government procurement actions. For purposes of this Section, the term “United States” includes its territories, possessions, and the Commonwealth of Puerto Rico.

(2) A contracting officer must, upon determining an apparent low small business offeror to be nonresponsible, refer that small business to SBA for a possible COC, even if the next low apparently responsible offeror is also a small business.

(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. To be eligible for the COC program, a firm must meet the following criteria:

(i) It must qualify as a small business concern under the size standard applicable to the procurement. Where the solicitation fails to specify a size standard or Standard Industrial Classification (SIC) code, SBA will assign the appropriate size standard to determine COC eligibility. SBA determines size eligibility as of the date described in § 121.404 of this chapter.

(ii) A manufacturing, service, or construction concern must demonstrate that it will perform a significant portion of the proposed contract with its own facilities, equipment, and personnel. The contract must be performed or the end item manufactured within the United States.

(iii) A non-manufacturer making an offer on a small business set-aside contract for supplies must furnish end items that have been manufactured in the United States by a small business. A waiver of this requirement may be requested under §§ 121.1301 through 121.1305 of this chapter for either the type of product being procured or the specific contract at issue.

(iv) A non-manufacturer making an offer on an unrestricted procurement or a procurement utilizing simplified acquisition threshold procedures with a cost that does not exceed $25,000 must furnish end items manufactured in the United States to be eligible for a COC.

(v) An offeror intending to provide a kit consisting of finished components or other components provided for a special purpose, is eligible if:

(A) It meets the Size Standard for the SIC code assigned to the procurement;

(B) Each component comprising the kit was manufactured in the United States; and

(C) In the case of a set-aside, each component comprising the kit was manufactured by a small business under the size standard applicable to the component provided. A waiver of this requirement may be requested under §§ 121.1301 through 121.1305 of this chapter.

(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.

(c) Referral of nonresponsibility determination to SBA. (1) A contracting officer who determines that an apparently successful offeror that has certified itself to be a small business with respect to a specific Government procurement lacks any element of responsibility (including competency, capacity, credit, integrity or perseverance) 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) A small business will be rebuttably presumed nonresponsive 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).

(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:
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<table>
<thead>
<tr>
<th>Contracting actions</th>
<th>SBA official or office with authority to make decision</th>
<th>Finality of decision: options for contracting agencies</th>
</tr>
</thead>
</table>
| $100,000 or less, or in accordance with Simplified Acquisition Threshold procedures. | (1) Director may approve or deny.  
(2) Director may approve, subject to right of appeal and other options. | Final. The Director will notify both applicant and contracting agency in writing of the decision.  
(1) Final.  
(2) Contracting agency may proceed under paragraph (h) or paragraph (i) of this section. |
| Between $100,000 and $25 million | (1) Director may deny.  
(2) Director may approve, subject to right of appeal and other options. | (1) Final.  
(2) Contracting agency may proceed under paragraph (h) or paragraph (i) of this section. |
| Exceeding $25 million | (1) Director may deny.  
(2) Director must refer to SBA Headquarters recommendation for approval. | (1) Final.  
(2) Contracting agency may proceed under paragraph (j) of this section. |

(h) Notification of intent to issue on a contract with a value between $100,000 and $25 million. Where the Director determines that a COC is warranted, he or she will notify the contracting officer 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 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 $100,000, 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, Office of Small and Disadvantaged Business Utilization (OSDBU) at the secretariat level 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 at that level. 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:

1. Ask SBA Headquarters to suspend the case so that the agency can meet
§ 125.6 Prime contractor performance requirements (limitations on subcontracting)

(a) In order to be awarded a full or partial small business set-aside contract, an 8(a) contract, or an unrestricted procurement where a concern has claimed a 10 percent small disadvantaged business (SDB) price evaluation preference, a small business concern must agree that:

(1) In the case of a contract for services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees.

(2) In the case of a contract for supplies or products (other than procurement from a non-manufacturer in such supplies or products), the concern will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials).

(3) In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials).
(4) In the case of a contract for construction by special trade contractors, the concern will perform at least 25 percent of the cost of the contract with its own employees (not including the cost of materials).

(b) An SDVO SBC prime contractor can subcontract part of an SDVO contract (as defined in §125.15) provided:

(1) In the case of a contract for services (except construction), the SDVO SBC spends at least 50% of the cost of the contract performance incurred for personnel on the concern’s employees or on the employees of other SDVO SBCs;

(2) In the case of a contract for general construction, the SDVO SBC spends at least 15% of the cost of contract performance incurred for personnel on the concern’s employees or the employees of other SDVO SBCs;

(3) In the case of a contract for construction by special trade contractors, the SDVO SBC spends at least 25% of the cost of contract performance incurred for personnel on the concern’s employees or the employees of other SDVO SBCs; and

(4) In the case of a contract for procurement of supplies or products (other than procurement from a non-manufacturer in such supplies or products), at least 50% of the cost of manufacturing the supplies or products (not including the costs of materials), will be performed by the SDVO SBC prime contractor or other SDVO SBCs.

(c) A qualified HUBZone SBC prime contractor can subcontract part of a HUBZone contract (as defined in §126.600 of this chapter) provided:

(1) In the case of a contract for services (except construction), the qualified HUBZone SBC spends at least 50% of the cost of the contract performance incurred for personnel on the concern’s employees or on the employees of other qualified HUBZone SBCs;

(2) In the case of a contract for general construction, the qualified HUBZone SBC spends at least 15% of the cost of contract performance incurred for personnel on the concern’s employees; and

(d) 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 category, and

(3) In the case of a contract for construction by special trade contractors, the qualified HUBZone SBC spends at least 25% of the cost of contract performance incurred for personnel on the concern’s employees;

(4) In the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), the qualified HUBZone SBC spends at least 50% of the manufacturing cost (excluding the cost of materials) on performing the contract in a HUBZone. One or more qualified HUBZone SBCs may combine to meet this subcontracting percentage requirement; and

(5) In the case of a contract for the procurement by the Secretary of Agriculture of agricultural commodities, the qualified HUBZone SBC may not purchase the commodity from a subcontractor if the subcontractor will supply the commodity in substantially the final form in which it is to be supplied to the Government.

(5) In accordance with §125.15(b)(3), the SDVO SBC joint venture must perform the applicable percentage of work.

(f) 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 category, and

(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 requestor 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:
§ 125.6 13 CFR Ch. I (1–1–08 Edition)

(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 purpose of the small business, 8(a), SDB, woman-owned business, or HUBZone 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.

(e) Definitions. The following definitions apply to this section:

(1) Cost of the contract. All allowable direct and indirect costs allocable to the contract, excluding profit or fees.

(2) Cost of contract performance incurred for personnel. Direct labor costs and any overhead which has only direct labor as its base, plus the concern's General and Administrative rate multiplied by the labor cost.

(3) Cost of manufacturing. Those costs incurred by the firm in the production of the end item being acquired. These are costs associated with the manufacturing process, including the direct costs of fabrication, assembly, or other production activities, and indirect costs which are allocable and allowable. The cost of materials, as well as the profit or fee from the contract, are excluded.

(4) Cost of materials. Includes costs of the items purchased, handling and associated shipping costs for the purchased items (which includes raw materials), off-the-shelf items (and similar proportionately high-cost common supply items requiring additional manufacturing or incorporation 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, the acquisition of services or products from outside sources following normal commercial practices within the industry are also included.

(5) Off-the-shelf item. An item produced and placed in stock by a manufacturer, or stocked by a distributor, before orders or contracts are received for its sale. The item may be commercial or may be produced to military or Federal specifications or description. Off-the-shelf items are also known as Nondevelopmental Items (NDI).

(6) Personnel. Individuals who are “employees” under §121.106 of this chapter except for purposes of the HUBZone program, where the definition of “employee” is found in §126.103 of this chapter.

(7) Subcontracting. That portion of the contract performed by a firm, other than the concern awarded the contract, under a second contract, purchase order, or agreement for any parts, supplies, components, or subassemblies which are not available off-the-shelf, 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 to use any specific source for parts, supplies, components subassemblies or services, the costs associated with those purchases will be considered as part of the cost of materials, not subcontracting costs.
(f) Compliance will be considered an element of responsibility and not a component of size eligibility.

(g) The period of time used to determine compliance will be the period of performance which the evaluating agency uses to evaluate the proposal or bid. If the evaluating agency fails to articulate in its solicitation the period of performance it will use to evaluate the proposal or bid, the base contract period, excluding options, will be used to determine compliance. In indefinite quantity contracts, performance over the guaranteed minimum will be used to determine compliance unless the evaluating agency articulates a different period of performance which it will use to evaluate the proposal or bid in its solicitation.

(h) Work to be performed by subsidiaries or other affiliates of a concern is not counted as being performed by the concern for purposes of determining whether the concern will perform the required percentage of work.

(i) Where an offeror is exempt from affiliation under §121.103(h)(3) of this chapter and qualifies as a small business concern, the performance of work requirements set forth in this section apply to the cooperative effort of the joint venture, not its individual members.

§125.7 [Reserved]

Subpart A—Definitions for the Service-Disabled Veteran-Owned Small Business Concern Program

SOURCE: 69 FR 25267, May 5, 2004, unless otherwise noted.

§125.8 What definitions are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) Program?

(a) Contracting Officer has the meaning given such term in section 27(f)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 423f)(5).

(b) Interested Party means the contracting activity’s contracting officer, the SBA or any concern that submits an offer for a specific SDVO contract.

(c) Permanent caregiver is 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, 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.

(d) Service-Disabled Veteran with a Permanent and Severe Disability means a veteran with a service-connected disability that has been determined by the VA, 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.

(e) Service-Connected has the meaning given that term in section 101(16) of Title 38, United States Code.

(f) Service-disabled veteran is a veteran with a disability that is service-connected.

(g) SBC owned and controlled by service-disabled veterans (also known as a Service-Disabled Veteran-Owned SBC) is a concern—

(1) Not less than 51% of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51% of the stock of which is owned by one or more service-disabled veterans;

(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; and

(3) That is small as defined by §125.11.
(h) Spouse has the meaning given the term in section 101(31) of Title 38, United States Code.

(i) Veteran has the meaning given the term in section 101(2) of Title 38, United States Code.


Subpart B—Eligibility Requirements for the SDVO SBC Program

SOURCE: 69 FR 25267, May 5, 2004, unless otherwise noted.

§ 125.9 Who does SBA consider to own an SDVO SBC?

A concern must be at least 51% unconditionally and directly owned by one or more service-disabled veterans. More specifically:

(a) Ownership must be direct. Ownership by one or more service disabled veterans must be direct ownership. A concern owned principally by another business entity that is in turn owned and controlled by one or more service-disabled veterans does not meet this requirement. Ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by service-disabled veterans where the trust is revocable, and service-disabled veterans are the grantors, trustees, and the current beneficiaries of the trust.

(b) Ownership of a partnership. In the case of a concern which is a partnership, at least 51% of every class of partnership interest must be unconditionally owned by one or more service-disabled veterans. 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% of each class of member interest must be unconditionally owned by one or more service-disabled veterans.

(d) 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 service-disabled veterans.

(e) Stock options’ effect on ownership. In determining unconditional ownership, SBA will disregard any unexercised stock options or similar agreements held by service-disabled veterans. However, any unexercised stock options or similar agreements (including rights to convert non-voting stock or debentures into voting stock) held by non-service-disabled veterans still 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) Change of ownership. A concern may change its ownership or business structure so long as one or more service-disabled veterans own and control it after the change.

§ 125.10 Who does SBA consider to control an SDVO SBC?

(a) General. To be an eligible SDVO SBC, 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 service-disabled veterans means that both the long-term decisions making and the day-to-day management and administration of the business operations must be conducted 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).

(b) Managerial position and experience. A service-disabled veteran (or in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such 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 run the concern. The service-disabled veteran manager (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) need not have the technical expertise or possess the required license to be found to control
the concern if the service-disabled 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 service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) 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 service-disabled veterans (or in the case of a veteran with permanent or severe disability, the spouse or permanent caregiver of such veteran) must serve as managing members, with control over all decisions of the limited liability company.

(e) Control over a corporation. 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) must control the Board of Directors of the concern. Service-disabled veterans are considered to control the Board of Directors when either:

1. One or more service-disabled veterans own at least 51% 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. Service-disabled veterans comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.

§ 125.12 May an SDVO SBC have affiliates?

A concern may have affiliates provided that the aggregate size of the concern and all its affiliates is small as defined in part 121 of this chapter.

§ 125.13 May 8(a) Program participants, HUBZone SBCs, Small and Disadvantaged Businesses, or Women-Owned Small Businesses qualify as SDVO SBCs?

Yes, 8(a) Program participants, HUBZone SBCs, Small and Disadvantaged Businesses, and Women-Owned SBCs, may also qualify as SDVO SBCs if they meet the requirements in this subject.

[70 FR 56814, Sept. 29, 2005]

Subpart C—Contracting with SDVO SBCs

SOURCE: 69 FR 25268, May 5, 2004, unless otherwise noted.

§ 125.14 What are SDVO contracts?

SDVO contracts are contracts awarded to an SDVO SBC through a sole source award or a set-aside award based on competition restricted to SDVO SBCs.

§ 125.15 What requirements must an SDVO SBC meet to submit an offer on a contract?

(a) Representation of SDVO SBC status. An SDVO SBC must submit the following representations with its initial offer (which includes price) on a specific contract:

1. It is an SDVO SBC;
2. It is small under the NAICS code assigned to the procurement;
3. It will meet the percentage of work requirements set forth in §125.6;
4. If applicable, it is an eligible joint venture; and
5. If applicable, it is an eligible nonmanufacturer.

(b) Joint ventures. An SDVO SBC may enter into a joint venture agreement with one or more other SBCs for the purpose of performing an SDVO contract.

1. Size of concerns to an SDVO SBC joint venture.
§ 125.16 Does SDVO SBC status guarantee receipt of a contract?

No, SDVO SBCs should market their capabilities to appropriate procuring agencies in order to increase their prospects of having a procurement set-aside for SDVO contract award.

§ 125.17 Who decides if a contract opportunity for SDVO competition exists?

The contracting officer for the contracting activity decides if a contract opportunity for SDVO competition exists.

§ 125.18 What requirements are not available for SDVO contracts?

A contracting activity may not make a requirement available for a SDVO 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 that requirement or SBA has accepted that requirement for performance under the authority of the section 8(a) program, unless SBA has
§ 125.19 When may a contracting officer set-aside a procurement for SDVO SBCs?

(a) The contracting officer first must review a requirement to determine whether it is excluded from SDVO contracting pursuant to §125.18.

(b) If the contracting officer determines that §125.18 does not apply, the contracting officer should consider setting aside the requirement for 8(a), HUBZone, or SDVO SBC participation before considering setting aside the requirement as a small business set-aside.

(c) If the CO decides to set-aside the requirement for competition restricted to SDVO SBCs, the CO must:

(1) Have a reasonable expectation that at least two responsible SDVO SBCs will submit offers; and

(2) Determine that award can be made at fair market price.

§ 125.20 When may a contracting officer award sole source contracts to SDVO SBCs?

A contracting officer may award a sole source contract to an SDVO SBC only when the contracting officer determines that:

(a) None of the provisions of §§125.18 or 125.19 apply;

(b) The anticipated award price of the contract, including options, will not exceed:

(1) $5,000,000 for a requirement within the NAICS codes for manufacturing, or

(2) $3,000,000 for a requirement within all other NAICS codes;

(c) A SDVO SBC is a responsible contractor able to perform the contract; and

(d) Contract award can be made at a fair and reasonable price.

§ 125.21 Are there SDVO contracting opportunities at or below the simplified acquisition threshold?

Yes, if the requirement is at or below the simplified acquisition threshold, the contracting officer may set-aside the requirement for consideration among SDVO SBCs using simplified acquisition procedures or may award a sole source contract to an SDVO SBC.

§ 125.22 May SBA appeal a contracting officer’s decision not to reserve a procurement for award as an SDVO contract?

The Administrator may appeal a contracting officer’s decision not to make a particular requirement available for award as an SDVO sole source or a SDVO set-aside contact at or above the simplified acquisition threshold.

§ 125.23 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 SDVO 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 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 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 D—Protests Concerning SDVO SBCs

Source: 69 FR 25269, May 5, 2004, unless otherwise noted.
§ 125.24 Who may protest the status of an SDVO SBC?

(a) For Sole Source Procurements. SBA or the contracting officer may protest the proposed awardee’s service-disabled veteran status.

(b) For Competitive Set-Asides. Any interested party may protest the apparent successful offeror's SDVO SBC status.

§ 125.25 How does one file a service disabled veteran-owned status protest?

(a) General. The protest procedures described in this part are separate from those governing size protests and appeals. All protests relating to whether an eligible SDVO SBC 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 SDVO SBC and whether the concern meets the SDVO SBC requirements set forth in § 125.15(a), 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 an SDVO contract.

(b) 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 SDVO SBC, without setting forth specific facts or allegations is insufficient. Example: A protester submits a protest stating that the awardee’s owner is not a service-disabled veteran. The protest does not state any basis for this assertion. The protest allegation is insufficient.

(c) Filing. An interested party, other than the contracting officer or SBA, must deliver their protests in person, by facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period) to the contracting officer. The contracting officer or SBA must submit their written protest directly to the Director, Office of Government Contracting.

(d) Timeliness. (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.

(2) For sealed bid acquisitions, an interested party must submit its protest by close of business on the fifth business day after bid opening.

(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 awardee, whichever applies, is premature.

(e) Referral to SBA. The contracting officer must forward to SBA any non-premature protest received, notwithstanding whether he or she believes it is sufficiently specific or timely. The contracting officer must send all protests, along with a referral letter, directly to the Director, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416 or by fax to (202) 205-6390, marked Attn: Service-Disabled Veteran Status Protest. The CO’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 CO; whether the contract was sole source or set-aside; whether the protester submitted an offer; whether the protested concern was the apparent successful offeror; when the protested concern submitted its offer (i.e., made the self-representation that it was a SDVO SBC); whether the procurement was conducted using sealed bid or negotiated procedures; the bid opening date, if applicable; when the protest was submitted to the CO; when the protester received notification about the apparent successful offeror, if applicable; and whether a contract has been awarded.


§ 125.26 What are the grounds for filing an SDVO SBC protest?

(a) Status. In cases where the protest is based on service-connected disability, permanent and severe disability, or veteran status, the Director, Office of Government Contracting will
only consider a protest that presents specific allegations supporting the contention that the owner(s) cannot provide documentation from the VA, DoD, or the U.S. National Archives and Records Administration to show that they meet the definition of service-disabled veteran or service disabled veteran with a permanent and severe disability as set forth in §125.8.

(b) Ownership and control. In cases where the protest is based on ownership and control, the Associate Administrator for Government Contracting will consider a protest only if the protestor presents credible evidence that the concern is not 51% owned and controlled by one or more service-disabled veterans. In the case of a veteran with a permanent and severe disability, the protestor must present credible evidence that the concern is not controlled by the veteran, spouse or permanent caregiver of such veteran.


§ 125.28 What are the procedures for appealing an SDVO status protest?

The protested concern, the protester, or the contracting officer may file an appeal of an SDVO status protest determination with OHA in accordance with part 134 of this chapter. If the contract has already been awarded and on appeal, the OHA Judge affirms that the SDVO SBC does not meet a status or ownership and control requirement set forth in these regulations, then the procuring agency cannot count the award as an award to an SDVO SBC. In addition, the protested concern cannot

(2) Forward a copy of the protest to the protested concern, with a copy to the contracting officer if one has not already been made available.

(d) Time period for determination. SBA will determine the SDVO SBC status of the protested concern within 15 business days after receipt of the protest, or within any extension of that time which the contracting officer may grant SBA. If SBA does not issue its determination within the 15-day period, the contracting officer may award the contract, unless the contracting officer has granted SBA an extension.

(e) Award of contract. The CO 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.

(f) Notification of determination. SBA will notify the contracting officer, the protestor, and the protested concern in writing of its determination.

(g) Effect of determination. SBA’s determination is effective immediately and is final unless overturned by OHA on appeal. If SBA sustains the protest, and the contract has not yet been awarded, then the protested concern is ineligible for an SDVO SBC contract award. If a contract has already been awarded, and SBA sustains the protest, then the contracting officer cannot count the award as an award to an SDVO SBC and the concern cannot submit another offer as an SDVO SBC on a future SDVO SBC procurement unless it overcomes the reasons for the protest (e.g., it changes its ownership to satisfy the definition of an SDVO SBC set forth in §125.8).

[70 FR 14528, Mar. 23, 2005]
§ 125.29
self-represent its status for another procurement until it has cured the eligibility issue. If a contract has not yet been awarded and on appeal the OHA Judge affirms that the protested concern does not meet the status or ownership and control requirement set forth in this part, then the protested concern is ineligible for an SDVO SBC contract award.
[70 FR 14528, Mar. 23, 2005]

Subpart E—Penalties and Retention of Records

SOURCE: 69 FR 25270, May 5, 2004, unless otherwise noted.

§ 125.29 What penalties may be imposed under this part?
(a) Suspension or debarment. The Agency debarring official may suspend or debar a person or concern pursuant to the procedures set forth in part 145 of this chapter. The contracting agency debarring official may debar or suspend a person or concern under the Federal Acquisition Regulation, 48 CFR Part 9, subpart 9.4.
(b) Civil penalties. Persons or concerns are subject to severe civil 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.
(c) Criminal penalties. Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the SDVO status of a SBC in connection with procurement programs pursuant to section 16 of the Small Business Act, 15 U.S.C. 645, as amended; 18 U.S.C. 1001; and 31 U.S.C. 3729-3733. Persons or concerns also 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.
§ 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 qualified HUBZone SBCs to identify qualified HUBZone SBCs for similar programs authorized under state or local law.


§ 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/GC&BD means Associate Administrator, Office of Government Contracting & Business Development.

ADA/GC&BD means SBA’s Associate Deputy Administrator for Government Contracting and 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 ANCSA, 43 U.S.C. 1602.

Alaska Native Village has the same meaning as the term “Native village” in section 3 of the ANCSA, 43 U.S.C. 1602.

ANCSA means the Alaska Native Claims Settlement Act, as amended.

An attempt to maintain means making substantive and documented efforts such as written offers of employment, published advertisements seeking employees, and attendance at job fairs.

Base closure area means lands within the external boundaries of a military installation that were closed through a privatization process under the authority of:


(2) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Pub. L. 100-526; 10 U.S.C. 2687 note);

(3) 10 U.S.C. 2687; or

(4) 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.

Certify means the process by which SBA determines that a HUBZone SBC is qualified for the HUBZone program and entitled to be included in SBA’s “List of Qualified HUBZone SBCs.”

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 1961, 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.

County unemployment rate is the rate of unemployment for a county based on the most recent data available from the United States Department of Labor, Bureau of Labor Statistics. The appropriate data may be found in the DOL/BLS publication titled “Supplement 2, Unemployment in States and Local Areas.” This publication is available for public inspection at the Department of Labor, Bureau of Labor Statistics, Division of Local Area Unemployment Statistics located at 2 Massachusetts Ave., NE, Room 4675, Washington D.C. 20212. A copy is also available at SBA, Office of AA/HUB, 409 3rd Street, SW, Washington D.C. 20416.

D/BD means SBA’s Director, Office of Business Development;

D/HUB means SBA’s Director Office of HUBZone;

De-certify means the process by which SBA determines that a concern is no longer a qualified HUBZone SBC and removes that concern from its List.

Employee means a person (or persons) employed by a HUBZone SBC on a full-time (or full-time equivalent), permanent basis. Full-time equivalent includes employees who work 30 hours per week or more. Full-time equivalent also includes the aggregate of employees who work less than 30 hours a week, where the work hours of such employees add up to at least a 40 hour work week. The totality of the circumstances, including factors relevant for tax purposes, will determine whether persons are employees of a concern. Temporary employees, independent contractors or leased employees are not employees for these purposes.

Example 1: 4 employees each work 20 hours per week; SBA will regard that circumstance as 2 full-time equivalent employees.

Example 2: 1 employee works 20 hours per week and 1 employee works 15 hours per week; SBA will regard that circumstance as 1.5 full-time equivalent employee.

Example 3: 1 employee works 15 hours per week, 1 employee works 10 hours per week, and 1 employee works 20 hours per week; SBA will regard that circumstance as 1 full-time equivalent employee.

Example 4: 1 employee works 30 hours per week and 2 employees each work 15 hours per week; SBA will regard that circumstance as 1 full-time equivalent employee.

HUBZone means a historically under-utilized 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) Qualified base closure area; or

(5) Redesignated area.

HUBZone small business concern (HUBZone SBC) means an SBC that is:

(1) At least 51% owned and controlled by 1 or more persons, each of whom is a United States citizen;

(2) An ANC owned and controlled by Natives (as determined pursuant to section 29(e)(1) of the ANCSA, 43 U.S.C. 1626(e)(1));

(3) A direct or indirect subsidiary corporation, joint venture, or partnership of an ANC qualifying pursuant to section 29(e)(1) of the ANCSA, 43 U.S.C. 1626(e)(1)), if that subsidiary, joint venture, or partnership is owned and controlled by Natives (as determined pursuant to section 29(e)(2) of the ANCSA, 43 U.S.C. 1626(e)(2));

(4) Wholly owned by one or more Indian Tribal Governments, or by a corporation that is wholly owned by one or more Indian Tribal Governments;

(5) An SBC that is owned in part by one or more Indian Tribal Governments or in part by a corporation that is wholly owned by one or more Indian Tribal Governments, if all other owners are either United States citizens or SBCs;

(6) An SBC that is wholly owned by a CDC or owned in part by one or more CDCs, if all other owners are either United States citizens or SBCs; or

(7) An SBC that is a small agricultural cooperative organized or incorporated in the United States, wholly owned by one or more small agricultural cooperatives organized or incorporated in the United States or owned...
in part by one or more small agricultural cooperatives organized or incorporated in the United States, provided that all other owners are small business concerns or United States citizens.

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 sole source or set-aside contract, 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 SBC, 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.”

List refers to the database of qualified HUBZone SBCs that SBA has certified.


Metropolitan statistical area means an area as defined in section 143(k)(2)(B) of the Internal Revenue Code of 1986, (Title 26 of the United States Code).


Person means a natural person.

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.

Qualified base closure area means a base closure area for a period of 5 years either from December 8, 2004, or from the date of final base closure, whichever is later.

Qualified census tract has the meaning given that term in section 42(d)(5)(C)(ii) of the Internal Revenue Code of 1986.

Qualified HUBZone SBC means a HUBZone SBC that SBA certifies as qualified for federal contracting assistance under the HUBZone program.

Qualified non-metropolitan county means any county that was not located in a metropolitan statistical area at the time of the most recent census taken for purposes of selecting qualified census tracts under section 42(d)(5)(C)(ii) of the Internal Revenue Code of 1986, and in which:

(i) The median household income is less than 80% of the non-metropolitan State median household income, based on the most recent data available from the Bureau of the Census of the Department of Commerce; or

(ii) The unemployment rate is not less than 140 percent of the average unemployment rate for the United States or for the State in which such county is located, whichever is less, based on the most recent data available from the Secretary of Labor.

Redesignated area means any census tract or any non-metropolitan county that ceases to be a qualified HUBZone, except that such census tracts or non-metropolitan counties may be "redesignated areas" only until the later of:

(1) The date on which the Census Bureau publicly releases the first results from the 2010 decennial census; or

(2) Three years after the date on which the census tract or non-metropolitan county ceased to be so qualified. The date on which the census tract or non-metropolitan county ceases to be qualified is the date that the official government data, which affects the eligibility of the HUBZone, is released to the public.

Reside means to live in a primary residence at a place for at least 180 days, or as a currently registered voter, and with intent to live there indefinitely.

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. 1141, 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.

Small disadvantaged business (SDB) means a concern that is small pursuant to part 121 of this chapter, is owned and controlled by one or more socially and economically disadvantaged individuals, tribes, ANCs, Native Hawaiian Organizations, or CDCs and has been certified pursuant to subpart A or B, part 124 of this chapter.

Statewide average unemployment rate is the rate based on the most recent data available from the Bureau of Labor Statistics, United States Department of Labor, Division of Local Area Unemployment Statistics, 2 Massachusetts Ave., NE., Room 4675, Washington, D.C. 20212. A copy is also available at SBA, Office of AA/HUB, 409 3rd Street, SW., Washington DC 20416.


Subpart B—Requirements to be a Qualified HUBZone SBC

§ 126.200 What requirements must a concern meet to receive SBA certification as a qualified HUBZone SBC?

(a) Concerns owned by Indian Tribal Governments—(1) Ownership. (i) The concern must be wholly owned by one or more Indian Tribal Governments;

(ii) The concern must be wholly owned by a corporation that is wholly
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owned by one or more Indian Tribal Governments;

(iii) The concern must be owned in part by one or more Indian Tribal Governments and all other owners are either United States citizens or SBCs; or

(iv) The concern must be owned in part by a corporation, which is wholly owned by one or more Indian Tribal Governments, and all other owners are either United States citizens or SBCs.

(2) Size. The concern, with its affiliates, must meet the size standard corresponding to its primary industry classification as defined in part 121 of this chapter.

(3) Other Requirements. The concern 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 (b)(4) 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 adjoining such Indian reservation. A HUBZone and Indian reservation are adjoining when the two areas are next to and in contact with each other; and

(iii) The concern will “attempt to maintain” (see ¶126.103) that applicable employment percentage stated above during the performance of any HUBZone contract it receives.

(b) Concerns owned by U.S. citizens, ANCs or CDCs—(1) Ownership. (i) The concern must be at least 51% unconditionally and directly owned and controlled by persons who are United States citizens;

Example: A concern that is a partnership owned 50% by an individual who is a United States citizen and 50% by someone who is not, is not an eligible concern because it is not at least 51% owned by United States citizens.

(ii) The concern must be an ANC owned and controlled by Natives (determined pursuant to section 29(e)(1) of the ANCSA); or

(iii) The concern must be wholly owned by a CDC, or owned in part by one or more CDCs, if all other owners are either United States citizens or SBCs;

(2) Size. The concern, together with its affiliates, must qualify as a small business under the size standard corresponding to its primary industry classification as defined in part 121 of this chapter.

(3) Principal office. The concern’s principal office must be located in a HUBZone.

(4) Employees. At least 35% of the 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, round up to the nearest whole number;

Example 1: A concern has 25 employees, 35% or 8.75 employees must reside in a HUBZone. Thus, 9 employees must reside in a HUBZone.

Example 2: A concern has 95 employees, 35% or 33.25 employees must reside in a HUBZone. Thus, 34 employees must reside in a HUBZone.

(5) Contract Performance. The concern must represent, as provided in the application, that it will “attempt to maintain” (see ¶126.103) having 35% of its employees reside in a HUBZone during the performance of any HUBZone contract it receives.

(6) Subcontracting. The concern must represent, as provided in the application, that it will ensure that it will comply with certain contract performance requirements in connection with contracts awarded to it as a qualified HUBZone SBC, as set forth in ¶126.700.

(c) Concerns owned by small agricultural cooperatives—(1) Ownership. (i) A small agricultural cooperative organized or incorporated in the United States;

(ii) A small business concern wholly owned by one or more small agricultural cooperatives organized or incorporated in the United States; or
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(iii) A small business concern owned in part by one or more small agricultural cooperatives organized or incorporated in the United States, provided that all other owners are small business concerns or United States citizens.

(2) Size. The small agricultural cooperative must meet the size standard corresponding to its primary industry classification as defined in part 121 of this chapter. However, 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.

(3) Principal office. The cooperative’s principal office must be located in a HUBZone.

(4) Employees. At least 35% of the cooperative’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, round up to the nearest whole number.

(5) Contract Performance. The concern must represent, as provided in the application, that it will “attempt to maintain” (see §126.103) having 35% of its employees reside in a HUBZone during the performance of any HUBZone contract it receives.

(d) Subcontracting. The concern must represent, as provided in the application, that it will ensure that it will comply with certain contract performance requirements in connection with contracts awarded to it as a qualified HUBZone SBC, as set forth in §126.700.


§ 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 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]

§ 126.203 What size standards apply to HUBZone SBCs?

(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.

may deny the concern status as a qualified HUBZone SBC, or SBA may request a formal size determination from the responsible Government Contracting Area Director or designee.

(b) At time of initial contract offer. A HUBZone SBC must be small for the size standard corresponding to the NAICS code assigned to the contract.


§ 126.204 May a qualified HUBZone SBC have affiliates?

A concern may have affiliates provided that the aggregate size of the concern and 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.

[70 FR 51249, Aug. 30, 2005]

§ 126.205 May participants in other SBA programs be certified as qualified HUBZone SBCs?

Participants in other SBA programs may be certified as qualified HUBZone SBCs if they meet all of the requirements set forth in this part. Participation in other SBA Programs is not a requirement for participation in the HUBZone Program.

[69 FR 29423, May 24, 2004]

§ 126.206 May non-manufacturers be certified as qualified HUBZone SBCs?

Non-manufacturers (referred to in the HUBZone Act of 1997 as “regular dealers”) may be certified as qualified HUBZone SBCs if they meet all of the requirements set forth in §126.200. For purposes of this part, a “non-manufacturer” is defined in §121.406(b)(1)(i) and (ii) of this title.

[66 FR 4645, Jan. 18, 2003]

§ 126.207 May a qualified HUBZone SBC have offices or facilities in another HUBZone or outside a HUBZone?

A qualified HUBZone SBC may have offices or facilities in another HUBZone or even outside a HUBZone and still be a qualified HUBZone SBC. However, in order to be certified as a qualified HUBZone SBC and if required by §126.200, the concern’s principal office must be located in a HUBZone.

[69 FR 29423, May 24, 2004]

Subpart C—Certification

§ 126.300 How may a concern be certified as a qualified HUBZone SBC and what information will SBA consider?

A concern must 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 a concern fails to cooperate with SBA or submit information requested by SBA. If SBA determines that the concern is a qualified HUBZone SBC, it will issue a certification to that effect and add the concern to the List.

[69 FR 29423, May 24, 2004]

§ 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 and certification?

A concern seeking certification as a HUBZone SBC must submit either an electronic application to SBA via https://eweb1.sba.gov/hubzone/internet/ or a written application to the D/HUB, U.S. Small Business Administration,
§ 126.304 What must a concern submit to SBA?

(a) To be certified by SBA as a qualified HUBZone SBC, a concern must submit a completed application and represent to SBA that it meets the requirements set forth in §126.200. After submitting the application, applicants must notify SBA of any material changes that could affect its eligibility. The concern must also submit any additional information required by SBA.

(b) Concerns applying for HUBZone status based on a location within the external boundaries of an Indian reservation must use SBA's maps (located at https://eweb1.sba.gov/hubzoneInternet/) to verify that the location is within the external boundaries of an Indian reservation. If, however, SBA's maps indicate that the location is not within the external boundaries of an Indian reservation and the concern disagrees, then the concern must submit official documentation from the appropriate Bureau of Indian Affairs (BIA) Land Titles and Records Office with jurisdiction over the concern's area, confirming that it is located within the external boundaries of an Indian reservation. BIA lists the Land Titles and Records Offices and their jurisdiction in 25 CFR 150.4 and 150.5.

(c) Concerns applying for HUBZone status based on a location within a qualified base closure area must use SBA's List of Qualified Base Closure Areas (located at http://www.sba.gov/hubzone) to verify that the location is within a qualified base closure area. If a concern disagrees with the failure of SBA's List of Qualified Base Closure Areas to include a particular area as a qualified base closure area, then the concern must submit relevant documentation from the Department of Defense, Office of Economic Adjustment, or the military department responsible for closing that installation.

(d) If the concern was decertified for failure to notify SBA of a material change affecting its eligibility pursuant to §126.501, 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 may decline to certify the concern.

§ 126.305 What format must the certification to SBA take?

A concern must submit the required information in either a written or electronic application form provided by SBA. An electronic application must be sufficiently authenticated for enforcement purposes.

§ 126.306 How will SBA process the certification?

(a) The D/HUB or designee is authorized to approve or decline certifications. SBA will receive and review all certifications, but SBA will not process incomplete packages. SBA will make its determination within 30 calendar days after receipt of a complete package whenever practicable. The decision of the D/HUB or designee is the final agency decision.

(b) SBA may request additional information or clarification of information contained in an application submission at any time.

(c) If SBA approves the application, SBA will send a written notice to the concern and automatically enter it on the List described in §126.307.

(d) A decision to deny eligibility must be in writing and state the specific reasons for denial.

§ 126.307 Where will SBA maintain the List of qualified HUBZone SBCs?

Qualified HUBZone SBCs are identified by running a search on CCR/DSBS (http://dsbs.sba.gov/dsbs/dsp_dsbs.cfm) and are listed on the HUBZone Web page at https://eweb1.sba.gov/hubzone/internet/general/approved-firms.cfm. In addition, requesters may obtain a copy of the List by writing to the D/HUB at U.S. Small Business Administration,
§ 126.308 What happens if SBA inadvertently omits a qualified HUBZone SBC from the List?

A HUBZone SBC that has received SBA's notice of certification, but is not on the List within 10 business days thereafter, should immediately notify the D/HUB in writing at U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416 or via e-mail at hubzone@sba.gov. The concern must appear on the List to be eligible for HUBZone contracts.

[69 FR 29423, May 24, 2004]

§ 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 no sooner than one year 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. See §126.304(c).

[69 FR 29423, May 24, 2004]

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 and what will SBA examine?

(a) General. 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 process or in connection with a HUBZone contract. 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 HUBZone contract.

(b) Scope of review. Examiners may conduct the review, or parts of the review, at one or all of the concern's offices. SBA will determine the location of the examination. Examiners may review any information related to the concern's eligibility requirements including, but not limited to, documentation related to the location and ownership of the concern, the employee percentage requirements, and the concern's "attempt to maintain" (see §126.103) this percentage. The concern must document each employee's residence address through employment records. The examiner also may review property tax, public utility or postal records, and other relevant documents. The concern must retain documentation demonstrating satisfaction of the employee residence and other qualifying requirements for 6 years from date of submission of the application and any recertifications issued to SBA.

[69 FR 29423, May 24, 2004]

§ 126.402 When may SBA conduct program examinations?

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 certified as a qualified HUBZone SBC.

[69 FR 29423, May 24, 2004]

§ 126.403 May SBA require additional information from a HUBZone SBC?

(a) At the discretion of the D/HUB, SBA has the right to require that a HUBZone SBC submit additional information as part of the certification process, or at any time thereafter. SBA may draw an adverse inference from the failure of a HUBZone SBC to cooperate with a program examination or provide requested information.

(b) In order to gauge the success of the program, SBA requires that a HUBZone SBC submit updated financial information and information relating to the number of its employees.

[69 FR 29424, May 24, 2004]
§ 126.500 How does a qualified HUBZone SBC maintain HUBZone certification?

Any qualified HUBZone SBC seeking to remain on the List must recertify every three years to SBA that it remains a qualified HUBZone SBC (See §126.501 for ongoing obligations). Concerns wishing to remain in the program without any interruption must recertify their continued eligibility to SBA within 30 calendar days after the third anniversary of their date of certification and each subsequent three-year period. Failure to do so will result in SBA initiating decertification proceedings. Once decertified, the concern then would have to submit a new application for certification pursuant to §126.309. The recertification to SBA must be in writing and must represent that the circumstances relative to eligibility that existed on the date of certification showing on the List have not materially changed and that the concern meets any new eligibility requirements.

§ 126.501 What are a qualified HUBZone SBC's ongoing obligations to SBA?

A qualified HUBZone SBC must immediately notify SBA of any material change that could affect its eligibility. Material change includes, but is not limited to, a change in the ownership, business structure, or principal office of the concern, or a failure to meet the 35% HUBZone residency requirement (See §126.200 for certain eligibility requirements). The notification must be in writing, and must be sent or delivered to the D/HUB to comply with this requirement. Failure of a qualified HUBZone SBC to notify SBA of such a material change may result in decertification and removal from the List pursuant to §126.504. In addition, SBA may seek the imposition of penalties under §126.800. If the concern later becomes eligible for the program, it must apply for certification pursuant to §§126.300 through 126.306.

§ 126.502 Is there a limit to the length of time a qualified HUBZone SBC may be on the List?

There is no limit to the length of time a qualified HUBZone SBC may remain on the List so long as it continues to follow the provisions of §§126.200, 126.500, and 126.501.

§ 126.503 What happens if SBA is unable to verify a qualified HUBZone SBC's eligibility or determines that the concern is no longer eligible for the program?

If SBA is unable to verify a qualified HUBZone SBC's eligibility or determines it is not eligible for the program, SBA may propose decertification of the concern.

(a) Proposing Decertification. Except as set forth in paragraph (c) of this section, the Deputy D/HUB or designee will first notify the qualified HUBZone SBC in writing that SBA is proposing to decertify it, the reasons for the proposed de-certification, and that the SBC must rebut each of the reasons SBA sets forth. The qualified HUBZone SBC will have 30 calendar days from the date that it receives SBA's notification to respond, in writing, to the D/HUB or designee.

(b) SBA's Decision. The D/HUB or designee will consider the reasons for proposed decertification and the qualified HUBZone SBC's response before making a written decision whether to decertify. The D/HUB may draw an adverse inference where a qualified HUBZone SBC fails to cooperate with SBA or provide the information requested. The D/HUB's decision is the final agency decision.

(c) Decertifying Pursuant to a Protest. SBA will decertify a qualified HUBZone SBC and remove its name from the List without first proposing it for decertification if the D/HUB upholds a protest pursuant to §126.803 and the D/HUB's decision is not overturned pursuant to §126.805.

§ 126.504 When is a concern removed from the List?

If SBA determines at any time that a HUBZone SBC is not qualified, SBA
§ 126.600 What are HUBZone contracts?

HUBZone contracts are contracts awarded to a qualified HUBZone SBC through any of the following procurement methods:
(a) Sole source awards to qualified HUBZone SBCs;
(b) Set-aside awards based on competition restricted to qualified HUBZone SBCs; or
(c) Awards to qualified HUBZone SBCs through full and open competition after a price evaluation preference in favor of qualified HUBZone SBCs.

§ 126.601 What additional requirements must a qualified HUBZone SBC meet to bid on a contract?

(a) In order to submit an offer on a specific HUBZone contract, the qualified HUBZone SBC, together with its affiliates, must be small under the size standard corresponding to the NAICS code assigned to the contract.
(b) A firm must be a qualified HUBZone SBC both at the time of its initial offer and at the time of award in order to be eligible for a HUBZone contract.
(c) At the time a qualified HUBZone SBC submits its initial offer, and where applicable its final offer, on a specific HUBZone contract, it must certify to the CO that:
(1) It is a qualified HUBZone SBC that appears on SBA’s List;
(2) There has been no material change in its circumstances since the date of certification shown on the List that could affect its HUBZone eligibility;
(3) It is small under the NAICS code assigned to the procurement; and
(4) If the qualified HUBZone SBC was certified pursuant to §126.200(b), it must represent that it will “attempt to maintain” (See §126.103) the required percentage of employees who are HUBZone residents during the performance of a HUBZone contract. If the qualified HUBZone SBC was certified pursuant to §126.200(a), then it must represent that at least 35% of its employees engaged in performing the HUBZone contract reside within any Indian reservation governed by one or more of its Indian Tribal Government owners or reside within any HUBZone adjoining any such Indian reservation.
(d) If submitting an offer as a joint venture, each qualified HUBZone SBC must make the certifications in paragraph (c) of this section separately under its own name.
(e) A qualified HUBZone SBC 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(b)(1) of this chapter, and if the small manufacturer providing the end item for the contract is also a qualified HUBZone SBC.

(1) There are no waivers to the nonmanufacturer rule for HUBZone contracts.
(i) SBA will not issue contract-specific waivers as it does for small business set-aside and 8(a) contracts under §121.406(b)(3)(i) of this chapter.
(ii) Class waivers issued under §121.406(b)(3)(ii) of this chapter do not apply to HUBZone contracts.
(2) For HUBZone contracts at or below $25,000 in total value, a qualified HUBZone SBC may supply the end item of any manufacturer, including a large business, so long as the product acquired is manufactured or produced in the United States.

§ 126.602 Must a qualified HUBZone SBC maintain the employee residency percentage during contract performance?

Qualified HUBZone SBCs eligible for the program pursuant to §126.200(b)...
§ 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 if it is at or below the simplified acquisition threshold. In addition, a CO may award a requirement as a HUBZone contract
§ 126.605 What must the contracting officer do if a contracting opportunity does not exist for competition among qualified HUBZone SBCs?

If a contract opportunity for competition among qualified SBCs does not exist under the provisions of §126.607, the contracting officer must first consider the possibility of making an award to a qualified HUBZone SBC on a sole source basis, and then to a small business under small business set-aside procedures, in that order of precedence. If the criteria are not met for any of these special contracting authorities, then the contracting officer may solicit the procurement through another appropriate contracting method.

§ 126.609 What must the contracting officer do if a contract opportunity 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.

§ 126.610 May SBA appeal a contracting officer’s decision not to reserve a procurement 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.

§ 126.611 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 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.

§ 126.612 When may a CO award sole source contracts to qualified HUBZone SBCs?

A contracting officer may award a sole source contract to a qualified HUBZone SBC 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) $5,000,000 for a requirement within the NAICS codes for manufacturing; or

(2) $3,000,000 for a requirement within all other NAICS codes;

(c) Two or more qualified HUBZone SBCs are not likely to submit offers;

(d) A qualified HUBZone SBC 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.

§ 126.613 How does a price evaluation preference affect the bid of a qualified HUBZone SBC 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 qualified HUBZone SBC to be lower than the price offered by another offeror (other than another SBC)
if the price offered by the qualified HUBZone SBC 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 offeror. If the price of the large business' offer is not more than 10% higher than the price of the large business' offer and, consequently, the qualified HUBZone SBC displaces the large business as the lowest, responsive, and responsible offeror, the CO must apply the HUBZone price evaluation preference in this procurement because the lowest, responsive, responsible offeror represents the best value to the Government, in accordance with the terms of the solicitation.

