

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: Interim final rule; request for comments.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is amending 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. SBA previously published a Notice of Proposed Rulemaking addressing all of the topics and issues covered by this interim final rule and received extensive comments from the public. SBA is publishing this rule interim final rather than proceeding to a final rule in order to provide the public with an additional opportunity to comment. In addition, the rule will become effective in 30 days but compliance with two of the regulatory changes will not be required until October 1, 2020.

DATES:

Effective date: This rule is effective March 11, 2020.

Compliance date: The compliance date for §§ 103.5(b) and 120.221(a) is October 1, 2020.

Comment date: Comments on this rule must be received on or before April 10, 2020.

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 (*Regulations.Gov* Docket: SBA-2018-0009).

- *Mail:* Rosemarie Drake, Office of Financial Assistance, Office of Capital Access, Small Business Administration, 409 Third Street SW, Washington, DC 20416.

- *Hand Delivery/Courier:* Rosemarie Drake, 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 Rosemarie Drake, 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: Dianna L. Seaborn, Director, Office of Financial Assistance, Office of Capital Access, Small Business Administration, 409 Third Street SW, Washington, DC 20416; telephone: (202) 205-3645; email: Dianna.Seaborn@sba.gov.

SUPPLEMENTARY INFORMATION:**I. Background Information**

The SBA programs affected by this interim final rule are:

1. The 7(a) Loan Program authorized pursuant to Section 7(a) of the Small Business Act (the Act) (15 U.S.C. 636(a));
2. The Business Disaster Loan Programs (collectively, Economic Injury Disaster Loans, Military Reservist Economic Injury Disaster Loans, and Physical Disaster Business Loans) authorized pursuant to Section 7(b) of the Act (15 U.S.C. 636(b));
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.*). (In this interim final rule, the 7(a), Microloan, ILP, and 504 Loan Programs are collectively referred to as the Business Loan Programs.)

On September 28, 2018, SBA published a proposed rule with request for comments in the **Federal Register** to incorporate the requirements related to the SBA Express and Export Express Loan Programs; add a regulation pertaining to the 7(a) and Development Company (504) loan programs regarding when the owners of a small business Applicant are required to inject excess liquid assets into the project; amend certain regulations setting forth the affiliation principles applicable to SBA financial assistance programs; limit certain fees payable by loan Applicants to amounts deemed reasonable by SBA;

clarify the responsibility of a Lender for the contingent liabilities associated with 7(a) loans purchased from the Federal Deposit Insurance Corporation; and, finally, amend certain regulations governing the use of microloan grant funds by Microloan Intermediaries and the maximum maturity of a microloan. (83 FR 49001) The original comment period was scheduled to end November 27, 2018. On November 16, 2018, SBA announced an extension of the public comment period for an additional 15 business days to December 18, 2018. (83 FR 57693)

II. Summary of Comments

During the public comment period, 4,251 comments were submitted, 142 of which were duplicate submissions, meaning an identical comment submitted multiple times by the same commenter.

The comments submitted came from 17 Congressional representatives or State government offices, 48 trade associations or non-profit organizations, 64 Certified Development Companies (CDCs), 86 Agents or Lender Service Providers (LSPs), 259 banks and non-bank lenders, SBA's Office of Advocacy, and 3,635 individuals. The Agency's responses to the Office of Advocacy's comments are included in section III.C below.

The majority of the regulatory changes proposed by SBA, including but not limited to incorporating SBA Express and Export Express Loan Program Requirements, modifying certain regulations concerning the Microloan Program, and technical corrections or conforming amendments, were supported by the commenters with either no opposition or recommendation for minor modifications.

While there were a significant number of comments in opposition to the proposed changes to limit fees that Lenders and Agents may charge small business Applicants in connection with an SBA-guaranteed loan, SBA notes that most of these comments were generated through a single website through which interested parties could submit a public comment to SBA "with one click." This website's electronic mechanism auto-generated a rotating boilerplate comment letter and submitted the comment letter on behalf of the individual who simply had to provide a name, street address, zip code, phone number, and email address. Approximately 54 percent of the total comments received by SBA were comprised of these auto-generated boilerplate comments, and more than 90 percent of the comments received on the proposed changes to the regulations

concerning fees that Agents may charge Applicants in connection with SBA-guaranteed loans were comprised of these auto-generated boilerplate comments. The website promoting these auto-generated comments was created by a coalition made up of small business-focused lenders, facilitators, and associations working with small businesses and entrepreneurs. As discussed more fully in the Section-by-Section Analysis below, the information contained on the coalition's website and communicated on their social media platforms contained significant inaccuracies regarding both the current and proposed SBA rules regarding Agent fees. SBA considered this misinformation by the coalition when reviewing the comments received.

SBA received a large number of comments on the proposed changes to the affiliation principles applicable to the financial assistance programs set out in § 121.301(f). The majority of these comments were in response to the proposed changes to § 121.301(f)(4), which would expand the "identity of interest" basis for affiliation to include businesses with common investments and businesses that are economically dependent. Many commenters who opposed these proposed changes expressed concern that the changes would negatively impact poultry farmers and other agricultural producers.

SBA also received comments from 75 individuals or entities expressing general concerns unassociated with any specific section of the proposed regulations. One concern, expressed by 58 commenters, was related to the determination that the rule is not a "significant" regulatory action for the purposes of Executive Order 12866. Since the end of the public comment period, the Office of Management and Budget has changed the designation of the rule to "significant." In this interim final rule, SBA has amended the Regulatory Impact Analysis and Regulatory Flexibility Analysis to reflect the change in designation.

SBA also received 54 recommendations for the Agency to consider requesting a statutory amendment to increase the maximum size of SBA Express loans from \$350,000 to \$500,000. SBA included a request in the President's fiscal year 2020 budget to increase the maximum SBA Express loan amount to \$1,000,000 and agrees that an increase in the maximum loan size is needed.

SBA received 13 comments that generally opposed the proposed rule as a whole, but none provided specific reasons or explanation for why the

proposed regulations should not be put into place.

Finally, SBA received two comments related to general 7(a) Loan Program policy that were not related to any regulation included in the proposed modifications. SBA will consider those comments when updating future program guidance.

SBA has addressed in detail the comments received on specific proposed regulatory changes within the appropriate Section-by-Section analysis below.

III. Section-by-Section Analysis of Comments and Changes

A. Business Loan Programs

1. SBA Express and Export Express Loan Programs

Section 120.441 SBA Express and Export Express Loan Programs

SBA proposed to add a regulation providing general descriptions of the SBA Express and Export Express Loan Programs.

SBA received 60 comments on this proposed change. Fifty-nine of the comments supported this proposed change with a recommendation that SBA amend this section and other relevant subsections to clarify that SBA's general Loan Program Requirements apply to SBA Express and Export Express loans, except when such requirements are inconsistent with other requirements or guidance provided in SBA Loan Program Requirements specific to SBA Express or Export Express. SBA believes that this recommendation has already been addressed in the regulatory language proposed in § 120.441(a) and (b), which applies to the associated regulations in §§ 120.442 through 120.447. It is repetitive and unnecessary to include this statement in all subsequent related sections.

One commenter expressed concern that SBA granting Lenders unilateral authority to process SBA Express and Export Express loans could "disproportionately affect" women and minority business owners because the proposed regulations do not appear to incorporate necessary safeguards against "stifled growth in urban communities and sustainability for women and other minority businesses within these communities." The commenter did not provide any evidence to support his or her concern. SBA does not agree that delegating loan making authority to lenders disproportionately affects women or minority business owners. The SBA Express and Export Express Programs began operating as pilot

programs in 1995 and 1998, respectively, and were made permanent in 2004 and 2010, respectively. As explained in the description of the programs being added as § 120.441, both programs were designed for Lenders to process loans exclusively under delegated authority and Congress has authorized SBA to permit qualified Lenders to make SBA Express and Export Express loans using, to the maximum extent practicable, their own processes, analyses, and documentation.

SBA is adopting the regulation as proposed.

Section 120.442 Process To Obtain or Renew SBA Express or Export Express Authority

SBA proposed adding a regulation that sets forth the criteria and process to obtain or renew SBA Express or Export Express authority.

SBA received 57 comments on this proposed change. All commenters supported the addition of the regulation. SBA is adopting the regulation as proposed.

Section 120.443 SBA Express and Export Express Loan Processing Requirements

SBA proposed adding a regulation that sets forth the requirements for loan processing under the SBA Express and Export Express loan programs.

SBA received 59 comments on this proposed change. All commenters supported the addition of the regulation. SBA is adopting the regulation as proposed with one modification.

An additional eligibility requirement applicable to Export Express, which has been a part of the Export Express Program since it was established and which is currently set out in SBA's *Standard Operating Procedures 50 10*, Lender and Development Company Loan Programs, as amended from time to time (SOP 50 10), was inadvertently omitted from the proposed rule. This additional eligibility requirement states that, in addition to the eligibility requirements for all 7(a) loans, Applicants for Export Express loans must have been in operation, although not necessarily in exporting, for at least 12 full months. However, Applicants that have been in operation for less than 12 months are eligible if the Lender determines that the Applicant's key personnel have clearly demonstrated export expertise and substantial previous successful business experience, and the Lender processes the Export Express loan using conventional commercial loan underwriting procedures and does not rely solely on credit scoring or credit

matrices to approve the loan.¹ The Export Express Lender must document that the Applicant's key personnel have the requisite experience in exporting. The Export Working Capital Program, which Export Express was based on, has a similar requirement set out in § 120.341.

As one of the stated purposes of the proposed rule was to "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," SBA is modifying § 120.443 to include the additional eligibility requirement applicable to Export Express which was inadvertently omitted in the proposed rule. SBA is adding a new paragraph (b) to incorporate the requirement. SBA is redesignating the remaining paragraphs as (c) through (f).

Section 120.444 Eligible Uses of SBA Express and Export Express Loan Proceeds

SBA proposed adding a regulation to identify the eligible uses of loan proceeds for SBA Express and Export Express loans.

SBA received 59 comments on this proposed change. Fifty-seven commenters supported the addition of the regulation. One SBA Lender commented in opposition to § 120.444(b)(4) which 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." This Lender believes this requirement to be unnecessary and burdensome and instead recommends a risk-based approach, such as having the customer sign an attestation as to the licensing requirements for lower-risk transactions or, for higher-risk transactions, requiring customers to provide a copy of the license(s) or a letter from an export attorney as to why a license is not required. This requirement has always been part of the Export Express Program and, pursuant to the current procedure in SOP 50 10, Export Express Lenders can satisfy this requirement by checking the *Ex-Im Bank Country Limitation Schedule* and, for certain types of Export Express loans, the Department of Treasury's *Office of Foreign Assets Control (OFAC) sanctions list*. SBA is not expanding this requirement and,

therefore, the Agency does not agree that this regulation as proposed will cause any undue burden on Export Express Lenders.

Another Lender expressed concern that while the summary of the proposed change in the preamble to the proposed rule references the SBA Express Lender's responsibility to "take reasonable steps to ensure and document that the loan proceeds are used exclusively for business-related purchases," there is no regulatory language proposed in § 120.444 that describes this requirement. The Lender objected to the language in the preamble, claiming that it would be impractical for the Lender to fulfill any such proposed responsibility "postdisbursement." In addition, the Lender stated that during the loan application and documentation processes, the Applicant already attests that all funds will be exclusively used for business-related purposes. This responsibility is an existing requirement for all Lenders making 7(a) loans, including SBA Express Lenders on SBA Express loans, pursuant to §§ 120.120 and 120.130. SBA's SOP 50 10, Subpart B, Chapter 7 clearly outlines the acceptable documentation with which Lenders may document disbursement. The Lender's responsibility as described in the preamble of the proposed rule references this existing requirement, which SBA is not expanding and, therefore, the Agency does not agree with the commenter's objections.

SBA is adopting the regulation as proposed with two minor technical clarifications to § 120.444(b)(3) to replace "overseas operations" with "operations outside of the United States" and to replace "U.S." with "United States."

Section 120.445 Terms and Conditions of SBA Express and Export Express Loans

SBA proposed 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.

SBA received 59 comments on this proposed regulation, with 57 commenters supporting the addition of the regulation. One individual opposed the provision in § 120.445(g) that prohibits SBA Express and Export Express Lenders from selling the guaranteed portion of an SBA Express or Export Express revolving line of credit

on the secondary market. This commenter argued that any product that has ended its draw period and is in principal and interest repayment should be able to be sold on the secondary market, regardless of delivery method or whether the loan is a line of credit. SBA's existing Loan Program Requirements for all 7(a) loans, including SBA Express and Export Express loans, prohibit revolving loans or line of credit facilities to be sold on the secondary market. SBA appreciates the opinion expressed by this commenter but is not electing to modify this Loan Program Requirement.

One SBA Lender objected to the proposed change 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. This Lender stated that it does not charge an "application fee" in connection with its SBA-guaranteed loans; rather, it charges a "loan fee." Further, this Lender asserted that, if it "will be required to document 'packaging fees' and process the related paperwork and transmittal [to SBA's Fiscal and Transfer Agent]" then the Lender will likely have to increase the fees it charges to Applicants and the Lender's "delivery process efficiency will be impaired." This Lender appears to have misunderstood the proposed changes regarding fees, as well as the current requirements concerning disclosure of fees.

As stated in the preamble to the proposed rule, SBA proposed changes to the fees a Lender is permitted to collect from an Applicant in order to simplify the rules regarding such fees. SBA stated that, regardless of what the fee is called (*e.g.*, a packaging fee, an application fee, etc.), the Lender would be permitted to charge an Applicant a fee up to a certain amount, depending on the loan amount. Thus, whether this Lender calls the fee an "application fee" or a "loan fee," as long as the fee charged does not exceed the maximum set forth in § 120.221(a), the Lender would be permitted to charge the fee. Further, while the proposed rule did not change the requirement that, if the Lender charges an Applicant a fee for assistance with obtaining an SBA-guaranteed loan, the Lender must disclose the fee on SBA Form 159, the proposed rule did eliminate the current requirement that the Lender itemize fees over \$2,500. Thus, if this Lender charges a "loan fee" it would need to disclose the fee on SBA Form 159, but it would not be required to itemize the fee or

¹ Non-bank Lenders that do not have a conventional loan portfolio must submit their underwriting procedures to the Office of Credit Risk Management for written approval prior to making an Export Express loan.

provide supporting documentation. Finally, the requirement to submit the completed SBA Form 159 to SBA's Fiscal and Transfer Agent after there has been an initial disbursement on the loan is a current requirement applicable to all 7(a) Lenders, including SBA Express and Export Express Lenders. SBA disagrees with the Lender's contention that the proposed change will increase the burden on SBA Express and Export Express Lenders and is adopting as proposed the change 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.

With respect to interest rates, SBA stated in the proposed rule that SBA Express and Export Express Lenders may charge up to 4.5 percent over the prime rate on loans over \$50,000 and up to 6.5 percent over the prime rate for loans of \$50,000 or less, regardless of the maturity of the loan, and did not distinguish between fixed or variable interest rate loans. Since the publication of the proposed rule, SBA published a document in the **Federal Register** revising the maximum allowable fixed interest rate for 7(a) loans under 13 CFR 120.213. (83 FR 55478, November 6, 2018) In that **Federal Register** document, SBA set the maximum allowable fixed interest rates for SBA Express and Export Express loans at the same levels as the maximum fixed interest rates allowable for 7(a) loans generally.

Consequently, SBA is modifying § 120.445(d) to differentiate between fixed and variable rate loans and to provide that the maximum allowable fixed interest rate for SBA Express and Export Express loans is the same as the maximum fixed interest rate allowable for 7(a) loans generally as set forth in 13 CFR 120.213. SBA is adopting the remainder of the regulation as proposed.

Section 120.446 SBA Express and Export Express Loan Closing, Servicing, Liquidation, and Litigation Requirements

SBA proposed 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 provided 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. The proposed regulation also described the circumstances under which SBA will honor the guaranty on SBA Express and Export Express loans.

SBA received 59 comments on this proposed regulation, all of which supported its incorporation into the regulations. SBA is adopting the regulation as proposed.

Section 120.447 Oversight of SBA Express and Export Express Lenders

SBA proposed to add a new regulation explaining that SBA Express and Export Express Lenders are subject to the same risk-based lender oversight as other 7(a) Lenders, including supervision and enforcement provisions, in accordance with 13 CFR part 120, subpart I.

SBA received 57 comments on this proposed regulation, all of which supported its incorporation into the regulations. SBA is adopting the regulation as proposed with one minor technical clarification to insert "other" before "7(a) Lenders" and a minor edit to the section heading.

