

# Rules and Regulations

Federal Register

Vol. 74, No. 209

Friday, October 30, 2009

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## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 120

RIN 3245-AF90

#### The American Recovery and Reinvestment Act of 2009: Secondary Market First Lien Position 504 Loan Pool Guarantee

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This interim final rule implements Section 503 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which establishes a secondary market for the first mortgage loan that is a component of a financing made under the 504 program. The Recovery Act authorizes SBA to establish a program to provide a guarantee for pools comprised of portions of these first mortgage loans that will back certificates to be sold to investors.

**DATES:** *Effective Date:* This rule is effective October 30, 2009.

*Comment Date:* Comments must be received on or before January 28, 2010.

*Applicability Date:* Subpart J of Part 120 is applicable to all eligible First Lien Position 504 Loans financing a Project in conjunction with a 504 loan by a CDC funded by a debenture that was sold on or after February 17, 2009.

**ADDRESSES:** You may submit comments, identified by RIN: 3245-AF90, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* James W. Hammersley, Deputy Assistant Administrator, Office of Policy and Strategic Planning, Small Business Administration, 409 Third Street, SW., Washington, DC 20416.
- *Hand Delivery/Courier:* James W. Hammersley, Deputy Assistant

Administrator, Office of Policy and Strategic Planning, 409 Third Street, SW., Washington, DC 20416.

SBA will post all comments on [www.regulations.gov](http://www.regulations.gov). If you wish to submit confidential business information (CBI) as defined in the User Notice at [www.regulations.gov](http://www.regulations.gov), please submit the information to James W. Hammersley, Deputy Assistant Administrator, Office of Policy and Strategic Planning, 409 Third Street, SW., Washington, DC 20416, or send an e-mail to [james.hammersley@sba.gov](mailto:james.hammersley@sba.gov). 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:** James W. Hammersley, Deputy Assistant Administrator, Office of Policy and Strategic Planning, at [james.hammersley@sba.gov](mailto:james.hammersley@sba.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background Information

The American Recovery and Reinvestment Act of 2009 (Recovery Act), Public Law 111-5, was enacted on February 17, 2009, to, among other things, promote economic recovery by preserving and creating jobs, and assisting those most impacted by the severe economic conditions facing the nation. The U.S. Small Business Administration is one of several agencies that will play a role in achieving these goals.

As authorized by the Recovery Act, this rule will establish a temporary secondary market guarantee program for pools comprised of first mortgage loans made under SBA's 504 program. The 504 program provides long-term, fixed rate financing to small businesses for expansion or modernization, primarily of real estate (including land and new building construction, existing building purchases or renovation, and machinery and equipment). Financing is delivered through Certified Development Companies (CDCs), which are private primarily nonprofit entities established pursuant to the 504 program to contribute to the economic development of their communities. In a typical 504 program project, a lender (First Lien Position 504 Lender) provides a loan for 50 percent or more of the Project costs

(the First Lien Position 504 Loan), the CDC provides a loan for up to 40% of the Project costs (the 504 loan) funded through the sale of a debenture that is fully guaranteed by SBA, and the small business receiving the financing contributes at least 10 percent of the Project costs. The CDC obtains the funds to make the 504 loan by issuing a debenture that is guaranteed by SBA (CDC Debenture). The small business must meet eligibility requirements for SBA financial assistance, and a project generally must create or retain at least one job for every \$65,000 guaranteed by SBA. First Lien Position 504 Lenders, small business borrowers, and CDCs in the 504 program are required to pay various fees to offset the costs of the program. Regulations implementing the 504 program are in Subpart H of Part 120 of SBA's regulations. (13 CFR Part 120, Subpart H).

Over the years, the development of secondary markets for 504 loans facilitated the capacity of CDCs to originate such loans and small businesses to apply for them. By selling loans to investors via the secondary markets, among other benefits, lenders can receive additional funds, or liquidity, which can enable them to make more loans. Sellers, broker-dealers, and other secondary market participants make profits from the premiums that investors pay for the securities, through various fees, and through servicing the loans over time. There is a secondary market for CDC Debentures and another secondary market for the First Lien Position 504 Loans. Due to the disruption in the credit markets, there has been a significant decline in secondary market activity relating to First Lien Position 504 Loans. Section 503 of the Recovery Act provides authority to SBA to assist the secondary market for the First Lien Position 504 Loans by allowing the SBA Administrator to establish a secondary market guarantee for pools of First Lien Position 504 Loans to sell to third-party investors. The authority terminates on February 16, 2011, which is two years after enactment. First Lien Position 504 Loans are eligible to be part of a pooling if, among other things, the debenture funding the associated loan by a CDC was sold on or after February 17, 2009.

## II. Section-by-Section Analysis of New Subpart J of Part 120

The defined terms in subpart J include:

**504 financing.** The loans made to a small business to fund a Project under the SBA's development company loan program authorized by Title V of the Small Business Investment Act of 1958.

