contractually required to remain in the project until the HVCRE exposure has been reclassified by the FDIC-supervised institution as a non-HVCRE exposure under paragraph (6) of this definition;

(3) An HVCRE exposure does not include any loan made prior to January 1, 2015;

(4) An HVCRE exposure does not include a credit facility reclassified as a non-HVCRE exposure under paragraph (6).

(5) Value Of contributed real property.—For the purposes of this definition of HVCRE exposure, the value of any real property contributed by a borrower as a capital contribution is the appraised value of the property as determined under standards prescribed pursuant to section 1110 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3339), in connection with the extension of the credit facility or loan to such borrower.

(6) Reclassification as a non-HVCRE exposure.—For purposes of this definition of HVCRE exposure and with respect to a credit facility and an FDIC-supervised institution, an FDIC-supervised institution may reclassify an HVCRE exposure as a non-HVCRE exposure upon—

(i) The substantial completion of the development or construction of the real property being financed by the credit facility; and

(ii) Cash flow being generated by the real property being sufficient to support the debt service and expenses of the real property, in accordance with the FDIC-supervised institution's applicable loan underwriting criteria for permanent financings.

* * * * *

Dated: September 11, 2018.

Joseph M. Otting,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, September 18, 2018.

Ann E. Misback,

Secretary of the Board.

Dated at Washington, DC, on September 12, 2018.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2018–20875 Filed 9–27–18; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 103, 120 and 121

RIN 3245–AG74

Express Loan Programs; Affiliation Standards

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is proposing to amend various regulations governing its business loan programs, including the SBA Express and Export Express Loan Programs and the Microloan and Development Company (504) loan programs.

DATES: SBA must receive comments to the proposed rule on or before November 27, 2018.

ADDRESSES: You may submit comments, identified by RIN: 3245–AG74, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Kimberly Chuday or Thomas Heou, Office of Financial Assistance, Office of Capital Access, Small Business Administration, 409 Third Street SW, Washington, DC 20416.
- *Hand Delivery/Courier:* Kimberly Chuday or Thomas Heou, Office of Financial Assistance, Office of Capital Access, Small Business Administration, 409 Third Street SW, Washington, DC 20416.

SBA will post all comments on *www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* please submit the information to Kimberly Chuday or Thomas Heou, Office of Financial Assistance, Office of Capital Access, 409 Third Street SW, Washington, DC 20416. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Robert Carpenter, Acting Chief, 7(a) Program and Policy Branch, Office of Financial Assistance, Office of Capital Access, Small Business Administration, 409 Third Street SW, Washington, DC 20416; telephone: (202) 205–7654; *email://robert.carpenter@sba.gov.*

SUPPLEMENTARY INFORMATION:

I. Background Information

The SBA Express Loan Program (SBA Express) is established in section 7(a)(31) of the Small Business Act (the Act) (15 U.S.C. 636(a)(31)). Under SBA Express, designated Lenders (SBA Express Lenders) are permitted to use, to the maximum extent practicable, their own analyses, procedures, and documentation in making, closing, servicing, and liquidating SBA Express loans. They also have reduced requirements for submitting documentation to SBA and obtaining the Agency's prior approval. These loan analyses, procedures, and documentation must meet prudent lending standards; be consistent with those the Lenders use for their similarly-sized, non-SBA guaranteed commercial loans; and conform to all requirements imposed upon Lenders generally and SBA Express Lenders in particular by Loan Program Requirements (as defined in 13 CFR 120.10), as such requirements are issued and revised by SBA from time to time, unless specifically identified by SBA as inapplicable to SBA Express loans. In exchange for the increased authority and autonomy provided under the SBA Express Program, SBA Express Lenders agree to accept a maximum guaranty of 50 percent.

The Export Express Loan Program (Export Express) is established in section 7(a)(34) of the Act (15 U.S.C. 636(a)(34)). This program is designed to help SBA meet the export financing needs of small businesses. Although it is a separate program, Export Express is generally subject to the same loan processing, making, closing, servicing, and liquidation requirements as well as the same interest rates and applicable fees as SBA Express. However, Export Express loans have a higher maximum loan amount than is available under SBA Express, and a maximum guaranty percentage of 75 or 90 percent, depending on the amount of the Export Express loan.

A. Proposed Amendments

This proposed rule would:

1. Incorporate into the regulations governing the 7(a) Loan Program the requirements specifically applicable to the SBA Express and Export Express Loan Programs in order to provide additional clarity for SBA Express and Export Express Lenders;

2. Add a new regulation to require certain owners of the small business Applicant to inject excess liquid assets into the business to reduce the amount of SBA-guaranteed funds that otherwise would be needed;

3. Revise the regulations concerning allowable fees for the 7(a) Loan Program to limit the fees payable by the small business Applicant and to clarify what SBA considers reasonable with respect to such fees;

4. Amend the regulation that explains the Agency's policy governing SBA-guaranteed loans to qualified employee trusts to require that all such applications be processed under non-delegated procedures;

5. Incorporate a change to implement SBA's long-standing policy regarding the responsibility of a Lender for the contingent liabilities (including repairs and denials) for Lenders purchasing 7(a) loans from the Federal Deposit Insurance Corporation (FDIC) (as receiver, conservator, or other liquidator of a failed insured depository institution), whether such loans are acquired through a loan sale where SBA has not already purchased the guaranty or through a whole bank transfer;

6. Revise the regulations governing the use of microloan grant funds by Microloan Intermediaries and extend the maximum maturity of a microloan;

7. Modify the affiliation principles applicable to SBA's financial assistance programs to include additional circumstances when a small business Applicant will be deemed to be affiliated with another entity for purposes of determining the small business Applicant's size;

8. Amend the regulation identifying when the size status of an Applicant for financial assistance is determined with respect to applications under the SBA Express and Export Express Loan Programs; and

9. Make technical corrections to the regulation identifying prohibited fees in the 7(a) Loan Program and the regulation discussing the application for the Accredited Lenders Program (ALP) in the 504 Loan Program, as well as conforming amendments to two existing regulations for consistency with the proposed regulations governing SBA Express and Export Express, and a conforming amendment to one existing regulation for consistency with the proposed changes to the allowable fees that may be charged in connection with a 7(a) loan.

B. Affected Programs

The SBA programs affected by this proposed rule are:

1. The 7(a) Loan Program authorized pursuant to Section 7(a) of the Act (15 U.S.C. 636(a));

2. The Business Disaster Loan Programs (collectively, the Economic Injury Disaster Loans, Military Reservist Economic Injury Disaster Loans, and Physical Disaster Business Loans) authorized pursuant to Section 7(b) of the Act;

3. The Microloan Program authorized pursuant to Section 7(m) of the Act (15 U.S.C. 636(m));

4. The Intermediary Lending Pilot (ILP) Program authorized pursuant to Section 7(l) of the Act (15 U.S.C. 636(l));

5. The Surety Bond Guarantee Program authorized pursuant to Part B of Title IV of the Small Business Investment Act of 1958 (15 U.S.C. 694b *et seq.*); and

6. The Development Company Program (the 504 Loan Program) authorized pursuant to Title V of the Small Business Investment Act of 1958 (15 U.S.C. 695 *et seq.*).

(The 7(a), Microloan, ILP, and 504 Loan Programs are collectively referred to as the Business Loan Programs.)

The Agency requests comments on all aspects of the regulatory revisions in this proposed rule and on any related issues affecting the Business Loan, Surety Bond Guarantee, and Business Disaster Loan Programs.

II. Summary of Proposed Changes

A. Business Loan Programs

1. SBA Express and Export Express Loan Programs

Sections 120.441 through 120.447 SBA Express and Export Express Loan Programs

SBA proposes adding a new undesignated center heading entitled ''SBA Express and Export Express Loan Programs'' and several new regulations that describe the two loan programs and the specific requirements applicable to them, as described more fully below. These proposed regulations are drafted based on the current statutory limits applicable to the SBA Express and Export Express Loan Programs. In the event that the SBA Express or Export Express statutory loan limits are increased by Congress, SBA will revise the regulations, including making necessary changes to mitigate any additional risk associated with an increase in loan size.

Section 120.441 SBA Express and Export Express Loan Programs. SBA proposes adding a regulation providing general descriptions of the SBA Express and Export Express Loan Programs.

Section 120.442 Process to obtain or renew SBA Express or Export Express authority. SBA proposes adding a regulation that sets forth the criteria and process to obtain or renew SBA Express or Export Express authority. In evaluating an existing 7(a) Lender's application for SBA Express or Export Express authority, SBA will consider the delegated authority criteria and follow the procedures set forth in § 120.440. Lending institutions that do not currently participate with SBA may apply to be SBA Express and/or Export Express Lenders, but must become 7(a) Lenders in order to participate in SBA Express and/or Export Express. Such institutions may request SBA 7(a) lending and SBA Express and/or Export Express authority simultaneously. In evaluating such institutions, in addition to the criteria set forth in §§ 120.410 (requirements for all participating Lenders) and 120.440 (delegated authority criteria), SBA will consider whether the institution has acceptable experience making small commercial loans, and whether its employees have received appropriate training on SBA's policies and procedures. Currently, SBA considers a Lender to have acceptable experience making small commercial loans when the Lender has at least 20 commercial loans of $350,000 or less with acceptable performance.

As set forth in § 120.440, the decision to grant SBA Express or Export Express authority will be made by the appropriate SBA official in accordance with Delegations of Authority, and is final. If SBA Express or Export Express authority is approved, SBA will provide the Lender with the appropriate supplemental guarantee agreement, which the Lender must execute and return to SBA before the Lender's SBA Express or Export Express authority will become effective.

In renewing a Lender's SBA Express or Export Express authority and determining the term of the renewal, SBA will consider the criteria and follow the process set forth in § 120.440. Currently, in renewing a Lender's Export Express authority, SBA also will consider whether the Export Express Lender can effectively process, make, close, service, and liquidate Export Express loans; has received a major substantive objection regarding renewal from the Field Office(s) covering the territory where the Lender generates significant numbers of Export Express loans; and has received acceptable review results on the Export Express portion of any SBA-administered Lender reviews. In this rule, SBA proposes to incorporate the additional considerations identified above for Export Express authority, but modify them to apply to both SBA Express and Export Express authority. Thus, in addition to the criteria set out in § 120.440, SBA also would consider whether the Lender can effectively process, make, close, service, and liquidate SBA Express or Export Express

loans, as applicable; has received a major substantive objection regarding renewal from the Field Office(s) covering the territory where the Lender generates significant numbers of SBA Express or Export Express loans, as applicable; and has received acceptable review results on the SBA Express or Export Express portion, as applicable, of any SBA-administered Lender reviews.

SBA may approve a Lender's initial application for authority to participate in SBA Express or Export Express for a maximum term of two years. SBA may approve a lesser term or limit a Lender's maximum SBA Express or Export Express loan volume if, in SBA's sole discretion, a Lender's qualifications, performance, experience with SBA lending, or other factors so warrant (*e.g.,* Lenders with little or no experience with SBA lending).

SBA is proposing to include in the regulations that the Agency may renew a Lender's authority to participate in SBA Express for a maximum term of three years if, in SBA's sole discretion, a Lender's qualifications, performance, SBA experience, or other factors so warrant. Although renewals of other types of delegated authority (*e.g.,* Preferred Lender Program (PLP)) are for a maximum term of two years, SBA is proposing a longer renewal term for Lenders participating in SBA Express because SBA Express Lenders have accepted more of the risk in their SBA Express loans than other SBA Lenders, including Export Express Lenders.

SBA may renew a Lender's authority to participate in Export Express for a maximum term of two years. SBA may approve a shorter renewal term or limit a Lender's maximum SBA Express or Export Express loan volume if, in SBA's sole discretion, a Lender's qualifications, performance, experience with SBA lending, or other factors so warrant.