(2) Where, after considering the price evaluation adjustment, the price offered by a qualified HUBZone SBC is equal to the price offered by a large business (or, in a best value procurement, the total evaluation points received by a qualified HUBZone SBC is equal to the total evaluation points received by a large business), award shall be made to the qualified HUBZone SBC.

Example 1: In a full and open competition, a qualified HUBZone SBC submits an offer of $96, a non-HUBZone SBC submits an offer of $95, and a large business submits an offer of $93. The CO would not apply the price evaluation preference in this procurement because a price evaluation preference is not applied to change an offer and benefit a non-HUBZone SBC.

Example 2: In a full and open competition, a qualified HUBZone SBC submits an offer of $103, a non-HUBZone SBC submits an offer of $100, 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 qualified HUBZone SBC's offer is not more than 10% higher than the large business' offer and, consequently, the qualified HUBZone SBC displaces the large business as the lowest, responsive, and responsible offeror. The CO must then apply the HUBZone price evaluation preference. In this example, the qualified HUBZone SBC's offer is more than 10% higher than the large business' offer and, consequently, the qualified HUBZone SBC displaces the large business as the lowest, responsive, and responsible offeror.

In addition, the non-HUBZone SBC'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 SBC.

Example 3: In a full and open competition, a qualified HUBZone SBC submits an offer of $98 and a non-HUBZone SBC 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.

(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.

Example 2: 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 SBC) is $1.05/pound for 20,000 pounds of wheat. Bid 3 (from a HUBZone SBC) 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, the price evaluation preferences will be applied to the first 5,000 pounds of Bid 2. With the price evaluation adjustment, the price for Bid 2, as measured against Bid 3, for 5,000 pounds changes from $5,000 to $5,500. Bid 2's price of $5,500 ($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 $15,750.
pounds is also $15,750 ($1.05 \times 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.

(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 qualified HUBZone SBC 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 SBCs.


§ 126.614 How does a CO apply HUBZone and SDB price evaluation preferences in full and open competition?

A CO may receive offers from both qualified HUBZone SBCs and SDB concerns, or of concerns that qualify as both, during a full and open competition. The CO must first apply the SDB price evaluation preference described in 10 U.S.C. 2323 to all appropriate offerors. The CO must then apply the HUBZone price evaluation preference as described in § 126.613 to all appropriate offerors. A concern that is both a qualified HUBZone SBC and an SDB must receive the benefit of both the HUBZone price evaluation preference described in § 126.613 and the SDB price evaluation preference described in 10 U.S.C. 2323 and the Federal Acquisition Streamlining Act, section 7102(a)(1)(B), Public Law 103-355, in a full and open competition.

Example 1: In a full and open competition, a qualified HUBZone SBC (but not an SDB) submits an offer of $102; an SDB (but not a qualified HUBZone SBC) submits an offer of $107; and a large business submits an offer of $93. The CO first applies the SDB price evaluation preference and adds 10% to the qualified HUBZone SBC’s offer thereby making that offer $112.2, and to the large business’s offer thereby making that offer $102.3. As a result, the large business is the lowest, responsive, and responsible offeror. Next, the CO applies the HUBZone preference and, since the qualified HUBZone SBC’s offer is not more than 10% higher than the large business’s offer, the CO must deem the price offered by the qualified HUBZone SBC to be lower than the price offered by the large business.

Example 2: A qualified HUBZone SBC (but not an SDB) submits an offer of $102; a qualified HUBZone SBC that is also an SDB submits an offer of $105; an SDB (but not a qualified HUBZone SBC) submits an offer of $107; a small business concern (but not a qualified HUBZone SBC or an SDB) submits an offer of $100; and a large business submits an offer of $93. The CO must first apply the SDB price evaluation preference to establish the lowest, responsive, and responsible offeror. Thus, the qualified HUBZone SBC’s offer becomes $112.2; the qualified HUBZone SBC/ SDB’s offer remains $105; the SDB’s offer remains $107; the small business concern’s offer becomes $110; and the large business’s offer becomes $102.3. As a result of the SDB price evaluation preference, the large business is the lowest, responsive, and responsible offeror. Next, the CO must apply the HUBZone price evaluation preference and if a qualified HUBZone SBC’s price is not more than 10% higher than the large business’s price, the CO must deem its price to be lower than the large business’s price. In this example, the qualified HUBZone price of $112.2 is not more than 10% higher than the large business’s price, however, the qualified HUBZone/SDB’s price of $105 is also not more than 10% higher than the large business’s price and is lower than the qualified HUBZone SBC’s price. Consequently, the CO must deem the price of the qualified HUBZone/SDB as the lowest, responsive, and responsible offeror.

[69 FR 29426, May 24, 2004]

§ 126.615 May a large business participate on a HUBZone contract?

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.
§ 126.616 What requirements must a joint venture satisfy to submit an offer on a HUBZone contract?

A joint venture may submit an offer on a HUBZone contract if the joint venture meets all of the following requirements:

(a) HUBZone joint venture. A qualified HUBZone SBC may enter into a joint venture with another qualified HUBZone SBC for the purpose of submitting an offer for a HUBZone contract. The joint venture itself need not be certified as a qualified HUBZone SBC.

(b) Size of concerns. (1) A joint venture of two or more qualified HUBZone SBCs may submit an offer for a HUBZone contract so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract and the HUBZone joint venture in the aggregate may exceed the size standard provided the procurement meets the following conditions:

(i) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the NAICS code assigned to the contract; and

(ii) For a procurement having an employee-based size standard, the procurement exceeds $10 million.

(2) For a procurement that does not exceed the applicable dollar amount specified in paragraph (b)(1) of this section, a joint venture of two or more qualified HUBZone SBCs may submit an offer for a HUBZone contract so long as the qualified HUBZone SBCs in the aggregate are small under the size standard corresponding to the NAICS code assigned to the contract.

(c) Performance of work. The aggregate of the qualified HUBZone SBCs to the joint venture, not each concern separately, must perform the applicable percentage of work required by 13 CFR 125.6.

[69 FR 29426, May 24, 2004]

§ 126.617 Who decides contract disputes arising between a qualified HUBZone SBC 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 qualified HUBZone SBC and the contracting activity.

[69 FR 29426, May 24, 2004]

§ 126.618 How does a HUBZone SBC’s participation in a Mentor-Protégé relationship affect its participation in the HUBZone Program?

(a) Qualified HUBZone SBCs may enter into Mentor-Protégé relationships in connection with other Federal programs, provided that such relationships do not conflict with the underlying HUBZone requirements.

(b) For purposes of determining whether an applicant to the HUBZone Program or a HUBZone SBC qualifies as small under part 121 of this chapter, SBA will not find affiliation between the applicant or qualified HUBZone SBC and the firm that is its mentor in a Federally-approved mentor-Protégé relationship (including a mentor that is other than small) on the basis of the mentor-Protégé agreement.

(c)(1) A qualified HUBZone SBC that is a prime contractor on a HUBZone contract may team with and subcontract work to its mentor.

(i) The HUBZone SBC must meet the applicable performance of work requirement set forth in § 125.6(b) of this chapter.

(ii) 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(f)(4) of this chapter.

(2) A qualified HUBZone SBC may not joint venture with its mentor on a HUBZone contract unless the mentor is also a qualified HUBZone SBC.

[69 FR 29427, May 24, 2004]

Subpart G—Contract Performance Requirements

§ 126.700 What are the performance of work requirements for HUBZone contracts?

(a) A prime contractor receiving an award as a qualified HUBZone SBC must meet the performance of work requirements set forth in § 125.6(c) of this chapter.
§ 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.

§ 126.800 Who may protest the status of a qualified HUBZone SBC?

(a) For sole source procurements. SBA or the contracting officer may protest the proposed awardee’s qualified HUBZone SBC status.

(b) For all other procurements. SBA, the CO, or any other interested party may protest the apparent successful offeror’s qualified HUBZone SBC status.

§ 126.801 How does one file a HUBZone status protest?

(a) General. The protest procedures described in this part are separate from those governing size protests and appeals. All protests relating to whether a qualified HUBZone SBC 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 SBC and whether the concern meets the HUBZone qualifying requirements set forth in §126.200, SBA will process protests 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 HUBZone contract.

(b) Format. Protests must be in writing and state all specific grounds for the protest. A protest merely asserting that the protested concern is not a
§ 126.803 How will SBA process a HUBZone status protest?

(a) 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 HUBZone SBC of the protest and the identity of the protestor. The protested HUBZone SBC may submit information responsive to the protest within 5 business days.

(b) Time period for determination. (1) SBA will determine the HUBZone status of the protested HUBZone SBC within 15 business days after receipt of a protest.

(2) If SBA does not contact the contracting officer within 15 business days, the contracting officer may award the contract, unless the contracting officer has granted SBA an extension.

(3) 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.

(c) Notice of determination. SBA will notify the contracting officer, the protestor, and the protested concern of its determination.

(d) Effect of determination. The determination is effective immediately and is final unless overturned on appeal by the AA/GC&BD, pursuant to §126.805. If
§ 126.804 Will SBA decide all HUBZone status protests?
SBA will decide all protests not dismissed as premature, untimely or non-specific.

§ 126.805 What are the procedures for appeals of HUBZone status determinations?
(a) Who may appeal. The protested HUBZone SBC, the protestor, or the CO may file appeals of protest determinations with the ADA/GC&BD.
(b) Timeliness of appeal. The ADA/GC&BD must receive the appeal no later than five business days after the date of receipt of the protest determination. SBA will dismiss any appeal received after the five-day period.
(c) Method of Submission. The party appealing the decision may deliver its appeal in person, by facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period).
(d) Notice of appeal. The party bringing an appeal must provide notice of the appeal to the contracting activity contracting officer and either the protested HUBZone SBC or original protestor, as appropriate.
(e) Grounds for appeal. (1) SBA will re-examine a protest determination only if there was a clear and significant error in the processing of the protest or if the AA/HUB failed completely to consider a significant fact contained within the information supplied by the protestor or the protested HUBZone SBC.
(2) SBA will not consider additional information or changed circumstances that were not disclosed at the time of the AA/HUB’s decision or that are based on disagreement with the findings and conclusions contained in the determination.
(f) Contents of appeal. The appeal must be in writing. The appeal must identify the protest determination being appealed and set forth a full and specific statement as to why the decision is erroneous or what significant fact the AA/HUB failed to consider.
(g) Completion of appeal after award. An appeal may proceed to completion even after award of the contract that prompted the protest, if so desired by the protested HUBZone SBC, or where SBA determines that a decision on appeal is meaningful.

Subpart I—Penalties
§ 126.900 What penalties may be imposed under this part?
(a) Suspension or debarment. The Agency debarring official may suspend or debar a person or concern pursuant to the procedures set forth in part 145 of this title. The contracting agency debarring official may debar or suspend a person or concern under the Federal Acquisition Regulation, 48 CFR Part 9, subpart 9.4.
(b) Civil penalties. Persons or concerns are subject to civil penalties under the False Claims Act, 31 U.S.C. 3729–3733, and under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812, and any other applicable laws.
(c) Criminal penalties. Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the HUBZone status of a small business 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; and 31 U.S.C. 3729-3733. Persons or concerns also 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.
§ 130.110 Definitions.

Applicant organization. An entity, described in §130.200(a), which applies to establish and operate an SBDC network.

Application. The written submission by a new applicant organization or an existing recipient organization explaining its projected SBDC activities for the upcoming budget period and requesting SBA funding for use in its operations.

Area of Service. The State or territory, or portion of a State or territory (when there is more than one SBDC in a State or territory), or the District of Columbia, in which an applicant organization proposes to provide services or in which a recipient organization provides services.

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 allocated specifically to the operation of the SBDC network equaling no less than fifty percent of the Federal funds. Cash Match includes direct costs committed by the applicant or recipient organization and sponsoring SBDC organizations, to the extent that such costs are committed as part of the verified, specific, line item direct costs prior to funding. Cash Match does not include indirect costs, overhead costs or in-kind contributions.

Cognizant Agency. The Federal agency, other than SBA, from which a recipient organization or sponsoring SBDC organization receives its largest grant or greatest amount of Federal funding, and from which it obtains an indirect cost rate for budgetary and program, a partnership exists between SBA and the recipient organization for the delivery of assistance to the small business community.

(b) Incorporation of amended references. All references in these regulations to OMB Circulars, other SBA regulations, Standard Operating Procedures, and other sources of SBA policy guidance incorporate all ensuing changes or amendments to such sources.

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funding purposes, applicable throughout the Federal government.

Cooperative Agreement. The written contract between SBA and a recipient organization, describing the conditions under which SBA awards Federal funds and recipient organizations provide services to the small business community.

Cosponsorship. A "Cosponsorship" as defined in and governed by §8(b)(1)(A) of the Act and SBA’s Standard Operating Procedures.

Counseling. Individual advice, guidance or instruction given to a small business person or entity.

Direct costs: "Direct costs" as defined in Office of Management and Budget (OMB) Circulars A–21, A–87 and A–122. Recipient organizations must allocate at least 80 percent of the Federal funds provided through the Cooperative Agreement to the direct costs of program delivery.

Dispute. Dispute means a program or financial disagreement which the recipient organization requests be handled with SBA in a formal manner.

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 designated by the AA/SBDCs who is responsible for the financial review, award, and administration of one or more SBDC Cooperative Agreements.

In-kind contributions. Property, facilities, services or other non-monetary contributions from non-federal sources. See OMB Circular A–87, A–102, or A–110, as appropriate.

Indirect costs. "Indirect costs" as defined in Office of Management and Budget (OMB) Circular A–21, A–87 or A–122.

Lead Center. The entity which administers and operates the SBDC network.


Overmatched Amount. Non-Federal Contributions to SBDC project costs, including cash, in-kind contributions and indirect costs, in excess of the statutorily required amount.

Program Announcement. SBA’s annual publication of requirements which an applicant or recipient organization must address in its initial or renewal application.

Program income. Income earned or received by the SBDC network from any SBDC supported activity as defined in Attachment D of OMB Circular A–110 and Attachment E of OMB Circular A–102.

Program manager. An SBA employee responsible for overseeing the operations of one or more SBDCs.

Project officer. An SBA employee who negotiates the annual Cooperative Agreement and monitors the ongoing operations of an SBDC.

Project period. The period of time, usually in twelve (12) month increments, during which the SBDC network operates, beginning on the day of award and continuing over a number of budget periods.

Recipient organization. The name given to an applicant organization after funding is approved and the applicant organization enters into a Cooperative Agreement. The recipient organization receives the Federal funds and is responsible for establishing the Lead Center.

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 network. The Lead Center and SBDC service providers.

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 and Training.

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.
Small Business Administration

Training. The provision of advice, guidance and instruction to groups of prospective and existing small business persons and entities, whether by in-person group sessions or by such communication modes as teleconferences, videos, publications and electronic media.

§ 130.200 Eligible entities.
(a) Recipient Organization. The following entities are eligible to operate an SBDC network:
(1) A public or private institution of higher education;
(2) A land-grant college or university;
(3) A college or school of business, engineering, commerce or agriculture;
(4) A community or junior college;
(5) An entity formed by two or more of the above entities; or
(6) Any entity which was operating as a recipient organization as of December 31, 1990.
(b) SBDC Service Providers. SBDC service providers are not required to meet the eligibility requirements of a recipient organization.

§ 130.300 Small Business Development Centers (SBDCs), [Reserved]

§ 130.310 Area of service.
The AA/SBDC shall designate in writing the Area of Service of each recipient organization, consistent with the State plan. More than one recipient organization may be located in a State or Territory if the AA/SBDC determines it is necessary or beneficial to implement the Program effectively and to provide services to all interested small businesses.

§ 130.320 Location of lead centers and SBDC service providers.
(a) The recipient organization must locate its Lead Center and SBDC service providers so that services are readily accessible to small businesses in the Area of Service.
(b) The locations of the Lead Center and the SBDC service providers will be reviewed by SBA as part of the application review process for each budget period.

§ 130.330 Operating requirements.
(a) The Lead Center must be an independent entity 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.
(c) The Lead Center shall be open to the public throughout the year during the normal business hours of the recipient organization. Anticipated closures shall be included in the annual renewal application. Emergency closures shall be reported to the SBA Project Officer as soon as is feasible. Other SBDC service providers shall be open during the normal business hours of their sponsoring SBDC organizations.
(d) The Lead Center and other SBDC service providers must have a conflict of interest policy applicable to their SBDC consultants, employees, instructors and volunteers.
(e) The SBDC network shall comply with 13 CFR parts 112, 113 and 117, which require that no person shall be excluded on the grounds of age, color, handicap, marital status, national origin, race, religion or sex from participation in, be denied that benefits of, or otherwise be subjected to discrimination under, any program or activity for which the recipient organization received Federal financial assistance from SBA.

§ 130.340 SBDC services and restrictions on service.
(a) Services. The SBDC network must provide prospective and existing small business persons and entities with Counseling, Training and Specialized Services, concerning the formation, financing, management and operation of small business enterprises, reflecting local needs. The recipient organization shall primarily utilize institutions of higher education to provide services to the small business community. To the extent possible, SBDCs shall use other Federal, State, and local government programs that assist small business.
Services periodically should be assessed and improved to keep pace with changing small business needs.

(b) Access to Capital. (1) SBDCs are encouraged to 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 should help prepare their clients to represent themselves to lending institutions. While SBDCs may attend meetings with lenders to assist clients in preparing financial packages, the SBDCs may not take a direct role in representing clients in loan negotiations.

(3) SBDCs should inform their clients that financial packaging assistance does not guarantee receipt of a loan.

(4) SBDCs may not make loans, service loans or make credit decisions regarding the award of loans.

(5) With respect to SBA guaranty programs, SBDCs may assist clients to formulate a business plan, prepare financial statements, complete forms which are part of a loan application, and accompany an applicant appearing before SBA. Unless authorized by the SBA Administrator with respect to a specific program, an SBDC may not advocate, recommend approval or otherwise attempt in any manner to influence SBA to provide financial assistance to any of its clients. An SBDC cannot collect fees for helping a client to prepare an application for SBA financial assistance.

(c) Special emphasis initiatives. From time to time, SBA may identify portions of the general population to be targeted for assistance by SBDCs. Support of SBA special emphasis initiatives will be negotiated each year as part of the application process and included in the Cooperative Agreement when appropriate.

§ 130.350 Specific program responsibilities.

(a) Policy development. SBA 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 Circulars and Executive Orders. In doing so, SBA should consult, to the extent practicable, with the Recognized Organization.

(b) Responsibilities of SBDC Directors. The SBDC Director shall direct and monitor program activities and financial affairs of the SBDC network to deliver effective services to the small business community, comply with applicable laws, regulations, OMB Circulars and Executive Orders, and implement the Cooperative Agreement. The SBDC Director has authority to control expenditures under the Lead Center’s budget. SBDC Directors may manage other programs in addition to the SBDC Program if the programs serve small businesses and do not duplicate the services provided by the SBDC network. However, SBDC Directors may not receive additional compensation for managing these programs. The SBDC Director shall serve as the principal contact point for all matters involving the SBDC network.

§ 130.360 SBDC advisory boards.

(a) State/Regional Advisory Boards. (1) The Lead Center must establish an advisory board to advise, counsel, and confer with the SBDC Director on matters pertaining to the operation of the SBDC network.

(2) The advisory board shall be referred to as a State SBDC Advisory Board in an Area of Service having only one recipient organization, and a Regional SBDC Advisory Board in an Area of Service 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 no later than the second budget 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.

(b) National SBDC Advisory Board. (1) SBA shall establish a National SBDC Advisory Board consisting of nine
§ 130.400 Application procedure. [Reserved]

§ 130.410 New applications.

(a) If SBA declines to renew an existing recipient organization or the recipient organization declines to reapply, SBA may accept applications from other organizations interested in becoming a recipient organization. An eligible entity may apply by submitting an application to the SBA District Office in the Area of Service in which the applicant proposes to provide services.

(b) An application for initial funding of a new SBDC network must include a letter by the Governor, or his or her designee, of the Area of Service in which the SBDC will operate, or other evidence, confirming that the applicant's designation as an SBDC would be consistent with the plan adopted by the State government and approved by SBA. No such requirement is imposed on subsequent applications from existing recipient organizations.

(c) The application must set forth the eligible entity or entities proposing to operate the SBDC network; a list of the Lead Center and other SBDC service providers by name, address and telephone number; the geographic areas to be serviced; the resources to be used; the services that will be provided; the method for delivering the services, including a description of how and to what extent academic, private and public resources will be used; a budget; a listing of the proposed members of the State or Regional Advisory Board and other relevant information set forth in the Program Announcement.

(d) SBA officials may request supplemental information or documentation to revise or complete an application.

(e) Upon written recommendation for approval by the SBA District Director, the proposal shall be submitted to the AA/SBDCs for review.

§ 130.420 Renewal applications.

(a) SBDCs shall comply with the requirements in the annual Program Announcement, including format and due dates, to receive consideration of their renewal applications. The SBA Project Officer, with the concurrence of the Program Manager, may grant an extension. The recipient organization shall submit the renewal application to the SBA office in the District in which the recipient organization is located. The annual Program Announcement will include a timetable for SBA review.

(b) After review by the SBA Project Officer and written recommendation for approval by the District Director, the Program Manager and Grants Management Specialist shall review the renewal application for conformity with the Program Announcement, OMB Circulars and all other statutory, financial and regulatory requirements. SBA officials may request supplemental information and documentation prior to issuing the Cooperative Agreement.

§ 130.430 Application decisions.

(a) The AA/SBDCs may approve, conditionally approve, or reject any application. In the event of a rejection, the AA/SBDCs shall communicate the reasons for rejection to the applicant and the appropriate SBA field office. If the approval is conditional, the conditions and applicable remedies shall be specified as special terms and conditions in the Cooperative Agreement. Upon approval or conditional approval, the Grants Management specialist may issue a Cooperative Agreement.

(b) In considering the application, significant factors shall include:

(1) The applicant's ability to contribute Matching Funds;

(2) For renewal Proposals, the quality of prior performance;
§ 130.440 Maximum grant.

No recipient shall receive an SBDC grant 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) of the Act.

§ 130.450 Matching funds.

(a) The recipient organization must provide total Matching Funds equal to the total amount of SBA funding. At least 50% of the Matching Funds must be Cash Match. The remaining 50% 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. All applicants must submit a Certification of Cash Match and Program Income executed by an authorized official of the recipient organization or any sponsoring SBDC organization providing Cash Match through a subcontract agreement. The account containing such cash must be under the direct management of the SBDC Director, or, if provided by a sponsoring SBDC organization, its subcenter Director. 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) The Grants Management Specialist is responsible for determining whether Matching Funds or Cash Match meet the requirements of the Act and appropriate OMB circulars.

(d) Overmatched Amounts. (1) SBDC are encouraged to furnish Overmatched Amounts.

(2) An Overmatched Amount can be applied to additional Matching Funds requirements necessitated by any supplemental funding increase received by the SBDC during the budget period, as long as the total Cash Match provided by the SBDC is 50% or more of the total SBA funds provided during the budget period.

(3) If used in the manner described in paragraph (d)(2) of this section, such Overmatched Amount is reclassified as committed Matching Funds.

(e) Impermissible sources of Matching Funds. Under no circumstances may the following be used as sources of the Matching Funds of the recipient organization:

(1) Uncompensated student labor;

(2) SCORE, ACE, or SBI volunteers;

(3) Program income or fees collected from small businesses receiving assistance;

(4) Funds or indirect or in-kind contributions from any other Federal source.

§ 130.460 Budget justification.

The SBDC Director, as a part of the renewal application, 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 shall be reviewed annually upon submission of a renewal application.

(a) Direct costs. Unless otherwise provided in applicable OMB circulars, at
least eighty percent (80%) of SBA funding must be allocated to direct costs of Program delivery.

(b) Indirect costs. If the applicant organization waives all indirect costs to meet the Matching Funds requirement, one hundred percent (100%) of SBA funding must be allocated to program delivery. If some, but not all, indirect costs are waived to meet the Matching Funds requirement, the lesser of the following may be allocated as indirect costs of the Program and charged against the Federal contribution:

(1) Twenty percent (20%) of Federal contribution, or

(2) The amount remaining after the waived portion of indirect costs is subtracted from the total indirect costs.

(c) Separate SBDC service provider budgets. (1) The applicant organization shall include separate budgets for all subcontracted SBDC service providers in conformity with OMB requirements. Applicable direct cost categories and indirect cost base/rate agreements shall 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 shall 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 negotiated with the SBA Project Officer in accordance with OMB guidelines (see OMB Circular A–21).

(2) The amount of cash, in-kind contributions and indirect costs for the Lead Center and all sub-contracted SBDC service providers shall be included in accordance with OMB requirements.

(d) Cost principles. Principles for determining allowable costs are contained in OMB Circulars A–21 (cost principles for grants, contracts, and other agreements with educational institutions), A–87 (cost principles for programs administered by State and local governments), and A–122 (cost principles for nonprofit organizations).

(e) Costs associated with lobbying. No portion of the Federal contribution received by an SBDC may be used for lobbying activities, either directly by the SBDC or indirectly through outside organizations, except those activities permitted by OMB. Restrictions on and reports of lobbying activities by the SBDC shall be in accordance with OMB requirements, Section 319 of Public Law No. 101-121, and the annual Program Announcement.

(f) Salaries. (1) If a recipient organization is an educational institution, the salaries of the SBDC Director and the subcenter Directors 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 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 and the individual’s experience and background.

(2) 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.

(3) Recruitment and salary increases for SBDC Directors, subcenter Directors and staff members should conform to the administrative policy of the recipient organization.

(g) Travel. All travel must be separately identified in the proposed budget as planned in-State, planned out-of-State, unplanned in-State or unplanned out-of-State. All proposed travel must use coach class, apply directly to specific work of the SBDC or be incurred in the normal course of Program administration, and conform to the written travel policies of the recipient organization or the sponsoring SBDC organization. (Per diem rates, including lodging, shall not exceed those authorized by the recipient organization.) 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. A specific projected amount, based on the SBDC’s past experience,
where appropriate, must also be included in the budget for unplanned travel. A more detailed justification must be given for unplanned out-of-State travel. Any proposed unplanned out-of-State travel exceeding the approved budgeted amount for travel must be submitted to the Project Officer for approval on a case-by-case basis. Travel outside the United States must have prior approval by the AA/SBDCs on a case-by-case basis.

(h) Dues. Costs of memberships in business, technical, and professional organizations shall be allowable expenses. The use of Federal funds to pay dues for business, technical and professional organizations shall be permitted, provided that the payments are included in the budget proposal, are approved by the SBA and comply with §130.460(e).

§ 130.470 Fees.
An SBDC may charge clients a reasonable fee to cover the costs of Training sponsored or cosponsored by the SBDC, costs of services provided by or obtained from third parties, or the costs of providing Specialized Services. Fees may not be imposed for Counseling.

§ 130.480 Program income.
(a) Program income for recipient organizations or SBDC service providers based in universities or nonprofit organizations shall be subject to OMB requirements (see OMB Circular A-110). Program income for recipient organizations or SBDC service providers based in State or local governments shall be subject to OMB requirements (see the provisions of §7.e and Attachment E of OMB Circular A-102) and 13 CFR 143.25.
(b) Program income, including any interest earned on Program income, must be used to expand the quantity or quality of services, resources or outreach provided by the SBDC network. It cannot be used to satisfy the requirements for Matching Funds. The Project Officer shall monitor the use of Program income. Any unused Program income will be carried over to a subsequent budget period.
(c) SBDCs must report in detail on standard SBA forms receipts and expenditures of program income, including any income received through cosponsored activities. A narrative description of how Program income was used to accomplish Program objectives shall be included.

§ 130.500 Funding.
The SBA funds Cooperative Agreements through its internal Letter of Credit Replacement System (LORS), using SBA standard forms to establish and modify letters of credit. SBDCs must use SBA standard forms to draw down funds required to meet their estimated or actual expenses and to submit quarterly cash transactions reports used by SBA to monitor the frequency of drawdowns and the cash-on-hand balance. Repeated drawdowns in excess of immediate cash needs may result in the cancellation of the letter of credit. If interest results from the deposit of any drawdowns in an interest-bearing account, SBDCs, other than State government sponsored SBDCs, must report and return such interest annually to SBA.

§ 130.600 Cooperative agreement. [Reserved]

§ 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. Administrative requirements are contained in 13 CFR 143 and applicable OMB Circulars.

§ 130.620 Revisions and amendments to cooperative agreement.
(a) Requests for revisions. The recipient organization may request at any time one or more revisions to the Cooperative Agreement on an appropriate SBA form signed by the recipient organization's authorized representative (including a revised budget and budget narrative, if applicable). Revisions will normally relate to changes in scope, work or funding during the specified budget year.
§ 130.630 Dispute resolution procedures.

(a) Financial Disputes. (1) A recipient organization wishing to resolve a financial Dispute formally must submit a written statement describing the subject of the Dispute, together with any relevant documents or other evidence bearing on the Dispute, to the Grants Management Specialist, with copies to the Project Officer. The Grants Management Specialist shall 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 Grants Management Specialist, it may file an appeal with the AA/SBDCs within 30 calendar days of issuance of the unfavorable decision. The AA/SBDCs shall respond in writing to the recipient organization within 15 calendar days of receipt of the appeal.

(3) If the recipient organization receives an unfavorable decision from the AA/SBDCs, it may make a final appeal to the SBA Grants and Cooperative Agreements Appeals Committee (the “Committee”) within 30 calendar days of the date of issuance of the AA/SBDCs’ written decision. Copies of the appeal shall also be sent to the Grants Management Specialist and the Project Officer.

(4) Appeals must be in writing. Formal briefs and other technical forms of pleading are not required. Requests for a hearing will not be granted unless there are material facts substantially in dispute. Appeals must contain at least the following:

(i) Name and address of the recipient organization;

(ii) The SBA field office;

(iii) The Cooperative Agreement;

(iv) A statement of the grounds for appeal, with reasons why the appeal should be sustained;

(v) The specific relief desired on appeal; and

(vi) If a hearing is requested, a statement of the material facts which are substantially in dispute.

(5) The AA/SBDCs or the Committee may request from the SBDC or the District Office additional information or documentation at any stage in the proceedings.

(6) If a request for a hearing is granted, the Committee will provide the recipient organization with written instructions, and will afford the parties
§ 130.700 Suspension, termination and non-renewal.

(a) General. After SBA has entered into a Cooperative Agreement with a recipient organization, it shall not suspend, terminate or fail to renew the agreement unless SBA gives the recipient organization written notice setting forth the reasons and affording the recipient organization an opportunity for a hearing. Subject to this requirement and the provisions of §130.700(c) regarding non-renewal procedures for non-performance, the applicable general procedures for suspension and termination are contained in 13 CFR 143.43 and 143.44, and in OMB Circular A-110, Attachment L.

(b) Causes. Causes which may lead to suspension, termination, or failure to renew include non-performance, poor performance, unwillingness to implement changes to improve performance, or any of the following reasons:

(1) Disregard or material violation of these regulations;

(2) A willful or material failure to perform under the Cooperative Agreement or under these regulations;

(3) Conduct reflecting a lack of business integrity or honesty;

(4) A conflict of interest causing real or perceived detriment to a small business concern, a contractor, the SBDC or SBA;

(5) Improper use of Federal funds;

(6) Failure of a Lead Center or its subcenters to consent to audits or examination or to maintain required documents or records;

(7) Failure of the SBDC Director to work at the SBDC Lead Center on a full-time basis;

(8) Failure promptly to suspend or terminate the employment of an SBDC Director, subcenter Director or other key employee upon receipt of knowledge by the recipient organization and/or SBA that such individual is engaging in or has engaged in conduct resulting in a criminal conviction or civil judgment which would cause the public to question the SBDC’s business integrity, taking into consideration such factors as the magnitude, repetitiveness, harm caused and remoteness in time of the activity or activities underlying the conviction or judgment.
§ 130.810 SBA review authority.

(a) Site visits. The AA/SBDCs, or a representative, on notice to the SBDC Director, is authorized to make programmatic and financial review visits to SBDC service providers to inspect records and client files, and to analyze and assess SBDC activities.

(b) SBA examinations. SBA examiners shall perform a biannual programmatic

(9) Violation of the SBDC’s standards of conduct as specified in these rules and as established by the SBDC pursuant to these rules; or

(10) Any other cause not otherwise specified which materially and adversely affects the operation or integrity of an SBDC or the SBDC program.

(c) Non-Renewal Procedure. (1) Subject to §130.700(a), when an SBA District Director believes there is sufficient evidence of SBDC nonperformance, poor performance or unwillingness to implement changes to improve performance, under the terms of the Cooperative Agreement or these regulations, the District Director shall notify the SBDC Director and any other appropriate official of the recipient organization of an intention not to approve its renewal application.

(2) Notice can be submitted at any time during the budget period, but normally should be sent no later than 3 months prior to the due date for renewal applications at the District Office.

(3) The notice shall specifically cite the reasons for the intention not to renew. It must allow the recipient organization 60 days within which to change its operations to correct the problems cited in the notice, and to report to the Project Officer, in writing, regarding the results of such changes.

(4) If the recipient organization is unwilling or unable to address the specific problem areas to the satisfaction of the SBA District Office within the 60-day period, the SBA Project Officer shall have ten (10) calendar days after expiration of the 60 days to submit to the AA/SBDCs a written description of the unresolved issues, a summary of the positions of the District Office on the issues, and any supportive documentation.

(5) The AA/SBDCs shall transmit a written, final decision to the recipient organization, the SBDC Director, the SBA Project Officer and other appropriate SBA field office personnel within 30 calendar days of receipt of such documentation, unless an extension of time is mutually agreed upon by the recipient organization and the AA/SBDCs.

(6) The AA/SBDCs shall consider written documentation of the issues to be resolved, including all relevant correspondence between the Project Officer, District Director and any other SBA personnel and the affected recipient organization. At a minimum, such documentation shall commence with the first written notice of issues invoking the non-renewal procedure. In addition, the AA/SBDCs also may communicate with the recipient organization and appropriate SBA personnel.

(7) If the AA/SBDCs determines that the evidence submitted establishes nonperformance, ineffective performance or an unwillingness to implement suggested changes to improve performance, the AA/SBDCs shall have full discretion to order non-renewal of the SBDC. The SBA District Office shall then pursue proposals from other organizations interested in applying for SBDC designation. The incumbent SBDC shall have until the end of the budget period or 120 days, whichever is longer, to conclude operations and to submit close-out documents to the SBA District Office. Close-out procedures shall conform with applicable OMB Circulars.

(d) Effect of action on subcenter. If competing applications are being accepted, a subcenter of the previously funded recipient organization may apply for designation as the recipient organization, so long as the subcenter was not involved in the conduct leading to non-renewal or termination of the former recipient organization.

§ 130.800 Oversight of the SBDC program.

SBA shall monitor and oversee the Cooperative Agreement and ongoing operations of the SBDC network to ensure the effective and efficient use of Federal funds for the benefit of the small business community.
§ 130.820 Reports and recordkeeping.

(a) Records. The recipient organization shall maintain the records required for a Lead Center audit and SBA reports. Lead Centers and other SBDC service providers shall maintain detailed, complete and accurate client activity files, specifying counseling, training and other assistance provided.

(b) Reports. The recipient organization shall submit client service evaluations and performance and financial reports for SBA review to determine the quality of services provided by the SBDC, the completeness and accuracy of SBDC records, and actual SBDC network accomplishments compared to performance objectives.

(c) Performance reports. For recipient organizations in the Program for more than three years, interim reports shall be due 30 days after completion of six months of operation each year; for those recipient organizations in the Program three years or less, reports shall be due 30 days after completion of each of the first three quarters. The annual report shall include the second semiannual or the fourth quarter report and shall be due December 30 for fiscal year and March 30 for calendar year SBDCs. These reports shall reflect accurately the activities, accomplishments and deficiencies of the SBDC network.

(d) Financial reports. The recipient organization shall provide three quarterly and one annual financial report to the SBA Project Officer as set forth in the Program Announcement and the Cooperative Agreement, in compliance with OMB Circulars.

(e) Availability of records. As required by OMB (see Circular A–133), all SBDC service provider records shall be made available to SBA for review upon request.

§ 130.830 Audits and investigations.

(a) Access to records. Applicable OMB Circulars set forth the requirements concerning record access and retention.

(b) Audits—(1) Pre-award audit. Applicant organizations that propose to enter the Program for the first time may be subject to a pre-award audit conducted by or coordinated with the SBA Office of Inspector General. The purpose of a pre-award audit is to verify the adequacy of the accounting system, the suitability of posed costs and the nature and source of proposed Matching Funds.

(2) Interim or final audits. The recipient organization or SBA may conduct SBDC network audits. All audits will be conducted according to Government Auditing Standards, promulgated by the Comptroller General of the United States.

(i) The recipient organization will conduct its audits as a single audit of a recipient organization pursuant to OMB Circulars A–102, A–110, A–128, and A–133, as applicable.

(ii) The SBA Office of Inspector General or its agents will conduct, supervise, or coordinate SBA’s audits, which may, at SBA’s discretion, be audits of the SBDC network, even though single audits may have been performed. In such instances, SBA will conduct such audits in compliance with Government Auditing Standards and all applicable OMB Circulars.

(c) Investigations. SBA may conduct investigations as it deems necessary to determine whether any person or entity has engaged in acts or practices constituting a violation of the Act, any rule, regulation or order issued under that Act, or any other applicable Federal law.
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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), 637(a), 648(l), 656(i), and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Source: 61 FR 2683, Jan. 29, 1996, unless otherwise noted.


Subpart A—General Rules

§ 134.101 Definitions.

As used in this part:
AA/OHA means the Assistant Administrator for OHA.
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.
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.
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.
Judge means an Administrative Law Judge or an Administrative Judge of 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.
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.


§ 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...
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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 130 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) The eligibility of any bank or non-bank lender to continue to participate in SBA loan programs under the Act and part 120 of this chapter, or to do so with preferred or certified status, and any other appeal that is specifically authorized by part 120 of this chapter;

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) The rights, privileges, or obligations of development companies under section 504 of the Investment Act and part 120, subpart H, of this chapter;

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. “Size determinations” include 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;

(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) Appeals from the determination of the SBA under part 120 of this chapter to revoke or suspend a microloan intermediary or microloan non-lending technical assistance provider;

(n) Appeals from the following small disadvantaged business (SDB) determinations under part 124 of this chapter:

(1) SBA’s determination that an applicant firm does not qualify for certification, or that a certified SDB no longer qualifies for the program; and

(2) A Private Certifier’s ownership and control determination made on a firm’s application for certification;

(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 C.F.R. parts 180 and 2700;

(q) Appeals from the Service-Disabled Veteran-owned SBC Program ownership and control status under part 125 of this chapter;

(r) The decision of the Appropriate Management Official in SBA Employee Dispute Resolution Process cases (Employee Disputes) under Standard Operating Procedure 37 71 02 (available at http://www.sba.gov/library/soproom.html); and

§ 134.103 Rules applicable to time periods provided in this part.

(a) The day from which the time period is computed is excluded, but the last business day is counted, excluding Saturday, Sunday, or Federal holiday.

(b) At the Judge's initiative, or upon the motion of a party showing good cause, the Judge may modify any of the applicable time limits, other than those established by statute and those governing when a case may be commenced.

[61 FR 2683, Jan. 29, 1996, as amended at 67 FR 47246, July 18, 2002]

Subpart B—Rules of Practice for Most Cases

§ 134.201 Scope of the rules in this subpart B.

(a) The rules in this subpart generally apply to all proceedings over which OHA has jurisdiction, except for appeals from size determinations and NAICS code designations. Specific procedural rules pertaining to 8(a) program appeals and to proceedings under the Program Fraud Civil Remedies Act are set forth, respectively in subpart D of this part and part 142 of this chapter.

(b) In the case of a conflict between a particular rule in this subpart and a rule of procedure pertaining to OHA appearing in another subpart of this part or another part of this chapter, the latter rule shall govern.


§ 134.202 Commencement of cases.

(a) A party other than the SBA may commence a case by filing a written petition within the following time periods:

(1) Except as provided by paragraphs (a)(2) through (a)(5) of this section, no later than 45 days from the date of receipt of the SBA action or determination to which the petition relates;

(2) In proceedings for debt collection under part 140 of this chapter: no later than 15 days after receipt of a notice of indebtedness and intention to collect such debt by salary or administrative offset; in accordance with the time frames specified in § 140.11 of this chapter; with respect to administrative wage garnishment;

(3) In applications for an award of fees pursuant to subpart E of this part, no later than 30 days after the decision to which it applies becomes final;

(4) For 8(a) program suspension proceedings, see § 124.305 of this chapter;


(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.

[67 FR 47246, July 18, 2002, as amended at 70 FR 17587, Apr. 7, 2005]

§ 134.203 The petition.

(a) A petition must contain the following:

(1) The basis of OHA's jurisdiction;

(2) A copy of the SBA determination being appealed, if applicable, and date received;

(3) A clear and concise statement of the factual basis of the case;

(4) The relief being sought;

(5) The name, address, telephone number, facsimile number, and signature of the petitioner or its attorney;

(6) A certificate of service (see § 134.204(d)); and

(7) In a debt collection case, a statement showing when the petitioner received the SBA notice initiating the debt collection proceeding (see § 140.3 of this chapter).

(b) A petition also must contain additional information or documents as required by the applicable program regulations in this chapter or by other subparts of this part 134. For SBA Employee Disputes, see Standard Operating Procedure 37 71 02, available at www.sba.gov/library/soproom.html.
§ 134.204 Filing and service requirements.

(a) Methods of filing and service.
Pleadings or other submissions must be filed and served by mail, delivery, or facsimile. Mail includes first class (including certified and registered), express, and priority mail. For good cause, the Judge may order that filing or service be effected by one of these methods.

(b) Filing. Filing is the receipt of pleadings and other submissions at OHA.

(1) OHA’s address. OHA accepts filings between the hours of 8:30 a.m. and 5 p.m. eastern time at the following address: Docketing Clerk, Office of Hearings and Appeals, Small Business Administration, 409 3rd Street, SW., Washington, DC 20416. OHA’s telephone number is (202) 401–8203. The number for OHA’s facsimile machine is (202) 205–7059.

(2) The date of filing for pleadings and other submissions filed by mail, delivery, or facsimile is the date the filing is received at OHA. Any filing received at OHA after 5:00 p.m. eastern time is considered filed as of the next day.

(3) Exhibits. An exhibit, whether an original or a copy, must be authenticated or identified to be what it purports to be.

(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 is the mailing, delivery, or facsimile to all other parties of a copy of each pleading or other submission filed with OHA.

(1) Complete copies of all pleadings and other submissions filed with OHA must be served upon all other parties or, if represented, their authorized representatives or their attorneys, at their record addresses.

(2) The date of service is as follows: for facsimile, the date the facsimile is sent; for personal delivery by the party, its employee, or its attorney, the date the document is given to the party served; for commercial delivery, the date the document is given to the delivery service; for mail, the date of mailing. The date of mailing is the date of a U.S. Postal Service postmark or any other proof of mailing. If there is insufficient proof of mailing, there is a rebuttable presumption that the mailing was made five days before receipt.

(3) If the SBA is a party, the SBA must be served, as required by the applicable program regulations or by other subparts of this part 134. If the SBA office for service is not specified elsewhere, serve: Office of General Counsel, Small Business Administration, 409 Third Street, S.W., Washington, DC 20416. For SBA Employee Disputes, see Standard Operating Procedure 37 71 02, available at www.sba.gov/library/soproom.html.

(d) Certificate of service. A certificate of service shows how, when, and to whom service was made. Every pleading and other submission filed with OHA and served on the other parties must include a certificate of service. The certificate should state: “I certify that on [date], I caused the foregoing document to be served by [either ‘‘placing a copy in the mail,’’ ‘‘sending a copy by facsimile,’’ ‘‘personally delivering a copy,’’ or ‘‘giving a copy to a delivery service,’’] upon the following: [list name, address, telephone number, and facsimile number of each party served].” The certificate must be signed and include the typed name and title of the individual serving the pleading or other submission.

(1) 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.

[67 FR 47247, July 18, 2002]
§ 134.205 Motion for a more definite statement.

(a) Procedure. No later than 15 days after service of the petition or order to show cause, the respondent may file and serve a motion requesting a more definite statement of particular allegations in the petition.

(b) Stay. The filing and service of a motion for a more definite statement stays the time for filing and serving an answer or response. The Judge will establish the time for filing and serving an answer or response.

§ 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. For SBA Employee Disputes, see Standard Operating Procedure 37 71 02, available at www.sba.gov/library/soproom.html.

(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.

(b) Upon the filing of a petition appealing from an SBA determination, the Judge or the AA/OHA will issue an order informing all known parties of the date the appeal was filed. The respondent must file and serve a response to such a petition within 45 days after the filing of such a petition. The response need not admit or deny the allegations in the petition but shall set forth the respondent's positions in support of the SBA determination. The response must also set forth the name, address, telephone number, facsimile number, and signature of the respondent or its attorney.

(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.

§ 134.207 Amendments and supplemental pleadings.

(a) Amendments. Upon motion, 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.
§ 134.211 Motions.

(a) Contents. All motions must state the relief being requested, as well as the grounds and any authority for that relief.

(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. No later than 20 days after the service of a motion, all non-moving parties must serve and file a response or be deemed to have consented to the relief sought. Unless the Judge directs otherwise, the moving party will have no right to reply to a response, nor will oral argument be heard 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 has not been filed, the motion to dismiss stays the time to answer or respond. If the Judge denies the motion, and an answer or response has not been filed, the respondent must file the answer or response within 20 days after the order deciding the motion.