**Affiliate.** A person or entity SBA determines to be an affiliate of a Program Participant pursuant to the application of the principles and guidelines set forth in section 121.103 of this Title.

**Certified Development Company or CDC.** An entity as defined in section 120.10 of this Part.

**Central Servicing Agent or CSA.** The entity serving as SBA's central servicing agent for the Program.

**Current.** That no scheduled payment owed by an Obligor pursuant to a Pool Note is over 29 days past due.

**First Lien Position 504 Loan.** The financing provided by the First Lien Position 504 lender that is part of the 504 project financing.

**First Lien Position 504 Loan Pool Guarantee Agreement.** The agreement, in the form approved by SBA, wherein entities agree to participate in the forming of a Pool under the Program, available at <http://www.sba.gov/aboutsba/sbaprograms/elending/index.html>.

**Guide.** The SBA First Lien Position 504 Loan Pooling Program Guide published by SBA which provides information applicable to the Program including, among other things, requirements relating to the formation of a Pool, available at <http://www.sba.gov/aboutsba/sbaprograms/elending/index.html>.

**Liquidation Proceeds.** Cash, including insurance proceeds, proceeds of any foreclosed-on property disposition, revenues received with respect to the conservation and disposition of a foreclosed-on property or repossessed collateral, including any real property securing the Pool Loan, consisting of a commercial property or residential property and any improvements thereon, and any other amounts received in connection with the liquidation of the Pool Loan, whether through Seller's sale, foreclosure sale, any offset or workout, or otherwise.

**Loan Interest.** The right to receive the owned portion of the principal balance of the Pool Loan together with interest thereon at a per annum rate in effect from time to time in accordance with the First Lien Position 504 Loan Pool Guarantee Agreement.

**Maturity.** The maturity of the Loan Interest in the Pool that has the longest

remaining term of any Loan Interest in the Pool. The maturity will change from time to time due to prepayment or default on Loan Interests in the Pool.

**Obligor.** The obligor(s) under a Pool Note.

**Ongoing Guarantee Fee.** An annual fee collected monthly and based on the percentage of the Pool Loan that is in the pool, pursuant to section 503(C)(3)(B)(ii) of the Recovery Act, to result in a cost of the loan guarantee of zero as determined under the Federal Credit Reform Act of 1990, as amended. The funds generated by the fee serve as a reserve to pay for program losses. The fee will be published in a Notice by SBA prior to the commencement of the program.

**Pool.** The aggregate of Loan Interests formed into a single pool by the Pool Originator in accordance with the Program. The Pool is comprised of an unguaranteed portion and an SBA-guaranteed portion. The unguaranteed portion of the Pool backs the Pool Originator Receipt, and cannot be sold to Pool Investors. The SBA-guaranteed portion of the Pool backs the Pool Certificates which may be sold to Pool Investors. The Seller's Loan Interest is not included in the Pool.

**Pool Assembler.** An entity that meets the qualifications set forth in section 120.630 of this Part and has been approved as such by SBA.

**Pool Certificate.** The document representing a beneficial fractional interest in the SBA-guaranteed portion of a Pool.

**Pooled.** When one or more Loan Interests in a Pool Loan has been put into a Pool.

**Pooling.** The transfer of one or more Loan Interests in a Pool Loan into a Pool.

**Pool Investor.** An entity which holds a Pool Certificate in accordance with Program Rules and Regulations.

**Pool Loan.** A loan that meets the Program eligibility requirements set forth in section 120.1704 of this subpart J and has been pooled.

**Pool Loan Receivables.** Pool Loan payments, prepayments, or collections made in connection with the Pool Loan by the Obligor pursuant to Pool Note or any other Pool Loan documents or agreements, or by another person or entity made on behalf of any such Pool Loan obligor, and Liquidation Proceeds.

**Pool Note.** The document evidencing a Pool Loan.

**Pool Originator.** An entity approved by SBA to pool Loan Interests under the Program.

**Pool Originator Receipt.** The document evidencing the Pool

Originator's retained ownership in a Pool it has formed under the Program.

**Premier Certified Lenders Program.** The program defined in section 120.845 of this Part.

**Program.** The program authorized by section 503 of the American Recovery and Reinvestment Act of 2009.

**Program Participant.** An entity that executes the First Lien Position 504 Loan Pool Guarantee Agreement as Seller, Pool Originator, or Pool Investor, and any successors or assignees thereof.

**Program Participant Associate.** (i) An officer, director, key employee, or holder of 20 percent or more of the value of a Program Participant's stock or debt instruments, or (ii) any individual in which one or more individuals referred to in clause (i) of this definition, or a spouse, or child, or sibling, or the spouse of any such individual, owns or controls at least 20 percent.

**Program Preference.** Any arrangement giving the Seller, or a Program Associate or Affiliate of Seller, a preference or benefit of proportion greater than its Loan Interest as compared to Pool Originator, Pool Investor, or SBA relating to the making, servicing, or liquidation of the Pool Loan with respect to such things as repayment, collateral, guarantees, control, maintenance of a compensating balance, purchase of a certificate of deposit or acceptance of a separate or companion loan, without SBA's consent. Seller's agreement to grant a Pool Loan's Obligor a deferment in return for receiving more collateral on a different loan owned by Seller is an example of a preference.