SBA is proposing a conforming amendment to the delegated authority criteria regulation at § 120.440(c) to clarify that a Lender's authority to participate in SBA Express may be renewed for a maximum term of three years. In addition, SBA is proposing some technical corrections to § 120.440(c).

Section 120.443 SBA Express and Export Express loan processing requirements. SBA proposes adding a regulation that sets forth the requirements for loan processing under the SBA Express and Export Express loan programs. The regulations applicable to all Business Loans in Subparts A and B of Part 120, and 7(a) Loans specifically, govern the making of SBA Express and Export Express loans, unless specifically identified by SBA as inapplicable. For example, the same types of businesses that are ineligible for 7(a) loans under § 120.110 also are ineligible for SBA Express and Export Express loans. SBA Express and Export Express Lenders must follow all 7(a) eligibility requirements and maintain appropriate documentation supporting their eligibility determination in the loan file.

Certain types of loans and loan programs are not eligible for processing under a Lender's delegated authority (including under a Lender's SBA Express or Export Express authority), as described in SBA's Standard Operating Procedure (SOP) 50 10 (Lender and Development Company Loan Programs). These loans currently include, but are not limited to: Special purpose loans (*e.g.,* Disabled Assistance Loans, loans to Employee Stock Ownership Plans or equivalent trusts, Pollution Control Loans, or CAPLines); a loan that would reduce an SBA Express or Export Express Lender's existing credit exposure for a single Borrower, including its affiliates as defined in 13 CFR 121.301(f); a loan to a business that has an outstanding 7(a) loan where the Applicant is unable to certify that the loan is current at the time the SBA Express or Export Express Lender approves the SBA Express or Export Express loan; a loan that would have as its primary collateral real estate or personal property that will not meet SBA's environmental requirements; and complex loan structures or eligibility situations.

For all other loans, SBA has authorized SBA Express and Export Express Lenders to make the credit decision without prior SBA review (*i.e.,* using the Lender's delegated authority). As with all 7(a) loans, Lenders must not make an SBA-guaranteed loan that would be available on reasonable terms from either the Lender itself or another non-federal source without an SBA guaranty. In addition, the Lender's credit analysis must demonstrate that there is reasonable assurance of repayment. SBA Express and Export Express Lenders must use appropriate and prudent credit analysis processes and procedures that are generally accepted in the commercial lending industry and consistent with those used for their similarly-sized, non-SBA guaranteed commercial loans. As part of their prudent credit analysis, SBA Express and Export Express Lenders may use a business credit scoring model (such a model cannot rely solely on consumer credit scores) to assess the credit history of the Applicant and/or repayment ability if they do so for their similarly-sized, non-SBA guaranteed commercial loans. If used, the business credit scoring results must be documented in each loan file and available for SBA review. Lenders that do not use credit scoring for their similarly-sized, non-SBA guaranteed commercial loans may not use credit scoring for SBA Express or Export Express. Although Small Business Lending Companies (SBLCs), as defined in § 120.10, do not make non-SBA guaranteed loans, SBA has determined that they may use credit scoring as part of their prudent credit analysis for their SBA Express or Export Express loans.

All SBA Express and Export Express Lenders must validate (and document) with appropriate statistical methodologies that their credit analysis procedures are predictive of loan performance, and they must provide that documentation to SBA upon request. SOP 50 10 includes the requirement that SBLCs provide credit scoring model validation to SBA for review and approval on an annual basis.

The credit decision, including for example, how much to factor in a past bankruptcy and whether to require an equity injection (outside of any injection of excess personal resources under the proposed new § 120.102, as discussed below), is left to the business judgment of the SBA Express or Export Express Lender. Also, if the SBA Express or Export Express Lender requires an equity injection and, as part of its standard processes for its similarly-sized, non-SBA guaranteed loans verifies the equity injection, it must do so for its SBA Express or Export Express loans. SBLCs must follow the written policies and procedures that have been reviewed by SBA. While the credit decision is left to the business judgment of the SBA Express or Export Express Lender, early loan defaults will be reviewed by SBA pursuant to SOP 50 57 (7(a) Loan Servicing and Liquidation).

SBA Express and Export Express Lenders are responsible for all loan decisions, including eligibility for 7(a) loans (including size), creditworthiness and compliance with all Loan Program Requirements (as defined in § 120.10). SBA Express and Export Express Lenders also are responsible for confirming that all loan closing decisions are correct and that they have complied with all requirements of law and Loan Program Requirements.

SBA Express and Export Express Lenders must ensure all required forms are obtained and are complete and properly executed. Appropriate documentation must be maintained in the Lender's loan file, including

adequate information to support the eligibility of the Applicant and the loan.

Section 120.444 Eligible uses of SBA Express and Export Express loan proceeds. SBA is proposing to add a regulation to identify the eligible uses of loan proceeds for SBA Express and Export Express loans. Under SBA Express, loan proceeds must be used exclusively for eligible business-related purposes, as described in 13 CFR 120.120 and 120.130, which set forth the eligible uses of loan proceeds for 7(a) loans. In addition, it is the SBA Express Lender's responsibility to take reasonable steps to ensure and document that the loan proceeds are used exclusively for business-related purposes.

Notwithstanding 13 CFR 120.130(c), revolving lines of credit are eligible for SBA Express, subject to certain conditions related to maturities and disbursement as set forth in SOP 50 10. Currently, SBA Express revolving loans have a maximum maturity of 10 years and must be structured with a term-out period that is not less than the draw period, with no draws permitted during the term-out period. For example, an SBA Express loan can have an eight year maturity with a two year draw period and a term-out period of six years. Conversely, a loan with an eight year maturity cannot have a draw period of six years and term-out period of two years. Further, as set forth in 13 CFR part 120, subpart F, revolving loans cannot be sold on the secondary market. (SBA is proposing a conforming amendment to § 120.130(c) (''Restrictions on uses of proceeds'') to include a reference to this new § 120.444 to clarify that revolving lines of credit are an eligible use of 7(a) loan proceeds under SBA Express and Export Express.)

SBA Express and Export Express Lenders may refinance certain outstanding debts with SBA Express or Export Express loans, under the conditions set forth in SOP 50 10. An SBA Express Lender may refinance an existing non-SBA guaranteed loan held by another lender with an SBA Express loan if the Lender determines that the existing debt no longer meets the needs of the Applicant and, for certain types of debt, the new loan will provide a 10 percent improvement in the debt service coverage ratio. An SBA Express Lender may refinance its own non-SBA guaranteed debt, provided that: (1) The Lender determines that the existing debt no longer meets the needs of the Applicant; (2) the new loan will provide a 10 percent improvement in the debt service coverage ratio (for certain types of loans as explained in SOP 50 10); (3) the debt to be refinanced is, and has been, current for the past 36 months (''current'' means no required payment has been more than 29 days past due); and (4) the Lender's credit exposure to the Applicant will not be reduced. Existing SBA-guaranteed loans may not be refinanced under SBA Express, unless: (1) The transaction is the purchase of an existing business that has an existing SBA loan that is not with the requesting SBA Express Lender; or (2) the Applicant needs additional financing and the existing Lender is unable or unwilling to increase the existing SBA loan or make a second loan, and (3) the new loan will provide a 10 percent improvement in debt service coverage. An SBA Express Lender may not refinance its own existing SBA-guaranteed debt under SBA Express.

Export Express loans must be used for an export development activity, which is defined in section 7(a)(34)(A)(i) of the Act and includes the following:

(1) Obtaining a Standby Letter of Credit when required as a bid bond, performance bond, or advance payment guarantee;

(2) Participation in a trade show that takes place outside the United States;

(3) Translation of product brochures or catalogues for use in markets outside the United States;

(4) Obtaining a general line of credit for export purposes;

(5) Performing a service contract for buyers located outside the United States;

(6) Obtaining transaction-specific financing associated with completing export orders;

(7) Purchasing real estate or equipment to be used in the production of goods or services for export;

(8) Providing term loans and other financing to enable a small business concern, including an export trading company and an export management company, to develop a market outside the United States; and

(9) Acquiring, constructing, renovating, modernizing, improving or expanding a production facility or equipment to be used in the United States in the production of goods or services for export.

As noted above, Export Express loans may be used to refinance certain outstanding debts, under the conditions set forth in SOP 50 10. Specifically, Export Express loans may be used to refinance existing non-SBA guaranteed debt, whether held by another lender or by the Export Express Lender, if the Export Express Lender follows the guidance for refinancing under SBA Express and verifies and documents that the new loan will be used to finance an export development activity. Export Express loans may be used to refinance an existing Export Express loan held by another Export Express Lender only if the original Export Express Lender is unable or unwilling to increase or make a second Export Express loan, which must be documented in the loan file. An Export Express Lender may not refinance one of its own Export Express loans with a new Export Express loan.

Export Express loans may not be used to finance overseas operations, except for the marketing and/or distribution of products/services exported from the United States.

Export Express Lenders are responsible for ensuring that U.S. companies are authorized to conduct business with the Persons and countries to which the Borrower will be exporting. Specific guidance as to how Export Express Lenders will be expected to do so will be included in SOP 50 10.

Specific documentation requirements related to the use of proceeds for Export Express loans are described more fully in SOP 50 10.

Section 120.445 Terms and conditions of SBA Express and Export Express loans. While generally the terms and conditions applicable to 7(a) loans also apply to SBA Express and Export Express loans, there are some differences. SBA is proposing to add a new regulation to identify those terms and conditions of SBA Express and Export Express loans that are unique to these two programs, including maximum loan amounts and guaranty percentages, maturities, interest rates, collateral and insurance requirements, allowable fees and requirements concerning loan increases. With respect to the maximum loan amounts, the proposed rule refers to the maximum loan amount for each program as set forth in the applicable section of the Small Business Act (sections 7(a)(31)(D) and 7(a)(34)(C)(i), respectively). Currently, the maximum loan amount for SBA Express is $350,000 and the maximum loan amount for Export Express is $500,000.

With respect to collateral, currently, for loans of $25,000 or less, SBA Express and Export Express Lenders are not required to take collateral to secure the loan. For loans over $25,000, SBA Express and Export Express Lenders must, to the maximum extent practicable, follow the written collateral policies and procedures that they have established and implemented for their similarly-sized, non-SBA guaranteed commercial loans, except for Export Express lines of credit over $25,000 used to support the issuance of a

standby letter of credit. Export Express lines of credit over $25,000 used to support the issuance of a standby letter of credit must have collateral (cash, cash equivalent or project) that will provide coverage for at least 25% of the issued standby letter of credit amount.

SBA proposes to incorporate these collateral requirements into new § 120.445(e), with the exception of the dollar thresholds. Rather than include the current thresholds in the proposed rule, SBA is proposing to include language in the regulation giving the Agency the ability to establish a threshold below which SBA Express and Export Express Lenders will not be required to take collateral to secure an SBA Express or Export Express loan. The threshold would be described more fully in SOP 50 10. This will provide the Agency with the flexibility to adjust the threshold if necessary.

Additionally, this proposed regulation provides that SBA Express and Export Express Lenders may sell the guaranteed portions of SBA Express and Export Express term loans on the secondary market in accordance with 13 CFR subpart F, but may not sell the guaranteed portions of SBA Express or Export Express revolving lines of credit on the secondary market.

