



TECHNICAL NOTICE

*May 5, 2009 TN 09-013
Contact: Kathy Van Kleeck*

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards; Temporary Alternative Size Standards for 7(a) Business Loan Program; Interim Final Rule with Request for Comments

SBA has published an Interim Final Rule that temporarily amends the size eligibility criteria for loan assistance provided under the 7(a) Business Loan Program effective from today to the end of FY 2010 (9/30/09). Additionally, SBA is requesting comments on the Rule's underlying policies and is specifically interested in comments addressing the duration of the change and whether SBA should make the change permanent.

Currently, motorcycle and ATV dealers must have average annual receipts of \$7 million or less to qualify for 7(a) loans. The Interim Final Rule temporarily establishes an alternative size standard to qualify for loans in an effort to expand the pool of eligible small businesses. To qualify, a small business must meet the current size eligibility criteria or have a tangible net worth not in excess of \$8.5 million and average net income after federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of \$3 million.

Pursuant to funding provided by the American Recovery and Reinvestment Act of 2009 (Stimulus Bill), SBA has also made several additional changes to existing programs including, but not limited to, temporarily reducing or eliminating 7(a) loan fees and authorizing up to a 90 percent guarantee on most 7(a) loans.

SBA 7(a) loans are provided by participating lenders and may be used to assist in the operation, acquisition or expansion of an existing business. They cannot be used for floorplan financing.

Comments must be submitted by August 3, 2009.

This Interim Final Rule was published in the May 5, 2009 *Federal Register*, Vol. 74, No. 85, pages 20577-20580, and is reprinted here for your information.

ACTION: Interim final rule with request for comments.

SUMMARY: The U.S. Small Business Administration (SBA) is temporarily amending the size eligibility criteria for loan assistance provided under its 7(a) Business Loan Program. This rule temporarily establishes the same alternative small business size standard that applies to SBA's Certified Development Company (CDC) Program. The U.S. Congress passed and the President signed the American Recovery and Reinvestment Act of 2009 (Recovery Act). The purposes and goals of the Recovery Act are to promote economic recovery and to preserve and create jobs. SBA prepared this rule as an interim final rule, effective immediately, because it will help alleviate the pressing needs of many small businesses for financial assistance in the current economic environment.

DATES: *Effective Dates:* This rule is effective on May 5, 2009.

Comment Date: Comments on the interim final rule must be received on or before August 3, 2009.

Applicability Dates: This rule applies to all 7(a) loan applications approved from May 5, 2009 through September 30, 2010.

ADDRESSES: You may submit comments, identified by [RIN number 3245–[INSERT]] by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Carl J. Jordan, Acting Division Chief for Size Standards, U.S. Small Business Administration, 409 3rd Street, SW., 8th floor, Washington, DC 20416.

- *Hand Delivery/Courier:* Carl J. Jordan, Acting Division Chief for Size Standards, U.S. Small Business Administration, 409 3rd Street, SW., 8th Floor, Washington, DC 20416.

All comments will be posted on <http://www.Regulations.gov>. If you wish to include within your comment confidential business information (CBI) as defined in the Privacy and Use Notice/User Notice at <http://www.Regulations.gov> and you do not want that information disclosed, you must submit the comment by either mail or hand delivery, and you must address the comment to the attention of Carl J. Jordan, Acting Division Chief for Size Standards. In the submission, you must highlight the information that you consider is CBI and explain why you believe this information should be held confidential. SBA will make the final determination, in its discretion, of whether the information is CBI and, therefore, will not be published.

FOR FURTHER INFORMATION CONTACT: For size standard questions please contact Carl J. Jordan, Acting Division Chief for Size Standards, (202) 205–6093, carl.jordan@sba.gov. For finance questions please contact Grady Hedgespeth, Director, Office of Financial Assistance, (202) 205–7562, grady.hedgespeth@sba.gov.