**Program Rules and Regulations.** This subpart J, as may be amended from time to time by SBA, the Program Regulations, available at <http://www.sba.gov/aboutsba/sbaprograms/elending/index.html>, the First Lien Position 504 Loan Pool Guarantee Agreement, available at <http://www.sba.gov/aboutsba/sbaprograms/elending/index.html>, any other Program agreements signed by a Program Participant, if applicable, the Guide, available at <http://www.sba.gov/aboutsba/sbaprograms/elending/index.html>, the Recovery Act available at [Recovery.gov](http://www.recovery.gov), and the provisions of subpart H governing Third Party Loans and Third Party Lenders available at <http://www.sba.gov/aboutsba/sbaprograms/elending/index.html>.

**Project.** A project as defined by section 120.802 of this Part.

**SBA.** The United States Small Business Administration, an agency of the United States Government.

**Seller.** An entity that has sold a Pool Loan to a Pool Originator to be Pooled.

*Seller's Pool Loan.* The Pool Loan sold to a Pool Originator pursuant to the First Lien Position 504 Loan Pool Guarantee Agreement.

*Seller Receipt.* The document that evidences a Seller's retained Loan Interest in a Pool Loan.

*Servicing Retention Amount.* The amount of a Pool Loan interest payment retained by Seller for servicing the Pool Loan that is payable and calculated pursuant to the First Lien Position 504 Loan Pool Guarantee Agreement. This approach is customary for loans sold in the secondary market.

*Weighted Average Interest Rate.* The dollar-weighted average interest rate of a Pool Certificate calculated by multiplying the interest rate of each Loan Interest in the Pool by the ratio of that Loan Interest's current outstanding principal in the SBA-guaranteed portion of the Pool (that is, the portion of the Pool Loan backing the Pool Certificates) to the current aggregate or outstanding principal of each Loan Interest in the SBA-guaranteed portion of the Pool, and adding the sum of the resulting products. The Pool Certificate interest rate will fluctuate over the life of the Pool as defaults, prepayments and normal repayments applicable to a Pooled Loan Interest occurs.

*Weighted Average Maturity.* The weighted average maturity of a Pool Certificate is a dollar weighted average maturity that is calculated by multiplying the remaining term, in months, of each Loan Interest in a Pool by the ratio of that Loan Interest's current outstanding pooled principal to the current aggregate outstanding pooled principal of all Loan Interests in the Pool, and adding the sum of the resulting products. The weighted average maturity of a Pool Certificate will fluctuate over the life of the Pool as Loan Interest defaults, prepayments and normal Loan Interest repayments occur.

An important term defined in subpart J is "Loan Interest". A Loan Interest is the right to receive the owned portion of the principal balance of a loan together with interest thereon at a per annum rate in effect from time to time in accordance with the applicable program agreement. Under the program, the pooling process results in a First Lien Position 504 Loan being split into three separate parts, or Loan Interests. One Loan Interest will be held by a Seller that will be equal to 15% or more of the Pool Loan and will be evidenced by a document issued by the Central Servicing Agent (CSA) called a Seller Receipt. The Seller's Loan Interest will not be part of the Pool, and is not guaranteed under this program. A second Loan Interest will be held by a

Pool Originator in an unguaranteed portion of a Pool that will be equal to 5% or more of the aggregate of each Loan Interest in the Pool, and will be evidenced by a Pool Originator Receipt. A third Loan Interest will be put into the pool and be fully guaranteed by SBA, and will back Pool Certificates sold to Pool Investors. The part of the pool of Loan Interests backing a Pool Originator Receipt is referred to as the unguaranteed portion of the Pool. The part of the pool of Loan Interests backing a Pool Certificate is referred to as the SBA-guaranteed portion of the Pool.

Under the Program, in connection with the forming of a particular pool, it is possible for the Seller and Pool Originator to be the same entity; however, a Seller or a Pool Originator cannot be a Pool Investor for that pool. In such a case, the entity pooling a Pool Loan it made or acquired prior to the pooling would execute the First Lien Position 504 Loan Pool Guarantee Agreement as Seller, the party responsible for servicing the Pool Loan and retaining at least a 15% Loan Interest in the Pool Loan, and as Pool Originator, the party placing 85% or less of the Loan Interest in the Pool Loan into the Pool (with at least 5% of the Loan Interest in the Pool Loan going into the unguaranteed portion of the Pool). In such a scenario, a single entity (the Pool Originator) would hold 20% or more of the Loan Interest in a Pool Loan that is unguaranteed, cannot be sold to Pool Investors, and must be serviced pursuant to the Program Rules and Regulations.