SBA Express and Export Express Lenders must pay the same fees to SBA that all 7(a) Lenders pay, which are identified in § 120.220. The fees and expenses that 7(a) Lenders may collect from an Applicant or Borrower are set forth in the regulation at § 120.221. Currently, with the exception of renewal fees, SBA Express and Export Express Lenders may charge an Applicant or Borrower on an SBA Express or Export Express loan the same types of fees they charge on their similarly-sized, non-SBA guaranteed commercial loans, provided that the fees are directly related to the service provided and are reasonable and customary for the services performed. The fees charged on SBA Express or Export Express loans may not be higher than those charged on the Lender's similarly-sized, non-SBA guaranteed commercial loans. In this rule, SBA proposes to require SBA Express and Export Express Lenders to comply with the same rules that apply to all other 7(a) Lenders with respect to the fees that may be collected from an Applicant or Borrower on SBA Express and Export Express loans. As noted above, the regulation at § 120.221 sets forth the fees and expenses that 7(a) Lenders may collect from an Applicant or Borrower. In addition, 13 CFR part 103 of the regulations governs Agents, including their fees and provision of services. As discussed more fully in Section 3 below, SBA is proposing changes to §§ 120.221, 103.4(g), and 103.5 with respect to the fees that may be collected from an Applicant or Borrower by a 7(a) Lender or Agent. These changes will be applicable to all 7(a) loans, including SBA Express and Export Express loans.

Consistent with SBA Loan Program Requirements, if an SBA Express or Export Express Lender requests that SBA honor its guaranty, the Agency will not purchase any portion of the loan balance that consists of fees charged to the borrower, with the exception of the SBA guaranty fee. Also, as set forth in § 120.222, SBA Express and Export Express Lenders and their Associates are prohibited from sharing any premium received from the sale of an SBA guaranteed loan in the secondary market with a Service Provider, packager, or other loan-referral source. Lenders may be subject to enforcement or other appropriate action, including suspension or revocation of their privilege to sell loans in the secondary market, in the event of a violation of this prohibition.

Because SBA will require SBA Express and Export Express Lenders to comply with the same rules that apply to all other 7(a) Lenders with respect to the fees and expenses that may be collected from an Applicant or Borrower in connection with an SBA-guaranteed loan (including SBA Express and Export Express loans), SBA is not including language regarding fees in proposed § 120.445.

Section 120.446 SBA Express and Export Express loan closing, servicing, liquidation, and litigation requirements. SBA proposes to add a new regulation providing that SBA Express and Export Express Lenders must close, service, liquidate, and litigate their SBA Express and Export Express loans using the same documentation and procedures they use for their similarly-sized, non-SBA guaranteed commercial loans, which must comply with law, prudent lending practices, and Loan Program Requirements. Additionally, the proposed regulation provides that SBA Express and Export Express Lenders must comply with the loan servicing and liquidation responsibilities set forth for 7(a) Lenders in 13 CFR part 120, subpart E and other Loan Program Requirements. Additional guidance on loan closing, servicing, liquidation and litigation is provided in SOPs 50 10 and 50 57.

The proposed regulation also describes the circumstances under which SBA will honor the guaranty on SBA Express and Export Express Loans. As is true for 7(a) loans generally, SBA will purchase the guaranteed portion of an SBA Express or Export Express loan in accordance with § 120.520 and other Loan Program Requirements, in particular SOP 50 57. In accordance with § 120.520(a)(1), for loans approved on or after May 14, 2007, unless the Borrower filed for bankruptcy, the SBA Express or Export Express Lender may request that SBA honor the guaranty on the loan if there is an uncured payment default of more than 60 days and the Lender has liquidated the business personal property collateral securing the defaulted loan. In accordance with § 120.520(a)(2) and SOP 50 57, for loans approved before May 14, 2007, an SBA Express Lender must liquidate all collateral for the loan and pursue all cost-effective means of recovery to collect the debt before the Lender can request that SBA honor its guaranty. For Export Express loans, however, the Lender does not have to liquidate all of the collateral and pursue all cost-effective means of recovery prior to requesting that SBA honor its guaranty if the outstanding principal balance is $50,000 or less or there is protracted litigation or other circumstances that will extend the liquidation process. It is important to note that, while non-financial default provisions are allowed under SBA Express and Export Express under certain conditions set forth in SOP 50 10, an SBA Express or Export Express Lender may not request purchase of the guaranty based solely on a violation of a non-financial default provision.

SBA will be released of its liability on an SBA Express or Export Express loan guaranty in accordance with § 120.524.

Section 120.447 Lender oversight of SBA Express and Export Express Lenders. SBA proposes to add a new regulation explaining that SBA Express and Export Express Lenders are subject to the same risk-based lender oversight as 7(a) Lenders, including supervision and enforcement provisions, in accordance with 13 CFR part 120, subpart I. Additional guidance concerning Lender supervision and enforcement is provided in SOPs 50 53 (Lender Supervision and Enforcement) and 51 00 (On-Site Lender Reviews/ Examinations).

2. Credit Elsewhere and the Personal Resources of Owners of the Small Business Applicant

Section 120.102 Funds not available from alternative sources, including the personal resources of owners. Effective April 21, 2014, SBA removed § 120.102 from the regulations, thereby eliminating what was commonly known as the ''personal resources test'' from the

requirements to determine eligibility for the Business Loan Programs. This regulation required certain owners of the Applicant business to inject personal liquid assets into the business to reduce the amount of SBA-guaranteed funds that would otherwise be needed. The Agency eliminated this requirement in 2014 because it was concerned, at that time, that even borrowers whose principals had significant personal resources may have been unable to obtain long-term fixed asset financing from private sources at reasonable rates. The Agency also questioned whether the existence of personal resources directly correlated to the ability to obtain commercial credit on reasonable terms. In addition, the Agency determined that financing more robust borrowers in the program would offset some of the risks to SBA. However, SBA is now concerned that borrowers with large amounts of personal assets are receiving government-backed loans. In order to ensure that SBA financial assistance is provided only to those small businesses that are unable to obtain credit from alternative sources without a government guaranty, including the personal resources of the owners of the small business, SBA proposes to reinstitute a personal resources test.

SBA proposes to add a regulation that would require SBA Lenders (*i.e.,* both 7(a) Lenders and Certified Development Companies (CDCs)) to analyze the resources of individuals and entities that own 20 percent or more of the Applicant business in order to determine if any of the owners have liquid assets available that can provide some or all of the desired financing. (The resources of an owner who is an individual include the resources of the owner's spouse and minor children.) When an owner of 20 percent or more has liquid assets that exceed stated thresholds, SBA is proposing to require an injection of cash from any such owner to reduce the SBA loan amount. Specifically, when the total financing package (*i.e.,* any SBA loans and any other financing, including loans from any other source, requested by the Applicant business at or about the same time):

(1) Is $350,000 or less, each 20 percent owner of the Applicant must inject any liquid assets that are in excess of one and three-quarter times the total financing package, or $200,000, whichever is greater;

(2) Is between $350,001 and $1,000,000, each 20 percent owner of the Applicant must inject any liquid assets that are in excess of one and one-half times the total financing package, or $1,000,000, whichever is greater;

(3) Exceeds $1,000,000, each 20 percent owner of the Applicant must inject any liquid assets that are in excess of one times the total financing package, or $2,500,000, whichever is greater.

SBA, in its sole discretion, may permit exceptions to the required injection of an owner's excess liquid assets only in extraordinary circumstances, such as when the excess funds are needed for medical expenses of a family member or education/college expenses for children.

3. Permissible Fees That a Lender or Agent May Collect From an Applicant or Borrower in Connection With a 7(a) Loan Application.

The regulations governing permissible fees a Lender may collect from a loan Applicant or Borrower in connection with an SBA-guaranteed loan are set forth in § 120.221. In addition, the regulations governing Agents, including their fees and provision of services, are set forth in 13 CFR part 103. Based on feedback obtained when conducting lender oversight activities and the numerous questions SBA receives concerning permissible fees, it is apparent that there is a significant amount of confusion surrounding who may charge an Applicant fees in connection with an SBA-guaranteed loan, what fees may be charged to the Applicant, what fees may be charged to the Lender, and what is a ''reasonable fee.'' In addition, in many cases, Applicants are being charged multiple fees by multiple providers (*e.g.,* the Lender and a third party), on the same loan. On numerous occasions, SBA has had to require that a Lender or Agent refund amounts to an Applicant or Borrower that the Agency deemed were unreasonable or prohibited.

The regulations governing Agents, including their fees and provision of services to either an Applicant or a Lender are set forth in Part 103, not in Part 120 of the regulations. The regulations in Part 103 provide key definitions, including but not limited to Agents, Lender Service Providers, Packagers and Referral Agents. (See § 103.1.) The definition of a Referral Agent in § 103.1(f) states that a Referral Agent may be compensated by either an Applicant or a Lender. Thus, Agents are permitted to charge an Applicant a referral fee, while Lenders are not. In addition, while SBA permits Lenders to engage with Lender Service Providers (LSPs) (as defined in § 103.1(d)) to assist the Lender with lender functions in connection with SBA-guaranteed loans, the cost of the LSP services may not be charged to the Applicant or Borrower. (*See* § 103.5(c).) To further complicate matters, the regulation at § 103.4(g) states that a Lender Service Provider may not act as both a Lender Service Provider or Referral Agent and a Packager for an Applicant on the same SBA business loan and receive compensation for such activity from both the Applicant and Lender. However, that regulation provides a limited exception to this ''two master'' prohibition when an Agent acts as a Packager and is compensated by the Applicant for packaging services, and the same Agent also acts as a Referral Agent and is compensated by the Lender for referral activities in connection with the same loan application, provided the packaging services are disclosed to the Lender and the referral services are disclosed to the Applicant.

In order to simplify who may charge fees to the Applicant and/or the Lender, and to limit the total amount of fees that an Applicant may be charged in order to obtain an SBA-guaranteed loan, SBA proposes to revise certain portions of the regulations at §§ 120.221, 103.4, and 103.5.

Section 120.221 Fees and expenses which the Lender may collect from a loan Applicant or Borrower. Currently, § 120.221(a) permits a Lender to charge an Applicant reasonable fees (customary for similar Lenders in the geographic area where the loan is being made) for packaging and other services. Under the current regulation, SBA permits Lenders to charge an Applicant a reasonable fee to assist the Applicant with the preparation of the application and supporting materials. However, SBA does not permit Lenders (or their Associates) to charge an Applicant a commitment, broker, referral, or similar fee.

SBA proposes to amend § 120.221(a) to limit the total fees an Applicant can be charged by a Lender for assistance in obtaining an SBA-guaranteed loan. Regardless of what the fee is called (*e.g.,* a packaging fee, application fee, etc.), the Lender would be permitted to collect a fee from the Applicant that is no more than $2,500 for a loan up to and including $350,000 and no more than $5,000 for a loan over $350,000. With the exception of necessary out-of-pocket costs, such as filing or recording fees permitted in § 120.221(c), this is the only fee that a Lender may collect directly or indirectly from an Applicant for assistance with obtaining an SBA-guaranteed loan. In addition, the Lender may not split a loan into two loans for the purpose of charging an additional fee to an Applicant. If there is a

legitimate business need for the Applicant's loan request to be split into two loans (*e.g.,* a term loan and a line of credit), the Lender may only charge the Applicant one fee within the maximums set forth above, based on the combined loan amounts. For example, if the Applicant needs a $2 million term loan to purchase real estate and a building and a $350,000 line of credit for working capital, the Lender may charge one fee for both loans not to exceed $5,000.

SBA considers these fees to be reasonable for the services provided by a Lender to an Applicant for assistance with obtaining an SBA-guaranteed loan. SBA will monitor these fees and, if adjustments are necessary, SBA may revise these amounts from time to time.

If the Lender charges the Applicant a fee for assistance with obtaining an SBA-guaranteed loan, the Lender must disclose the fee to the Applicant and SBA by completing the Compensation Agreement (SBA Form 159) in accordance with the regulation at § 103.5 and the procedures set forth in SOP 50 10.