(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 days before the original deadline.

§ 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. 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.

§ 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. Subpoenas are not authorized for proceedings relating to internal Agency determinations, such as Employee Disputes.

(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 state the relevant 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 J judge. No oral argument will be heard on the motion unless the J judge directs otherwise.

§ 134.215 Interlocutory appeals.

(a) General. A motion for leave to take an interlocutory appeal from a J 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 J judge’s own initiative, the J 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 J 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 J judge.

§ 134.216 Alternative dispute resolution procedures.

At any time during the pendency of a case, the parties may submit a joint motion requesting that the J judge permit the use of alternative dispute resolution procedures to assist in resolving the matter. If the motion is granted, the J 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.

§ 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 J judge has express authority, under statute, SBA regulation or SBA standard operating procedures, to review the contents of a settlement agreement for legality, the J judge may order the parties to file a copy of the settlement agreement. Otherwise, upon the filing of a joint motion to dismiss, the J judge will issue an order dismissing the case. Settlement negotiations, and rejected settlement agreements, are not admissible into evidence.

§ 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 J judge. The AA/OHA will assign all other cases before OHA to either an Administrative Law J judge or an Administrative J 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 J 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 J judge’s own initiative, a J 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 immediately appealed to the AA/OHA, or to the Administrative Law
§ 134.219 Judge if the AA/OHA is the Judge, but that appeal will not stay proceedings in the case.

§ 134.219 Sanctions.

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:
(a) Fails to comply with an order of the Judge;
(b) Fails to comply with the rules set forth in this part;
(c) Acts in bad faith or for purposes of delay or harassment;
(d) Submits false statements knowingly, recklessly, or with deliberate disregard for the truth; or
(e) Otherwise acts in an unethical or disruptive manner.

§ 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.
(3) The Judge determines that an oral hearing is necessary in administrative wage garnishment proceedings conducted pursuant to §140.11 of this chapter.
(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 which obtains a witness’ 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.

§ 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.

§ 134.224 Standards for decision.

The decision of a Judge will be based upon a preponderance of the evidence.

§ 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) Public access. Except for information subject to a protective order, proprietary or confidential information
Small Business Administration § 134.228

withheld in accordance with this part, or any other information which is excluded from disclosure by law or regulation, the record will be available at OHA for public inspection during normal business hours. Copies of the documents available for public inspection may be obtained by the public upon payment of any duplication charges.

(c) 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.

§ 134.226 The decision.

(a) Contents. Following closure of the record, the Judge will issue a decision containing findings of fact and conclusions of relevant law, reasons for such findings and conclusions, and any relief ordered. The contents of the record will constitute the exclusive basis for a decision.

(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.

§ 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; and

(4) 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 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.

§ 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
§ 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.

§ 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.

§ 134.303 Advisory opinions.

The Office of Hearings and Appeals does not issue advisory opinions.

§ 134.304 Commencement of appeals from size determinations and NAICS code designations.

(a) Appeals from size determinations and NAICS code designations must be commenced by filing and serving an appeal petition as follows:

(1) If the appeal is from a size determination in a pending procurement or pending Government property sale, then the appeal petition must be filed and served within 15 days after appellant receives the size determination;

(2) If the appeal is from a size determination other than one in a pending procurement or pending Government property sale, then the appeal petition must be filed and served within 30 days after appellant receives the size determination;

(3) If the appeal is from a NAICS code designation, then the appeal petition must be filed and served within 10 days after the issuance of the initial solicitation. If the appeal relates to an amendment affecting the NAICS code, then the appeal petition must be filed and served within 10 days after the issuance of the amendment.
§ 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.

§ 134.309 Response to an appeal petition.

(a) Who may respond. Any person served with an appeal petition, any intervener, 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.

§ 134.310 Discovery.

Discovery will not be permitted in appeals from size determinations or NAICS code designations.

§ 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.

§ 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.

§ 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.

§ 134.315 The record.

Where relevant, the provisions of §134.225 (a), (b), and (c) 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.

§ 134.316 The decision.

(a) 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.

(b) 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.

(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.

(d) Reconsideration. The decision in a NAICS code appeal may not be reconsidered.

§ 134.317 Return of the case file.
Upon issuance of the decision, OHA will return the case file to the transmitting Area Office. The remainder of the record will be retained by OHA.
[67 FR 47250, July 18, 2002]

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.

§ 134.403 Service of appeal petition.
(a) Concurrent with its filing with OHA, a concern must also serve SBA’s Director, Office of Business Development and the appropriate Associate General Counsel in SBA’s Office of General Counsel with a copy of the petition, including attachments.
(1) For appeals relating to denials of program admission pursuant to § 124.206 of this title, suspensions of program assistance pursuant to § 124.305, or denials of requests for waivers pursuant to § 124.515, a petitioner must serve the SBA’s Associate General Counsel for Procurement Law.
(2) For appeals relating to early graduation pursuant to §§ 124.302 and 124.304 or termination pursuant to §§ 124.303 and 124.304, a petitioner must serve the SBA’s Associate General Counsel for Litigation.
(b) Serve the Director, Office of Business Development and the applicable Associate General Counsel at the Small Business Administration, 409 3rd Street, SW, Washington, DC 20416.

§ 134.404 Decision by Administrative Law Judge.
Appeal proceedings brought under this subpart will be conducted by an Administrative Law Judge.

§ 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 under § 134.202 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 by 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.
§ 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 reasonable, the Administrative Law Judge must uphold it on appeal.

(c) 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 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. 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) 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. 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). A remand under this section will be for a reasonable period.

§ 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.

§ 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.

§ 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.

Subpart E—Rules of Practice for Appeals From Service-Disabled Veteran Owned Small Business Concern Protests

§ 134.501 What is the scope of the rules in this subpart E?

(a) The rules of practice in this subpart E apply to all appeals to OHA from formal protest determinations made by the Director, Office of Government Contracting (D/GC) in connection with a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) protest relating to the status or ownership or control of the SDVO SBC, as set forth in §125.26 of this chapter. This includes appeals from determinations made by the D/GC that the protest was premature, untimely, nonspecific, or not based upon protestable allegations.

SOURCE: 70 FR 8927, Feb. 24, 2005, unless otherwise noted.
§ 134.502  Who may appeal?  
(b) Except where inconsistent with this subpart, the provisions of Subpart 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.

§ 134.503  When must a person file an appeal from an SDVO SBC protest determination?  
Appeals from an SDVO SBC protest determination must be commenced by filing and serving an appeal petition within 10 business days after the appellant receives the SDVO SBC protest determination (see § 134.204 for filing and service requirements). An untimely appeal will be dismissed.

§ 134.504  What are the effects of the appeal on the procurement at issue?  
The filing of an SDVO SBC appeal with OHA stays the procurement. However, the contracting officer may award the contract after receipt of an appeal if the contracting officer determines in writing that an award must be made to protect the public interest. A timely filed appeal applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the appeal.

§ 134.505  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 petition is appealing an SDVO SBC protest determination issued by the D/GC and the date the petitioner received the SDVO SBC protest determination;  
(3) A full and specific statement as to why the SDVO SBC 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 an SDVO SBC determination;  
(3) The protested concern (the business concern whose SDVO SBC 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) 205–6673.  
(c) Certificate of Service. The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

§ 134.506  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.

§ 134.507  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.

§ 134.508  What is the standard of review?  
The standard of review for an appeal of a SDVO SBC protest determination is whether the D/GC’s determination was based on clear error of fact or law. With respect to status determinations
on whether the owner is a veteran, service-disabled veteran, or veteran with a permanent and severe disability, the Judge will not review the determinations made by the U.S. Department of Veteran’s Affairs, U.S. Department of Defense, or such determinations identified by documents provided by the U.S. National Archives and Records Administration.

§ 134.509 When will a Judge dismiss an appeal?

(a) The Judge selected to preside over a protest appeal shall dismiss the appeal, if:

(1) The appeal does not, on its face, allege facts that if proven to be true, warrant reversal or modification of the determination;

(2) The appeal petition does not contain all of the information required in § 134.505;

(3) The appeal is untimely filed pursuant to §134.503 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

(4) The matter has been decided or is the subject of an adjudication before a court of competent jurisdiction over such matters.

(b) Once Appellant files an appeal, subsequent 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.

§ 134.510 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 7 business days after service of the appeal petition. The response should present argument.

§ 134.511 Will the Judge permit discovery and oral hearings?

Discovery will not be permitted and oral hearings will not be held.

§ 134.512 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.

§ 134.513 When is the record closed?

The record will close when the time to file a response to an appeal petition expires pursuant to 13 CFR 134.510.

§ 134.514 When must the Judge issue his or her decision?

The Judge shall issue a decision, insofar as practicable, within 15 business days after close of the record. If OHA does not issue its determination within the 15-day period, the contracting officer may award the contract, unless the contracting officer has agreed to wait for a final determination from the Judge.

§ 134.515 What are the effects of the Judge’s decision?

(a) A decision of the Judge under this subpart is the final agency decision and is binding on the parties. For the effects of the decision on the contract or procurement at issue, please see 13 CFR 125.28.

(b) The Judge may reconsider an appeal decision within 20 calendar days after service 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 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.

(c) The Judge may remand a proceeding to the D/GC for a new SDVO SBC determination if the latter 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 SDVO SBC determination.

Subpart F—Implementation of the Equal Access to Justice Act


§ 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 §134.405(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.

§ 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 §134.406 and you prevail over SBA in a final decision:

(a) The type of administrative proceeding which qualifies as an “adversary adjudication” under §134.403 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.

§ 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,
Small Business Administration

§ 134.610

You are eligible for possible reimbursement if you participated in the administrative proceeding only on behalf of persons or entities that are ineligible.

§ 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.

<table>
<thead>
<tr>
<th>If your participation in the proceeding was:</th>
<th>Eligibility requirements:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) As an individual rather than a business owner</td>
<td>(1) Personal net worth may not exceed 2 million dollars.</td>
</tr>
<tr>
<td>(2) As owner of an unincorporated business</td>
<td>(2) Personal net worth may not exceed 7 million dollars, and</td>
</tr>
<tr>
<td>(3) As a partnership, corporation, association, organization, or unit of local government.</td>
<td>(3) Business net worth may not exceed 7 million dollars, and</td>
</tr>
<tr>
<td>(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. 1141(a).</td>
<td>(4) No net worth limitations, and</td>
</tr>
</tbody>
</table>

§ 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;
§ 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 § 134.408), 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:

<table>
<thead>
<tr>
<th>Party</th>
<th>Required documents</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Individual, owner of unincorporated business, partnership, corporation, association, organization, or unit of local government.</td>
<td>(1) Net worth exhibit.</td>
</tr>
<tr>
<td>(2) Organization qualified as tax-exempt under 26 U.S.C. 501(c)(3).</td>
<td>(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.</td>
</tr>
<tr>
<td>(3) Tax-exempt religious organization not required to obtain a ruling from the Internal Revenue Service on its exempt status.</td>
<td>(3) Description of your organization and the basis for your belief you are exempt.</td>
</tr>
<tr>
<td>(4) Cooperative association as defined in 12 U.S.C. 1141(a) ...</td>
<td>(4) Copy of your charter or articles of incorporation, and Copy of your bylaws.</td>
</tr>
</tbody>
</table>

§ 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) Aggregate net worth for all affiliates; and

(4) Description of your organization and the basis for your belief you are exempt.
§ 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.

§ 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).

§ 134.616 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.

§ 134.615 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.

§ 134.614 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.

§ 134.613 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.

§ 134.618 How are 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.

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PART 136—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE SMALL BUSINESS ADMINISTRATION

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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.
Small Business Administration § 136.111

(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.


§§ 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 or 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 contractors, 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
Small Business Administration § 136.150

§ 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
§ 136.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, 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 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 Director, OEEOC, 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
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and the notice of appeal to the AA/EEOCCR.

(2) If a notice of appeal is 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 Director, OEOC, 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, 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 Director, OEOC, 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. The decision shall set forth the findings, 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
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the final determination may not be delegated to another agency.


PART 140—DEBT COLLECTION

Subpart A—Overview

Sec. 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
§ 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.

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 SBA 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 SBA initiate administrative wage garnishment proceedings? Whenever SBA determines you owe a delinquent non-tax debt, SBA may initiate administrative wage garnishment proceedings to withhold a portion of your wages to satisfy the debt.

(e) What notice must the SBA give you before beginning an administrative wage garnishment? (1) SBA 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) SBA’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 at SBA’s Office of Hearings and Appeals (OHA) 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) SBA will retain evidence of service showing when SBA mailed the pre-garnishment notice.

(f) What type of hearing must SBA give me?—(1) Procedural rules. Unless they expressly conflict with this section, the rules of procedure governing cases before OHA apply to administrative wage garnishment hearings.

(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 Judge determines that the issues in dispute cannot be resolved solely by review of the documentary evidence, for example, when the Judge finds that the validity of the claim turns on the issue of credibility or veracity.

(ii) If the Judge 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 Judge will accord you a “paper hearing,” that is, the Judge will decide the issues in dispute based upon a review of the written record. The Judge will set a reasonable deadline for the submission of evidence.
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(4) Effect of timely request for hearing. Subject to paragraph (f)(13) of this section (failure to appear), if the Judge determines your written request for a hearing was received at OHA by the 15th business day after SBA mailed the pre-garnishment notice, SBA will not issue a garnishment order before the Judge renders a decision.

(5) Untimely request for hearing. If the Judge determines your written request for a hearing was not received at OHA by the 15th business day after SBA mailed the pre-garnishment notice, SBA will provide a hearing to you. However, SBA may proceed with the issuance of a garnishment order and acceptance of payments unless the Judge 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 Judge, as designated by the Assistant Administrator for Hearings and Appeals.

(7) Procedure. After you request a hearing, the Judge 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 Judge 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 Judge must render a written decision within 60 days of the date on which your request for a hearing was received by OHA. If the Judge’s decision is not rendered within that time, and SBA had previously issued a garnishment order, SBA must suspend garnishment beginning on the 61st day. This suspension must continue until the Judge renders a decision.

(11) Content of decision. The written decision shall include:
(i) A summary of the facts presented;
(ii) The Judge’s findings, analysis and conclusions; and
(iii) The terms of any repayment schedule, if applicable.

(12) Final agency action. The Judge’s decision will be the final agency action 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 SBA receives an adverse decision from the Judge or information it believes justifies delaying or canceling garnishment, SBA 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 SBA mailed the pre-garnishment notice;
(ii) If you did make a timely request for a pre-garnishment hearing, within 30 days after the Judge renders a final 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
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pay, and the address for sending payments.

(3) SBA will retain evidence of service showing when it mailed the garnishment order.

(h) Certification by employer. Along with the garnishment order, SBA 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, SBA 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 SBA garnishment orders.

(ii) If amounts are being withheld from your pay because of a garnishment order issued before SBA’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 SBA 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, SBA 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 SBA 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 SBA 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 SBA’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 SBA notifies your employer to stop wage garnishment.

(j) Exclusions from garnishment. SBA may not garnish your wages if SBA knows you have been involuntarily unemployed at any time during the last 12 months. You are responsible for informing SBA of the facts and circumstances of your unemployment.

(k) Financial hardship. (1) If your wages are subject to a garnishment order issued by SBA, 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 SBA finds financial hardship, SBA will decide how much and how long to reduce the amount garnished from your pay. SBA will notify your employer of any reductions.

   (l) Ending garnishment. (1) After SBA has recovered the amount you owe, including interest, penalties, and administrative costs consistent with the FCCS, SBA will send a notice to your employer to stop wage garnishment with a copy to you.

   (2) SBA 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 SBA.

   (n) Refunds. (1) SBA 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) SBA determines that your employer continued submitting to SBA 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. SBA 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, SBA 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 SBA 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 SBA 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]
§ 142.33 What are the procedures for appealing the ALJ decision?
§ 142.34 Are there any limitations on the right to appeal to the Administrator?
§ 142.35 How does the Administrator dispose of an appeal?
§ 142.36 Can I obtain judicial review?
§ 142.37 What judicial review is available?
§ 142.38 Can the administrative complaint be settled voluntarily?
§ 142.39 How are civil penalties and assessments collected?
§ 142.40 What if the investigation indicates criminal misconduct?
§ 142.41 How does SBA protect the rights of defendants?

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 $5,000 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.

§ 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
§ 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; or
(3) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or
(4) Acts in reckless disregard of the truth or falsity of the claim or 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.

§ 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
§ 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 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
§ 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
(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.

§ 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
§ 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.
Small Business Administration

(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—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

Subpart A—General

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CHANGES, PROPERTY, AND SUBAWARDS

143.30 Changes.
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143.34 Copyrights.
143.35 Subawards to debarred and suspended parties.
§ 143.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§ 143.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§ 143.3 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and

goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from programmatic requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions mean the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for grant and subgrant in this section and except where qualified by Federal) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.
Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For non-construction grants, the SF-269 “Financial Status Report” (or other equivalent report); (2) for construction grants, the SF-271 “Outlay Report and Request for Reimbursement” (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. 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, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the United States Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of in-kind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee’s cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.
Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant to a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of grant in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than equipment as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. Termination does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§ 143.4 Applicability.

(a) General. Subparts A through D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of §143.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health...
Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)(19)(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) Entitlement programs. Entitlement programs enumerated above in §143.4(a)(3) through (8) are subject to subpart E.

§ 143.5 Effect on other issuances.
All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in §143.6.

§ 143.6 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.
Subpart B—Pre-Award Requirements

§ 143.10 Forms for applying for grants.

(a) Scope. (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) Authorized forms and instructions for governmental organizations. (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF–424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§ 143.11 State plans.

(a) Scope. The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, “Intergovernmental Review of Federal Programs,” States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) Requirements. A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) Assurances. In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) Amendments. A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ 143.12 Special grant or subgrant conditions for “high-risk” grantees.

(a) A grantee or subgrantee may be considered high risk if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or
(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

1. Payment on a reimbursement basis;
2. Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;
3. Requiring additional, more detailed financial reports;
4. Additional project monitoring;
5. Requiring the grantee or subgrantee to obtain technical or management assistance; or
6. Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

1. The nature of the special conditions/restriictions;
2. The reason(s) for imposing them;
3. The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and
4. The method of requesting reconsideration of the conditions/restrictions imposed.

Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

§ 143.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

1. Permit preparation of reports required by this part and the statutes authorizing the grant, and
2. Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

1. Financial reporting. Accurate, current, and complete disclosure of financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.
2. Accounting records. Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.
3. Internal control. Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.
4. Budget control. Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.
5. Allowable cost. Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.
6. Source documentation. Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.
7. Cash management. Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed
§ 143.21 Payment.

(a) Scope. This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) Basic standard. Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) Advances. Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) Reimbursement. Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency’s payments to the grantee or subgrantee will be based on the grantee’s or subgrantee’s actual rate of disbursement.

(e) Working capital advances. If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee’s disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee’s actual cash disbursements.

(f) Effect of program income, refunds, and audit recoveries on payment. (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) Withholding payments. (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall
be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with §143.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) Cash depositories. (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) Interest earned on advances. Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

§143.22 Allowable costs.

(a) Limitation on use of funds. Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) Applicable cost principles. For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

<table>
<thead>
<tr>
<th>For the costs of a—</th>
<th>Use the principles in—</th>
</tr>
</thead>
<tbody>
<tr>
<td>State, local or Indian tribal government.</td>
<td>OMB Circular A–87.</td>
</tr>
<tr>
<td>Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A–122 as not subject to that circular.</td>
<td>OMB Circular A–122.</td>
</tr>
<tr>
<td>Educational institutions.</td>
<td>OMB Circular A–21.</td>
</tr>
<tr>
<td>For-profit organization other than a hospital and an organization named in OMB Circular A–122 as not subject to that circular.</td>
<td>48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.</td>
</tr>
</tbody>
</table>

§143.23 Period of availability of funds.

(a) General. Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) Liquidation of obligations. A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF–269). The Federal agency may extend this deadline at the request of the grantee.

§143.24 Matching or cost sharing.

(a) Basic rule: Costs and contributions acceptable. With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.
(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) Qualifications and exceptions—(1) Costs borne by other Federal grant agreements. Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) General revenue sharing. For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) Cost or contributions counted towards other Federal costs-sharing requirements. Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) Costs financed by program income. Costs financed by program income, as defined in §143.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in §143.25(g).)

(5) Services or property financed by income earned by contractors. Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) Records. Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) Special standards for third party in-kind contributions. (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) Valuation of donated services—(1) Volunteer services. Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee’s or subgrantee’s organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar
work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) Employees of other organizations. When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee’s normal line of work, the services will be valued at the employee’s regular rate of pay exclusive of the employee’s fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) Valuation of third party donated supplies and loaned equipment or space.
(1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.
(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) Valuation of third party donated equipment, buildings, and land. If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) Awards for capital expenditures. If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.
(2) Other awards. If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2)(i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.
(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in §143.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property’s market value at the time it was donated.

(f) Valuation of grantee or subgrantee donated real property for construction/acquisition. If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) Appraisal of real property. In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§ 143.25 Program income.

(a) General. Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement,
§ 143.26 Non-Federal audit.

(a) Basic Rule. Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A-133, “Audits of States, Local Governments, and Non-Profit Organizations.” The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) Subgrantees. State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends $300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year shall:

and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) Definition of program income. Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. During the grant period is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) Cost of generating program income. If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) Governmental revenues. Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) Royalties. Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See §143.34.)

(f) Property. Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§143.31 and 143.32.

(g) Use of program income. Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) Deduction. Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) Addition. When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) Cost sharing or matching. When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) Income after the award period. There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.
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(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, "Uniform Administrative Requirements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A–110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee’s own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) Auditor selection. In arranging for audit services, §143.36 shall be followed.

§143.30 Changes, Property, and Subawards

(a) General. Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) Relation to cost principles. The applicable cost principles (see §143.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) Budget changes—(1) Nonconstruction projects. Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency’s share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) Construction projects. Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) Combined construction and nonconstruction projects. When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) Programmatic changes. Grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a
grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of §143.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) Additional prior approval requirements. The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) Requesting prior approval. (1) A request for prior approval of any budget revision will be in the same budget format the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see §143.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and approve or disapprove the request in writing. A grantees will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee’s approved proposal which requires Federal prior approval, the grantee will obtain the Federal agency’s approval before approving the subgrantee’s request.

§ 143.31 Real property.

(a) Title. Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) Use. Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) Disposition. When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) Retention of title. Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency’s percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) Sale of property. Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency’s percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) Transfer of title. Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee’s percentage of participation in the purchase of the real property to the current fair market value of the property.

§ 143.32 Equipment.

(a) Title. Subject to the obligations and conditions set forth in this section, title to equipment acquired under a
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grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) States. A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) Use. (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in §143.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) Management requirements. Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) Disposition. When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of without further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency’s share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) Federal equipment. In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with
§ 143.33 Supplies.

(a) Title. Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) Disposition. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§ 143.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

§ 143.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

§ 143.36 Procurement.

(a) States. When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) Procurement standards. (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:
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(i) The employee, officer or agent,
(ii) Any member of his immediate family,
(iii) His or her partner, or
(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee’s or subgrantee’s officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee’s and subgrantee’s officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and
(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with
the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee’s or subgrantee’s protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) Competition. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of §143.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a brand name product instead of allowing an equal description to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a brand name or equal description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) Methods of procurement to be followed—(1) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to
the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in §143.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors’ qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.
(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) Contracting with small and minority firms, women's business enterprise and labor surplus area firms. (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:
   (i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
   (ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
   (iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;
   (iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;
   (v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and
   (vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2)(i) through (v) of this section.

(f) Contract cost and price. (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see §143.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) Awarding agency review. (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have
the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when:

(i) A grantee’s or subgrantee’s procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a ‘‘brand name’’ product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency’s right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) Bonding requirements. For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency’s interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The ‘‘bid guarantee’’ shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A ‘‘performance bond’’ is one executed in connection with a contract to assure fulfillment of all the contractor’s obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A ‘‘payment bond’’ is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) Contract provisions. A grantee’s and subgrantee’s contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.
§ 143.37 Subgrants.

(a) States. States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 143.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) All other grantees. All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis)
Small Business Administration

§ 143.40 Monitoring and reporting program performance.

(a) Monitoring by grantees. Grantees are responsible for managing the day- 
to-day operations of grant and subgrant supported activities. Grantees 
must monitor grant and subgrant supported activities to assure compliance 
with applicable Federal requirements and that performance goals are being 
achieved. Grantee monitoring must cover each program, function or activ-

(b) Nonconstruction performance reports. The Federal agency may, if it de-
cides that performance information available from subsequent applications 
contains sufficient information to meet its programmatic needs, require 
the grantee to submit a performance report only upon expiration or termin-
ation of grant support. Unless waived by the Federal agency this report will 
be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) Construction performance reports. For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) Significant developments. Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a
§ 143.41 Financial reporting.

(a) General. (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or
(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extent required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(b) Financial Status Report—(1) Form. Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with §143.41(e)(2)(iii) of this section.

(2) Accounting basis. Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) Frequency. The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) Due date. When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) Federal Cash Transactions Report—(1) Form. (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272,
Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) Forecasts of Federal cash requirements. Forecasts of Federal cash requirements may be required in the Remarks section of the report.

(3) Cash in hands of subgrantees. When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days’ needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) Frequency and due date. Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) Request for advance or reimbursement—(1) Advance payments. Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) Reimbursements. Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in §143.41(b)(3).

(e) Outlay report and request for reimbursement for construction programs. (1) Grants that support construction activities paid by reimbursement method.

(i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in §143.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in §143.41(b)(3).

(2) Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.

(i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by §143.41(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in §143.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in §143.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) Accounting basis. The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by §143.41(b)(2).
(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or
(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.
(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see §143.36(i)(10).

(b) Length of retention period. (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.
(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.
(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.
(4) Starting date of retention period—(1) General. When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.
(2) Real property and equipment records. The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.
(3) Records for income transactions after grant or subgrant support. In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.
(4) Indirect cost rate proposals, cost allocations plans, etc. This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).
(i) If submitted for negotiation. If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.
(ii) If not submitted for negotiation. If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal, plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.
(d) Substitution of microfilm. Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.
(e) Access to records—(1) Records of grantees and subgrantees. The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to
make audits, examinations, excerpts, and transcripts.

(2) Expiration of right of access. The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) Restrictions on public access. The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records. Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

§ 143.43 Enforcement.

(a) Remedies for noncompliance. If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

1. Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

2. Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

3. Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

4. Withhold further awards for the program, or

5. Take other remedies that may be legally available.

(b) Hearings, appeals. In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) Effects of suspension and termination. Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

1. The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination and are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

2. The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) Relationship to debarment and suspension. The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to “Debarment and Suspension” under E.O. 12549 (see § 143.35).

§ 143.44 Termination for convenience.

Except as provided in § 143.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 143.43 or paragraph (a) of this section.

Subpart D—After-the-Grant Requirements

§ 143.50 Closeout.

(a) General. The Federal agency will close out the award when it determines
§ 143.51 Later disallowances and adjustments.

The closeout of a grant does not affect:
(a) The Federal agency’s right to disallow costs and recover funds on the basis of a later audit or other review;
(b) The grantee’s obligation to return any funds due as a result of later refunds, corrections, or other transactions;
(c) Records retention as required in § 143.42;
(d) Property management requirements in §§ 143.31 and 143.32; and
(e) Audit requirements in § 143.26.

§ 143.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:
(1) Making an administrative offset against other requests for reimbursements;
(2) Withholding advance payments otherwise due to the grantee, or
(3) Other action permitted by law.
(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.
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Subpart F—Agency Reports

§ 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 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 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
§ 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
§ 146.400 Penalties.
(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 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 $10,000 and not more than $100,000 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 $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, 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.
§ 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 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
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§ 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 extension, 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

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 ☐ Subawaardee
   Tier ______, if known:
   Congressional District, if known:

5. If Reporting Entity in No. 4 is Subawaardee, 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
    of individual, last name, first name, Mls:
    b. Individuals Performing Services (including address if different from No. 9a)
       (last name, first name, Mls):

11. Amount of Payment (check all that apply): $  __________
    ☐ actual ☐ planned

12. Form of Payment (check all that apply):
    a. cash ☐
    b. linked; specify: nature ______
    value ______

13. Type of Payment (check all that apply):
    a. retainer ☐
    b. one-time fee ☐
    c. commission ☐
    d. contingent fee ☐
    e. deferred ☐
    f. other; specify: ______

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:

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 facts upon which reliance was placed by the IRS 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 $5,000 and not more than $10,000 for each such failure.

   Signature: __________________________
   Print Name: _________________________
   Title: ________________________________
   Telephone No.: _____________________ Date: ______

   Federal Use Only:

   Authorized for Local Reproduction
   Standard Form: LLL-A

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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 subaward, 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." 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.
9. (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).
10. 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 minutes 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.
PART 147—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (NONPROCUREMENT)

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:

<table>
<thead>
<tr>
<th>If you are . . .</th>
<th>see subparts . . .</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) A recipient who is not an individual</td>
<td>A, B and E.</td>
</tr>
<tr>
<td>(2) A recipient who is an individual</td>
<td>A, C and E.</td>
</tr>
<tr>
<td>(3) A(n) SBA awarding official</td>
<td>A, D and E.</td>
</tr>
</tbody>
</table>

§ 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.

Subpart B—Requirements for Recipients Other Than Individuals

§ 147.200 What must I do to comply with this part?
§ 147.205 What must I include in my drug-free workplace statement?
§ 147.210 To whom must I distribute my drug-free workplace statement?
§ 147.215 What must I include in my drug-free awareness program?
§ 147.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?
§ 147.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?
§ 147.230 How and when must I identify workplaces?

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?

Subpart D—Responsibilities of SBA Awarding Officials

§ 147.400 What are my responsibilities as an SBA awarding official?

Subpart E—Violations of This Part and Consequences

§ 147.500 How are violations of this part determined for recipients other than individuals?
§ 147.505 How are violations of this part determined for recipients who are individuals?
§ 147.510 What actions will the Federal Government take against a recipient determined to have violated this part?
§ 147.515 Are there any exceptions to those actions?

Subpart F—Definitions

§ 147.605 Award.
§ 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:

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<th>If...</th>
<th>then you...</th>
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<tr>
<td>(a) The performance period of the award is less than 30 days.</td>
<td>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.</td>
</tr>
<tr>
<td>(b) The performance period of the award is 30 days or more.</td>
<td>must have the policy statement and program in place within 30 days after award.</td>
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</table>
§ 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—

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<th>If . . .</th>
<th>then you . . .</th>
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<tr>
<td>(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.</td>
<td>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.</td>
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</tbody>
</table>

(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.

(c) 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
§ 147.615 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 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 non-procurement 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, Government-wide Debarment and Suspension (Non-procurement), 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.
# CHAPTER III—ECONOMIC DEVELOPMENT ADMINISTRATION, DEPARTMENT OF COMMERCE

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PART 300—GENERAL INFORMATION

Sec. 300.1 Introduction and mission.
300.2 EDA Headquarters and regional offices.
300.3 Definitions.


SOURCE: 71 FR 56675, Sept. 27, 2006, unless otherwise noted.

§ 300.1 Introduction and mission.
EDA was created by Congress pursuant to the Public Works and Economic Development Act of 1965 to provide financial assistance to both rural and urban distressed communities. EDA’s mission is to lead the Federal economic development agenda by promoting innovation and competitiveness, preparing American regions for growth and success in the worldwide economy. EDA will fulfill its mission by fostering entrepreneurship, innovation and productivity through investments in infrastructure development, capacity building and business development in order to attract private capital investments and higher-skill, higher-wage jobs to Regions experiencing substantial and persistent economic distress. EDA works in partnership with distressed Regions to address problems associated with long-term economic distress as well as to assist those Regions experiencing sudden and severe economic dislocations, such as those resulting from natural disasters, conversions of military installations, changing trade patterns and the depletion of natural resources. EDA investments generally take the form of Grants to or Cooperative Agreements with Eligible Recipients.

§ 300.2 EDA Headquarters and regional offices.
(a) EDA’s Headquarters Office is located at: U.S. Department of Commerce, Economic Development Administration, 14th Street and Constitution Avenue, NW., Washington, DC 20230.
(b) EDA has regional offices throughout the United States and each regional office’s contact information may be found on EDA’s Internet Web site at http://www.eda.gov or in the notice of Federal Funding Opportunity published annually by EDA. Please contact the appropriate regional office to learn about EDA Investment opportunities in your Region.

§ 300.3 Definitions.
As used in this chapter, the following terms shall have the following meanings:

Assistant Secretary means the Assistant Secretary for Economic Development within the Department.

Comprehensive Economic Development Strategy or CEDS means a strategy that meets the requirements of § 303.7 of this chapter.

Cooperative Agreement means the financial assistance award of EDA funds to an Eligible Recipient under PWEDA, where substantial involvement is expected between EDA and the Eligible Recipient in carrying out the activities contemplated in an agreement between the parties. See 31 U.S.C. 6305.

Department means the U.S. Department of Commerce.

District Organization means an organization meeting the requirements of § 304.2 of this chapter.

Economic Development District or District or EDD means any Region in the United States designated by EDA as an Economic Development District under § 304.1 of this chapter (or such regulation as was previously in effect before the effective date of this section) and also includes any economic development district designated as such under section 403 of PWEDA, as in effect on February 10, 1999.

EDA means the Economic Development Administration within the Department.

Eligible Applicant means an entity qualified to be an Eligible Recipient or its authorized representative.

Eligible Recipient means any of the following:

1. City or other political subdivision of a State, including a special purpose unit of State or local government engaged in economic or infrastructure development activities, or a consortium of political subdivisions;

2. State;
§ 300.3

(3) Institution of higher education or a consortium of institutions of higher education;

(4) Public or private non-profit organization or association, including a community or faith-based non-profit organization, acting in cooperation with officials of a political subdivision of a State;

(5) District Organization;

(6) Indian Tribe or a consortium of Indian Tribes; or

(7) Private individual or for-profit organization, but only for Training, Research and Technical Assistance Investments under part 306 of this chapter.

Federal Agency means a department, agency or instrumentality of the United States government.

Federal Funding Opportunity or FFO means the notice EDA publishes annually at http://www.grants.gov and on EDA’s Internet Web site at http://www.eda.gov that describes the amounts, particular application procedures, funding priorities, special circumstances and other relevant information concerning EDA’s Investment programs for the year. EDA may also periodically publish FFOs on specific programs or initiatives.

Federally-Declared Disaster means a Federally-Declared Disaster, a fisheries resource disaster pursuant to section 312(a) of the Magnuson-Stevens Fishery Conservation and Management Act, as amended (16 U.S.C. 1861a(a)), or other federally-declared disasters pursuant to applicable law.

Grant means the financial assistance award of EDA funds to an Eligible Recipient under PWEDA, where the Eligible Recipient bears responsibility for carrying out the activities contemplated in an agreement between the parties. See 31 U.S.C. 6304.

Immediate Family means a person’s spouse, parents, grandparents, siblings, children and grandchildren, but does not include distant relatives, such as cousins, unless the distant relative lives in the same household as the person.

In-Kind Contribution(s) means non-cash contributions, which may include contributions of space, equipment, services and assumptions of debt that are fairly evaluated by EDA and that satisfy applicable Federal cost principles and the requirements of 15 CFR parts 14 or 24, as applicable.

Indian Tribe means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native Village or Regional Corporation as defined in or established under the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601 et seq.), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. This term includes the governing body of an Indian tribe, non-profit Indian corporation (restricted to Indians), Indian authority, or other non-profit Indian tribal organization or entity; provided that the Indian tribal organization or entity is wholly owned by, and established for the benefit of, the Indian tribe or Alaska Native Village.

Interested Party means any officer, employee or member of the board of directors or other governing board of the Recipient, including any other parties that advise, approve, recommend or otherwise participate in the business decisions of the Recipient, such as agents, advisors, consultants, attorneys, accountants or shareholders. An Interested Party also includes the Interested Party’s Immediate Family and other persons directly connected to the Interested Party by law or through a business arrangement.

Investment or Investment Assistance means an EDA Grant or Cooperative Agreement entered into by EDA and a Recipient.

Investment Rate means, as set forth in §301.4 of this chapter, the amount of the EDA Investment in a particular Project expressed as a percentage of the total Project costs.

Local Share or Matching Share means the non-EDA funds and any In-Kind Contributions that are approved by EDA and provided by Recipients or third parties as a condition of an Investment. The Matching Share may include funds from other Federal Agencies only if authorized by statute that allows such use, which may be determined by EDA’s reasonable interpretation of such authority.
Presidentially-Declared Disaster means a major disaster or emergency declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5121 et seq.).

Private Sector Representative means, with respect to any for-profit enterprise, any senior management official or executive holding a key decision-making position, or that person's designee.

Project means the proposed or authorized activity (or activities) the purpose of which fulfills EDA's mission and program requirements as set forth in PWEDA and this chapter and which may be funded in whole or in part by EDA Investment Assistance.


Recipient means an entity receiving EDA Investment Assistance, including any EDA-approved successor to the entity.

Region or Regional means an economic unit of human, natural, technological, capital or other resources, defined geographically. Geographic areas comprising a Region need not be contiguous or defined by political boundaries, but should constitute a cohesive area capable of undertaking self-sustained economic development. For the limited purposes of determining economic distress levels and Investment Rates pursuant to part 301 of this chapter, a Region may also comprise a specific geographic area defined solely by its level of economic distress, as set forth in §§301.3(a)(2) and 301.3(a)(3) of this chapter.

Regional Commission means any of the following:

1. The Appalachian Regional Commission established under chapter 143 of title 40, United States Code;
2. The Delta Regional Authority established under subtitle F of the Consolidated Farm and Rural Development Act (7 U.S.C. 2009aa et seq.);
4. The Northern Great Plains Regional Authority established under subtitle G of the Consolidated Farm and Rural Development Act (7 U.S.C. 2009bb et seq.).

Special Impact Area means a Region served by a Project for which the requirements of section 302 of PWEDA and §303.7 of this chapter have, upon an application filed by an Eligible Recipient pursuant to section 214 of PWEDA and part 310 of this chapter, been waived in whole or in part by the Assistant Secretary.

Special Need means a circumstance or legal status arising from actual or threatened severe unemployment or economic adjustment problems resulting from severe short-term or long-term changes in economic conditions, including:

1. Substantial outmigration or population loss;
2. Underemployment; that is, employment of workers at less than full-time or at less skilled tasks than their training or abilities permit;
3. Military base closures or realignments, defense contractor reductions-in-force, or U.S. Department of Energy defense-related funding reductions;
4. Natural or other major disasters or emergencies;
5. Extraordinary depletion of natural resources;
6. Closing or restructuring of an industrial firm or loss of a major employer;
7. Negative effects of changing trade patterns; or
8. Other circumstances set forth in an FFO.

State means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

Trade Act means title II, chapters 3 and 5, of the Trade Act of 1974, as amended (19 U.S.C. 2341 et seq.).

United States means all of the States.
PART 301—ELIGIBILITY, INVESTMENT RATE AND PROPOSAL AND APPLICATION REQUIREMENTS

Subpart A—General

Sec. 301.1 Overview of eligibility requirements.

Subpart B—Applicant Eligibility

301.2 Applicant eligibility.

Subpart C—Economic Distress Criteria

301.3 Economic distress levels.

Subpart D—Investment Rates and Matching Share Requirements

301.4 Investment rates.
301.5 Matching share requirements.
301.6 Supplementary investment assistance.

Subpart E—Proposal and Application Requirements; Evaluation Criteria

301.7 Investment assistance proposal.
301.9 Proposal selection criteria.
301.10 Formal application requirements.


Source: 71 FR 56675, Sept. 27, 2006, unless otherwise noted.

Subpart A—General

§ 301.1 Overview of eligibility requirements.

In order to receive EDA Investment Assistance, an applicant and the Project proposed by the applicant must satisfy each of the following requirements:

(a) The applicant must be an Eligible Applicant as set forth in subpart B of this part;

(b) The Region in which the Project will be located must meet the economic distress criteria set forth in subpart C of this part;

(c) The sources of funding for the Project must fulfill the Investment Rate and Matching Share requirements set forth in subpart D of this part;

(d) EDA must select the Eligible Applicant's Project and the Eligible Applicant must satisfy the formal application requirements set forth in subpart E of this part; and

(e) The Project must meet the general requirements set forth in part 302 (General Terms and Conditions for Investment Assistance) and the specific program requirements (as applicable) set forth in part 303 (Planning Investments and Comprehensive Economic Development Strategies), part 304 (Economic Development Districts), part 305 (Public Works and Economic Development Investments), part 306 (Training, Research and Technical Assistance Investments), or part 307 (Economic Adjustment Assistance Investments) of this chapter.

Subpart B—Applicant Eligibility

§ 301.2 Applicant eligibility.

(a) An Eligible Applicant for EDA Investment Assistance is defined in § 300.3 of this chapter.

(b) An Eligible Applicant that is a non-profit organization must include in its application for Investment Assistance a resolution passed by (or a letter signed by) an authorized representative of a general purpose political subdivision of a State, acknowledging that it is acting in cooperation with officials of such political subdivision. EDA may waive this cooperation requirement for certain Projects of a significant Regional or national scope under parts 306 or 307 of this chapter. See §§ 306.3(b), 306.6(b) and 307.5(b) of this chapter.

Subpart C—Economic Distress Criteria

§ 301.3 Economic distress levels.

(a) Part 305 (Public Works and Economic Development Investments) and part 307 (Economic Adjustment Assistance Investments).

(1) Except as otherwise provided by this paragraph (a), for a Project to be eligible for Investment Assistance under parts 305 or 307 of this chapter, the Project must be located in a Region that, on the date EDA receives an application for Investment Assistance, is subject to one (or more) of the following economic distress criteria:

(i) An unemployment rate that is, for the most recent twenty-four (24) month
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period for which data are available, at least one (1) percent greater than the national average unemployment rate;

(ii) Per capita income that is, for the most recent period for which data are available, eighty (80) percent or less of the national average per capita income;
or

(iii) A Special Need, as determined by EDA.

(2) A Project located within an Economic Development District, which is located in a Region that does not meet the economic distress criteria of paragraph (a)(1) of this section, is also eligible for Investment Assistance under parts 305 or 307 of this chapter if EDA determines that the Project will be of “substantial direct benefit” to a geographic area within the District that meets the criteria of paragraph (a)(1) of this section. For this purpose, a Project provides a “substantial direct benefit” if it provides significant employment opportunities for unemployed, underemployed or low-income residents of the geographic area within the District.

(3) A Project located in a geographic area of poverty or high unemployment that meets the requirements of paragraph (a)(1) of this section, but which is located in a Region that overall does not meet the requirements of paragraph (a)(1) of this section, is eligible for Investment Assistance under parts 305 or 307 of this chapter without regard to political or other subdivisions or boundaries.

(4) EDA will determine the economic distress levels pursuant to this subsection at the time EDA receives an application for Investment Assistance as follows:

(i) For economic distress levels based upon the unemployment rate or per capita income requirements, EDA will base its determination upon the most recent Federal data from other sources (including data available from the Census Bureau and the Bureau of Economic Analysis, Labor Statistics, Indian Afflairs or any other Federal source determined by EDA to be appropriate). If no Federal data are available, an Eligible Applicant must submit to EDA the most recent data available from the State.

(ii) For economic distress based upon a Special Need, EDA will conduct the independent analysis it deems necessary under the facts and circumstances of a given case. Eligible Applicants are encouraged to submit reliable data substantiating their claim of a Special Need.

(b) Part 303 (Planning Investments) and part 306 (Training, Research and Technical Assistance Investments). There are no minimum economic distress level requirements for Investment Assistance awarded to Projects under parts 303 or 306 of this chapter.

(c) Part 304 (Economic Development Districts). For EDA to designate a Region as an Economic Development District under part 304 of this chapter, such Region must:

(1) Contain at least one (1) geographic area that fulfills the economic distress criteria set forth in paragraph (a)(1) of this section and is identified in an approved CEDS; and

(2) Meet the Regional eligibility requirements set forth in § 304.1 of this chapter.

(d) EDA reserves the right to reject any documentation of Project eligibility that it determines is inaccurate or otherwise unreliable.

Subpart D—Investment Rates and Matching Share Requirements

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Investment rates.

(a) Minimum Investment Rate. There is no minimum Investment Rate for a Project.

(b) Maximum Investment Rate.

(1) General rule. Except as otherwise provided by this paragraph (b) or paragraph (c) of this section, the maximum EDA Investment Rate for all Projects shall, after the application of Table 1 in paragraph (b)(1)(ii) of this subsection, not exceed the sum of: (x)
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Fifty (50) percent, plus (y) up to an additional thirty (30) percent based on the relative needs of the Region in which the Project is located, as determined by EDA.

(i)(A) Relative needs. In determining the relative needs of the Region in which the Project is located, EDA will prioritize allocations of its Investment Assistance to ensure that the level of economic distress of a Region, rather than a preference for a specific geographic area or a specific type of economic distress, is the primary factor in allocating its Investment Assistance. In making this determination, EDA will take into consideration the following measures of economic distress:

(1) The severity of the unemployment rate and the duration of the unemployment in the Region;
(2) The per capita income levels and the extent of underemployment in the Region;
(3) The outmigration of population and the extent to which such outmigration is causing economic injury in the Region;

(4) Such other factors as EDA deems relevant in determining the relative needs of the Region in which the Project is located.

(B) A Project is eligible for the maximum allowable Investment Rate as determined by EDA between the time EDA receives the application for Investment Assistance and the time that EDA awards Investment Assistance to the Project; however, the burden is on the Eligible Applicant to establish the relative needs of the Region in which the Project is located.

(ii) Table 1. Table 1 of this paragraph sets forth the maximum allowable Investment Rate for Projects located in Regions subject to certain levels of economic distress. In cases where Table 1 produces divergent results (i.e., where Table 1 produces more than one (1) maximum allowable Investment Rate based on the Region’s levels of economic distress), the higher Investment Rate produced by Table 1 shall be the maximum allowable Investment Rate for the Project.

