

Small Business Administration

§ 120.398

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.

AMERICA'S RECOVERY CAPITAL (BUSINESS STABILIZATION) LOAN PROGRAM—ARC LOAN PROGRAM

§ 120.398 America's Recovery Capital (ARC) Loan Program.

(a) *Purpose.* The purpose of the ARC Loan Program is to enable SBA to guarantee certain loans to viable small businesses that are experiencing immediate financial hardship. Loans made under this loan program are referred to as ARC Loans and are subject to the requirements set forth in this Part for 7(a) loans except as noted in this section.

(b) *Definitions.*

(1) (i) *Eligible Borrower* is a small business concern as defined in Section 3 of the Small Business Act and § 120.100. Eligible Borrower does not include:

(A) Ineligible small businesses as listed in § 120.110; and

(B) Small business concerns with the following primary industry North

American Industry Classification System (NAICS) codes:

(1) 713210 (Casinos (Except Casino Hotels));

(2) 721120 (Casino Hotels);

(3) 713290 (Other Gambling Industries);

(4) 713910 (Golf Courses and Country Clubs); and

(5) 712130 (Zoos and Botanical Gardens).

(ii) Applications submitted by small business concerns with a primary industry NAICS code of 713940 (Fitness and Recreational Sports Centers) will be identified and reviewed by SBA to determine eligibility in accordance with the statutory restriction on assistance to swimming pools.

(2) *Going Concern* is a small business concern actively engaging in business with the expectation of indefinite continuance.

(3) *Qualifying Small Business Loan* is a loan previously made to an Eligible Borrower for any of the purposes set forth in § 120.120 and not for any of the purposes set forth in § 120.130 or 120.160(d). Qualifying Small Business Loans may include credit card obligations, capital leases for major equipment and vehicles, notes payable to vendors or suppliers, loans in the first lien position made by commercial lenders in connection with the Development Company Loan Program (504), home equity loans used to finance business operations, other loans to small businesses made without an SBA guaranty, and loans made by or with an SBA guaranty on or after February 17, 2009. Loans made or guaranteed by SBA before February 17, 2009 are not Qualifying Small Business Loans for the purposes of the ARC Loan Program. A Qualifying Small Business Loan may not be used as the basis for more than one ARC Loan but ARC Loans may be used to pay multiple Qualifying Small Business Loans.

(4) *Viable small business* is a small business that is a Going Concern but which is having difficulty making periodic payments of principal and interest on Qualifying Small Business Loan(s) and/or meeting operating expenses of the business although it can reasonably demonstrate its projected continued operation for a reasonable period

beyond the six month period of payment assistance with an ARC Loan.

(c) *Period of program.* The ARC Loan Program is authorized through September 30, 2010, or until appropriated funds are exhausted, whichever is sooner.

(d) *Use of proceeds.* Loans made under the ARC Loan Program are for the sole purpose of making periodic payments of principal and interest (including default interest), in full or in part, for up to six (6) months, on one or more existing Qualifying Small Business Loans. ARC Loan proceeds cannot be used to make payments on loans made or guaranteed by SBA prior to February 17, 2009.

(e) *Loan terms.* (1) *Guaranty percentage.* ARC Loans are 100% guaranteed by SBA.

(2) *Maximum loan size.* An ARC Loan may not exceed \$35,000.

(3) *Interest rate.* The interest rate for ARC Loans will be published by SBA in the FEDERAL REGISTER.

(4) *Loan maturity.* An ARC Loan may be made with a maturity of up to six and one-half years.

(5) *Disbursement period.* The disbursement period for an ARC Loan is up to six consecutive months.

(6) *Loan payments.*

(i) *Borrower's payments.* The borrower will be responsible for all principal payments.

(ii) *Payment of interest by SBA.* SBA will make periodic interest payments to the lender on ARC Loans. Interest will accrue only until the date 120 days after the earliest uncured payment default on the ARC Loan. However, the amount paid by SBA on a defaulted ARC Loan, when it honors its guarantee, will be adjusted to reconcile for any overpayments or underpayments of interest previously paid to the Lender. Interim adjustments to interest paid by SBA to lenders may be made during the term of the ARC Loan and interest payments due the Lender will be adjusted to accommodate the interim interest adjustments.