SBA also proposes to amend § 120.221(b) to permit extraordinary servicing fees in excess of 2 percent for Export Working Capital Program (EWCP) loans and Working Capital CAPLines that are disbursed based on a Borrowing Base Certificate. In these programs, the fees charged must be reasonable and prudent based on the level of extraordinary effort required, and cannot be higher than the fees charged on the Lender's similarly-sized, non-SBA guaranteed commercial loans. In addition, the fees charged cannot exceed the actual cost of the extra service provided. (SBA is proposing a conforming amendment to § 120.344(b) to ensure extraordinary servicing fees charged on EWCP loans are reasonable and prudent.)

The remaining sections of § 120.221 (sections (c) through (e)) remain unchanged. Thus, in appropriate circumstances as set forth in current §§ 120.221(c) through (e) and further clarified in SOP 50 10, a Lender may charge an Applicant or Borrower out of pocket expenses, a late payment fee, and for legal services charged on an hourly basis.

Section 103.4 What is ''good cause'' for suspension or revocation? As noted above, the regulation at § 103.4(g) currently permits a limited exception to the ''two master'' prohibition when an Agent acts as a Packager and is compensated by the Applicant for packaging services, and the same Agent also acts as a Referral Agent and is compensated by the Lender for those activities in connection with the same loan application. SBA believes there is, at a minimum, an appearance of a conflict of interest when an Agent represents both the Applicant and the SBA Lender on the same loan application. In addition, the definition of an ''Associate'' of a SBA Lender set forth in § 120.10 includes ''an agent involved in the loan process.'' Therefore, an LSP or Referral Agent acting on behalf of the SBA Lender meets the definition of an Associate of the SBA Lender and is prohibited under current Loan Program Requirements from charging the Applicant certain fees or expenses in connection with an SBA-guaranteed loan. Further, when conducting Lender oversight activities, SBA has observed numerous instances where Applicants have been erroneously charged for services that were provided for the SBA Lender, not the Applicant. In order to prevent any conflicts of interest from arising and to ensure the Applicants are not improperly charged for services provided to the SBA Lender, SBA proposes to eliminate the limited exception to the ''two master prohibition'' and prevent an Agent, including an LSP, from providing services to both the Applicant and the SBA Lender and being compensated by both parties in connection with the same loan application. SBA proposes to use the defined term ''SBA Lender'' in the revised regulation to clarify that it applies to both 7(a) Lenders and CDCs. SBA also proposes to revise the remaining text of § 103.4(g) for clarity.

Section 103.5 How does SBA regulate an Agent's fees and provision of service? The regulation at § 103.5 sets forth, among other things, the requirement for all Agents to disclose to SBA the compensation received for services provided to an Applicant and requires that fees charged must be considered reasonable by SBA. In an effort to clarify what SBA considers reasonable and to prevent Applicants from being overcharged by Agents, SBA proposes to amend this section to limit the total fees that an Agent may charge an Applicant in connection with obtaining an SBA-guaranteed loan.

SBA proposes the following limitations on the fees that an Agent may charge an Applicant:

(1) For loans up to and including $350,000: A maximum of up to 2.5% of the loan amount, or $7,000, whichever is less;

(2) For loans $350,001-$1,000,000: A maximum of up to 2% of the loan amount, or $15,000, whichever is less; and

(3) For loans over $1,000,000: A maximum of up to 1.5% of the loan amount, or $30,000, whichever is less.

If an Agent provides more than one service (*e.g.,* packaging and referral services), only one fee would be permitted for all services performed by the Agent. Further, if more than one Agent (*e.g.,* a Packager and a Referral Agent) provides assistance to the Applicant in obtaining the loan, the amount of all fees that the Applicant may be required to pay would be combined to meet the maximum allowable fee set by SBA. (However, a fee charged to the Applicant by the Lender in accordance with proposed § 120.221(a) will not be counted toward the maximum allowable fee for an Agent or Agents.) These maximum limits would apply regardless of whether the Agent's fee is based on a percentage of the loan amount or on an hourly basis.

SBA considers these fees to be reasonable for the services provided by an Agent or Agents to an Applicant in connection with obtaining an SBA-guaranteed loan. SBA will monitor these fees and, if adjustments are necessary, SBA may revise these amounts from time to time by publishing a notice with request for comments in the **Federal Register**.

If an Agent or Agents charge an Applicant fees in connection with obtaining an SBA-guaranteed loan, the Agent or Agents must disclose the fees to SBA by completing a Compensation Agreement (SBA Form 159) in accordance with the regulation at § 103.5 and must provide supporting documentation as set forth in SOP 50 10.

Additionally, SBA proposes to remove the word ''directly'' from the last sentence of § 103.5(c) to clarify that compensation paid by the Lender to a Lender Service Provider may not be charged to Applicants, either directly or indirectly.

4. Loans to Qualified Employee Trusts

The regulations governing SBA-guaranteed loans to qualified employee trusts or ''ESOPs'' are set forth in §§ 120.350 through 120.354. Currently, the regulation at § 120.350 describes the Agency's policy concerning such loans and states that SBA is authorized under section 7(a)(15) of the Act to provide guaranteed loans to ESOPs to help finance the growth of the employer small business or to purchase ownership or voting control of the employer. Because of the complex nature of these transactions, SBA is proposing to amend the regulation at § 120.350 to require such applications to

be processed only on a non-delegated basis.

5. A Lender's Responsibility When Purchasing 7(a) Loans From the FDIC as Receiver, Conservator, or Other Liquidator of a Failed Financial Institution

Generally, when the FDIC takes over a failed insured depository institution, it sells the 7(a) loan assets of the institution to either an Assuming Institution (through a purchase and assumption transaction) or to an investor in one or more FDIC loan sales. SBA has a long-standing policy of holding Assuming Institutions and investors responsible for the contingent liabilities (including repairs and denials) associated with 7(a) loans originated by failed insured depository institutions, whether the 7(a) loans are purchased by a Lender through an FDIC loan sale where SBA has not already purchased the guaranty or to an Assuming Institution through a whole bank transfer.

Under § 120.432(a), for 7(a) loan sales that do not involve the FDIC (*i.e.,* the sale of a Lender's entire interest in a 7(a) loan to another Lender), SBA holds a purchasing Lender responsible for the contingent liabilities associated with the 7(a) loans acquired (even if the guaranteed portion of the loan has already been sold on the secondary market). SBA is proposing to amend the regulation at § 120.432(a) to implement its long-established policy for 7(a) loans acquired by Lenders from the FDIC (as receiver, conservator, or other liquidator of a failed insured depository institution).

6. Microloan Program

Section 120.707 What conditions apply to loans by Intermediaries to Microloan borrowers? In order to provide more flexibility for the Microloan borrower, SBA proposes to revise the regulation at § 120.707(b) to increase the maximum maturity of a loan from an Intermediary to a Microloan borrower from six years to seven years. This change would allow for a longer repayment period for these small loans.

Section 120.712 How does an Intermediary get a grant to assist Microloan borrowers? SBA proposes to revise the regulation at § 120.712(b) to incorporate recent statutory changes to the percentage of grant funds that may be used by the Intermediary for marketing, managerial, and technical assistance to prospective Microloan borrowers from 25 percent to 50 percent. The balance of grant funds must be used to provide technical assistance to actual borrowers (*i.e.,* small businesses that have received loan funds from the Intermediary). In § 120.712(d), SBA proposes to incorporate an identical recent statutory change to the percentage of grant funds the Intermediary may use to contract with third parties to provide technical assistance to Microloan borrowers. In addition, SBA proposes to revise § 120.712(b) to limit the amount of grant funds that an Intermediary may use to market or advertise the Microloan program to prospective borrowers to no more than 5 percent of the amount of the grant. None of the grant funds may be used by the Intermediary to market or advertise its non-SBA products or services. Furthermore, in accordance with the Office of Management and Budget guidance for grants and agreements set forth in 2 CFR 200.403 and 200.404, the amount of grant funds used by the Intermediary to market or advertise the Microloan program to prospective borrowers must be reasonable.

7. Technical Corrections

Section 120.222 Prohibition on sharing premiums for secondary market sales. SBA proposes a technical correction to § 120.222 to remove an extra word (''in'') that was inserted in error.

Section 120.840 Accredited Lenders Program (ALP). In § 120.840(b), SBA is proposing to replace the reference to the Director, Office of Financial Assistance with ''appropriate SBA official in accordance with Delegations of Authority.''

B. Affiliation Principles for the Business Loan, Business Disaster Loan, and Surety Bond Guarantee Programs

Section 121.301 What size standards and affiliation principles are applicable to financial assistance programs? SBA proposes to amend the affiliation principles applicable to Applicants for assistance in the financial assistance programs set forth in § 121.301(f). Specifically, SBA proposes to expand the principle of affiliation arising from ''identity of interest'' to include common investments and economic dependence through contractual or other relationships between any two or more individuals or businesses, reinstate the ''newly organized concern'' rule, reinstate the ''totality of the circumstances'' analysis when determining affiliation between an Applicant for financial assistance and other entities, and clarify affiliation based on a franchise or license agreement.

Currently, the regulation at § 121.301(f)(4) defines affiliation based on ''identity of interest'' for the Business Loan, Business Disaster Loan, and Surety Bond Guarantee Programs as arising only when there are ''close relatives'' with identical or substantially identical business or economic interests (such as where the close relatives operate concerns in the same or similar industry in the same geographic area). Prior to 2016, this regulation also defined affiliation to include identity of interest based on other grounds, including common investments or economic dependence among other parties (not just close relatives). The current regulation also differs from the principles of affiliation SBA uses for all its other programs, all of which include common investments and economic dependence as grounds for affiliation. By limiting the regulation to close relatives only, SBA has allowed businesses that are economically dependent on one another to be treated as independent businesses (*i.e.,* not affiliated) for the purposes of the programs referenced in this paragraph. SBA has also allowed individuals with multiple common investments to have their ownership interests be considered separately in the Business Loan Programs, whereas other SBA programs would find those individuals to have an identity of interest. SBA believes the 2016 regulatory change should be reversed in order to better reflect the controlling effect of an identity of interest through common investments or economic dependence and to conform more closely to other SBA programs. Accordingly, SBA is now proposing to expand this regulation to include affiliation between individuals or firms that have identical or substantially identical business or economic interests (individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships).

Under the proposed rule, SBA would find affiliation based on common investments under the identity of interest rule when multiple entities are owned by the same individuals or firms, and the entities owned by such investors conduct business with each other or share resources. In order to find an identity of interest between investors, the common investments would need to be substantial, either in number of investments or total value. As an example, in the *Size Appeal of W. Harris, Government Services Contractor, Inc.,* SBA No. SIZ–5717 (2016), SBA found two individuals to have an identity of interest based on common

investments where they each owned 50% of one firm, and split the ownership of a second firm on a 55%/45% basis. While there were only two common investments, based on the fact that the two individuals' combined ownership of the two firms was 100%, their common investments were deemed to be substantial in value. Because of the substantial common investments, the two firms were affiliated with each other and with a firm wholly owned by one of the individuals. The proposed rule adopts the standard in *W. Harris* with the following modification: Under the proposed rule, SBA would consider businesses to be affiliated based on common investments only if they conduct business with each other, or share resources, equipment, locations or employees; or provide loan guaranties or other financial or managerial support to each other.