Section 120.1701 describes the purpose of this temporary Program. The purpose of the Program is to provide a federal guarantee for Pools of First Lien Position 504 Loans to facilitate the sale of such loans and increase the liquidity of the lenders holding the loans so that the lenders can use the sale proceeds to fund more such loans.

Section 120.1702 discusses the SBA fee for guaranteeing a portion of the pool, which is called the Ongoing Guarantee Fee. The Ongoing Guarantee Fee is collected from program participants and is used to pay program losses.

Section 120.1703 establishes the qualifications applicable to becoming a Pool Originator under the Program. An entity applying to become a Pool Originator must send an application to SBA certifying that it is an approved Pool Assembler pursuant to subpart F of this Title or it: (1) Is regulated by the appropriate agency as defined in section 3(a)(34)(G) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(34)(G)); (2)

meets all financial and other applicable requirements of its regulatory authority and the Government Securities Act of 1986, as amended (Pub. L. 99-571, 100 Stat. 3208); (3) has the financial capability to originate acceptable pools consisting of eligible Pool Loans in sufficient quantity to support the issuance of Pool Certificates; and (4) is in good standing with the SBA (as the SBA determines), Office of the Comptroller of the Currency (OCC) if it is a national bank, the Federal Deposit Insurance Corporation if it is a bank not regulated by the OCC, the Financial Institutions Regulatory Authority, if it is a member, the National Credit Union Administration if it is a credit union, and (5) for any Pool Originator that is an SBA Lender, that the SBA Lender has satisfactory SBA performance, as determined by SBA in its sole discretion.

Section 120.1704 establishes which loans are eligible to be part of a pooling under the Program. It states, among other things, that eligible Pool Loans must: (1) Be Current and have been Current for the six-month period immediately prior to the date the Pool is formed or for the life of the Pool Loan, whichever time period is shorter; (2) have been closed and serviced in accordance with Program Rules and Regulations; (3) be part of a completed 504 financing, funded by a CDC debenture, which means that the Pool Loan must be fully disbursed, and that the debenture funding the CDC loan must have been sold on or after February 17, 2009; and (4) not be (i) to a business deriving more than one-third of its gross annual revenue from legal gambling activities; (ii) to a casino, gambling establishment, or casino hotel; (iii) for financing the acquisition, construction or renovation of an aquarium, zoo, golf course, or swimming pool; or (iv) to a business covered by a six-digit North American Industry Classification System (NAICS) code for casinos—713210 ("Casinos (Except Casino Hotels)"); casino hotels—721120 ("Casino Hotels"); other gambling institutions—713290 ("Other Gambling Industries"); golf courses—713910 ("Golf Courses and Country Clubs"); or aquariums and zoos—712130 ("Zoos and Botanical Gardens"). The restrictions on the business activities identified in (i) through (iv) above arise from the fact that the guaranty on the pool is established in the Recovery Act. The Recovery Act provides that these types of businesses may not receive any assistance provided directly or indirectly by the Act.

A Pool Originator must identify and submit to SBA for review Pool Loans to

businesses with NAICS code 713940 covering Fitness and Recreational Sports Centers, as this category includes both swimming pools, which are not eligible for assistance under the Recovery Act, and other types of fitness and recreational centers which may be eligible for Recovery Act assistance. Section 1604 of the Recovery Act states that none of the funds appropriated or otherwise made available in the Act may be used by any State or local government, or any private entity, for any casino or other gambling establishment, aquarium, zoo, golf course or swimming pool. SBA may not guarantee a pool that contains a Pool Loan made to a business primarily engaged in any such activities or to a business that used the loan funds to acquire, construct, renovate or for another purpose that included the restricted uses.

Section 120.1705 establishes requirements relating to Pool formation. It states that only an entity approved by SBA to be a Pool Originator under the Program and that continues to qualify to be a Pool Originator pursuant to subpart J may initiate the formation of a Pool. The Pool's characteristics must meet the parameters set forth in the Guide created by SBA for this Program, which may be adjusted based on market conditions and program experience. A revised version of the Guide will be published in the **Federal Register** to reflect any such changes.

Section 120.1706 establishes a Pool Originator's required retained interest in each Pool it forms under the program. It states that the Pool Originator must retain an ownership interest in any such Pool equal to at least 5% of the aggregate of the total outstanding principal balance of each Pool Loan with a Loan Interest in the pool as calculated at the time of pool formation. At Pool formation, the CSA will issue the Pool Originator a Pool Originator Receipt evidencing the Pool Originator's retained interest in the Pool. The Pool Originator may not sell, pledge, participate, hypothecate, or otherwise transfer its Pool Originator Receipt or any interest therein for the life of the Pool.

Section 120.1707 establishes a Seller's required retained interest in the Pool Loan it sells to the Pool Originator at the time of Pool formation under the program, and states that the Seller must retain a 15% or greater Loan Interest in such loan. At pool formation, the CSA will issue the Seller a Seller Receipt evidencing the Seller's retained ownership in the Pool Loan. With SBA's written permission, the Seller may sell the Seller Receipt and Servicing

Retention Amount in whole, but not in part, to a single entity at one time. The Seller may not sell less than 100% of the Seller Receipt and Servicing Retention Amount and may not sell a participation interest in any portion of the loan. In addition, in order to complete the sale, Seller must have the purchaser of its rights to the Pool Loan execute the First Lien Position 504 Loan Pool Guarantee Agreement as Seller and deliver the executed original to the CSA.