TABLE 1

<table>
<thead>
<tr>
<th>Projects located in regions in which:</th>
<th>Maximum allowable investment rates (percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) The twenty-four (24) month unemployment rate is at least 225% of the national average; or</td>
<td>80</td>
</tr>
<tr>
<td>(B) The per capita income is not more than 50% of the national average</td>
<td>80</td>
</tr>
<tr>
<td>(C) The twenty-four (24) month unemployment rate is at least 200% of the national average; or</td>
<td>70</td>
</tr>
<tr>
<td>(D) The per capita income is not more than 60% of the national average</td>
<td>70</td>
</tr>
<tr>
<td>(E) The twenty-four (24) month unemployment rate is at least 175% of the national average; or</td>
<td>60</td>
</tr>
<tr>
<td>(F) The per capita income is not more than 65% of the national average</td>
<td>60</td>
</tr>
<tr>
<td>(G) The twenty-four (24) month unemployment rate is at least 1% greater than the national average; or</td>
<td>50</td>
</tr>
<tr>
<td>(H) The per capita income is not more than 80% of the national average</td>
<td>50</td>
</tr>
</tbody>
</table>

(2) Projects subject to a Special Need. EDA shall determine the maximum allowable Investment Rate for Projects subject to a Special Need (as determined by EDA pursuant to § 301.3(a)(1)(iii)) based on the actual or threatened overall economic situation of the Region in which the Project is located. However, unless the Project is eligible for a higher Investment Rate pursuant to paragraph (b)(5) of this section, the maximum Investment Rate for any Project subject to a Special Need shall be eighty (80) percent.

(3) Projects under part 303.

(i) The minimum Investment Rate for Projects under part 303 of this chapter shall be fifty (50) percent.

(ii) Except as otherwise provided in paragraph (b)(3)(iii) of this section or in paragraph (b)(5) of this section, the maximum allowable Investment Rate for Projects under part 303 of this chapter shall be the maximum allowable Investment Rate set forth in Table 1 for the most economically distressed county or other equivalent political unit (e.g., parish) within the Region. The maximum allowable Investment Rate shall not exceed eighty (80) percent.
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(iii) In compelling circumstances, the Assistant Secretary may waive the application of the first sentence in paragraph (b)(3)(ii) of this section. The Assistant Secretary shall not delegate the authority to grant a waiver under this paragraph.

(4) Projects under part 306. The maximum allowable Investment Rate for Projects under part 306 of this chapter shall generally be determined based on the relative needs (as determined under paragraph (b)(1) of this section) of the Region which the Project will serve. However, for Projects of a national scope under part 306 of this chapter and for all other Projects under part 306 of this chapter (after the application of paragraph (b)(1) of this section), the Assistant Secretary has the discretion to establish a maximum Investment Rate of up to one hundred (100) percent where the Project:

(i) Merits, and is not otherwise feasible without, an increase to the Investment Rate; or

(ii) Will be of no or only incidental benefit to the Eligible Recipient.

(5) Special Projects. Table 2 of this paragraph sets forth the maximum allowable Investment Rate for certain special Projects as follows:

<table>
<thead>
<tr>
<th>Projects</th>
<th>Maximum allowable investment rates (percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Projects of Indian Tribes</td>
<td>100</td>
</tr>
<tr>
<td>Projects under part 307 of this chapter located in Presidentially-Declared Disaster areas for which EDA receives an application for Investment Assistance for post-disaster economic recovery efforts pursuant to a supplemental appropriation within eighteen (18) months of the date of such declaration</td>
<td>100</td>
</tr>
<tr>
<td>Projects of States or political subdivisions of States that the Assistant Secretary determines have exhausted their effective taxing and borrowing capacity, or Projects of non-profit organizations that the Assistant Secretary determines have exhausted their effective borrowing capacity</td>
<td>100</td>
</tr>
<tr>
<td>Projects under parts 305 or 307 that receive performance awards pursuant to § 308.2 of this chapter</td>
<td>100</td>
</tr>
<tr>
<td>Projects located in a District that receive planning performance awards pursuant to § 308.3 of this chapter</td>
<td>100</td>
</tr>
</tbody>
</table>

(c) Federal Funding Opportunity notices may provide additional Investment Rate criteria and standards to ensure that the level of economic distress of a Region, rather than a preference for a geographic area or a specific type of economic distress, is the primary factor in allocating Investment Assistance.

§ 301.5 Matching share requirements.

The required Matching Share of a Project’s eligible costs may consist of cash or In-Kind Contributions. In addition, the Eligible Applicant must show that the Matching Share is committed to the Project, will be available as needed and is not or will not be conditioned or encumbered in any way that would preclude its use consistent with the requirements of the Investment Assistance.

§ 301.6 Supplementary investment assistance.

(a) Pursuant to a request by an Eligible Applicant, EDA Investment Assistance may supplement grants awarded in another “designated Federal grant program,” if the Eligible Applicant qualifies for financial assistance under such program, but is unable to provide the required non-Federal share because of the Eligible Applicant’s economic situation. For purposes of this section, a “designated Federal grant program” means any Federal grant program that:

(1) Provides assistance in the construction or equipping of public works, public service or development facilities;

(2) Is designated by EDA as eligible for supplementary Investment Assistance under this section; and

(3) Assists Projects that are otherwise eligible for Investment Assistance and consistent with the Eligible Applicant’s CEDS.

(b) For Projects located in Regions meeting the criteria of §301.3(a), the EDA Investment Assistance, combined with funds from a designated Federal grant program, may be at the maximum allowable Investment Rate, even
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if the designated Federal grant program has a lower grant rate. If the designated Federal grant program has a grant rate higher than the maximum EDA Investment Rate, the combination of EDA Investment and other Federal funds may exceed the EDA Investment Rate; provided, the EDA share of total funding does not exceed the maximum allowable Investment Rate.

Subpart E—Proposal and Application Requirements; Evaluation Criteria

§ 301.7 Investment Assistance proposal.

(a) The EDA Investment Assistance process begins with the submission of an Investment Assistance proposal. Investment proposals are submitted on a Pre-application for Investment Assistance (Form ED–900P or any successor form) that may be obtained from EDA’s Internet Web site at http://www.eda.gov or from the appropriate regional office. EDA generally accepts proposals on a competitive and continuing basis to respond to market forces in Regional economies. The timing with which competitive investment opportunities arise, as determined by the criteria set forth in §301.8, paired with the availability of funds in a given fiscal year, will affect EDA’s ability to participate in any given Project. EDA will evaluate all proposals using the criteria set forth in §301.8 and will:

(1) Solicit a formal application from the proponent;
(2) Return the proposal to the proponent for specified deficiencies and suggest resubmission upon corrections; or
(3) Deny the proposal for specifically stated reasons and notify the proponent.

(b) For certain programs, EDA may instruct an Eligible Applicant to submit an Application for Investment Assistance (Form ED–900A or any successor form) in lieu of the Pre-application for Investment Assistance (Form ED–900P or any successor form).

§ 301.8 Proposal evaluation criteria.

EDA will screen all proposals for the feasibility of the budget presented and conformance with EDA statutory and regulatory requirements. EDA will assess the economic development needs of the affected Region in which the proposed Project will be located (or will service), as well as the capability of the proponent to implement the proposed Project. EDA will also consider the degree to which an Investment in the proposed Project will satisfy one (1) or more of the following criteria:

(a) Is market-based and results driven. An Investment will capitalize on a Region’s competitive strengths and will positively move a Regional economic indicator measured and evaluated by EDA on a performance matrix system, such as EDA’s Balanced Scorecard or other performance matrix. These Regional economic indicators include measures such as an increased number of higher-skill, higher-wage jobs, increased tax revenue, or increased private sector investment resulting from an Investment.

(b) Has strong organizational leadership. An Investment will have strong leadership, relevant Project management experience and a significant commitment of human resources talent to ensure a Project’s successful execution.

(c) Advances productivity, innovation and entrepreneurship. An Investment will embrace the principles of entrepreneurship, enhance Regional industry clusters and leverage and link technology innovators and local universities to the private sector to create the conditions for greater productivity, innovation, and job creation.

(d) Looks beyond the immediate economic horizon, anticipates economic changes and diversifies the local and Regional economy. An Investment will be part of an overarching, long-term Comprehensive Economic Development Strategy that enhances a Region’s success in achieving a rising standard of living by supporting existing industry clusters, developing emerging new clusters or attracting new Regional economic drivers.

(e) Demonstrates a high degree of local commitment. An Investment will exhibit:

(1) High levels of local government or non-profit Matching Share and private sector leverage;
(2) Clear and unified leadership and support by local elected officials; and
(3) Strong cooperation among the business sector, relevant Regional partners and Federal, State and local governments.
(f) Other criteria as set forth in the applicable FFO.

§ 301.9 Proposal selection criteria.
(a) EDA will review completed proposal materials for compliance with the requirements set forth in PWEDA, this chapter, the applicable FFO and other applicable Federal statutes and regulations. From those proposals that meet EDA’s technical and legal requirements, EDA will select proposals for further consideration based on:
1. The availability of funds;
2. The competitiveness of the proposals based on the criteria set forth in §301.8; and
3. The funding priority considerations identified in the applicable FFO.
(b) EDA will endeavor to notify proponents regarding whether their proposals are selected as soon as practicable.

§ 301.10 Formal application requirements.
(a) General. For Projects selected from successful proposals, EDA will invite the proponents to submit a formal application for Investment Assistance. The appropriate regional office will provide application materials and guidance in completing them. The applicant will generally have thirty (30) days to submit the completed application materials to the applicable regional office. EDA staff will work with the applicant to resolve application deficiencies.
(b) Formal application. Each formal application for EDA Investment Assistance must:
1. Include evidence of applicant eligibility (as set forth in §301.2) and of economic distress (as set forth in §301.3);
2. Identify the sources of funds, both eligible Federal and non-EDA, and In-Kind Contributions that will constitute the required Matching Share for the Project (see the Matching Share requirements under §301.5); and
3. For construction Projects under parts 305 or 307 of this chapter, include a CEDS acceptable to EDA pursuant to part 303 of this chapter or otherwise incorporate by reference a current CEDS that EDA approves for the Project. The requirements of the preceding sentence shall not apply to:
   (i) Strategy Grants, as defined in §307.3 of this chapter; and
   (ii) Projects located in a Region designated as a Special Impact Area pursuant to part 310 of this chapter.

PART 302—GENERAL TERMS AND CONDITIONS FOR INVESTMENT ASSISTANCE

Sec. 302.1 Environment.
302.2 Procedures in disaster areas.
302.3 Project servicing for loans, loan guarantees and Investment Assistance.
302.4 Public information.
302.5 Relocation assistance and land acquisition policies.
302.6 Additional requirements; Federal policies and procedures.
302.7 Amendments and changes.
302.8 Pre-approval Investment Assistance costs.
302.9 Inter-governmental review of Projects.
302.10 Attorneys’ and consultants’ fees; employment of expediters and administrative employees.
302.11 Economic development information clearinghouse.
302.12 Project administration, operation and maintenance.
302.13 Maintenance of standards.
302.14 Records and audits.
302.15 Acceptance of certifications by Eligible Applicants.
302.16 Reports by recipients.
302.17 Conflicts of interest.
302.18 Post-approval requirements.
302.19 Indemnification.
302.20 Civil rights.


SOURCE: 71 FR 56675, Sept. 27, 2006, unless otherwise noted.
amended (Pub. L. 91–190; 42 U.S.C. 4321 et seq., as implemented under 40 CFR chapter V) ("NEPA"), and all applicable Federal environmental statutes, regulations and Executive Orders. These authorities include the implementing regulations of NEPA requiring EDA to provide public notice of the availability of project-specific environmental documents, such as environmental impact statements, environmental assessments, findings of no significant impact, and records of decision, to the affected or interested public, as specified in 40 CFR 1506.6(b). Depending on the Project's location, environmental information concerning specific Projects can be obtained from the Environmental Officer in the appropriate EDA regional office as listed in the applicable FFO.

§ 302.2 Procedures in disaster areas.

When non-statutory EDA administrative or procedural conditions for Investment Assistance awards under PWEDA cannot be met by an Eligible Applicant as the result of a disaster, EDA may waive such conditions.

§ 302.3 Project servicing for loans, loan guaranties and Investment Assistance.

EDA will provide Project servicing to borrowers who received EDA loans or EDA-guaranteed loans and to lenders who received EDA loan guaranties under any EDA-administered program. Project servicing includes but is not limited to loans made under PWEDA prior to the effective date of the Economic Development Administration Reform Act of 1990, as amended (2 U.S.C. 661c(e)).

(c) In the event that EDA determines it necessary or desirable to take actions to protect or further the interests of EDA in connection with loans, loan guaranties or evidence of purchased debt, EDA may:

(1) Assign or sell at public or private sale or otherwise dispose of for cash or credit, in its discretion and upon such terms and conditions as it shall determine to be reasonable, any evidence of debt, contract, claim, personal or real property, or security assigned to or held by it in connection with any EDA loans, EDA-guaranteed loans or Investment Assistance extended under PWEDA;

(2) Collect or compromise all obligations assigned to or held by it in connection with any EDA loans, EDA-guaranteed loans or Investment Assistance awarded under PWEDA until such time as such obligations may be referred to the Attorney General of the United States for suit or collection; and

(3) Take any and all other actions determined to be necessary or desirable in purchasing, servicing, compromising, modifying, liquidating, or otherwise administratively processing or disposing of loans or loan guaranties made or evidence of purchased debt in connection with any EDA loans, EDA-guaranteed loans or Investment Assistance awarded under PWEDA.

§ 302.4 Public information.


§ 302.5 Relocation assistance and land acquisition policies.

Recipients of EDA Investment Assistance under PWEDA and the Trade Act (States and political subdivisions of States and non-profits organizations, as applicable) are subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Pub. L. 91–646; 42 U.S.C. 4601 et seq.). See 15 CFR part 11.
§ 302.6 Additional requirements; Federal policies and procedures.

Recipients are subject to all Federal laws and to Federal, Department and EDA policies, regulations and procedures applicable to Federal financial assistance awards, including but not limited to 15 CFR part 14, the Uniform Administrative Requirements for Grants and Cooperative Agreements with Institutions of Higher Education, Hospitals, other Non-Profit and Commercial Organizations, and 15 CFR part 24, the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, as applicable.

§ 302.7 Amendments and changes.

(a) Recipients shall submit requests for amendments to Investment awards in writing to EDA for approval and shall provide such information and documentation as EDA deems necessary to justify the request.

(b) Any changes to Projects made without EDA's approval are made at the Recipient's risk of non-payment of costs, suspension, termination or other applicable EDA action with respect to the Investment.

§ 302.8 Pre-approval Investment Assistance costs.

Project activities carried out before approval of Investment Assistance shall be carried out at the sole risk of the Eligible Applicant. Such activity is subject to the rejection of the application, the disallowance of costs, or other adverse consequences as a result of non-compliance with EDA or Federal requirements, including but not limited to procurement requirements, civil rights requirements, Federal labor standards, or Federal environmental, historic preservation and related requirements.

§ 302.9 Inter-governmental review of projects.

(a) When an Eligible Applicant is not a State, Indian Tribe or other general purpose governmental authority, the Eligible Applicant must afford the appropriate general purpose local government authority (the "Authority") in the Region a minimum of fifteen (15) days to review and comment on a proposed Project under EDA's Public Works and Economic Development program or a proposed construction Project or RLF Grant under EDA's Economic Adjustment Assistance program. Under these programs, Eligible Applicants shall furnish the following with their applications: If no comments are received from the Authority, a statement of efforts made to obtain such comments; or, if comments are received from the Authority, a copy of the comments and a statement of any actions taken to address such comments.

(b) As required by 15 CFR part 13 and Executive Order 12372, "Intergovernmental Review of Federal Programs," as amended, if a State has adopted a process under Executive Order 12372 to review and coordinate proposed Federal financial assistance and direct Federal development (commonly referred to as the "single point of contact review process"), all Eligible Applicants must also give State and local governments a reasonable opportunity to review and comment on the proposed Project, including review and comment from area-wide planning organizations in metropolitan areas, as provided for in 15 CFR part 13.

§ 302.10 Attorneys' and consultants' fees; employment of expediters and administrative employees.

(a) General. Investment Assistance awarded under PWEDA shall not directly or indirectly reimburse any attorneys' or consultants' fees incurred in connection with obtaining Investment Assistance and contracts under PWEDA.

(b) Employment of expediters and administrative employees. Investment Assistance under PWEDA shall not be awarded to any Eligible Applicant, unless the owners, partners or officers of the Eligible Applicant:

(1) Certify to EDA the names of any attorneys, agents and other persons engaged by or on behalf of the Eligible Applicant for the purpose of expediting applications made to EDA in connection with obtaining Investment Assistance under PWEDA and the fees paid or
§ 302.11 Economic development information clearinghouse.

Pursuant to section 502 of PWEDA, EDA maintains an economic development information clearinghouse on its Internet Web site at http://www.eda.gov.

§ 302.12 Project administration, operation and maintenance.

EDA shall approve Investment Assistance awards only if, as determined in its sole discretion, the Project for which such Investment Assistance is awarded will be properly and efficiently administered, operated and maintained.

§ 302.13 Maintenance of standards.

All laborers and mechanics employed by contractors or subcontractors on Projects receiving Investment Assistance under PWEDA shall be paid wages at rates not less than those prevailing on similar construction in the locality, as determined by the U.S. Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40 United States Code. EDA shall not extend any Investment Assistance under this chapter for a Project without first obtaining adequate assurance that these labor standards will be maintained upon the construction work. The U.S. Secretary of Labor shall have, with respect to the labor standards specified in this provision, the authority and functions set forth in Reorganization Plan No. 14 of 1950 (15 FR 3176 (May 25, 1950); 64 Stat. 1267) and section 3145 of title 40, United States Code.

§ 302.14 Records and audits.

(a) Records. Recipients of Investment Assistance under PWEDA shall keep such records as EDA shall require, including records that fully disclose:

(1) The amount and the disposition by the Recipient of the proceeds of the awarded Investment Assistance;

(2) The total cost of the Project that the Investment Assistance funds;

(3) The amount and nature of the portion of Project costs provided by other sources; and

(4) Such other records as EDA determines will facilitate an effective audit.

(b) Audits. The Recipient shall permit the Assistant Secretary, the Inspector General of the Department, the Comptroller General of the United States and/or any of their respective agents or representatives access to its properties in order to examine all books, correspondence, and records, including without limitation computer programs and data processing software, to verify the Recipient’s compliance with Investment Assistance requirements.

§ 302.15 Acceptance of certifications by Eligible Applicants.

EDA will accept an Eligible Applicant’s certifications, accompanied by evidence satisfactory to EDA, that the Eligible Applicant meets the requirements for receiving Investment Assistance.

§ 302.16 Reports by Recipients.

(a) In general, each Recipient must submit reports to EDA at intervals and in the manner that EDA shall require, except that EDA shall not require any report to be submitted more than ten (10) years after the date of closeout of the Investment Assistance.

(b) Each report must contain a data-specific evaluation of the effectiveness of the Investment Assistance provided in fulfilling the Project’s purpose (including alleviation of economic distress) and in meeting the objectives of PWEDA. Data used by a Recipient in preparing reports shall be accurate and verifiable as determined by EDA, and
§ 302.18 Post-approval requirements.

(a) General. A Recipient must comply with all financial, performance, progress report and other requirements set forth in the terms and conditions of the Investment Assistance, including any special terms and applicable Federal cost principles (collectively, “Post-Approval Requirements”). A Recipient’s failure to comply with Post-Approval Requirements may result in the disallowance of costs, termination of the Investment Assistance award, or other adverse consequences to the Recipient.

(b) Prohibition on direct or indirect financial or personal benefits. (1) An Interested Party shall not receive any direct or indirect, financial or personal benefits in connection with the award of Investment Assistance or its use for payment or reimbursement of costs by or to the Recipient. Recipients shall establish safeguards to prohibit an Interested Party from using its position for a purpose that constitutes or presents the appearance of personal or organizational conflicts of interest or of personal gain. See also 15 CFR 14.42 and 24.36(b)(3); Forms SF–424B and SF–424D.

(2) An Interested Party shall also not, directly or indirectly, solicit or accept any gift, gratuity, favor, entertainment or other benefit having monetary value, for himself or herself or for another person or entity, from any person or organization which has obtained or seeks to obtain Investment Assistance from EDA.

(3) Costs incurred in violation of any conflicts of interest rules contained in this chapter or in violation of any assurances by the Recipient may be denied reimbursement.

(4) See §315.15 of this chapter for special conflicts of interest rules for Trade Adjustment Assistance Investments.

(c) Special rules for Revolving Loan Fund (“RLF”) Grants. In addition to the rules set forth in this section:

(1) An Interested Party of a Recipient of an RLF Grant shall not receive, directly or indirectly, any personal or financial benefits resulting from the disbursement of RLF loans;

(2) A Recipient of an RLF Grant shall also not lend RLF funds to an Interested Party; and

(3) Former board members of a Recipient of an RLF Grant and members of his or her Immediate Family shall not receive a loan from such RLF for a period of two (2) years from the date that the board member last served on the RLF’s board of directors.

§ 302.17 Conflicts of interest.

(a) General. It is EDA’s and the Department’s policy to maintain the highest standards of conduct to prevent conflicts of interest in connection with the award of Investment Assistance or its use for reimbursement or payment of costs (e.g., procurement of goods or services) by or to the Recipient. A conflict of interest generally exists when an Interested Party participates in a matter that has a direct and predictable effect on the Interested Party’s personal or financial interests. A conflict may also exist where there is an appearance that an Interested Party’s objectivity in performing his or her responsibilities under the Project is impaired. For example, an appearance of impairment of objectivity may result from an organizational conflict where, because of other activities or relationships with other persons or entities, an Interested Party is unable to render impartial assistance, services or advice to the Recipient, a participant in the Project or to the Federal government. Additionally, a conflict of interest may result from non-financial gain to an Interested Party, such as benefit to reputation or prestige in a professional field.

(b) Prohibition on direct or indirect financial or personal benefits. (1) An Interested Party shall not receive any direct or indirect, financial or personal benefits in connection with the award of Investment Assistance or its use for payment or reimbursement of costs by or to the Recipient. Recipients shall establish safeguards to prohibit an Interested Party from using its position for a purpose that constitutes or presents the appearance of personal or organizational conflicts of interest or of personal gain. See also 15 CFR 14.42 and 24.36(b)(3); Forms SF–424B and SF–424D.

(2) An Interested Party shall also not, directly or indirectly, solicit or accept any gift, gratuity, favor, entertainment or other benefit having monetary value, for himself or herself or for another person or entity, from any person or organization which has obtained or seeks to obtain Investment Assistance from EDA.

(3) Costs incurred in violation of any conflicts of interest rules contained in this chapter or in violation of any assurances by the Recipient may be denied reimbursement.

(4) See §315.15 of this chapter for special conflicts of interest rules for Trade Adjustment Assistance Investments.

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(1) An Interested Party of a Recipient of an RLF Grant shall not receive, directly or indirectly, any personal or financial benefits resulting from the disbursement of RLF loans;

(2) A Recipient of an RLF Grant shall also not lend RLF funds to an Interested Party; and

(3) Former board members of a Recipient of an RLF Grant and members of his or her Immediate Family shall not receive a loan from such RLF for a period of two (2) years from the date that the board member last served on the RLF’s board of directors.

§ 302.18 Post-approval requirements.

(a) General. A Recipient must comply with all financial, performance, progress report and other requirements set forth in the terms and conditions of the Investment Assistance, including any special terms and applicable Federal cost principles (collectively, “Post-Approval Requirements”). A Recipient’s failure to comply with Post-Approval Requirements may result in the disallowance of costs, termination of the Investment Assistance award, or other adverse consequences to the Recipient.
(b) Part 307 (Economic Adjustment Assistance Investments). Recipients of Economic Adjustment Assistance Investments under part 307 of this chapter must comply with the Post-Approval Requirements set forth in §307.6 of this chapter.

§302.19 Indemnification.
To the maximum extent permitted by law, a Recipient shall indemnify and hold EDA harmless from any liability that EDA may incur due to the actions or omissions of the Recipient.

§302.20 Civil rights.
(a) Discrimination is prohibited by a Recipient or Other Party (as defined in paragraph (b) of this section) with respect to a Project receiving Investment Assistance under PWEDA, or by an entity receiving Adjustment Assistance (as defined in §315.2 of this chapter) under the Trade Act, in accordance with the following authorities:
(1) Section 601 of Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d et seq.) (proscribing discrimination on the basis of race, color, or national origin), and the Department’s implementing regulations found at 15 CFR part 8;
(2) 42 U.S.C. 3123 (proscribing discrimination on the basis of sex in Investment Assistance provided under PWEDA) and 42 U.S.C. 6709 (proscribing discrimination on the basis of sex under the Local Public Works Program), and the Department’s implementing regulations found at 15 CFR 8.7 through 8.15;
(3) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) (proscribing discrimination on the basis of disabilities), and the Department’s implementing regulations found at 15 CFR part 8b;
(4) The Age Discrimination Act of 1975, as amended (42 U.S.C. 6101 et seq.) (proscribing discrimination on the basis of age), and the Department’s implementing regulations found at 15 CFR part 20; and
(5) Other Federal statutes, regulations and Executive Orders, as applicable.
(b) Definitions. (1) For purposes of this section, an “Other Party” means an “other party subject to this part,” as defined in 15 CFR 8.3(l), and includes an entity which (or which is intended to) creates and/or saves fifteen (15) or more permanent jobs as a result of Investment Assistance; provided that such entity is also either specifically named in the application as benefiting from the Project, or is or will be located in an EDA building, port, facility, or industrial, commercial or business park constructed or improved in whole or in part with Investment Assistance prior to EDA’s final disbursement of Investment Assistance funds.
(2) Additional applicable definitions are provided in 15 CFR part 8.
(c) No Recipient or Other Party shall intimidate, threaten, coerce or discriminate against any person for the purpose of interfering with any right or privilege secured by 42 U.S.C. 3123 or 42 U.S.C. 6709, or because the person has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this section.
(d) All Recipients of Investment Assistance under PWEDA, all Other Parties and all entities receiving Adjustment Assistance under the Trade Act must submit to EDA written assurances that they will comply with applicable laws, EDA regulations, Department regulations, and such other requirements as may be applicable, prohibiting discrimination.
(e) Reporting and other procedural matters are set forth in 15 CFR parts 8, 8a, 8b, 8c and 20.
§ 303.1 Purpose and scope.

The purpose of EDA Planning Investments is to provide support to Planning Organizations for the development, implementation, revision or replacement of Comprehensive Economic Development Strategies, and for related short-term Planning Investments and State plans designed to create and retain higher-skill, higher-wage jobs, particularly for the unemployed and underemployed in the nation’s most economically distressed Regions. EDA’s Planning Investments support partnerships with District Organizations, Indian Tribes, community development corporations, non-profit regional planning organizations and other Eligible Recipients. Planning activities supported by these Investments must be part of a continuous process involving the active participation of Private Sector Representatives, public officials and private citizens, and include:

(a) Analyzing local economies;
(b) Defining economic development goals;
(c) Determining Project opportunities; and
(d) Formulating and implementing an economic development program that includes systematic efforts to reduce unemployment and increase incomes.

§ 303.2 Definitions.

In addition to the defined terms set forth in § 300.3 of this chapter, the following terms used in this part shall have the following meanings:

Planning Investment means the award of EDA Investment Assistance under section 203 of PWEDA and this part.

Planning Organization means a Recipient whose purpose is to develop and implement a CEDS for a specific EDA-approved Region under section 203 of PWEDA.

Strategy Committee means the committee or other entity identified by the Planning Organization as responsible for the development, implementation, revision or replacement of the CEDS for the Planning Organization.

§ 303.3 Application requirements and evaluation criteria.

(a) For Planning Investment awards, EDA uses the general application evaluation criteria set forth in § 301.8 of this chapter. In addition, applications for Planning Investments must include information about the following:

(1) The proposed scope of work for the development, implementation, revision or replacement of the CEDS, or the relation of the CEDS to the proposed short-term planning activities or the State plan;

(2) Qualifications of the Eligible Applicant to implement the goals and objectives resulting from the CEDS, short-term planning activities or the State plan;

(3) The involvement of the Region’s business leadership at each stage of the preparation of the CEDS, short-term planning activities or State plan;

(4) Extent of broad-based representation and involvement of the Region’s civic, business, labor, minority and other interests in the Eligible Applicant’s economic development activities; and

(5) Feasibility of the proposed scope of work to create and retain higher-skill, higher-wage jobs through implementation of the CEDS.

(b) In addition to the criteria set forth in paragraph (a) of this section, funded Recipients are evaluated on the basis of the extent of continuing economic distress within the Region, their past performance, and the overall effectiveness of their CEDS.

(c) For Planning Investment awards to a State, the Assistant Secretary shall also consider the extent to which the State will integrate and coordinate its CEDS with local and Economic Development District plans.

(d) The Investment Rates for Planning Investments will be determined in accordance with § 301.4 of this chapter.

§ 303.4 Award requirements.

(a) Planning Investments shall function in conjunction with any other available Federal, State or local planning assistance to ensure adequate and
§ 303.5 Effective planning and economical use of funds.

(b) Except in compelling circumstances as determined by the Assistant Secretary, EDA will not provide Planning Investments for multiple CEDS that address the needs of an identical or substantially similar Region.

(c) EDA will provide a Planning Investment for the period of time required to develop, revise or replace, and implement a CEDS, generally in thirty-six (36) month renewable Investment award periods.

§ 303.5 Eligible administrative expenses.

In accordance with applicable Federal cost principles, Planning Investments may be used to pay the direct and indirect costs incurred by a Planning Organization in the development, implementation, revision or replacement of a CEDS and for related short-term planning activities.

§ 303.6 EDA-funded CEDS process.

If EDA awards Investment Assistance to a Planning Organization to develop, revise or replace a CEDS, the Planning Organization must follow the procedures set forth in this section:

(a) The Planning Organization must appoint a Strategy Committee. The Strategy Committee must represent the main economic interests of the Region and must include Private Sector Representatives as a majority of its membership. In addition, the Planning Organization should ensure that the Strategy Committee includes public officials, community leaders, representatives of workforce development boards, institutions of higher education, minority and labor groups, and private individuals. The Strategy Committee representing Indian Tribes or States may vary.

(b) The Planning Organization must develop and submit to EDA a CEDS that:

(1) Complies with the requirements of § 303.7; and

(2) Was made available for review and comment by the public for a period of at least thirty (30) days prior to submission to EDA.

(c)(1) After obtaining EDA approval of the CEDS, the Planning Organization must submit annually an updated CEDS performance report to EDA.

(2) The Planning Organization must submit a new or revised CEDS to EDA at least every five (5) years, unless EDA or the Planning Organization determines that a new or revised CEDS is required earlier due to changed circumstances.

(3) Any updated CEDS performance report that results in a change of the requirements set forth in § 303.7(b)(3) of the EDA-accepted CEDS or any new or revised CEDS, must be available for review and comment by the public in accordance with paragraph (b)(2) of this section.

(d) If EDA determines that implementation of the CEDS is inadequate, it will notify the Planning Organization in writing and the Planning Organization shall submit to EDA a new or revised CEDS.

(e) If any part of a Region is covered by one or more of the Regional Commissions as set forth in section 404 of PWEDA, the Planning Organization shall ensure that a copy of the CEDS is provided to the Regional Commission(s).

§ 303.7 Requirements for Comprehensive Economic Development Strategies.

(a) General. CEDS are designed to bring together the public and private sectors in the creation of an economic roadmap to diversify and strengthen Regional economies. The CEDS should analyze the Regional economy and serve as a guide for establishing Regional goals and objectives, developing and implementing a Regional plan of action, and identifying investment priorities and funding sources. Public and private sector partnerships are critical to the implementation of the integral elements of a CEDS set forth in paragraph (b) of this section. As a performance-based plan, the CEDS will serve a critical role in a Region's efforts to defend against economic dislocations due to global trade, competition and other events resulting in the loss of jobs and private investment.
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(b) Technical requirements. A CEDS must be the result of a continuing economic development planning process, developed with broad-based and diverse public and private sector participation, and shall contain the following:

(1) A background of the economic development situation of the Region with a discussion of the economy, population, geography, workforce development and use, transportation access, resources, environment and other pertinent information;

(2) An in-depth analysis of economic and community development problems and opportunities, including:
   (i) Incorporation of relevant material from other government-sponsored or supported plans and consistency with applicable State and local workforce investment strategies; and
   (ii) An identification of past, present and projected future economic development investments in the Region covered;

(3) A section setting forth goals and objectives necessary to solve the economic development problems of the Region;

(4) A discussion of community and private sector participation in the CEDS effort;

(5) A section listing all suggested Projects and the projected numbers of jobs to be created as a result thereof;

(6) A section identifying and prioritizing vital Projects, programs and activities that address the Region’s greatest needs or that will best enhance the Region’s competitiveness, including sources of funding for past and potential future Investments;

(7) A section identifying economic clusters within the Region, focusing on those that are growing or in decline;

(8) A plan of action to implement the goals and objectives of the CEDS, including:
   (i) Promoting economic development and opportunity;
   (ii) Fostering effective transportation access;
   (iii) Enhancing and protecting the environment;
   (iv) Maximizing effective development and use of the workforce consistent with any applicable State or local workforce investment strategy;
   (v) Promoting the use of technology in economic development, including access to high-speed telecommunications;
   (vi) Balancing resources through sound management of physical development; and
   (vii) Obtaining and utilizing adequate funds and other resources; and

(9) A list of performance measures used to evaluate the Planning Organization’s successful development and implementation of the CEDS, including but not limited to the following:
   (i) Number of jobs created after implementation of the CEDS;
   (ii) Number and types of investments undertaken in the Region;
   (iii) Number of jobs retained in the Region;
   (iv) Amount of private sector investment in the Region after implementation of the CEDS; and
   (v) Changes in the economic environment of the Region; and

(10) A section outlining the methodology for cooperating and integrating the CEDS with a State’s economic development priorities.

(c) Consideration of non-EDA funded CEDS. (1) In determining the acceptability of a CEDS prepared independently of EDA Investment Assistance or oversight for Projects under parts 305 and 307 of this chapter, EDA may in its discretion determine that the CEDS is acceptable without fulfilling all the requirements of paragraph (b) of this section. In doing so, EDA shall consider the circumstances surrounding the application for Investment Assistance, including emergencies or natural disasters and the fulfillment of the requirements of section 302 of PWEDA.

(2) If the CEDS for a Project under parts 305 and 307 of this chapter is developed under another federally-supported program, it must include acceptable performance measures similar to those set forth in paragraph (b) of this section and information on the state of the Regional economy. To the maximum extent practicable, the CEDS shall be consistent and coordinated with any existing economic development plan for the Region.

§ 303.8  Requirements for State plans.

(a) As a condition of a State receiving a Planning Investment:
§ 303.9 Requirements for short-term Planning Investments.

(a) In addition to providing support for CEDS and State plans, EDA may also provide Investment Assistance to support short-term planning activities. EDA may provide such Investment Assistance to:

(1) Develop the economic development planning capacity of States, cities and other Eligible Applicants experiencing economic distress;

(2) Assist in institutional capacity building; or

(3) Undertake innovative approaches to economic development.

(b) Eligible activities may include but are not limited to updating a portion of a CEDS, economic analysis, development of economic development policies and procedures, and development of economic development goals.

(c) Applicants for short-term Planning Investments must provide performance measures acceptable to EDA that can be used to evaluate the success of the program and provide EDA with progress reports during the term of the Planning Investment, as set forth in the Investment agreement.

§ 304.1 Designation of Economic Development Districts: Regional eligibility.

Upon the request of a District Organization (as defined in §304.2), EDA may designate a Region as an Economic Development District if such Region:

(a) Contains at least one geographic area that is subject to the economic distress criteria set forth in §301.3(a)(1) of this chapter and is identified in an approved CEDS;

(b) Is of sufficient size or population and contains sufficient resources to foster economic development on a scale involving more than a single geographic area subject to the economic distress criteria set forth in §301.3(a)(1) of this chapter;

(c) Has an EDA-approved CEDS that

(1) Meets the requirements under §303.7 of this chapter;

(2) Contains a specific program for intra-District cooperation, self-help, and public investment; and

(3) Is approved by each affected State and by the Assistant Secretary;

(d) Obtains commitments from at least a majority of the counties or other areas within the proposed District, as determined by EDA, to support the economic development activities of the District; and

(e) Obtains the concurrence with the designation request from the State (or States) in which the proposed District will be wholly or partially located.
(1) A public organization formed through an inter-governmental agreement providing for the joint exercise of local government powers; or
(2) A public organization established under State-enabling legislation for the creation of multi-jurisdictional area-wide planning organizations; or
(3) A non-profit organization incorporated under the applicable non-profit statutes of the State in which it is incorporated.

(c) Organization and governance.
(1) Each District Organization must meet the requirements of this paragraph (c) concerning membership composition, the maintenance of adequate staff support to perform its economic development functions, and its authorities and responsibilities for carrying out economic development functions. The District Organization's board of directors (or other governing body) must also meet these requirements.
(2) The District Organization must demonstrate that its governing body is broadly representative of the principal economic interests of the Region, and, unless otherwise prohibited by applicable State or local law, must include at least one (1) Private Sector Representative and one (1) or more of the following: Executive Directors of Chambers of Commerce, or representatives of institutions of post-secondary education, workforce development groups or labor groups, all of which must comprise in the aggregate a minimum of thirty-five (35) percent of the District Organization's governing body. The governing body shall also have at least a simple majority of its membership who are elected officials and/or employees of a general purpose unit of State, local or Indian tribal government who have been appointed to represent the government. Upon the District Organization's showing of its inability to locate a Private Sector Representative to serve on its governing body following extensive due diligence, the Assistant Secretary may waive the Private Sector Representative requirement. The Assistant Secretary shall not delegate the authority to grant a waiver under this paragraph.
(3) The District Organization must be assisted by a professional staff drawn from qualified persons in economic development, planning, business development or related disciplines.
(4) The governing bodies of District Organizations must provide access for persons who are not members to make their views known concerning ongoing and proposed District activities in accordance with the following requirements:
(i) The District Organization must hold meetings open to the public at least once a year and shall also publish the date and agenda of such meetings sufficiently in advance to allow the public a reasonable time to prepare in order to participate effectively.
(ii) The District Organization shall adopt a system of parliamentary procedures to assure that board members and others have access to an effective opportunity to participate in the affairs of the District.
(iii) The District Organization shall provide information sufficiently in advance of decisions to give the public adequate opportunity to review and react to proposals. District Organizations should communicate technical data and other material to the public so they may understand the impact of public programs, available options and alternative decisions.
(iv) The District Organization must make available to the public such audited statements, annual budgets and minutes of public meetings, as may be reasonably requested.
(v) The District Organization and its board of directors must comply with all Federal and State financial assistance reporting requirements and the conflicts of interest provisions set forth in § 302.17 of this chapter.
(d) Operations. (1) The District Organization shall engage in the full range of economic development activities listed in its EDA-approved CEDS. These activities may include:
(i) Coordinating and implementing economic development activities in the District;
(ii) Carrying out economic development research, planning, implementation and advisory functions identified in the CEDS; and
(iii) Coordinating the development and implementation of the CEDS with other local, State, Federal and private organizations.
§ 304.3

(2) The District Organization may at its option contract for services to accomplish the activities listed in paragraphs (d)(1)(i) through (iii) of this section.

§ 304.3 District modification and termination.

(a) Modification. Upon the request of a District Organization and with the concurrence of the State or States affected (unless such concurrence is waived by the Assistant Secretary), EDA may modify the geographic boundaries of a District, if it determines that such modification will contribute to a more effective program for economic development.

(b) Termination. EDA may, upon sixty (60) days prior written notice to the District Organization, member counties and other areas determined by EDA and each affected State, terminate a Region's designation as an Economic Development District when:

(1) A District or District Organization no longer meets the requirements of §§ 304.1 or 304.2; or

(2) EDA determines that the District Organization fails to execute its CEDS according to the development, implementation and other performance measures set forth therein; or

(3) A District Organization has requested termination.

(c) Prior to terminating a District Organization under paragraph (b)(2) of this section, EDA will consult with the District Organization and consider all facts and circumstances regarding the District Organization's operations. EDA will not terminate a District's designation based on circumstances beyond the control of the District Organization (e.g., natural disaster, plant closure, overall economic downturn, sudden and severe economic dislocation, or other situation).

(d) EDA may further modify or terminate a Region's designation as a District according to the standards set forth in an FFO.

§ 304.4 Performance evaluations.

(a) EDA shall evaluate the management standards, financial accountability and program performance of each District Organization within three (3) years after the initial Investment award and at least once every three (3) years thereafter, so long as the District Organization continues to receive Investment Assistance. EDA's evaluation shall assess:

(1) The continuing Regional eligibility of the District, as set forth in § 304.1;

(2) The management of the District Organization, as set forth in § 304.2; and

(3) The implementation of the CEDS, including the District Organization's performance and contribution towards the retention and creation of employment, as set forth in § 303.7 on this chapter.

(b) For peer review, EDA shall ensure the participation of at least one (1) other District Organization in the performance evaluation on a cost-reimbursement basis.
Subpart A—General

§ 305.1 Purpose and scope.

Public Works and Economic Development Investments ("Public Works Investments") intend to help the nation's most distressed communities revitalize, expand and upgrade their physical infrastructure to attract new industry, encourage business expansion, diversify local economies and generate or retain long-term private sector jobs and investments. The primary goal of these Investments is the creation of new, or the retention of existing, long-term private sector job opportunities in communities experiencing significant economic distress as evidenced by chronic high unemployment, underemployment, low per capita income, outmigration, or a Special Need. These Investments also intend to assist communities in attracting private capital investment and higher-skill, higher-wage job opportunities and to promote the successful long-term economic recovery of a Region.

§ 305.2 Award requirements.

(a) Project scope. Public Works Investments may fund the following activities:

(1) Acquisition or development of land and improvements for use in a public works, public service or other type of development facility; or

(2) Acquisition, design and engineering, construction, rehabilitation, alteration, expansion, or improvement of such a facility, including related machinery and equipment.

(b) Requirements. A Public Works Investment may be made if EDA determines that:

(1) The Project will, directly or indirectly:

(i) Improve the opportunities for the successful establishment or expansion of industrial or commercial plants or facilities in the Region where the Project is located;

(ii) Assist in the creation of additional long-term employment opportunities in the Region; or

(iii) Primarily benefit the long-term unemployed and members of low-income families in the Region;

(2) The Project will fulfill a pressing need of the Region, or a part of the Region, in which the Project is located; and

(3) The Region in which the Project is located has a CEDS and the Project is consistent with the CEDS.

(c) Not more than fifteen (15) percent of the annual appropriations made available to EDA to fund Public Works Investments may be made in any one (1) State.

§ 305.3 Application requirements.

(a) Each application for Public Works Investment Assistance must:

(1) Include evidence of eligibility, as provided in part 301 of this chapter;

(2) Include, or incorporate by reference, a CEDS (as provided in §303.7 of this chapter);

(3) Demonstrate how the proposed Project meets the criteria of §305.2; and

(4) Demonstrate how the proposed Project meets the proposal evaluation criteria set forth in §301.8 of this chapter.

(b) The Investment Rate for Public Works Investments will be determined in accordance with §301.4 of this chapter.

§ 305.4 Projects for design and engineering work.

In the case of Public Works Investment Assistance awarded solely for design and engineering work, the following additional application requirements and terms shall apply:

(a) EDA may determine that a separate Investment for design and engineering is warranted due to the technical complexity or environmental sensitivity of the construction Project;

(b) The purpose of the Investment may be limited to the development and production of all documents required for the construction of the proposed construction Project in a format and in sufficient quantity to permit advertisement and award of a construction contract soon after securing construction financing for the Project;

(c) EDA will not disburse any portion of the Investment Assistance until it receives and certifies compliance with the Investment award of all design and engineering contracts; and

(d) EDA's funding of the Project for design and engineering work does not
in any way commit EDA to fund construction of the Project.

Subpart B—Requirements for Approved Projects

§ 305.5 Project administration by District Organization.
(a) When a District Organization is not the Recipient or co-Recipient of Investment Assistance, the District Organization may administer the Project for the Recipient if EDA determines fulfillment of the following conditions:
   (1) The Recipient has requested (either in the application or by separate written request) that the District Organization for the Region in which the Project is located administer the Project;
   (2) The Recipient certifies and EDA finds that:
      (i) Administration of the Project is beyond the capacity of the Recipient's current staff and would require hiring additional staff or contracting for such services;
      (ii) No local organization or business exists that could administer the Project in a more efficient or cost-effective manner than the staff of the District Organization; and
      (iii) The staff of the District Organization would administer the Project without sub-contracting the work; and
   (3) The allowable costs for the administration of the Project by the District Organization's staff will not exceed the amount that would be allowable to the Recipient.
(b) EDA must approve the request either by approving the application in which the request is made or by separate specific written approval.

§ 305.6 Allowable methods of procurement for construction services.
(a) Recipients may use alternate construction procurement methods to the traditional design/bid/build procedures (including lump sum or unit price-type construction contracts). These methods include but are not limited to design/bid/build, construction management at risk and force account. If an alternate method is used, the Recipient shall submit to EDA for approval a construction services procurement plan and the Recipient must use a design professional to oversee the process. The Recipient shall submit the plan to EDA prior to advertisement for bids and shall include the following, as applicable:
   (1) Justification for the proposed method for procurement of construction services;
   (2) The scope of work with cost estimates and schedules;
   (3) A copy of the proposed construction contract;
   (4) The name and qualifications of the selected design professional; and
   (5) Procedures to be used to ensure full and open competition, including the selection criteria.
(b) For all procurement methods, the Recipient must comply with the procurement standards set forth in 15 CFR parts 14 or 24, as applicable.

