

**§ 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 employees of other Government organizations.**

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

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

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

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

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

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

public in the integrity of the Government.

**Administrative Provisions****§ 105.401 Standards of Conduct Committee.**

(a) The Standards of Conduct Committee will:

(1) Advise and give direction to SBA management officials in 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 Deputy Administrator for Management and Administration, or in his or her absence, the Assistant Administrator for Administration; and

(3) The Director of Human Resources, or in his or her absence the Deputy Director of Human Resources.

**§ 105.402 Standards of Conduct Counselors.**

(a) The SBA Standards of Conduct Counselor is the Deputy General Counsel. The Associate General Counsel for General Law (AGC) is an Assistant Standards of Conduct Counselor, and other Assistants 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;

(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; and

(4) Provide Outside Employment decisions pursuant to 5 CFR § 5401.104.

(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.**

(a) The Designated Agency Ethics Officials, pursuant to the Ethics in Government Act of 1978, is the Deputy General Counsel. He or she may, in turn, appoint one or more an Alternate Designated Agency Ethics Officials. The Alternates will assist the Designated Agency Ethics Official and act for him or her whenever absent.

(b) The Designated Agency Ethics Officials 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 Officials and Alternates are set forth in more detail in 5 CFR 2638.203, which is promulgated and amended by the Office of Government Ethics.

Philip Lader,  
*Administrator.*

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**13 CFR Part 115****Surety Bond Guarantee**

**AGENCY:** Small Business Administration (SBA).

**ACTION:** Proposed rule.

**SUMMARY:** SBA proposes to revise the rules governing the Surety Bond Guarantee Program. It seeks to eliminate inconsistencies, clarify procedures, accommodate program experience and industry changes, and provide for more efficient program operation. It also seeks to clarify and shorten regulations where appropriate, eliminate redundant provisions, consolidate and reorganize sections, and clarify ambiguous language.

**DATES:** Written comments must be submitted on or before December 27, 1995.

**ADDRESSES:** Comments should be sent to David R. Kohler, Regulatory Reform Initiative Team Leader (115), U.S. Small Business Administration, 409 3rd Street, S.W., Suite 13, Washington, D.C., 20416.

**FOR FURTHER INFORMATION CONTACT:** Barbara Brannan, Office of Surety Guarantees, (202) 205-6540.

**SUPPLEMENTARY INFORMATION:** On March 4, 1995, President Clinton issued a Memorandum to all federal agencies, directing them to simplify their regulations. In response to this

directive, SBA has completed a page-by-page, line-by-line review of all of its existing regulations to determine which might be revised or eliminated. As a result of its review of the regulations governing the Surety Bond Guarantee Program, SBA is proposing to eliminate obsolete or redundant regulations, substantively revise others, and reorganize all of Part 115 in a more readable format.

As background, the following analysis discusses the anticipated effect of this proposed rule on SBA's current regulations.

Changes to Part 115 are being proposed which would reorganize and re-word some of the sections, and consolidate others. Sections, as well as subsections within the sections, have been reordered into a more logical sequence so that they are easier to follow. The major consolidations consist of (1) combining §§ 115.39 and 115.62 from Subparts B and C, respectively, and moving the new section to Subpart A (where provisions are applicable to both the Prior Approval and Preferred Surety Bond Programs) as new § 115.18 "Refusal to issue further guarantees" and (2) combining §§ 115.40 and 115.63 and moving the new section to Subpart A as new § 115.21 "Audits and investigations."

Substantive changes are also proposed. The most significant change is an increase in the fees paid to SBA by participating sureties and principals. This is being proposed in an attempt to make the program self-financing to overcome uncertainties and fluctuations in the funding of the program. In addition, all increases in the contract or bond amount will require the payment of additional fees by the principal and the surety, and the \$40.00 threshold under which fees do not need to be paid is proposed to be eliminated. Conversely, all decreases in the contract or bond amount will require SBA to reimburse the proportionate amount of fees paid by the principal and the surety. A brief summary of the primary changes follows.

Proposed § 115.10, which sets forth definitions of terms used in this part, eliminates some current definitions, adds definitions, and changes others. "Investment Act" is added as a defined term for the Small Business Investment Act of 1958, as amended. "Amount of contract" is eliminated as a defined term and moved to § 115.12(e). "Approval or approved" is proposed to be deleted. "Contract" is clarified to mean a *written* obligation and could include an agreement to cover defective workmanship, but not defective materials, unless agreed to by SBA.

"Contractor" is eliminated and replaced in the text of the regulations by "Principal," which is already defined in the current regulations. "Issuance or issued" is proposed to be deleted because the meaning is vague, and replaced with "Execution" which more clearly pinpoints the time at which a certain action is taken. In the proposed regulations, conforming changes are made throughout the text.

The definition of "Obligee" would make clear that the addition of co-obligees does not increase the liability of the surety under the bond. A new term, "Prior Approval Surety," would be added to refer to those sureties that are participants in SBA's program requiring prior SBA approval on guarantees. Two new definitions would be added for the guarantee agreements in the Prior Approval Program and the PSB Program: "Prior Approval Agreement" would be defined as the guarantee agreement (Current SBA Form 990) entered into between a Prior Approval Surety and SBA for a specific bond; "PSB Agreement" would be defined as the agreement authorizing a PSB Surety to participate in the PSB program.

Proposed § 115.11, "Applying to participate in the Surety Bond Guarantee Program," is a new section which provides general guidance about applying to the Prior Approval and PSB programs.

Proposed §§ 115.12 (c) and (d) are currently found in § 115.10(c). The latter is proposed to be rewritten into two subsections, one concerning the "Eligibility of Sureties" and the other, the "Guarantee agreement."

Proposed § 115.12(e), "Amount of Contract," is proposed to be moved from current § 115.11. This would eliminate the phrase as a defined term although the substantive provisions remain the same. Within this section, the term "issuance" is replaced with "Execution" since this substitution of terms is proposed in § 115.10.

Proposed § 115.12(f) would be a new provision which prohibits the sale or transfer of surety files or accounts. This is proposed to maintain SBA's control over the accounts in accordance with its guarantee agreement with the surety. Without this prohibition, in the event of a transfer of files or accounts, SBA might have no control over a purchaser's methods of recovery.

Proposed § 115.13(c) clarifies that a principal must certify that a bond is expressly required by the bid solicitation or the original contract.

Proposed § 115.13(e) clarifies the concept that SBA will not guarantee bonds for principals who are primarily

brokers or construction managers, replacing the term "packagers."

Proposed § 115.13(g) is a new provision which reflects current practice. This provision states that SBA will not issue a guarantee on bonds where the surety, or any of its affiliates, close relatives or members of its household, owns 10% or more of the principal.

The substance of proposed § 115.14 "Loss of Principal's eligibility for future assistance," is derived from current § 115.34, but is re-worded, and several other instances whereby a principal will be ineligible for guaranteed bonds are added. It is relocated to Subpart A so that it will apply to both the Prior Approval and the PSB Surety Bond Guarantee Programs.

Proposed § 115.15(a), currently § 115.32(a), specifies the underwriting standards to be adhered to by sureties rather than requiring sureties to consult the SOP as the current regulation does.