SUPPLEMENTARY INFORMATION:

I. Background Information

The American Recovery and Reinvestment Act of 2009 (Recovery Act), Public Law 111–05 was enacted on February 17, 2009, to among other things, promote economic recovery by preserving and creating jobs, and to assist those most impacted by the severe economic conditions facing the nation. SBA is one of several agencies that are intended to play a role in achieving these goals. SBA received funding and authority through the Recovery Act to modify its existing loan programs or establish new loan programs to help reinvigorate small business lending. SBA's actions will increase access to affordable credit for small businesses through the agency's 7(a) and 504 loan programs, unfreeze the secondary market for SBA guaranteed loans, help small businesses struggling with existing debt, and allow greater investment in high-growth small businesses. The changes to SBA's programs by the Recovery Act include the following: (1) Temporary reduction or elimination of fees in the 7(a) and 504 loan guarantee programs; (2) temporary authorization of up to a 90 percent guarantee on most 7(a) loans; (3) creation of a temporary Secondary Market Guarantee Authority to provide a Federal guarantee for pools of first lien 504 loans that are to be sold to third-party investors; (4) new authority for refinancing community development loans under the 504 program; (5) revision of the job creation goals of the 504 program; (6) simplification of the maximum leverage limits and aggregate investment limits required of Small Business Investment Companies; (7) temporary authority to provide loans on a deferred basis to viable small business concerns that have a qualifying small business loan and are experiencing immediate financial hardship; (8) temporary increase in the surety bond maximum amount; and (9) establishment of a Secondary Market Lending Authority to make loans to systemically important broker dealers in SBA's 7(a) secondary market.

To achieve its mandate under the Recovery Act and maximize credit available through its programs to

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AF96

**Small Business Size Standards;
Temporary Alternative Size Standards
for 7(a) Business Loan Program**

AGENCY: Small Business Administration (SBA).

America's small businesses, SBA is issuing this rule. SBA believes that in the current economic environment, many businesses that are slightly outside of traditional size standards to qualify for SBA guaranteed 7(a) loans are shut out of conventional lending markets and unable to obtain credit. As a result of the recent disruptions in credit markets, commercial borrowers are on average less creditworthy than in previous years. Lenders have also significantly tightened credit standards for borrowers. These trends are evidenced by Quarterly Senior Loan Officer Opinion Surveys released by the Federal Reserve Board (available at <http://www.federalreserve.gov/BoardDocs/SnLoanSurvey/default.htm>) in July 2008, October 2008 and January 2009 and are expected to continue given the unprecedented disruptions in the financial system.

Under SBA's CDC program, a business concern must meet either the size eligibility criteria of the 7(a) Business Loan Program, or have tangible net worth not in excess of \$8.5 million and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of \$3.0 million (13 CFR 120.301(b)). This interim final rule temporarily extends eligibility for 7(a) loans to businesses that meet the alternate size criteria for the CDC Program. SBA estimates that this will qualify an additional 70,000 businesses for the 7(a) Business Loan program and immediately help make capital available to these small businesses which may be affected by diminished credit opportunities as a result of the economy. This temporary size standard will be available from the Effective Date of this rule through the end of Federal Fiscal Year 2010, September 30, 2010.

SBA has at least twice before taken similar measures to provide assistance to additional small businesses in times of economic uncertainty. SBA temporarily applied the CDC size standards to the 7(a) Business Loan Program from December 31, 1992 to March 4, 1993. SBA also applied the CDC size standards to 7(a) loans made through its Gulf Opportunity Loan Pilot program because of the urgent need for Federal financial assistance as a result of Hurricanes Katrina and Rita in 2005. 70 FR 69045, November 14, 2005.

Small businesses are critical to the nation's economy and are responsible for most new private sector jobs created and roughly 50% of the non-farm employment base. Access to capital at affordable rates and attractive terms is the lifeblood of a healthy small business sector. Today, many small business

concerns, including those which may not qualify for 7(a) loans under the existing framework, are experiencing financial hardship as a result of economy. SBA believes that temporarily applying the CDC size standards to the 7(a) program will provide an effective mechanism for the Federal Government to extend crucial financial assistance to small businesses that cannot obtain financial assistance in the current economic environment. This will also help achieve the purposes and goals of the Recovery Act to promote economic recovery, create and preserve jobs, and make small business credit more available.

II. Analysis of Changes to Section 121

Section 121.301(a). This section is revised to clarify that the alternative 7(a) business loan size standard is temporary and applies only for a period that coincides with two Federal Fiscal Years (FY 2009 and FY 2010). This date also coincides with SBA Recovery Act funding and several new Recovery Act SBA Programs, which are available through September 30, 2010.

Section 121.301(b). This section is revised to extend temporarily the alternate size standards currently in use for SBA's CDC program to small businesses seeking financial assistance under the Agency's 7(a) program.