§ 305.7 Services performed by the Recipient’s own forces.
In certain circumstances, the Recipient may wish to consider having a portion or all of the design, construction, inspection, legal services or other work and/or services in connection with the Project performed by personnel who are employed by the Recipient either full-time or part-time. EDA may approve the use of such “in-house forces” if:
   (a) The services are routinely performed by the Recipient for all construction Projects performed by the Recipient (for example, inspection or legal); or
   (b) The Recipient has a special skill required for the construction of the Project (for example, construction of unique Indian structures); or
   (c) The Recipient has made all reasonable efforts to obtain a contractor but has failed to do so because of uncontrollable factors such as the remoteness of the Project site or an overload of construction work in the Region; or
   (d) The Recipient demonstrates substantial cost savings.

§ 305.8 Recipient-furnished equipment and materials.
The Recipient may wish to incorporate into the Project equipment or materials that it will secure through
its own efforts, subject to the following requirements:

(a) EDA must approve any use of Recipient-furnished equipment and materials. EDA may require that major equipment items be subject to a lien in favor of EDA and may also require a statement from the Recipient regarding expected useful life and salvage value of such equipment;

(b) EDA may require the Recipient to establish that the expense claimed for such equipment or materials is competitive with current local market costs; and

(c) Acquisition of Recipient-furnished equipment and/or materials under this section is also subject to the requirements of 15 CFR parts 14 or 24, as applicable.

§ 305.9 Project phasing and Investment disbursement.

(a) EDA may authorize in advance the award of construction contracts in phases, provided the Recipient submits a request that includes each of the following:

1. Valid reasons justifying why the Project must be phased;
2. Description of the specific elements to be completed in each phase;
3. Detailed construction cost estimates for each phase;
4. Time schedules for completing all phases of the Project;
5. Certification that the Recipient can and will fund any overrun(s); and
6. Certification that the Recipient is capable of paying incurred costs prior to the first disbursement of EDA funds.

(b) EDA will begin disbursement of funds after receipt of evidence sufficient to EDA of compliance with all Investment award conditions. EDA may approve the disbursement of funds prior to the tender of all construction contracts if the Recipient can demonstrate to EDA's satisfaction that a severe financial hardship will result without such approval.

§ 305.10 Bid underrun.

If at the construction contract bid opening, the lowest responsive bid is less than the total Project cost, the Recipient will notify EDA to determine whether Investment funds should be deobligated from the Project.

§ 305.11 Contract awards; early construction start.

EDA must determine that the award of all contracts necessary for design and construction of the Project facilities is in compliance with the terms and conditions of the Investment award in order for the costs to be eligible for EDA reimbursement. Pending this determination, the Recipient may issue a notice permitting construction under the contract to commence. If construction commences prior to EDA's determination, the Recipient proceeds at its own risk until EDA review and concurrence. The EDA regional office will advise the Recipient of the requirements necessary to obtain EDA's determination.

§ 305.12 Project sign.

The Recipient shall be responsible for the construction, erection and maintenance in good condition throughout the construction period of a sign or signs at a conspicuous place at the Project site indicating that the Federal government is participating in the Project. The EDA regional office will provide mandatory specifications for the signage.

§ 305.13 Contract change orders.

(a) If it becomes necessary to alter the construction contracts post-execution, the Recipient and contractor shall agree to a formal contract change order.

(b) All contract change orders must receive EDA review for compliance with the terms and conditions of the Investment award, even if the Recipient is to pay for all additional costs resulting from the change or the change order reduces the contract price.

(c) Work on the Project may continue pending EDA review of the contract change order, but all such work will be at the Recipient's risk until EDA completes its review.

§ 305.14 Occupancy prior to completion.

Occupancy of any part of the Project prior to final acceptance is entirely at the Recipient's risk and must follow the requirements of local and State law.
PART 306—TRAINING, RESEARCH AND TECHNICAL ASSISTANCE INVESTMENTS

Subpart A—Local and National Technical Assistance

Sec. 306.1 Purpose and scope.
306.2 Award requirements.
306.3 Application requirements.

Subpart B—University Center Economic Development Program

306.4 Purpose and scope.
306.5 Award requirements.
306.6 Application requirements.
306.7 Performance evaluations of University Centers.


SOURCE: 71 FR 56675, Sept. 27, 2006, unless otherwise noted.

Subpart A—Local and National Technical Assistance

§ 306.1 Purpose and scope.
(a) Local and National Technical Assistance Investments may:
(1) Determine the causes of excessive unemployment, underemployment, low per capita income, outmigration or other problems throughout the nation;
(2) Formulate and implement economic development tools, models, and innovative techniques that will alleviate or prevent conditions of excessive unemployment or underemployment;
(3) Formulate and implement economic development programs to increase local, regional and national capacity;
(4) Evaluate the effectiveness and economic impact of programs, projects and techniques to alleviate economic distress and promote economic development;
(5) Conduct project planning and feasibility studies;
(6) Provide management and operational assistance;
(7) Establish business outreach centers;
(8) Disseminate information about effective programs, projects and techniques that alleviate conditions of economic distress and promote economic development;
(9) Assess, market and establish business clusters and associations; or
(10) Perform other activities determined by EDA to be appropriate under the Local and National Technical Assistance program.

(b) Investment Assistance may not be used to start or expand a private business.

(c) EDA may identify specific training, research or technical assistance Projects it will fund, which will be subject to competition. Ordinarily, these Projects are specified in an FFO, which will provide the specific requirements, timelines and the appropriate points of contact and addresses.

(d) In providing Local and National Technical Assistance under this subpart, EDA, in addition to making Investments, may:
(1) Provide Local and National Technical Assistance through officers or employees of the Department;
(2) Pay funds made available to carry out this subpart to Federal Agencies;
or
(3) Employ private individuals, partnerships, businesses, corporations, or appropriate institutions under contracts entered into for this purpose.

§ 306.2 Award requirements.
EDA selects Projects for Local and National Technical Assistance Investments in accordance with the general evaluation and selection criteria set forth in part 301 of this chapter and the extent to which the Project:
(a) Strengthens the capacity of local, State or national organizations and institutions to undertake and promote effective economic development programs targeted to Regions of distress;
(b) Benefits distressed Regions;
(c) Demonstrates innovative approaches to stimulate economic development in distressed Regions;
(d) Is consistent with an EDA-approved CEDS, as applicable, for the Region in which the Project is located; and
(e) Meets the criteria outlined in the applicable FFO.
§ 306.3 Application requirements.
(a) EDA will provide Investment Assistance under this subpart for the period of time required to complete the Project's scope of work, generally not to exceed twelve (12) to eighteen (18) months.
(b) For a Project of significant Regional or national scope, EDA may waive the requirement set forth in § 301.2(b) of this chapter that the nonprofit organization act in cooperation with officials of a political subdivision of a State.
(c) The Investment Rate for Investments under this subpart shall be determined in accordance with § 301.4(b)(4) of this chapter.

Subpart B—University Center Economic Development Program

§ 306.4 Purpose and scope.
The University Center Economic Development Program is intended to help improve the economies of distressed Regions. Institutions of higher education have many assets, such as faculty, staff, libraries, laboratories and computer systems that can address local economic problems and opportunities. With Investment Assistance, institutions of higher education establish and operate research centers ("University Centers") that provide technical assistance to public and private sector organizations with the goal of enhancing local economic development.

§ 306.5 Award requirements.
EDA provides Investment Assistance to University Center Projects in accordance with the general evaluation and selection criteria set forth in part 301 of this chapter, the competitive selection process outlined in the applicable FFO, and the extent to which the Project:
(a) Addresses the economic development needs, issues and opportunities of the Region and will benefit distressed areas in the Region;
(b) Provides service and value that are unique and will maximize coordination with other organizations in the Region;
(c) Has the commitment and support (both financial and non-financial) of the highest management levels of the sponsoring institution;
(d) Outlines activities consistent with the expertise of the proposed staff, academic programs and other resources available within the sponsoring institution; and
(e) Documents past experience of the sponsoring institution in operating technical assistance programs.

§ 306.6 Application requirements.
(a) EDA will provide Investment Assistance under this subpart for the period of time required to complete the Project's scope of work, as specifically outlined in the applicable FFO.
(b) For a Project of significant Regional or national scope, EDA may waive the requirement set forth in § 301.2(b) of this chapter that the nonprofit organization act in cooperation with officials of a political subdivision of a State.
(c) The Investment Rate for Investments under this subpart shall be determined in accordance with § 301.4(b)(4) of this chapter.
(d) At least eighty (80) percent of EDA funding must be allocated to direct costs of program delivery.

§ 306.7 Performance evaluations of University Centers.
(a) EDA will:
(1) Evaluate each University Center within three (3) years after the initial Investment award and at least once every three (3) years thereafter, so long as such University Center continues to receive Investment Assistance; and
(2) Assess the University Center's contribution to providing technical assistance, conducting applied research, meeting program performance objectives (as evidenced by retention and creation of employment opportunities) and disseminating Project results in accordance with the scope of work funded during the evaluation period.
(b) The performance evaluation will determine in part whether a University Center can compete to receive Investment Assistance under the University Center Economic Development Program for the following Investment Assistance cycle.
(c) For peer review, EDA shall ensure the participation of at least one (1)
PART 307—ECONOMIC ADJUSTMENT ASSISTANCE INVESTMENTS

Subpart A—General

§ 307.1 Purpose.

The purpose of Economic Adjustment Assistance Investments is to address the needs of communities experiencing adverse economic changes that may occur suddenly or over time, including but not limited to those caused by:

(a) Military base closures or realignments, defense contractor reductions in force, or U.S. Department of Energy defense-related funding reductions;
(b) Federally-Declared Disasters;
(c) International trade;
(d) Long-term economic deterioration;
(e) Loss of a major community employer; or
(f) Loss of manufacturing jobs.

§ 307.2 Criteria for Economic Adjustment Assistance Investments.

(a) Economic Adjustment Assistance Investments are intended to enhance a distressed community’s ability to compete economically by stimulating private investment in targeted economic sectors through use of tools that:

(1) Help develop and implement a CEDS;
(2) Expand the capacity of public officials and economic development organizations to work effectively with businesses;
(3) Assist in overcoming major obstacles identified in the CEDS;
(4) Enable communities to plan and coordinate the use of Federal resources and other resources available to support economic recovery, development of Regional economies, or recovery from natural or other disasters; or
(5) Encourage the development of innovative public and private approaches to economic restructuring and revitalization.

(b) Economic Adjustment Assistance Investments may be made when the Project funded by the Investment will help the Region meet a Special Need. The Region in which a Project is located must have a CEDS with which the Project is consistent (except that this requirement shall not apply to Strategy Grants described in § 307.3).

§ 307.3 Use of Economic Adjustment Assistance Investments.

Economic Adjustment Assistance Investments may be used to develop a CEDS to alleviate long-term economic deterioration or a sudden and severe economic dislocation (a “Strategy
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(Economic Adjustment Assistance Project or ‘‘CEDS’’), or to fund a Project implementing such a CEDS (an ‘‘Implementation Grant’’).

(a) Strategy Grants support developing, updating or refining a CEDS.

(b) Implementation Grants support the execution of activities identified in a CEDS. Specific activities may be funded as separate Investments or as multiple elements of a single Investment. Examples of Implementation Grant activities include:

(i) Infrastructure improvements, such as site acquisition, site preparation, construction, rehabilitation and equipping of facilities;

(ii) Provision of business or infrastructure financing through the capitalization of Recipient-administered Revolving Loan Funds (‘‘RLFs’’), which may include loans, loan guarantees and interest rate buy-downs to facilitate business lending activities;

(iii) Market or industry research and analysis;

(iv) Technical assistance, including organizational development such as business networking, restructuring or improving the delivery of business services, or feasibility studies;

(v) Public services;

(vi) Training; and

(vii) Other activities justified by the CEDS that satisfy applicable statutory and regulatory requirements.

§ 307.4 Award requirements.

(a) General. EDA will select Economic Adjustment Assistance Projects in accordance with part 301 of this chapter and the additional criteria provided in paragraphs (b) and (c) of this section, as applicable.

(b) Strategy Grants. EDA will review Strategy Grant proposals to ensure that the proposed activities conform to the CEDS requirements set forth in §303.7 of this chapter.

(c) Implementation Grants.

(i) EDA will review Implementation Grant proposals for the extent to which:

(A) The applicable CEDS meets the requirements in §303.7 of this chapter; and

(B) The proposed Project is identified as a necessary element of or consistent with the applicable CEDS.

(ii) Revolving Loan Fund Grants. For Eligible Applicants seeking to capitalize or recapitalize an RLF, EDA will review the proposals for:

(A) The need for a new or expanded public financing tool to enhance other business assistance programs and services targeting economic sectors and locations described in the CEDS;

(B) The types of financing activities anticipated; and

(C) The capacity of the RLF organization to manage lending activities, create networks between the business community and other financial providers, and implement the CEDS.

(d) Funding priority considerations for Economic Adjustment Assistance may be set forth in an FFo.

§ 307.5 Application requirements.

(a) Each application for Economic Adjustment Assistance must:

(i) Include or incorporate by reference (if so approved by EDA) a CEDS, except that a CEDS is not required when applying for a Strategy Grant; and

(ii) Explain how the proposed Project meets the criteria set forth in §307.2.

(b) For a technical assistance Project of significant Regional or national scope under this subpart, EDA may waive the requirement set forth in §301.2(b) of this chapter that the non-profit organization act in cooperation with officials of a political subdivision of a State.

§ 307.6 Economic Adjustment Assistance post-approval requirements.

In addition to the post-approval requirements set forth in §302.18 of this chapter:

(a) Strategy Grants shall comply with the applicable provisions of part 303 of this chapter;

(b) Implementation Grants involving construction shall comply with the provisions of subpart B of part 305 of this chapter;

(c) Implementation Grants not involving construction shall comply with the applicable provisions of subpart A of part 306 of this chapter; and

(d) RLF Grants shall comply with the requirements set forth in this part and in the following publications:
§ 307.7

(1) EDA’s RLF Standard Terms and Conditions; and
(2) The compliance supplement to OMB Circular A–133 (the “Compliance Supplement”). The Compliance Supplement is available via the Internet at http://www.omb.gov.

Subpart B—Special Requirements for Revolving Loan Funds and Use of Grant Funds

§ 307.7 Revolving Loan Funds established for business lending.

Economic Adjustment Assistance Grants to capitalize or recapitalize RLFs most commonly fund business lending, but may also fund public infrastructure or other authorized lending activities. The requirements in this subpart B apply to RLFs established for business lending activities. Special award conditions may contain appropriate modifications of these requirements to accommodate non-business RLF awards.

§ 307.8 Definitions.

In addition to the defined terms set forth in § 300.3 of this chapter, the following terms used in this part shall have the following meanings:

Closed Loan means any loan for which all required documentation has been, received, reviewed and executed by an RLF Recipient.

Exempt Security means a Security that is not subject to certain SEC or Federal Reserve Board rules.

Guaranteed Loan means a loan made and serviced by a third party lending institution under a loan guaranty agreement providing that an RLF Recipient will purchase the guaranteed portion of the loan in the event of borrower default.

Prudent Lending Practices means generally accepted underwriting and lending practices for public loan programs, based on sound judgment to protect Federal and lender interests. Prudent Lending Practices include loan processing, documentation, loan approval, collections, servicing, administrative procedures, collateral protection and recovery actions. Prudent Lending Practices provide for compliance with local laws and filing requirements to perfect and maintain a security interest in RLF collateral.

Recapitalization Grants are investments of additional Grant funds to increase the capital base of an RLF.

Revolving Phase means that stage of the RLF’s business lending activities that commences immediately after all Grant funds have been disbursed to the RLF Recipient.

RLF Capital means, at any point in time, the aggregate amount of cash held by the RLF Recipient from any of the following sources: Grant funds; Local Share; repayments of principal from RLF loans; and RLF Income. The initial RLF capital base is normally comprised of EDA funds and the cash Local Share.

RLF Income means interest earned on outstanding loan principal and RLF accounts holding RLF funds (excluding interest earned on excess funds pursuant to § 307.16(c)(2)), all fees and charges received by the RLF, and other income generated from RLF operations. An RLF Recipient may use RLF Income only to capitalize the RLF for financing activities and to cover eligible and reasonable costs necessary to administer the RLF, unless otherwise provided for in the Grant agreement or approved in writing by EDA. RLF Income excludes repayments of principal and any interest remitted to the U.S. Treasury pursuant to § 307.16(c)(2)(i).

RLF Third Party, for purposes of this subpart B only, means an Eligible Recipient or for-profit entity selected by EDA through a request for proposals or Cooperative Agreement to facilitate and/or manage the intended liquidation of an RLF.

Sale means an EDA-approved sale by an RLF Recipient of its RLF loan portfolio (or a portion thereof) to a third party. A third party may participate in a subsequent Securitization offered in a secondary market transaction and collateralized by the underlying RLF loan portfolio (or a portion thereof).

SEC or the Commission means the U.S. Securities and Exchange Commission.

Securitization refers to the financing technique of securing an investment of new capital with a stream of income

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generated by aggregating similar instruments such as loans or mortgages into a new transferable Security.

Security means any investment instrument issued by a corporation, government or other organization which offers evidence of debt or equity.

§ 307.9 Revolving Loan Fund Plan.

All RLF Recipients shall manage RLFs in accordance with an RLF plan (the “RLF Plan” or “Plan”) as described in this section. The Plan shall be submitted to and approved by EDA.

(a) Format and content. (1) Part I of the Plan titled “Revolving Loan Fund Strategy” shall summarize the CEDS and business development objectives and shall describe the RLF’s financing strategy, policy and portfolio standards.

(2) Part II of the Plan titled “Operational Procedures” shall serve as the internal operating manual for the RLF Recipient. The administrative procedures for operating the RLF must be consistent with Prudent Lending Practices.

(b) Evaluation of RLF Plans. EDA will use the following criteria in evaluating Plans:

(1) The Plan must be consistent with the CEDS or EDA-approved strategy for the Region;

(2) The Plan must identify the strategic purpose of the RLF and must describe the selection of the financing strategy and lending criteria, including:

(i) An analysis of the local capital market and the financing needs of the targeted businesses; and

(ii) Financing policies and portfolio standards that are consistent with EDA policies and requirements; and

(3) The Plan must demonstrate an adequate understanding of commercial loan portfolio management procedures, including loan processing, underwriting, closing, disbursements, collections, monitoring, and foreclosures. It shall also provide sufficient administrative procedures to prevent conflicts of interest and to ensure accountability, safeguarding of assets and compliance with Federal and local laws.

(c) Modification of RLF Plans. An RLF Recipient must request and obtain EDA approval prior to any modification of the Plan.

§ 307.10 Pre-loan requirements.

(a) RLF Recipients must adopt procedures to review the impacts of prospective loan proposals on the physical environment. The Plan must provide for compliance with applicable environmental laws and other regulations, including but not limited to parts 302 and 314 of this chapter. The RLF Recipient must also adopt procedures to comply, and ensure that potential borrowers comply, with applicable environmental laws and regulations.

(b) RLF Recipients must ensure that prospective borrowers, consultants, or contractors are aware of and comply with the Federal statutory and regulatory requirements that apply to activities carried out with RLF loans. RLF loan agreements shall include applicable Federal requirements to ensure compliance and RLF Recipients must adopt procedures to diligently correct instances of non-compliance, including loan call stipulations.

(c) All RLF loan documents and procedures must protect and hold the Federal government harmless from and against all liabilities that the Federal government may incur as a result of providing an RLF Grant to assist directly or indirectly in site preparation or construction, as well as the direct or indirect renovation or repair of any facility or site. These protections apply to the extent that the Federal government may become potentially liable as a result of ground water, surface, soil or other natural or man-made conditions on the property caused by operations of the RLF Recipient or any of its borrowers, predecessors or successors.

§ 307.11 Disbursement of funds to Revolving Loan Funds.

(a) Pre-disbursement requirements. Prior to any disbursement of EDA funds, RLF Recipients are required to provide in a form acceptable to EDA:

(1) Evidence of fidelity bond coverage for persons authorized to handle funds under the Grant award in an amount sufficient to protect the interests of EDA and the RLF. Such insurance coverage must exist at all times during...
§ 307.12 Revolving Loan Fund Income.

(a) General requirements. RLF Income must be placed into the RLF Capital base for the purpose of making loans or paying for eligible and reasonable administrative costs associated with the RLF’s operations. RLF Income may fund administrative costs, provided:

(1) Such RLF Income and the administrative costs are incurred in the same twelve-month (12) reporting period;

(2) RLF Income that is not used for administrative costs during the twelve-month (12) reporting period is made available for lending activities;

(3) RLF Income shall not be withdrawn from the RLF Capital base in a subsequent reporting period for any purpose other than lending without the prior written consent of EDA; and

(4) The RLF Recipient completes an RLF Income and Expense Statement (the “Income and Expense Statement”) as required under § 307.14(c).

(b) Compliance guidelines. When charging costs against RLF Income, RLF Recipients must comply with applicable OMB cost principles and RLF audit guidelines as found in:

(1) OMB Circular A–87 for State, local, and Indian tribal governments, OMB Circular A–122 for non-profit organizations other than institutions of higher education, hospitals or organizations named in OMB Circular A–122 as not subject to such circular, and OMB Circular A–21 for educational institutions; and

(2) OMB Circular A–133 for Single Audit Act requirements for States, local governments, and non-profit organizations and the Compliance Supplement, as appropriate.

(f) Local Share. (1) Cash Local Share of the RLF may only be used for lending purposes. The cash Local Share must be used either in proportion to the Grant funds or at a faster rate than the Grant funds.

(2) When an RLF has a combination of In-Kind Contributions and cash Local Share, the cash Local Share and the Grant funds will be disbursed proportionately as needed for lending activities, provided that the last twenty (20) percent of the Grant funds may not be disbursed until all cash Local Share has been expended. The full amount of the cash Local Share shall remain for use in the RLF.
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(c) Priority of payments on defaulted RLF loans. When an RLF Recipient receives proceeds on a defaulted RLF loan that is not subject to liquidation pursuant to §307.20, such proceeds shall be applied in the following order of priority:

(1) First, towards any costs of collection;
(2) Second, towards outstanding penalties and fees;
(3) Third, towards any accrued interest to the extent due and payable; and
(4) Fourth, towards any outstanding principal balance.

§ 307.13 Records and retention.

(a) Closed Loan files and related documents. The RLF Recipient shall maintain Closed Loan files and all related documents, books of account, computer data files and other records over the term of the Closed Loan and for a three-year (3) period from the date of final disposition of such Closed Loan. The date of final disposition of a Closed Loan is the date:

(1) Principal, interest, fees, penalties and all other costs associated with the Closed Loan have been paid in full; or
(2) Final settlement or discharge and cessation of collection efforts of any unpaid amounts associated with the Closed Loan have occurred.

(b) Administrative records. RLF Recipients must at all times:

(1) Maintain adequate accounting records and source documentation to substantiate the amount and percent of RLF Income expended for eligible RLF administrative costs.
(2) Retain records of administrative expenses incurred for activities and equipment relating to the operation of the RLF for three (3) years from the actual submission date of the last semi-annual or annual report that covers the period that such costs were claimed, or for five (5) years from the date the costs were claimed, whichever is less.
(3) Make available for inspection retained records, including those retained for longer than the required period. The record retention periods described in this section are minimum periods and such prescription does not limit any other record retention requirement of law or agreement. In no event will EDA question claimed administrative costs that are more than three (3) years old, unless fraud is at issue.

§ 307.14 Revolving Loan Fund semi-annual and annual reports.

(a) Frequency of reports. All RLF Recipients, including those receiving Recapitalization Grants for existing RLFs, must submit semi-annual reports. EDA may approve the substitution of annual reports for semi-annual reports upon written request by the Recipient if the following conditions have been met:

(1) At least one (1) year has passed from the date that the RLF has loaned an aggregate amount equal to its initial RLF Capital base;
(2) The RLF Recipient has timely submitted accurate semi-annual reports for the preceding two (2) years;
(3) The RLF Recipient has ensured completion and submission to EDA of required periodic audits for the most recent audit period within the preceding two (2) years; and
(4) EDA determines that the RLF is in compliance with all applicable RLF requirements.

(b) Report contents. RLF Recipients must certify as part of the semi-annual or annual report to EDA that the RLF is operating in accordance with the applicable RLF Plan. RLF Recipients must also describe (and propose pursuant to §307.9) any modifications to the RLF Plan to ensure effective use of the RLF as a strategic financing tool.

(c) RLF Income and Expense Statement. (1) An RLF Recipient using either fifty (50) percent or more (or more than $100,000) of RLF Income for administrative costs in the twelve-month (12) reporting period must submit a completed Income and Expense Statement annually to the appropriate regional office within ninety (90) days of the end of its fiscal year. An RLF Recipient using less than fifty (50) percent and less than $100,000 of RLF Income for administrative costs in the twelve-month (12) reporting period must prepare and retain for four (4) years a completed Income and Expense Statement for the applicable fiscal year, which shall be made available to EDA upon request.
§ 307.15 Prudent management of Revolving Loan Funds.

(a) Accounting principles. (1) RLFs shall operate in accordance with generally accepted accounting principles ("GAAP") as in effect from time to time in the United States and the provisions outlined in OMB Circular A–133 and the Compliance Supplement, as applicable.

(2) In accordance with GAAP, a loan loss reserve may be recorded in the RLF Recipient's financial statements to show the fair market value of an RLF's loan portfolio, provided this loan loss reserve is non-funded and represents non-cash entries.

(b) Loan and accounting system documents. (1) Within sixty (60) days prior to the initial disbursement of EDA funds, an independent accountant familiar with the RLF Recipient's accounting system shall certify to EDA and the RLF Recipient that such system is adequate to identify, safeguard and account for all RLF Capital, outstanding RLF loans and other RLF operations.

(2) Prior to the disbursement of any EDA funds, the RLF Recipient shall certify that standard RLF loan documents reasonably necessary or advisable for lending are in place and that these documents have been reviewed by its legal counsel for adequacy and compliance with the terms and conditions of the Grant and applicable State and local law. The standard loan documents must include, at a minimum, the following:

(i) Loan application;
(ii) Loan agreement;
(iii) Promissory note;
(iv) Security agreement(s);
(v) Deed of trust or mortgage (as applicable);
(vi) Agreement of prior lien holder (as applicable); and
(vii) Guaranty agreement (as applicable).

(c) Interest rates. An RLF Recipient may make loans and may guarantee loans to eligible borrowers at interest rates and under conditions determined by the RLF Recipient to be appropriate in achieving the goals of the RLF. However, the minimum interest rate an RLF can charge is four (4) percentage points below the lesser of the current money center prime interest rate quoted in the Wall Street Journal, or the maximum interest rate allowed under State law. In no event shall the interest rate be less than four (4) percent. However, should the prime interest rate listed in the Wall Street Journal exceed fourteen (14) percent, the minimum RLF interest rate is not required to be raised above ten (10) percent if doing so compromises the ability of the RLF Recipient to implement its financing strategy.

(d) Private leveraging. (1) RLF loans must leverage private investment of at least two dollars for every one dollar of such RLF loans. This leveraging requirement applies to the RLF portfolio as a whole rather than to individual loans and is effective for the duration of the RLF's operation. To be classified as leveraged, private investment must be made within twelve (12) months prior to approval of an RLF loan, as part of the same business development Project, and may include:

(i) Capital invested by the borrower or others;
(ii) Financing from private entities; or
(iii) The non-guaranteed portions and ninety (90) percent of the guaranteed portions of the U.S. Small Business Administration's 7(A) loans and 504 debenture loans.

(2) Private investments shall not include accrued equity in a borrower's assets.

§ 307.16 Effective utilization of Revolving Loan Funds.

(a) Loan closing and disbursement schedule. (1) RLF loan activity must be sufficient to draw down Grant funds in accordance with the schedule prescribed in the award conditions for
loan closings and disbursements to eligible RLF borrowers. The schedule usually requires that the RLF Recipient lend the entire amount of the initial RLF Capital base within three (3) years of the Grant award.

(2) If an RLF Recipient fails to meet the prescribed lending schedule, EDA may de-obligate the non-disbursed balance of the RLF Grant. EDA may allow exceptions where:

(i) Closed Loans approved prior to the schedule deadline will commence and complete disbursements within forty-five (45) days of the deadline;

(ii) Closed Loans have commenced (but not completed) disbursement obligations prior to the deadline; or

(iii) EDA has approved a time schedule extension pursuant to § 307.16(b).

(b) Time schedule extensions. (1) RLF Recipients shall promptly inform EDA in writing of any condition that may adversely affect their ability to meet the prescribed schedule deadlines. RLF Recipients must submit a written request to EDA for continued use of Grant funds beyond a missed deadline. RLF Recipients must provide good reason for the delay in their extension requests by demonstrating that:

(i) The delay was unforeseen or beyond the control of the RLF Recipient;

(ii) The financial need for the RLF still exists;

(iii) The current and planned use and the anticipated benefits of the RLF will remain consistent with the current CEDS and the RLF Plan; and

(iv) The proposal of a revised time schedule is reasonable. An extension request must also provide an explanation as to why no further delays are anticipated.

(2) EDA is under no obligation to grant a time extension and in the event an extension is denied, EDA may deobligate all or part of the unused Grant funds and terminate the Grant.

(c) Capital utilization standard. (1) During the Revolving Phase, RLF Recipients must manage their repayment and lending schedules to provide that at all times at least seventy-five (75) percent of the RLF Capital is loaned or committed. The following exceptions apply:

(i) An RLF Recipient that anticipates making large loans relative to the size of its RLF Capital base may propose a Plan that provides for maintaining a capital utilization percentage greater than twenty-five (25) percent; and

(ii) EDA may require an RLF Recipient with an RLF Capital base in excess of $4 million to adopt a Plan that maintains a proportionately higher percentage of its funds loaned.

(2) When the percentage of loaned RLF Capital falls below the applicable capital utilization percentage, the dollar amount of the RLF funds equivalent to the difference between the actual percentage of RLF Capital loaned and the applicable capital utilization percentage is referred to as “excess funds.”

(i) Sequestration of excess funds. If the RLF Recipient fails to satisfy the applicable capital utilization percentage requirement for two (2) consecutive reporting intervals, EDA may require the RLF Recipient to deposit excess funds in an interest-bearing account separate from the EDA funds account. The portion of interest earned on the account holding excess funds attributable to the RLF Grant shall be remitted to the U.S. Treasury. RLF Recipients must obtain EDA’s written authorization to withdraw any sequestered funds.

(ii) Persistent non-compliance. An RLF Recipient will generally be allowed a reasonable period of time to lend excess funds and achieve the applicable capital utilization percentage. However, if an RLF Recipient fails to achieve the applicable capital utilization percentage after a reasonable period of time, as determined by EDA, it may be subject to sanctions such as suspension or termination.

§ 307.17 Uses of capital.

(a) General. RLF Capital shall be used for the purpose of making RLF loans that are consistent with an RLF Plan or such other purposes approved by EDA. To ensure that RLF funds are used as intended, each loan agreement must clearly state the purpose of each loan.

(b) Restrictions on use of RLF Capital. RLF Capital shall not be used to:
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(1) Acquire an equity position in a private business;
(2) Subsidize interest payments on an existing RLF loan;
(3) Provide for borrowers’ required equity contributions under other Federal Agencies’ loan programs;
(4) Enable borrowers to acquire an interest in a business either through the purchase of stock or through the acquisition of assets, unless sufficient justification is provided in the loan documentation. Sufficient justification may include acquiring a business to save it from imminent closure or to acquire a business to facilitate a significant expansion or increase in investment with a significant increase in jobs. The potential economic benefits must be clearly consistent with the strategic objectives of the RLF;
(5) Provide RLF loans to a borrower for the purpose of investing in interest-bearing accounts, certificates of deposit or any investment unrelated to the RLF; or
(6) Refinance existing debt, unless:
   (i) The RLF Recipient sufficiently demonstrates in the loan documentation a “sound economic justification” for the refinancing (e.g., the refinancing will support additional capital investment intended to increase business activities). For this purpose, reducing the risk of loss to an existing lender(s) or lowering the cost of financing to a borrower shall not, without other indicia, constitute a sound economic justification; or
   (ii) RLF Capital will finance the purchase of the rights of a prior lien holder during a foreclosure action which is necessary to preclude a significant loss on an RLF loan. RLF Capital may be used for this purpose only if there is a high probability of receiving compensation from the sale of assets sufficient to cover an RLF’s costs plus a reasonable portion of the outstanding RLF loan within eighteen (18) months following the date of refinancing;
   (c) Credit not otherwise available. RLF Recipients must determine and clearly demonstrate in the loan documentation for each RLF loan that credit is not otherwise available on terms and conditions that permit the completion or successful operation of the activity to be financed.
   (d) Use of In-Kind Contributions. In-Kind Contributions may satisfy Matching Share requirements when specifically authorized in the terms and provisions of the RLF Grant and may be used to provide technical assistance to borrowers or for eligible RLF administrative costs.
   (e) Loan guaranty agreements. Prior to the full disbursement of Grant funds, the RLF Recipient shall not use RLF Capital to guarantee loans made by other lending institutions. After the full disbursement of Grant funds, RLF Capital may be used to guarantee loans of private lenders, provided the RLF Recipient has obtained prior written approval from EDA of its proposed loan guaranty activities and submitted to EDA:
      (1) The maximum guaranty percentage offered by the RLF Recipient and accepted by the lender;
      (2) The loan guaranty agreement which must (at a minimum) document:
         (i) The RLF Recipient’s maximum liability;
         (ii) The respective rights, representations and obligations of the RLF Recipient and lender with regard to collection procedures, servicing requirements, borrower delinquency, events of defaults and termination of the loan guaranty agreement;
         (iii) The responsible party’s obligations in the event of any foreclosure, bankruptcy or insolvency proceeding;
         (iv) The responsible party’s obligations with respect to collateral disposition and the call provisions for the Guaranteed Loan; and
         (v) The distribution of interest income and loan fees, if any, to the RLF; and
      (3) Certification from the RLF Recipient’s legal counsel that the loan guaranty agreement is valid and enforceable under applicable State law; and
      (4) An amended RLF Plan accommodating the loan guaranty activities approved by EDA (as necessary).

§ 307.18 Addition of lending areas; merger of RLFs.

(a)(1) Addition of Lending Areas. An RLF Recipient shall make loans to implement and assist economic activity only within its EDA-approved lending
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area, as set forth and defined in the RLF Grant and the Plan. An RLF Recipient may add an additional lending area (an “Additional Lending Area”) to its existing lending area to create a new merged lending area (the “New Lending Area”) only with EDA’s prior written approval and subject to the following provisions and conditions:

(i) EDA shall have disbursed the full amount of its Investment Assistance to the RLF Recipient;

(ii) The Additional Lending Area must fulfill the economic distress criteria for Economic Adjustment Investments under this part and in accordance with §301.3(a) of this chapter;

(iii) Prior to EDA’s disbursement of additional funds to the RLF Recipient (for example, through a recapitalization), EDA shall determine a new Investment Rate for the New Lending Area based on the criteria set forth in §301.4 of this chapter;

(iv) The RLF Recipient must demonstrate that the Additional Lending Area is consistent with its CEDS, or modify its CEDS for any such Additional Lending Area, in accordance with §307.9(b)(1);

(v) The RLF Recipient shall modify its Plan to incorporate the Additional Lending Area and revise its lending strategy, as necessary;

(vi) The RLF Recipient shall execute an amended RLF Grant award agreement, as necessary; and

(vii) The RLF Recipient fulfills any other conditions reasonably requested by EDA.

(2) The New Lending Area designation shall remain in place indefinitely following EDA approval.

(b) Merger of RLFs—(1) Single RLF Recipient. An RLF Recipient with more than one (1) EDA-funded RLF Grant may consolidate two (2) or more EDA-funded RLFs into one (1) surviving RLF with EDA’s prior written approval and provided:

(i) It meets the requirements to obtain annual report status identified in paragraphs (a)(2) through (a)(4) of §307.14;

(ii) It demonstrates a rational basis for undertaking the merger (for example, the lending area(s) and borrower criteria identified in different RLF Plans are compatible, or will be compatible, for all RLFs to be consolidated);

(iii) It amends and consolidates its Plan to account for the merger of RLFs, including items such as the New Lending Area (including any Additional Lending Area(s)), its lending strategy and borrower criteria;

(iv) Prior to EDA’s disbursement of additional funds to the RLF Recipient (for example, through a recapitalization), EDA shall determine a new Investment Rate for the New Lending Area based on the criteria set forth in §301.4 of this chapter; and

(v) The RLF Recipient fulfills any other conditions reasonably requested by EDA.

(2) Multiple RLF Recipients. Two (2) or more RLF Recipients may consolidate their EDA-funded RLFs into one (1) surviving RLF with EDA’s prior written approval and provided:

(i) The surviving RLF Recipient meets the requirements to obtain annual report status identified in paragraphs (a)(2) through (a)(4) of §307.14;

(ii) The surviving RLF Recipient amends and consolidates its Plan to account for the merger of RLFs, including items such as the New Lending Area (including any Additional Lending Area(s)), its lending strategy and borrower criteria;

(iii) Prior to EDA’s disbursement of additional funds to the surviving RLF Recipient (for example, through a recapitalization), EDA shall determine a new Investment Rate for the New Lending Area based on the criteria set forth in §301.4 of this chapter;

(iv) EDA must provide written approval of the merger agreement(s), modifications and revisions to the Plans and any other related amendments thereto;

(v) All applicable RLF Grant assets of the discharging RLF Recipient(s) transfer to the surviving RLF Recipient as of the merger’s effective date; and

(vi) The surviving RLF Recipient becomes fully responsible for administration of the RLF Grant assets transferred and fulfills all surviving RLF Grant requirements and any other conditions reasonably requested by EDA.
§ 307.19 RLF Loan portfolio Sales and Securitizations

EDA may take such actions as appropriate to enable an RLF Recipient to sell or securitize RLF loans, except that EDA may not issue a Federal guaranty covering any issued Security. With prior approval from EDA, an RLF Recipient may enter into a Sale or a Securitization of all or a portion of its RLF loan portfolio, provided:

(a) An RLF Recipient must use all proceeds from any Sale or Securitization (net of reasonable transaction costs) to make additional RLF loans;

(b) An RLF Recipient must request EDA to subordinate its interest in all or a portion of any RLF loan portfolio sold or securitized;

(c) No Security collateralized by RLF loans and other RLF property and offered in a secondary market transaction pursuant to a Securitization shall be treated as an Exempt Security for purposes of the Securities Act of 1933, as amended (15 U.S.C. 77a et seq.), or the Securities Exchange Act of 1934, as amended (15 U.S.C. 78a et seq.) (the “Exchange Act”), unless exempted by a rule or regulation issued by the Commission; and

(d) Except as provided in paragraph (c), no provision of this section supersedes or otherwise affects the application of the “securities laws” (as such term is defined in section 3(a)(47) of the Exchange Act) or the rules, regulations or orders issued by the Commission or a self-regulatory organization under the Commission.

§ 307.20 Partial liquidation and liquidation upon termination.

(a) Partial liquidation. EDA may require an RLF Recipient to transfer any RLF loans that are more than one hundred and twenty (120) days delinquent to an RLF Third Party for liquidation.

(b) Liquidation upon termination. When EDA approves the termination of an RLF Grant, EDA may assign or transfer assets of the RLF to an RLF Third Party for liquidation.

(c) Terms. The following terms will govern any liquidation:

(1) EDA shall have sole discretion in choosing the RLF Third Party;

(2) The RLF Third Party may be an Eligible Applicant or a for-profit organization not otherwise eligible for Investment Assistance;

(3) EDA may enter into an agreement with the RLF Third Party to liquidate the assets of one (1) or more RLFs or RLF Recipients;

(4) EDA may allow the RLF Third Party to retain a portion of the RLF assets, consistent with the agreement referenced in paragraph (c)(3) of this section, as reasonable compensation for services rendered in the liquidation; and

(5) EDA may require additional reasonable terms and conditions.

(d) Distribution of proceeds. The proceeds resulting from any liquidation upon termination shall be distributed in the following order of priority:

(1) First, for any third party liquidation costs;

(2) Second, for the payment of EDA’s Federal Share (as defined in §314.5 of this chapter); and

(3) Third, if any proceeds remain, to the RLF Recipient.

§ 307.21 Termination of Revolving Loan Funds.

(a) EDA may suspend or terminate an RLF Grant for cause, including but not limited to the following reasons:

(1) Failure to operate the RLF in accordance with the Plan, the RLF Grant or this part;

(2) Failure to obtain prior EDA approval for material changes to the Plan, including provisions for administering the RLF;

(3) Failure to submit timely progress, financial and audit reports as required by the RLF Grant and §307.14; and

(4) Failure to comply with the conflicts of interest provisions set forth in §302.17.

(b) EDA may approve a request from an RLF Recipient to terminate an RLF Grant. The RLF Recipient must compensate the Federal government for the Federal Share of the RLF property, including the current value of all outstanding RLF loans. However, with EDA’s prior approval, upon a showing of compelling circumstances, the RLF Recipient may use for other economic development activities a portion of
RLF property that EDA determines is attributable to RLF Income.
(c) Upon termination, distribution of proceeds shall occur in accordance with § 307.20(d).

§ 307.22 Variances.
EDA may approve variances to the requirements contained in this subpart, provided such variances:
(a) Are consistent with the goals of the Economic Adjustment Assistance program and with an RLF Plan;
(b) Are necessary and reasonable for the effective implementation of the RLF;
(c) Are economically and financially sound; and
(d) Do not conflict with any applicable legal requirements, including Federal, State and local law.

PART 308—PERFORMANCE INCENTIVES

§ 308.2 Performance awards.
(a) A Recipient of Investment Assistance under parts 305 or 307 of this chapter may receive a performance award in connection with an Investment made on or after the date of enactment of section 215 of PWEDA in an amount not to exceed ten (10) percent of the amount of the Investment award.
(b) To receive a performance award, a Recipient must demonstrate Project performance in one (1) or more of the areas listed in this paragraph, weighted at the discretion of the Assistant Secretary:
(1) Meet or exceed the Recipient’s projection of jobs created;
(2) Meet or exceed the Recipient’s projection of private sector capital invested;
(3) Meet or exceed target dates for Project start and completion stated at the time of investment approval;
(4) Fulfill the proposal evaluation criteria set forth in § 301.8 of this chapter; or
(5) Demonstrate other unique Project performance characteristics as determined by the Assistant Secretary.
(c) A Recipient may receive a performance award no later than three (3) years following the Project’s closeout.
(d) A performance award may fund up to one hundred (100) percent of the cost of an eligible Project or any other authorized activity under PWEDA. For the purpose of meeting the non-Federal share requirement of PWEDA or any other statute, the amount of a performance award shall be treated as non-Federal funds.
(e) The applicable FFO will set forth the requirements, qualifications, guidelines and procedures for performance awards to be made during the applicable fiscal year, with all performance awards being subject to the availability of funds.

§ 308.3 Planning performance awards.
(a) A Recipient of Planning Assistance under parts 305 or 307 of this chapter may receive a planning performance award in connection with an Investment made on or after the date of enactment of section 215 of PWEDA in an amount not to exceed ten (10) percent of the amount of the Planning Assistance Award.
(b) To receive a planning performance award, a Recipient must demonstrate Planning performance in one (1) or more of the areas listed in this paragraph, weighted at the discretion of the Assistant Secretary:
(1) Meet or exceed the Recipient’s projection of jobs created;
(2) Meet or exceed the Recipient’s projection of private sector capital invested;
(3) Meet or exceed target dates for Project start and completion stated at the time of investment approval;
(4) Fulfill the proposal evaluation criteria set forth in § 301.8 of this chapter; or
(5) Demonstrate other unique Planning performance characteristics as determined by the Assistant Secretary.
(c) A Recipient may receive a planning performance award no later than three (3) years following the Project’s closeout.
(d) A planning performance award may fund up to one hundred (100) percent of the cost of an eligible Planning Assistance Project or any other authorized activity under PWEDA. For the purpose of meeting the non-Federal share requirement of PWEDA or any other statute, the amount of a planning performance award shall be treated as non-Federal funds.
(e) The applicable FFO will set forth the requirements, qualifications, guidelines and procedures for planning performance awards to be made during the applicable fiscal year, with all planning performance awards being subject to the availability of funds.
§ 308.3 Planning performance awards.

(a) At the discretion of the Assistant Secretary, a Recipient of Investment Assistance awarded on or after the date of enactment of section 216 of PWEDA located in an EDA-funded Economic Development District may receive a planning performance award in an amount not to exceed five (5) percent of the amount of the applicable Investment award if EDA determines no later than three (3) years following closeout of the Project that:

(1) The Recipient, through the Project, actively participated in the economic development activities of the District;

(2) The Project demonstrated exceptional fulfillment of one (1) or more components of, and is otherwise in accordance with, the applicable CEDS, including any job creation or job retention requirements; and

(3) The Recipient demonstrated exceptional collaboration with Federal, State and local economic development entities throughout the development of the Project.

(b) The Recipient shall use the planning performance award to increase, up to one hundred (100) percent, the Federal share of the cost of a Project under this chapter.

(c) The applicable FFO may set forth additional requirements, qualifications and guidelines for planning performance awards.

PART 309—REDISTRIBUTIONS OF INVESTMENT ASSISTANCE

Sec.
309.1 Redistributions under parts 303, 305 and 306.
309.2 Redistributions under part 307.


Source: 71 FR 56675, Sept. 27, 2006, unless otherwise noted.

§ 309.1 Redistributions under parts 303, 305 and 306.