As a hypothetical example, ABC Company is owned by four unrelated individuals: Ann owns 60% of the business; Barbara owns 15%; Charlie owns 15%; and David owns 10%. ABC Company applies for a 504 loan to acquire land and build a hotel. XYZ Company is owned by the same four unrelated individuals, but in different ownership percentages: Ann owns 10% of the business; Barbara owns 60%; Charlie owns 15%; and David owns 15%. XYZ Company, a management company, applies for a 7(a) loan for working capital. DEF Company also is owned by the same four unrelated individuals in different ownership percentages, but with a new member as well: Ann owns 5% of the business; Barbara owns 10%; Charlie owns 55%; David owns 15%; and Ella owns 15%. DEF Company applies for a 504 loan to acquire land and build a hotel. XYZ Company has agreements with ABC Company and DEF Company to manage both of the hotels. Under the proposed rule, SBA will consider Ann, Barbara, Charlie and David to have an identity of interest because of their substantial common investments in the three companies, and the fact that XYZ Company manages the hotels owned by ABC Company and DEF Company. Any firm in which Ann, Barbara, Charlie, or David individually or collectively own more than 50% also will be considered affiliated with ABC Company, XYZ Company, and DEF Company, if the business owned by Ann, Barbara, Charlie, or David conducts business or shares resources with, or provides financial or managerial support to, any of the co-owned firms. Any other businesses in which Ella may have an ownership interest, however, will not be considered affiliated because Ella only has a small ownership percentage in DEF Company.

Also under the proposed identity of interest rule, if a small business Applicant derived more than 85% of its revenue from another business over the previous three fiscal years, SBA would find that the small business Applicant is economically dependent on the other business and, therefore, that the two businesses are affiliated. For example, Company A manufactures tires and has a contract with Company B to supply the vast majority of Company B's tires. The sales to Company B accounted for 86%–88% of Company A's revenues over the previous three fiscal years. Under the proposed rule, Company A would be economically dependent on Company B and the two businesses would be deemed affiliated. The proposed rule departs from SBA's other programs in using a higher threshold of 85% of the Applicant's revenues to establish economic dependence, rather than 70%. SBA believes the higher threshold is more appropriate to establish affiliation in the programs discussed in this Section II.B. As in SBA's other programs, this basis of affiliation would include an exception for a business that is new or a start-up. New or start-up businesses may only have a few customers or obtained a few contracts, and do not have as many partners and clients as established businesses. In order to be eligible for the exception for new or start-up businesses, these businesses would need to have a plan to diversify and become less dependent on one entity. For example, in the matter of *Size Appeal of Argus And Black, Inc.,* SBA No. SIZ–5204, 2011 WL 1168302 (February 22, 2011), the SBA Office of Hearings and Appeals held that where a small business has only recently begun operations either initially or after a period of dormancy, and is dependent upon its alleged affiliate for only one small contract of short duration, which by itself could not sustain a business, a finding of economic dependence is not warranted.

SBA recognizes that, if the proposed identity of interest rule is adopted as final, SBA Lenders may need assistance in applying the rule to certain agricultural business relationships or agreements. In particular, the agreement between a poultry farmer and a large poultry producer (integrator) may be critical to the determination of whether the farmer is an independent small business but, due to the complexity of the typical integrator agreement, SBA Lenders may be uncertain as to the correct outcome of the affiliation analysis for such a business relationship. SBA is considering reviewing these agreements and making the affiliation determination itself so that SBA Lenders will not be reluctant to make loans to small poultry farmers operating under such agreements. SBA will provide further information on this in the final rule, if necessary.

Additionally, SBA proposes to add the newly organized concern rule to § 121.301(f), which will create uniformity among SBA's various affiliation rules. The newly organized concern rule applied to the Business Loan Programs prior to the 2016 rule change, but was removed at SBA's own initiative. Under the proposed newly organized concern rule, a newly organized spin-off company may be found affiliated with the original company where all of the following conditions are met: (1) Former or current officers, directors, principal stockholders, managing members, general partners, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the individuals who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, general partners, or key employees; and (4) the original concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. The proposed rule would define a key employee to be an employee who, because of his or her position in the concern, has a critical influence in or substantive control over the operations or management of the concern. The proposed rule further defines a ''newly organized'' concern to be one that has been actively operating continuously for two years or less. The proposed newly organized concern basis of affiliation would be a rebuttable presumption that may be rebutted if there is a clear line of fracture between the new concern and the other firm.

Finally, SBA proposes to amend § 121.301(f) by adding a new paragraph 6 to explain that, when making affiliation determinations, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation. The totality of the circumstances criterion for determining affiliation was removed in 2016 in response to comments received on the proposed revisions to the affiliation rules. Commenters requested that SBA either eliminate the criterion

or provide examples of when it would be used. SBA stated that, generally, examples of when this criterion was used involved negative control or control through management agreements. Rather than include examples in the rule, SBA provided additional specific guidance in §§ 121.301(f)(1) and (f)(3) to address negative control and control through management agreements. However, SBA now believes that there are other examples of when affiliation may be present and, therefore, is reinstating the totality of the circumstances criterion.

Examples of affiliation between small businesses based on the totality of the circumstances include:

(1) SBA found a newly established firm to be affiliated with the firm owned by its 40% owner where both firms were construction companies; they had similar names (Specialized Services, Inc. and Specialized Veterans, LLC); the 40% owner provided a $300,000 initial capital contribution compared to the 60% owner's $1,000 contribution; the majority owner was previously the Chief Operating Officer of the affiliate; the majority owner had no construction experience; and the affiliate provided indemnification to the firm's surety. (*Size Appeal of Specialized Veterans, LLC,* SBA No. SIZ–5138 (2010).)

(2) SBA found a newly established firm to be affiliated with its minority owner, an entity in the same line of business, where the other owners were previously key employees of the affiliate; the affiliate provided guarantees for the firm's financing and required the firm to seek the affiliate's approval before undertaking long-term commitments; the affiliate supplied the firm with machines and equipment for free; the affiliate promised the firm a large amount of business; and the sales the firm made to the affiliate accounted for the vast majority, 86%–88%, of its revenues. (*Size Appeal of Pointe Precision, LLC,* SBA No. SIZ–4466 (2001).)

SBA notes that a business found affiliated under the totality of the circumstances test (or any other ground of affiliation) in the Business Loan Programs may challenge the determination by requesting a formal size determination from SBA's Office of Government Contracting in accordance with 13 CFR 121.1001(b)(1)(i). A business can appeal a formal size determination to SBA's Office of Hearings and Appeals in accordance with 13 CFR 121.1101.

Finally, SBA proposes to revise § 121.301(f)(5) to clarify that the term ''franchise'' has the meaning given by the Federal Trade Commission (FTC) in its definition of ''franchise'' as set forth in 16 CFR 436. SBA proposes to cross reference the FTC definition of ''franchise'' in the regulation to clarify that the regulation applies to all agreements or relationships, whatever they may be called, that meet the FTC definition of a franchise. All such agreements will be referred to in the regulation as ''franchise agreements'' and the parties to such agreements will be referred to as ''franchisor'' and ''franchisee.'' Further, SBA proposes to add to this regulation a statement that SBA will maintain a centralized list of franchise and other similar agreements that are eligible for SBA financial assistance. SBA will make this centralized list available to SBA Lenders and the public. The proposed changes discussed in this paragraph are consistent with SBA's current policy and procedure.

Although not included in the regulations, SBA is providing below a description of the franchise procedures currently in effect for lending to franchisees in the Business Loan Programs. As of January 1, 2018, SBA created the SBA Franchise Directory (the ''Directory'') of all franchise and other brands reviewed by SBA that are eligible for SBA financial assistance. The Directory only includes business models that SBA determines are eligible under SBA's affiliation rules and other eligibility criteria. If the Applicant's brand meets the FTC definition of a franchise, it must be on the Directory in order to obtain SBA financing. (To help minimize confusion over brands that may appear to be franchises but that do not meet the FTC definition, SBA includes such brands on the Directory at their request if they are eligible in all other respects.) SBA Lenders are able to rely on the Directory and no longer need to review franchise or other brand documentation for affiliation or eligibility.

The Directory will continue to be maintained on SBA's website at *www.sba.gov.* It will contain the following information:

(1) Whether the brand meets the FTC definition of a franchise;

(2) The SBA Franchise Identifier Code, if applicable (a code will only be issued if the agreement meets the FTC definition of a franchise);

(3) Whether an addendum is needed in order to resolve any affiliation issues as a result of provisions in the franchise agreement and, if so, whether the franchisor will use the SBA Addendum to Franchise Agreement (SBA Form 2462) or an SBA Negotiated Addendum (with respect to an SBA Negotiated Addendum, the Directory will reference the addendum most recently negotiated with SBA, which will not be earlier than 2015); and

(4) Whether there are additional issues the Lender must consider with respect to the brand (*e.g.,* documentation that the business will be open to all, review of any third party management agreement to ensure Applicant is not a passive business or affiliated with the management company).

For applications involving a franchise or similar relationship that meets the FTC definition of a franchise, before submitting the application to SBA for non-delegated processing or approving the loan under the SBA Lender's delegated authority, the SBA Lender must check the Directory to determine if it includes the Applicant's brand. If the Applicant's brand is on the Directory, the SBA Lender may proceed with submitting the application to SBA for non-delegated processing, or approving the loan under its delegated authority. If the Applicant's brand is not on the Directory, the SBA Lender cannot submit the application to SBA for non-delegated processing, or approve the loan under its delegated authority. (See, SOP 50 10 for a full discussion of the procedures for processing franchise loans.)

Section 121.302 When does SBA determine the size status of an applicant? SBA proposes to incorporate the SBA Express and Export Express programs into this regulation to clarify that, with respect to applications for financial assistance under these programs, size is determined as of the date of approval of the loan by the SBA Express or Export Express Lender.

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612).

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is not a ''significant'' regulatory action for the purposes of Executive Order 12866. However, SBA has drafted a Regulatory Impact Analysis in the next section. This is not a major rule under the Congressional Review Act, 5 U.S.C. 800.

Regulatory Impact Analysis

1. Is there a need for this regulatory action?

The Agency believes it is necessary to provide regulatory guidance for SBA Express and Export Express loans, which are authorized by statute. Current

regulatory guidance provides an extensive framework for the delivery of SBA's 7(a) guaranteed loans through participating private sector lenders. However, currently there are not regulations identifying the specific Loan Program Requirements applicable to SBA Express and Export Express. Congress has authorized SBA to permit qualified lenders to make SBA Express and Export Express loans using, to the maximum extent practicable, their own analyses, procedures, and documentation. It is necessary to provide clear and succinct regulatory guidance for lenders to encourage participation in extending these smaller dollar loans, and to enable these lenders to extend credit with confidence in their ability to rely on payment by SBA of the guaranty if necessary.

The Small Business 7(a) Lending Oversight Reform Act of 2018 was signed into law on June 21, 2018. As part of this legislation, Congress has authorized the Agency to direct the methods by which Lenders determine whether a borrower is able to obtain credit elsewhere. SBA will be implementing that legislation in a separate rulemaking, but in this rule SBA proposes to reinstate a personal resources test in an effort to provide clear direction to SBA Lenders when analyzing whether a borrower has credit available elsewhere on reasonable terms from non-Federal or alternative sources.

The statutory changes in the Consolidated Appropriations Act of 2018 (Pub. L. 115–141) regarding the Microloan Program require amendments to existing regulations for the percentage of grant funds that may be used by the Microloan Intermediary for marketing, managerial, and technical assistance to prospective Microloan borrowers. Existing regulations must be revised as proposed to reflect the statutory changes.

Further, the Agency believes it needs to streamline and reduce regulatory burdens to facilitate robust participation in the business loan programs that assist small and underserved U.S. businesses. For that reason, SBA is proposing the changes to the regulatory provisions related to allowable fees that a Lender or Agent may collect from an Applicant for financial assistance. The proposed changes are needed to simplify the regulations regarding fees that may be collected from an Applicant. The proposal would establish clear limits on the amount of fees that may be charged by a Lender and/or an Agent. In addition, the proposed changes to the affiliation principles applicable to the Business Loan, Disaster Loan, and Surety Bond Guarantee Programs are needed in order to simplify and clarify the determination of eligibility of a business as a small concern.