Currently, as stated above, to be eligible for assistance under the CDC program, a business concern must meet either the size eligibility criteria of the 7(a) Business Loan Program, or have tangible net worth not in excess of \$8.5 million and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of \$3.0 million. Size standards based on the CDC net worth and net income size standard make assistance available to some small businesses that may be larger in size than business concerns that qualify for the 7(a) Business Loan Program.

SBA recognizes that small business concerns are experiencing difficulty accessing credit in the current economic environment. Many businesses that previously qualified for conventional credit programs, without government assistance, are now less able to access the financing they need. The broader CDC alternate size standards will make more small businesses eligible for 7(a) loans.

Applying the alternate net worth and net income size standards to the 7(a) loan program on a temporary basis during the current downturn in the economy provides an effective mechanism for the Federal Government

to extend crucial financial assistance that would otherwise be unavailable to this segment of the small business community.

III. Justification for Publication as Interim Final Rule

In general, SBA publishes a rule for public comment before issuing a final rule in accordance with the Administrative Procedure Act (APA) and SBA regulations. 5 U.S.C. 553 and 13 CFR 101.108. Section 553(b)(3)(B) of the APA provides an exception to this standard rulemaking process, however, where an agency finds good cause to adopt a rule without prior public participation. The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim final rule without soliciting public comment.

In enacting the good cause exception to standard rulemaking procedures, Congress recognized that emergency situations arise where an agency must issue a rule without public participation.

The Recovery Act was enacted in response to pronounced turmoil in the financial markets. It promotes economic recovery by preserving and creating jobs and assisting those most impacted by the severe economic conditions facing the nation. SBA received funding and authority through the Recovery Act to modify existing loan programs and establish new loan programs to significantly stimulate small business lending. SBA expects these actions will increase access to affordable credit for small businesses through the Agency's 7(a) loan programs, unfreeze the secondary market for SBA guaranteed loans, help small businesses struggling with existing debt, and allow greater investment in high-growth small businesses.

To achieve the purposes and spirit of the Recovery Act, SBA's temporary application of the broader alternate size standards of the CDC Program to businesses seeking 7(a) loans will provide them with additional choices for obtaining financial assistance. This temporary alternative 7(a) loan size standard will enable businesses currently sharing many characteristics of existing small businesses to have access to SBA's flagship credit program in this time of tight credit.

Accordingly, SBA finds that good cause exists to publish this rule as an interim final rule in light of the urgent need. Advance solicitation of comments for this rulemaking would be impracticable and contrary to the public

interest, as it would harm those small businesses that need immediate access to capital. Any such delay would be extremely prejudicial to the affected businesses.

IV. Justification for Immediate Effective Date of Interim Final Rule

The Administrative Procedure Act requires that "publication or service of a substantive rule shall be made not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. 553(d)(3). SBA finds that good cause exists to make this final rule effective the same day it is published in the **Federal Register**.

The purpose of the APA provision is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule takes effect. For the reasons set forth above in the section on Justification for Publication as Interim Final Rule, SBA finds that good cause exists for making this interim final rule effective immediately, instead of observing the 30-day period between publication and effective date. Small businesses can receive assistance without delay by the immediate adoption of this rule, and no postponement of effective date is necessary for the public to adjust its behavior. The changes adopted in this rule temporarily extend the 7(a) program to an additional group of small businesses; however, current programs and practices remain in place.

V. Comments Request

Although this rule is being published as an interim final rule, SBA is soliciting comments from interested members of the public on all aspects of this rule, including the underlying policies. In particular, SBA would appreciate comments addressing the duration of the regulatory change and whether SBA should consider making the change permanent.

Compliance With Executive Orders 12866, 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

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

Regulatory Impact Analysis

1. Is there a need for the regulatory action?

As discussed in the supplementary information, the current economic conditions warrant applying the alternate size standards of the CDC Program to the 7(a) Business Loan Program as a mechanism for addressing diminished sources of credit for the small business community. SBA's mission is to aid and assist small businesses through a variety of financial, procurement, business development, and advocacy programs. To assist effectively the intended beneficiaries of these programs, SBA must establish distinct definitions of which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(a)) delegates to SBA's Administrator the responsibility for establishing small business definitions.

For two of SBA's financial assistance programs (*i.e.*, the CDC Program and the Small Business Investment Company Program), a business may qualify for assistance if it does not exceed the industry size standard for its primary industry (13 CFR 121.201) or alternate size standards based on net worth and net income. For certain industries, the alternate size standards qualify businesses larger in size than under the industry size standard levels.