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

To aid SBA Lenders in determining whether an Applicant has access to "credit elsewhere," SBA proposed to reinstitute a "personal resources test." The personal resources test provides SBA Lenders (*i.e.*, both 7(a) Lenders and CDCs) with a bright-line test 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. When an owner of 20 percent or more has liquid assets that exceed stated thresholds, SBA proposed to require an injection of cash from any such owner to reduce the SBA loan amount. SBA proposed specific thresholds setting the required injection of such owners' excess liquid assets based on the size of the total financing package (defined for the purposes of this section as any SBA loans and any other financing, including loans from any other source, requested by the Applicant business at or about the same time). As set forth in SOP 50 10, SBA considers "at or about the same time" to mean loans approved within 90 days of each other.

SBA received 200 comments on this proposed change. Of these comments, 135 expressed concern with this change, including 103 SBA Lenders, 18 individuals, 9 trade associations, 4 Agents, and SBA's Office of Advocacy.

There were a few main concerns expressed by these commenters. Some argued that the personal resources test and required equity injection of excess personal liquid assets should not apply to the 504 Loan Program because Congress already requires an equity injection for 504 loans and because 504 loans are statutorily required to create jobs; therefore, these small businesses need liquidity to meet these objectives. Another concern expressed by many commenters was that compliance with the proposed regulation would be onerous and burdensome for SBA Lenders. Lastly, commenters expressed concern that the personal resources test may limit the resources available to a small business owner in the event of an unforeseen emergency or may eliminate potential borrowers from seeking SBA financing altogether due to owners' aversion to additional equity injections.

SBA disagrees with the argument that the personal resources test should not apply to the 504 Loan Program. Regardless of other program-specific requirements, SBA's statutory responsibility for both financial assistance programs includes ensuring that loans are not made if the Applicant has access to funds from private sources or elsewhere on reasonable terms. Subsequent to SBA's removal of the personal resources test from the regulations in 2014 (79 FR 15641), many SBA Lenders expressed confusion as to how to adequately determine whether a small business has access to credit elsewhere based on personal liquid assets. During SBA Lender reviews, SBA has identified inconsistent and irregular applications of this assessment when the determination was left to the SBA Lender's discretion, including approval of loans to businesses with principals that maintained extremely high levels of personal liquid assets. Reinstatement of the personal resources test will eliminate the ambiguity of the credit elsewhere determination and provide SBA Lenders the certainty they have sought in recent years. With respect to the job creation or retention requirements in the 504 Loan Program, in November 2018, SBA increased the dollar amounts used in calculating the number of jobs that must be created or retained, thereby making it easier for 504 loans to satisfy the statutory job creation requirement. In addition, SBA designated additional areas for application of the higher portfolio

average. (83 FR 55224, November 2, 2018) Thus, SBA already has taken steps to facilitate compliance with the job creation requirements in the 504 Loan Program. Further, while SBA recognizes that the requirement of additional equity injections in the proposed rule may be unattractive to some potential borrowers, SBA proposed to increase the thresholds set forth in the 2014 personal resources test to allow for greater personal liquidity to be maintained by owners.

Sixty-five commenters supported reinstatement of the personal resources test with suggested modifications. The commenters included 53 SBA Lenders, 5 Agents, 3 individuals, 3 trade associations, and 1 member of Congress. While these commenters supported reinstatement, many recommended that the personal liquidity thresholds be modified, especially for smaller loans. Commenters also recommended that SBA more clearly define what assets are considered "liquid" and provide further explanation or additional examples of the extraordinary circumstances that may qualify as an exception to the injection requirement. Additionally, some commenters requested that SBA modify the test to be based on the SBA loan amount, rather than the total financing package, and to apply the test only to individual persons and not entities. Two commenters suggested that SBA consider allowing an alternative to requiring the owner to inject excess liquid assets by allowing the owner to instead pledge the liquid assets as collateral for the loan.

After considering the comments received on this change, SBA has reevaluated the personal liquidity threshold for smaller loans and agrees to modify the limits to ensure that Applicants applying for smaller loans are not adversely affected. SBA is adopting the regulation as proposed for loans greater than \$350,000; however, based on the comments received, SBA is increasing the liquidity that 20 percent or more owners may retain for loans of \$350,000 or less. 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, as defined in SOP 50 10) is \$350,000 or less, each 20 percent owner of the Applicant must inject any liquid assets that are in excess of two times the total financing package, or \$500,000, whichever is greater. (The proposed rule would have required injection of any liquid assets that were in excess of one and three-quarter times the total financing package, or \$200,000, whichever was greater.) SBA also is

modifying the regulatory text to provide that SBA will reexamine the thresholds periodically and, if adjustments are necessary, SBA may modify the thresholds through rulemaking from time to time based on nationally-recognized economic indicators.

SBA is adopting the proposed definition of "liquid assets," with a modification to exclude the cash value of life insurance policies from the definition. The Agency will provide additional examples as to what will or will not be considered "liquid assets" in SOP 50 10. SBA will continue to base the personal resources test on the total financing package, but is adding language to clarify that the phrase "at or about the same time" has the meaning set forth in SBA Loan Program Requirements. (As noted above, SOP 50 10 sets forth that SBA considers "at or about the same time" to mean loans approved within 90 days of each other.) 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 immediate medical expenses of a family member.

3. Permissible Fees That a Lender or Agent May Collect From an Applicant or Borrower in Connection With an SBA-Guaranteed Loan

Section 120.221 Fees and Expenses That the Lender May Collect From an Applicant or Borrower

SBA proposed revisions to paragraphs (a) and (b) of this section. SBA proposed to amend § 120.221(a) to limit the total fees an Applicant can be charged by a Lender for assistance with 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 of 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) and legal fees that are charged on an hourly basis permitted in § 120.221(e), this is the only fee that a Lender may collect directly or indirectly from an Applicant for assistance with obtaining an SBA-guaranteed loan.

SBA received 294 comments on this proposed change. Of these comments, 215 (73 percent) were comprised of 7 different auto-generated templates submitted by individuals and SBA Lenders. Each template varied slightly in wording; however, all template comments opposed the proposed

changes and expressed concern that limiting the fees an SBA Lender may charge to an Applicant will hurt small businesses by forcing Lenders to leave the market for smaller loans of \$350,000 or less.

SBA received 17 other non-automated comments expressing similar concern: 9 from SBA Lenders; 4 from individuals; 3 from trade associations; and 1 from an Agent. Many of these comments echoed the sentiment that the fee limits, specifically for loans of \$350,000 or less, were set too low.

The remaining 62 comments received on this proposed change supported SBA's proposal to clarify the fees that Lenders can charge 7(a) loan Applicants, with modification. These commenters included 52 SBA Lenders, 4 trade associations, 4 Agents, and 2 individuals. While these commenters generally supported the proposed change, they recommended that SBA consider increasing the fee that a Lender may charge an Applicant for a loan of \$350,000 or less.

SBA has considered these comments and agrees to increase the maximum permissible fee a Lender may charge an Applicant for a loan of \$350,000 or less. Regardless of what the fee is called (*e.g.*, a packaging fee, application fee, etc.), the Lender will be permitted to collect a fee from the Applicant that is no more than \$3,000 for a loan up to and including \$350,000 and no more than \$5,000 for a loan over \$350,000.

Based on the comments and SBA's observations during lender reviews, SBA considers the revised 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 fee levels and, if adjustments are necessary, SBA may revise these amounts from time to time through rulemaking.

SBA received several comments on proposed § 120.221 suggesting that SBA modify the circumstances under which SBA may require a Lender to refund excess fee amounts. SBA considered these comments and is modifying the regulatory text to specifically state that SBA may require a Lender to refund any amount charged to an Applicant in excess of what is permitted by SBA in this regulation.

In addition, in accordance with longstanding Agency policy, the Lender may not split a loan into two loans for the purpose of charging an additional fee to an Applicant. Even 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. However, it is not SBA's intention to restrict a Lender from charging a new fee if an Applicant subsequently returns to the Lender to apply for a new loan for a different project or purpose. SBA will provide additional guidance in SOP 50 10 as necessary.

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 § 103.5 and the procedures set forth in SOP 50 10. However, the Lender will no longer be required to itemize the fees charged to the Applicant.

SBA recognizes that some Lenders may need to revise their policies, procedures or documentation in order to comply with the new limits on fees in § 120.221(a). In order to minimize the impact of the change on affected Lenders, SBA is not requiring compliance with revised § 120.221(a) until October 1, 2020. Until that time, Lenders are to continue to comply with the requirements in § 120.221(a) as published in the 2019 edition of the Code of Federal Regulations, and the guidance in SOP 50 10 5(K). However, considering the benefits that the new fee limits offer, SBA expects that many Lenders will want to comply with them before October 1, 2020. They are permitted to do so. SBA recommends that these Lenders document in each loan file their decision to use the new fee limits.

SBA also proposed to amend § 120.221(b) to permit extraordinary servicing fees in excess of 2 percent per year 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 would need to be reasonable and prudent based on the level of extraordinary effort required and could not be higher than the fees charged on the Lender's similarly-sized, non-SBA guaranteed commercial loans.

SBA received 54 comments on this proposed change. All comments supported the amendment to allow different extraordinary servicing fees to be charged in connection with EWCP loans and Working Capital CAPLines that are disbursed based on a Borrowing Base Certificate. However, one commenter noted that the regulatory language proposed makes no mention of the extraordinary servicing fees permissible for other 7(a) loans that may be allowed in certain cases, such as

construction. This commenter recommended that SBA clearly identify that extraordinary servicing fees previously allowed are not impacted by the rule change.

SBA appreciates this comment and agrees that the proposed regulatory language inadvertently omitted the current language in the regulation. It was not SBA's intent to eliminate the permissible extraordinary servicing fees previously allowed in appropriate circumstances for certain 7(a) loans. SBA is adopting the amendment to the regulation and is correcting the inadvertent error that would have eliminated the current language in the regulation.

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

SBA proposed to eliminate the limited exception to the "two master prohibition" currently contained in § 103.4(g). This exception currently applies 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's proposed elimination of this exception would 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 also proposed to revise the remaining text of § 103.4(g) for clarity and to use the defined term "SBA Lender" in the revised regulation to clarify that it applies to both 7(a) Lenders and CDCs.

SBA received 987 comments on this proposal. Of these comments, 915 were auto-generated comments submitted by individuals (*i.e.*, 93 percent of all comments received on this issue). The comments were comprised of 11 templates which varied slightly in wording; however, all template comments opposed the proposed changes and expressed the concern that eliminating an Agent's ability to serve both the SBA Lender and the Applicant would restrict a small business's access to capital, specifically for loans under \$350,000. The commenters asserted that the changes proposed in this section and § 103.5 would force Agents out of the market for loans under \$350,000 and, according to these commenters, without Agents, small businesses would have no other way to gain access to affordable credit from an SBA Lender.

SBA strongly disagrees with the claims and underlying assumptions made by these commenters. Applicants

are in no way obligated or expected to engage a third party or pay for assistance in order to obtain an SBA-guaranteed loan. For those Applicants who would like assistance in applying for a loan, SBA provides several options for free and low-cost assistance through our resource partners, including Small Business Development Centers, Women's Business Centers, Veteran's Business Outreach Centers, United States Export Assistance Centers, SCORE Business Mentors, Lender Match, and local SBA District Offices, which are accessible nationwide. Over the course of five fiscal years (FY2013–FY2017), only 2.78 percent of total approved 7(a) loans reported utilizing an Agent (other than the participating Lender) to provide assistance to an Applicant for a fee. Therefore, SBA disagrees with the claim that small businesses will not be able to obtain SBA loans, or that SBA Lenders will not be willing to make such SBA loans, if the proposed changes to § 103.4 are made final.

SBA received only 12 other comments opposing the proposed change: 4 from associations representing bankers or small business owners; 3 from SBA Lenders; 3 from Agents; 1 from a Member of Congress; and 1 from an individual. These comments aligned with the sentiments of the auto-generated comments, also claiming that the elimination of the limited exception to the "two master" rule would lead to a reduction in small SBA loans and would negatively impact both the small businesses seeking SBA loans and the economic interests of the Agents that serve them.

Five individuals commented that the proposed changes to § 103.4 would eliminate SBA-guaranteed lending to small business poultry farmers. SBA believes these comments were misdirected and intended to be made instead on the proposed affiliation regulations and has included these comments in that discussion later in the Section-by-Section Analysis.

The remaining 55 commenters (47 bank and non-bank lenders, 5 Agents, 2 individuals, and 1 trade association representing government-guaranteed lenders) supported the proposal, with some providing recommendations for improvement. The recommendations for improvement included: Allowing specific and nominal fees to be charged by an Agent to both the Lender and the Applicant; requiring more transparent disclosure of Agent involvement on SBA forms; and defining the terms "Agent" and "Associate" more clearly.

After consideration of the comments received on the proposed change to

§ 103.4(g), SBA continues to believe that 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, which SBA believes should not be permitted under SBA regulations. Therefore, SBA is adopting the proposal to eliminate the limited exception to the “two master” prohibition. No Agent, including an LSP, may provide services to both the Applicant and the SBA Lender and be compensated by both parties in connection with the same loan application.

One commenter, a trade association representing hundreds of government-guaranteed Lenders and other members of the SBA lending community, including Agents, recommended that the regulation include a provision clarifying that “agent” includes any “associates” of the Agent. This would make clear that, for example, an Agent cannot use a separate (but related) entity to circumvent the two master prohibition. SBA agrees that this recommendation is consistent with the intent of the proposed rule and is modifying the regulatory text to add the clarification. For additional clarity, SBA is using the term “Affiliate” of an agent (as defined in § 121.103), rather than “associate.” Further, SBA is adopting the proposal to use the defined term “SBA Lender” in the revised regulation to clarify that this rule applies to both 7(a) Lenders and CDCs.

In addition, based on the comments received, SBA reviewed the definitions in § 103.1 to determine if further clarification of the defined terms is necessary. The rules governing Agents in part 103, including the definitions within § 103.1, were last modified in 1996. Since that time, the number of Agents, including LSPs, as well as their involvement in SBA loan making has increased dramatically. According to Lenders’ reporting of fees charged to an Applicant in connection with obtaining a 7(a) loan, and other information gathered by the Office of Credit Risk Management (OCRM) during lender oversight reviews, the number of loans where an Agent was reported to have been used has increased by an average of 49 percent each year from FY2013 to FY2017 (although the total reported number of such loans is only 2.78 percent of total approved 7(a) loans for such period). Further, advancements in technology have resulted in Agents charging fees for services to both Applicants and SBA Lenders that could not have been considered at the time these rules were last revised. Based on the foregoing, SBA agrees with the commenters that the definitions in part

103 need clarification as to whom SBA considers to be an Agent.

Therefore, in this interim final rule, SBA is clarifying the definitions of the various categories of Agents, including LSPs, Packagers, and Referral Agents for purposes of the business loan programs.²

Specifically, SBA is moving the definitions of LSP, Packager, and Referral Agent into § 103.1(a) (the definition of “Agent”), which will clarify that these are different types of Agents for purposes of the business loan programs. In addition, in the definition of the term “Agent” in § 103.1(a), SBA is replacing the term “person” with “individual or entity,” consistent with the longstanding understanding of that term.

In the definition of LSP, SBA is simplifying the language describing the services that an LSP provides to a Lender. An LSP “assists the Lender with originating, disbursing, servicing, liquidating, or litigating SBA loans.” To further clarify that the LSP may only assist the Lender (and not make decisions on behalf of the Lender), SBA is including in the definition a statement that the Lender bears full responsibility for all aspects of its SBA loan operation, including, but not limited to, approvals, closings, disbursements, servicing actions, and due diligence. This description of the Lender’s responsibility over all aspects of its SBA loan operation is longstanding SBA policy that has been included in SBA’s SOP 50 10. SBA is incorporating this important concept into the definition of an LSP to further clarify the relationship between an LSP and Lender.

SBA also is clarifying in the definition that LSPs may only receive compensation from the Lender and such compensation may not be passed on to the Applicant or paid out of SBA-guaranteed loan proceeds. This conforms the definition of LSP to the proposed change to § 103.5(c) discussed below. This also is consistent with longstanding SBA policy regarding LSPs.

Further, SBA is making a conforming change to the definition of “Packager” to clarify that, going forward, the term will apply only to those Agents who provide packaging services to Applicants. SBA’s SOP 50 10 defines “packaging services” as “assisting the Applicant with completing one or more applications, preparing a business plan,

cash flow projections, and other documents related to the application.” (SOP 50 10 5, Subpart B, Chapter 3, Paragraph VI.) Accordingly, SBA is clarifying that Packagers may only be compensated by the Applicant (as opposed to the Applicant or the Lender as in the current regulation). Agents that provide “loan packaging services” to Lenders are considered to be LSPs, not Packagers. This is because, based on OCRM’s observations during lender oversight reviews, when an Agent provides “loan packaging services” for the Lender, the services provided typically include underwriting and assisting the Lender with its analysis of the application. Because this type of Agent is assisting the Lender with originating loans, it is considered to be an LSP.