Section 120.1708 establishes the characteristics of Pool Certificates. It states, among other things, that: (1) A Pool Certificate represents a fractional beneficial interest in a Pool; (2) it is self-liquidating by payments on Loan Interests in the Pool; (3) the CSA prepares the Pool Certificate; (4) SBA must approve the form and terms of the Pool Certificate; and (5) it must be registered with the CSA.

Section 120.1709 discusses how a Pool Certificate can be transferred. It establishes, that, in order for the transfer of a Pool Certificate to be effective, the CSA must reflect the transfer on its records. It also establishes the content of the applicable transmittal letter relating to the transfer and that the transfer costs due to the CSA must be paid prior to transfer. It also states that such transfers must comply with Article 8 of the Uniform Commercial Code (UCC) of the State of New York. (Because each Pool Certificate will be an immobilized certificate held in New York and ownership transfers will occur as outlined in Article 8 of the UCC, Article 8 of the UCC of the State of New York applies.)

Section 120.1710 establishes the CSA responsibilities related to the central servicing of the Program. It states that the CSA must: (1) Issue a Seller Receipt to the Seller, a Pool Originator Receipt to the Pool Originator, and a Pool Certificate to each Pool Investor; (2) forward all Loan Receivables it receives to pay the Servicing Retention Amount, Ongoing Guarantee Fee, Seller Receipt, Pool Originator Receipt, Pool Certificates, and any other applicable payment in accordance with Program Rules and Regulations; (3) maintain a registry of Pool Investors and other information as SBA requires; (4) register all Pool Certificates; and (5) provide SBA with a list, by Pool, of each Loan Interest with an underlying note that is 60 days or more in arrears on a monthly basis.

Section 120.1711 establishes the conditions pursuant to which a Participant's participation privileges may be suspended or terminated by SBA and a Participant's right to appeal such suspension or termination. It states

that SBA may, by following the procedures set forth in the section, suspend or terminate the privilege of a Participant, and/or any Associate or Affiliate of the Participant, to sell, purchase, broker, or deal in loans, Loan Interests, or Pool Certificates under the program if any such Participant or its Associate or Affiliate has:

(1) Failed to comply materially with any requirement imposed by Program Rules and Requirements, or (2) making a material false statement or failure to disclose a material fact to SBA. Section 120.1711 also establishes additional grounds for the suspension or termination of a Pool Originator which are related to the Pool Originator's fitness to form Pools.

Section 120.1712 establishes that Seller's responsibilities with respect to Seller's Pool Loan shall remain in effect for the life of such loan unless SBA provides written notice to the contrary.

Section 120.1713 establishes the standards applicable to Seller's origination of Seller's Pool Loan. It states that the Seller is responsible for having made and closed Seller's Pool Loan in a commercially reasonable manner, consistent with prudent lending standards, and in accordance with any applicable Program Rules and Regulations.

Section 120.1714 establishes the standards and requirements applicable to Seller's servicing of Seller's Pool Loan. It states that the Seller must service Seller's Pool Loan, subject to section 120.1718 of this subpart J, in a commercially reasonable manner, consistent with prudent lending standards, and in accordance with applicable Program Rules and Regulations.

Section 120.1715 establishes the standards and requirements applicable to Seller's liquidation of Seller's Pool Loan. It states that, subject to 120.1718 of the subpart, the Seller must liquidate and conduct debt collection litigation for Seller's Pool Loan in a prompt, cost-effective and commercially reasonable manner, consistent with prudent lending standards, in accordance with applicable Program Rules and Regulations, and with SBA approval of either a liquidation or litigation plan or any amendment of such a plan, if applicable.

Section 120.1716 establishes the servicing actions by Seller which need SBA's prior approval. It states that Seller shall not, without prior written consent of SBA, take the following actions with respect to Seller's Pool Loan: (1) Make or consent to any substantial alteration in the terms ("substantial" includes, but is not

limited to, any changes to the principal amount or interest rate); (2) accelerate the maturity; (3) sue; or (4) waive or release any claim. Guidance on other servicing actions, some of which may need prior SBA approval, is provided in the Guide.

Section 120.1717 establishes when a Seller may defer payments on Seller's Pool Loan without SBA's prior approval. It states that, without the prior written consent of SBA, Seller, at the request of Obligor, may grant one deferment of Obligor's scheduled payments for a continuous period not to exceed three months of past or future installments. Seller shall immediately notify CSA of any payment deferment and that notification shall include (1) the SBA Pool Loan Number, (ii) the Obligor's name, (iii) the terms of such deferment, (iv) the date Obligor is to resume payment and (v) reconfirmation of the basis of interest calculation (e.g. 30/360 or Actual Days/365).