Proposed § 115.15(b), currently § 115.32(b) concerning servicing, imposes a new requirement that sureties monitor the progress of principals on bonded contracts guaranteed by SBA to insure that additional guarantees are not issued if there are problems with the work on hand.

Proposed § 115.16, "Calculation of Loss," is a new section bringing together all provisions dealing with loss amount. "Loss after excess contract amount" is eliminated as a defined term and the substantive provisions moved to new §§ 115.31(d) and 115.61. "Loss adjustment expense," "Loss from litigation cost" and "Loss from attorneys' fees and damages" are restructured into two paragraphs setting forth the expenses included in the calculation of loss and those that are not. The new paragraphs specify that allowable expenses must be itemized and documented and must be attributable solely to the loss under the guaranteed bond. In addition, overhead and mark-up on expenses are explicitly excluded.

Proposed § 115.17(a), currently § 115.37(a), is rewritten and relocated to Subpart A to apply to both the Prior Approval and Preferred Programs. There are also some new provisions. One prohibits sureties from separately collateralizing the non-guaranteed portion of the bond. Without this provision, a surety would have no incentive to pursue recovery since it might be able to recoup 100% of its losses from SBA and the collateral securing the unguaranteed portion. Sureties would also be prohibited from entering into an agreement by which they indemnify a principal since such

an agreement would create a conflict of interest; nor could an indemnity agreement be obtained from an agent or other representative of the surety.

Proposed § 115.17(b), currently § 115.37(c), makes clear that SBA is entitled to its guaranteed share of all salvage and recovery related to the guaranteed bond or any other bond provided by the surety on behalf of the principal.

Proposed § 115.18, "Refusal to issue further guarantees," would be a consolidation of current §§ 115.39 and 115.62. In addition, the provisions in current §§ 115.39(a) and 115.62(a) that a surety may file a petition for review of certain agency actions is proposed to be modified to provide that only suspensions and terminations of surety bond guarantee participants are reviewable by the SBA Office of Hearings and Appeals.

Grounds on which SBA may deny liability are scattered throughout the current regulations. Proposed § 115.19, "Denial of liability," consolidates these provisions (currently found at §§ 115.10(g), 115.13, 115.31(c)(2) and 115.64(b)), and some new ones are added. Proposed § 115.19(a), "Excess Contract or bond amount," adds, as a new reason for denial of liability, the circumstance where the bond amount exceeds the contract amount.

Current §§ 115.13 (d) and (e)(2) provide that regulatory violations or alterations to a bond or contract by a surety which cause an increase in the bond liability by more than 25% or \$50,000 in the aggregate, whichever is less, are grounds on which SBA may deny liability under its guarantee. Proposed §§ 115.19 (d) and (e)(2) would provide that such actions which cause an increase in bond liability of *at least* 25% or \$50,000 are grounds for denying liability. Also proposed § 115.19(e)(2) provides that the sanction applies when the increase occurs *at one time* rather than in the aggregate.

Current § 115.13(c) provides that material breaches which cause an increase in the bond liability in the stated amount are grounds for denial. Proposed §§ 115.19 (c), (d) and (e) would change current §§ 115.13 (c), (d) and (e) by adding, as grounds for denial, enumerated actions which cause an increase in the *contract* amount of at least 25% or \$50,000.

Proposed § 115.19(e) rewords current § 115.13(e) and allows SBA to deny liability if the surety acquiesces to a material change in the *contract*, in addition to such changes in the bond, as currently provided. Proposed § 115.19(e)(2) makes clear that this applies only to Prior Approval sureties

since PSB sureties do not need SBA's approval to make alterations causing increases in the bond liability or contract amount.

Proposed §§ 115.19 (f) and (g) are moved from current §§ 115.10(g) and 115.31(c)(2), respectively. Proposed § 115.19(f) also allows SBA to deny liability if the bond was executed prior to the date of SBA's guarantee. The term "Executed" is used in place of "issuance" to conform to the changes made in proposed § 115.10 "Definitions."

Proposed § 115.19(h) sets forth "other regulatory violations" as a basis for SBA to deny liability. These provisions are moved from current § 115.64(b) and made applicable to both the Prior Approval and PSB programs.

Proposed § 115.20, "Insolvency of Surety," expands on the provision currently in § 115.10(a) concerning insolvent sureties. The proposed section would provide that in the event of a surety's insolvency, any rights or benefits conferred on a surety under a valid Surety Bond Guarantee Agreement (either Prior Approval or PSB) would accrue only to the trustee or receiver of the surety and to no other party. This provision is currently stated on SBA Form 990. The proposed section would also add a new requirement that the trustee or receiver submit quarterly status reports to SBA concerning funds received and settlements under consideration. This is necessary in order to properly monitor claims and recovery situations handled by persons other than the surety.

Proposed § 115.21 is a consolidation of current §§ 115.40 and 115.63, both titled "Audits and investigations." This section is placed in Subpart A since it is applicable to both Surety Bond Guarantee Programs. In addition, the provisions in current §§ 115.40(a) and 115.63(a) that a surety may file a petition for review of certain agency actions is proposed to be modified and moved into proposed § 115.18. It would provide that only suspensions and terminations of PSB sureties are reviewable by the SBA's Office of Hearings and Appeals.

Current § 115.30(b), "Application for guarantee," is proposed to be deleted from the regulations and issued as internal guidance. In addition, a change would be made to require that an approved form (Current Form 1624—Lower Tier Certification form regarding debarment, etc.) be submitted for a principal with each application for a bond guarantee, not just the initial application. This change is being made to reflect the current practice and to be consistent with Part 146 of this Title

(governing lobbying activities) which mandates the submission of information relative to any proposal submitted in connection with a lower tier covered transaction.

Current § 115.30(c), which provides information on the different guarantee percentages provided by SBA under the Prior Approval program, would be moved to its own section—proposed § 115.31. Section 115.31(a)(2), which would provide for a 90% guarantee for concerns owned and controlled by disadvantaged individuals, refers the reader to Part 124 of SBA regulations for information on social and economic disadvantage.

Proposed § 115.30(d) (currently §§ 115.31(c) and 115.36(f)) consolidates the time deadlines and information to be submitted to SBA when a final bond has been issued under the Prior Approval program, including bonds issued under a bonding line. The Prior Approval Agreement (SBA Form 990) would be required, rather than the Surety Bond Guarantee Review Update (Form 994C), which is currently suggested to be used when final bonds are issued under a bonding line. Because Form 990 asks for the amount of the premium being charged, and Form 994C does not, SBA can use the Form 990 for information it needs to determine the fee to be charged to the surety. This change would formalize current practice. In the case of final bonds issued other than under a bonding line, the deadline for submission of the forms would be changed from 45 days from award of the contract or issuance of the bond, to 45 days from execution of the bond. Forms for bonds issued under a bonding line would be required to be submitted within 15 days of execution. This is a technical correction to current § 115.31(c) which provides for a 45 day deadline. (The current provision is contrary to current § 115.36(f), which provides 15 days for submission to SBA of final bonds issued under a bonding line).