SBA also is modifying the definition of “Referral Agent” by changing the term to “Loan Broker” in order to more closely align with the terminology used in the industry. In addition, consistent with the change to the two master prohibition in § 103.4(g) discussed above, SBA is using the term “SBA Lender” to clarify that the defined term “Loan Broker” applies to both 7(a) Lenders and CDCs. The revised definition of Loan Broker will include a statement that a Loan Broker may be employed and compensated by either the Applicant or the SBA Lender, but not both. (The current definition of “Referral Agent” includes a similar statement.)

As a result, an Agent may be both a Loan Broker and a Packager for the Applicant; however, under the two master prohibition in § 103.4(g), an Agent that is a Packager for the Applicant may not also serve as a Loan Broker for the SBA Lender. In addition, SBA is clarifying in the definition that compensation paid to a Loan Broker from an SBA Lender cannot be passed on to the Applicant or paid out of SBA-guaranteed loan or debenture proceeds. Again, this is consistent with longstanding policy that an SBA Lender may not pass on to the Applicant any fees paid by an SBA Lender to an Agent the SBA Lender has employed in connection with an SBA-guaranteed loan.

The above described clarifications to the definitions related to Agents in § 103.1 also will assist Agents and SBA Lenders in properly identifying Agents and their services when completing SBA Form 159 and will provide the transparency requested by commenters.

During the course of lender oversight reviews, OCRM has found arrangements between Agents and Lenders where the Agent and/or Lender assert that the

² The clarifications being made to the definitions in § 103.1 do not affect the use of the terms “packager, agent, or representative” in § 124.4, regarding the 8(a) Business Development Program.

Agent is not an LSP (and, therefore, not subject to the requirements that an LSP Agreement be reviewed by SBA and the prohibition on sharing secondary market premiums). In some instances, although these Agents state they are providing “packaging” and/or “referral services” to the Applicant and being paid out of the guaranteed loan proceeds, the Agent actually is operating under a written contract with the Lender to package and refer Applicants that meet the Lender’s internal credit policies and is providing a fully underwritten loan application to the Lender. In other instances, the “packaging” services the Agent is providing are actually underwriting functions for the Lender (e.g., the Agent is pulling credit reports/credit scores, obtaining IRS tax transcripts, providing financial ratios and analyses, analyzing applicant eligibility). In still other instances, the services are provided by the Agent to the Lender through a software platform and are called “technology services” or a “technology license,” but the “technology” is performing underwriting functions for the Lender.

One Agent asserted in its comment letter that it serves only as a referral and packaging agent for Applicants and that it does not perform any Lender functions on behalf of the bank. This Agent stated that it charges the Applicant a packaging fee of 2 percent of the loan amount and a referral fee of 2 percent of the loan amount. This Agent also stated that it licenses a software platform to banks to assist them with evaluating and processing SBA loans of \$350,000 or less and that, as a technology licensor, the Agent does not perform any Lender functions on behalf of the bank. SBA disagrees with this characterization. Regardless of whether the assistance is provided through technology or otherwise, SBA believes that an Agent who is assisting a Lender with evaluating and processing loans is assisting the Lender with originating loans and, therefore, meets the definition of an LSP.

SBA intends to provide additional guidance on the circumstances under which SBA considers an individual or entity to be an Agent in SOP 50 10. However, in response to comments requesting additional clarity in this rulemaking, SBA is providing the following example of individuals or entities that SBA considers to be Agents and, more specifically, when SBA considers an Agent to be working for an SBA Lender (such Agents cannot also provide services to the Applicant on the same loan application):

- An individual or entity engaged by an SBA Lender to provide services that include interaction with the Applicant, either in-person or through the use of technology, to request or obtain eligibility and/or financial information that will be provided to the SBA Lender for the purposes of obtaining Federal financial assistance. This includes Agents who perform any pre-qualification review based on SBA’s eligibility and credit criteria or the SBA Lender’s internal policies prior to submitting the Applicant’s information to the SBA Lender. This also includes Agents who provide to the SBA Lender an underwritten application, whether through the use of technology or otherwise. In all such cases, the Agent is providing services to the SBA Lender and, therefore, may not also provide services to the Applicant in connection with the same loan.

Further, when determining whether an Agent is considered to be an LSP for the Lender (and therefore required to enter into a written agreement with the Lender, among other requirements), the degree to which a Lender relies on a Loan Broker to generate loan originations may be considered. Again, SBA will provide additional guidance in SOP 50 10.

SBA also intends to include guidance in SOP 50 10 as to when certain entities will not be considered by the Agency to be Agents, such as:

- Entities that license software or software platforms to SBA Lenders solely for the purpose of performing administrative functions (not including any underwriting functions), such as generating SBA-required forms; and
- Entities that develop systems or lending platforms to automate the SBA Lender’s internal loan decision making process for the SBA Lender’s use in determining an Applicant’s eligibility or creditworthiness.

Finally, in response to public comments asking for clarity in the definitions of “Agent” and “Associates,” SBA also is clarifying the definition of “Associate” of a Lender or CDC in § 120.10. The current definition of an Associate of a Lender or CDC includes, among others, “an agent involved in the loan process.” In order to provide more clarity for SBA Lenders and their Associates, SBA is modifying this definition to capitalize the term “Agent” and add a parenthetical to clarify that “an Agent involved in the loan process” means an Agent, as that term is defined in 13 CFR 103.1. This is consistent with SBA’s longstanding interpretation of the definition of Associate in § 120.10.

Some Agents may need to make adjustments to conform to the definitions of the various types of Agents, as clarified in this interim final rule. For example, some Agents may need to enter into LSP agreements with the Lenders they provide services to, and the agreement must be submitted to SBA for review in accordance with § 103.5. (SBA’s SOP 50 10 provides guidance related to the content of LSP agreements and the process to submit the agreement for SBA’s review.) While Agents will not be permitted to provide assistance to both the Applicant and the SBA Lender in connection with the same loan beginning on the effective date of this interim final rule, SBA will permit Agents and Lenders a period of 120 days from the date of publication of this interim final rule in order to enter into an LSP agreement that has been reviewed by SBA. SBA will work with Agents and Lenders to help them meet that deadline.

Section 103.5 How does SBA regulate an Agent’s fees and provision of service?

SBA proposed to revise paragraphs (b) and (c) of this regulation. Section 103.5(b) contains 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 compensation for services provided to an Applicant by an Agent or Agents and to prevent Applicants from being overcharged by Agents, SBA proposed to amend this section to limit the total fees that one or more Agents may charge an Applicant for assistance with obtaining an SBA-guaranteed loan. SBA proposed the following limitations on the fees that an Agent (or Agents) may charge an Applicant:

- *For loans up to and including \$350,000:* A maximum of up to 2.5 percent of the loan amount, or \$7,000, whichever is less;
- *For loans \$350,001–\$1,000,000:* A maximum of up to 2 percent of the loan amount, or \$15,000, whichever is less; and
- *For loans over \$1,000,000:* A maximum of up to 1.5 percent of the loan amount, or \$30,000, whichever is less.

SBA received 2,441 comments on this proposal. Similar to the comments received on § 103.4, 2,343 of these comments were comprised of 26 auto-generated templates (96 percent of the comments received on this issue). Of these comments, 2,242 were submitted by individuals, 70 by Agents, 30 by SBA Lenders, and 1 by a banking association.

Each template varied slightly in wording; however, all template comments opposed the proposed changes and expressed concern that limiting the fees an Agent may charge to an Applicant will restrict a small business's access to capital, specifically for loans under \$350,000.

SBA received 35 non-automated comments that expressed a similar concern with this proposal: 14 from individuals; 7 from SBA Lenders; 6 from associations representing commercial lenders; 5 from Agents; 2 from Members of Congress; and 1 from SBA's Office of Advocacy. These comments expressed concern that the proposed fee limits are set below market rates and, with these caps in place, it would not be economically feasible for Agents to continue to assist small businesses with loans under \$350,000, which would in turn force small businesses to predatory lenders with no other way to gain access to affordable credit from an SBA Lender. These commenters requested that the permitted fee structure remain at the current limits, which as stated in the Summary of Comments above has been inaccurately interpreted by the coalition that created a website to facilitate the auto-generated comments, as well as by many Agents who charge Applicants multiple fees of up to 2 percent of the loan amount for each fee in connection with the same loan application.

The coalition website incorrectly states that SBA currently caps fees an Agent may charge an Applicant at 2 percent for "Referral" and 2 percent for "Packaging" services, for a total of 4 percent of the loan amount, for loans between \$50,000 and \$1,000,000. SBA's current policy regarding fees for loan packaging and other services (including referral fees paid by the Applicant) is that the fees must be reasonable and customary and must be for services actually performed; a standard or flat fee is not acceptable; and for fees charged based on a percentage of the loan amount, the fee may not exceed 2 percent of the loan amount for loans between \$50,000 and \$1,000,000. While some have apparently interpreted SBA's current policy to permit multiple fees exceeding, in the aggregate, the maximum fee amount, SBA does not permit an Applicant to be charged multiple fees, with each fee permitted to be up to the maximum of 2 percent of the loan amount. If an Agent performs multiple services for an Applicant in connection with a loan application between \$50,000 and \$1,000,000 (e.g., packaging and referral services), the total amount the Agent can charge the Applicant for all services may not exceed 2 percent of the loan amount.

Five individuals commented that the proposed changes to § 103.5 would eliminate SBA-guaranteed lending to small business poultry farmers. SBA believes these comments were misdirected and intended to be made on the proposed affiliation regulations and has included the comments in that discussion later in the Section-by-Section Analysis.

The remaining 59 commenters (50 SBA Lenders, 4 Agents, 3 individuals, and 2 trade associations) supported the proposal with recommended modifications. The main recommendation presented to SBA was to increase the maximum fee limit for loans under \$350,000.

Once again, SBA strongly disagrees with the commenters' claims that these proposed fee limits will eliminate access to capital for small businesses seeking small SBA loans. SBA developed the proposed fee limits based on Lender-reported data and other information gathered by OCRM during lender oversight reviews in fiscal years 2013 through 2017. In that period, 288,398 7(a) loans were guaranteed. Of the total 7(a) loans guaranteed, only 8,025 loans, or 2.78 percent of total 7(a) loans guaranteed, reported using an Agent (other than the participating Lender) to provide assistance to the Applicant in securing the loan. Therefore, it is a very small portion of the SBA loan portfolio that will be affected by limits imposed on Agents.

When conducting lender oversight activities, OCRM has found that many SBA Lenders receive findings of non-compliance related to Agent and Lender fees charged to an Applicant. Typically, these findings involve the failure to submit the SBA Form 159 to SBA's Fiscal Transfer Agent in a timely manner, failure to complete SBA Form 159 correctly and/or completely, charging the Applicant for services provided to the SBA Lender by an LSP, or charging the Applicant fees that are not permitted (e.g., for underwriting of the loan). Further, as noted above, many public commenters, including Agents, incorrectly interpret SBA's current fee rules. This demonstrates the lack of clarity of the existing rules governing permissible fees and the need for simplification. SBA believes it can address any confusion among SBA Lenders and Agents by providing a bright-line test for what is considered "reasonable" by the Agency. As discussed more fully below in the Regulatory Impact Analysis, providing this bright-line test will reduce the burden on SBA Lenders and Agents with respect to the time it takes to

review fees and determine whether they are permissible and reasonable.

Based on the foregoing, the Agency reaffirms its decision to set specific limitations on the fees that an Agent or Agents may charge an Applicant for assistance with obtaining an SBA-guaranteed loan. However, in an effort to avoid unintended consequences for loans of \$350,000 or less, SBA is increasing the maximum amount an Agent or Agents may charge an Applicant for those loans. In addition, in order to prevent fees from loans over \$350,000 and up to \$500,000 from having a lower maximum permissible fee than loans of \$350,000 or less, SBA also is revising the lower two ranges. Thus, in this interim final rule, the maximum amount an Agent or Agents may charge an Applicant for assistance with obtaining an SBA-guaranteed loan is as follows:

- *For loans up to and including \$500,000:* A maximum of 3.5 percent of the loan amount, or \$10,000, whichever is less;
- *For loans \$500,001–\$1,000,000:* A maximum of 2 percent of the loan amount, or \$15,000, whichever is less; and
- *For loans over \$1,000,000:* A maximum of 1.5 percent of the loan amount, or \$30,000, whichever is less.

According to SBA's analysis of all loans guaranteed by SBA during FY2013 through FY2017, only 1% of the loans reported fees charged to an Applicant by an Agent (other than the participating Lender) that were in excess of the revised maximums in this interim final rule. It is important to note that all of the fees charged by Agents that were in excess of the revised limits in this interim final rule also were in excess of the current permitted fees, and were therefore not in compliance with current SBA policy.

SBA received several comments suggesting SBA modify the circumstances under which SBA may require an Agent to refund any excess fee amount to the Applicant. SBA considered these comments and is modifying the regulatory text to clearly state that SBA may require an Agent to refund any amount charged to an Applicant in excess of what is permitted by SBA in § 103.5. SBA will monitor these fee levels and, if adjustments are necessary, SBA may revise these amounts from time to time through rulemaking.

Because SBA's primary concern is to minimize the cost for a small business Applicant to obtain an SBA-guaranteed loan, these fee limitations will not apply when an SBA Lender pays fees to an Agent for services in connection with an

SBA-guaranteed loan; however, SBA Lenders are reminded that such fees may not be passed on to the Applicant either directly or indirectly and such fees may not be paid out of SBA-guaranteed loan or debenture proceeds. Also, SBA reiterates that if an Agent provides more than one service (e.g., packaging and referral services) to an Applicant, only one fee is permitted for all services performed by the Agent. Further, if more than one Agent (e.g., a Packager and a Loan Broker/Referral Agent) provides assistance to the Applicant in obtaining the loan, the total amount of all fees that the Applicant is required to pay must not exceed the maximum allowable fee set by SBA. (However, a fee charged to the Applicant by the Lender in accordance with § 120.221(a) will not be counted toward the maximum allowable fee for an Agent or Agents.) These maximum limits apply regardless of whether the Agent's fee is based on a percentage of the loan amount or on an hourly basis.

If an Agent or Agents charge an Applicant fees in connection with obtaining an SBA-guaranteed loan, the Agent(s) 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.

SBA recognizes that some Agents may need to revise their business practices or documentation in order to comply with the new limits on fees in § 103.5(b). In order to minimize the impact of the change on affected Agents, SBA is not requiring compliance with revised § 103.5(b) until October 1, 2020. Until that time, Agents are to continue to comply with the requirements in § 103.5(b) as published in the 2019 edition of the Code of Federal Regulations, and the guidance in SOP 50 10 5(K). However, considering the benefits that the new fee limits offer, SBA expects that many Agents will want to comply with them before October 1, 2020. They are permitted to do so. SBA recommends that these Agents document their decision to use the new fee limits when reporting the fees on SBA Form 159.

In § 103.5(c), SBA proposed to remove the word "directly" from the last sentence to clarify that compensation paid by the SBA Lender to an LSP may not be charged to the Applicant, either directly or indirectly.

SBA received two comments on this proposed change, both from SBA Lenders. Both SBA Lenders expressed concern over the removal of the word "directly" and believed that it could

lead to SBA inaccurately determining fees are indirectly being passed on to the borrower either as part of the interest rate or if, for example, the SBA Lender charges the Applicant a packaging fee.

SBA sets parameters on both the maximum allowable interest rate and permissible fees SBA Lenders may charge an Applicant. As long as the SBA Lender does not charge the Applicant beyond what is permitted, SBA would not consider that fees are being passed on to the Applicant through these means. SBA is adopting the modification to § 103.5(c) as proposed.

4. Loans to Qualified Employee Trusts Section 120.350 Policy

The regulations governing SBA-guaranteed loans to qualified employee trusts or "Employee Stock Ownership Plans" (ESOPs) are set forth in §§ 120.350 through 120.354. Because of the complex nature of these transactions, SBA proposed to amend § 120.350 to require such applications be processed only on a non-delegated basis.

SBA received 78 comments on this proposal. One comment supported the proposed change. The rest of the comments expressed concern with the amendment as proposed. The concerns center around two positions. The first position is that delegated Lenders should be permitted to process ESOP loans under their delegated authority, in line with the spirit of the policy enacted by Congress in Section 862 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) (NDAA FY19), which charges SBA with promoting enhanced employee ownership of small businesses by maximizing their ability to affordably access capital. This position was expressed by 22 commenters, including 10 trade associations, 8 individuals, 3 members of Congress, and 1 SBA Lender.

The second position was whether SBA's decision to require ESOP loans to be processed on a non-delegated basis could be addressed in SBA's SOP 50 10, rather than be incorporated into the regulation. This position was expressed by 55 commenters, including 46 SBA Lenders, 5 Agents, 2 trade associations, and 2 individuals.