(iii) *Deferral period.* No principal repayment is required during the disbursement period or for 12 months following the final loan disbursement.

(iv) *Repayment period.* The borrower will be required to pay the loan prin-

cipal over five years beginning in the 13th month following the final loan disbursement. The ARC Loan balance will be fully amortized over the five year repayment period. Balloon payments may not be required by lenders. The borrower may prepay all or a portion of the principal during the life of the loan without penalty.

(f) *Number of ARC Loans per small business.* No small business may obtain more than one ARC Loan, but the proceeds of the ARC loan may be used to pay more than one Qualifying Small Business Loan.

(g) *Personal guarantees.* Holders of at least a 20 percent ownership interest in the borrower generally must guarantee the ARC Loan.

(h) *Collateral.* SBA requires each lender to follow the collateral policies and procedures that it has established and implemented for similarly-sized non-SBA guaranteed commercial loans. The lender's collateral policies must be commercially reasonable and prudent. Lenders will certify that the collateral policies applied to the ARC Loan meet this standard. Lenders may charge borrowers the direct cost of securing and liquidating collateral for ARC Loans. SBA will reimburse Lenders for the direct cost of liquidating collateral that are not reimbursed by the borrower in the event of default. Reimbursement of the direct costs of liquidation by SBA to the Lender is limited to the amount of the recovery received on the ARC Loan.

(i) *Credit criteria.* To be approved for an ARC Loan, the applicant must be a creditworthy small business with a reasonable expectation of repayment, taking into consideration the following:

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

(2) Experience and depth of management;

(3) Strength of the business;

(4) Past earnings, current earnings, and projected cash flow; and

(5) Ability to repay the loan with earnings from the business.

(j) *Statement of hardship.* In addition to the certifications required for 7(a) loans generally, ARC Loan recipients must submit a statement certifying

that they are experiencing immediate financial hardship and provide documentation to support the certification.

(k) *Loan application.* The provisions of §120.191 do not apply for ARC Loans. A lender making an ARC Loan will provide an application with information on the small business that includes the nature and history of the business, current and historical financial statements (or tax returns), and other information that SBA may require.

(l) *Preferences and refinancing.* A lender may make an ARC Loan to an Eligible Borrower that intends to use the proceeds of the ARC Loan to make periodic payments of principal and interest on a Qualifying Small Business Loan that is owned or serviced by that same lender. The provisions of §§ 120.10, 120.536(a)(2) and 120.925 with regard to Preference for repayments without prior SBA approval do not apply to ARC Loans. The provisions of §120.201 restricting refinancing also do not apply to ARC Loans.

(m) *Loan fees.* Neither the lender nor SBA shall impose any fees or direct costs on a borrower of an ARC Loan, except that lenders may charge borrowers for the direct costs of securing and liquidating collateral for the ARC Loan. Fees include, but are not limited to, points, bonus points, prepayment penalties, brokerage fees, fees for processing, origination, or application, and out of pocket expenses (other than the direct costs of securing and liquidating collateral). SBA will not impose any fees on a lender making an ARC Loan.

(n) *Lender reporting.* Lenders shall report on its ARC Loans in accordance with requirements established by SBA from time to time for 7a loans and loans made under the American Recovery and Reinvestment Act of 2009.

(o) *Loan servicing.* Each originating lender shall service all of its ARC Loans in accordance with the existing practices and procedures that the Lender uses for its non-SBA guaranteed commercial loans. In all circumstances, such practices and procedures must be commercially reasonable and consistent with prudent lending standards and in accordance with SBA Loan Program Requirements as defined in §120.10. SBA's prior written consent is required for servicing actions that

may have significant exposure implications for SBA. SBA may require written notice of other servicing actions it considers necessary for portfolio management purposes.