Proposed § 115.31(b), currently § 115.30(c)(2), clarifies that the 80% guarantee applies to contracts, not bonds, of more than \$100,000.

The definition of "Loss after excess contract amount" which is currently under § 115.11, is proposed to be moved to § 115.31(d) and renamed "Contract increase to over \$1,250,000."

Proposed § 115.31(e), "Contract decrease to \$100,000 or less," would be a new subsection that provides for an increase in SBA's guarantee percentage if the surety demonstrates that the contract amount has decreased to \$100,000 or less.

Most of the provisions found at current § 115.33 are proposed to be deleted since the concepts are covered under proposed § 115.15, "Underwriting and servicing standards." The prohibition against guaranteeing forfeiture bonds is proposed to be incorporated within the definition of "Bid Bond."

Proposed § 115.32(b), current § 115.35(b), has several changes. First, the fee charged to principals would be raised from \$6.00 to \$8.00 per thousand dollars of the contract amount. Because of uncertainties and fluctuations in SBA's budget, an attempt is being made to make this program self-financing. Another change involves the rounding of the principal's guarantee fee. Currently the contract amount is rounded and the fee calculated from that figure. SBA proposes to calculate the fee and then round that figure to the nearest dollar. This will eliminate cents in the fee and simplify the accounting process.

Proposed § 115.32(c), currently § 115.35(c)(1), would likewise raise the surety fee from 20% to 25% of the bond premium. In addition, § 115.32(d) would revise the notification requirement concerning increases and decreases in the contract or bond amount. The surety would be required to notify SBA of every increase or decrease, and each increase would require payment of additional fees, unlike the current requirement which mandates payment of increased fees only when the increases reach a certain threshold. When the original contract or bond amount increases at one time by more than 25% or \$50,000, whichever is less, the prior written approval of the authorized SBA officer would be required on a supplemental Form 990. Approval would be conditioned on the surety's payment of the additional principal's fee. Whether there is an increase or decrease, the proposed rules eliminate the current \$40.00 threshold before payment is required or reimbursed. The threshold is proposed to be eliminated for administrative convenience.

Current § 115.36(c) is proposed to be moved from the regulations as not needed and issued in internal guidance.

Proposed § 115.33(d)(1) is new. It would require sureties to submit a "Surety Bond Guarantee Underwriting Review" (Current Form 994B) to SBA for approval within 15 business days after execution of a bid bond under a bonding line. If this deadline is not met, this section provides that SBA's guarantee is void from its inception unless SBA determines otherwise upon

a showing that a valid reason exists for the delay.

Proposed § 115.33(d)(2), which sets forth a 15 day deadline for submission of what is now Form 994B (or 994C if 994B is already on file) on final bonds, is moved from current § 115.36(f).

Proposed § 115.33(e), "Cancellation," is moved from current § 115.36(h) and clarifies that the surety is required to notify SBA of any adverse information concerning a principal. Upon receipt, SBA may cancel the principal's bonding line.

Proposed § 115.34(a), "Imminent Breach," would provide that the aggregate of payments made by SBA to a surety to avoid imminent breach cannot exceed 10% of the contract price. This would be a change from current § 115.37(b)(1) which provides that no payment by SBA to avoid imminent breach will exceed 10%. The current provision that the Administrator can approve payments exceeding 10%, and that in no event will SBA pay an amount exceeding its guaranteed share of the bond penalty, is likewise changed to reflect that amounts will be aggregated in determining when the Administrator's approval is needed and when SBA's guaranteed share of the bond penalty will be exceeded.

Proposed § 115.34(b), "Salvage and recovery," (currently § 115.37(c)) adds a new requirement. If a surety recommends settlement to SBA or recommends that pursuit of salvage or recovery be discontinued, the surety would have to certify that pursuing recovery is neither economically feasible nor a viable strategy in maximizing recovery.

Proposed § 115.35 "Claims for Losses," is based on current §§ 115.38 and 115.34, but also adds some new provisions. First, there is a requirement that the surety notify SBA within 30 days of acquiring knowledge of specified adverse circumstances concerning a principal. Another subsection requires the surety to take action to mitigate losses and expenses due to such adverse circumstances and to handle claims and suits arising from a defaulted bond. The requirement that the surety submit semiannual status reports on claims is retained, but a requirement that SBA also be notified immediately of any substantial changes, is added. Lastly, proposed § 115.35(e) provides that payment by SBA on a claim submitted by a surety does not waive or invalidate the terms of the Prior Approval Agreement or any defenses SBA may have. In addition, if SBA determines that it should not have paid any portion of a claim, the surety

must reimburse SBA that amount within 30 days of being so notified.

Proposed § 115.36, "Indemnity settlements and reinstatement of Principal," has two subsections taken from current § 115.34 concerning conditions for reinstatement of a principal that has become ineligible for further bond guarantees, and guidance on underwriting for a principal after reinstatement. It also has a new section on indemnity settlements, requiring a Prior Approval surety to provide SBA with certain documents relevant to making a determination on a settlement proposal. The surety would also have to obtain SBA's concurrence before agreeing to a settlement. This section retains the provision in current § 115.38 that the surety must pay SBA its *pro rata* share of the settlement amount within 90 days of receipt. A new provision is proposed which would require the surety to certify that SBA has received its share of all indemnity recovery before closing the file.

Current § 115.39, "Refusal to issue further guarantees," is proposed to be combined with § 115.62, "Qualifications of surety," and moved to Subpart A and renumbered § 115.18.

Current § 115.40, "Audits and investigations," is proposed to be combined with § 115.63, and moved to Subpart A and renumbered § 115.21.

The information on applying to be a PSB surety currently found at § 115.60(a) is proposed to be moved to new § 115.11 which sets forth information on applying to either the Prior Approval or PSB program.

Proposed §§ 115.60 (a), (c) and (d) set forth under Subpart C the provisions stated at current §§ 115.10 (d), (e) and (f) regarding the selection of sureties for the PSB program, duration of the program and prohibition of PSB sureties against participating in the Prior Approval program. This also serves to consolidate certain information concerning the preferred program found currently in Subpart A. The sunset provision at proposed § 115.60(c) has been changed to September 30, 1997, which is when the PSB program is currently set to expire unless extended by Congress.

Proposed § 115.60(e), "Allotment of guarantee authority," is moved from current § 115.60(b). The proposed subsection clarifies that where a bid bond is executed by the PSB surety and (1) the contract is awarded for an amount other than the bid amount, (2) the bid is withdrawn or (3) the bond has expired, the allotment will be debited or credited accordingly. Where the surety did not execute a related bid bond, a new provision provides that the

guarantee percentage of the penal sum of a guaranteed final bond will count against the allotment.

Proposed § 115.60(f), "Timeliness," is new, and provides that a PSB surety may not execute a bond after commencement of work under a contract unless the surety receives the written approval of the Associate Administrator for Surety Guarantees.