SBA considered the comments and the statutory text of the NDAA FY19. The legislation provides the Administrator with the discretion to permit loans to qualified employee trusts and cooperatives to be processed under a Lender's delegated authority. SBA maintains its position that these

transactions are complex in nature and, for the time being, should continue to be processed on a non-delegated basis, as current procedures direct. SBA agrees, however, to eliminate the proposed regulatory change requiring SBA-guaranteed loans to a qualified employee trust to be processed under non-delegated procedures. SBA will maintain the specific processing instruction that ESOP loans must be processed on a non-delegated basis in SOP 50 10 and will monitor the activity of ESOP loans during the initial implementation period of the revised statutory requirements in order to ensure compliance with Loan Program Requirements for such loans.

SBA is, however, making a technical amendment to both § 120.350, Policy, and § 120.352, Use of Proceeds, to incorporate the statutory change made in the NDAA that permits SBA to guarantee a loan to the small business concern (rather than the qualified employee trust), if the proceeds from the loan are used only to make a loan to a qualified employee trust that results in the qualified employee trust owning at least 51 percent of the small business concern. SBA is making this technical amendment in order to ensure that the regulations are not inconsistent with the statute and to provide clarity to SBA Lenders and SBA employees with respect to guaranteed loans involving ESOPs. Additional guidance governing these loans will be provided in SOP 50 10.

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

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

SBA proposed modifying § 120.432(a) to implement its longstanding 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 a Federal Deposit Insurance Corporation (FDIC) loan sale or transferred to an Assuming Institution through a whole bank transfer.

SBA received three comments on this proposed change. One SBA Lender commented in support of the modification. The other two commenters, one banking association representative and one SBA Lender,

objected to the proposed modification, stating that as drafted the proposed change may preclude the Agency from entering into agreements with the FDIC to affirm the validity of the guaranties at the time of such loan sale or whole bank transfer. According to both commenters, the proposed change would create a perception in the minds of qualified purchasers that a large number of guaranties will be denied, thus creating a disincentive for qualified SBA Lenders to enter into such transactions.

SBA proposed this modification to ensure consistent treatment of all portfolio loan transfers whether through voluntary bank mergers or asset sales, or through FDIC-led portfolio transfers following the failure of a Lender. SBA is modifying the regulatory language to include a statement that clarifies the applicability of the paragraph and the ability for the Agency to agree otherwise in writing (*i.e.*, to affirm the validity of the guaranties). SBA also is modifying the regulatory language to remove the specific reference to the FDIC and make it applicable to all 7(a) loans purchased from any Federal or state banking regulator, any receiver, or any conservator.

6. Microloan Program

Section 120.707 What conditions apply to loans by Intermediaries to Microloan borrowers?

SBA proposed to revise the regulation at § 120.707(b) to increase the maximum maturity of a loan from an Intermediary to a Microloan borrower from 6 years to 7 years. SBA received two comments supporting this change. SBA is amending this section as proposed.

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

In § 120.712(b), SBA proposed to incorporate a recent statutory change to the percentage of grant funds that may be used by the Intermediary for marketing, managerial, and technical assistance to prospective Microloan borrowers. In § 120.712(d), SBA proposed to incorporate a 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. SBA received one comment in support of each respective change. SBA is amending this section as proposed.

7. Technical Corrections and Conforming Amendments

Section 120.130 Restrictions on Uses of Proceeds

SBA proposed a conforming amendment to § 120.130 to include a reference to the proposed § 120.444 (Eligible uses of SBA Express and Export Express loan proceeds) to clarify that revolving lines of credit are an eligible use of 7(a) loan proceeds under SBA Express and Export Express. SBA did not receive any comments on this proposal. SBA is adopting the amendment as proposed.

Section 120.222 Prohibition on Sharing Premiums for Secondary Market Sales

SBA proposed a technical correction to § 120.222 to remove an extra word (“in”) that was inserted in error. SBA did not receive any comments on this proposal. SBA is adopting the rule as proposed.

Section 120.344 Unique Requirements of the EWCP

SBA proposed a conforming amendment to § 120.344(b) to ensure that the extraordinary servicing fees charged on EWCP loans, as permitted by the revised § 120.221(b), are reasonable and prudent.

SBA received 53 comments on this section, all in support of the proposed change. SBA is adopting the amendment as proposed.

Section 120.440 How does a Lender obtain delegated authority?

SBA proposed several technical corrections and 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 3 years.

SBA received 54 comments on this proposed change, 1 of which opposed the proposed change and recommended that the SBA Express renewal period remain a 2-year renewal period to remain consistent with other delegated authority renewal periods and to ensure efficient SBA oversight over delegated authorities. While the other 53 commenters expressed a similar concern that an increase in renewal period may conflict with the maximum 2-year renewal period allowed for general delegated authority, they supported the proposal with modification. In order to address this concern, these 53 commenters requested that SBA provide additional information on how delegated authority renewals will be processed when a Lender holds both

SBA Express authority and Preferred Lenders Program (PLP) authority.

SBA considered the comments received and is adopting the amendment as proposed. As a point of clarification, the amendment to this regulation will permit SBA to grant a longer term for renewals of SBA Express authority, not to exceed three (3) years. SBA may continue to grant shorter renewals and SBA’s OCRM will coordinate with those Lenders concerned with maintaining alignment of their SBA Express renewal periods with any other delegated authorities they may hold. SBA will provide additional information on how delegated authority renewals will be processed when a Lender holds SBA Express authority and other delegated authority (*e.g.*, PLP, Export Express) in SOP 50 10.

Section 120.840 Accredited Lenders Program (ALP)

SBA proposed a technical correction to § 120.840 to replace the reference in this section to the Director, Office of Financial Assistance with “appropriate SBA official in accordance with Delegations of Authority.”

SBA received 68 comments on this proposed change. All of these comments recommended that SBA also revise the ALP application requirements outlined in this section under § 120.840(b) to reflect the modernized application submission process, which will allow CDCs to submit ALP applications electronically into the Corporate Governance Repository, rather than apply to the Lead SBA Office.

SBA appreciates the recommendation and agrees to make both the correction proposed by SBA and the revision recommended through public comment in order to reflect SBA’s current ALP application process.

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?

The proposed § 121.301(f) expanded the “identity of interest” 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). This was how the identity-of-interest affiliation rule operated prior to the 2016 rule change that limited such affiliation to “close relatives.” (81 FR

41423, June 27, 2016) SBA's proposal was intended to return SBA's identity-of-interest affiliation rule closer to the pre-2016 rule. SBA received 1,137 comments on this proposed identity-of-interest regulation. Of those, 52 comments supported the rule as proposed, 4 supported the rule with some modifications, and the remainder opposed the rule as written. Most of the comments opposed either the rule change in general or the specific economic-dependence ground of affiliation in § 121.301(f)(4)(iv).

Close relatives. Businesses that are owned by family members may be affiliated under SBA's longstanding close-relatives rule. In 2016, SBA clarified that the rule applies where family members have overlapping business interests and are operating in the same geographic area. In the proposed rule, SBA retained the identity-of-interest ground for affiliation based on close relatives, but moved it to paragraph (f)(4)(ii). SBA is adopting paragraph (f)(4)(ii) of the rule as proposed.

Common Investments. The proposed rule provided that 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. 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. One comment criticized the proposed common investments rule as being better addressed through SBA's program eligibility rules and another comment criticized the proposal as vague.

In response to comments, SBA is limiting the application of affiliation under common investments to firms that operate in the same or related industry. Thus, firms that operate in different, unrelated industries would not be subject to common-investment affiliation.

Additionally, in this common-investments ground of affiliation and several others that follow, SBA adopts a reasonableness standard for reviewing affiliation determinations made by SBA Lenders. SBA acknowledges that some SBA Lenders may have limited

experience in applying some of SBA's more complicated affiliation standards. Thus, in instances in which SBA reviews an SBA Lender's determination that there is no affiliation under the common investments rule, SBA will not overturn the SBA Lender's determination if the SBA Lender's determination was reasonable at the time that the SBA Lender made it, given the information that the SBA Lender had available. For example, if the SBA Lender *reasonably* determined that two firms with common investors with substantial ownership interests were not affiliated because, even though the firms shared employees and locations, the firms were in what the SBA Lender deemed to be unrelated industries, SBA will accept that determination even if SBA would have found the industries to be related if presented with the same facts. SBA's reasonableness standard takes into account that the SBA Lender's determination might not be the same as SBA's, but still would be consistent with the regulation as long as it was reasonable. SBA believes using this standard will provide SBA Lenders with the ability to make a prudent lending decision without concern that their decision, if reasonable, will be second-guessed. SBA Lenders are reminded that they must document their analysis and determination in each loan file.

Economic Dependence. The proposed rule provided that, if a small business Applicant derived more than 85 percent 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. SBA proposed that the rule would include an exception for a firm that has been in business for a short amount of time and has a plan to lessen its dependence on the other concern. In response to comments, SBA is replacing the exception for a firm that has been in business for a short amount of time with two different exceptions in the interim final rule.

The comments raised the issue that economic-dependence affiliation would apply where a seller limited its sales to one buyer because of circumstances unrelated to control. Such circumstances might include situations where, though the terms of its relationship with its single buyer do not restrict selling to other customers, the seller does not have sufficient inventory to do so. For example, the buyer might have several locations or lines of business, and the seller could be selling to multiple locations or business lines under the buyer's control but is not

restricted from selling to other customers. As another example, the seller could be selling exclusively to the Federal Government either through a prime contract or subcontract. Under SBA affiliation principles, affiliation applies only where there is control or the power to control. Therefore, SBA is creating an exception to the economic-dependence rule for contracts that do not restrict the concern in question from selling the same type of products or services to another purchaser. This exception avoids applying the rule to situations where the seller's product only has one buyer or where the seller chooses to sell only to one buyer. This exception replaces the exception in the proposed rule for newly created businesses that have a plan to lessen their dependence on the other concern, which SBA concluded would be too easily circumvented and was not practical to apply in the loan programs.

Many comments expressed concern over how economic-dependence affiliation would apply to an agreement between a poultry farmer and a large poultry producer (integrator) and whether most poultry farmers would be considered ineligible for SBA financial assistance under the provisions of the proposed rule. SBA's proposal was not intended to eliminate lending to poultry and other farmers in the Business Loan Programs. The Small Business Act authorizes SBA to make non-disaster business loans to farming and agricultural related industries and SBA understands the need for SBA financial assistance to small businesses in those industries. SBA also recognizes, however, that integrator agreements generally restrict the poultry farmer from raising another producer's chicks on the same farm and therefore would not qualify for the first exception described above. Accordingly, SBA is creating a second exception to address this circumstance and others where the first exception does not apply.

Under this second exception, an SBA Lender or other party may request SBA to review a contractual relationship where one firm derived more than 85 percent of its receipts over the previous three fiscal years from the other firm, and the contract restricts the seller from selling the same type of products or services to another purchaser. For businesses that have been in operation for less than 1 year, the 85 percent threshold will be applied based on the Applicant's business plan and projected revenues. For businesses that have been in operation for at least 1 year, but less than 3 years, the threshold will be applied based on the receipts for the

period the business has been in operation.

In assessing whether economic-dependence affiliation exists, SBA will review the contract to determine whether, notwithstanding the concentration of sales and the restriction, the buyer does not have control or the power to control the seller. In determining control under these circumstances, SBA will consider the volume of sales that the contract covers, the contract's termination provisions, the risk that the concern in question bears under the contract, the concern's right to profit from its efforts, the rationale for restrictions that the contract places on the small business, and other factors. SBA is making available for public comment on its website guidance on the types of provisions that establish control or do not establish control for purposes of this provision, and the process for requesting SBA review of a contract. The guidance can be found at <https://www.sba.gov/offices/headquarters/oca/spotlight>. If SBA finds no control, SBA will determine that there is no affiliation between the two concerns under the economic-dependence rule. Even where SBA finds no economic-dependence affiliation, SBA Lenders are reminded that they still must ensure that the applicant business meets all other eligibility criteria and they must make a credit determination. SBA will accept comments on the guidance during the 60-day comment period for this interim final rule.

Newly Organized Concerns. In order to create greater uniformity among SBA's various affiliation rules, SBA proposed to add to § 121.301(f) a newly organized concern rule, similar to the one which had applied to the Business Loan Programs prior to the 2016 rule change. 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 four 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 defined 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 defined 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.

SBA received 130 comments on this proposed regulation. Three commenters, consisting of two SBA Lenders and one non-profit organization, were supportive of the proposed rule. The remaining 127 commenters expressed concern with the proposed regulation. Commenters observed that the newly organized concern rule included several undefined terms and could hamper a new firm's ability to recruit employees. SBA agrees that it can provide greater clarity with respect to the undefined terms and can simplify the rule to make it easier to apply and to ensure that recruitment or hiring efforts are not adversely affected by the rule. In the interim final rule, in response to the comments, SBA is replacing the term "principal stockholders" with the term "owners of a 20 percent interest or greater" (in conditions number (1) and (3) above). SBA also is replacing the term "key employees" with "persons hired to manage day-to-day operations" in the list of affected individuals in the original concern (in condition number (1) above), and is deleting the term "key employee" from the list of affected individuals in the new concern (in condition number (3) above). Therefore, a new firm can hire anyone, including a former owner or key employee of another firm, as an employee without the employee causing affiliation under the newly organized concern rule. Due to these changes, SBA is eliminating the definition of "key employee" from the regulatory text, as it is no longer necessary.

SBA also is revising the interim final rule with respect to the benefits that flow from the original concern to the new concern (in condition number (4) above). Rather than applying the newly organized concern rule based on whether 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, SBA is revising the regulatory text so

that the newly organized concern rule only applies when direct monetary benefits flow from the new concern to the original concern. It is not SBA's intent to apply the rule where the original concern does not receive direct monetary benefits from the new concern. Examples of direct monetary benefits would include profit or revenue sharing agreements or royalty payments. Further, SBA will not consider the referral of business without compensation to constitute "direct monetary benefits." In addition, in the definition of a new concern, SBA is deleting the term "continuously," because that term might cause confusion for businesses that operate on a seasonal or intermittent basis.

Finally, in the newly organized concern ground of affiliation, SBA adopts a reasonableness standard for reviewing affiliation determinations made by SBA Lenders. In instances in which SBA reviews an SBA Lender's initial determination that there is no affiliation under the newly organized concern rule, SBA will not overturn the SBA Lender's determination if it was reasonable at the time it was made, given the information that the SBA Lender had available. For example, if the SBA Lender reasonably determined that the new firm's owners were corporate officers of another firm, but that the benefits flowing from the new firm to the other firm are not direct monetary benefits, SBA will accept the determination even if SBA would have found the benefits to be direct monetary benefits if presented with the same facts. SBA's reasonableness standard takes into account that the SBA Lender's determination might not be the same as SBA's, but still would be consistent with the regulation as long as it was reasonable. SBA believes using this standard will provide SBA Lenders with the ability to make a prudent lending decision without concern that their decision, if reasonable, will be second-guessed. SBA Lenders are reminded that they must document their analysis and determination in each loan file.

Totality of the Circumstances. The proposed rule added a new paragraph (f)(6) to § 121.301 to explain that, when making affiliation determinations, SBA would 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 from the regulations in 2016. At that time, SBA stated that, generally, examples of when this criterion was used involved negative control or control through management

agreements. Thus, in 2016, SBA provided additional specific guidance in § 121.301(f)(1) and (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 but not covered by the specific affiliation rules and, therefore, proposed to reinstate the totality of the circumstances criterion. In proposing to reinsert the criterion in the regulations, SBA provided two examples of where the totality of the circumstances test would result in a finding of affiliation.

SBA received 146 comments on this proposed change. Four commenters, comprised of three individuals and one non-profit organization, expressed support of the proposal. These comments expressed the same opinion, that it is critical for SBA to consider the totality of the circumstances in determining affiliation, specifically with respect to contracts and agreements between poultry farmers/growers and poultry integrators.

The remaining 142 comments were submitted by 117 SBA Lenders, 10 individuals, 8 Agents, and 7 trade associations. These comments expressed concern that the totality of the circumstances test could result in arbitrary and unpredictable application of SBA's affiliation rules. SBA believes that this overstates the potential reach of the totality of the circumstances rule. The rule is merely an application of the general principle that affiliation is caused by control or the power to control of one firm by another, or common control of multiple firms. There may be instances of control that are not covered by the specific grounds of affiliation, and the totality of the circumstances test merely states that those instances are not exempt from affiliation analysis. For example, the relationship between a recording artist and a record company might cause affiliation if the record company has exclusive rights over the recording artist and closely controls the activities of the recording artist, but none of the specific grounds of affiliation would reach that relationship necessarily. As another example, a firm's operating agreement might require that the firm obtain approval from a third party prior to making certain decisions that typically are made independently by firms in that industry in the ordinary course of business. This approval requirement might grant the third party control over the firm and could result in affiliation under the totality of the circumstances, even though none of the specific grounds of affiliation might apply. The totality of the circumstances test should

not reach routine and typical business relationships, however.