Section 120.1718 establishes SBA's right to assume Seller's responsibilities with respect to Seller's Pool Loan. It states that SBA may, in its sole discretion, undertake the servicing, liquidation and/or litigation of Seller's Pool Loan at any time and, in such event, Seller must take any steps necessary to facilitate the assumption by SBA of such responsibilities, which can be transferred by SBA at its discretion to a contractor, agent or other entity.

Section 120.1719 establishes when SBA is entitled to recover from Seller monies paid by SBA under the Program. It establishes that SBA is entitled to recover from Seller any monies paid on SBA's guarantee of a Pool Certificate backed in part by Seller's Pool Loan, plus interest, if SBA in its sole discretion determines that any of the following events has occurred:

- (1) Seller's improper action or inaction has put SBA at risk;
- (2) Seller has failed to disclose a material fact to SBA regarding a Seller's Pool Loan in a timely manner;
- (3) Seller has misrepresented a material fact to SBA regarding Seller's Pool Loan;
- (4) Seller has failed to comply materially with section 120.1720 of this subpart;
- (5) SBA has received a written request from Seller to terminate the SBA's guarantee on the Loan Interest in Seller's Pool Loan;
- (6) Seller has failed to comply materially with Program Rules and Regulations; or
- (7) Seller has failed to make, close, service or liquidate Seller's Pool Loan in a prudent manner.

Section 120.1720 establishes SBA's right to review Seller's Pool Loan documents. It establishes that, in the event that SBA purchases a Loan Interest in Seller's Pool Loan, Seller must provide to SBA copies of the Pool Loan collateral documents, Pool Loan underwriting documents, and any other documents SBA may require in writing within 30 calendar days of a written request from SBA (which SBA will review in connection with its efforts to determine if Seller is obligated to reimburse SBA pursuant to this subpart). A Seller's failure to provide the requested documentation may constitute a material failure to comply with the Program Rules and Regulations and may lead to an action for recovery under 120.1719. SBA will also evaluate a Seller's continued participation in the Program and may restrict further sales under the Program until SBA determines that the Seller has provided sufficient documentation.

Section 120.1721 establishes a Seller's responsibility to facilitate an SBA investigation into whether Seller is responsible for reimbursing SBA for a loss incurred by it under the program due to Seller's improper actions. It establishes that SBA may undertake such investigation as it deems necessary to determine whether it is entitled to seek recovery from the Seller and that the Seller agrees to take whatever actions are necessary to facilitate such investigation.

Section 120.1722 establishes SBA's offset rights with respect to Seller. It states SBA shall have the right to offset any amount owed by Lender to SBA, including, without limitation, an offset against CSA's obligation to pay Lender pursuant to any Section 504 First Mortgage Loan Pool Guarantee Agreement.

Section 120.1723 establishes when Seller must forward Pool Loan Receivables to CSA. It states that any loan receivables received by Seller in connection with obligations under Seller's Pool Loan must be forwarded by Seller to CSA within two business days of receipt of collected funds. Pool Loan Receivables include Liquidation Proceeds.

Section 120.1724 discusses how ordinary servicing and liquidation expenses incurred by Seller are recoverable from SBA and the applicable Pool Originator and Pool Investors. It establishes that all ordinary and reasonable expenses of servicing, and liquidating Seller's Pool Loan shall be paid by, or be recoverable from, Obligor, and that all such ordinary and reasonable expenses incurred by Seller or SBA which are not recoverable from

Obligor shall be shared ratably by Seller, SBA, and the Pool Originator pursuant to the applicable percentages set forth in the First Lien Position 504 Loan Pool Guarantee Agreement.

Section 120.1725 states that a Seller and the Pool Originator must not establish a Program Preference, which is defined in 13 CFR 120.10.

Section 120.1726 discusses the Pool Certificates a Seller must not purchase. It establishes that neither a Seller, nor any of its Program Associates or Affiliates, may purchase a Pool Certificate that is backed by a Loan Interest in a Pool Loan that the Seller, or any of its Program Associates or Affiliates, originated or owned, and, in the event such purchase occurs, SBA's guarantee shall not be in effect with respect to any such Pool Certificate.

### III. Justification for Publication as Interim Final Rule

In general, before issuing a final rule, SBA publishes the rule for public comment in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553. The APA provides an exception from the general rule where the agency finds good cause to omit public participation. 5 U.S.C. 553(c)(3)(B). The good cause requirement is satisfied when prior public participation can be shown to be 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 current turmoil in the financial markets is having a negative impact on the availability of financing for small businesses. SBA finds that good cause exists to publish this rule as an interim final rule in light of the urgent need to help small businesses sustain and survive during this economic downturn. Advance solicitation of comments for this rulemaking would be impracticable, contrary to the public interest, and would harm those small businesses that need immediate access to capital.