2. What are the potential benefits and costs of this regulatory action?

SBA does not anticipate any additional costs or impact on the subsidy to operate the business loan programs under these proposed regulations. SBA anticipates that providing clear regulatory guidance for the SBA Express and Export Express Loan Programs will result in an increase in the number of participating lenders and loans in both programs, which would mean increased access to capital for small businesses. SBA does not anticipate any additional cost from the addition of the SBA Express and Export Express regulations because both programs have been in use and performing for over 5 years. Additionally, portfolio performance of both programs, including prepayment, default and recovery behaviors is already being captured in the 7(a) program's annual subsidy calculation.

In return for the additional autonomy and authority granted under SBA Express, Lenders who participate in the SBA Express program agree to receive a maximum guaranty of 50% on loans of $350,000 or less. The ability for SBA Express Lenders to use the same forms, procedures and policies that they already follow for their similarly-sized, non-SBA guaranteed commercial loans removes an additional layer of documents and permits a lender to move more quickly to a decision and funding of small dollar small business loans. This reduces the time and costs, as well as the paperwork involved in making these smaller loans (up to $350,000 for SBA Express and up to $500,000 for Export Express).

The Export Express Loan Program provides lenders with a maximum guaranty of 90% for loans of $350,000 or less and 75% for loans over $350,000 up to $500,000, as well as the authority to use their own forms, procedures and policies to the maximum extent possible. As with SBA Express, the increased autonomy and authority reduces redundancy in documentation, time and costs associated with underwriting smaller export loans.

Cost to deliver is an important consideration for lenders when assessing the benefits of participating with SBA programs. Streamlined rules result in increased lender participation, particularly for community banks, credit unions and other mission-based lenders who generally serve more rural communities and underserved populations with smaller dollar loans. While SBA does not have specific statistics, cost savings to the lender generally trickle down to the small business Applicant. Further, providing plain language regulatory guidance for the SBA Express and Export Express Loan Programs will reduce improper payment risk for lenders and SBA by ensuring that lenders are fully informed and understand the program requirements.

3. What alternatives have been considered?

SBA has provided guidance on the SBA Express and Export Express Loan Programs in SOP 50 10, Lender and Development Company Programs, SOP 50 57, 7(a) Loan Servicing and Liquidation, SOP 50 53, Lender Supervision and Enforcement, and 51 00, On-Site Reviews and Examinations, and official Agency notices. The Agency recognizes, however, that regulations are important for the proper implementation of the two programs.

Executive Order 13563

This executive order supplements and reaffirms the principles and requirements in E.O. 12866, including the requirement to provide the public with an opportunity to participate in the regulatory process. In compliance with the executive order, a description of the need for this regulatory action and benefits and costs associated with this action, including possible distributional impacts are included above in the Regulatory Impact Analysis. The Agency has participated in public forums and meetings, which have included outreach to many of its program participants to seek valuable insight, guidance, and suggestions for program reform. Some of the proposed changes in this rule are a direct result of the feedback SBA has received from program participants.

Executive Order 13771

This proposed rule is not expected to be an E.O. 13771 regulatory action because this proposed rule is not significant under E.O. 12866.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

SBA has determined that this proposed rule would not have substantial, direct effects on the States,

on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purposes of Executive Order 13132, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

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

SBA has determined that this proposed rule would impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act (PRA). Applicants for SBA Express and Export Express loans, as well as SBA Express and Export Express Lenders, use the same forms as all other 7(a) loans in order to apply for an SBA guaranteed loan. These forms include: SBA Form 1919, Borrower Information Form; SBA Form 1920, Lender's Application for Guaranty; SBA Form 1971, Religious Eligibility Worksheet (for those businesses that may have a religious aspect); and SBA Form 2237 (to request modifications to an approved loan). These forms are all OMB-approved forms under OMB Control number 3245–0348. SBA Form 1920 would need to be revised due to the proposed new regulation at § 120.102, which would require Lenders to analyze the personal resources of certain owners of the Applicant business to determine if they have liquid assets that can provide some or all of the desired financing. The change would have a *de minimis* impact on Lenders since the personal resource analysis is already part of the credit analysis Lenders currently conduct in determining an Applicant's eligibility for SBA financial assistance. SBA Form 1920 is completed by the Lender, not by the Applicant.

The rule also proposes changes that would require revisions to SBA Form 159, Fee Disclosure and Compensation Agreement (OMB Control number 3245–0201), which is used to collect information from Lenders and Agents on the fees that they charge to Applicants for assistance with obtaining an SBA-guaranteed loan. SBA Form 159 is also used to collect information from Lenders on referral fees that it pays to Referral Agents in connection with an SBA-guaranteed loan. The specific proposed revisions to SBA Form 159 would implement the proposed changes to §§ 120.221, 103.4(g), and 103.5 that limit the amount and types of fees that may be charged to an Applicant. The proposed revisions to SBA Form 159 would reduce the hour burden for Lenders because they will no longer have to itemize the fees charged to Applicants in excess of $2,500, but merely disclose the amount charged. The revisions would have no material effect on the reporting burden for Agents. They will continue to report on all fees imposed on Applicants as they do now. The proposed changes to SBA Forms 1920 and 159 will be submitted to OMB as part of a broader, comprehensive revision of the forms that is not affected by this proposed rule, but is part of the Agency's efforts to streamline and simplify the information collected from Applicants and Lenders. SBA will make it clear in the final rule that the specific revisions affected by this proposed rule will not take effect until the rule is finalized. SBA invites comments on the proposed changes to the underlying regulations that would impact these forms by the deadline for comments noted in the **DATES** section.

Finally, this proposed rule proposes to put into the regulations the existing requirement for SBLCs to submit to SBA for review and approval on an annual basis the validation of any credit scoring model they are using in connection with SBA Express and Export Express loans. This reporting requirement will be included in OMB-approved collection, SBA Lender Reporting Requirements (OMB Approval Number 3245–0365). This information collection expires September 30, 2018 and will be submitted to OMB for renewal prior to that date. The proposed regulatory change does not impact that requirement; it merely codifies the requirement in the regulation instead of the SOP.

Regulatory Flexibility Act, 5 U.S.C. 601–612

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires the agency to ''prepare and make available for public comment an initial regulatory analysis'' which will ''describe the impact of the proposed rule on small entities.'' Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Although the rulemaking will impact all of the approximately 4,500 7(a) Lenders, all of the approximately 214 CDCs, all of the approximately 146 Microloan Intermediaries, all of the approximately 33 ILP Intermediaries, and all of the approximately 32 Sureties that participate in the SBG Program, SBA does not believe the impact will be significant because this proposal modifies existing regulations and procedures to provide bright-line guidance.

SBA has determined that by proposing a limit to fees that a Lender or an Agent may charge to a small business Applicant or Borrower for SBA 7(a) loans, small business borrowers will be protected from incurring excessive expense to obtain a loan. SBA issued guaranties on 288,398 7(a) loans from fiscal year 2013 through fiscal year 2017. Fees charged to the Borrower or Applicant for packaging or other services were disclosed on 21% of the total 7(a) loans approved in that period. Applicants or Borrowers were charged fees that exceed the limits proposed in this rulemaking on 3.8% of total 7(a) loans approved.

Based on the analysis above, SBA has determined that the proposed fee limits will not cause undue financial burden to the Lenders or Agents. Having this bright-line test, Lenders, Borrowers, and Agents will, in fact, save time and costs in analyzing and documenting that fees charged to the Applicant are reasonable.

SBA's proposal to reinstate a personal resources test will have no impact, either directly or indirectly, to Applicants for 7(a) or 504 loans. Currently, the regulation (13 CFR 120.101) and program guidance require SBA Lenders to analyze the ability of the business to obtain credit from non-federal sources, including the personal resources of individuals and entities that own 20 percent or more of the Applicant business. The proposed change reinstates a bright-line test for SBA Lenders to appropriately consider the personal resources of the principals.

SBA's proposal to presume affiliation between a small business Applicant and another business from which the Applicant has derived more than 85% of its revenue over the previous three fiscal years includes an exception for new or start-up businesses. The exception will require the new or start-up Applicant to prepare a diversification plan demonstrating how it plans to become less dependent on any single source of income. This requirement to create a diversification plan may create an additional regulatory burden on those Applicants eligible for the exception. However, SBA considers this impact to be *de minimis* to the overall cost and time burden of the Applicant in preparing an application and business plan.

SBA believes that this proposed rule encompasses best practice guidance that aligns with the Agency's mission to increase access to capital for small businesses and facilitate American job preservation and creation with the

removal of unnecessary regulatory requirements. For these reasons, SBA has determined that there is no significant economic impact on a substantial number of small entities. SBA invites comment from members of the public who believe there will be a significant impact on sureties, microloan intermediaries, participant lenders, CDCs, or small businesses.

List of Subjects

13 CFR Part 103

Administrative practice and procedure.

13 CFR Part 120

Community development, Environmental protection, Equal employment opportunity, Exports, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 121

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

For the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 103, 120 and 121 as follows:

PART 103—STANDARDS FOR CONDUCTING BUSINESS WITH SBA

■ 1. The authority citation for part 103 is revised to read as follows:

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

■ 2. Amend § 103.4 by revising paragraph (g) to read as follows:

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

* * * * *

(g) Acting as an Agent (including a Lender Service Provider) for an SBA Lender and an Applicant on the same SBA business loan and receiving compensation from both the Applicant and SBA Lender.

* * * * *

■ 3. Amend § 103.5 by revising paragraph (b) and the last sentence of paragraph (c) to read as follows:

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

* * * * *

(b) Total compensation charged by an Agent or Agents to an Applicant for services rendered in connection with obtaining an SBA-guaranteed loan must be reasonable. In cases where the compensation exceeds the amount SBA deems reasonable, the Agent(s) must reduce the charge and refund to the Applicant any sum in excess of the amount SBA deems reasonable. SBA considers the following amounts to be reasonable for the total compensation that an Applicant can be charged by an Agent or Agents:

(1) For loans up to and including $350,000: A maximum of up to 2.5% of the loan amount, or $7,000, whichever is less;

(2) For loans $350,001–$1,000,000: A maximum of up to 2% of the loan amount, or $15,000, whichever is less; and

(3) For loans over $1,000,000: A maximum of up to 1.5% of the loan amount, or $30,000, whichever is less.

(c) * * * However, such compensation may not be charged to an Applicant or Borrower.

PART 120—BUSINESS LOANS

■ 4. The authority citation for part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), (b)(14), (h), and note, 636(a), (h) and (m), 650, 687(f), 696(3), and 697(a) and (e); Pub. L. 111–5, 123 Stat. 115; Pub. L. 111–240, 124 Stat. 2504.

■ 5. Add § 120.102 to read as follows:

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

(a) An Applicant for a business loan must show that the desired funds are not available from the resources of any individual or entity owning 20 percent or more of the Applicant. SBA will require the use of liquid assets from any such owner as an injection to reduce the SBA loan amount when that owner's liquid assets exceed the amounts specified in paragraphs (a)(1) through (3) of this section. When the total financing package (*i.e.,* any SBA loans and any other financing, including loans from any other source, requested by the Applicant business at or about the same time):

(1) Is $350,000 or less, each 20 percent owner of the Applicant must inject any liquid assets that are in excess of one and three-quarter times the total financing package, or $200,000, whichever is greater;

(2) Is between $350,001 and $1,000,000, each 20 percent owner of the Applicant must inject any liquid assets that are in excess of one and one-half times the total financing package, or $1,000,000, whichever is greater;

(3) Exceeds $1,000,000, each 20 percent owner of the Applicant must inject any liquid assets that are in excess of one times the total financing package, or $2,500,000, whichever is greater.