Proposed § 115.60(g)(1), currently § 115.60(c)(1), concerning the retention of certifications and records for inspection by SBA, has a new provision requiring such documents to be retained for the term of the bond, plus time required to settle claims and an additional three years thereafter. This requirement corresponds with the current document retention requirement for purposes of SBA-conducted audits. (See current §§ 115.40(b) and 115.63(b), and proposed § 115.19(b)). The proposed section also provides that documentation must be retained until any unresolved audit findings are resolved.

Proposed § 115.60(g)(4), currently § 115.60(c)(3), would raise the PSB surety's fee and principal's guarantee fee to 25% of the premium and \$8.00 per thousand dollars of the contract amount, respectively. As with the Prior Approval program, these fee increases are being recommended in an attempt to make the program self-financing.

The proposed rules at § 115.60(g)(5)(i) would eliminate the provision at current § 115.60(c)(6)(i) which requires payment of additional fees only when aggregate increases of the bond liability exceed 25% or \$50,000, whichever is less. Instead, additional fees will be required to be paid on any amount of increase. Correspondingly, under proposed § 115.60(g)(5)(ii), any amount of decrease in fees will be reimbursed by SBA. These sections also make clear that the provisions apply to increases in either the contract or bond amount.

Whether there is an increase or decrease in the fees, the proposed rules eliminate the current \$40.00 threshold (see current §§ 115.60(c)(6)(i) and (6)(ii)) before payment is required or reimbursed. The threshold is proposed to be eliminated for administrative convenience.

The substance of proposed § 115.61 is moved from current § 115.64(a), "Percentage of indemnification," given its own section number and renamed "Guarantee percentage."

Current § 115.62 is proposed to be consolidated with current § 115.39, moved to Subpart A and renumbered as § 115.18.

Proposed § 115.62, "Imminent Breach," is moved from current

§ 115.61(b) and given its own section number. A provision would be added limiting SBA's aggregate payments to PSB sureties to avoid imminent breach to 10% of the contract price. Also added is a provision that the Administrator could approve payments exceeding the 10% ceiling, and that in no event would SBA reimburse imminent breach payments in an aggregate amount exceeding its guaranteed share of the bond penalty. These are added to conform to the limitations set by statute. The current provision that SBA's guaranteed share of the aggregate of imminent breach payments and of indemnification against loss is limited to SBA's guaranteed share of the bond penalty, is proposed to be deleted. This provision is unnecessary in light of the restrictions on imminent breach payments discussed above.

Current § 115.63 is proposed to be consolidated with current § 115.40, moved to Subpart A and renumbered as § 115.21 "Audits and investigations."

Proposed § 115.63, "Claims for Losses," would have two new subsections, taken from the Prior Approval program. Subsection (b) directs the surety to take the necessary steps for mitigation of losses and expenses and to take charge of claims and suits arising from defaulted bonds, both in a manner consistent with the surety's practices on non-guaranteed bonds. This is consistent with current practice. Subsection (c) provides that payment by SBA on a claim submitted by a surety does not waive or invalidate the terms of the PSB Agreement or any defenses SBA may have. This subsection also provides that if SBA determines that it should not have paid any portion of a claim, the surety must reimburse SBA that amount within 30 days of being so notified.

Proposed § 115.64, "Denial of liability," would be moved from current § 115.64(b) and given its own section number. Redundant provisions would be deleted.

*Compliance With Executive Orders 12778, 12612 and 12866, the Regulatory Flexibility Act and the Paperwork Reduction Act*

SBA certifies that this proposed rule, if adopted, would not constitute a significant regulatory action for purposes of Executive Order 12866, since it is not likely to result in an annual effect on the economy of \$100 million or more.

For purposes of the Regulatory Flexibility Act, 5 U.S.C. 604, SBA has determined that these rules would *not* have a significant impact on a substantial number of small entities.

Although fee increases are proposed, it is SBA's opinion that the increases would not have a significant impact on either the principals or the sureties. The fees paid by principals (small business contractors requiring guaranteed bonds) would increase from \$6.00 to \$8.00 per thousand dollars of the contract to be bonded. Under this increase, an average contract of \$161,251 would impose a fee of \$1290 rather than \$968, a \$322 increase. A surety company typically charges a contractor a bond premium of 2.15% of the bond amount. SBA currently charges the surety 20% of the premium for SBA's guarantee. It is proposed that this fee be raised to 25%. On an average final bond, SBA's charge to the surety would increase from \$694 to \$867, a \$173 increase.

There are no reporting, recordkeeping and other compliance requirements not approved by the Office of Management and Budget which would come under the Paperwork Reduction Act, 44 U.S.C. Ch. 35.

SBA certifies that this rule is drafted, to the extent practicable, in accordance with the standards set forth in Section 2 of Executive Order 12778.

SBA certifies that these rules do not warrant the preparation of a Federal Assessment in accordance with Executive Order 12612.

List of Subjects in 13 CFR Part 115

Small business, Surety bonds.

For the above reasons, SBA proposes to revise Part 115, Title 13 of the Code of Federal Regulations, as follows:

**PART 115—SURETY BOND GUARANTEE**

- 115.1 Overview of regulations.
- 115.2 Savings clause.

**Subpart A—Provisions For All Surety Bond Guarantees**

- 115.10 Definitions.
- 115.11 Applying to participate in the Surety Bond Guarantee Program.
- 115.12 Program Provisions.
- 115.13 Eligibility of Principal.
- 115.14 Loss of Principal's eligibility for future assistance.
- 115.15 Underwriting and servicing standards.
- 115.16 Determination of Loss.
- 115.17 Minimization of Surety's Loss.
- 115.18 Refusal to issue further guarantees; suspension and termination of PSB status.
- 115.19 Denial of liability.
- 115.20 Insolvency of Surety.
- 115.21 Audits and investigations.

**Subpart B—Guarantees Subject to Prior Approval**

- 115.30 Submission of Surety's guarantee application.
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- 115.64 Denial of liability.

Authority: Title IV, Part B, and sections 310(a) and 311, of the Small Business Investment Act of 1958, as amended (15 U.S.C. 687b and c, 694a, 694b), the Inspector General Act of 1978 (5 U.S.C. app. 3), Pub. L. 100-590, Title II, and Pub. L. 101-574, Sec. 216.

#### **§ 115.1 Overview of regulations.**

The regulations in this part cover the SBA's Surety Bond Guarantee Programs under Part B of Title IV of the Small Business Investment Act of 1958, as amended (the Investment Act). Subpart A 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 contains the regulations applicable only to the Prior Approval Program. Subpart C 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.**

*AA/SG* means SBA's Associate Administrator for Surety Guarantees.

*Affiliate* is defined in part 121.

*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. The term 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 can include an agreement of 2 years or less solely to cover defective workmanship. It can also include an agreement to cover defective workmanship which is ancillary to another Contract described in this paragraph if it must be performed by the same Principal, is customarily required in the relevant trade or industry, and SBA's written approval has been obtained.

*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 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.

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

*Loss* has the meaning set forth in § 115.16.

*Obligee* means:

(1)(i) In the case of a Bid Bond, the Person requesting bids for the performance of a Contract; or

(ii) In the case of a Final Bond, the Person who has contracted with a Principal for the completion of the Contract and to whom the primary obligation of the Surety runs in the event of a breach by the Principal.