(a) General. Except as provided in paragraph (b) of this section, a Recipient of Investment Assistance under parts 303, 305 or 306 of this chapter may directly expend such Investment Assistance or, with prior EDA approval, may redistribute such Investment Assistance in the form of a subgrant to another Eligible Recipient that qualifies for Investment Assistance under the same part of this chapter as the Recipient, to fund required components of the scope of work approved for the Project. All subgrants made pursuant to this section shall be subject to the same terms and conditions applicable to the Recipient under the original Investment Assistance award and must satisfy the requirements of PWEDA and of this chapter.

(b) Exception. A Recipient may not make a subgrant of Investment Assistance received under parts 303 or 305 of this chapter to a for-profit entity.

§ 309.2 Redistributions under part 307.

(a) A Recipient of Investment Assistance under part 307 of this chapter may directly expend such Investment Assistance or, with prior EDA approval, may redistribute such Investment Assistance in the form of:

(1) A subgrant to another Eligible Recipient that qualifies for Investment Assistance under part 307 of this chapter;

(2) Pursuant to part 307, subpart B, a loan or other appropriate assistance to non-profit and private for-profit entities.

(b) All redistributions of Investment Assistance made pursuant to this section shall be subject to the same terms and conditions applicable to the Recipient under the original Investment Assistance award and must satisfy the requirements of PWEDA and of this chapter.

PART 310—SPECIAL IMPACT AREAS

Sec.
310.1 Special Impact Area.
310.2 Pressing need; alleviation of unemployment or underemployment.

Authority: 42 U.S.C. 3154; Department of Commerce Organization Order 10-4.

Source: 71 FR 56675, Sept. 27, 2006, unless otherwise noted.
§ 310.1 Special Impact Area.

Upon the application of an Eligible Recipient, and with respect to that Eligible Recipient’s Project only, the Assistant Secretary may designate the Region which the Project will serve as a Special Impact Area if the Eligible Recipient demonstrates that its proposed Project will:

(a) Directly fulfill a pressing need and

(b) Be useful in alleviating or preventing conditions of excessive unemployment or underemployment, or assist in providing useful employment opportunities for the unemployed or underemployed residents of the Region.

§ 310.2 Pressing need; alleviation of unemployment or underemployment.

(a) The Assistant Secretary may find a pressing need to exist if the Region which the Project will serve:

(1) Has a unique or urgent circumstance that would necessitate waiver of the CEDS requirements of § 303.7 of this chapter;

(2) Involves a Project undertaken by an Indian Tribe;

(3) Is rural and severely distressed;

(4) Is undergoing a transition in its economic base as a result of changing trade patterns (e.g., the Region is certified as eligible by the North American Development Bank Program or the Community Adjustment and Investment Program);

(5) Exhibits a substantial reliance on a natural resource for its economic well-being;

(6) Has been designated as a Federally-Declared Disaster area; or

(7) Has a Special Need.

(b) For purposes of this part, excessive unemployment exists if the twenty-four (24) month unemployment rate is at least 225% of the national average or the per capita income is not more than 50% of the national average. A Region demonstrates excessive underemployment if the employment of a substantial percentage of workers in the Region is less than full-time or at less skilled tasks than their training or abilities would otherwise permit. Eligible Recipients seeking a Special Impact Area designation under this criterion must present appropriate and compelling economic and demographic data.

(c) Eligible Recipients may demonstrate the provision of useful employment opportunities by quantifying and evidencing the Project’s prospective:

(1) Creation of jobs;

(2) Commitment of financial investment by private entities; or

(3) Application of innovative technology that will lead to the creation of jobs or the commitment of financial investment by private entities.

PARTS 311–313 [RESERVED]

PART 314—PROPERTY

Subpart A—General

Sec. 314.1 Definitions.

314.2 Federal Interest.

314.3 Authorized Use of Property.

314.4 Unauthorized Use of Property.

314.5 Federal Share.

314.6 Encumbrances.

Subpart B—Real Property

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314.8 Recorded statement.

Subpart C—Personal Property

314.9 Recorded statement—title.

Subpart D—Release of EDA’s Property Interest

314.10 Procedures for release of EDA’s Property interest.

Authority: 42 U.S.C. 3211; Department of Commerce Organization Order 10-4.

Source: 71 FR 56675, Sept. 27, 2006, unless otherwise noted.

Subpart A—General

§ 314.1 Definitions.

In addition to the defined terms set forth in § 300.3 of this chapter, the following terms shall have the following meanings:

Adequate Consideration means the fair market value at the time of sale or lease of any Property, as adjusted, in EDA’s sole discretion, by any services, property exchanges, contractual commitments, acts of forbearance or other
§314.2 Federal Interest.

(a) Property that is acquired or improved, in whole or in part, with Investment Assistance shall be held in trust by the Recipient for the benefit of the Project for the Estimated Useful Life of the Project, during which period EDA retains an undivided equitable reversionary interest in the Property (the “Federal Interest”). The Federal Interest secures compliance with matters such as the purpose, scope and use of a Project and is often reflected by a recorded lien, statement or other recordable Instrument setting forth EDA’s Property interest in a Project (e.g., a mortgage, covenant, or other statement of EDA’s Real Property interest in the case of a Project involving the acquisition, construction or improvement of a building. See §314.8.)

(b) When the Federal government is fully compensated for the Federal Share of Property acquired or improved, in whole or in part, with Investment Assistance, the Federal Interest is extinguished and the Federal government has no further interest in the Property.

§314.3 Authorized Use of Property.

(a) The Recipient or Owner must use any Property acquired or improved in whole or in part with Investment Assistance only for the authorized purpose of the Project and such Property must not be Disposed of or encumbered without EDA’s prior written authorization.

(b) Where EDA and the Recipient determine that Property acquired or improved in whole or in part with Investment Assistance is no longer needed for the original purpose of the Investment Assistance, EDA, in its sole discretion, may approve the use of such Property in other Federal grant programs or in programs that have purposes consistent with those authorized by PWEDA and by this chapter.

(c) Where EDA determines that the authorized purpose of the Investment Assistance is to develop Real Property to be leased or sold, such sale or lease is permitted provided it is for Adequate Consideration and the sale is consistent with the authorized purpose of the Investment Assistance and with all

c onsiderations that are in furtherance of the authorized purposes of the Investment Assistance, which are received by the Recipient or Owner in exchange for such Property.

Disposition or Dispose means the sale, lease, abandonment or other disposition of any Property and also includes the Unauthorized Use of such Property.

Estimated Useful Life, as used in this part, means the period of years that constitutes the expected useful lifespan of a Project, as determined by EDA, during which EDA anticipates obtaining the economic development benefits of its Investment.

Federal Interest has the definition ascribed to it in §314.2(a).

Federal Share has the definition ascribed to it in §314.5.

Owner means a fee owner, transferee, lessee or optionee of any Property. The term Owner also includes the holder of other interests in a Property where the interests are such that the holder effectively controls the use of such Property.

Personal Property means all tangible and intangible property other than Real Property.

Property means Real Property, Personal Property and mixed property.

Real Property means any land, whether raw or improved, and includes structures, fixtures, appurtenances and other permanent improvements, excluding moveable machinery and equipment. Real Property includes land that is improved by the construction of Project infrastructure such as, but not limited to, roads, sewers and water lines that are not situated on or under the land, where the infrastructure contributes to the value of such land as a specific purpose of the Project.

Successor Recipient means an EDA-approved transferee of Property pursuant to §314.3(d). A Successor Recipient must be an Eligible Recipient of Investment Assistance.

Unauthorized Use means any use of Property acquired or improved in whole or in part for purposes not authorized by EDA Investment Assistance, PWEDA or this chapter, as set forth in §314.4.
applicable Investment Assistance requirements including but not limited to nondiscrimination and environmental compliance.

(d) EDA, in its sole discretion, may approve the transfer of any Property from a Recipient to a Successor Recipient (or from one Successor Recipient to another Successor Recipient). The Recipient will remain responsible for complying with the rules of this part and the terms and conditions of the Investment Assistance for the period in which it is the Recipient. Thereafter, the Successor Recipient must comply with the rules of this part and with the same terms and conditions as were applicable to the Recipient (unless such terms and conditions are otherwise amended by EDA). The same rules apply to EDA-approved transfers of Property between Successor Recipients.

(e) When acquiring replacement Personal Property of equal or greater value than Personal Property originally acquired with Investment Assistance, the Recipient may, with EDA’s approval, trade in such Personal Property originally acquired or sell the original Personal Property and use the proceeds for the acquisition of the replacement Personal Property; provided that the replacement Personal Property is for use in the Project. The replacement Personal Property is subject to the same requirements as the original Personal Property. In extraordinary and compelling circumstances, the Assistant Secretary may approve the replacement of Real Property used in a Project.

(f) With EDA’s prior written approval, a Recipient may undertake an incidental use of Property that does not interfere with the scope of the Project or the economic purpose for which the Investment was made; provided that the Recipient is in compliance with applicable law and the terms and conditions of the Investment Assistance, and the incidental use of the Property will not violate the terms and conditions of the Investment Assistance or otherwise adversely affect the economic useful life of the Property. Eligible Applicants and Recipients should contact the appropriate regional office (whose contact information is available via the Internet at http://www.eda.gov) for guidelines on obtaining approval for incidental use of Property under this section.

§ 314.4 Unauthorized Use of Property.

(a) Except as provided in §§314.3 (regarding the authorized use of Property) or 314.10 (regarding the release of EDA’s interest in certain Property), or as otherwise authorized by EDA, the Federal government must be compensated by the Recipient for the Federal Share whenever, during the Estimated Useful Life of the Project, any Property acquired or improved in whole or in part with Investment Assistance is disposed of, encumbered, or no longer used for the purpose of the Project; provided that for equipment and supplies, the requirements at 15 CFR parts 14 or 24, as applicable, including any supplements or amendments thereto, shall apply.

(b) Additionally, prior to the release of EDA’s interest, Real Property or tangible Personal Property acquired or improved with EDA Investment Assistance may not be used:

(1) In violation of the nondiscrimination requirements of §302.20 of this chapter or in violation of the terms and conditions of the Investment Assistance; or

(2) For any purpose prohibited by applicable law.

(c) Where the Disposition, encumbrance or use of any Property violates paragraphs (a) or (b) of this section, EDA may assert its interest in the Property to recover the Federal Share for the Federal government and may take such actions as authorized by PWEDA and this chapter, including but not limited to the actions provided in §§302.3 and 307.21 of this chapter. EDA may pursue its rights under paragraph (a) of this section and this paragraph (c) to recover the Federal Share, plus costs and interest. When the Federal government is fully compensated for the Federal Share, the Federal Interest is extinguished as provided in §314.2(b), and EDA will have no further interest in the ownership, use or Disposition of the Property.
§ 314.5 Federal Share.

For purposes of this part, “Federal Share” means that portion of the current fair market value of any Property (after deducting actual and reasonable selling and repair expenses, if any, incurred to put the Property into marketable condition) attributable to EDA’s participation in the Project. The Federal Share excludes that portion of the current fair market value of the Property attributable to acquisition or improvements before or after EDA’s participation in the Project, which are not included in the total Project costs. For example, if the total Project costs are $100, consisting of $50 of Investment Assistance and $50 of Matching Share, the Federal Share is fifty (50) percent.

If the Property is disposed of when its current fair market is $250, the Federal Share is $125 (i.e., fifty (50) percent of $250). If $10 is spent to put the Property into salable condition, the Federal Share is $120 (i.e., fifty (50) percent of ($250–$10)).

§ 314.6 Encumbrances.

(a) General. Except as provided in paragraph (b) of this section or as otherwise authorized by EDA, Recipient-owned Property acquired or improved in whole or in part with Investment Assistance must not be used to secure a mortgage or deed of trust or in any way collateralized or otherwise encumbered, except to secure a grant or loan made by a Federal Agency or State agency or other public body participating in the same Project. An encumbrance includes but is not limited to easements, rights-of-way or other restrictions on the use of any Property.

(b) Exceptions. Subject to EDA’s approval, which will not be unreasonably withheld or unduly delayed, paragraph (a) of this section does not apply to:

(1) Recipient-owned Property that is subject to an encumbrance at the time EDA approves the Project, where EDA determines that the requirements of §314.7(b) are met;

(2) Encumbrances arising solely from the requirements of a pre-existing water or sewer facility or other utility encumbrances, which by their terms extend to additional Property connected to such facilities; and

(3) Encumbrances in cases where all of the following are met:
   (i) EDA, in its sole discretion, determines that there is good cause for a waiver of paragraph (a) of this section;
   (ii) All proceeds secured by the encumbrance on the Property shall be available only to the Recipient and shall be used only for the Project for which the Investment Assistance applies or for related activities of which the Project is an essential part;
   (iii) A grantor/lender will not provide funds without the security of a lien on the Property; and
   (iv) There is a reasonable expectation, as determined by EDA, that the Recipient will not default on its obligations.

(c) Encumbering Recipient-owned Property, other than as permitted in this section, is an Unauthorized Use of the Property under §314.4.

Subpart B—Real Property

§ 314.7 Title.

(a) General. The Recipient must hold title to the Real Property required for a Project at the time the Investment Assistance is awarded or as provided by paragraph (c) of this section and must maintain title at all times during the Estimated Useful Life of the Project, except in those limited circumstances as provided in paragraph (c) of this section. The Recipient must also furnish evidence, satisfactory in form and substance to EDA, that title to Real Property required for a Project (other than property of the United States) is vested in the Recipient and that any easements, rights-of-way, State or local government permits, long-term leases or other items required for the Project have been or will be obtained by the Recipient within an acceptable time, as determined by EDA.

(b)(1) The Recipient must disclose to EDA all encumbrances, including but not limited to the following:
   (i) Liens;
   (ii) Mortgages;
   (iii) Reservations;
   (iv) Reversionary interests; and
   (v) Other restrictions on title or on the Recipient’s interest in the Property.

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(2) No encumbrance will be acceptable if, as determined by EDA, the encumbrance interferes with the construction, use, operation or maintenance of the Project during its Estimated Useful Life.

(c) Exceptions. The following are exceptions to the requirements of paragraph (a) of this section that the Recipient hold title to the Real Property required for a Project.

(1) Where the acquisition of Real Property required for a Project is contemplated as part of an Investment Assistance award, EDA may determine that an agreement for the Recipient to purchase the Real Property will be acceptable for purposes of paragraph (a) of this section if:

(i) The Recipient provides EDA with reasonable assurances that it will obtain fee title to the Real Property prior to or concurrent with the initial disbursement of the Investment Assistance; and

(ii) EDA, in its sole discretion, determines that the terms and conditions of the purchase agreement adequately safeguard the Federal government’s interest in the Real Property.

(2) EDA may determine that a long-term leasehold interest for a period not less than the Estimated Useful Life of the Real Property required for a Project will be acceptable for purposes of paragraph (a) of this section if:

(i) Fee title to the Real Property is not otherwise obtainable; and

(ii) EDA, in its sole discretion, determines that the terms and conditions of the lease adequately safeguard the Federal government’s interest in the Real Property.

(3) When a Project includes construction within a railroad’s right-of-way or over a railroad crossing, EDA may find it acceptable for the work to be completed by the railroad and for the railroad to continue to own, operate and maintain that portion of the Project, if required by the State or local government; provided that, the construction is a minor but essential component of the Project, the construction is completed in accordance with EDA requirements, and the State or local government provides assurances to EDA that the:

(i) State or local government will operate and maintain the improvements for the Estimated Useful Life of the Project;

(ii) State or local government will not sell the improvements for the Estimated Useful Life of the Project; and

(iii) Use of the Property will be consistent with the authorized purposes of the Project.

(4) When a Project includes construction on a State-owned or local government-owned highway (i.e., where the Recipient is not the State or local government owner), EDA may find it acceptable for the State or local government to own, operate and maintain that portion of the Project, if required by the State or local government; provided that, construction is a minor but essential component of the Project, the construction is completed in accordance with EDA requirements, and the State or local government provides assurances to EDA that the:

(i) State or local government will retain title until the sale of the Property;

(ii) Use of the Property will be consistent with the authorized purposes of the Project.

(5)(i) When an authorized purpose of the Project is to construct facilities to serve Real Property owned by the Recipient, including but not limited to industrial or commercial parks, for sale or lease to private parties, such sale or lease is permitted so long as:

(A) In cases where an authorized purpose of the Project is to sell Real Property, the Recipient provides evidence sufficient to EDA that it holds title to the Real Property required for such Project prior to the disbursement of any portion of the Investment Assistance and will retain title until the sale of the Property;

(B) In cases where an authorized purpose of the Project is to lease Real Property, the Recipient provides evidence sufficient to EDA that it holds title to the Real Property required for such Project prior to the disbursement of any portion of the Investment Assistance and will retain title until the sale of the Property.

(C) The Recipient completes the Project according to the terms of the Investment Assistance;

(D) The sale or lease of any portion of the Project during its Estimated Useful Life must be for Adequate Consideration and the terms and conditions of the Investment Assistance and the purposes of the Project must continue to be fulfilled after such sale or lease; provided, however, that EDA may waive
§ 314.8 Recorded statement.

(a) For all Projects involving the acquisition, construction or improvement of a building, as determined by EDA, the Recipient shall execute a lien, covenant or other statement of EDA’s interest in the Property acquired or improved in whole or in part with the EDA Investment Assistance. The statement shall specify the Estimated Useful Life of the Project and shall include, but not be limited to, the Disposition, encumbrance and Federal Share requirements. The statement shall be satisfactory in form and substance to EDA.
(b) The statement of EDA’s interest must be perfected and placed of record in the Real Property records of the jurisdiction in which the Real Property is located, all in accordance with applicable law.

(c) Facilities in which the EDA Investment is only a small part of a large project, as determined by EDA, may be exempted from the requirements of this section.

Subpart C—Personal Property

§ 314.9 Recorded statement—title.
For all Projects which EDA determines involve the acquisition or improvement of significant items of Personal Property, including but not limited to ships, machinery, equipment, removable fixtures or structural components of buildings, the Recipient shall execute a security interest or other statement of EDA’s interest in the Personal Property, acceptable in form and substance to EDA, which statement must be perfected and placed of record in accordance with applicable law, with continuances re-filed as appropriate. Whether or not a statement is required by EDA to be recorded, the Recipient must hold title to the Personal Property acquired or improved as part of the Project, except as otherwise provided in this part.

Subpart D—Release of EDA’s Property Interest

§ 314.10 Procedures for release of EDA’s Property interest.

(a) General. Upon the request of a Recipient and before the expiration of the Estimated Useful Life of a Project, EDA may release any Real Property or tangible Personal Property interest held by EDA, in connection with Investment Assistance after the date that is twenty (20) years after the date on which the Investment Assistance was awarded.


(c)(1) Unauthorized Use. Notwithstanding the release of EDA’s interest pursuant to paragraphs (a) or (b) of this section, Real Property or tangible Personal Property acquired or improved with Investment Assistance may not be used:

(i) In violation of the nondiscrimination requirements set forth in § 302.20 of this chapter; or

(ii) For inherently religious activities prohibited by applicable Federal law.

(2) Violation of this paragraph (c) constitutes an Unauthorized Use of the Real Property or of the tangible Personal Property.

(d) Release.

(1) Except as provided in paragraph (b) of this section, the release of EDA’s interest pursuant to this section is not automatic; it requires EDA’s approval, which will not be withheld except for good cause, as determined in EDA’s sole discretion. In addition to the restrictions set forth in paragraph (c) of this section, the release may be conditioned upon some activity of the Recipient intended to be pursued as a consequence of the release.

(2) When requesting a release of EDA’s interest pursuant to paragraph (a) of this section, the Recipient will be required to disclose to EDA the intended future use of the Real Property or the tangible Personal Property for which the release is requested.

(i) A Recipient not intending to use the Real Property or tangible Personal Property for inherently religious activities following EDA’s release will be required to execute a covenant of use. A covenant of use with respect to Real Property shall be recorded in the jurisdiction where the Real Property is located in accordance with § 314.8. A covenant of use with respect to items of tangible Personal Property shall be perfected and recorded in accordance with applicable law, with continuances re-filed as appropriate. See § 314.9. A covenant of use shall (at a minimum) prohibit the use of the Real Property or the tangible Personal Property:

(A) For inherently religious activities in violation of applicable Federal law; and
(B) For any purpose that would violate the nondiscrimination requirements set forth in §302.20 of this chapter.

(ii) EDA may require a Recipient (or its successors in interest) who intends or foresees the use of Real Property or tangible Personal Property for inherently religious activities following the release of EDA’s interest to compensate EDA for the Federal Share of such Property. EDA recommends that a Recipient who intends or foresees the use of Real Property or tangible Personal Property (including by successors of the Recipient) for inherently religious activities to contact EDA well in advance of requesting a release pursuant to this section.

PART 315—TRADE ADJUSTMENT ASSISTANCE FOR FIRMS

Subpart A—General Provisions

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315.1 Purpose and scope.
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Subpart E—Assistance to Industries

315.17 Assistance to Firms in import-impacted industries.


SOURCE: 71 FR 56675, Sept. 27, 2006, unless otherwise noted.
its sales or production during the applicable prior time period, and:
(1) Irrespective of industry or market fluctuations; and
(2) Relative only to the previous performance of the Firm.

Directly Competitive means:
(1) Articles which are substantially equivalent for commercial purposes (i.e., are adapted to the same function or use and are essentially interchangeable); and
(2) Oil or natural gas (exploration, drilling or otherwise produced).

Firm means an individual proprietorship, partnership, joint venture, association, corporation (including a development corporation), business trust, cooperative, trustee in bankruptcy or receiver under court decree and including fishing, agricultural entities and those which explore, drill or otherwise produce oil or natural gas. For purposes of receiving benefits under this part, when a Firm owns or controls other Firms, the Firm and such other Firms, may be considered a single Firm when they produce like or Directly Competitive articles or are exerting essential economic control over one or more production facilities. Such other Firms include:
(1) Predecessor—see the following definition for Successor;
(2) Successor—a newly established Firm (that has been in business less than two years) which has purchased substantially all of the assets of a previously operating company (or in some cases a whole distinct division) (such prior company, unit or division, a “Predecessor”) and is able to demonstrate that it continued the operations of the Predecessor which has operated as an autonomous unit, provided that there were no significant transactions between the Predecessor unit and any related parent, subsidiary, or affiliate that would have affected its past performance, and that separate records are available for the Predecessor’s operations for at least two years before the petition is submitted. The Successor Firm must have continued virtually all of the Predecessor Firm’s operations by producing the same type of products, in the same plant, utilizing most of the same machinery and equipment and most of its former workers, and the Predecessor Firm must no longer be in existence;
(3) Affiliate—a company (either foreign or domestic) controlled or substantially beneficially owned by substantially the same person or persons that own or control the Firm filing the petition; or
(4) Subsidiary—a company (either foreign or domestic) that is wholly owned or effectively controlled by another company.

Increase in Imports means an increase of imports of Directly Competitive or Like Articles with articles produced by such Firm that Contributed Importantly to the applicable Total or Partial Separation or threat thereof, and to the applicable decline in sales or production.

Like Articles means any articles which are substantially identical in their intrinsic characteristics.

Partial Separation means, with respect to any employment in a Firm, either:
(1) A reduction in an employee’s work hours to eighty (80) percent or less of the employee’s average weekly hours during the year of such reductions as compared to the preceding year; or
(2) A reduction in the employee’s weekly wage to eighty (80) percent or less of his/her average weekly wage during the year of such reduction as compared to the preceding year.

Person means an individual, organization or group.

Record means any of the following:
(1) A petition for certification of eligibility to qualify for Adjustment Assistance;
(2) Any supporting information submitted by a petitioner;
(3) The report of an EDA investigation with respect to petition; and
(4) Any information developed during an investigation or in connection with any public hearing held on a petition.

Significant Number or Proportion of Workers means five (5) percent of a Firm’s work force or fifty (50) workers, whichever is less. An individual farmer or fisherman is considered a Significant Number or Proportion of Workers.
Substantial Interest means a direct material economic interest in the certification or non-certification of the petitioner.

TAAC means a Trade Adjustment Assistance Center, as more fully described in §315.5.

Threat of Total or Partial Separation means, with respect to any group of workers, one or more events or circumstances clearly demonstrating that a Total or Partial Separation is imminent.

Total Separation means, with respect to any employment in a Firm, the laying off or termination of employment of an employee for lack of work.

§ 315.3 Confidential Business Information.

EDA will follow the procedures set forth in 15 CFR 4.9 for the submission of Confidential Business Information. Submitters should clearly mark and designate as confidential any Confidential Business Information.

§ 315.4 Eligible petitioners.

Eligible petitioners for assistance under this part shall be:

(a) Trade Adjustment Assistance Centers ("TAACs"). A TAAC can be an:

(1) University affiliate;
(2) State or local government affiliate; or
(3) Non-profit organization.

(b) Firms; or
(c) Organizations assisting or representing industries in which a substantial number of Firms or workers have been certified as eligible to apply for Adjustment Assistance under sections 223 or 251 of the Trade Act, including:

(1) Existing agencies;
(2) Private individuals;
(3) Firms;
(4) Universities;
(5) Institutions;
(6) Associations;
(7) Unions; or
(8) Other non-profit industry organizations.

§ 315.5 TAAC scope, selection, evaluation and awards.

(a) TAAC purpose and scope. (1) TAACs are available to assist Firms in obtaining Adjustment Assistance in all fifty (50) U.S. States, the District of Columbia and the Commonwealth of Puerto Rico. TAACs provide Adjustment Assistance in accordance with this part either through their own staffs or by arrangements with outside consultants. Information concerning TAACs serving particular areas may be obtained from the TAAC Web site at http://www.taacenters.org or from EDA. See the applicable FFO for the appropriate points of contact and addresses.

(2) Prior to submitting a petition for Adjustment Assistance to EDA, a Firm should determine the extent to which a TAAC can provide the required Adjustment Assistance. EDA will provide Adjustment Assistance through TAACs whenever EDA determines that such assistance can be provided most effectively in this manner. Requests for Adjustment Assistance will normally be made through TAACs.

(3) TAACs generally provide Adjustment Assistance to a Firm by providing the following:

(i) Assistance to a Firm in preparing its petition for certification;
(ii) Assistance to a Certified Firm in diagnosing its strengths and weaknesses and developing its Adjustment Proposal; and
(iii) Assistance to a Certified Firm in the implementation of its Adjustment Proposal.

(b) TAAC selection. (1) EDA invites currently funded TAACs to submit either new or amended applications; provided they have performed in a satisfactory manner and complied with previous and/or current conditions in their Cooperative Agreements with EDA and contingent upon availability of funds. Such TAACs shall submit an application on a form approved by OMB, as well as a proposed budget, narrative scope of work, and such other information as requested by EDA. Acceptance of an application or amended application for a Cooperative Agreement does not assure funding by EDA.

(2) EDA may invite new TAAC proposals through an FFO. If such a proposal is acceptable, EDA will invite an application on a form approved by OMB. An application will require a narrative scope of work, proposed budget
and such other information as requested by EDA. Acceptance of an application does not assure funding by EDA.

(c) TAAC evaluation. (1) EDA generally evaluates currently funded TAACs based on:
   (i) Performance under Cooperative Agreements with EDA and compliance with the terms and conditions of such Cooperative Agreements;
   (ii) Proposed scope of work, budget and application or amended application; and
   (iii) Availability of funds.

(2) EDA generally evaluates new TAACs based on:
   (i) Competence in administering business assistance programs;
   (ii) Background and experience of staff;
   (iii) Proposed scope of work, budget and application; and
   (iv) Availability of funding.

(d) TAAC award requirements. (1) EDA generally funds TAACs for twelve (12) months.

(2) There are no Matching Share requirements for Adjustment Assistance provided by the TAACs to Firms for certification or for administrative expenses of the TAACs.

§ 315.6 Firm eligibility for Adjustment Assistance.

(a) Firms participate in the Trade Adjustment Assistance for Firms program in accordance with the following:

(1) Firms apply for certification through a TAAC by completing a petition for certification. The TAAC will assist Firms in completing such petitions at no cost to the Firms;

(2) Firms certified in accordance with the procedures described in §§ 315.7 and 315.8 must prepare an Adjustment Proposal for Adjustment Assistance from the TAAC, and submit it to EDA for approval; and

(3) EDA determines whether the Adjustment Assistance requested in the Adjustment Proposal is eligible based upon the evaluation criteria set forth in subpart D of this part. A Certified Firm may submit a request to the TAAC for Adjustment Assistance to implement an approved Adjustment Proposal.

(b) For certification, EDA evaluates Firms’ petitions strictly on the basis of fulfillment of the requirements set forth in § 315.7.

(c) (1) Firms generally receive Adjustment Assistance over a two-year (2) period.

(2) Matching Share requirements are as follows:

   (i) Each Firm must pay at least twenty-five (25) percent of the cost of the preparation of its Adjustment Proposal. Each Firm requesting $30,000 or less in total Adjustment Assistance in its approved Adjustment Proposal must pay at least twenty-five (25) percent of the cost of that Adjustment Assistance. Each Firm requesting more than $30,000 in total Adjustment Assistance in its approved Adjustment Proposal must pay at least fifty (50) percent of the cost of that Adjustment Assistance.

   (ii) Organizations representing trade-injured industries must pay at least fifty (50) percent of the total cash cost of the Adjustment Assistance, in addition to appropriate in-kind contributions.

Subpart B—Certification of Firms

§ 315.7 Certification requirements.

(a) EDA may certify a Firm as eligible to apply for Adjustment Assistance under section 251(c) of the Trade Act if EDA determines that the petition for certification meets one of the requirements set forth in paragraph (b) of this section. In order to be certified, a Firm must meet the criteria listed under any one of the three (3) circumstances in paragraph (b) of this section.

(b)(1) Twelve-month (12) decline. Based upon a comparison of the most recent twelve-month (12) period for which data are available and the immediately preceding twelve-month (12) period:

   (i) A Significant Number or Proportion of Workers in the Firm has undergone Total or Partial Separation or a Threat of Total or Partial Separation;
   (ii) Either sales or production of the Firm has Decreased Absolutely; or sales or production, or both, of any article that accounted for not less than twenty-five (25) percent of the total production or sales of the Firm during the twelve-month (12) period preceding
§ 315.8 Processing petitions for certification.

(a) Firms shall consult with a TAAC for guidance and assistance in the preparation of their petitions for certification.

(b) A Firm seeking certification shall complete a Petition by a Firm for Certification of Eligibility to Apply for Trade Adjustment Assistance (Form ED–840P or any successor form) with the following information about such Firm:

1. Identification and description of the Firm, including legal form of organization, economic history, major ownership interests, officers, directors, management, parent company, subsidiaries or Affiliates, and production and sales facilities;

2. Description of goods and services produced and sold;

3. Description of imported Directly Competitive or Like Articles with those produced;

4. Data on its sales, production and employment for the two most recent years;

5. One (1) copy of a complete auditor’s certified financial report for the entire period covering the petition, or if not available, one (1) copy of the complete profit and loss statements, balance sheets and supporting statements prepared by the Firm’s accountants for the entire period covered by the petition;

6. Information concerning its major customers and their purchases (or its bids, if there are no major customers); and

7. Such other information as EDA considers material.

(c) EDA shall determine whether the petition has been properly prepared and can be accepted. Promptly thereafter, EDA shall notify the petitioner that the petition has been accepted or advise the TAAC that the petition has not been accepted, but may be resubmitted at any time without prejudice when the specified deficiencies have been corrected. Any resubmission will be treated as a new petition.

(d) EDA will publish a notice of acceptance of a petition in the Federal Register.

(e) EDA will initiate an investigation to determine whether the petitioner meets the requirements set forth in section 251(c) of the Trade Act and §315.7.

(f) A petitioner may withdraw a petition for certification if EDA receives a
request for withdrawal before it makes a certification determination or denial. A Firm may submit a new petition at any time thereafter in accordance with the requirements of this section and §315.7.

(g) Following acceptance of a petition, EDA will:

(1) Make a determination based on the Record as soon as possible after the petitioning Firm or TAAC has submitted all material. In no event may the determination period exceed sixty (60) days from the date on which EDA accepted the petition; and

(2) Either certify the petitioner as eligible to apply for Adjustment Assistance or deny the petition. In either event, EDA shall promptly give written notice of action to the petitioner. Any written notice to the petitioner or any parties as specified in §315.10(d) of a denial of a petition shall specify the reason(s) for the denial. A petitioner shall not be entitled to resubmit a petition within one (1) year from the date of denial, provided, EDA may waive the one-year (1) limitation for good cause.

§315.10 Loss of certification benefits.

A Firm may fail to obtain benefits of certification, regardless of whether its certification is terminated, for any of the following reasons:

(a) Failure to submit an acceptable Adjustment Proposal within two (2) years after date of certification. While approval of an Adjustment Proposal may occur after the expiration of such two-year (2) period, a Firm must submit an acceptable Adjustment Proposal before such expiration;

(b) Failure to submit documentation necessary to start implementation or modify its request for Adjustment Assistance consistent with its Adjustment Proposal within six (6) months after approval of the Adjustment Proposal, where two (2) years have elapsed since the date of certification. If the Firm anticipates needing a longer period to submit documentation, it should indicate the longer period in its Adjustment Proposal. If the Firm is unable to submit its documentation within the allowed time, it should notify EDA in writing of the reasons for the delay and submit a new schedule. EDA has the discretion to accept or refuse a new schedule;

(c) EDA has denied the Firm’s request for Adjustment Assistance, the time period allowed for the submission of any documentation in support of such request has expired, and two (2) years have elapsed since the date of certification; or

(d) Failure to diligently pursue an approved Adjustment Proposal where two (2) years have elapsed since the date of certification.
§ 315.11 Appeals, final determinations and termination of certification.

(a) Any petitioner may appeal in writing to EDA from a denial of certification, provided that EDA receives the appeal by personal delivery or by registered mail within sixty (60) days from the date of notice of denial under § 315.8(g). The appeal must state the grounds on which the appeal is based, including a concise statement of the supporting facts and applicable law. The decision of EDA on the appeal shall be the final determination within the Department. In the absence of an appeal by the petitioner under this paragraph, the determination under § 315.8(g) shall be final.

(b) A Firm, its representative or any other interested domestic party aggrieved by a final determination under paragraph (a) of this section may, within sixty (60) days after notice of such determination, begin a civil action in the United States Court of International Trade for review of such determination, in accordance with section 284 of the Trade Act.

(c) Whenever EDA determines that a Certified Firm no longer requires Adjustment Assistance or for other good cause, EDA will terminate the certification and promptly publish notice of such termination in the Federal Register. The termination will take effect on the date specified in the published notice.

(d) EDA shall immediately notify the petitioner and shall state the reasons for any termination.

Subpart C—Protective Provisions

§ 315.12 Recordkeeping.

Each TAAC shall keep records that fully disclose the amount and disposition of Trade Adjustment Assistance program funds so as to facilitate an effective audit.

§ 315.13 Audit and examination.

EDA and the Comptroller General of the United States shall have access for the purpose of audit and examination to any books, documents, papers, and records of a Firm, TAAC or other recipient of Adjustment Assistance pertaining to the award of Adjustment Assistance.

§ 315.14 Certifications.

EDA will provide no Adjustment Assistance to any Firm unless the owners, partners, members, directors or officers thereof certify:

(a) The names of any attorneys, agents, and other Persons engaged by or on behalf of the Firm for the purpose of expediting applications for such Adjustment Assistance; and

(b) The fees paid or to be paid to any such Person.

§ 315.15 Conflicts of interest.

EDA will provide no Adjustment Assistance to any Firm under this part unless the owners, partners, or officers execute an agreement binding them and the Firm for a period of two (2) years after such Adjustment Assistance is provided, to refrain from employing, tendering any office or employment to, or retaining for professional services any Person who, on the date such assistance or any part thereof was provided, or within one (1) year prior thereto, shall have served as an officer, attorney, agent, or employee occupying a position or engaging in activities which involved discretion with respect to the provision of such Adjustment Assistance.

Subpart D—Adjustment Proposals

§ 315.16 Adjustment Proposal Requirements.

EDA evaluates Adjustment Proposals based on the following:

(a) EDA must receive the Adjustment Proposal within two (2) years after the date of the certification of the Firm;

(b) The Adjustment Proposal must include a description of any Adjustment Assistance requested to implement such proposal, including financial and other supporting documentation as EDA determines is necessary, based upon either:

(1) An analysis of the Firm’s problems, strengths and weaknesses and an assessment of its prospects for recovery; or

(2) If EDA so determines, other available information;

(c) The Adjustment Proposal must:
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(1) Be reasonably calculated to contribute materially to the economic adjustment of the Firm (i.e., that such proposal will constructively assist the Firm to establish a competitive position in the same or a different industry);

(2) Give adequate consideration to the interests of a sufficient number of separated workers of the Firm, by providing, for example, that the Firm will:
   (i) Give a rehiring preference to such workers;
   (ii) Make efforts to find new work for a number of such workers; and
   (iii) Assist such workers in obtaining benefits under available programs; and

(3) Demonstrate that the Firm will make all reasonable efforts to use its own resources for its recovery, though under certain circumstances, resources of related Firms or major stockholders will also be considered; and

(d) The Adjustment Assistance identified in the Adjustment Proposal must consist of specialized consulting services designed to assist the Firm in becoming more competitive in the global marketplace. For this purpose, Adjustment Assistance generally consists of knowledge-based services such as market penetration studies, customized business improvements, and designs for new products. Adjustment Assistance does not include expenditures for capital improvements or for the purchase of business machinery or supplies.

Subpart E—Assistance to Industries

§ 315.17 Assistance to Firms in import-impacted industries.

(a) Whenever the International Trade Commission makes an affirmative finding under section 202(B) of the Trade Act that increased imports are a substantial cause of serious injury or threat thereof with respect to an industry, EDA shall provide to the Firms in such industry assistance in the preparation and processing of petitions and applications for benefits under programs which may facilitate the orderly adjustment to import competition of such Firms.

(b) EDA may provide Adjustment Assistance, on such terms and conditions as EDA deems appropriate, for the establishment of industry-wide programs for new product development, new process development, export development or other uses consistent with the purposes of the Trade Act and this part.

(c) Expenditures for Adjustment Assistance under this section may be up to $10,000,000 annually per industry, subject to availability of funds, and shall be made under such terms and conditions as EDA deems appropriate.
PART 400—EMERGENCY STEEL GUARANTEE LOAN PROGRAM

Subpart A—General

§ 400.1 Purpose.


[65 FR 70293, Nov. 22, 2000]

§ 400.2 Definitions.


(b) Administer, administering and administration, mean the Lender’s actions in making, disbursing, servicing (including, but not limited to care, preservation and maintenance of collateral), collecting and liquidating a loan and security.

(c) Agent means that Lender authorized to take such actions, exercise such powers, and perform such duties on behalf and in representation of all Lenders party to a Guarantee of a single loan, as is required by, or necessarily incidental to, the terms and conditions of the Guarantee.

(d) Applicant means the private banking or investment institution applying for a loan guarantee under this part.

(e) Board means the Emergency Steel Guarantee Loan Board.

(f) Borrower means a Qualified Steel Company which could receive a loan guaranteed by the Board under this Program.

(g) Guarantee means the written agreement between the Board and one or more Lenders, and approved by the Borrower, pursuant to which the Board guarantees repayment of a specified percentage of the principal of the loan, including the Special Terms and Conditions, the General Terms and Conditions, and all exhibits thereto.

(h) Guaranteed Portion means the portion of the principal of a loan that is subject to the Guarantee.

(i) Lender means a private banking or investment institution, eligible under § 400.201, that is a party to a Guarantee issued by the Board. With respect to a Guarantee of a single loan to which more than one Lender is a party, the term Lender means Agent.

(j) Loan Documents mean the loan agreement and all other instruments, and all documentation between the Lender and the Borrower evidencing the making, disbursing, securing, collecting, or otherwise administering of the loan. It includes any agreement and other documents relating to a Supplemental Guarantee. Loan Documents may not be modified without the prior written approval of the Board.

[65 FR 70293, Nov. 22, 2000]
§ 400.100 Purpose and scope.
This subpart describes the Board’s authorities and organizational structure, the means and rules by which the Board takes actions, and procedures for public access to Board records.

§ 400.101 Composition of the Board.
The Board consists of the Chairman of the Board of Governors of the Federal Reserve System, who acts as Chairman of the Board, the Chairman of the Securities and Exchange Commission, and the Secretary of Commerce.
through the use of conference call, telephone or similar communications equipment, by means of which all persons participating in the meeting can simultaneously speak to and hear each other. Any member so participating in a meeting shall be deemed present for all purposes. Actions taken by the Board at meetings conducted through the use of such equipment, including the votes of each member, shall be recorded in the usual manner in the minutes of the meetings of the Board.

(f) Actions between meetings. When, in the judgment of the Chairman, circumstances occur making it desirable for the Board to consider action when it is not feasible to call a meeting, the relevant information and recommendations for action may be transmitted to the members by the Secretary of the Board and the voting members may communicate their votes to the Chairman in writing (including an action signed in counterpart by each Board member), electronically, or orally (including telephone communication). Any action taken under this paragraph has the same effect as an action taken at a meeting. Any such action shall be recorded in the minutes.

(g) Delegations of authority. The Board may delegate authority, subject to such terms and conditions as the Board deems appropriate, to the Executive Director, the General Counsel, or the Secretary of the Board, to take certain actions not required by the Act to be taken by the Board. All delegations shall be made pursuant to resolutions of the Board and recorded in writing, whether in the minutes of a meeting or otherwise. Any action taken pursuant to delegated authority has the effect of an action taken by the Board.

§ 400.105 Staff.

(a) Executive Director. The Executive Director of the Board advises and assists the Board in carrying out its responsibilities under the Act, provides general direction with respect to the administration of the Board's actions, directs the activities of the staff, and performs such other duties as the Board may require.

(b) General Counsel. The General Counsel of the Board provides legal advice relating to the responsibilities of the Board and performs such other duties as the Board may require.

(c) Secretary of the Board. The Secretary of the Board sends notice of all meetings, prepares minutes of all meetings, maintains a complete record of all votes and actions taken by the Board, has custody of all records of the Board and performs such other duties as the Board may require.

(d) An individual may hold more than one staff position.


§ 400.106 Ex parte communications.

Oral or written communication, not on the public record, between any member of the Board and any party or parties interested in any matter pending before the Board concerning the substance of that matter is prohibited.

[66 FR 53079, Oct. 19, 2001]

§ 400.107 Freedom of Information Act.

(a) Definitions. All terms used in this section which are defined in 5 U.S.C. 551 or 5 U.S.C. 552 shall have the same meaning in this section. In addition the following definitions apply to this section:

(1) FOIA, as used in this section, means the “Freedom of Information Act,” as amended, 5 U.S.C. 552.

(2) Commercial use request means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

(3) Direct costs mean those expenditures that the Board actually incurs in searching for, reviewing, and duplicating documents in response to a request made under paragraph (c) of this section. Direct costs include, for example, the labor costs of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits). Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

(4) Duplication means the process of making a copy of a document in response to a request for disclosure of
records or for inspection of original records that contain exempt material or that otherwise cannot be inspected directly. Among others, such copies may take the form of paper, microfilm, audiovisual materials, or machine-readable documentation (e.g., magnetic tape or disk).

(5) Educational institution means a preschool, a public or private elementary or secondary school, or an institution of undergraduate higher education, graduate higher education, professional education, or an institution of vocational education that operates a program of scholarly research.

(6) Noncommercial scientific institution refers to an institution that is not operated on a "commercial" basis (as that term is used in this section) and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(7) News means information about current events or that would be of current interest to the public. Examples of news media entities include, but are not limited to, television or radio stations broadcasting to the public at large, and publishers of newspapers and other periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. "Freelance" journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it.

(8) Representative of the news media means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the general public.

(9) Review means the process of examining documents, located in response to a request for access, to determine whether any portion of a document is exempt information. It includes doing all that is necessary to excise the documents and otherwise to prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(10) Search means the process of looking for material that is responsive to a request, including page-by-page or line-by-line identification within documents. Searches may be done manually or by computer.

(b) Records available for public inspection and copying—(1) Types of records made available. The information in this section is furnished for the guidance of the public and in compliance with the requirements of the Freedom of Information FOIA, as amended (5 U.S.C. 552)(FOIA). This section sets forth the procedures the Board follows to make publicly available the materials specified in 5 U.S.C. 552(a)(2). These materials shall be made available for inspection and copying at the Board's Freedom of Information Office pursuant to 5 U.S.C. 552(a)(2). Information routinely provided to the public as part of a regular Board activity (for example, press releases) may be provided to the public without following this section.

(2) Reading room procedures. Information available under this section is available for inspection and copying, from 9:00 a.m. to 5:00 p.m. weekdays, at the Freedom of Information Office of the Board, Steel Guarantee Loan Board, U.S. Department of Commerce, Washington, DC 20230.

(3) Electronic records. Information available under this section that was created on or after November 1, 1996, shall also be available on the Board's website found at http://elb.oiec.doc.gov and at http://elb.commerce.gov.

(c) Records available to the public on request—(1) Types of records made available. All records of the Board that are not available under paragraph (b) of this section shall be made available upon request, pursuant to the procedures in this section and the exceptions set forth in the FOIA. The Board's policy is to make discretionary disclosures of records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court.

(2) Procedures for requesting records. A request for records shall reasonably describe the records in a way that enables the Board's staff to identify and
produce the records with reasonable effort and without unduly burdening or significantly interfering with any of the Board’s operations. The request shall be submitted in writing to the Secretary of the Board, Steel Guarantee Loan Board, U.S. Department of Commerce, Washington, DC 20230; or sent by facsimile to the Secretary of the Board. The request shall be clearly marked FREDOM OF INFORMATION ACT REQUEST.