(b) Any liquid assets in excess of the applicable amount set forth in paragraph (a) of this section must be used to reduce the SBA loan amount. These funds must be injected prior to the disbursement of the proceeds of any SBA financing. In extraordinary circumstances, SBA may, in its sole discretion, permit exceptions to the required injection of an owner's excess liquid assets.

(c) For purposes of this section, ''liquid assets'' means cash or cash equivalents, including savings accounts, CDs, stocks, bonds, or other similar assets. Equity in real estate holdings and other fixed assets are not to be considered liquid assets. In addition, the liquid assets of any 20 percent owner who is an individual include the liquid assets of the owner's spouse and any minor children.

(d) SBA Lenders must document their analysis and determination in the loan file.

■ 6. Amend § 120.130 by revising paragraph (c) to read as follows:

§ 120.130 Restrictions on uses of proceeds.

* * * * *

(c) Floor plan financing or other revolving line of credit, except under § 120.340, § 120.390, or § 120.444;

* * * * *

■ 7. Amend § 120.221 by revising the section heading and paragraphs (a) and (b) to read as follows:

§ 120.221 Fees and expenses that the Lender may collect from an Applicant or Borrower.

* * * * *

(a) *Fees that can be collected from the Applicant for assistance in obtaining a loan.* The Lender may collect a fee from an Applicant for assistance with obtaining an SBA-guaranteed loan. The fee may not exceed $2,500 for a loan up to and including $350,000 and may not exceed $5,000 for a loan over $350,000. The Lender must advise the Applicant in writing that the Applicant is not required to obtain or pay for unwanted services. In cases where the compensation exceeds what SBA deems reasonable, the Lender must reduce the charge and refund to the Applicant any amount in excess of what SBA deems reasonable. If the Lender charges the Applicant a fee for assistance with obtaining an SBA-guaranteed loan, the fee must be disclosed to SBA in accordance with § 103.5 and documented in accordance with Loan Program Requirements.

(b) *Extraordinary servicing.* Subject to prior written SBA approval, if all or part of a loan will have extraordinary servicing needs, the Lender may charge extraordinary servicing fees in excess of 2 percent per year on the outstanding

balance of the part requiring special servicing for certain revolving lines of credit made under § 120.390 and on Export Working Capital Program loans (as allowed under § 120.344(b)), provided the fees are reasonable and prudent.

* * * * *

§ 120.222 [Amended]

■ 8. Amend § 120.222 by removing the word ''in'' before the words ''any premium received''.

§ 120.344 [Amended]

■ 9. Amend § 120.344(b) by removing the period at the end of the paragraph and adding '', provided the fees are reasonable and prudent.''

■ 10. Revise § 120.350 to read as follows:

§ 120.350 Policy.

(a) Section 7(a)(15) of the Act authorizes SBA to guarantee a loan to a qualified employee trust (''ESOP'') to:

(1) Help finance the growth of the employer small business; or

(2) Purchase ownership or voting control of the employer.

(b) Applications for SBA-guaranteed loans to a qualified employee trust may not be processed under a Lender's delegated authority.

■ 11. Amend § 120.432 by adding a sentence at the end of paragraph (a) to read as follows:

§ 120.432 Under what circumstances does this subpart permit sales of, or sales of participating interests in, 7(a) loans?

(a) * * * This paragraph applies to all 7(a) loans purchased from the FDIC (as receiver, conservator, or other liquidator of a failed insured depository institution), whether through a loan sale where SBA has not already purchased the guarantee or through a whole bank transfer.

* * * * *

■ 12. Amend § 120.440 by revising paragraph (c) to read as follows:

§ 120.440 How does a 7(a) Lender obtain delegated authority?

* * * * *

(c) If delegated authority is approved or renewed, Lender must execute a supplemental guarantee agreement, which will specify a term not to exceed two years. As provided in § 120.442(c)(2)(i), when SBA renews a Lender's authority to participate in SBA Express, SBA may grant a longer term, but not to exceed three years. For approval or renewal of any delegated authority, SBA may grant shortened approvals or renewals based on risk or any of the other delegated authority criteria. Lenders with less than three years of SBA lending experience will be limited to an initial term of one year or less.

■ 13. Add a new undesignated center heading after § 120.440 to read as follows:

''SBA EXPRESS AND EXPORT EXPRESS LOAN PROGRAMS''.

■ 14. Add §§ 120.441 through 120.447 to read as follows:

§ 120.441 SBA Express and Export Express Loan Programs.

(a) *SBA Express.* Under the SBA Express Loan Program (SBA Express), designated Lenders (SBA Express Lenders) process, close, service, and liquidate SBA-guaranteed 7(a) loans using their own loan analyses, procedures, and documentation to the maximum extent practicable, with reduced requirements for submitting documentation to, and prior approval by, SBA. These loan analyses, procedures, and documentation must meet prudent lending standards; be consistent with those an SBA Express Lender uses for its similarly-sized, non-SBA guaranteed commercial loans; and conform to all requirements imposed upon Lenders generally and SBA Express Lenders in particular by Loan Program Requirements, as such requirements are issued and revised by SBA from time to time, unless specifically identified by SBA as inapplicable to SBA Express loans. In return for the expanded authority and autonomy provided by the program, SBA Express Lenders agree to accept a maximum SBA guaranty of 50 percent of the SBA Express loan amount.

(b) *Export Express.* The Export Express Loan Program (Export Express) is designed to help current and prospective small exporters. It is subject to the same loan processing, making, closing, servicing, and liquidation requirements, as well as the same interest rates and applicable fees, as SBA Express, except as otherwise provided in Loan Program Requirements.

§ 120.442 Process to obtain or renew SBA Express or Export Express authority.

The decision to grant or renew SBA Express or Export Express authority will be made by the appropriate SBA official in accordance with Delegations of Authority, and is final. If SBA Express or Export Express authority is approved or renewed, the Lender must execute a supplemental guarantee agreement before the Lender's SBA Express or Export Express authority will become effective.

(a) *Criteria and process for initial approval of SBA Express or Export Express authority.* A Lender that wishes to participate in SBA Express or Export Express must submit a written request to SBA.

(1) *Existing 7(a) Lenders.* In evaluating an existing 7(a) Lender's application for SBA Express or Export Express authority, SBA will consider the criteria and follow the procedures set forth in § 120.440.

(2) *Lending institutions that do not currently participate with SBA.* Lending institutions that do not currently participate with SBA must become 7(a) Lenders to participate in SBA Express and/or Export Express. Such institutions may request SBA 7(a) lending and SBA Express and/or Export Express authority simultaneously. In evaluating such institutions, in addition to the criteria set forth in §§ 120.410 and 120.440, SBA will consider whether the institution:

(i) Has acceptable experience with small commercial loans, including an acceptable number of performing small commercial loans outstanding at its most recent fiscal year end; and

(ii) Has received appropriate training on SBA's policies and procedures.

(b) *Criteria and process for renewal of SBA Express or Export Express authority.* In renewing a Lender's SBA Express or Export Express authority and determining the term of the renewal, SBA will consider the criteria and follow the process set forth in § 120.440 and also will consider whether the Lender:

(1) Can effectively process, make, close, service, and liquidate SBA Express or Export Express loans, as applicable;

(2) Has received a major substantive objection regarding renewal from the Field Office(s) covering the territory where the Lender generates significant numbers of SBA Express or Export Express loans, as applicable; and

(3) Has received acceptable review results on the SBA Express or Export Express portion, as applicable, of any SBA-administered Lender reviews.

(c) *Term.*—(1) *Initial Approval.* SBA may approve a Lender's authority to participate in SBA Express or Export Express for a maximum term of two years. SBA may approve a shorter term or limit a Lender's maximum SBA Express or Export Express loan volume if, in SBA's sole discretion, a Lender's qualifications, performance, experience with SBA lending, or other factors so warrant.

(2) *Renewal.*—(i) *SBA Express.* SBA may renew a Lender's authority to participate in SBA Express for two years or, in SBA's sole discretion, a maximum of three years if a Lender's qualifications, performance, experience

with SBA lending, or other factors so warrant.

(ii) *Export Express.* SBA may renew a Lender's authority to participate in Export Express for a maximum term of two years.

(iii) SBA may renew a Lender's authority to participate in SBA Express or Export Express for a shorter term or limit a Lender's maximum SBA Express or Export Express loan volume if, in SBA's sole discretion, a Lender's qualifications, performance, experience with SBA lending, or other factors so warrant.

§ 120.443 SBA Express and Export Express loan processing requirements.

(a) SBA Express and Export Express loans are subject to all of the requirements set forth in Subparts A and B of this part, unless such requirements are specifically identified by SBA as inapplicable.

(b) Certain types of loans and loan programs are not eligible for SBA Express or Export Express, as detailed in official SBA policy and procedures, including but not limited to:

(1) A loan that would reduce the Lender's existing credit exposure to a single Borrower, including its affiliates as defined in § 121.301(f) of this chapter;

(2) A loan to a business that has an outstanding 7(a) loan where the Applicant is unable to certify that the loan is current at the time of approval of the SBA Express or Export Express loan;

(3) A loan that would have as its primary collateral real estate or personal property that do not meet SBA's environmental requirements; and

(4) Complex loan structures or eligibility situations.

(c) SBA has authorized SBA Express and Export Express Lenders to make the credit decision without prior SBA review. Lenders must not make an SBA guaranteed loan that would be available on reasonable terms from either the Lender itself or another source without an SBA guaranty. The credit analysis must demonstrate that there is reasonable assurance of repayment. SBA Express and Export Express Lenders must use appropriate and prudent credit analysis processes and procedures that are generally accepted in the commercial lending industry and are consistent with those used for their similarly-sized, non-SBA guaranteed commercial loans. As part of their prudent credit analysis, SBA Express and Export Express Lenders may use a business credit scoring model (such a model cannot rely solely on consumer credit scores) to assess the credit history of the Applicant and/or repayment ability if they do so for their similarly-sized, non-SBA guaranteed commercial loans. SBA Express and Export Express Lenders must validate (and document) with appropriate statistical methodologies that their credit analysis procedures are predictive of loan performance, and they must provide that documentation to SBA upon request. SBLCs must provide such credit scoring model validation and documentation to SBA for review and approval on an annual basis.

(d) SBA Express and Export Express Lenders are responsible for all loan decisions, including eligibility for 7(a) loans (including size), creditworthiness and compliance with Loan Program Requirements. SBA Express and Export Express Lenders also are responsible for confirming that all loan closing decisions are correct and that they have complied with all requirements of law and Loan Program Requirements.

(e) SBA Express and Export Express Lenders must ensure all required forms are obtained and are complete and properly executed. Appropriate documentation must be maintained in the Lender's loan file, including adequate information to support the eligibility of the Applicant and the loan.

§ 120.444 Eligible uses of SBA Express and Export Express loan proceeds.

(a) *SBA Express.*—(1) SBA Express loan proceeds must be used exclusively for eligible business-related purposes, as described in §§ 120.120 and 120.130.

(2) Revolving lines of credit are eligible for SBA Express, provided they comply with official SBA policy and procedures.

(b) *Export Express.* (1) Export Express loans must be used for an export development activity, which includes the following:

(i) Obtaining a Standby Letter of Credit when required as a bid bond, performance bond, or advance payment guarantee;

(ii) Participation in a trade show that takes place outside the United States;

(iii) Translation of product brochures or catalogues for use in markets outside the United States;

(iv) Obtaining a general line of credit for export purposes;

(v) Performing a service contract for buyers located outside the United States;

(vi) Obtaining transaction-specific financing associated with completing export orders;

(vii) Purchasing real estate or equipment to be used in the production of goods or services for export;

(viii) Providing term loans and other financing to enable a small business concern, including an export trading company and an export management company, to develop a market outside the United States; and

(ix) Acquiring, constructing, renovating, modernizing, improving or expanding a production facility or equipment to be used in the United States in the production of goods or services for export.