(2) In either case, no Person (other than a Federal department or agency) may be named co-Obligee or Obligee on a bond or on a rider to the bond unless that Person is bound by the Contract to the Principal (or to the Surety, if the Surety has arranged completion of the Contract) to the same extent as the original Obligee. In no event may the addition of one or more co-Obligees increase the aggregate liability of the Surety under the bond.

*OSG* means SBA's Office of Surety Guarantees.

*Payment Bond* means a bond which is conditioned upon the payment by the Principal of money to persons who have a right of action against such bond, including those who have furnished labor, materials, equipment and supplies for use in the performance of the Contract.

*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)) 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.

*Surety* means a company which

(1)(i) Under the terms of a *Bid Bond*, agrees to pay a sum of money to the Obligee if the Principal breaches the conditions of the bond;

(ii) Under the terms of a *Performance Bond*, agrees to pay a sum of money or to incur the cost of fulfilling the terms of a Contract if the Principal breaches the conditions of the Contract; and

(iii) Under the terms of a *Payment* or an *Ancillary Bond*, agrees to make payment to all who have a right of action against such bond, including those who have furnished labor, materials, equipment and supplies in the performance of the Contract.

(2) The term Surety includes an agent, independent agent, underwriter, or any other company or individual empowered to act on behalf of the Surety.

#### **§ 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 AA/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 recovery, and whether it is a corporation listed by the U.S. Treasury as eligible to issue bonds in connection with Federal procurement contracts.

#### § 115.12 Program provisions.

(a) *Description of Surety Bond Guarantee Programs.* SBA guarantees Sureties participating in the Surety Bond Guarantee Programs against a portion of their Losses incurred and paid as a result of a Principal's breach of the terms of a Bid, Payment, Performance or Ancillary Bond, on any eligible Contract. A Contract must not prohibit a Surety from performing the Contract upon default of the Principal. In the Prior Approval Program, the Surety must obtain SBA's approval before a guaranteed bond can be issued. In the PSB Program, selected Sureties may issue, monitor, and service SBA guaranteed bonds without further SBA approval.

(b) *Eligibility of bonds.* Bid, Performance, and Payment Bonds (other than bonds in the nature of a financial guarantee) are eligible for an SBA guarantee if they are executed in connection with a Contract and are of a type listed in the "Contract Bonds" section of the current Rating Manual of the Surety Association of America (100 Wood Avenue South, Iselin, New Jersey 08830). Ancillary Bonds may also be eligible for SBA's guarantee. A Payment Bond cannot be issued unless a Performance Bond is issued at the same time. A Performance Bond must not prohibit a Surety from performing the Contract upon default of the Principal.

(c) *Expiration of Bid Bond Guarantee.* A Bid Bond guarantee expires 120 days after Execution of the Bid Bond, unless the Surety notifies SBA in writing before the 120th day that a later expiration date is required. The notification must include the new expiration date.

(d) *Guarantee agreement.* The terms and conditions of SBA's bond guarantee agreements, including the guarantee percentage, may vary from Surety to Surety, depending on past experience with SBA. If the guarantee percentage is not fixed by the Act, it is determined by OSG after considering, among other things, the rating or ranking assigned to the Surety by recognized authority, and the Surety's Loss rate, average Contract amount, average bond penalty per guaranteed bond, and ratio of Bid Bonds to Final Bonds, all in comparison with other Sureties participating in the same SBA Surety Bond Guarantee Program (Prior Approval or PSB) to a comparable

degree. Any guarantee agreement under this part is made exclusively for the benefit of SBA and the Surety, and does not confer any rights (such as a right of action against SBA) or benefits on any other party.

(e) *Amount of Contract.* (1) *Statutory ceiling.* The amount of the Contract to be bonded must not exceed \$1,250,000 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 locality, irrespective 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 if the annual Contract amount and the penal sum of the bond do not exceed \$1,250,000 at any time.

(f) *Transfers or sales by Surety.* Sureties must not sell or otherwise transfer their files or accounts, whether before or after a default by the Principal has occurred. A violation of this provision is grounds for termination from participation in the program.

#### § 115.13 Eligibility of Principal.

In order to be eligible for a bond guaranteed by SBA, the Principal must comply with the following requirements:

(a) *Size.* Together with its Affiliates, it must qualify as a small business under part 121 of this title.

(b) *Character.* It must possess good character and reputation. A Principal meets this standard if each owner of 20% or more of its equity, and each of its officers, directors, or general partners possesses good character and reputation. Good character and reputation is presumed absent when:

(1) Any such Person is under indictment for, or has been convicted of a felony, or a final civil judgment has been entered stating that such Person has committed a breach of trust or has violated a law or regulation protecting the integrity of business transactions or business relationships; or

(2) A regulatory authority has revoked, canceled, or suspended a

license of such Person which is necessary to perform the Contract; or

(3) Any such Person has obtained a bond guarantee by fraud or material misrepresentation (as described in § 115.18(b)), or has failed to keep the Surety informed of unbonded contracts or of a contract bonded by another Surety as required by a bonding line commitment under § 115.33.

(c) *Need for bond.* It must certify that a bond is expressly required by the bid solicitation or the original Contract in order to bid on the Contract or to serve as a prime contractor or subcontractor.

(d) *Availability of bond.* It must certify that a bond is not obtainable on reasonable terms and conditions without SBA's bond guarantee assistance.

(e) *Partial subcontract.* It must certify the percentage of work under the Contract to be subcontracted. SBA will not guarantee bonds for Principals who are primarily brokers or construction managers.

(f) *Debarment.* It must certify that the Principal is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from transactions with any Federal department or agency, under governmentwide debarment and suspension rules.

(g) *Conflict of interest.* Neither the Surety, nor an Affiliate of the Surety, or a close relative or member of the household of the Surety or Affiliate can own, directly or indirectly, 10% or more of the Principal. This prohibition also applies to ownership interests in any of the Principal's Affiliates. Where such ownership equals or exceeds 10%, SBA will not issue a guarantee.

#### § 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:

(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 in excess of \$100.

(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 has committed fraud or material misrepresentation in obtaining a guaranteed bond.

(b) *Reinstatement.* Prior Approval Sureties should refer to § 115.36(b) for provisions on reinstatement of the Principal's eligibility.

### § 115.15 Underwriting and servicing standards.

(a) *Underwriting.* 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 principles and practices and the Surety's principles and practices on unguaranteed bonds. There must be a reasonable expectation that the Principal will successfully perform the Contract to be bonded. The terms and conditions of the bond and the Contract must be reasonable in light of the risks involved and the extent of the Surety's participation. The Principal must satisfy the eligibility requirements set forth in § 115.13. The bond must satisfy the eligibility requirements set forth in § 115.12(b). The Surety and SBA must be satisfied as to the reasonableness of cost and the feasibility of successful completion of the Contract. The Contract should be the same in type and size as those contracts previously completed by the Principal. Contracts for those who have not previously had SBA guaranteed bonds should not exceed 150% of that Principal's largest successfully completed contract. The work to be performed should be within the Principal's normal geographical area of operations and area of expertise.