(3) Contents of request. The request shall contain the following information:

(i) The name and address of the requester, and the telephone number at which the requester can be reached during normal business hours;

(ii) Whether the requested information is intended for commercial use, or whether the requester represents an educational or noncommercial scientific institution, or news media;

(iii) A statement agreeing to pay the applicable fees, or a statement identifying any fee limitation desired, or a request for a waiver or reduction of fees that satisfies paragraph (f) of this section.

(d) Processing requests—(1) Priority of responses. The date of receipt for any request, including one that is addressed incorrectly or that is referred to the Board by another agency, is the date the Secretary of the Board actually receives the request. The Secretary of the Board shall normally process requests in the order they are received. However, in the Secretary of the Board’s discretion, the Board may use two or more processing tracks by distinguishing between simple and more complex requests based on the number of pages involved, or some other measure of the amount of work and time needed to process the request, and whether the request qualifies for expedited processing as described in paragraph (d)(2) of this section. When using multitrack processing, the Secretary of the Board may provide requesters in the slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing. The Secretary of the Board shall contact the requester by telephone or by letter, whichever is most efficient in each case.

(2) Expedited processing. (i) A person may request expedited access to records by submitting a statement, certified to be true and correct to the best of that person’s knowledge and belief, that demonstrates a compelling need for the records, as defined in 5 U.S.C. 552(a)(6)(E)(v).

(ii) The Secretary of the Board shall notify a requester of the determination whether to grant or deny a request for expedited processing within ten working days of receipt of the request. If the Secretary of the Board grants the request for expedited processing, the Board shall notify the Board’s actual time for access to information as soon as practicable. If the Secretary of the Board denies a request for expedited processing, the requester may file an appeal pursuant to the procedures set forth in paragraph (e) of this section, and the Board shall respond to the appeal within twenty days after the appeal was received by the Board.

(3) Time limits. The time for response to requests shall be 20 working days, except:

(i) In the case of expedited treatment under paragraph (d)(2) of this section;

(ii) Where the running of such time is suspended for payment of fees pursuant to paragraph (f)(2)(ii) of this section;

(iii) Where the estimated charge is less than $250, and the requester does not guarantee payment pursuant to paragraph (f)(2)(i) of this section;

(iv) In unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B)(iii), the time limit may be extended for a period of time not to exceed 10 working days as provided by written notice to the requester, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched; or such alternative time period as mutually agreed to by the Secretary of the Board and the requester when the Secretary of the Board notifies the requester that the request cannot be processed in the specified time limit.

(4) Response to request. In response to a request that satisfies paragraph (c) of this section, an appropriate search shall be conducted of records in the possession, custody, and control of the Board on the date of receipt of the request, and
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a review made of any responsive information located. The Secretary of the Board shall notify the requester of:

(i) The Secretary of the Board’s determination of the request and the reasons therefor;

(ii) The information withheld, and

(iii) The right to appeal any denial or partial denial, pursuant to paragraph (e) of this section.

(5) Referral to another agency. To the extent a request covers documents that were created by, obtained from, classified by, or is in the primary interest of another agency, the Secretary of the Board may refer the request to that agency for a direct response by that agency and inform the requester promptly of the referral. The Secretary of the Board shall consult with another Federal agency before responding to a request if the Board receives a request for a record in which:

(i) Another Federal agency subject to the FOIA has a significant interest, but not the primary interest; or

(ii) Another Federal agency not subject to the FOIA has the primary interest or a significant interest. Ordinarily, the agency that originated a record will be presumed to have the primary interest in it.

(6) Providing responsive records. (i) A copy of records or portions of records responsive to the request shall be sent to the requester by regular U.S. mail to the address indicated in the request, unless the requester elects to take delivery of the documents at the Board’s Freedom of Information Office or makes other acceptable arrangements, or the Secretary of the Board deems it appropriate to send the documents by another means. The Secretary of the Board shall provide a copy of the record in any form or format requested if the record is readily reproducible in that form or format, but the Secretary of the Board need not provide more than one copy of any record to a requester.

(ii) The Secretary of the Board shall provide any reasonably segregable portion of a record that is responsive to the request after deleting those portions that are exempt under the FOIA or this section.

(iii) Except where disclosure is expressly prohibited by statute, regulation, or order, the Secretary of the Board may authorize the release of records that are exempt from mandatory disclosure whenever the Board or designated Board members determine that there would be no foreseeable harm in such disclosure.

(iv) The Board is not required in response to the request to create records or otherwise to prepare new records.

(7) Prohibition against disclosure. Except as provided in this part, no officer, employee, or agent of the Board shall disclose or permit the disclosure of any unpublished information of the Board to any person (other than Board officers, employees, or agents properly entitled to such information for the performance of official duties), unless required by law.

(e) Appeals. (1) Any person denied access to Board records requested under paragraph (c) of this section, denied expedited processing under paragraph (d) of this section, or denied a waiver of fees under paragraph (f) of this section may file a written appeal within 30 calendar days after the date of such denial with the Board. The written appeal shall prominently display the phrase FREEDOM OF INFORMATION ACT APPEAL on the first page, and shall be addressed to the General Counsel of the Board, Steel Guarantee Loan Board, U.S. Department of Commerce, Washington, DC 20230; or sent by facsimile to the General Counsel of the Board. The appeal shall include a copy of the original request, the initial denial, if any, and a statement of the reasons why the requested records should be made available and why the initial denial was in error.

(2) The General Counsel of the Board shall make a determination regarding any appeal within 20 working days of actual receipt of the appeal, and the determination letter shall notify the appealing party of the right to seek judicial review in event of denial.

(f) Fee schedules; waiver of fees—

(1) Fee schedule. The fees applicable to a request for records pursuant to paragraph (c) of this section are set forth in the uniform fee schedule at the end of this paragraph (f).
(i) Search. (A) Search fees shall be charged for all requests—other than requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media—subject to the limitations of paragraph (f)(1)(iv) of this section. The Secretary of the Board shall charge for time spent searching even if no responsive record is located or if the Secretary of the Board withholds the record(s) located as entirely exempt from disclosure. Search fees shall be the direct costs of conducting the search by the involved employees.

(B) For computer searches of records, requesters will be charged the direct costs of conducting the search, although certain requesters (as provided in paragraph (f)(3) of this section) will be charged no search fee and certain other requesters (as provided in paragraph (f)(3)) are entitled to the cost equivalent of two hours of manual search time without charge. These direct costs include the costs, attributable to the search, of operating a central processing unit and operator/programmer salary.

(ii) Duplication. Duplication fees will be charged to all requesters, subject to the limitations of paragraph (f)(1)(iv) of this section. For a paper photocopy of a record (no more than one copy of which need be supplied), the fee shall be 15 cents per page. For copies produced by computer, such as tapes or printouts, the Secretary of the Board shall charge the direct costs, including operator time, of producing the copy. For other forms of duplication, the Secretary of the Board will charge the direct costs of that duplication.

(iii) Review. Review fees shall be charged to requesters who make a commercial use request. Review fees shall be charged only for the initial record review—the review done when the Secretary of the Board determines whether an exemption applies to a particular record at the initial request level. No charge will be made for review at the administrative appeal level for an exemption already applied. However, records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies, and the costs of that review are chargeable. Review fees shall be the direct costs of conducting the review by the involved employees.

(iv) Limitations on charging fees. (A) No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media. No search fee or review fee will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(C) Whenever a total fee calculated under this paragraph is $25 or less for any request, no fee will be charged.

(D) For requesters other than those seeking records for a commercial use, no fee will be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages totals more than $25.

(2) Payment procedures. All persons requesting records pursuant to paragraph (c) of this section shall pay the applicable fees before the Secretary of the Board sends copies of the requested records, unless a fee waiver has been granted pursuant to paragraph (f)(6) of this section. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(i) Advance notification of fees. If the estimated charges are likely to exceed $25, the Secretary of the Board shall notify the requester of the estimated amount, unless the requester has indicated a willingness to pay fees as high as those anticipated. Upon receipt of such notice, the requester may confer with the Secretary of the Board to reformulate the request to lower the costs. The processing of the request shall be suspended until the requester provides the Secretary of the Board with a written guarantee that payment will be made upon completion of the processing.

(ii) Advance payment. The Secretary of the Board shall require advance payment of any fee estimated to exceed $250. The Secretary of the Board shall also require full payment in advance where a requester has previously failed to pay a fee in a timely fashion. If an advance payment of an estimated fee exceeds the actual total fee by $1 or more, the difference shall be refunded.
to the requester. The time period for responding to requests under paragraph (d)(4) of this section, and the processing of the request shall be suspended until the Secretary of the Board receives the required payment.

(iii) Late charges. The Secretary of the Board may assess interest charges when fee payment is not made within 30 days of the date on which the billing was sent. Assessment of such interest will commence on the 31st day following the day on which the billing was sent. Interest is at the rate prescribed in 31 U.S.C. 3717.

(3) Categories of uses. The fees assessed depend upon the fee category. In determining which category is appropriate, the Secretary of the Board shall look to the identity of the requester and the intended use set forth in the request for records. Where a requester’s description of the use is insufficient to make a determination, the Secretary of the Board may seek additional clarification before categorizing the request.

(i) Commercial use requester. The fees for search, duplication, and review apply when records are requested for commercial use.

(ii) Educational, non-commercial scientific institutions, or representatives of the news media requesters. The fees for duplication apply when records are not sought for commercial use, and the requester is a representative of the news media or an educational or non-commercial scientific institution, whose purpose is scholarly or scientific research. The first 100 pages of duplication, however, will be provided free.

(iii) All other requesters. For all other requests, the fees for search and duplication apply. The first two hours of search time and the first 100 pages of duplication, however, will be provided free.

(4) Nonproductive search. Fees for search may be charged even if no responsive documents are found. Fees for search and review may be charged even if the request is denied.

(5) Aggregated requests. A requester may not file multiple requests at the same time, solely in order to avoid payment of fees. If the Secretary of the Board reasonably believes that a requester is separating a request into a series of requests for the purpose of evading the assessment of fees or that several requesters appear to be acting together to submit multiple requests solely in order to avoid payment of fees, the Secretary of the Board may aggregate such requests and charge accordingly. It is considered reasonable for the Secretary of the Board to presume that multiple requests by one requester on the same topic made within a 30-day period have been made to avoid fees.

(6) Waiver or reduction of fees. A request for a waiver or reduction of the fees, and the justification for the waiver, shall be included with the request for records to which it pertains. If a waiver is requested and the requester has not indicated in writing an agreement to pay the applicable fees if the waiver request is denied, the time for response to the request for documents, as set forth under paragraph (d)(4) of this section, shall not begin until a determination has been made on the request for a waiver or reduction of fees.

(i) Standards for determining waiver or reduction. The Secretary of the Board may grant a waiver or reduction of fees where it is determined both that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operation or activities of the government, and that the disclosure of information is not primarily in the commercial interest of the requester. In making this determination, the following factors shall be considered:

(A) Whether the subject of the records concerns the operations or activities of the government;

(B) Whether disclosure of the information is likely to contribute significantly to public understanding of government operations or activities;

(C) Whether the requester has the intention and ability to disseminate the information to the public;

(D) Whether the information is already in the public domain;

(E) Whether the requester has a commercial interest that would be furthered by the disclosure; and, if so,

(F) Whether the magnitude of the identified commercial interest of the
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requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(ii) Contents of request for waiver. A request for a waiver or reduction of fees shall include a clear statement of how the request satisfies the criteria set forth in paragraph (f)(6)(i) of this section.

(iii) Burden of proof. The burden shall be on the requester to present evidence or information in support of a request for a waiver or reduction of fees.

(iv) Determination by Secretary of the Board. The Secretary of the Board shall make a determination on the request for a waiver or reduction of fees and shall notify the requester accordingly. A denial may be appealed to the Board in accordance with paragraph (e) of this section.

(7) Uniform fee schedule.

<table>
<thead>
<tr>
<th>Service</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Manual search</td>
<td>Actual salary rate of employee involved, plus 16 percent of salary rate.</td>
</tr>
<tr>
<td>(ii) Computerized search</td>
<td>Actual direct cost, including operator time.</td>
</tr>
<tr>
<td>(iii) Duplication of records:</td>
<td>$1.50 per page</td>
</tr>
<tr>
<td>(A) Paper copy reproduction</td>
<td>Actual direct cost, including operator time.</td>
</tr>
<tr>
<td>(B) Other reproduction (e.g., computer disk or printout, microfilm, microfiche, or microform).</td>
<td></td>
</tr>
<tr>
<td>(iv) Review of records (includes preparation for release, i.e. excising).</td>
<td>Actual salary rate of employee conducting review, plus 16 percent of salary rate.</td>
</tr>
</tbody>
</table>

(g) Request for confidential treatment of business information—(1) Submission of request. Any submitter of information to the Board who desires confidential treatment of business information pursuant to 5 U.S.C. 552(b)(4) shall file a request for confidential treatment with the Board at the time the information is submitted or a reasonable time after submission.

(2) Form of request. Each request for confidential treatment of business information shall state in reasonable detail the facts supporting the commercial or financial nature of the business information and the legal justification under which the business information should be protected. Conclusory statements that release of the information would cause competitive harm generally will not be considered sufficient to justify confidential treatment.

(3) Designation and separation of confidential material. All information considered confidential by a submitter shall be clearly designated “PROPRIETARY” or “BUSINESS CONFIDENTIAL” in the submission and separated from information for which confidential treatment is not requested. Failure to segregate confidential commercial or financial information from other material may result in release of the nonsegregated material to the public without notice to the submitter.

(h) Request for access to confidential commercial or financial information.—(1) Request for confidential commercial or financial information. A request by a submitter for confidential treatment of any business information shall be considered in connection with a request for access to that information.

(2) Notice to the submitter. (i) The Secretary of the Board shall notify a submitter who requested confidential treatment of information pursuant to 5 U.S.C. 552(b)(4), of the request for access.

(ii) Absent a request for confidential treatment, the Secretary of the Board may notify a submitter of a request for access to submitter’s business information if the Secretary of the Board reasonably believes that disclosure of the information may cause substantial competitive harm to the submitter.

(iii) The notice given to the submitter by mail, return receipt requested, shall be given as soon as practicable after receipt of the request for access, and shall describe the request and provide the submitter seven working days from the date of notice, to submit written objections to disclosure of the information. Such statement shall specify all grounds for withholding any of the information and shall demonstrate why the information which is considered to be commercial or financial information, and that the information is a trade secret, is privileged or confidential, or that its disclosure is likely to cause substantial competitive harm to the submitter. If the submitter fails to respond to the notice within the time specified, the submitter will be considered to have no...
§ 400.108 Restrictions on lobbying.

(a) No funds received through a loan guaranteed under this Program may be expended by the recipient of a Federal contract, grant, loan, loan Guarantee, 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 or loan Guarantee, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, loan Guarantee, or cooperative agreement.

(b) 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 the application form, 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.

(c) 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 Standard Form-LLL 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.

(d) Each person shall file a certification, contained in the application against the Board to compel disclosure of such information, and shall promptly notify a requester of any suit filed against the Board to enjoin the disclosure of requested documents.

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form, and a disclosure form (Standard Form-LLL), 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.

(e) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

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 (c) of this section.

(f) 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 (d) or (e) 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), employees, or Member(s) contacted to influence or attempt to influence a covered Federal action.

§ 400.109 Government-wide debarment and suspension (nonprocurement).

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a government-wide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect. The Board shall review the List of Debarred entities prior to making final loan Guarantee decisions. Suspension or debarment may be a basis for denying a loan Guarantee.

(b) This section applies to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of this section such transactions will be referred to as “covered transactions”.

1. Covered transaction. For purposes of this section, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) Primary covered transaction. Except as noted in paragraph (b)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan Guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person.

(ii) Lower tier covered transaction. A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction;

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $100,000) under a primary covered transaction;

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons may include loan officers or...
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chief executive officers acting as principal investigators and providers of federally-required audit services.

(2) Exceptions. The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual’s business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of this section would be prohibited by law.

(3) Board covered transactions. This section applies to the Board’s loan Guarantees, subcontracts and transactions at any tier that are charges as direct or indirect costs, regardless of type.

(c) Primary covered transactions. Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the Executive Branch of the Federal Government for the period of their debarment, suspension, or the period they are proposed for debarment under 48 CFR part 9, subpart 9.4. Accordingly, no agency shall enter into primary covered transactions with such excluded persons during such period, except as permitted pursuant to paragraph (l) of this section.

(d) Lower tier covered transactions. Except to the extent prohibited by law, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see paragraph (b)(1)(ii) of this section for the period of their exclusion.)

(e) Exceptions. Debarment or suspension does not affect a person's eligibility for—

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual’s present responsibility (but benefits received in an individual’s business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of this section would be prohibited by law.

(f) Persons who are ineligible are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

(g) Persons who accept voluntary exclusions are excluded in accordance with the terms of their settlements. The Board shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

(h) The Board may grant an exception permitting a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under 48 CFR part 9, subpart 9.4, to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by
Executive Order 12549. However, in accordance with the President’s stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with the Executive Order.

(i) Notwithstanding the debarment, suspension, proposed debarment under 48 CFR part 9, subpart 9.4, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(j) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded, except as provided in paragraph (h) of this section.

(k) Except as permitted under paragraphs (h) or (i) of this section, a participant shall not knowingly do business under a covered transaction with a person who is—

(1) Debarred or suspended;
(2) Proposed for debarment under 48 CFR part 9, subpart 9.4; or
(3) Ineligible for or voluntarily excluded from the covered transaction.

(l) Violation of the restriction under paragraph (k) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(m) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

§ 400.110 Amendments.

The Board’s rules in this chapter may be adopted or amended, or new rules may be adopted, only by majority vote of the Board.

[65 FR 70293, Nov. 22, 2000]

Subpart C—Steel Guarantee Loans

§ 400.200 Eligible Borrower.

(a) An eligible Borrower must be a Qualified Steel Company that can demonstrate:

(1) Credit is not otherwise available to it under reasonable terms or conditions sufficient to meet its financing needs, as reflected in the financial and business plans of the company;
(2) The prospective earning power of that company, together with the character and value of the security pledged, furnish reasonable assurance of repayment of the loan to be guaranteed in accordance with its terms;
(3) The company has agreed to permit audits by the General Accounting Office and an independent auditor acceptable to the Board prior to the issuance of the guarantee and while any such guaranteed loan is outstanding;
(4) It has experienced layoffs, production losses, or financial losses between January 1, 1998, and the date of application for the Guarantee, demonstrated as a comparison between employment, production, or net income existing on January 1, 1998 and on the date of application; and
(5) In the case of a purchaser of substantial assets of a Qualified Steel Company; the Qualified Steel Company is unable to re-organize itself.

(b) For purposes of this section, a company will be considered a purchaser of substantial assets of a Qualified Steel Company if the company’s identifiable assets purchased from a Qualified Steel Company are 50 percent or more of the consolidated assets of that Qualified Steel Company and its subsidiaries.

(c) The Lender must provide with its application a letter from at least one
§ 400.201 Eligible Lender.

(a) A lender eligible to apply to the Board for a Guarantee of a loan must be:

(1) A banking institution, such as a commercial bank or trust company, subject to regulation by the Federal banking agencies enumerated in 12 U.S.C. 1813; or

(2) An investment institution, such as an investment bank, commercial finance company, or insurance company, that is currently engaged in commercial lending in the normal course of its business.

(b) If more than one banking or investment institution is applying to the Board for a Guarantee of a single loan, each one of the banking or investment institutions on the application must meet the requirements to be an eligible lender set forth in paragraph (a) of this section.

(c) Status as a Lender under paragraph (a) of this section does not assure that the Board will issue the Guarantee sought, or otherwise preclude the Board from declining to issue a Guarantee. In addition to evaluating an application pursuant to §400.207, in making a determination to issue a Guarantee to a Lender, the Board will assess:

(1) The Agent Lender’s level of regulatory capital, in the case of banking institutions, or net worth, in the case of investment institutions;

(2) Whether the Agent Lender possesses the ability to administer the loan, as required by §400.211(b), including its experience with loans to steel companies;

(3) The scope, volume and duration of the Agent Lender’s activity in administering loans;

(4) The performance of the Agent Lender’s loan portfolio, including its current delinquency rate;

(5) The Agent Lender’s loss rate as a percentage of loan amounts for its current fiscal year; and

(6) Any other matter the Board deems material to its assessment of the Agent Lender.

§ 400.202 Loan amount.

(a) The aggregate amount of loan principal guaranteed under this Program to a single Qualified Steel Company may not exceed $250 million.

(b) Of the aggregate amount of loans authorized to be guaranteed and outstanding at any one time, not more than $30 million shall be loans to iron ore companies.

§ 400.203 Guarantee percentage.

A guarantee issued by the Board may not exceed 85 percent of the amount of the principal of a loan to a Qualified Steel Company. Subject to the provisions of this part, one or more third
§ 400.204 Loan terms.

(a) All loans guaranteed under the Program shall be due and payable in full no later than December 31, 2005.

(b) Loans guaranteed under the Program must bear a rate of interest determined by the Board to be reasonable. The reasonableness of an interest rate will be determined with respect to current average yields on outstanding obligations of the United States with remaining periods of maturity comparable to the term of the loan sought to be guaranteed. The Board may reject an application to guarantee a loan if it determines the interest rate of such loan to be unreasonable.

(c)(1) The performance of all of the Borrower's obligations under the Loan Documents shall be secured by, and shall have the priority in, such Security as provided for within the terms and conditions of the Guarantee.

(2) Without limiting the Lender's or Borrower's obligations under paragraph (c) of this section, at a minimum, the loan shall be secured by:
   (i) A fully perfected and enforceable security interest and/or lien, with first priority over conflicting security interests or other liens in all property acquired, improved or derived from the loan funds;
   (ii) A fully perfected and enforceable security interest and/or lien in any other property of the Borrower's pledged to secure the loan, including accessions, replacements, proceeds, or property given by a third party as Security for the loan.

(3) The entire loan will be secured by the same Security with equal lien priority for the Guaranteed Portion and the Unguaranteed Portion of the loan. The Unguaranteed Portion of the loan will neither be paid first nor given any preference over the Guaranteed Portion. A Supplemental Guarantor shall not have a security interest, direct or indirect, in any asset of the Borrower or any affiliate thereof other than the Security.

(d) An Applicant's compliance with paragraph (c)(2) of this section does not assure a finding of reasonable assurance of repayment, or assure the Board's Guarantee of the loan.

§ 400.205 Application process.

(a) Application process. An original application and three copies must be received by the Board no later than 5 p.m. EST, August 31, 2001 in the Board's offices at 1099—14th Street, NW, Suite 2600 East, Washington, DC 20005. Applications which have been provided to a delivery service with "delivery guaranteed" before 5 p.m. on August 31, 2001 will be accepted for review if the Applicant can document that the application was provided to the delivery service with delivery to the address listed in this section guaranteed prior to the closing date and time. A postmark is not sufficient to meet this deadline as the application must be received by the required date and time. Applications will not be accepted via facsimile machine transmission or electronic mail.

(b) Applications shall contain the following:
   (1) A completed Form "Application for Steel Guarantee Loan";
   (2) The information required for the completion of Form "Environmental Assessment and Compliance Findings for Related Environmental Laws" and attachments, as required by § 400.206(a)(2)(i)(D);
   (3) All Loan Documents that will be signed by the Lender and the Borrower, if the application is approved, including all terms and conditions of, and Security or additional Security to assure the Borrower's performance under, the loan;
§ 400.206 Environmental requirements.

(a)(1) In general. Environmental assessments of the Board’s actions will be conducted in accordance with applicable statutes, regulations, and Executive Orders. Therefore, each application for a Guarantee under the Program must be accompanied by information necessary for the Board to meet the requirements of applicable law.

(2) Actions requiring compliance with NEPA. (i) The types of actions classified as “major Federal actions” subject to NEPA procedures are discussed generally in 40 CFR parts 1500 through 1508.

(ii) With respect to this Program, these actions typically include:

(A) Any project, permanent or temporary, that will involve construction and/or installations;

(B) Any project, permanent or temporary, that will involve ground disturbing activities; and

(C) Any project supporting renovation, other than interior remodeling.

(4) Certification by the chairman of the board and the chief executive officer of the Borrower acknowledging that the Borrower is aware that the Lender is applying to the Board for a Guarantee of a loan under the Program, as described in the Loan Documents; and agreeing to permit audits by the General Accounting Office, its designee, and an independent auditor acceptable to the Board prior to the issuance of the Guarantee and annually thereafter while such guarantee is outstanding;

(5) The Lender’s full written underwriting analysis of the loan to be guaranteed by the Board;

(6) A certification by the Lender that the Lender meets each of the requirements of the Program as set forth in the Act and the Board’s rules in this part;

(7) A description of all Security for the loan, including, as applicable, current appraisal of real and personal property, copies of any appropriate environmental site assessments, and current personal and corporate financial statements of any guarantors for the same period as required for the Borrower. Appraisals of real property shall be prepared by State licensed or certified appraisers, and be consistent with the “Uniform Standards of Professional Appraisal Practice,” promulgated by the Appraisal Standards Board of the Appraisal Foundation. Financial statements of guarantors shall be prepared by independent Certified Public Accountants;

(8) Consolidated financial statements of the Borrower for the previous three years that have been audited by an independent certified public accountant, including any associated notes, as well as any interim financial statements and associated notes for the current fiscal year;

(9) A five year history and five year projection for revenue, cash flow, average realized prices and average realized production costs. If the loan funds are to be used to purchase substantial assets of an existing firm, a pro forma balance sheet at startup, and five years projected year end balance sheets and income statement at start-up;

(10) Documentation that credit is not otherwise available to the borrower under reasonable terms or conditions sufficient to meet its financial needs, as reflected in the financial or business plan of that company. The Lender must provide with its application those items required by § 400.200(c);

(11) Documentation sufficient to demonstrate that the Lender is eligible under § 400.201(a) and to allow the Board to make a determination to issue a Guarantee to such Lender as set forth in § 400.201(c); and

(12) A description of any Supplemental Guarantee(s) that will apply to the Unguaranteed Portion of the loan.

(c) No Guarantee will be made if either the Borrower or Lender has an outstanding, delinquent Federal debt until:

(1) The delinquent account has been paid in full;

(2) A negotiated repayment schedule is established and at least one payment has been received; or

(3) Other arrangements, satisfactory to the agency responsible for collecting the debt, are made.

3. Environmental information required from the Lender. (i) Environmental data or documentation concerning the use of the proceeds of any loan guaranteed under this Program must be provided by the Lender to the Board to assist the Board in meeting its legal responsibilities; the Lender may obtain this information from the Borrower. (ii) Such information includes:
(A) Documentation for an environmental threshold review from qualified data sources, such as a Federal, State or local agency with expertise and experience in environmental protection, or other sources, qualified to provide reliable environmental information;
(B) Any previously prepared environmental reports or data relevant to the loan at issue;
(C) Any environmental review prepared by Federal, State, or local agencies relevant to the loan at issue;
(D) The information required for the completion of Form XYZ, “Environmental Assessment and Compliance Findings for Related Environmental Laws;” and
(E) Any other information that can be used by the Board to ensure compliance with environmental laws.

(ii) All information supplied by the Lender is subject to verification by the Board.

(b) The regulations of the Council on Environmental Quality implementing NEPA require the Board to provide public notice of the availability of project specific environmental documents such as environmental impact statements, environmental assessments, findings of no significant impact, records of decision etc., to the affected public. See 40 CFR 1506.6(b). Environmental information concerning specific projects can be obtained from the Board by contacting: Executive Director, Emergency Steel Guarantee Loan Board, U.S. Department of Commerce, Washington, DC 20230.

c. National Environmental Policy Act—(1) Purpose. The purpose of this paragraph (c) is to adopt procedures for compliance with the National Environmental Policy Act, 42 U.S.C. 4321 et seq., by the Board. This paragraph supplements regulations at 40 CFR Chapter V.

(2) Definitions. For purposes of this section, the following definitions apply: Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and for which neither an environmental assessment nor an environmental impact statement is required.

Environmental assessment means a document that briefly discusses the environmental consequences of a proposed action and alternatives prepared for the purposes set forth in 40 CFR 1508.9.

EIS means an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA.

FONS I means a finding of no significant impact on the quality of the human environment after the completion of an environmental assessment.

NEPA means the National Environmental Policy Act, 42 U.S.C. 4321, et seq.

Working capital loan means money used by an ongoing business concern to fund its existing operations.

(3) Delegations to Executive Director. (i) All incoming correspondence from Council on Environmental Quality (CEQ) and other agencies concerning matters related to NEPA, including draft and final EIS, shall be brought to the attention of the Executive Director. The Executive Director will prepare or, at his or her discretion, coordinate replies to such correspondence.

(ii) With respect to actions of the Board, the Executive Director will:
(A) Ensure preparation of all necessary environmental assessments and EISs;
(B) Maintain a list of actions for which environmental assessments are being prepared;
(C) Revise this list at regular intervals, and send the revisions to the Environmental Protection Agency;
(D) Make the list available for public inspection;
(E) Maintain a list of EISs; and
(F) Maintain a file of draft and final EISs.

(4) Categorical exclusions. (1) This paragraph describes various classes of Board actions that normally do not have a significant impact on the
human environment and are categorically excluded. The word “normally” is stressed; there may be individual cases in which specific factors require contrary action.

(ii) Subject to the limitations in paragraph (c)(4)(iii) of this section, the actions described in this paragraph have been determined not to have a significant impact on the quality of the human environment. They are categorically excluded from the need to prepare an environmental assessment or an EIS under NEPA.

(A) Guarantees of working capital loans; and

(B) Guarantees of loans for the refinancing of outstanding indebtedness of the Borrower, regardless of the purpose for which the original indebtedness was incurred.

(iii) Actions listed in paragraph (c)(4)(ii) of this section that otherwise are categorically excluded from NEPA review are not necessarily excluded from review if they would be located within, or in other cases, potentially affect:

(A) A floodplain;

(B) A wetland;

(C) Important farmlands, or prime forestlands or rangelands;

(D) A listed species or critical habitat for an endangered species;

(E) A property that is listed on or may be eligible for listing on the National Register of Historic Places;

(F) An area within an approved State Coastal Zone Management Program;

(G) A coastal barrier or a portion of a barrier within the Coastal Barrier Resources System;

(H) A river or portion of a river included in, or designated for, potential addition to the Wild and Scenic Rivers System;

(I) A sole source aquifer recharge area;

(J) A State water quality standard (including designated and/or existing beneficial uses and anti-degradation requirements); or

(K) The release or disposal of regulated substances above the levels set forth in a permit or license issued by an appropriate regulatory authority.

Responsibilities and procedures for preparation of an environmental assessment. (i) The Executive Director will request that the Lender and Borrower provide information concerning all potentially significant environmental impacts of the Borrower’s proposed project pursuant to 13 CFR 400.206. The Executive Director, consulting at his discretion with CEQ, will review the information provided by the Lender and Borrower. Though no specific format for an environmental assessment is prescribed, it shall be a separate document, suitable for public review and should include the following in conformance with 40 CFR 1508.9:

(1) Description of the environment. The existing environmental conditions relevant to the Board’s analysis determining the environmental impacts of the proposed project, should be described. The no action alternative also should be discussed;

(2) Documentation. Citations to information used to describe the existing environment and to assess environmental impacts should be clearly referenced and documented. These sources should include, as appropriate, but not be limited to, local, tribal, regional, State, and Federal agencies, as well as, public and private organizations and institutions;

(E) Evaluating environmental consequences of proposed actions. A brief discussion should be included of the need for the proposal, of alternatives as required by 42 U.S.C. 4332(2)(E) and their environmental impacts. The discussion of the environmental impacts should include measures to mitigate adverse impacts and any irreversible or irretrievable commitments of resources to the proposed project.

(ii) The Executive Director, in preparing an environmental assessment, may:

(1) Tier upon the information contained in a previous EIS, as described in 40 CFR 1502.20;

(2) Incorporate by reference reasonably available material, as described in 40 CFR 1502.21; and/or

(3) Adopt a previously completed EIS reasonably related to the project for which the proceeds of the loan sought to be guaranteed under the Program will be used, as described in 40 CFR 1506.3.

(iii) Because of the statute’s admonition to the Board to make its decisions
as soon as possible after receiving applications, the Board will not:

(A) Publish notice of intent to prepare an environmental assessment, as described in 40 CFR 1501.7;

(B) Conduct scoping, as described in 40 CFR 1501.7; and

(C) Seek comments on the environmental assessment, as described in 40 CFR 1503.1.

(iv) If, on the basis of an environmental assessment, it is determined that an EIS is not required, a FONSI, as described in 40 CFR 1508.13 will be prepared. The FONSI will include the environmental assessment or a summary of it and be available to the public from the Board. The Executive Director shall maintain a record of these decisions, making them available to interested parties upon request. Requests should be directed to the Executive Director, Emergency Steel Guarantee Loan Program, 1099—14th Street, NW, Suite 2600 East, Washington, DC 20005. Prior to a final loan guarantee decision, a copy of the NEPA documentation shall be sent to the Board for consideration.

(6) Responsibilities and procedures for preparation of an environmental impact statement. (i) If after an environmental assessment has been completed, it is determined that an EIS is necessary, a FONSI, as described in 40 CFR 1508.13 will be prepared. The FONSI will include the environmental assessment or a summary of it and be available to the public from the Board. The Executive Director shall maintain a record of these decisions, making them available to interested parties upon request. Requests should be directed to the Executive Director, Emergency Steel Guarantee Loan Program, 1099—14th Street, NW, Suite 2600 East, Washington, DC 20005. Prior to a final loan guarantee decision, a copy of the NEPA documentation shall be sent to the Board for consideration.

(ii)(A) The following procedures, as discussed in 40 CFR parts 1500 through 1508, will be followed:

(1) The format and contents of the draft and final EIS shall be as discussed in 40 CFR 1502.

(2) The requirements of 40 CFR 1506.9 for filing of documents with the Environmental Protection Agency shall be followed.

(3) The Executive Director, consulting at his discretion with CEQ, shall examine carefully the basis on which supportive studies have been conducted to assure that such studies are objective and comprehensive in scope and in depth.

(4) NEPA requires that the decision making “utilize a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts.” 42 U.S.C. 4332(A). If such disciplines are not present on the Board staff, appropriate use should be made of personnel of Federal, State, and local agencies, universities, nonprofit organizations, or private industry.

(B) Until the Board issues a record of decision as provided in 40 CFR 1502.2 no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(3) 40 CFR 1506.10 places certain limitations on the timing of Board decisions on taking “major Federal actions.” A loan guarantee shall not be made before the times set forth in 40 CFR 1506.10.

(iii) A public record of decision stating what the decision was; identifying alternatives that were considered, including the environmentally preferable one(s); discussing any national considerations that entered into the decision; and summarizing a monitoring and enforcement program if applicable for mitigating the environmental effects of a proposal will be prepared. This record of decision will be prepared at the time the decision is made.

§ 400.207 Application evaluation.

(a) Eligibility screening. Applications will be reviewed to determine whether the Lender and Borrower are eligible, the information required under §400.205(b) is complete, and the proposed loan complies with applicable statutes and regulations. The Board
can at any time reject an application that does not meet these requirements.

(b) Evaluation criteria. Applications that are determined to be eligible pursuant to paragraph (a) of this section shall be subject to a substantive review by the Board based upon the following evaluation factors, in order of importance:

(1) The ability of the Borrower to repay the loan by the date specified in the Loan Document, which shall be no later than December 31, 2005. Evaluation of this factor will consider the prospective earning power of the Borrower. An essential and necessary element of the Board’s evaluation of whether this criterion is satisfied is whether the applicant has committed to undertake significant efforts to eliminate or reduce economically unviable capacity;

(2) The adequacy of the proposed provisions to protect the Government, including sufficiency of Security, the priority of the lien position in the Security, and the percentage of Guarantee requested; and

(3) Adequacy of the underwriting analysis performed by the Lender in preparing the application and the ability of the Lender to administer the loan in full compliance with the requisite standard of care set forth in § 400.211(b).

(c) Decisions by the Board. Upon completion of the evaluation of an application and as soon as possible after its receipt, the Board will approve or deny an eligible application that is timely received under this Program. The Board shall notify the Applicants and the Borrower in writing of the approval or denial of an application as soon as possible. Approvals for loan Guarantees shall be conditioned upon compliance with § 400.208.

§ 400.208 Issuance of the Guarantee.

(a) The Board’s decisions to approve any application for, and extend an offer of, a guarantee under § 400.207 is conditioned upon:

(1) The Lender and Borrower obtaining any required regulatory or judicial approvals;

(2) The Lender and Borrower being legally authorized to enter into the loan under the terms and conditions submitted to the Board in the application;

(3) The Board’s receipt of the Loan Documents and any related instruments, in form and substance satisfactory to the Board, and the Guarantee, all properly executed by the Lender, Borrower, and any other required party other than the Board; and

(4) No material adverse change in the Borrower’s ability to repay the loan between the date of the Board’s approval and the date the Guarantee is to be issued.

(b) The Board may withdraw its approval of an application and rescind its offer of Guarantee if the Board determines that the Lender or the Borrower cannot, or is unwilling to, provide adequate documentation and proof of compliance with paragraph (a) of this section within the time provided for in the offer.

(c) Only after receipt of all the documentation, required by this section, will the Board sign and deliver the Guarantee.

(d) A Borrower receiving a loan guaranteed by the Board under this Program shall pay a one-time guarantee fee of 0.5 percent of the amount of the principal of the loan. This fee must be paid no later than one year from the issuance of the Guarantee.

§ 400.209 Funding for the Program.

The Act provides funding for the costs incurred by the Government as a result of granting Guarantees under the Program. While pursuing the goals of the Act, it is the intent of the Board to minimize the cost of the Program to the Government. The Board will estimate the risk posed by the guaranteed loans to the funds appropriated for the costs of the Guarantees under the Program and operate the Program accordingly.

§ 400.210 Assignment or transfer of loans.

(a) Neither the Loan Documents nor the Guarantee of the Board may be modified, in whole or in part, without
§ 400.215 Supplemental Guarantees.

The Board will allow the structure of a guaranteed loan to include one or more Supplemental Guarantees that the prior written approval of the Board.

(b) Upon notice to the Board and a certification by the assignor that the assignee is an Eligible Lender, and subject to the provisions of paragraphs (c) and (d) of this section and other provisions of this part, a Lender may assign or transfer its interest in the loan including the Loan documents and the Guarantee to a party that qualifies as an Eligible Lender pursuant to §400.201. Any other assignment or transfer will require the prior written approval of the Board.

(c) The provisions of paragraph (b) of this section shall not apply to transfers which occur by operation of law.

(d) The Agent must hold and may not assign or transfer an interest in a loan guaranteed under the Program equal to at least the lesser of $25 million or fifteen percent of the aggregate amount of the loan. In addition, the Agent must hold and may not assign or transfer an interest the Unguaranteed Portion of the loan equal to at least the minimum amount of the loan required to be held by the Agent under the preceding sentence multiplied by the percentage of the loan represented by the Unguaranteed Portion. A non-Agent Lender must hold and may not assign or transfer an interest in the Unguaranteed Portion of the loan representing no less than five percent of such Lender’s total interest in the loan; provided, that a non-Agent Lender may transfer its interest in the Unguaranteed Portion after payment of the Guaranteed Portion has been made under the Guarantee.

§ 400.211 Lender responsibilities.

The Lender shall have such obligations and duties to the Board as are set forth in the Guarantee.

§ 400.212 Guarantee.

The Board shall adopt a form of Guarantee to be used by the Board under the Program, and shall publish the Guarantee on its website. Modifications to the provisions of the form of Guarantee must be approved and adopted by the Board.

§ 400.213 Termination of obligations.

The Board shall have such rights to terminate the Guarantee as are set forth in the Guarantee.

§ 400.214 Participations in guaranteed loans.

(a) Subject to paragraphs (b), (c) and (d) of this section, a Lender may distribute the risk of a portion of a loan guaranteed under the Program by sale of participations therein if:

(1) Neither the loan note nor the Guarantee is assigned, conveyed, sold, or transferred in whole or in part;

(2) The Lender remains solely responsible for the administration of the loan; and

(3) The Board’s ability to assert any and all defenses available to it under the Guarantee and the law is not adversely affected.

(b) The following categories of entities may purchase participations in loans guaranteed under the Program:

(1) Eligible Lenders;

(2) Private investment funds and insurance companies that do not usually invest in commercial loans;

(3) Steel company suppliers or customers, who are interested in participating as a means of commencing or solidifying the supplier or customer relationship with the borrower; or

(4) Any other entity approved by the Board on a case-by-case basis.

(c) The Agent may not grant participations in that portion of its interest in a loan that may not be assigned or transferred under §400.210(d). A Lender, other than the Agent, may not grant participations in that portion of its interest in a loan that may not be assigned or transferred under §400.210(d).

(d) At least 5 percent of any participation interest in a loan must be unguaranteed.
cover the Unguaranteed Portion of the loan; provided that:

(a) There shall be no Supplemental Guarantee with respect to the Unguaranteed Portion required to be held by the Agent pursuant to §400.210(c);

(b) The Loan Documents relating to any Supplemental Guarantee shall be acceptable in form and substance to the Board; and

(c) In approving the issuance of a Guarantee, the Board may impose any conditions with respect to Supplemental Guarantee(s) relating to the loan that it considers appropriate.

[66 FR 53080, Oct. 19, 2001]
CHAPTER V—EMERGENCY OIL AND GAS
GUARANTEED LOAN BOARD

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PART 500—EMERGENCY OIL AND GAS GUARANTEED LOAN PROGRAM

Subpart A—General

§ 500.1 Purpose.

This part is issued by the Emergency Oil and Gas Guaranteed Loan Board pursuant to section 552 of title 5 of the United States Code and the Emergency Oil and Gas Guaranteed Loan Act, Chapter 2 of Public Law 106-51. This part contains rules for making and servicing loans to qualified oil and gas guaranteed by the Board.

§ 500.2 Definitions.

(a) Act means the Emergency Oil and Gas Guaranteed Loan Program Act, Chapter 2 of Public Law 106-51.
(b) Administer, administering and administration, mean the Lender’s actions in making, disbursing, servicing (including, but not limited to care, preservation and maintenance of collateral), collecting and liquidating a loan and security.
(c) Agent means that Lender authorized to take such actions, exercise such powers, and perform such duties on behalf and in representation of all Lenders party to a Guarantee of a single loan, as is required by, or necessarily incidental to, the terms and conditions of the Guarantee.
(d) Applicant means the private banking or investment institution applying for a loan guarantee under this Program.
(e) Board means the Emergency Oil and Gas Guaranteed Loan Board.
(f) Borrower means a Qualified Oil and Gas Company which could receive a loan guaranteed by the Board under this Program.
(g) Guarantee means the written agreement between the Board and one or more Lenders, and approved by the Borrower, pursuant to which the Board guarantees repayment of a specified percentage of the principal of the loan, including the Special Terms and Conditions, the General Terms and Conditions, and all exhibits thereto.
(h) Lender means a private banking or investment institution, eligible under §500.201, that is a party to a Guarantee issued by the Board. With respect to a Guarantee of a single loan to which more than one Lender is a party, the term Lender means Agent.
(i) Loan Documents mean the loan agreement and all other instruments, and all documentation between the Lender and the Borrower evidencing the making, disbursing, securing, collecting, or otherwise administering of the loan.
(j) Program means the Emergency Oil and Gas Guaranteed Loan Program established by the Act.
(k) Security means all property, real or personal, required by the provisions
§ 500.100 Purpose and scope.

This subpart describes the Board’s authorities and organizational structure, the means and rules by which the Board takes actions, and procedures for public access to Board records.

§ 500.101 Composition of the Board.

The Board consists of the Chairman of the Board of Governors of the Federal Reserve System, who acts as Chairman of the Board, the Chairman of the Securities and Exchange Commission, and the Secretary of Commerce.

§ 500.102 Authority of the Board.

Pursuant to the provisions of the Act, the Board is authorized to guarantee loans provided to Qualified Oil and Gas companies by private banking and investment institutions in accordance with the procedures, rules, and regulations established by the Board, to make the determinations authorized by the Act, and to take such other actions as necessary to carry out its functions in accordance with the Act.

§ 500.103 Offices.

The principal offices of the Board are in the U.S. Department of Commerce, Washington, D.C. 20230.

§ 500.104 Meetings and actions of the Board.

(a) Place and frequency. The Board meets, on the call of the Chairman, in order to consider matters requiring action by the Board. Time and place for any such meeting shall be determined by the members of the Board.

(b) Quorum and voting. Two voting members of the Board constitute a quorum for the transaction of business. All decisions and determinations of the Board shall be made by a majority vote of the voting members. All votes on determinations of the Board required by the Act shall be recorded in the minutes. A Board member may request that any vote be recorded according to individual Board members.

(c) Agenda of meetings. To the extent practicable, an agenda for each meeting shall be distributed to members of the Board at least two days in advance of the date of the meeting, together with copies of materials relevant to the agenda items.

(d) Minutes. The Secretary of the Board shall keep minutes of each Board meeting and of action taken without a meeting, a draft of which is to be distributed to each member of the Board as soon as practicable after each meeting or action. To the extent practicable, the minutes of a Board meeting shall be corrected and approved at the next meeting of the Board.

(e) Use of conference call communications equipment. Any member may participate in a meeting of the Board through the use of conference call, telephone or similar communications equipment, by means of which all persons participating in the meeting can simultaneously speak to and hear each other. Any member so participating in a meeting shall be deemed present for all purposes. Actions taken by the Board at meetings conducted through the use of such equipment, including
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the votes of each member, shall be recorded in the usual manner in the minutes of the meetings of the Board.

(f) Actions between meetings. When, in the judgment of the Chairman, circumstances occur making it desirable for the Board to consider action when it is not feasible to call a meeting, the relevant information and recommendations for action may be transmitted to the members by the Secretary of the Board and the voting members may communicate their votes to the Chairman in writing (including an action signed in counterpart by each Board member), electronically, or orally (including telephone communication). Any action taken under this paragraph has the same effect as an action taken at a meeting. Any such action shall be recorded in the minutes.