This regulatory action promotes the Administration's objectives. One of SBA's goals in support of the Administration's objectives is to help individual small businesses succeed through fair and equitable access to capital and credit. Reviewing and modifying size standards, when appropriate, ensures that intended beneficiaries have access to small business programs designed to assist them.

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

The benefit to businesses obtaining small business status as a result of this interim final rule is eligibility for SBA's 7(a) Business Loan Program. The alternate CDC net worth and net income size standards do not affect other SBA programs, Federal procurement preference programs for small businesses, or regulatory and other programs of other Federal agencies that use SBA size standards. Under this interim final rule, approximately 70,000 additional businesses (primarily engaged in construction, retail trade, and services) will become eligible for the 7(a) Business Loan Program. The assistance available under the 7(a) Business Loan Program will enable

newly eligible businesses to access credit they need to maintain or expand their operations during the current economic conditions.

SBA estimates that approximately 900 additional 7(a) loans per year totaling \$450 million could be made to these newly defined small businesses. Extending the 7(a) Business Loan Program to additional businesses is not expected to crowd-out other small businesses since the estimated additional loans represent approximately 3.5 percent of the total loan volume in fiscal year 2008 of approximately \$13 billion and is well within the SBA authorized loan ceiling for fiscal year 2009.

SBA does not anticipate any significant costs to the Program as a result of this interim final rule. The Program is self-financing and existing resources are in place to sufficiently process the additional loans.

Executive Order 12988: For the purposes of Executive Order 12988, Civil Justice Reform, SBA has determined that this rule is crafted, to the extent practicable, in accordance with the standards set forth in §§ 3(a) and 3(b)(2), to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13132: For the purposes of Executive Order 13132, SBA determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act: This interim final rule does not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 USC Chapter 35.

Regulatory Flexibility Act: Because the rule is an interim final rule, there is no requirement for SBA to prepare an Initial Regulatory Flexibility Act (IRFA) analysis. The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small non-profit businesses, and small local governments. Pursuant to the RFA, when an agency issues a rule, the agency must prepare an IRFA which describes whether the impact of the rule will have a significant economic impact on a substantial number of small entities. However, the RFA requires analysis of a rule only where notice and comment rulemaking are required. Rules are exempt from Administrative Procedure Act (APA) notice and comment requirements and therefore from the RFA requirements when the agency for good cause finds that notice and public procedure thereon is impracticable, unnecessary, or contrary to the public interest.

List of Subjects in 13 CFR Part 121

Loan programs—business, Disaster assistance loans, Reporting and recordkeeping requirements, Small business.

■ For reasons set forth in the preamble, amend part 121 of title 13 Code of Federal Regulations as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

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

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637, 644, and 662(5); and Pub. L. 105–135, sec. 401 *et seq.*, 111 Stat. 2592.

■ 2. Amend § 121.301 by revising paragraphs (a) introductory text and (b) to read as follows:

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

(a) For Business Loans (other than for 7(a) Business Loans for the period beginning May 5, 2009 and ending on September 30, 2010) and for Disaster Loans (other than physical disaster loans), an applicant business concern must satisfy two criteria:

* * * * *

(b) For Development Company programs and, for the period beginning May 5, 2009 and ending on September 30, 2010, for 7(a) Business Loans, an applicant must meet one of the following standards:

- (1) The same standards applicable under paragraph (a) of this section; or
- (2) Including its affiliates, tangible net worth not in excess of \$8.5 million, and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two completed fiscal years not in excess of \$3.0 million. If the applicant is not required by law to pay Federal income taxes at the enterprise level, but is required to pass income through to its shareholders, partners, beneficiaries, or other equitable owners, the applicant's "net income after Federal income taxes" will be its net income reduced by an amount computed as follows:

(i) If the applicant is not required by law to pay State (and local, if any) income taxes at the enterprise level, multiply its net income by the marginal State income tax rate (or by the combined State and local income tax rates, as applicable) that would have applied if it were a taxable corporation.

(ii) Multiply the applicant's net income, less any deduction for State and local income taxes calculated under paragraph (b)(2)(i) of this section, by the marginal Federal income tax rate that

would have applied if the applicant were a taxable corporation.

(iii) Sum the results obtained in paragraphs (b)(2)(i) and (b)(2)(ii) of this section.

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Dated: April 15, 2009.

Karen G. Mills,

Administrator.

[FR Doc. E9–10359 Filed 5–1–09; 11:15 am]

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