(p) *Liquidations.* Each Lender shall be responsible for liquidating any defaulted ARC Loan originated by the Lender. ARC Loans will be liquidated in accordance with the existing practices and procedures that the Lender uses for its non-SBA guaranteed commercial loans. In all circumstances, such practices and procedures must be commercially reasonable and consistent with prudent lending standards and in accordance with SBA Loan Program Requirements as defined in Section 120.10. Loans with de minimis value may, at the Lender's request and with SBA's approval, be liquidated by SBA or its agent(s). Significant liquidation actions taken on ARC Loans must be documented. The reimbursement of liquidation related fees by SBA to the Lender is limited to the amount of the recovery on the ARC Loan.

(q) *Purchase requests.* Any purchase request to SBA to honor its guaranty on a defaulted ARC Loan shall be made by the originating lender. Lenders may request SBA to purchase an ARC Loan when there has been an uncured payment default exceeding 60 days or when the borrower has declared bankruptcy. SBA requires Lenders to submit loans for purchase no later than 120 days after the earliest uncured payment default on the ARC Loan. Additionally, SBA may honor its guarantee and require a Lender to submit an ARC Loan for purchase at any time. Except as noted above, the Lender is required to complete all recovery actions on the ARC Loan after purchase.

(r) *Prohibition on secondary market sales and loan participations.* A lender may not sell an ARC loan into the secondary market nor may a lender participate a portion of an ARC loan with another lender.

(s) *Loan volume.* SBA reserves the right to allocate loan volume under the ARC Loan Program among Lenders (as defined in §120.10).

(t) *Delegated authority.* SBA may allow lenders to use their delegated authority to process ARC Loans.

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(u) *Personal resources test.* The personal resources test provisions of § 120.102 do not apply to ARC Loans.

(v) *Statutory loan limit.* The provisions of § 120.151 do not apply to ARC Loans.

[74 FR 27247, June 9, 2009]

Subpart D—Lenders

§ 120.400 Loan Guarantee Agreements.

SBA may enter into a Loan Guarantee Agreement with a Lender to make deferred participation (guaranteed) loans. Such an agreement does not obligate SBA to participate in any specific proposed loan that a Lender may submit. The existence of a Loan Guarantee Agreement does not limit SBA's rights to deny a specific loan or establish general policies. *See also* §§ 120.441(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, liquidate and litigate small business loans including, but not limited to:

(1) Holding sufficient permanent capital to support SBA lending activities (for SBA Lenders with a Federal Financial Institution Regulator, meeting capital requirements for an adequately capitalized financial institution is considered sufficient permanent capital to support SBA lending activities; for SBLCs, meeting its SBA minimum capital requirement; and for NFRLs, meeting its state minimum capital requirement); and

(2) Maintaining satisfactory SBA performance, as determined by SBA in its discretion. The 7(a) Lender's Risk Rating, among other factors, will be considered in determining satisfactory SBA performance. Other factors may include, but are not limited to, on-site review/examination assessments, historical performance measures (like default rate, purchase rate and loss rate), loan volume to the extent that it impacts performance measures, and other performance related measurements and

information (such as contribution toward SBA mission);

(b) Be open to the public for the making of such loans (not be a financing subsidiary, engaged primarily in financing the operations of an affiliate);

(c) Have continuing good character and reputation, and otherwise meet and maintain the ethical requirements of § 120.140

(d) Be supervised and examined by either:

(1) A Federal Financial Institution Regulator,

(2) A state banking regulator satisfactory to SBA, or

(3) SBA;

(e) Be in good standing with SBA as defined in § 120.420(f) (and determined by SBA in its discretion) and, as applicable, with an SBA Lender's state regulator and Federal Financial Institution Regulator; and

(f) Operate in a safe and sound condition using commercially reasonable lending policies, procedures, and standards employed by prudent Lenders.

[61 FR 3235, Jan. 31, 1996, as amended at 62 FR 302, Jan. 3, 1997; 73 FR 75510, Dec. 11, 2008]

§ 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.