In order to address concerns raised by the commenters, SBA is modifying the regulatory language to provide that, when applying the totality of the circumstances test, SBA may consider all connections between the Applicant business and a possible affiliate and, if no single factor is sufficient to constitute affiliation, SBA may determine on a case-by-case basis that affiliation exists when there is "clear and convincing evidence" based on the totality of the circumstances. Further, as with the common investments rule and the newly organized concern rule, SBA is adopting a reasonableness standard for reviewing affiliation determinations made by SBA Lenders under the totality of the circumstances rule. For the totality of the circumstances rule, SBA will not overturn the SBA Lender's determination if it was reasonable at the time it was made, given the information that the SBA Lender had available. For example, if the SBA Lender *reasonably* determined that a firm whose day-to-day operations required the approval of a minority owner in some situations was not affiliated with the minority owner, SBA will accept that determination even if SBA would have found the firm and the minority owner to be affiliated in the first instance. SBA Lenders are reminded that they must document their analysis and determination in each loan file.

121.301(f)(7) Affiliation Based on Franchise Agreements

SBA proposed to revise this paragraph 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 part 436. SBA proposed 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 would 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 proposed to add to this regulation a statement that SBA will maintain a publicly available centralized list of franchise and other similar agreements that are eligible for SBA financial assistance, consistent with SBA's current policy and procedure.

SBA received 125 comments on this proposed change, all of which supported the proposal. Two of the 125 commenters also recommended that SBA expand paragraph (7) to define the

relationship between poultry or swine farmers and their integrators. In addition, these 2 commenters suggested that, in order to expedite the approval process, SBA should maintain a centralized list of integrator agreements in the same manner as franchise agreements. SBA appreciates the recommendation, but is not going to expand the principle of affiliation based on franchise or license agreements to include integrator agreements or maintain a separate centralized list of agreements between poultry or swine farmers and their integrators at this time. SBA has discussed how the relationships between poultry or swine farmers and their integrators will be reviewed in the section above on economic-dependence affiliation. SBA is adopting paragraph (7) as proposed.

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

SBA proposed 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. SBA did not receive any comments on this proposal. SBA is adopting the regulation as proposed.

C. Agency Responses to the Office of Advocacy's Comments on the Proposed Rule

1. Proposed Fee Caps

SBA's Office of Advocacy expressed concern that, although the proposed fee caps will reduce the fees that small businesses pay to obtain a loan, some members of the public believe that the proposed caps will hurt small banks and possibly eliminate the incentives to facilitate small SBA loans that small businesses need. Advocacy also expressed concern that SBA is attempting to address a problem that is being created by a few bad actors, and that in doing so SBA may discourage the facilitation and use of SBA's products. SBA does not agree that the proposed fee limits will hurt small SBA Lenders, as the Agency believes the changes in these rules will simplify the rules regarding fees and will reduce the burden on all SBA Lenders, including small SBA Lenders. (For additional discussion of the estimated reduction in the burden on SBA Lenders, see the discussion in the Regulatory Impact Analysis and Regulatory Flexibility Act sections below.) Further, as Advocacy acknowledges in its comment letter, in approximately 96 percent of the loans

guaranteed during FY2013–FY2017, Applicants were charged fees (by Lenders and Agents) that were less than the maximum fees in the proposed rule. As discussed earlier in the Section-by-Section Analysis, in consideration of the comments received and in order to ensure there are no unintended consequences for smaller loans, SBA has increased the maximum fees that both Lenders and Agents will be permitted to charge Applicants in connection with smaller loans. When the revised fee limits for smaller loans in the interim final rule are taken into consideration, the percentage of loans guaranteed in FY2013–FY2017 with fees less than the permitted maximums increases to nearly 99%.

In addition, recognizing that some SBA Lenders and Agents, including LSPs, may need to revise their practices, policies, procedures, or documentation to comply with revised § 103.5(b) or § 120.221(a), SBA is not requiring compliance with those provisions until October 1, 2020. As discussed more fully in the Regulatory Flexibility Act section of this interim final rule, SBA believes the extended period for SBA Lenders and Agents to comply with those sections of the interim final rule will help to minimize any potential adverse effects on small SBA Lenders and Agents. Further, with the modifications to the maximum permitted fees made in this interim final rule and the extended time period for compliance, the Agency believes it has addressed any concern that small SBA Lenders will be unable to find Agents to assist them with facilitating SBA-guaranteed loans. Finally, as noted earlier in the Section-by-Section Analysis, SBA provides several options for free or low-cost assistance through its resource partners, which are accessible nationwide.

2. The Personal Resources Test

The Office of Advocacy expressed concern that the proposed reinstatement of a personal resources test will limit the resources available to a small business owner in the event of an emergency. Additionally, Advocacy expressed concern that the proposed personal resources test would eliminate potential borrowers and be difficult to include in the current underwriting practices of small financial institutions. Advocacy encouraged SBA to consider a contribution level that will allow small businesses to have a buffer in the event of unforeseen circumstances. After considering the comments received on this change, SBA has reevaluated the personal liquidity threshold for smaller loans and agrees to

modify the limits to ensure that Applicants applying for smaller loans are not adversely affected.

In this interim final rule, SBA has increased the threshold for loans of \$350,000 or less to allow the owners of the small business Applicant to retain more personal liquidity. SBA also is modifying the regulatory text to provide that SBA will reexamine the thresholds periodically and, if adjustments are necessary, SBA may modify the thresholds through rulemaking from time to time based on nationally-recognized economic indicators. Also, the regulation will provide SBA with the ability to permit exceptions to the required injection of an owner's excess liquid assets in extraordinary circumstances, such as when the excess funds are needed for immediate medical expenses of a family member. With respect to Advocacy's concern that small financial institutions will have difficulty implementing this change, as discussed in the Regulatory Impact Analysis below, SBA believes that providing a bright-line test will assist SBA Lenders in analyzing 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. This bright-line test will reduce the burden on SBA Lenders when making this critical eligibility determination. In addition, SBA notes that a personal resources test was in SBA's regulations until 2014, so SBA Lenders have experience applying such a test and should not have difficulty implementing this change.

3. Affiliation

The Office of Advocacy expressed concern that the affiliation sections of the proposed rule may be vague and confusing to small entities. In addition, Advocacy expressed concern that the proposed changes may be problematic in small rural communities that rely on contracts with large companies/integrators to buy agricultural goods. Advocacy encouraged SBA to clarify the proposed changes.

As discussed more fully in section III.B. above, in this interim final rule, SBA has clarified several of the proposed changes, including the common-investments affiliation rule, the economic-dependence affiliation rule, the newly organized concern affiliation rule, and the totality of the circumstances affiliation rule. Specifically, in order to ensure there would be no adverse impact on rural areas or small agricultural businesses, SBA added a second exception to the

economic-dependence affiliation rule for businesses operating under contracts that restrict the seller from selling the same type of products or services to another purchaser. Under this second exception, an SBA Lender or other party may request SBA to review the contractual relationship between the large company/integrator and the small business Applicant to determine whether affiliation exists.

4. Additional Outreach

The Office of Advocacy encouraged SBA to perform additional business outreach with the industries that may be impacted by the proposed rule to determine the best way to implement changes that will achieve SBA's goals without being unduly burdensome. As discussed more fully in the Regulatory Impact Analysis and Regulatory Flexibility Analysis below, SBA believes it has received sufficient input and feedback from program participants and other stakeholders to implement the proposed changes, with the modifications identified in this Section-by-Section Analysis, in a manner that will reduce the burden on those participants and stakeholders and provide meaningful benefits to small business Applicants. Nevertheless, SBA is publishing this rule interim final rather than proceeding to a final rule in order to provide the public with an additional opportunity to comment. See Justification for Interim Final Rule below. SBA will consider comments submitted during the 60-day comment period and address them in a Final Rule.

D. Severability

The provisions of this interim final rule are separate and severable from one another. If any provision is stayed or is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it is SBA's intention that the remaining provisions of the interim final rule will remain in effect.

Justification for Interim Final Rule

SBA finds that good cause exists to publish this rule as an interim final rule. As discussed above, SBA previously published a Notice of Proposed Rulemaking (NPRM) addressing all of the topics and issues covered by this interim final rule. SBA has already allowed for public comment (including an extension of the original comment period), reviewed the comments, and made changes accordingly. SBA has determined that the changes made in this rule are a logical outgrowth of the proposed rule and the comments received on the proposed rule.

Procedurally, SBA could therefore issue a final rule; however, SBA is publishing this rule interim final rather than proceeding to a final rule in order to provide the public with an additional opportunity to comment. Although not legally required, the additional opportunity to comment on the interim final rule is desirable given the level of interest in the proposed changes and the recommendation by the Office of Advocacy for additional outreach to affected parties.

SBA invites public comment on this interim final rule and will consider amendments to the rule based on comments submitted during the 60-day comment period. SBA will address any comments through the publication of a Final Rule.

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

Executive Order 12866

As referenced above, the Office of Management and Budget (OMB) has determined that this interim final rule is a “significant” rulemaking for the purposes of Executive Order 12866. Accordingly, the next section contains SBA’s Regulatory Impact Analysis. However, 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 primary objective of this interim final rule is to 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. 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 (Pub. L. 115–189) 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 is implementing that legislation in a separate rulemaking, but in this interim final rule SBA is reinstating a personal resources test in an effort to provide clear direction to SBA Lenders for analyzing whether a borrower has credit available elsewhere on reasonable terms from non-Federal, non-state, non-local, or alternative sources. Many SBA Lenders expressed confusion and sought guidance from SBA on how to adequately determine whether a small business had access to credit elsewhere based on personal liquid assets. This interim final rule will provide a bright-line test to assist SBA Lenders in analyzing 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 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 Loan Program Requirements and reduce regulatory burdens to facilitate robust participation in the business loan programs that assist small U.S. businesses, particularly those small businesses in underserved markets. For that reason, SBA has modified regulatory provisions related to allowable fees that a Lender or an Agent may collect from an Applicant for financial assistance. It is clear to the Agency, based on results from reviews conducted by OCRM, public comments received in response to the proposed rule, and technical assistance requests received by SBA from SBA Lenders and Agents, that confusion is widespread across the industry regarding what fees Agents and Lenders may charge to an Applicant. In this interim final rule, SBA is simplifying the regulations applicable to Agents, as well as the fees that Agents and Lenders may charge to Applicants for assistance with obtaining an SBA-guaranteed loan, in order to provide more clarity to the industry.

The interim final rule also revises the affiliation principles applicable to the Business Loan, Disaster Loan, and Surety Bond Guarantee Programs in order to simplify and clarify the

determination of eligibility of a business as a small concern and to ensure that only small independently owned and operated businesses benefit from SBA’s small business financial assistance programs.

SBA does not expect the proposed changes to change loan volume significantly. Overall program participation is driven by broad economic activity, making it difficult to attribute increased or decreased loan volume to a particular cause. The overriding public policy objective of the rule changes is the creation of economic efficiencies and compliance in program participation. The codification of the rules for delivering SBA Express and Export Express loans will provide Lenders with confidence as the requirements will be found in regulation as opposed to Agency procedural guidance. The inclusion of the SBA Express and Export Express guidance may positively impact small loan volume.

SBA expects that the additional detailed clarity on the requirements for program delivery in the subject areas of this rule would increase understanding for program users, decrease time spent qualifying small business Applicants, and result in a reduction of overall cost to participants.

The interim final rule changes for the codification of the SBA Express and Export Express Loan Program Requirements and for the Personal Resources Test impact the Lenders directly, and would not be considered a transfer to or from Applicants as the Lender currently bears responsibility for determining eligibility. The interim final rule changes relative to Lender and Agent fees reduce or limit the fees a small business Applicant may expend to gain access to the loan guarantee programs, which benefits the Applicant. This also potentially transfers an economic benefit between Lenders and Agents because Lenders, given the authority to charge an SBA-controlled fee to Applicants, may choose to provide application services through either internal lending staff or outsourced Agents. In either case the Lender’s decision is driven by cost effectiveness and efficiency.

The interim final rule changes for affiliation determinations provides detailed guidance for the Lender charged with determining the size of a small business Applicant. This currently is and will continue to be the responsibility of the Lender, who will benefit from the time savings in making the eligibility determination. The benefits further transfer or inure to the Applicant via streamlined loan

processing. SBA believes that the interim final rule presents the optimum net benefit to the overall affected population of small entities (i.e., small business Applicants, small Lenders, and small Agents). For instance, receipt and consideration of the public comments prompted SBA to adopt a more generous fee structure than was originally proposed.

Baseline Scenario

The interim final rule will provide clear and streamlined guidance to loan program participants. In order to estimate the net economic impact of this interim final rule on stakeholders, an approximation of the change in behavior of Applicants, SBA Lenders, and Agents is needed. The effects of the interim final rule are estimated relative to a baseline, and where the regulatory changes are required by statutory requirements, the analysis uses a pre-statutory baseline to determine impact in the analysis. The baseline represents the state of SBA’s financial assistance programs in the absence of this final regulatory action.

Based on lender oversight reviews by SBA’s OCRM, fees charged to Applicants by Agents have increased dramatically in the past few years (although the total reported number of loans that reported using an Agent is only 2.78 percent of total approved 7(a) loans over a five year period) and some Applicants have been charged fees by Lenders and Agents that are not permissible under SBA’s current Loan Program Requirements. In addition, OCRM has observed that there is confusion by both Lenders and Agents as to who can charge fees to an Applicant, for which services, and how much can be charged. In the absence of this final regulatory action, the cost of financial assistance may continue to rise for those loan Applicants who opt to use

the services of Agents, including Packagers and other similar providers, despite free and low-cost assistance and resources made available by SBA. The costs incurred by OCRM when conducting lender oversight reviews involving issues related to fees also would continue to rise, with some of those costs being passed on to Lenders.

In addition, many SBA Lenders struggle with making the determination of credit elsewhere and identifying when an Applicant’s owners have excess personal liquidity that could affect their eligibility for SBA financial assistance. SBA has identified some examples of loans made to businesses with owners who have extremely high amounts of personal liquid assets. Without this final regulatory action, SBA Lenders and small businesses may continue to take advantage of government/taxpayer funded financial assistance programs and SBA Lenders may continue to erroneously make loans to businesses that do not meet SBA’s lending criteria.

Finally, under the current affiliation rules, some businesses have been considered to be small when they should have been combined as affiliates and may, in fact, be large. This has allowed some businesses that are not considered “small businesses” to receive SBA financial assistance. SBA’s Office of Inspector General (OIG) published a report in March 2018 on SBA 7(a) Loans Made to Poultry Farmers and recommended that the Agency review the arrangements between integrators and growers and establish and implement controls, such as supplemental guidance, to ensure that SBA loan specialists and lenders make appropriate affiliation determinations. SBA reviewed its regulations and determined that the regulations should be modified to clarify the meaning of affiliation in the

context of contractual relationships, so that only independently owned and operated small businesses continue to receive SBA financial assistance. In the absence of this final regulatory action, this needed clarification will not be provided.

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

Benefits to SBA Lenders, Applicants, and Agents

The greatest benefit from this interim final rule to all program participants, including SBA Lenders, Applicants, and Agents, is clear regulatory guidance and bright-line tests to increase efficiency. SBA anticipates that incorporating the SBA Express and Export Express Loan Programs into the regulations governing the 7(a) Loan Program may 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 Lenders will be provided with bright-line tests for making certain determinations about eligibility which will eliminate the ambiguity and uncertainty that has hindered some SBA Lenders in recent years. Reinstating the personal resources test, in particular, will aid SBA Lenders in making the determination of an Applicant’s access to credit elsewhere, which will increase efficiencies and reduce the efforts currently required by the Agency to provide assistance due to the subjectivity of the analysis in the prior rule. SBA Lenders will be more confident in their loan making with a better understanding of SBA’s expectations. SBA estimates that the reinstatement of the personal resources test at section § 120.102 will save SBA Lenders a total of approximately 67,000 hours annually, monetized to \$2,456,890 per year.

TABLE 1—ESTIMATED ANNUAL BENEFIT TO SBA LENDERS FROM PERSONAL RESOURCES TEST

Outcomes	Number of expected occurrences per year	Average time saved per occurrence (hours)	Total benefit
Increased efficiency in determining credit elsewhere ..	67,000	1–2	67,000–134,000 hours, \$2,456,890–\$4,913,780.
Estimated Annual Benefit .....	.....	.....	67,000–134,000 hours, \$2,456,890–\$4,913,780. ¹

¹ SBA arrived at this estimate by inquiring with various Lenders as to the average time required to determine an Applicant’s access to credit elsewhere. SBA calculated the average of the timeframes provided to estimate the range of time the personal resources test will save SBA Lenders, on average, in their analysis. Since each loan is required to address an Applicant’s access to credit elsewhere, the number of expected occurrences per year was estimated by using the average number of 7(a) and 504 loans guaranteed in the most recent five fiscal years (2014–2018), according to SBA’s 7(a) and 504 loan data reports. The number of expected occurrences per year was multiplied by the average time saved per occurrence to estimate the total hourly benefit. The cost benefit was estimated by multiplying the hours saved by the mean hourly wage for a loan officer, as reported by the U.S. Department of Labor’s Bureau of Labor Statistics as of May 2018 (\$36.67).