(b) *Servicing.* The Surety must ensure that the Principal remains viable and eligible for SBA's Surety Bond Guarantee Program, must monitor the Principal's progress on bonded Contracts guaranteed by SBA, and must obtain job status reports from Obligees of Final Bonds guaranteed by SBA.

### § 115.16 Determination of Loss.

(a) *Loss under Bid Bond* is the lesser of the penal sum or the amount which is the difference between the bonded bid and the next higher responsive bid. In either case, the Loss is reduced by any amounts recovered by reason of the Principal's defenses against the Obligees' demand for performance by the Principal and any sums recovered from indemnitors and other salvage.

(b) *Loss under Payment Bond* is, at the Surety's option, the sum necessary to pay all just and timely claims against the Principal for the value of labor, materials, equipment and supplies furnished for use in the performance of the bonded Contract and other covered debts, or the penal sum of the Payment Bond. In either case, the Loss includes interest (if any), but Loss is reduced by any amounts recovered (through offset or otherwise) by reason of the Principal's claims against laborers, materialmen, subcontractors, suppliers, or other rightful claimants, and by any

amounts recovered from indemnitors and other salvage.

(c) *Loss under Performance Bond* is, at the Surety's option, the sum necessary to meet the cost of fulfilling the terms of a bonded Contract or the penal sum of the bond. In either case, the Loss includes interest (if any), but Loss is reduced by any amounts recovered (through offset or otherwise) by reason of the Principal's defenses or causes of action against the Obligees, and by any amounts recovered from indemnitors and other salvage.

(d) *Loss under Ancillary Bond* is the amount covered by such bond which is attributable to the Contract for which guaranteed Payment or Performance Bonds were Executed.

(e) *Loss includes* the following expenses if they are itemized, documented and attributable solely to the Loss under the guaranteed bond:

(1) Amounts actually paid by the Surety which are specifically allocable to the investigation, adjustment, negotiation, compromise, settlement of, or resistance to a claim for Loss resulting from the breach of the terms of the bonded Contract. Any cost allocation method must be reasonable and must comply with generally accepted accounting principles; and

(2) Amounts actually paid by the Surety for court costs and reasonable attorney's fees incurred to mitigate any Loss under paragraphs (a) through (e)(1) of this section including suits to obtain sums due from Obligees, indemnitors, Principals and others.

(f) *Loss does not include* the following expenses:

(1) Any unallocated expenses, or any mark-up on expenses or any overhead of the Surety, its attorney, or any other party;

(2) Expenses paid for any suits, cross-claims, or counterclaims filed against the United States of America or any of its agencies, officers, or employees unless the Surety has received, prior to filing such suit or claim, written concurrence from SBA that such suit may be filed;

(3) Attorney's fees and court costs incurred by the Surety in a suit by or against SBA or its Administrator; and

(4) Fees, costs, or other payments, including tort damages, arising from a successful tort suit or claim by a Principal or any other Person against the Surety.

### § 115.17 Minimization of Surety's Loss.

(a) *Indemnity agreements and collateral.* (1) *Requirements.* The Surety must take all reasonable action to minimize risk of Loss including, but not limited to, obtaining from each

Principal a written indemnity agreement which covers actual Losses under the Contract and Imminent Breach payments under § 115.34(a) or § 115.62. The indemnity agreement must be secured by such collateral as the Surety or SBA finds appropriate. Indemnity agreements from other Persons, secured or unsecured, may also be required by the Surety or SBA.

(2) *Prohibitions.* No indemnity agreement may be obtained from the Surety, its agent or any other representative of the Surety. The Surety must not separately collateralize the portion of its bond which is not guaranteed by SBA.

(b) *Salvage and recovery.* (1) *General.* The Surety must pursue all possible sources of salvage and recovery. Salvage and recovery includes all payments made in settlement of the Surety's claim, even though the Surety has incurred other losses as a result of that Principal which are not reimbursable by SBA.

(2) *SBA's share.* SBA is entitled to its guaranteed percentage of all salvage and recovery from a defaulted Principal, its guarantors and indemnitors, and any other party, received by the Surety in connection with the guaranteed bond or any other bond issued by the Surety on behalf of the Principal. The Surety must reimburse or credit SBA (in the same proportion as SBA's share of Loss) within 90 days of receipt of any recovery by the Surety.

(3) *Multiple Sureties.* In any dispute between two or more Sureties concerning recovery under SBA guaranteed bonds, the dispute must first be brought to the attention of OSG for an attempt at mediation and settlement.

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

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

(2) 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.

(3) SBA may also require the renegotiation of the guarantee percentage and/or SBA's charge to the Surety 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.

(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 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) does not, or ceases to, qualify as a Surety. SBA may require submission of a Statement of Personal History 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 AA/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. SBA's Administrator may, pending a decision pursuant to Part 134, 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 any actual or purported Prior Approval or PSB Agreement if any of the circumstances in paragraphs (a) through (h) exist.

(a) *Excess Contract or bond amount.* The total Contract amount at the time of Execution of the bond(s) exceeds \$1,250,000 in face value (see § 115.12(e)), or the bond amount at any time exceeds the total Contract amount as established at the time of the bond's Execution.

(b) *Misrepresentation or fraud.* The Surety obtained the Prior Approval or PSB Agreement, or applied for reimbursement for losses, by fraud or material misrepresentation. Material misrepresentation includes (but is not limited to) both the making of an untrue statement of material fact and the omission of a statement of material fact

necessary to make a statement not misleading in light of the circumstances in which it was made. Material misrepresentation also includes the adoption by the Surety of a material misstatement made by others which the Surety knew or under generally accepted underwriting standards should have known to be false or misleading. The Surety's failure to disclose its ownership (or the ownership by any owner of at least 20% of the Surety's equity) of an interest in a Principal or an Obligee is considered the omission of a statement of material fact.

(c) *Material breach.* The Surety has committed a material breach of one or more terms or conditions of its Prior Approval or PSB Agreement. A material breach is considered to have occurred if:

(1) Such breach (or such breaches in the aggregate) causes an increase in the Contract amount or in SBA's bond liability of at least 25% or \$50,000, whichever is less; or

(2) One of the statutory conditions 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 one which causes an increase in the Contract amount or SBA's bond liability of at least 25% or \$50,000 in the aggregate, whichever is less, 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 Contract or 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 Contract or bond which would increase the Contract amount or SBA's bond liability by at least 25% or \$50,000, whichever is less.

(f) *Timeliness.* (1) The bond was Executed prior to the date of SBA's guarantee; or

(2)(i) 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" 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 job 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.

(ii) For purposes of this paragraph (f)(2), 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. For purposes of this paragraph (f), the Surety must maintain a contemporaneous record of the Execution and approval of each bond.

(g) *Principal fee.* 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 § 115.60(g)(4) for PSB Sureties. SBA may reinstate the guarantee upon a showing that the Contract is not in default and that a valid reason exists why a timely submission was not made.