(2) Revolving lines of credit for export purposes are eligible for Export Express, provided they comply with official SBA policy and procedures.

(3) Export Express loans may not be used to finance overseas operations, except for the marketing and/or distribution of products/services exported from the U.S.

(4) Export Express Lenders are responsible for ensuring that U.S. companies are authorized to conduct business with the Persons and countries to which the Borrower will be exporting.

(c) An SBA Express or Export Express Lender may use loan proceeds to refinance certain outstanding debts, subject to official SBA policy and procedures. However, an SBA Express or Export Express Lender may not refinance its own existing SBA-guaranteed debt under SBA Express or Export Express.

§ 120.445 Terms and conditions of SBA Express and Export Express loans.

SBA Express and Export Express loans are subject to the same terms and conditions as other 7(a) loans except as set forth in this section:

(a) *Maximum loan amount and maximum aggregate loan amount.*

(1) *SBA Express.* The maximum loan amount for an SBA Express loan is set forth in section 7(a)(31)(D) of the Small Business Act. The aggregate amount of all outstanding SBA Express loans to a single Borrower, including the Borrower's affiliates as defined in § 121.301(f) must not exceed the statutory maximum.

(2) *Export Express.* The maximum loan amount for an Export Express loan is set forth in section 7(a)(34)(C)(i) of the Small Business Act. The aggregate amount of all outstanding Export Express loans to a single Borrower, including the Borrower's affiliates as defined in § 121.301(f), must not exceed the statutory maximum.

(b) *Maximum SBA guarantee.*—(1) *SBA Express.* The maximum SBA guarantee on an SBA Express loan is 50 percent of the SBA Express loan amount. In addition, the guaranteed amount of all SBA Express loans to a single Borrower, including the Borrower's affiliates, counts toward the

maximum guaranty amount as described in § 120.151.

(2) *Export Express.* The maximum SBA guarantee on an Export Express loan of $350,000 or less is 90 percent and for a loan over $350,000 is 75 percent of the Export Express loan amount. In addition, the guaranteed amount of all Export Express loans to a single Borrower, including the Borrower's affiliates, counts toward the maximum guaranty amount as described in § 120.151.

(c) *Maturity.*—(1) *SBA Express.* SBA Express loans must have a stated maturity and the maximum maturities are the same as any other 7(a) loan, except that revolving SBA Express loans are limited to a maximum of 10 years, as described more fully in official SBA policy and procedures.

(2) *Export Express.* Export Express loans must have a stated maturity and the maximum maturities are the same as any other 7(a) loan, except that revolving Export Express loans are limited to a maximum maturity of 7 years, as described more fully in official SBA policy and procedures.

(d) *Interest rates.*—(1) SBA Express and Export Express Lenders may charge up to 4.5% over the prime rate on loans over $50,000 and up to 6.5% over the prime rate for loans of $50,000 or less, regardless of the maturity of the loan. The prime rate will be that which is in effect on the first business day of the month, as printed in a national financial newspaper published each business day.

(2) For variable interest rate loans, SBA Express and Export Express Lenders are not required to use the base rate identified in § 120.214(c). SBA Express and Export Express Lenders may use the same base rate of interest they use on their similarly-sized, non-SBA guaranteed commercial loans, as well as their established change intervals, payment accruals, and other interest rate terms. However, the interest rate must never exceed the maximum allowable interest rate stated in paragraph (d)(1) of this section. Additionally, the loan may be sold on the Secondary Market only if the base rate is one of the base rates allowed in § 120.214(c).

(3) The amount of interest SBA will pay to a Lender following default of an SBA Express or Export Express loan is capped at the maximum interest rates for the standard 7(a) loan program set forth in §§ 120.213 through 120.215.

(e) *Collateral.*—(1) With the exception of paragraphs (e)(2) and (e)(3) of this section, to the maximum extent practicable, SBA Express and Export Express Lenders must follow the same collateral policies and procedures that they have established and implemented for their similarly-sized, non-SBA guaranteed commercial loans, including those concerning identification of collateral. Such policies and procedures must be commercially reasonable and prudent.

(2) SBA may establish a threshold below which SBA Express and Export Express Lenders will not be required to take collateral to secure an SBA Express or Export Express loan. Such a threshold will be described more fully in official SBA policy and procedures.

(3) Export Express lines of credit over $25,000 used to support the issuance of a standby letter of credit must have collateral (cash, cash equivalent or project) that will provide coverage for at least 25% of the issued standby letter of credit amount.

(f) *Insurance.* SBA Express and Export Express Lenders must follow the same policies they have established and implemented for their similarly-sized, non-SBA guaranteed commercial loans.

(g) *Sale on the secondary market.* SBA Express and Export Express Lenders may sell the guaranteed portion of an SBA Express or Export Express term loan on the secondary market under the policies and procedures described in Subpart F of this part. SBA Express or Export Express Lenders may not sell the guaranteed portion of an SBA Express or Export Express revolving line of credit on the secondary market.

(h) *Loan increases.* With SBA's prior written consent, an SBA Express or Export Express Lender may increase an SBA Express or Export Express loan based on the needs of the Borrower and its credit situation, as further specified in Loan Program Requirements.

§ 120.446 SBA Express and Export Express loan closing, servicing, liquidation and litigation requirements.

(a) *Closing.* Except as set forth in this paragraph, SBA Express and Export Express Lenders must close their SBA Express and Export Express loans using the same documentation and procedures that they use for their similarly-sized, non-SBA guaranteed commercial loans. Such documentation and procedures must comply with law, prudent lending practices, and Loan Program Requirements. When closing an SBA Express or Export Express loan, the Lender must require the Borrower to execute a promissory note that is legally enforceable and assignable. Before the first disbursement of any SBA Express or Export Express loan proceeds, the Lender must obtain all required collateral, including obtaining valid and enforceable security interests in such collateral, and also must meet all other required pre-closing loan conditions as set forth in official SBA policy and procedures.

(b) *Servicing, Liquidation, and Litigation.* Servicing, liquidation, and litigation responsibilities for SBA Express and Export Express Lenders are set forth in Subpart E of this Part.

(c) *SBA's purchase of the guaranteed portion of an SBA Express or Export Express loan.* (1) SBA will purchase the guaranteed portion of an SBA Express or Export Express loan in accordance with § 120.520 and official SBA policy and procedures. An SBA Express or Export Express Lender may not request purchase of the guaranty based solely on a violation of a non-financial default provision.

(2) *How much SBA will pay upon purchase*?—(i) *SBA Express.* SBA will pay a maximum of 50 percent of the total principal balance of the SBA Express loan outstanding after liquidation, including up to 120 days of interest at the rate in effect at the time of the earliest uncured default (if liquidation proceeds collected by the SBA Express Lender were insufficient for the Lender to recover a full 120 days of interest).

(ii) *Export Express.* SBA will pay a maximum of 75 or 90 percent (as applicable) of the total principal balance of the Export Express loan outstanding after liquidation, including up to 120 days of interest at the rate in effect at the time of the earliest uncured default (if liquidation proceeds collected by the Export Express Lender were insufficient for the Lender to recover a full 120 days of interest).

(3) *Release of SBA liability under its guarantee.* SBA will be released from its liability to purchase the guaranteed portion of an SBA Express or Export Express loan, either in whole or in part, in SBA's sole discretion, under any of the circumstances described in § 120.524.

§ 120.447 Lender oversight of SBA Express and Export Express Lenders.

SBA Express and Export Express Lenders are subject to the same risk-based lender oversight as 7(a) Lenders, including the supervision and enforcement provisions, in accordance with Subpart I of this Part.

§ 120.707 [Amended]

■ 15. Amend the last sentence of § 120.707(b) by removing the word ''six'' and add in its place ''seven''.

■ 16. Amend § 120.712 as follows:

■ a. Revise paragraph (b)(1); and

■ b. In paragraph (d) remove the number ''25'' and add in its place the number ''50''.

The revision and addition read as follows:

§ 120.712 How does an Intermediary get a grant to assist Microloan borrowers?

* * * * *

(b) * * *

(1) Up to 50 percent of the grant funds may be used to provide information and technical assistance to prospective Microloan borrowers; provided, however, that no more than 5 percent of the grant funds may be used to market or advertise the products and services of the Microloan Intermediary directly related to the Microloan Program; and

* * * * *

§ 120.840 [Amended]

■ 17. Amend § 120.840 by removing the term ''D/FA'' from the second sentence of paragraph (b) and adding in its place the phrase ''appropriate SBA official in accordance with Delegations of Authority''.

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 18. The authority citation for Part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662, and 649a(9).

■ 19. Amend § 121.301 by:
■ a. Revising paragraph (f)(4);
■ b. Redesignating paragraphs (f)(5), (f)(6), and (f)(7) as paragraphs (f)(7), (f)(8), and (f)(9) respectively;
■ c. Adding new paragraphs (f)(5) and (f)(6) and revising the redesignated (f)(7).

The revisions and additions read as follows:

§ 121.301 What size standards and affiliation principles are applicable to financial assistance programs?

* * * * *

(f) * * *

(4) *Affiliation based on identity of interest.* (i) Affiliation may arise among two or more individuals or firms with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as close relatives, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

(ii) Affiliation arises when there is an identity of interest between close relatives, as defined in § 120.10 of this chapter, with identical or substantially identical business or economic interests (such as where the close relatives operate concerns in the same or similar industry in the same geographic area).

(iii) Affiliation arises through common investments where the same individuals or firms together own a substantial portion of multiple concerns, and concerns owned by such investors conduct business with each other (such as subcontracts or joint ventures), or share resources, equipment, locations or employees with one another, or provide loan guaranties or other financial or managerial support to each other.

(iv) SBA will find affiliation based upon economic dependence if the concern in question derived more than 85% of its receipts from another concern over the previous three fiscal years, unless the concern has been in business for a short amount of time and has a plan to lessen its dependence on the other concern.

(5) *Affiliation based on the newly organized concern rule.* Affiliation may arise where current or former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the original concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. For the purpose of this rule, a ''key employee'' is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern. A concern will be considered ''new'' for the purpose of this rule if it has been actively operating continuously for two years or less.

(6) *Affiliation based on totality of the circumstances.* In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

(7) *Affiliation based on franchise agreements.* (i) The restraints imposed on a franchisee by its franchise agreement generally will not be considered in determining whether the franchisor is affiliated with an applicant franchisee provided the applicant franchisee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. SBA will only consider the franchise agreements of the applicant concern. SBA will maintain a centralized list of franchise and other similar agreements that are eligible for SBA financial assistance, which will identify any additional documentation necessary to resolve any eligibility or affiliation issues between the franchisor and the small business applicant.

(ii) For purposes of this section, ''franchise'' means any continuing commercial relationship or arrangement, whatever it may be called, that meets the Federal Trade Commission definition of ''franchise'' in 16 CFR 436.

* * * * *

■ 20. Amend § 121.302 by revising paragraphs (a) and (b) to read as follows:

§ 121.302 When does SBA determine the size status of an applicant?

(a) The size status of an applicant for SBA financial assistance is determined as of the date the application for financial assistance is accepted for processing by SBA, except for applications under the Preferred Lenders Program (PLP), the SBA Express Loan Program (SBA Express), the Export Express Loan Program (Export Express), the Disaster Loan Program, the SBIC Program, and the New Markets Venture Capital (NMVC) Program.

(b) For PLP, SBA Express, and Export Express, size is determined as of the date of approval of the loan by the Lender.

* * * * *

Dated: September 18, 2018.

Linda E. McMahon,

Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

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Airworthiness Directives; The Boeing Company Airplanes

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