The clear limitations on fees an Agent or Lender may charge to an Applicant leave no question as to what fees SBA considers to be reasonable. Further, the revisions to the definitions of Agents and Associates of Lenders and CDCs also will provide clarity as to whom SBA considers an Agent and what

services the different types of Agents may perform and be compensated for by the Applicant or the SBA Lender. This will save SBA Lenders and Agents time in making these determinations for each loan. In addition, 7(a) Lenders will no longer be required to itemize fees charged to Applicants when the amount

is over \$2,500, which also will save these Lenders time. Applicants will benefit from protection against impermissible or unreasonable costs for assistance with obtaining an SBA-guaranteed loan and may become more aware of the free and low-cost resources provided by the Agency.

TABLE 2—ESTIMATED ANNUAL BENEFIT TO SBA LENDERS AND AGENTS FROM FEE LIMITS

Outcomes	Number of expected occurrences per year	Average time saved per occurrence (hours)	Total benefit
Increased efficiency for SBA Lenders when determining permissibility and reasonableness of fees.	67,000	0.5–1	33,500–67,000 hours, \$1,228,445–\$2,456,890.
Increased efficiency for Agents determining permissibility and reasonableness of fees.	1,605	0.5–1	803–1,605 hours, \$29,446–\$58,855.
Increased efficiency for 7(a) Lenders no longer required to itemize fees.	60,951	0.5–1	30,476–60,951 hours, \$1,117,555–\$2,235,073.
Estimated Annual Benefit .....	.....	.....	64,779–129,556 hours, \$2,375,446–\$4,750,818. ²

² SBA arrived at this estimate by inquiring with various Lenders as to the average time required to determine the reasonableness and permissibility of all fees charged to an Applicant for assistance with obtaining an SBA-guaranteed loan. SBA calculated the average of the timeframes provided to estimate the range of time SBA Lenders will save, on average, in determining permissible and reasonable fees with the bright-line tests included in this interim final rule, which SBA estimates would be the same for an Agent. The number of expected occurrences per year for SBA Lenders is estimated based on the average number of 7(a) and 504 loans guaranteed in the most recent five fiscal years (2014–2018), according to SBA’s 7(a) and 504 loan data reports. The total number of guaranteed loans is used, versus the number of loans identified to have charged fees as discussed in the preamble of this rule, because SBA Lenders must review every loan application to determine whether any fees were charged to an Applicant and, if so, whether the fees are permissible and reasonable. Because Agents are not involved in every SBA-guaranteed loan, the number of expected occurrences per year for Agents is estimated based on averaging the total number of loans identified to have used an Agent (other than the participating Lender) in fiscal years 2013–2017. The number of expected occurrences per year for 7(a) Lenders no longer being required to itemize fees is based on the average number of 7(a) loans guaranteed over the most recent five fiscal years. The number of expected occurrences per year for each outcome was multiplied by the average time saved per occurrence to estimate the total hourly benefit. The cost benefit was estimated by multiplying the hours saved by the mean hourly wage for a loan officer, as reported by the U.S. Department of Labor’s Bureau of Labor Statistics as of May 2018 (\$36.67).

Finally, by modifying the principles of affiliation, the Agency and SBA Lenders will be better able to uphold the Agency’s statutory obligation to provide financial assistance only to businesses

determined to be small. Further, SBA Lenders will be provided with assistance from the Agency in making determinations of affiliation for businesses with certain types of

contractual relationships, such as poultry farmers, which will provide additional needed clarity with regard to affiliation in the financial assistance programs.

TABLE 3—ESTIMATED ANNUAL BENEFIT TO SBA LENDERS AND SURETIES FROM MODIFIED PRINCIPLES OF AFFILIATION

Outcomes	Number of expected occurrences per year	Average time saved per occurrence (hours)	Total benefit
Increased efficiency in determining affiliation	77,000	2–4	154,000–308,000 hours, \$5,647,180–\$11,294,360.
Estimated Annual Benefit .....	.....	.....	154,000–308,000 hours, \$5,647,180–\$11,294,360. ³

³ SBA arrived at this estimate by inquiring with various Lenders as to the average time required to determine affiliation. SBA calculated the average of the timeframes provided to estimate the range of time SBA Lenders will save, on average, in determining affiliation with the guidance provided in this interim final rule. Since an affiliation determination must be made for each application for SBA financial assistance, the number of expected occurrences per year for SBA Lenders and Sureties was estimated by using the average number of 7(a) and 504 loans and the average number of Bid and Final Bonds guaranteed during the most recent five fiscal years (2014–2018), according to SBA’s 7(a) and 504 loan data reports and information on surety bonds entered into SBA’s Capital Access Finance System. The total number of expected occurrences for loans and surety bonds per year was multiplied by the average time saved per occurrence to estimate the total hourly benefit. The cost benefit was estimated by multiplying the hours saved by the mean hourly wage for a loan officer, as reported by the U.S. Department of Labor’s Bureau of Labor Statistics as of May 2018 (\$36.67).

SBA expects these benefits to be realized immediately upon enactment of the interim final rule and should remain the same each year thereafter, subject to changes in number of loans and hourly rates.

Benefits to SBA

Like the program participants, SBA will benefit from the clear regulatory guidance and bright-line tests included in this interim final rule, especially when performing lender oversight activities. OCRM will realize increased efficiencies in conducting loan file

reviews of SBA Lenders. With the reinstatement of the personal resources test, clear limitations on fees an Agent or Lender may charge to an Applicant, revised definitions of Agents and Associates of Lenders and CDCs, and simplified affiliation principles, SBA has removed the subjectivity of a

Lender’s assessment of these issues, which will improve SBA Lenders’ compliance and will allow OCRM to develop more efficient methods of

testing SBA Lenders’ compliance. In addition, the removal of the requirement that a Lender itemize fees charged to an Applicant when the fee is over \$2,500,

also will reduce the burden on OCRM of reviewing these additional documents.

TABLE 4—ESTIMATED ANNUAL BENEFIT TO SBA FROM INTERIM FINAL RULE

Outcomes	Number of expected occurrences per year	Average time saved per occurrence (hours)	Total benefit
Increased efficiency in reviewing credit elsewhere assessment.	2,000	0.25–0.5	500–1,000 hours, \$18,375–\$36,750.
Increased efficiency in reviewing fees charged to Applicants.	1,300	0.5–1	650–1,300 hours, \$23,888–\$47,775.
Increased efficiency in reviewing Lender’s affiliation determination.	2,000	0.25–0.5	500–1,000 hours, \$18,375–\$36,750.
Estimated Annual Benefit .....	.....	.....	1,650–3,300 hours, \$60,638–\$121,275. ⁴

⁴SBA developed this estimated annual benefit based on an estimate from OCRM on the range of time that the guidance and bright-line tests included in the interim final rule will save a Financial Analyst, on average, in reviewing each relevant element of an SBA Lender’s analysis during OCRM-conducted loan file reviews. The number of expected occurrences per year is based on the approximately 2,000 loan files reviewed by OCRM annually. The SBA Lender is required to address credit elsewhere and affiliation on every loan, but fees are not charged in connection with every loan. OCRM estimates that in approximately 65 percent of the 2,000 loans reviewed annually, OCRM identifies an issue related to fees charged to Applicants by SBA Lenders and/or Agents, including underreporting, inaccurate reporting, or impermissible fees. The number of expected occurrences per year for each outcome was multiplied by the average time saved per occurrence to estimate the total hourly benefit. The cost estimate was obtained by multiplying the hourly rate of a GS–13, Step 1 (\$36.75 per hour) by the number of expected occurrences per year and the average time saved per occurrence.

SBA expects these benefits to be realized immediately upon enactment of the rule and should remain the same each year thereafter, subject to changes in the number of loan files reviewed and hourly rates.

Costs

Costs to SBA Lenders, Applicants, and Agents

For purposes of this Regulatory Impact Analysis (RIA), the only costs to

program participants and relevant stakeholders necessary to comply with the interim final rule are administrative costs. Administrative costs considered include estimations on reading and interpreting the regulation, developing and revising internal policies and procedures, and training. It is noted that program participants are presumed to incur such administrative costs continuously in order to maintain familiarity with SBA Loan Program

Requirements, as required by 13 CFR 120.180, and to remain in good standing with SBA as defined in 13 CFR 120.420(f). The Table below shows the administrative costs SBA has estimated that are attributable to this specific rule, which are expected to occur mainly in the first year of implementation, decrease by half in the second year, and be eliminated by the third year.

TABLE 5—ESTIMATES OF ADMINISTRATIVE COMPLIANCE COSTS TO SBA LENDERS AND AGENTS

	Amount of time required (hours)	Value of time	Frequency for first year	Number of SBA lenders/agents affected	Total cost
Read and interpret the regulation	2–3	\$36.67	5–7	3,500	35,000–73,500 hours, \$1,283,450–\$2,695,245.
Develop or Revise Internal Policies and Procedures.	5–7	36.67	5–6	3,500	87,500–147,000 hours, \$3,208,625–\$5,390,490.
Training	5–8	36.67	10–12	3,500	175,000–336,000 hours, \$6,417,250–\$12,321,120.
Estimated First Year Administrative Costs.	.....	.....	.....	.....	297,500–556,500 hours, \$10,909,325–\$20,406,855. ⁵

⁵SBA developed the estimate for the administrative costs in the first year of the interim final rule based on the approximate number of active SBA Lenders and Agents. Although approximately 4,500 Lenders have executed agreements to participate as a 7(a) Lender, over the past two fiscal years, the average number of active Lenders has totaled only 1,958. (A 7(a) Lender is considered to be “active” if it has approved at least one 7(a) loan in that fiscal year.) SBA estimates that only those Lenders actively participating in the program will actually be affected by the costs of this interim final rule since the estimated costs are strictly administrative. The number of SBA Lenders and Agents affected includes approximately 2,474 active SBA Lenders (including approximately 2,061 active 7(a) Lenders, 213 CDCs, 135 Microloan Intermediaries, 33 ILP Intermediaries, and 32 Sureties), plus approximately 1,018 Agents identified as having conducted business with SBA during fiscal years 2013–2017, rounded up to the next hundred to account for trade associations, and other resource partners. SBA estimates that on average between 5–7 employees at each SBA Lending institution or Agent entity may spend between 2–3 hours each reading and interpreting the rule in the first year and that these employees are compensated at the mean hourly wage for a loan officer, as reported by the U.S. Department of Labor’s Bureau of Labor Statistics (\$36.67). SBA also estimates that 5–6 employees on average may be involved in developing or revising the internal policies of the respective program participant and would likely spend between 5–7 hours updating policies specifically related to this interim final rule. Finally, SBA estimates that between 10–12 employees on average for each program participant would spend between 5–8 hours on training related to updates and modifications made by this interim final rule. Applicants are not included as an entity affected by the administrative costs of the rule, as the Applicant relies on the SBA Lender or third-party Agent to inform them of SBA policy and procedure.

Costs to SBA

There are no additional costs to the Agency required to achieve the outcomes of the rule. The administrative

costs considered for the loan program participants, including reading and interpreting the regulation, developing and revising internal policies and procedures, and training are already

inherent requirements of SBA employees and therefore, the publication of this interim final rule has no additional bearing on the responsibilities of relevant SBA

employees involved in the Agency’s loan programs. Further, SBA does not anticipate any additional costs related to implementing the second exception to the economic-dependence affiliation rule because the Agency expects to absorb any costs related to reviewing integrator agreements by using existing SBA employees to conduct the reviews.

Transfers

SBA has also identified a transfer of costs, due to the limits on permissible

fees charged to an Applicant by Agents and Lenders, as well as the prohibition against Agents providing services to both an Applicant and an SBA Lender in connection with the same SBA loan application, which was previously permitted under limited circumstances. These limitations will provide a cost savings to Applicants; however, the Agency acknowledges that this savings to the Applicant will result in a cost (“transfer”) to the small number of

Agents and Lenders that reported charging fees in excess of the limits imposed by this interim final rule. (As discussed in the Regulatory Flexibility Act section below, the excess fees charged by this small number of Agents and Lenders also are in excess of the current limits on fees and are therefore not in compliance with current SBA Loan Program Requirements.)

TABLE 6—ESTIMATED TRANSFERS OF COSTS

Outcomes	Number of expected occurrences per year	Average money saved per occurrence	Total transfer
Elimination of fees exceeding set limits	746	\$2,380.75	\$1,776,042.63
Estimated Annual Transfer			⁶ 1,776,042.63

⁶SBA arrived at this estimate based on the total number of loans guaranteed between FY2013 and FY2017 that reported fees charged to an Applicant by an Agent or Lender over the limits imposed in this interim final rule and the total amount that those loans exceeded the imposed limit for each threshold.

Below is a table showing an estimation of the total costs and benefits of the rule over three years:

TABLE 7—ESTIMATED UNDISCOUNTED BENEFITS AND COSTS SCHEDULE

Benefits		Costs	
Year 1		Year 1	
Low estimate	High estimate	Low estimate	High estimate
267,429 hours	534,856 hours	297,500 hours	556,500 hours.
\$9,806,754	\$19,613,433	\$10,909,325	\$20,406,855.
Year 2		Year 2	
267,429 hours	534,856 hours	148,750 hours	278,250 hours.
\$9,806,754	\$19,613,433	\$5,454,662.50	\$10,203,427.50.
Year 3		Year 3	
267,429 hours	534,856 hours	0 hours	0 hours.
\$9,806,754	\$19,613,433	\$0	\$0.

Below is a table showing the annualized values of the estimated costs and cost savings, as of 2016, over an infinite horizon.

TABLE 8—ANNUALIZED VALUES AS OF 2016 OVER AN INFINITE HORIZON

	Primary estimate			
	3% Discount rate		7% Discount rate	
	Low estimate	High estimate	Low estimate	High estimate
Annualized Cost Savings	\$9,806,751	\$19,613,433	\$9,806,754	\$19,613,433
Annualized Costs	485,479	908,132	1,077,116	2,014,841
Annualized Net Cost Savings	9,321,272	18,705,301	8,729,638	17,598,592

3. What are the alternatives to this interim final rule?

SBA considered various alternatives to proceeding with the preferred option of promulgating this interim final rule. The first and most stringent alternative would be to adopt the rule as proposed. SBA chose not to pursue this option due to the concerns expressed by the industry and general public. Many commenters expressed concern that parts of the proposed rule may cause unintended consequences that would make it more difficult for Applicants seeking SBA loans of \$350,000 or less. Specifically, these commenters referred to the limits set for the fees Agents and Lenders may charge to an Applicant for loans of this size, and the maximum amount of personal liquidity that owners of 20 percent or more of such Applicants may retain, rather than inject into the project as additional equity in accordance with the proposed personal resources test. Also, several commenters expressed concern that the proposed changes to the principles of affiliation may render certain industries, like poultry farmers, ineligible for SBA financial assistance. Due to all of these concerns expressed by commenters, SBA has modified the interim final rule in several respects, including increasing

the amount of personal liquidity that owners of 20 percent or more of a small business Applicant may retain, increasing the fees that a Lender or an Agent may charge a small business Applicant for assistance with obtaining an SBA-guaranteed loan of \$350,000 or less, and revising the principles of affiliation to prevent any unintended consequences for certain industries, such as farmers. SBA also has provided an extended period for Lenders and Agents to comply with the fee provisions in §§ 103.5(b) and 120.221(a).

If the rule were finalized as proposed, the personal liquidity limits would have been more restrictive than the limits in the interim final rule. Under the interim final rule, fewer individuals will be required to inject excess liquid assets for small loans, which is a change (or transfer) that favors small business Applicants.

The original proposed rule included fee limitations for Lenders of \$2,500 for loans up to and including \$350,000; and \$5,000 for loans over \$350,000. Per the comments received and based on the costs to deliver small dollar loans, the interim final rule increases the fee limitation for loans up to and including \$350,000 to \$3,000. This change will not significantly transfer benefits or costs for the following reasons: (1) Increased

use by Applicants of SBA's no cost Lender Match to connect them to SBA Lenders; (2) increased development by SBA Lenders of in-house electronic application systems to better manage service and costs; and (3) continued innovation in the use of scoring and other data. All of these evolving technological improvements expand user options and level the playing field for services and costs.

If the rule were finalized as originally proposed, the change to limit fees Lenders may charge Applicants on small loans would have impacted 2,944 loans from Lenders who exceeded the \$2,500 proposed cap on loans guaranteed between FY2013 and FY2017. By increasing the permissible fee from \$2,500 to \$3,000 on loans of \$350,000 and less in the interim final rule, the number of loans where the Lender fee exceeded the cap was reduced to 1,731, resulting in lower economic impact to Lenders making small dollar loans.