In addition, the Recovery Act mandates that the SBA issue emergency regulations to implement Section 503 and establish the Secondary Market Guaranty Authority. The Recovery Act also specifically exempts any such regulations from the notice and comment requirement of the APA.

Although this rule is being published as an interim final rule, comments are

solicited from interested members of the public. These comments must be submitted on or before 90 days from the date of publication. The SBA will consider these comments and the need for making any amendments as a result of these comments.

#### IV. Justification for Immediate Effective Date

The APA 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).

The purpose of this provision is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule takes effect. In light of the current economic downturn and the sharp reduction in commercial lending, it is essential to accelerate the availability of additional 504 financing for small businesses by implementing this rule immediately. In addition, the program has a limited life, so it is important to make the program effective in a timely manner.

SBA finds that that there is good cause for making this rule effective immediately instead of observing the 30-day period between publication and effective date. Delaying implementation of the rule would have a serious adverse impact on the nation's small businesses.

*Compliance With Executive Orders 12866, 12988, 13175 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 rule constitutes a significant regulatory action for purposes of Executive Order 12866.

#### *Executive Order 12988*

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have preemptive effect, and has retroactive effect only to the extent that interests in loans made prior to the effective date of this rulemaking may be eligible to be sold and pooled in accordance with this rule.

#### *Executive Order 13132*

This rule does not have federalism implications as defined in Executive Order 13132. It 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, as specified in the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

#### *Paperwork Reduction Act*

The SBA has determined that this rule imposes new reporting and recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35. Because the Recovery Act requires SBA to issue emergency regulations, the agency has submitted a request to the Office of Management and Budget (OMB) for review and approval of the resulting collection of information under the OMB emergency processing procedures regulation, 5 CFR 1320.13. This information collection consists of the forms that the respondents described below, will be required to submit to SBA in order to provide the information necessary to participate in the SBA Secondary Market Guarantee Program for First Lien Position 504 Loan Pools.

The title, description and number of respondents, the estimated annual cost and hour burdens imposed on the respondents, as a result of this collection of information, are outlined below. SBA invites comments on this new information collection, particularly on: (1) Whether the proposed collection of information is necessary for the proper performance of SBA's functions, including whether the information will have a practical utility; (2) the accuracy of SBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

1. *Form Title and Purpose:* SBA Form 2401: First Lien Position 504 Loan Pool Guarantee Agreement. This is the primary agreement to be executed by all parties to each secondary market pool security transaction. It sets out the terms and conditions under which sellers will exchange portions of first lien position 504 loans in exchange for proceeds from a Pool Certificate.

*Description and Estimated Number of Respondents:* Approximately 50 Sellers and Pool Originators as those terms are defined in this rule.

*Estimated Number of Responses:* 9,000.

*Frequency of Response:* once per each project (response) financed.

*Total Estimated Hour Burden:* 27,000 based on an estimated 3 hours per response.

*Total Estimated Hourly Cost to Respondents:* The cost to the government estimated to be approximately \$308,250.00 annually. Each request for guaranty is estimated to require .5 hours of a contractor's time at \$50 per hour, times 9,000 pool applications or \$225,000.00. SBA would also incur approximately \$83,250.00 including .25 hour per application from a GS-13 staff analyst (GS-13 at \$37 per hour) for verifying the terms of the agreement with the underlying documentation.

2. *Form Title and Purpose:* SBA Form 2404: Application to Become a Pool Originator under the SBA Secondary Market Guarantee Program for First Lien Position 504 Pools. It sets out the information necessary for SBA to make a determination on the application for participation in the program.

*Description and Estimated Number of Respondents:* 15 broker dealers who are interested in becoming Pool Originators.

*Estimated Number of Responses (applications):* 15.

*Frequency of Response:* one time submission—per application.

*Total Estimated Hour Burden:* 150 hours based on an estimated time of 10 hours per application.

*Total Estimated Hourly Cost to Respondents:* This form will likely be completed by an attorney (in house or outside counsel). Their estimated average annual salary is \$100,000.00. Their hourly rate is calculated to be about \$48.08. It is estimated that it will cost respondents \$480.80 per response.

3. *Form Title and Purpose:* SBA Form 2403: Application for Pool of First Lien Position 504 Loan Interests. This form will provide SBA with details concerning each of the first lien position 504 loans the Pool Originator proposes to put into a loan pool.

*Description and Estimated Number of Respondents:* 15 Pool Originators.

*Estimated Number of Responses (loan pools):* 475.

*Frequency of Response:* Once per pool assembled.

*Total Estimated Hour Burden:* 1,425 hours based on the estimated time of 3 hours per response.

*Total Estimated Hourly Cost to Respondents:* The cost to the government is estimated to be approximately \$17,812.00 annually. Each request for guaranty is estimated to require .5 hours of a contractor's time at \$50 per hour, times 475 pool applications or \$17,812.00. SBA would

not be involved in the pool creation process and any review of the documents would have been done simultaneously with the review of First Lien Position 504 Loan Pool Guarantee Agreement and would not incur any expenses other than the cost for the contractor to perform the related duties.