(h) *Other regulatory violations.* (1) The Principal on the bonded Contract is not a small business;

(2) The bond was not required under the bid solicitation or the original Contract;

(3) The bond was not eligible for guarantee by SBA because the bonded contract was not a Contract as defined in § 115.10;

(4) The loss occurred under a bond that was not guaranteed by SBA;

(5) The loss incurred by the Surety was not a Loss as determined under § 115.16; or

(6) The Surety's loss did not result from the Principal's breach or Imminent Breach of the Contract for which the guaranteed bond was approved.

#### § 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 for consequences of failure to comply with this section.

(2) *Frequency of audits.* Each PSB Surety is audited at least once each year by examiners selected and approved by SBA.

(b) *Records.* The Surety must maintain the records listed in this paragraph for the term of each 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 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 § 115.60(g)(6);

(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 § 115.62 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; and

(9) 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 these Acts, or of any order issued under these 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 forth in § 115.13 and that the underwriting standards set forth in § 115.14 have been met.

(b) *SBA's determination.* SBA's approval or decline of a guarantee application is made in writing by an authorized SBA officer. The officer may provide telephone notice before the Prior Approval Surety's receives SBA's guarantee approval form if the officer has already signed the form. In the event of a conflict between the telephone notice and the written form, the written form controls.

(c) *Reconsideration-appeal of SBA determination.* A Prior Approval Surety may request reconsideration of a decline from the SBA officer who made the decision. If the decision on reconsideration is negative, the Surety may appeal to an individual designated by the AA/SG. If the decision is again adverse, the Surety may appeal to the AA/SG, who will make the final decision.

(d) *Notice and payment to SBA.* When the Surety has Executed a Final Bond,

including a Final Bond under a bonding line, the Surety must complete the Prior Approval Agreement, and submit the form, together with the Principal's payment for its guarantee fee (see § 115.32(b)) to SBA within 45 days, or in the case of a bonding line, within 15 business days (see § 115.33(d)) after Execution of the bond.

**§ 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 concern owned and controlled by socially and economically disadvantaged individuals. See part 124 of this title for applicable definitions and criteria.

(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.* Where the Contract amount, after Execution of the bond, increases to more than \$100,000, 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 guaranties which qualify under paragraph (a)(1) of this section.

(d) *Contract increase to over \$1,250,000.* Where the Contract amount, after Execution of the bond, increases beyond the statutory limit of \$1,250,000, 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 example, if a Contract amount increases to \$1,375,000, SBA's share of the Loss under an 80% guarantee is limited to  $72.73\% [1,250,000 / 1,375,000 = 90.91\% \times 80\% = 72.73\%]$ .

(e) *Contract decrease to \$100,000 or less.* Where the Contract amount, after Execution of the bond, decreases to \$100,000 or less, 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 of \$8 per thousand dollars of the Contract amount (unless SBA agrees otherwise in writing). The fee is rounded to the nearest dollar. Example: If the Contract amount is \$100,100, the Principal's guarantee fee is \$801.00 (.008 times \$100,100, or \$800.80, rounded off to \$801.00). The Principal's fee is to be remitted to SBA by the Surety together with the notice 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 § 115.17(a)(2), the Surety must pay SBA a guarantee fee on each guaranteed bond (other than a Bid Bond), computed at 25% of the bond Premium, in the ordinary course of business. 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 bond obligation or the Contract 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 as soon as the Surety acquires knowledge of the change. Whenever the original Contract or bond amount increases by a change order of at least 25% or \$50,000, whichever is less (see § 115.18(e)), the prior written approval of such increase by SBA is required on a supplemental Prior Approval Agreement and is conditioned upon payment by the Surety of the increase in the Principal's guarantee fee as set forth in paragraph (d)(2) of this section.

(2) *Increases; fees.* Notification of increases in the Contract or bond amount under this paragraph (d) must be accompanied by payment of the increase in the Principal's guarantee fee of \$8 per thousand dollars of increase in the Contract amount. The Surety's check for payment of the increase in the Surety's guarantee fee of 25% of the increase in the bond Premium may be submitted in the ordinary course of business.

(3) *Decreases.* 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. 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 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 volume of the Principal's bonded and unbonded work on hand at any one time, including outstanding bids, during the term of the bonding line;

(3) The number of such contracts during the term of the bonding line;

(4) The maximum dollar amount of any single guaranteed bonded Contract;

(5) The timing of Execution of bonds under the bonding line—bonds must be dated and Executed before the work on the underlying Contract has begun, or the Surety must submit to SBA the documentation required under § 115.18(f)(2); and

(6) Any other limitation related to type, specialty of work, geographical area, or credit.

(c) *Excess bonding.* If, after a bonding line is issued, the Principal desires a bond and the Surety desires a guarantee exceeding a limitation of the bonding line, the Surety must submit an application to SBA under regular procedures.

(d) *Submission of forms to SBA.* (1) *Bid Bonds.* Within 15 business days

after the Execution of any Bid Bonds under a bonding line, the Surety must submit a "Surety Bond Guarantee Underwriting Review" to SBA for approval. If that form is already on file with SBA and no new financial statements are required or have been received from the Principal, a "Surety Bond Guarantee Review Update" may be submitted instead. If the Surety fails to submit either form within this time period, SBA's guarantee of the bond will be void from its inception unless SBA determines otherwise upon a showing that a valid reason exists why the timely submission was not made.

(2) *Final Bonds.* Within 15 business days after the Execution of any Final Bonds under a bonding line, the Surety must submit a signed Prior Approval Agreement and a "Surety Bond Guarantee Underwriting Review" to SBA for approval. If that form is already on file with SBA and no new financial statements are required or have been received from the Principal, a "Surety Bond Guarantee Review Update" may be submitted instead. If the Surety fails to 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.

(e) *Cancellation of bonding line.* (1) *Optional cancellation.* Either SBA or the Surety may cancel a bonding line at any time, with or without cause, upon written notice to the other party. Upon the receipt of any adverse information concerning the Principal, the Surety must promptly notify SBA, and SBA may cancel the bonding line.

(2) *Mandatory cancellation.* Upon the occurrence of a default, 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.

#### **§ 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. The Surety must demonstrate to SBA's satisfaction that the breach is, in fact, imminent and that there is no other recourse to prevent such breach.

(2) *Amount of reimbursement.* The aggregate of the payments by SBA to avoid Imminent Breach cannot exceed 10% of the Contract price, unless the Administrator finds that a greater payment (not to exceed the guaranteed share of the bond penalty) is necessary and reasonable. In no event will SBA make any duplicate payment pursuant to this or any other provision of this part 115.

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

(b) *Salvage and recovery.* A Prior Approval Surety must pursue all possible sources of salvage and recovery until SBA concurs with the Surety's recommendation for a discontinuance or for a settlement. The Surety must certify that continued pursuit of salvage and recovery would be neither economically feasible nor a viable strategy in maximizing recovery. See also § 115.17(b).

#### **§ 115.35 Claims for reimbursement of Losses.**

(a) *Notification requirements.* (1) *Events requiring notification.* A Prior Approval Surety must notify OSG of the occurrence of any of the following:

(i) Legal action under the bond has been initiated.

(ii) The Oblige 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 pay laborers or suppliers.