Table 9 demonstrates the estimated reduction in the number of loans and dollars considered in excess of the Lender fee limitation as a result of increasing the proposed Lender fee limitation from \$2,500 to \$3,000 for loans of \$350,000 or less.

TABLE 9—COMPARISON OF THE ESTIMATED IMPACT OF THE LIMITATION ON THE FEE PAID BY THE APPLICANT TO THE LENDER IN THE PROPOSED RULE VS. THE INTERIM FINAL RULE *

	Proposed rule	Interim final rule	Difference
Loans with Excessive Lender Fees	2,944	1,731	(1,213)
Dollars in Excess of Fee Limits	\$5,813,734	\$3,419,091	(\$2,394,653)
Average Amount in Excess of Fee Limit per Loan	\$1,974.77	\$1,975.21	

* As the fee limitation for loans over \$350,000 did not change, this table only includes those loans where Lenders charged fees in excess of the fee limitations on loans of \$350,000 or less.

SBA originally proposed limiting total fees that an Agent(s) can charge an Applicant to a maximum of 2.5 percent of the loan amount or \$7,000, whichever is less, for loans up to and including \$350,000; a maximum of 2 percent or \$15,000, whichever is less, for loans over \$350,000 up to and including \$1,000,000; and a maximum of 1.5 percent or \$30,000, whichever is less, for loans over \$1,000,000. As a result of the comments received and to limit the

impact of the interim final rule on small Agents, SBA increased the limitations and thresholds for total fees that an Agent(s) may charge an Applicant to a maximum of 3.5 percent or \$10,000, whichever is less, for loans up to \$500,000; a maximum of 2 percent or \$15,000, whichever is less, for loans of \$500,001 to \$1,000,000; and 1.5 percent or \$30,000, whichever is less, for loans over \$1,000,000.

The changes in the interim final rule result in the total number of loans in excess of the fee limitations being reduced from 3,060 to 2,729 and the total dollars in excess of the fee limitations being reduced from \$7,217,868 to \$2,688,406. Table 10 demonstrates the estimated reduction in the number of loans and dollars considered in excess of the Agent fee limitation as a result of increasing the proposed fee limitation.

TABLE 10—COMPARISON OF THE ESTIMATED IMPACT OF THE LIMITATION ON THE FEE PAID BY THE APPLICANT OR THE LENDER TO AN AGENT(S) IN THE PROPOSED RULE VS. THE INTERIM FINAL RULE FOR LOANS OF \$1,000,000 AND LESS **

	Proposed rule	Interim final rule	Difference
Loans with Excessive Agent Fees	3,060	2,729	(331)
Dollars in Excess of Fee Limits	\$7,217,868	\$2,688,406	(\$4,529,462)

TABLE 10—COMPARISON OF THE ESTIMATED IMPACT OF THE LIMITATION ON THE FEE PAID BY THE APPLICANT OR THE LENDER TO AN AGENT(S) IN THE PROPOSED RULE VS. THE INTERIM FINAL RULE FOR LOANS OF \$1,000,000 AND LESS **—Continued

	Proposed rule	Interim final rule	Difference
Average Amount in Excess of the Fee Limit per Loan	\$2,359	\$985	

** As no changes were made to the Agent fee limitation for loans over \$1,000,000 from the proposed rule to the interim final rule, the loans over \$1,000,000 with excessive Agent fees were not included in this table.

The second, less stringent alternative considered was to make no regulatory change but strictly enforce existing SBA Loan Program Requirements. Of the major issues commented upon, SBA has existing mechanisms to enforce compliance with the credit elsewhere test, the fees Lenders and Agents are permitted to charge an Applicant, including when Lenders or Agents must refund amounts deemed unreasonable by SBA, and proper application of the affiliation principles applicable to the business loan programs. For example, with regard to fees charged to an Applicant, SBA has the authority to require fees deemed unreasonable by SBA to be refunded to a Borrower by a Lender or an Agent. In addition, SBA's OCRM can cite SBA Lenders during lender oversight reviews and take enforcement action against the SBA Lender, when appropriate. Further, SBA may suspend or revoke an Agent's privilege to conduct business with SBA. With regard to determining eligibility of an Applicant based on affiliation and credit available elsewhere, SBA may decline to approve applications that do not meet SBA Loan Program Requirements or, for loans made under a Lender's delegated authority, SBA may deny liability on the guaranty if the Lender did not make an acceptable determination for 7(a) loans or, for 504 loans, decline to close the loan, potentially at considerable expense to the small business Applicant. However, this option does not resolve the confusion that SBA Lenders and Agents have on current policy and procedure and would require an additional investment in Agency resources to rely on OCRM or the loan processing or guaranty purchase centers to rectify non-compliance after the fact. SBA has determined that it is more beneficial to all parties involved to provide clarity to these rules so that SBA Lenders and Agents can better understand and comply with SBA's Loan Program Requirements.

In consideration of the alternatives described above, SBA has determined that the most preferable option is to enact the rule with several modifications. The interim final rule

will, among other things, provide bright-line tests and clear guidance for SBA Lenders to determine what fees SBA considers to be reasonable and permissible and how to properly analyze an Applicant's personal liquidity as part of the analysis on credit available elsewhere. The interim final rule also will clarify the principles of affiliation to ensure that SBA financial assistance is not being provided to businesses that are not actually small due to affiliation with larger corporations, while ensuring that certain industries are not adversely impacted. Finally, the interim final rule will make minor corrections and updates to Loan Program Requirements to enhance program use.

Executive Order 13563

A description of the need for this regulatory action and benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563, are included above in the Regulatory Impact Analysis under Executive Order 12866.

The Business Loan Programs operate through the Agency's lending partners, which are 7(a) Lenders for the 7(a) Loan Program, Intermediaries for the Microloan Program and ILP Program, and Third Party Lenders and CDCs for the 504 Loan Program. SBA's SBG Program operates through Surety Bond Companies. SBA's Business Disaster Loan Programs are delivered directly by SBA, without the use of any intermediaries. The Agency held two public forums in the summer of 2018 to engage with stakeholders related to poultry lending. With respect to the 7(a) and 504 Loan Programs generally, SBA also met with trade association board members and program participants at industry conferences in the Fall of 2018 through Spring of 2019, which allowed it to reach representatives of trade associations and hundreds of its lending partners, from which it gained valuable insight regarding the loan programs. The Agency's outreach efforts to engage stakeholders before proposing this rule was extensive and concluded with the extended comment period.

Executive Order 13771

This interim final rule is considered an E.O. 13771 deregulatory action. SBA is estimating \$12,633,634 in annualized savings for this rule using a 7% discount rate in perpetuity in 2016 dollars. In addition, SBA estimates the present value of savings for this rule in perpetuity to be \$180,480,486. Details on the breakdown of the estimated cost savings of this interim final rule can be found in the rule's economic analysis.

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 rule will 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 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 interim final rule will 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 and, as discussed below, some of the forms will need to be revised based on the changes in this interim final rule.

SBA Form 1920, Lender's Application for Guaranty; SBA Form 2450, Eligibility Information Required for 504 Submission (Non-PCLP) (OMB Control number 3245–0071); and SBA Form 2234 (Part C), Eligibility Information Required for 504 Submission (PCLP) (OMB Control number 3245–0346) will need to be revised due to the new regulation at § 120.102, which will require SBA 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 will have a de minimis impact on SBA Lenders since reviewing the personal resources of the applicant business and its owners is already part of the analysis SBA Lenders currently conduct in determining an Applicant's eligibility for SBA financial assistance under the requirement to ensure that the Applicant does not have access to credit elsewhere on reasonable terms from non-Federal sources.

The interim final rule also makes changes that require revisions to SBA Form 159, Fee Disclosure and Compensation Agreement (OMB Control number 3245–0201), which is used to collect information from SBA 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 SBA Lenders on referral fees that it pays to Loan Brokers (also known as Referral Agents) in connection with an SBA-guaranteed loan. The specific revisions to SBA Form 159 would implement the 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 revisions to SBA Form 159 will reduce the estimated hour burden for 7(a) Lenders because, under the interim final rule, they will only be required to disclose the amount charged up to the permissible limit on SBA Form 159, but will no longer have to itemize fees charged to Applicants, which is currently required for fees over \$2,500. The revisions will have no material effect on the reporting burden for Agents. They will continue to report on all fees imposed on Applicants and provide supporting documentation for fees over \$2,500 as they do now.

The changes to SBA Forms 1920, 2450, 2234 (Part C), and 159 will be submitted to OMB as part of a broader, comprehensive revision of the forms that is not affected by this interim final

rule but is part of the Agency's efforts to streamline and simplify the information collected from Applicants and SBA Lenders.

Finally, this rule puts 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 is included in OMB-approved collection, SBA Lender Reporting Requirements (OMB Approval Number 3245–0365). This information collection was submitted to OMB for renewal in September 2018 and the renewal was approved by OMB in April 2019. The new expiration date is April 30, 2022. The 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, the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires the agency to “prepare and make available for public comment a final 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.

Small entities likely to be affected by this rule include small SBA Lenders and small Agents who assist small business Applicants with obtaining SBA-guaranteed financing. SBA Lenders are comprised of 7(a) Lenders, CDCs, Microloan Intermediaries, ILP Intermediaries, and Sureties that participate in the SBG Program. Based on SBA's size standards, SBA has determined that approximately 2,000 of the approximately 4,500 7(a) Lenders are small, all of the approximately 213 CDCs are small, all of the approximately 135 Microloan Intermediaries are small, all of the approximately 33 ILP Intermediaries are small, and 12 of the approximately 32 Sureties that participate in the SBG Program are small.

SBA does not track or collect information on entities or individuals serving as Agents, Packagers, or Lender Service Providers with regard to the NAICS codes or classification of those entities. Services provided to assist an Applicant in obtaining SBA-guaranteed financing may be performed by several different types of entities ranging from individuals who may assist with

packaging a loan application or assisting the Applicant with finding an SBA Lender, to entities formed for the purpose of providing such assistance, to attorneys or Certified Public Accountants. All of these different types of individuals or entities providing assistance to Applicants in connection with obtaining an SBA-guaranteed loan may be classified under numerous different NAICS codes. SBA considered NAICS codes that may apply to these entities for the purpose of estimating the number of small entities affected by this interim final rule. One possible classification includes 522310 for “Mortgage and Nonmortgage Loan Brokers,” which is described as being comprised of “establishments primarily engaged in arranging loans by bringing borrowers and lenders together on a commission or fee basis.” The size standard for this classification is \$7.5 million in annual receipts and according to the U.S. Census Bureau's 2012 Statistics of U.S. Businesses (SUSB),³ 6,817 entities classified by this NAICS code are considered small by SBA's size standards. SBA also considered 522390 for “Other Activities Related to Credit Intermediation,” which is described as being comprised of “establishments primarily engaged in facilitating credit intermediation (except mortgage and loan brokerage; and financial transactions processing, reserve, and clearinghouse activities)” because “loan servicing” is included as an illustrative example of this NAICS code. However, based upon the other examples provided, which include check cashing services, money order issuance services, and payday lending services, SBA does not believe that NAICS code 522390 is applicable to the Agents affected by this rule. Because there are no limitations as to what type of entity may be engaged by an Applicant for assistance with obtaining SBA financing, it is not reasonable to estimate the number of affected entities based on NAICS codes, as the number of entities included in these classifications would far exceed the number of entities that actually conduct business with SBA and would not provide a realistic portrayal of the population of small entities affected by this rule.

As an alternative to estimating the number of entities affected based on NAICS codes, SBA reviewed the Lender-reported data and other

³ Because SBA's size standard for most NAICS codes is based on annual receipts and U.S. Census Bureau SUSB data by enterprise receipt size is only collected every five years, 2012 is the most recent Census data available for use.

information gathered by OCRM during lender oversight reviews in fiscal years 2013 through 2017, which also was used to develop the fee limits in this interim final rulemaking. Within the 8,025 loans reported to have used an Agent (other than the participating Lender) to provide assistance to the Applicant in securing the loan during that time period, SBA identified 753 unique Agents based on their DUNS Number or street address. Since SBA has no means of knowing the average annual receipts of these entities, SBA will conservatively estimate that the majority or 80 percent of the 753 entities are small. SBA has also identified approximately 265 entities who have submitted LSP Agreements for review by SBA. Like the Agents, including Packagers, SBA does not capture the NAICS classification of these LSPs and therefore is unable to estimate their annual receipts and the number of which that would be considered small. Therefore, as indicated above with Agents, SBA will conservatively estimate that the majority or 80 percent of LSPs are small. For purposes of the RFA, SBA estimates that approximately 814 (80 percent of 1,018) small entities serving as Agents and LSPs will be affected by this interim final rule for a total of approximately 3,207 small entities including all small SBA Lenders, Agents, and LSPs.

As described more fully in the RIA above, SBA has determined that the only costs to program participants and relevant stakeholders necessary to comply with the interim final rule are administrative costs. Administrative costs considered include estimations on reading and interpreting the regulation, developing and revising internal policies and procedures, and training. To reiterate, although these costs are estimated here for the purposes of the Regulatory Flexibility Act, it is

important to note that, regardless of new rulemaking, program participants are presumed to incur administrative costs related to reading and interpreting SBA Loan Program Requirements, revising and updating internal policies, and training staff continuously in order to maintain familiarity with SBA Loan Program Requirements, as required by 13 CFR 120.180, and to remain in good standing with SBA as defined in 13 CFR 120.420(f).

The RIA also identifies an estimated transfer of costs due to the limits on permissible fees charged to an Applicant by Agents and Lenders, as well as the prohibition against an Agent providing services to both an Applicant and an SBA Lender in connection with the same SBA loan application, which was previously permitted under limited circumstances. These limitations have been put in place in order to protect small business Applicants from fees deemed unreasonable by SBA and will provide a cost savings to small business Applicants. However, the Agency acknowledges that this savings to the Applicant will result in a potential loss of revenue to the small number of Agents and Lenders that reported charging fees in excess of the limits imposed by this interim final rule that are considered to be small entities. As noted previously in Section III.C. above, approximately one percent of the loans guaranteed during fiscal years 2013–2017 reported fees charged to the Applicant by Lenders and Agents in excess of the revised maximum fees permitted in this interim final rule. Based on SBA’s analysis of the fees reported on loans guaranteed during that time frame, SBA estimates that 213 small entities (83 small Lenders and 130 small Agents)⁴ reported charging fees in excess of the limits imposed in this interim final rule. This represents only 8 percent of the 7(a) Lenders and Agents

that SBA has identified as small (2,000 7(a) Lenders and 602 Agents). Thus, only 8 percent of small Lenders and small Agents may experience reduced revenue as a result of this interim final rule. It is important to note that, while some small entities may experience reduced revenue, the fees that were being charged by these small entities were not in compliance with current SBA policy. Additionally, the reduced revenue will be offset at least in part by the estimated savings the small entities will experience due to increased efficiency in determining the permissibility and reasonableness of the fees charged.

To estimate the average annualized cost per small entity, SBA annualized the sum of all administrative costs plus the estimated potential loss of revenue (e.g., the total transfer amount of \$1,776,042.63) identified in the RIA over a 10-year period. (See Table 6 in the RIA.) The estimated total annualized costs over 10 years at a 7 percent discount rate range from a low estimate of \$2,773,295.70 to a high estimate of \$4,331,035. Dividing the total estimated annualized costs by the 3,207 estimated small entities affected, the annualized cost per entity is estimated to be between approximately \$864.76 and \$1,350.49. Although SBA is unable to ascertain the NAICS codes of all types of entities considered to be Agents, SBA used data from the 2012 U.S. Census Bureau’s SUSB for NAICS code 522310 for Mortgage and Nonmortgage Loan Brokers as an example to examine the annualized compliance cost as a percentage of annual receipts for small entities classified by this NAICS code. For the purposes of this estimation, SBA has averaged the high and low estimates of the annualized cost for a mid-point total of \$388 per entity.

MORTGAGE AND NONMORTGAGE LOAN BROKERS (NAICS 522310)
[\$7.5 Million Size Standard]

Firm size (by receipts)	Average annual receipts	Annualized cost per firm	Number of firms	Percent of small firms	Revenue test* (percent)
All Firms	\$1,005,967	\$388	7,007	N/A	0.0
Small Firms	549,802	388	6,817	100	0.1
<100K	48,038	388	1,533	22	0.8
100K–\$499,999	250,730	388	3,233	47	0.2
500,000–\$999,999	693,276	388	1,042	15	0.1
\$1,000,000–\$2,499,999	1,482,997	388	721	12	0.0
\$2,500,000–\$4,999,999	3,244,231	388	216	3	0.0

⁴ Based on SBA’s analysis of the loans guaranteed during FY2013–FY2017, 83 Lenders and 162 Agents reported charging the Applicant a fee in excess of the limits imposed in this interim final rule.