(g) Delegations of authority. The Board may delegate authority, subject to such terms and conditions as the Board deems appropriate, to the Executive Director, the General Counsel, or the Secretary of the Board, to take certain actions not required by the Act to be taken by the Board. All delegations shall be made pursuant to resolutions of the Board and recorded in writing, whether in the minutes of a meeting or otherwise. Any action taken pursuant to delegated authority has the effect of an action taken by the Board.

§ 500.106 Ex parte communications.

Oral or written communication, not on the public record, between the Board, or any member of the Board, and any party or parties interested in any matter pending before the Board concerning the substance of that matter is prohibited. This section also applies to the Board’s staff and employees of the constituent agencies who are or reasonably may be expected to be involved in the decisional process of the matter pending before the Board.

§ 500.107 Freedom of Information Act.

(a) Definitions. All terms used in this section which are defined in 5 U.S.C. 551 or 5 U.S.C. 552 shall have the same meaning in this section. In addition the following definitions apply to this section:

(1) FOIA, as used in this section, means the “Freedom of Information Act,” as amended, 5 U.S.C. 552.

(2) Commercial use request means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

(3) Direct costs mean those expenditures that the Board actually incurs in searching for, reviewing, and duplicating documents in response to a request made under paragraph (c) of this section. Direct costs include, for example, the labor costs of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits). Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

(4) Duplication means the process of making a copy of a document in response to a request for disclosure of records or for inspection of original records that contain exempt material or that otherwise cannot be inspected directly. Among others, such copies may take the form of paper, microfilm, audiovisual materials, or machine-readable documentation (e.g., magnetic tape or disk).

§ 500.105 Staff.

(a) Executive Director. The Executive Director of the Board advises and assists the Board in carrying out its responsibilities under the Act, provides general direction with respect to the administration of the Board’s actions, directs the activities of the staff, and performs such other duties as the Board may require.

(b) General Counsel. The General Counsel of the Board provides legal advice relating to the responsibilities of the Board and performs such other duties as the Board may require.

(c) Secretary of the Board. The Secretary of the Board sends notice of all meetings, prepares minutes of all meetings, maintains a complete record of all votes and actions taken by the Board, has custody of all records of the Board and performs such other duties as the Board may require.
(5) Educational institution means a preschool, a public or private elementary or secondary school, or an institution of undergraduate higher education, graduate higher education, professional education, or an institution of vocational education that operates a program of scholarly research.

(6) Noncommercial scientific institution refers to an institution that is not operated on a “commercial” basis (as that term is used in this section) and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(7) News means information about current events or that would be of current interest to the public. Examples of news media entities include, but are not limited to, television or radio stations broadcasting to the public at large, and publishers of newspapers and other periodicals (but only in those instances when they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. “Freelance” journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it.

(8) Representative of the news media means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the general public.

(9) Review means the process of examining documents, located in response to a request for access, to determine whether any portion of a document is exempt information. It includes doing all that is necessary to excise the documents and otherwise to prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(10) Search means the process of looking for material that is responsive to a request, including page-by-page or line-by-line identification within documents. Searches may be done manually or by computer.

(b) Records available for public inspection and copying—(1) Types of records made available. The information in this section is furnished for the guidance of the public and in compliance with the requirements of the Freedom of Information Act, as amended (5 U.S.C. 552) (FOIA). This section sets forth the procedures the Board follows to make publicly available the materials specified in 5 U.S.C. 552(a)(2). These materials shall be made available for inspection and copying at the Board's Freedom of Information Office pursuant to 5 U.S.C. 552(a)(2). Information routinely provided to the public as part of a regular Board activity (for example, press releases) may be provided to the public without following this section.

(2) Reading room procedures. Information available under this section is available for inspection and copying, from 9:00 a.m. to 5:00 p.m. weekdays, at the Freedom of Information Office of the Board, Oil and Gas Guarantee Loan Board, U.S. Department of Commerce, Washington, D.C. 20230.

(3) Electronic records. Information available under this section that was created on or after November 1, 1996, shall also be available on the Board's website, found at www.doc.gov.

(c) Records available to the public on request—(1) Types of records made available. All records of the Board that are not available under paragraph (b) of this section shall be made available upon request, pursuant to the procedures in this section and the exceptions set forth in the FOIA. The Board's policy is to make discretionary disclosures of records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court.

(2) Procedures for requesting records. A request for records shall reasonably describe the records in a way that enables the Board's staff to identify and produce the records with reasonable effort and without unduly burdening or significantly interfering with any of the Board's operations. The request shall be submitted in writing to the Secretary of the Board, Oil and Gas Guarantee Loan Board, U.S. Department of Commerce, Washington, D.C. 20230; or sent by facsimile to the Secretary of the Board. The request shall
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be clearly marked FREEDOM OF INFORMATION ACT REQUEST.

(3) Contents of request. The request shall contain the following information:

(i) The name and address of the requester, and the telephone number at which the requester can be reached during normal business hours;

(ii) Whether the requested information is intended for commercial use, or whether the requester represents an educational or noncommercial scientific institution, or news media;

(iii) A statement agreeing to pay the applicable fees, or a statement identifying any fee limitation desired, or a request for a waiver or reduction of fees that satisfies paragraph (f) of this section.

(d) Processing requests—(1) Priority of responses. The date of receipt for any request, including one that is addressed incorrectly or that is referred to the Board by another agency, is the date the Secretary of the Board actually receives the request. The Secretary of the Board shall normally process requests in the order they are received. However, in the Secretary of the Board’s discretion, the Board may use two or more processing tracks by distinguishing between simple and more complex requests based on the number of pages involved, or some other measure of the amount of work and/or time needed to process the request, and whether the request qualifies for expedited processing as described in paragraph (d)(2) of this section. When using multitrack processing, the Secretary of the Board may provide requesters in the slower track(s) with an opportunity to limit the scope of their request in order to qualify for faster processing. The Secretary of the Board shall contact the requester by telephone or by letter, whichever is most efficient in each case.

(2) Expedited processing. (i) A person may request expedited access to records by submitting a statement, certified to be true and correct to the best of that person’s knowledge and belief, that demonstrates a compelling need for the records, as defined in 5 U.S.C. 552(a)(6)(E)(iv).

(ii) The Secretary of the Board shall notify the requester of whether to grant or deny a request for expedited processing within ten working days of receipt of the request. If the Secretary of the Board grants the request for expedited processing, the Board shall process the request for access to information as soon as practicable. If the Secretary of the Board denies a request for expedited processing, the requester may file an appeal pursuant to the procedures set forth in paragraph (e) of this section, and the Board shall respond to the appeal within twenty days after the appeal was received by the Board.

(3) Time limits. The time for response to requests shall be 20 working days, except:

(i) In the case of expedited treatment under paragraph (d)(2) of this section;

(ii) Where the running of such time is suspended for payment of fees pursuant to paragraph (f)(2)(ii) of this section;

(iii) Where the estimated charge is less than $250, and the requester does not guarantee payment pursuant to paragraph (f)(2)(i) of this section; or

(iv) In unusual circumstances, as defined in 5 U.S.C. 552(a)(6)(B)(iii), the time limit may be extended for a period of time not to exceed 10 working days as provided by written notice to the requester, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched; or such alternative time period as mutually agreed to by the Secretary of the Board and the requester when the Secretary of the Board notifies the requester that the request cannot be processed in the specified time limit.

(4) Response to request. In response to a request that satisfies paragraph (c) of this paragraph, an appropriate search shall be conducted of records in the custody and control of the Board on the date of receipt of the request, and a review made of any responsive information located. The Secretary of the Board shall notify the requester of:

(i) The Secretary of the Board’s determination of the request and the reasons therefor;

(ii) The information withheld, and the basis for withholding; and

(iii) The right to appeal any denial or partial denial, pursuant to paragraph (e) of this section.
(5) Referral to another agency. To the extent a request covers documents that were created by, obtained from, classified by, or is in the primary interest of another agency, the Secretary of the Board may refer the request to that agency for a direct response by that agency and inform the requester promptly of the referral. The Secretary of the Board shall consult with another Federal agency before responding to a requester if the Board receives a request for a record in which:

(i) Another Federal agency subject to the FOIA has a significant interest, but not the primary interest; or

(ii) Another Federal agency not subject to the FOIA has the primary interest or a significant interest. Ordinarily, the agency that originated a record will be presumed to have the primary interest in it.

(6) Providing responsive records. (i) A copy of records or portions of records responsive to the request shall be sent to the requester by regular U.S. mail to the address indicated in the request, unless the requester elects to take delivery of the documents at the Board’s Freedom of Information Office or makes other acceptable arrangements, or the Secretary of the Board deems it appropriate to send the documents by another means. The Secretary of the Board shall provide a copy of the record in any form or format requested if the record is readily reproducible in that form or format, but the Secretary of the Board need not provide more than one copy of any record to a requester.

(ii) The Secretary of the Board shall provide any reasonably segregable portion of a record that is responsive to the request after deleting those portions that are exempt under the FOIA or this section.

(iii) Except where disclosure is expressly prohibited by statute, regulation, or order, the Secretary of the Board may authorize the release of records that are exempt from mandatory disclosure whenever the Board or designated Board members determine that there would be no foreseeable harm in such disclosure.

(iv) The Board is not required in response to the request to create records or otherwise to prepare new records.

(7) Prohibition against disclosure. Except as provided in this part, no officer, employee, or agent of the Board shall disclose or permit the disclosure of any unpublished information of the Board to any person (other than Board officers, employees, or agents properly entitled to such information for the performance of official duties), unless required by law.

(e) Appeals. (1) Any person denied access to Board records requested under paragraph (c) of this section, denied expedited processing under paragraph (d) of this section, or denied a waiver of fees under paragraph (f) of this section may file a written appeal within 30 calendar days after the date of such denial with the Board. The written appeal shall prominently display the phrase FREEDOM OF INFORMATION ACT APPEAL on the first page, and shall be addressed to the General Counsel of the Board, Oil and Gas Guaranteed Loan Board, U.S. Department of Commerce, Washington, D.C. 20230; or sent by facsimile to the General Counsel of the Board. The appeal shall include a copy of the original request, the initial denial, if any, and a statement of the reasons why the requested records should be made available and why the initial denial was in error.

(2) The General Counsel of the Board shall make a determination regarding any appeal within 20 working days of actual receipt of the appeal, and the determination letter shall notify the appealing party of the right to seek judicial review in event of denial.

(f) Fee schedules; waiver of fees—(1) Fee schedule. The fees applicable to a request for records pursuant to paragraph (c) of this section are set forth in the uniform fee schedule at the end of this paragraph (b).

(i) Search. (A) Search fees shall be charged for all requests—other than requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media—subject to the limitations of paragraph (f)(3)(iv) of this section. The Secretary of the Board shall charge for time spent searching even if no responsive record is located or if the Secretary of the Board withholds the record(s) located as entirely exempt from disclosure. Search fees shall be
the direct costs of conducting the search by the involved employees.

(B) For computer searches of records, requesters will be charged the direct costs of conducting the search, although certain requesters (as provided in paragraph (f)(3) of this section) will be charged no search fee and certain other requesters (as provided in paragraph (f)(3)) are entitled to the cost equivalent of two hours of manual search time without charge. These direct costs include the costs, attributable to the search, of operating a central processing unit and operator/programmer salary.

(ii) Duplication. Duplication fees will be charged to all requesters, subject to the limitations of paragraph (f)(1)(iv) of this section. For a paper photocopy of a record (no more than one copy of which need be supplied), the fee shall be 15 cents per page. For copies produced by computer, such as tapes or printouts, the Secretary of the Board shall charge the direct costs, including operator time, of producing the copy. For other forms of duplication, the Secretary of the Board will charge the direct costs of that duplication.

(iii) Review. Review fees shall be charged to requesters who make a commercial use request. Review fees shall be charged only for the initial record review—the review done when the Secretary of the Board determines whether an exemption applies to a particular record at the initial request level. No charge will be made for review at the administrative appeal level for an exemption already applied. However, records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies, and the costs of that review are chargeable. Review fees shall be the direct costs of conducting the review by the involved employees.

(iv) Limitations on charging fees. (A) No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media.

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

(C) Whenever a total fee calculated under this paragraph is $25 or less for any request, no fee will be charged.

(D) For requesters other than those seeking records for a commercial use, no fee will be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages totals more than $25.

(2) Payment procedures. All persons requesting records pursuant to paragraph (c) of this section shall pay the applicable fees before the Secretary of the Board sends copies of the requested records, unless a fee waiver has been granted pursuant to paragraph (f)(6) of this section. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(i) Advance notification of fees. If the estimated charges are likely to exceed $25, the Secretary of the Board shall notify the requester of the estimated amount, unless the requester has indicated a willingness to pay fees as high as those anticipated. Upon receipt of such notice, the requester may confer with the Secretary of the Board to reformulate the request to lower the costs. The processing of the request shall be suspended until the requester provides the Secretary of the Board with a written guarantee that payment will be made upon completion of the processing.

(ii) Advance payment. The Secretary of the Board shall require advance payment of any fee estimated to exceed $250. The Secretary of the Board shall also require full payment in advance where a requester has previously failed to pay a fee in a timely fashion. If an advance payment of an estimated fee exceeds the actual total fee by $1 or more, the difference shall be refunded to the requester. The time period for responding to requests under paragraph (d)(4) of this section, and the processing of the request shall be suspended until the Secretary of the Board receives the required payment.

(iii) Late charges. The Secretary of the Board may assess interest charges when fee payment is not made within 30 days of the date on which the billing was sent. Assessment of such interest will commence on the 31st day following the day on which the billing
was sent. Interest is at the rate prescribed in 31 U.S.C. 3717.

(3) Categories of uses. The fees assessed depend upon the fee category. In determining which category is appropriate, the Secretary of the Board shall look to the identity of the requester and the intended use set forth in the request for records. Where a requester’s description of the use is insufficient to make a determination, the Secretary of the Board may seek additional clarification before categorizing the request.

(i) Commercial use requester. The fees for search, duplication, and review apply when records are requested for commercial use.

(ii) Educational, non-commercial scientific institutions, or representatives of the news media requesters. The fees for duplication apply when records are not sought for commercial use, and the requester is a representative of the news media or an educational or non-commercial scientific institution, whose purpose is scholarly or scientific research. The first 100 pages of duplication, however, will be provided free.

(iii) All other requesters. For all other requests, the fees for search and duplication apply. The first two hours of search time and the first 100 pages of duplication, however, will be provided free.

(4) Nonproductive search. Fees for search may be charged even if no responsive documents are found. Fees for search and review may be charged even if the request is denied.

(5) Aggregated requests. A requester may not file multiple requests at the same time, solely in order to avoid payment of fees. If the Secretary of the Board reasonably believes that a requester is separating a request into a series of requests for the purpose of evading the assessment of fees or that several requesters appear to be acting together to submit multiple requests solely in order to avoid payment of fees, the Secretary of the Board may aggregate such requests and charge accordingly. It is considered reasonable for the Secretary of the Board to presume that multiple requests by one requester on the same topic made within a 30-day period have been made to avoid fees.

(6) Waiver or reduction of fees. A request for a waiver or reduction of the fees, and the justification for the waiver, shall be included with the request for records to which it pertains. If a waiver is requested and the requester has not indicated in writing an agreement to pay the applicable fees if the waiver request is denied, the time for response to the request for documents, as set forth in paragraph (4)(d) of this section, shall not begin until a determination has been made on the request for a waiver or reduction of fees.

(i) Standards for determining waiver or reduction. The Secretary of the Board may grant a waiver or reduction of fees where it is determined both that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operation or activities of the government, and that the disclosure of information is not primarily in the commercial interest of the requester. In making this determination, the following factors shall be considered:

(A) Whether the subject of the records concerns the operations or activities of the government;

(B) Whether disclosure of the information is likely to contribute significantly to public understanding of government operations or activities;

(C) Whether the requester has the intention and ability to disseminate the information to the public;

(D) Whether the information is already in the public domain;

(E) Whether the requester has a commercial interest that would be furthered by the disclosure; and, if so,

(F) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(ii) Contents of request for waiver. A request for a waiver or reduction of fees shall include a clear statement of how the request satisfies the criteria set forth in paragraph (f)(i) of this section.

(iii) Burden of proof. The burden shall be on the requester to present evidence
or information in support of a request for a waiver or reduction of fees.

(iv) Determination by Secretary of the Board. The Secretary of the Board shall make a determination on the request for a waiver or reduction of fees and shall notify the requester accordingly.

(7) Uniform fee schedule.

<table>
<thead>
<tr>
<th>Service</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Manual search</td>
<td>Actual salary rate of employee involved, plus 16 percent of salary rate.</td>
</tr>
<tr>
<td>(ii) Computerized search</td>
<td>Actual direct cost, including operator time.</td>
</tr>
<tr>
<td>(iii) Duplication of records:</td>
<td>$1.50 per page.</td>
</tr>
<tr>
<td>(A) Paper copy reproduction</td>
<td>Actual direct cost, including operator time.</td>
</tr>
<tr>
<td>(B) Other reproduction (e.g., computer disk or printout, microfilm, microfiche, or microform).</td>
<td></td>
</tr>
<tr>
<td>(iv) Review of records (includes preparation for release, i.e., excising).</td>
<td>Actual salary rate of employee conducting review, plus 16 percent of salary rate.</td>
</tr>
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</table>

(g) Request for confidential treatment of business information.—(1) Submission of request. Any submitter of information to the Board who desires confidential treatment of business information pursuant to 5 U.S.C. 552(b)(4) shall file a request for confidential treatment with the Board at the time the information is submitted or a reasonable time after submission.

(2) Form of request. Each request for confidential treatment of business information shall state in reasonable detail the facts supporting the commercial or financial nature of the business information and the legal justification under which the business information should be protected. Conclusory statements that release of the information would cause competitive harm generally will not be considered sufficient to justify confidential treatment.

(3) Designation and separation of confidential material. All information considered confidential by a submitter shall be clearly designated “PROPRIETARY” or “BUSINESS CONFIDENTIAL” in the submission and separated from information for which confidential treatment is not requested. Failure to segregate confidential commercial or financial information from other material may result in release of the nonsegregated material to the public without notice to the submitter.

(h) Request for access to confidential commercial or financial information.—(1) Request for confidential commercial or financial information. A request by a submitter for confidential treatment of any business information shall be considered in connection with a request for access to that information.

(2) Notice to the submitter. (i) The Secretary of the Board shall notify a submitter who requested confidential treatment of information pursuant to 5 U.S.C. 552(b)(4), of the request for access.

(ii) Absent a request for confidential treatment, the Secretary of the Board may notify a submitter of a request for access to submitter’s business information if the Secretary of the Board reasonably believes that disclosure of the information may cause substantial competitive harm to the submitter.

(iii) The notice given to the submitter by mail, return receipt requested, shall be given as soon as practicable after receipt of the request for access, and shall describe the request and provide the submitter seven working days from the date of notice, to submit written objections to disclosure of the information. Such statement shall specify all grounds for withholding any of the information and shall demonstrate why the information which is considered to be commercial or financial information, and that the information is a trade secret, is privileged or confidential, or that its disclosure is likely to cause substantial competitive harm to the submitter. If the submitter fails to respond to the notice within the time specified, the submitter will be considered to have no objection to the release of the information. Information a submitter provides under this paragraph may itself be subject to disclosure under the FOIA.

(3) Exceptions to notice to submitter. Notice to the submitter need not be given if:

(i) The Secretary of the Board determines that the request for access should be denied;

(ii) The requested information lawfully has been made available to the public;
(iii) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(iv) The submitter’s claim of confidentiality under 5 U.S.C. 552(b)(4) appears obviously frivolous or has already been denied by the Secretary of the Board, except that in this last instance the Secretary of the Board shall give the submitter written notice of the determination to disclose the information at least seven working days prior to disclosure.

(4) Notice to requester. At the same time the Secretary of the Board notifies the submitter, the Secretary of the Board also shall notify the requester that the request is subject to the provisions of this section.

(5) Determination by Secretary of the Board. The Secretary of the Board’s determination whether or not to disclose any information for which confidential treatment has been requested pursuant to this section shall be communicated to the submitter and the requester immediately. If the Secretary of the Board determines to disclose the business information over the objection of a submitter, the Secretary of the Board shall give the submitter written notice via mail, return receipt requested, or similar means, which shall include:

(i) A statement of reason(s) why the submitter’s objections to disclosure were not sustained;

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

(iii) A statement that the component intends to disclose the information seven working days from the date the submitter receives the notice.

(6) Notice of lawsuit. The Secretary of the Board shall promptly notify any submitter of information covered by this section of the filing of any suit against the Board to compel disclosure of such information, and shall promptly notify a requester of any suit filed against the Board to enjoin the disclosure of requested documents.

§500.108 Restrictions on lobbying.

(a) No funds received through a loan guaranteed under this Program may be expended by the recipient of a Federal contract, grant, loan, loan Guarantee, 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 or loan Guarantee, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, loan Guarantee, or cooperative agreement.

(b) 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 the application form, 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.

(c) 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 Standard Form-LLL 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.

(d) Each person shall file a certification, contained in the application form, and a disclosure form (Standard Form-LLL), 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.

(e) 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 (c) of this section.

(f) 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 (d) or (e) 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.

§ 500.109 Government-wide debarment and suspension (nonprocurement).

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a government-wide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and non-financial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect. The Board shall review the List of Debarred entities prior to making final loan Guarantee decisions. Suspension or debarment may be a basis for denying a loan Guarantee.

(b) This section applies to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of this section such transactions will be referred to as "covered transactions".

(1) Covered transaction. For purposes of this section, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds:

(i) Primary covered transaction. Except as noted in paragraph (b)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan Guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person.

(ii) Lower tier covered transaction. A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction;

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $100,000) under a primary covered transaction;

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons may include loan officers or chief executive officers acting as principal investigators and providers of federally-required audit services.

(2) Exceptions. The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;
(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual’s present responsibility (but benefits received in an individual’s business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of this section would be prohibited by law.

(3) Board covered transactions. This section applies to the Board’s loan Guarantees, subcontracts and transactions at any tier that are charged as direct or indirect costs, regardless of type.

(c) Primary covered transactions. Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the Executive Branch of the Federal Government for the period of their debarment, suspension, or the period they are proposed for debarment under 48 CFR part 9, subpart 9.4. Accordingly, no agency shall enter into primary covered transactions with such excluded persons during such period, except as permitted pursuant to paragraph (l) of this section.

(d) Lower tier covered transactions. Except to the extent prohibited by law, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see paragraph (b)(2)(ii) of this section) for the period of their exclusion.

(e) Exceptions. Debarment or suspension does not affect a person’s eligibility for—

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual’s present responsibility (but benefits received in an individual’s business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of this section would be prohibited by law.

(f) Persons who are ineligible are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

(g) Persons who accept voluntary exclusions are excluded in accordance with the terms of their settlements. The Board shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

(h) The Board may grant an exception permitting a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under 48 CFR part 9, subpart 9.4, to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549. However, in accordance with the President’s stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with the Executive Order.

(i) Notwithstanding the debarment, suspension, proposed debarment under
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48 CFR part 9, subpart 9.4, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(j) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible or voluntarily excluded, except as provided in paragraph (h) of this section.

(k) Except as permitted paragraphs (h) or (i) of this section, a participant shall not knowingly do business under a covered transaction with a person who is—

(1) Debarred or suspended;
(2) Proposed for debarment under 48 CFR part 9, subpart 9.4; or
(3) Ineligible for or voluntarily excluded from the covered transaction.

(l) Violation of the restriction under paragraph (k) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(m) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

§ 500.110 Amendments.

The Board's rules in this chapter may be adopted or amended, or new rules may be adopted, only by majority vote of the Board. Authority to adopt or amend these rules may not be delegated.

Subpart C—Oil and Gas Guaranteed Loans

§ 500.200 Eligible Borrower.

(a) An eligible Borrower must be a Qualified Oil and Gas Company that can demonstrate:

(1) Credit is not otherwise available to it under reasonable terms or conditions sufficient to meet its financing needs, as reflected in the financial and business plans of the company;
(2) The prospective earning power of that company, together with the character and value of the security pledged, furnish reasonable assurance of repayment of the loan to be guaranteed in accordance with its terms;
(3) The company has agreed to permit audits by the General Accounting Office and an independent auditor acceptable to the Board prior to the issuance of the guarantee and while any such guaranteed loan is outstanding; and
(4) It has experienced layoffs, production losses, or financial losses between January 1, 1997, and the date of application for the Guarantee, demonstrated as a comparison between employment, production, or net income existing on January 1, 1997 and on the date of application.

(b) The Lender must provide with its application a letter from at least one lending institution other than the Lender to which the Borrower has applied for substantially the same loan they are now applying for, and the reasons the Borrower was unable to obtain the financing for which it applied. In addition, the Lender applying for a guarantee under this Program must certify that it would not make the loan without the Board's guarantee.

§ 500.201 Eligible Lender.

(a) A lender eligible to apply to the Board for a Guarantee of a loan must be:

(1) A banking institution, such as a commercial bank or trust company, subject to regulation by the Federal
§ 500.202 Loan amount.

The aggregate amount of loan principal guaranteed under this Program to a single Qualified Oil and Gas Company may not exceed $10 million.

§ 500.203 Guarantee percentage.

A guarantee issued by the Board may not exceed 85 percent of the amount of the principal of a loan to a Qualified Oil and Gas Company.

§ 500.204 Loan terms.

(a) All loans guaranteed under the Program shall be due and payable in full no later than December 31, 2010.

(b) Loans guaranteed under the Program must bear a rate of interest determined by the Board to be reasonable. The reasonableness of an interest rate will be determined with respect to current average yields on outstanding obligations of the United States with remaining periods of maturity comparable to the term of the loan sought to be guaranteed. The Board may reject an application to guarantee a loan if it determines the interest rate of such loan to be unreasonable.

(c)(1) The performance of all of the Borrower’s obligations under the Loan Documents shall be secured by, and shall have the priority in, such Security as provided for within the terms and conditions of the Guarantee.

(2) Without limiting the Lender’s or Borrower’s obligations under paragraph (c) of this section, at a minimum, the loan shall be secured by:

(i) A fully perfected and enforceable security interest and or lien, with first
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§ 500.205 Application process.

(a) Application process. An original application and three copies must be received by the Board no later than 5 P.M. EST, February 28, 2000, in the U.S. Department of Commerce, 1401 Constitution Avenue, NW., room H–2500, Washington, DC 20230. Applications which have been provided to a delivery service on or before February 27, 2000, with "delivery guaranteed" before 5 P.M. on February 28, 2000, will be accepted for review if the Applicant can document that the application was provided to the delivery service with delivery to the address listed in this section guaranteed prior to the closing date and time. A postmark of February 27, 2000, is not sufficient to meet this deadline as the application must be received by the required date and time. Applications will not be accepted via facsimile machine transmission or electronic mail.

(b) Applications shall contain the following:

(1) A completed Form, "Application for Oil and Gas Guarantee Loan";

(2) The information required for the completion of Form "Environmental Assessment and Compliance Findings for Related Environmental Laws" and attachments, as required by §500.206(a)(2)(i)(D), unless the project is categorically excluded under §500.206(b);

(3) All Loan Documents that will be signed by the Lender and the Borrower, if the application is approved, including all terms and conditions of, and Security or additional Security to assure the Borrower's performance under, the loan;

(4) Certification by the chairman of the board and the chief executive officer of the Borrower acknowledging that the Borrower is aware that the Lender is applying to the Board for a Guarantee of a loan under the Program, as described in the Loan Documents, and agreeing to permit audits by the General Accounting Office, its designee, an independent auditor acceptable to the Board prior to the issuance of the Guarantee and annually thereafter while such guarantee is outstanding;

(5) The Lender's full written underwriting analysis of the loan to be guaranteed by the Board;

(6) A certification that the Lender has followed the same loan underwriting analysis with the loan to be guaranteed as it would follow for a loan not guaranteed by the Government; and a certification by the Lender, that the loan, Lender, and Borrower meet each of the requirements of the Program as set forth in the Act and the Board's rules in this part;

(7) A description of all Security for the loan, including, as applicable, current appraisal of real and personal property, copies of any appropriate environmental site assessments, and current personal and corporate financial statements of any guarantors for the
§ 500.206 Environmental requirements.

(a)(1) In General. Environmental assessments of the Board’s actions will be conducted in accordance with applicable statutes, regulations, and Executive Orders. Therefore, each application for a Guarantee under the Program must be accompanied by information necessary for the Board to meet the requirements of applicable law.

(2) Actions requiring compliance with NEPA. (i) The types of actions classified as “major Federal actions” subject to NEPA procedures are discussed generally in 40 CFR parts 1500 through 1508.

(ii) With respect to this Program, these actions typically include:

(A) Any project, permanent or temporary, that will involve construction and/or installations;

(B) Any project, permanent or temporary, that will involve ground disturbing activities; and

(C) Any project supporting renovations, other than interior remodeling.

(3) Environmental information required from the Lender. (i) Environmental data or documentation concerning the use of the proceeds of any loan guaranteed by the Board under §500.200(b) must provide with its application those items required by §500.200(b):

(11) Documentation sufficient to demonstrate that the Lender is eligible under §500.201(a) and to allow the Board to make a determination to issue a Guarantee to such Lender as set forth in §500.201(c).

(12) A report as to the Borrower’s designation of the nature and value of project reserves from an independent petroleum engineer acceptable to the Board.

(c) No Guarantee will be made if either the Borrower or Lender has an outstanding, delinquent Federal debt until:

(1) The delinquent account has been paid in full;

(2) A negotiated repayment schedule is established and at least one payment has been received; or

(3) Other arrangements, satisfactory to the agency responsible for collecting the debt, are made.

§ 500.206 Environmental requirements.

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under this Program must be provided by the Lender to the Board to assist the Board in meeting its legal responsibilities. The Lender may obtain this information from the Borrower. Such information includes:

(A) Documentation for an environmental threshold review from qualified data sources, such as a Federal, State or local agency with expertise and experience in environmental protection, or other sources, qualified to provide reliable environmental information;

(B) Any previously prepared environmental reports or data relevant to the loan at issue;

(C) Any environmental review prepared by Federal, State, or local agencies relevant to the loan at issue;

(D) The information required for the completion of Form XYZ "Environmental Assessment and Compliance Findings for Related Environmental Laws;" and

(E) Any other information that can be used by the Board to ensure compliance with environmental laws.

(ii) All information supplied by the Lender is subject to verification by the Board.

(b) The regulations of the Council on Environmental Quality implementing NEPA require the Board to provide public notice of the availability of project specific environmental documents such as environmental impact statements, environmental assessments, findings of no significant impact, records of decision etc., to the affected public. See 40 CFR 1506.6(b). Environmental information concerning specific projects can be obtained from the Board by contacting: Executive Director, Emergency Oil and Gas Guaranteed Loan Board, U.S. Department of Commerce, Washington, DC 20230.

(c) National Environmental Policy Act—(1) Purpose. The purpose of this paragraph (c) is to adopt procedures for compliance with the National Environmental Policy Act, 42 U.S.C. 4321 et seq., by the Board. This paragraph supplements regulations at 40 CFR Chapter V.

(2) Definitions. For purposes of this section, the following definitions apply:

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and for which neither an environmental assessment nor an environmental impact statement is required.

Environmental assessment means a document that briefly discusses the environmental consequences of a proposed action and alternatives prepared for the purposes set forth in 40 CFR 1508.9.

EIS means an environmental impact statement prepared pursuant to section 102(2)(C) of NEPA.

FONSI means a finding of no significant impact on the quality of the human environment after the completion of an environmental assessment.

NEPA means the National Environmental Policy Act, 42 U.S.C. 4321, et seq.

Working Capital Loan means money used by an ongoing business concern to fund its existing operations.

(3) Delegations to Executive Director. (i) All incoming correspondence from Council on Environmental Quality (CEQ) and other agencies concerning matters related to NEPA, including draft and final EIS, shall be brought to the attention of the Executive Director. The Executive Director will prepare or, at his or her discretion, coordinate replies to such correspondence.

(ii) With respect to actions of the Board, the Executive Director will:

(A) Ensure preparation of all necessary environmental assessments and EISs;

(B) Maintain a list of actions for which environmental assessments are being prepared;

(C) Revise this list at regular intervals, and send the revisions to the Environmental Protection Agency;

(D) Make the list available for public inspection;

(E) Maintain a list of EISs; and

(F) Maintain a file of draft and final EISs.

(4) Categorical exclusions. (i) This paragraph describes various classes of Board actions that normally do not have a significant impact on the human environment and are categorically excluded. The word "normally" is stressed; there may be individual cases in which specific factors require contrary action.
(ii) Subject to the limitations in paragraph (c)(4)(iii) of this section, the actions described in this paragraph have been determined not to have a significant impact on the quality of the human environment. They are categorically excluded from the need to prepare an environmental assessment or an EIS under NEPA.

(A) Guarantees of working capital loans; and

(B) Guarantees of loans for the refinancing of outstanding indebtedness of the Borrower, regardless of the purpose for which the original indebtedness was incurred.

(iii) Actions listed in paragraph (c)(4)(ii) of this section that otherwise are categorically excluded from NEPA review are not necessarily excluded from review if they would be located within, or in other cases, potentially affect:

(A) A floodplain;

(B) A wetland;

(C) Important farmlands, or prime forestlands or rangelands;

(D) A listed species or critical habitat for an endangered species;

(E) A property that is listed on or may be eligible for listing on the National Register of Historic Places;

(F) An area within an approved State Coastal Zone Management Program;

(G) A coastal barrier or a portion of a barrier within the Coastal Barrier Resources System;

(H) A river or portion of a river included in, or designated for, potential addition to the Wild and Scenic Rivers System;

(I) A sole source aquifer recharge area;

(J) A State water quality standard (including designated and/or existing beneficial uses and anti-degradation requirements); or

(K) The release or disposal of regulated substances above the levels set forth in a permit or license issued by an appropriate regulatory authority.

(5) Responsibilities and procedures for preparation of an environmental assessment.

(i) The Executive Director will request that the Lender and Borrower provide information concerning all potentially significant environmental impacts of the Borrower's proposed project pursuant to 13 CFR 500.206. The Executive Director, consulting at his discretion with CEQ, will review the information provided by the Lender and Borrower. Though no specific format for an environmental assessment is prescribed, it shall be a separate document and should include the following in conformance with 40 CFR 1508.9:

(A) Description of the environment. The existing environmental conditions relevant to the Board's analysis determining the environmental impacts of the proposed project, should be described. The no action alternative also should be discussed;

(B) Documentation. Citations to information used to describe the existing environment and to assess environmental impacts should be clearly referenced and documented. Such references should include, as appropriate, but not be limited to, local, tribal, regional, State, and Federal agencies, as well as, public and private organizations and institutions;

(C) Evaluating environmental consequences of proposed actions. A brief discussion should be included of the need for the proposal, of alternatives as required by 42 U.S.C. 4332(2)(E) and their environmental impacts. The discussion of the environmental impacts should include measures to mitigate adverse impacts and any irreversible or irretrievable commitments of resources to the proposed project.

(ii) The Executive Director, in preparing an environmental assessment, may:

(A) Tier upon the information contained in a previous EIS, as described in 40 CFR 1502.20;

(B) Incorporate by reference reasonably available material, as described in 40 CFR 1502.21, and/or

(C) Adopt a previously completed EIS reasonably related to the project for which the proceeds of the loan sought to be guaranteed under the Program will be used, as described in 40 CFR 1506.3.

(iii) Because of the statute's admonition to the Board to make its decisions as soon as possible after receiving applications, the Board will not:

(A) Publish notice of intent to prepare an environmental assessment, as described in 40 CFR 1501.7;
(B) Conduct scoping, as described in 40 CFR 1501.7; and
(C) Seek comments on the environmental assessment, as described in 40 CFR 1503.1.
(iv) If, on the basis of an environmental assessment, it is determined that an EIS is not required, a FONSI, as described in 40 CFR 1508.13 will be prepared. The FONSI will include the environmental assessment or a summary of it and be available to the public from the Board. The Executive Director shall make a record of these decisions, making them available to interested parties upon request. Requests should be directed to the Executive Director Emergency Oil and Gas Guarantee Loan Program, 14th Street and Constitution Avenue, NW., Washington DC 20230. Prior to a final loan guarantee decision, a copy of the NEPA documentation shall be sent to their Board for consideration.
(6) Responsibilities and procedures for preparation of an environmental impact statement. (i) If after an environmental assessment has been completed, it is determined that an EIS is necessary, it and other related documentation will be prepared by the Executive Director in accordance with section 102(2)(c) of NEPA, this section, and 40 CFR parts 1500 through 1508. The Executive Director may seek additional information from the applicant in preparing the EIS. Once the document is prepared, it shall be submitted to the Board. If the Board considers a document unsatisfactory, it shall be returned to the Executive Director for revision or supplementation prior to a loan guarantee decision; otherwise the Board will transmit the document to the Environmental Protection Agency.
(ii) The following procedures, as discussed in 40 CFR parts 1500 through 1508, will be followed in preparing an EIS:
(1) The format and contents of the draft and final EIS shall be as discussed in 40 CFR 1502.
(2) The requirements of 40 CFR 1506.9 for filing of documents with the Environmental Protection Agency shall be followed.
(3) The Executive Director, consulting at his discretion with CEQ, shall examine carefully the basis on which supportive studies have been conducted to assure that such studies are objective and comprehensive in scope and depth.
(4) NEPA requires that the decision making “utilize a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts.” 42 U.S.C. 4332(A). If such disciplines are not present on the Board staff, appropriate use should be made of personnel of Federal, State, and local agencies, universities, non-profit organizations, or private industry.
(B) Until the Board issues a record of decision as provided in 40 CFR 1502.2 no action concerning the proposal shall be taken which would:
(1) Have an adverse environmental impact; or
(2) Limit the choice of reasonable alternatives.
(3) 40 CFR 1506.10 places certain limitations on the timing of Board decisions on taking “major Federal actions.” A loan guarantee shall not be made before the times set forth in 40 CFR 1506.10.
(iii) A public record of decision stating what the decision was; identifying alternatives that were considered, including the environmentally preferable one(s); discussing any national considerations that entered into the decision; and summarizing a monitoring and enforcement program if applicable for mitigating the environmental effects of a proposal; will be prepared. This record of decision will be prepared at the time the decision is made.


§ 500.207 Application evaluation.

(a) Eligibility screening. Applications will be reviewed to determine whether the Lender and Borrower are eligible, the information required under §500.205(b) is complete, and the proposed loan complies with applicable statutes and regulations. The Board can at any time reject an application that does not meet these requirements.
(b) Evaluation criteria. Applications that are determined to be eligible pursuant to paragraph (a) of this section
§ 500.208 Issuance of the Guarantee.

(a) The Board's decisions to approve any application for, and extend an offer of, guarantee under §500.207 is conditioned upon:

(1) The Lender and Borrower obtaining any required regulatory or judicial approvals;

(2) The Lender and Borrower being legally authorized to enter into the loan under the terms and conditions submitted to the Board in the application;

(3) The Board's receipt of the Loan Documents, Guarantee, and any related instruments, properly executed by the Lender, Borrower, and any other required party other than the Board; and

(4) No material adverse change in the Borrower's ability to repay the loan between the date of the Board's approval and the date the Guarantee is to be issued.

(b) The Board may withdraw its approval of an application and rescind its offer of Guarantee if the Board determines that the Lender or the Borrower cannot, or is unwilling to, provide adequate documentation and proof of compliance with paragraph (a) of this section within the time provided for in the offer.

(c) Only after receipt of all the documentation, required by this section, will the Board sign and deliver the Guarantee.

(d) A Borrower receiving a loan guaranteed by the Board under this Program shall pay a one-time guarantee fee of 0.5 percent of the amount of the principal of the loan. This fee must be paid no later than one year from the issuance of the Guarantee.

§ 500.209 Funding for the Program.

The Act provides funding for the costs incurred by the Government as a result of granting Guarantees under the Program. While pursuing the goals of the Act, it is the intent of the Board to minimize the cost of the Program to the Government. The Board will estimate the risk posed by the guaranteed loans to the funds appropriated for the costs of the Guarantees under the Program and operate the Program accordingly.

§ 500.210 Assignment or transfer of loans.

(a) Neither the Loan Documents nor the Guarantee of the Board, or any interest therein, may be modified, assigned, conveyed, sold or otherwise transferred by the Lender, in whole or in part, without the prior written approval of the Board.

(b) Under no circumstances will the Board permit an assignment or transfer of less than 100 percent of a Lender's interest in the Loan Documents and Guarantee, nor will it permit an assignment or transfer to be made to a party which the Board determines not to be an Eligible Lender pursuant to §500.201.

(c) The proscription under paragraph (a) of this section shall not apply to:

(1) Transfers which occur by operation of law, unless a primary purpose of the transaction leading to such a transfer was to assign, convey or sell the loan note or Guarantee without the
necessity of securing the Board's prior written approval; or
(2) An action or agreement by the Lender which has the effect of distributing the risks of the credit among other Lenders if:
   (i) Neither the loan note nor the Guarantee is assigned, conveyed, sold, or transferred in whole or in part;
   (ii) Both the unguaranteed and guaranteed portions of the loan are treated in the same manner;
   (iii) The Lender remains solely responsible for the administration of the loan; and
   (iv) The Board's ability to assert any and all defenses available to it under the Guarantee and the law is not adversely affected; or
(3) Transfer by a non-Agent Lender of the non-guaranteed portion of the loan after payment under the Guarantee has been made.

§ 500.211 Lender responsibilities.

(a) General. Lender shall comply with all provisions of the Guarantee.

(b) Standard of care. The Lender shall exercise due care and diligence in administering the loan as would be exercised by a reasonable and prudent banking institution when administering a secured loan of such banking institution's own funds without a Federal guaranty. Such standard shall also apply to any and all approvals, determinations, permissions, acceptances, requirements, or opinion made, given, imposed or reached by Lender.

(c) Representation to the Board. In addition to any other representations required by the Guarantee, the Applicant shall represent to the Board that it has the ability to, and will, administer the loan, as well as to exercise the Applicant's rights and pursue its remedies, including conducting any liquidation of the Security or additional Security in full compliance with the standard of care, without the need for any advice, opinion, determination, recommendation, approval, disapproval, assistance (financial or other) or participation by the Board, except where the Board's consent is expressly required by the Guarantee, or where the Board, in its sole discretion and pursuant to the Guarantee, elects to provide same.

(d) Covenants. With respect to any loan guaranteed by the Board pursuant to the Act and this part, the Lender shall require the Loan Documents to contain such affirmative and negative covenants by the Borrower as are required by the terms and conditions of the Guarantee, such as the prohibition on the payment of dividends.

(e) Monitoring. In accordance with the Guarantee the Lender shall monitor Borrower's performance under the Loan Documents to detect any non-compliance by the Borrower with any provision thereof.

(f) Reporting. With respect to any loan guaranteed by the Board pursuant to the Act and this part the Lender shall provide the Board with the following information, in accordance with the Guarantee:

   (1) Financial statements for the borrower, as provided in the Guarantee;
   (2) Projected balance sheet, income statement, and cash flows for the Borrower for each year remaining on the term of the loan; and
   (3) A completed signed copy of Form “Quarterly Compliance Statement” that includes information on the recent performance of the loan, within 15 days of the end of each calendar quarter.

(g) Notices. All written notices, requests, or demands made to the Board shall be mailed to the Board at the U.S. Department of Commerce, H2500, Washington, DC 20230, except as otherwise specified by the Guarantee or as directed by the Board. Lender shall notify the Board in writing without delay of:

   (1) Deterioration in the internal risk rating of a loan guaranteed under this Program within 5 business days of such action by the Lender;
   (2) The occurrence of each event of default under the Loan Documents or Guarantee promptly, but not later than 5 business days, of the Lender's learning of such occurrence; and
   (3) Any other notification requirements as provided by law, or by the
§ 500.212 Liquidation.

(a) The Board may take, or direct to be taken, any action in liquidating the Security which the Board determines to be necessary or proper, consistent with Federal law and regulations.

(b) Pursuant to the Guarantee, upon written demand by the Lender and whether or not the Board has made any payment under the Guarantee, the Board, at the Board's sole option shall have the right to require that the Lender, solely or jointly with the Board, conduct to completion the liquidation of any or all of the Security. The Board may choose to conduct the liquidation itself.

§ 500.213 Termination of obligations.

(a) The Board, in its discretion, shall be entitled to terminate all, or a portion, of the Board's obligations under the Guarantee, without further cause, in the event that:

1. The Guarantee fee required by § 500.208(d) shall not have been paid;

2. A Lender shall have released or covenanted not to sue the Borrower or any other guarantor, or agreed to the modification of any obligation of any party to any agreement related to the loan, without the prior written consent of the Board;

3. A Lender has released the Board from its liability and obligations under the Guarantee;

4. A Lender shall have made any incorrect or incomplete representation to the Board in any material respect in connection with the Application, the Guarantee or the Loan Documents;

5. A Lender fails to make a demand for payment within 30 days of payment default; or

6. A Lender fails to comply with any material provision of the Loan Documents or the Guarantee.

(b) Upon receipt of a written demand for payment made pursuant to the Guarantee, the Board shall be entitled to seek such certifications from the Lender, undertake such audits or investigations, or take such other action as is provided for by law or the Guarantee so as to determine whether the Lender has complied with all of the Lender's obligations under the Guarantee.


§ 500.214 OMB control number. [Reserved]
FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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(Revised as of January 1, 2008)

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American National Standards Institute
25 West 43rd Street, Fourth floor, New York, NY 10036 Telephone:
(212) 642–4900
Making Buildings and Facilities Accessible to and Usable by the
Physically Handicapped.

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