(2) *Timing of notification.* Notification must be made in writing at the time the Surety applies for a guarantee on behalf of an affected Principal or, if no guarantee application is being filed, 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", 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 Loss 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 the requirements of governing SBA 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. SBA must be notified 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 remit 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. Sureties must not agree to any indemnity settlement proposal or enter into any such agreement without SBA's concurrence.

(2) All settlement proposals 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 § 115.36, the Surety may recommend that such Principal's eligibility for further bond guarantees be reinstated. OSG may agree to reinstate the Principal 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 SBA, 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 will assist in the prevention or elimination of Loss to SBA.

(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 Procedures for PSB Program.

(a) *Selection of sureties for the PSB program.* SBA's selection of PSB Sureties will be guided by, but not limited to, these factors:

(1) An underwriting limitation of at least \$1,250,000 on the U.S. Treasury Department list of acceptable sureties;

(2) An agreement to charge Principals no more than the advisory premium

rates of the Surety Association of America;

(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) *Execution of PSB Agreement.* 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 AA/SG or designee has countersigned the agreement.

(c) *Duration of PSB program.* The PSB program terminates on September 30, 1997, unless extended by legislation. SBA guarantees effective under this program on or before September 30, 1997, will remain in effect after such date.

(d) *Prohibition on participation in Prior Approval program.* Neither a PSB Surety nor any of its Affiliates is eligible to submit applications under subpart B of this part.

(e) *Allotment of guarantee authority.*

(1) *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.

(2) *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 has expired (see definition in § 115.11), SBA debits or credits the Surety's allotment accordingly.

(3) *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.

(4) *Release and non-issuance of Final Bonds.* The release of Final Bonds upon completion of the Contract does not restore the corresponding allotment. If, however, a PSB Surety approves a Final Bond but never issues the bond, SBA will credit the Surety's allotment for an amount equal to the guarantee percentage of the penal sum of the bond. In that event, the Surety must notify SBA as soon as possible, but in no event later than 5 business days after the non-issuance has been determined. Until the Surety has so notified SBA, it cannot rely on such credit.

(f) *Timeliness.* A PSB Surety may not Execute or approve a bond after commencement of work under a Contract unless the Surety submits a completed "Surety Bond Guarantee Agreement Addendum", together with the evidence and certifications described in § 115.18(f)(2), and obtains written approval from the AA/SG.

(g) *Operations.* (1) *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 and time of approval and Execution of each bond. 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. See also § 115.19(f).

(2) *Usual staff and procedures.* A PSB Surety must approve, Execute and administer SBA guaranteed bonds 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 the Obligees in accordance with its own procedures.

(3) *Notification to SBA.* A PSB Surety must advise SBA by electronic transmission or monthly bordereau, as agreed between the Surety and SBA, of all approved Bid and Final Bonds, and of the Surety's approval of increases and

decreases in the Contract or bond amount. The notice must contain the information specified from time to time in agreements between the Surety and SBA. SBA may deny liability with respect to Final Bonds for which SBA has not received timely notice.

(4) *Fees.* The PSB Surety must pay SBA 25% of the Premium it charges on Final Bonds. The fee is rounded to the nearest dollar. The PSB Surety must also remit to SBA the Principal's payment for its guarantee fee of \$8 per thousand dollars of the Contract amount. This fee is also 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.

(5) *Increases/decreases in Contract or bond amount.* (i) The PSB Surety must process Contract or bond amount increases within its allotment in the same manner as initial guaranteed bond issuances (see paragraph (g)(3) of this section). The Surety must present checks for additional fees due from the Principal and the Surety on the increases (computed under paragraph (g)(4) of this section), and attach such payments to the respective monthly bordereau.

(ii) 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.

(6) *Events requiring notification.* The PSB Surety must advise SBA within 30 calendar days of the name and address of a Principal against whom legal action on the bond has been instituted, or when the Oblige has declared a default, or when the Surety has established a claim reserve. The Surety must also notify SBA within 30 days of the recovery of any amounts on the guaranteed bond, or if the Surety determines to bond such Principal again.

#### **§ 115.61 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 \$1,250,000, 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).

#### **§ 115.62 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 cannot exceed 10% of the Contract price, 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 pursuant to this or any other provision of the regulations in this part.

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

#### **§ 115.63 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 140, SBA pays its share of Loss within 90 days of receipt of the requisite information. Claims for reimbursement and any additional information submitted are subject to review and audit by SBA.

(b) *Surety action.* The PSB Surety must take all necessary steps to mitigate Losses when legal action against a bond has been instituted, when the Oblige has declared a default, or when the Surety has established a claim reserve. When the Surety disposes of any collateral, it must do so at fair market value. Unless SBA notifies the Surety otherwise, the Surety must take charge of all claims or suits arising from a defaulted bond, and compromise, settle or defend the suits. The Surety must handle and process all claims under the bond and all settlements and recoveries in the same manner as it does on non-guaranteed bonds.

(c) *Reservation of rights.* The payment by SBA of a PSB Surety's claim does not waive or invalidate any of the terms of the PSB Agreement, the regulations in this part 115, or any defense SBA may have against the Surety. Within 30 days of receipt of notification that a claim or any portion of a claim should not have been paid by SBA, the Surety must pay the specified amounts to SBA.

#### **§ 115.64 Denial of liability.**

In addition to the grounds set forth in § 115.19, SBA may deny liability to a PSB Surety if:

(a) The PSB Surety's guaranteed bond was Executed in an amount which, together with all other guaranteed bonds, exceeded the allotment for the period during which the bond was approved, and no prior SBA approval had been obtained;

(b) The PSB Surety's loss was incurred under a bond which was not listed on the bordereau for the period when it was approved; or

(c) The loss incurred by the PSB Surety is not attributable to the particular Contract for which an SBA guaranteed bond was approved.

Dated: November 16, 1995.

Philip Lader,

Administrator.

[FR Doc. 95-28549 Filed 11-24-95; 8:45 am]

BILLING CODE 8025-01-P

### **13 CFR Part 125**

#### **Government Contracting Assistance**

**AGENCY:** Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** In response to President Clinton's Government-wide regulatory reform initiative, the Small Business Administration (SBA) has completed a page-by-page, line-by-line review of all of its existing regulations to determine which should be revised or eliminated. This proposed rule would eliminate seven sections which are currently contained in 13 CFR Part 125 pertaining to SBA's procurement assistance programs. The Part would be retitled Government Contracting Assistance.

**DATES:** Comments must be submitted on or before December 27, 1995.

**ADDRESS:** Written comments should be addressed to David R. Kohler, Regulatory Reform Team Leader, (125), Small Business Administration, 409 3rd Street, S.W., Suite 13, Washington, D.C. 20416.

**FOR FURTHER INFORMATION CONTACT:** John W. Klein, Chief Counsel for Special Programs, at (202) 205-6645.

**SUPPLEMENTARY INFORMATION:** On March 4, 1995, President Clinton issued a Memorandum to Federal agencies, directing them to simplify their regulations. In response to this directive, SBA has completed a page-by-page, line-by-line review of all of its existing regulations to determine which should be revised or eliminated. 13 CFR Part 125 is presently titled "Procurement Assistance" and consists