Although SBA recognizes that more than 50 percent of 7(a) Lenders are not small, for purposes of the RFA, SBA is assuming that all 83 Lenders are small. As noted above, SBA estimates that 80 percent of

Agents are small; therefore, SBA is estimating that 130 of the 162 Agents that reported charging fees in excess of the limits in this interim final rule are small.

MORTGAGE AND NONMORTGAGE LOAN BROKERS (NAICS 522310)—Continued
[\$7.5 Million Size Standard]

Firm size (by receipts)	Average annual receipts	Annualized cost per firm	Number of firms	Percent of small firms	Revenue test* (percent)
\$5,000,000–\$7,499,999	5,157,764	388	72	1	0.0

* Annualized compliance costs as a percentage of annual receipts.

SBA has determined that the annualized cost of this rule per entity will not have a significant economic impact on a substantial number of small entities. First, the average annualized cost in the example above is not a significant percentage of each entity's average annual revenue for any size firm considered to be small. It is also noted that these annualized costs will be offset by annualized benefits ranging from a low estimate of \$9,806,754 to a high estimate of \$19,613,433 (or approximately \$3,056–\$6,116 per entity). See the RIA above for more information on the net annualized costs and benefits. Second, the number of small entities affected is not substantial. As stated above, SBA estimates that from FY2013 through FY2017 213 small entities (83 small Lenders and 130 small Agents) reported charging fees in excess of the limits imposed in this interim final rule. This represents only 8 percent of the 7(a) Lenders and Agents that SBA has estimated are small. SBA does not consider 83 small Lenders to be a substantial number when compared to the overall number of small Lenders, which is approximately 2,000. With respect to small Agents, SBA does not consider 130 Agents to be a substantial number when compared to the overall number of small Agents. While SBA used 602 as an estimate of the number of small Agents, SBA believes the actual number of small entities acting as Agents in connection with the SBA loan programs is most likely much larger when taking into consideration the attorneys, accountants, business consultants and others that act as Agents. As SBA noted above, the NAICS Code for Mortgage and Nonmortgage Loan Brokers used in the above example is only one of numerous NAICS codes under which Agents may be classified. Many different types of individuals and entities, including attorneys, accountants, and business consultants, act as Agents and assist Applicants in obtaining SBA-guaranteed loans. Thus, SBA believes that the actual universe of small Agents may be considerably larger than 602. When all of the potentially relevant NAICS codes are considered, SBA believes that the number of small

entities affected by this rule would be even smaller than the 8% noted above.

Despite the fact that SBA determined that the proposed rulemaking would not have a significant economic impact on a substantial number of small entities, SBA made modifications to certain elements of this interim final rule based on comments received during the proposed rule's public comment period. These modifications aimed to relieve a perceived disparity for small SBA loans of \$350,000 or less, which according to public commenters, most frequently require the assistance of an Agent. For example, SBA originally proposed certain limitations to fees that Agents could charge to an Applicant for assistance in obtaining an SBA loan. Public commenters asserted that these fee limitations would force Agents out of the market and reduce access to capital for small businesses. Although SBA disagrees with the assertion that the proposed limits on fees would have disproportionately impacted access to these smaller loans, in the interim final rule, SBA increased the permitted fee an Agent or Agents may charge an Applicant for assistance with obtaining a loan of \$350,000 or less from 2.5 percent of the loan amount or \$7,000, whichever is less, to 3.5 percent of the loan amount or \$10,000, whichever is less. That revision represents an increase of approximately 40 percent in the permitted fees for smaller loans when compared to the proposed rule, and a significant increase in the fees permitted under SBA's current Loan Program Requirements. In addition, SBA adjusted the lower two loan amount ranges, to ensure that the maximum fee permitted on loans over \$350,000 up to and including \$500,000 would not be lower than the maximum fee permitted for loans of \$350,000 or less. Also, in the interim final rule, SBA increased the fee a Lender may charge an Applicant for assistance with obtaining a loan of \$350,000 or less from \$2,500 to \$3,000, an increase of 20 percent over the proposed limit. By having a bright-line test for what SBA considers reasonable compensation for services provided to an Applicant by an Agent and a Lender, Lenders and Agents will, in fact, save time and costs in

analyzing and documenting that fees charged to the Applicant are reasonable.

In an effort to minimize any potential costs or revenue losses that may be experienced by the 213 small Lenders and Agents that reported charging fees in excess of the revised limits in this interim final rule, SBA is giving all SBA Lenders and Agents additional time—until October 1, 2020—to comply with revised §§ 103.5(b) and 120.221(a). Thus, these entities will have had two years from the date of publication of the proposed rule in September 2018 to prepare for changes to the fee structure. Additionally, SBA is allowing a period of 120 days for Agents to make any adjustments to conform to the clarified definitions of the types of Agents in § 103.1 (e.g., Agents that may need to enter into LSP agreements with Lenders they provide services to).

Similarly, in accordance with SBA Loan Program Requirements, SBA Lenders must analyze the ability of the small business Applicant 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. SBA proposed thresholds, based on the size of the total financing package, to assist the SBA Lender in determining the amount of excess personal liquid assets of 20 percent or more owners of the small business Applicant. Personal liquid assets exceeding the stated thresholds must be injected into the project to reduce the SBA loan amount. Public commenters recommended that the personal liquidity thresholds be modified, especially for smaller loans. SBA reevaluated the personal liquidity threshold for smaller loans and agreed to modify the limits to ensure that Applicants applying for smaller loans are not adversely affected. The interim final rule reinstates a bright-line test for SBA Lenders to appropriately consider the personal resources of the owners of the Applicant, which will save SBA Lenders time in their analysis.

SBA believes that this interim final 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 by providing bright-line tests to assist program participants in understanding the Loan Program Requirements and by removing unnecessary regulatory requirements. For the aforementioned reasons, SBA has determined that this interim final rule will not have a significant economic impact on a substantial number of small entities.

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 is amending 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 § 103.1 by:
 - a. Revising paragraph (a); and
 - b. Removing paragraphs (d), (e), and (f) and redesignating paragraph (g) as paragraph (d).

The revision reads as follows:

§ 103.1 Key definitions.

(a) *Agent* means an authorized representative, including an attorney, accountant, consultant, packager, lender service provider, or any other individual or entity representing an Applicant or Participant by conducting business with SBA. For purposes of SBA’s business loan programs, the term Agent includes but is not limited to:

(1) *Lender Service Provider:* an Agent who assists the Lender with originating, disbursing, servicing, liquidating, or litigating SBA loans. The Lender bears full responsibility for all aspects of its SBA loan operation, including, but not limited to, approvals, closings, disbursements, servicing actions, and due diligence. Lender Service Providers may only receive compensation from the Lender and such compensation may not be passed on to the Applicant or paid out of SBA-guaranteed loan proceeds.

(2) *Packager:* An Agent who prepares the Applicant’s application for financial assistance and is employed and compensated by the Applicant.

(3) *Loan Broker (also known as Referral Agent):* an Agent who, on a specific transaction, either assists the Applicant in finding an SBA Lender that will be willing to make a loan to the Applicant or assists the SBA Lender in finding an Applicant. A Loan Broker may be employed and compensated by either the Applicant or the SBA Lender (but not both). Compensation paid to a Loan Broker by an SBA Lender may not be passed on to the Applicant and may not be paid out of SBA-guaranteed loan or debenture proceeds.

- 3. 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. For purposes of this paragraph (g), the actions of an Agent include the actions of the Agent’s Affiliates, as defined in § 121.103 of this chapter.

* * * * *

- 4. 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 an Agent or Agents charge any fee to an Applicant in excess of those specified in this part, the Agent(s) must reduce the charge and refund to the Applicant any amount in excess of the fee permitted by SBA. SBA considers the following amounts to be reasonable for the total compensation that an Applicant can be charged by one or more Agents:

(1) *For loans up to and including \$500,000:* A maximum of 3.5 percent of the loan amount, or \$10,000, whichever is less;

(2) *For loans \$500,001–\$1,000,000:* A maximum of 2 percent of the loan amount, or \$15,000, whichever is less; and

(3) *For loans over \$1,000,000:* A maximum of 1.5 percent 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

- 5. The authority citation for part 120 is revised to read as follows:

Authority: 15 U.S.C. 634(b) (6), (b) (7), (b) (14), (h), and note, 636(a), (h) and (m), and note, 650, 657t, and note, 657u, and note, 687(f), 696(3) and (7), and note, and 697(a) and (e), and note.

- 6. Amend § 120.10 by revising paragraph (1)(i) of the defined term “Associate” to read as follows:

§ 120.10 Definitions.

* * * * *

Associate. (1) * * *
 (i) An officer, director, key employee, or holder of 20 percent or more of the value of the Lender’s or CDC’s stock or debt instruments, or an Agent (as defined in § 103.1 of this chapter) involved in the loan process; or

* * * * *

- 7. 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. SBA will reexamine the thresholds periodically and, if adjustments are necessary based on nationally-recognized economic indicators, SBA may modify the thresholds from time to time through rulemaking. 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, as defined in Loan Program Requirements (see § 120.10)):

(1) Is \$350,000 or less, each 20 percent owner of the Applicant must inject any liquid assets that are in excess of two times the total financing package, or \$500,000, 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; or

(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, the cash value of life insurance policies, 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.

■ 8. 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;

* * * * *

■ 9. Amend § 120.221 by:

■ a. Revising the section heading and paragraph (a); and

■ b. Adding a sentence at the end of paragraph (b).

The revisions and addition 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 (as defined in § 103.1 of this chapter) for assistance with obtaining an SBA-guaranteed loan. The fee may not exceed \$3,000 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 Lender charges any fees to the Applicant in excess of those specified in this part, the Lender must reduce the charge and refund to the Applicant any amount in excess of the permitted fee. 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 of this chapter and documented in accordance with Loan Program Requirements.

(b) * * * For certain revolving lines of credit made under § 120.390 and on Export Working Capital Program loans (as allowed under § 120.344(b)), subject to SBA's prior written approval, the Lender may charge extraordinary servicing fees in excess of 2 percent per year on the outstanding balance of the part requiring special servicing, provided the fees are reasonable and prudent.

* * * * *

§ 120.222 [Amended]

■ 10. Amend § 120.222 by removing the word "in" before the words "any premium received".

§ 120.344 [Amended]

■ 11. Amend § 120.344(b) by removing the period at the end of the paragraph and adding in its place ", provided the fees are reasonable and prudent."

■ 12. Revise § 120.350 to read as follows:

§ 120.350 Policy.

Section 7(a)(15) of the Act authorizes SBA to guarantee a loan to a:

(a) Qualified employee trust ("ESOP") to:

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

(2) Purchase ownership or voting control of the employer; and a

(b) Small business concern, if the proceeds from the loan are only used to make a loan to a qualified employee trust that results in the qualified employee trust owning at least 51 percent of the small business concern.

■ 13. Revise § 120.352 to read as follows:

§ 120.352 Use of proceeds.

Loan proceeds may be used for:

(a) *Qualified employee trust.* A qualified employee trust may use loan proceeds for two purposes:

(1) *Qualified employer securities.* A qualified employee trust may relend loan proceeds to the employer by purchasing qualified employer securities. The small business concern may use these funds for any general 7(a) purpose.

(2) *Control of employer.* A qualified employee trust may use loan proceeds to purchase a controlling interest (51 percent) in the employer. Ownership and control must vest in the trust by the time the loan is repaid.

(b) *Small business concern.* A small business concern may only use loan proceeds to make a loan to a qualified employee trust that results in the qualified employee trust owning at least 51 percent of the small business concern.

■ 14. 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 (a) applies to all 7(a) loans purchased from any Federal or state banking regulator, any receiver, or any conservator, unless SBA agrees otherwise in writing.

* * * * *

■ 15. 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.

■ 16. Add an undesignated center heading and §§ 120.441 through 120.447 to read as follows:

SBA Express and Export Express Loan Programs

Sec.

120.441 SBA Express and Export Express Loan Programs.

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

120.443 SBA Express and Export Express loan processing requirements.

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

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

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

120.447 Oversight of SBA Express and Export Express Lenders.

§ 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) *Shorter term or loan volume limit*. 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) In addition to the eligibility criteria applicable to all 7(a) loans, an Export Express Applicant must have been in business for at least 12 full months at the time of application, but not necessarily in the exporting business, unless the Lender determines that the Applicant's key personnel have clearly demonstrated export expertise and substantial previous successful business experience and the Lender processes the Export Express loan using conventional commercial loan underwriting procedures and does not rely solely on credit scoring or credit matrices to approve the loan.

(c) 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 does not meet SBA's environmental requirements; and

(4) Complex loan structures or eligibility situations.

(d) 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 in accordance with § 120.101. 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.

(e) 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.

(f) 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 operations outside of the United States, except for the marketing and/or distribution of products/services exported from the United States.

(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) *Debt refinancing*. 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) 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) of this chapter, 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) 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) of this chapter, must not exceed the statutory maximum.

(b) *Maximum SBA guarantee*—(1) *SBA Express*. The maximum SBA

guarantee on an SBA Express loan is 90 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) For fixed interest rate loans, SBA Express and Export Express Lenders may charge a reasonable fixed interest rate in accordance with § 120.213.

(2) For variable interest rate loans:

(i) SBA Express and Export Express Lenders may charge up to 4.5 percent over the prime rate on loans over \$50,000 and up to 6.5 percent 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.

(ii) 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)(2)(i) 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 (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. If established, 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 percent of the issued standby letter of credit amount.

(f) *Insurance*. SBA Express and Export Express Lenders must follow the same insurance 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 (a), 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) *When SBA will purchase*. 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) *Amount that 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, plus up to 120 days of accrued 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, plus 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 Oversight of SBA Express and Export Express Lenders.

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

§ 120.707 [Amended]

■ 17. Amend the last sentence of § 120.707(b) by removing the word “six” and adding in its place the word “seven”.

■ 18. Amend § 120.712 by:

■ a. Revising paragraph (b)(1); and

■ b. In paragraph (d), removing the number “25” and adding in its place the number “50”.

The revision reads 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

* * * * *

■ 19. Amend § 120.840 by revising paragraph (b) to read as follows:

§ 120.840 Accredited Lenders Program (ALP).

* * * * *

(b) *Application*. A CDC must apply for ALP status by submitting an application in accordance with SBA's Standard Operating Procedure 50 10, available at <http://www.sba.gov>. A final decision will be made by the appropriate SBA official in accordance with Delegations of Authority.

* * * * *

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 20. The authority citation for part 121 continues to read as follows:

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

■ 21. Amend § 121.301 by:

■ a. Revising paragraph (f)(4);

■ b. Redesignating paragraphs (f)(5) through (7) as paragraphs (f)(7) through (9), respectively;

■ c. Adding new paragraphs (f)(5) and (6) and revising newly redesignated paragraph (f)(7).

The revisions and additions to 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) *General*. 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) *Close relatives*. 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) *Common investments*. Affiliation arises through common investments where the same individuals or firms together own a substantial portion of multiple concerns in the same or related industry, and such concerns conduct business with each other, or share resources, equipment, locations, or employees with one another, or provide loan guaranties or other financial or managerial support to each other. However, where an SBA Lender has made a determination of no affiliation under this ground, SBA will not overturn that determination as long as it was reasonable when made given the information available to the SBA Lender at the time.

(iv) *Economic dependence*. Affiliation based upon economic dependence may arise when a concern derived more than 85 percent of its receipts over the previous three fiscal years from a contractual relationship with another concern, unless:

(A) The contract (or contracts) does not restrict the concern in question from selling the same type of products or services to another purchaser; or

(B) SBA agrees that the terms of the contract (or contracts) do not provide the purchaser with control or the power to control the seller.

(5) *Affiliation based on the newly organized concern rule in this paragraph (f)(5)*. Affiliation may arise where current or former officers, directors, owners of a 20 percent interest or greater, managing members, or persons hired to manage day-to-day operations 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, owners of a 20 percent interest or greater, or managing members, and there are direct monetary benefits flowing from the new concern to the original concern. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A concern will be considered “new” for the purpose of this paragraph (f)(5) if it has been actively operating for two years or less. However, where an SBA Lender has made a determination of no affiliation under this ground, SBA will not overturn that determination as long as it was reasonable when made given the information available to the SBA Lender at the time.

(6) *Affiliation based on totality of the circumstances*. In determining whether affiliation exists, SBA may consider all connections between the concern and a possible affiliate. Even though no single factor is sufficient to constitute affiliation, SBA may find affiliation on a case-by-case basis where there is clear and convincing evidence based on the totality of the circumstances. However, where an SBA Lender has made a determination of no affiliation, SBA will not overturn that determination as long as it was reasonable when made given the information available to the SBA Lender at the time.

(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 part 436.

* * * * *

■ 22. 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: January 29, 2020.

Jovita Carranza,
Administrator.

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