4. *Form Title and Purpose:* SBA Form 2402: Form of Detached Assignment For U.S. Small Business Administration Guaranteed First Lien Position 504 Loan Pool Certificate. This form will be used to collect information concerning the transfer of Pool Certificates for the benefit of investors.

*Description and Estimated Number of Respondents:* 250 potential investors and broker dealers who will participate in the program established by this rule.

*Estimated Number of Responses (loan pools):* 3,000.

*Frequency of Response:* Once for each pool.

*Total Estimated Hour Burden:* 4,500 based on an estimated time of 1.5 hours per response.

*Estimated Hourly Cost to Respondents:* The cost to the government estimated to be approximately \$37,500.00 annually. Each request for guaranty is estimated to require .25 hours of a contractor's time at \$50 per hour, times 3,000 pool certificate transfer applications or \$37,500.00. SBA would not be involved in the transfer transaction and would not incur any expenses other than the cost for the contractor to perform the related duties.

#### *Regulatory Flexibility Act*

Because this rule is an interim final rule, there is no requirement for SBA to prepare a Regulatory Flexibility Act (RFA) analysis. The RFA 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 analysis that describes whether the impact of the rule will have a significant economic impact on a substantial number of small entities. However, the RFA requires such analysis only where notice and comment rulemaking is required.

#### **List of Subjects in 13 CFR Part 120**

Loan programs—business, Small businesses.

■ For the reasons stated in the preamble, SBA amends 13 CFR part 120 as follows:

### **PART 120—BUSINESS LOANS**

■ 1. The authority for 13 CFR part 120 continues to read as follows:

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

■ 2. Add a new subpart J to read as follows:

#### **Subpart J—Establishment of SBA Secondary Market Guarantee Program for First Lien Position 504 Loan Pools**

Sec.

- 120.1700 Definitions used in subpart J.
- 120.1701 Program purpose.
- 120.1702 Program fee.
- 120.1703 Qualifications to be a Pool Originator.
- 120.1704 Pool Loans eligible for pooling.
- 120.1705 Pool formation requirements.
- 120.1706 Pool Originator's retained interest in Pool.
- 120.1707 Seller's retained Loan Interest.
- 120.1708 Pool Certificates.
- 120.1709 Transfers of Pool Certificates.
- 120.1710 Central servicing of the Program.
- 120.1711 Suspension or termination of Program participation privileges.
- 120.1712 Seller responsibilities with respect to Seller's Pool Loan.
- 120.1713 Seller's Pool Loan origination.
- 120.1714 Seller's Pool Loan servicing.
- 120.1715 Seller's Pool Loan liquidation.
- 120.1716 Required SBA approval of servicing actions.
- 120.1717 Seller's Pool Loan deferments.
- 120.1718 SBA's right to assume Seller's responsibilities.
- 120.1719 SBA's right to recover from Seller.
- 120.1720 SBA's right to review Pool Loan documents.
- 120.1721 SBA's right to investigate.
- 120.1722 SBA's offset rights.
- 120.1723 Pool Loan receivables by Seller.
- 120.1724 Servicing and liquidation expenses.
- 120.1725 No Program Preference by Seller or Pool Originator.
- 120.1726 Pool Certificates a Seller cannot purchase.

#### **§ 120.1700 Definitions used in subpart J.**

*504 financing.* The loans made to a small business to fund a Project under the SBA's development company loan program authorized by Title V of the Small Business Investment Act of 1958.

*Affiliate.* A person or entity SBA determines to be an affiliate of a Program Participant pursuant to the application of the principles and guidelines set forth in § 121.103 of this Title.

*Central Servicing Agent or CSA.* The entity serving as SBA's central servicing agent for the Program.

*Certified Development Company or CDC.* An entity that meets the definition of a Certified Development Company as defined in § 120.10 of this Part.

*Current.* That no scheduled payment owed by an Obligor pursuant to a Pool Note is over 29 days past due.

*First Lien Position 504 Loan.* The financing provided by the First Lien Position 504 lender that is part of the 504 project financing.

*First Lien Position 504 Loan Pool Guarantee Agreement.* The agreement, in the form approved by SBA, wherein entities agree to participate in the forming of a Pool under the Program, available at <http://www.sba.gov/aboutsba/sbaprograms/elending/index.html/>.

*Guide.* The First Lien Position 504 Loan Pooling Program Guide published by SBA which provides information applicable to the Program including, among other things, requirements relating to the formation of a Pool, available at <http://www.sba.gov/aboutsba/sbaprograms/elending/index.html/>.

*Liquidation Proceeds.* Cash, including insurance proceeds, proceeds of any foreclosed-on property disposition, revenues received with respect to the conservation and disposition of a foreclosed-on property or repossessed collateral, including any real property securing the Pool Loan, consisting of a commercial property or residential property and any improvements thereon, and any other amounts received in connection with the liquidation of the Pool Loan, whether through Seller's sale, foreclosure sale, any offset or workout, or otherwise.

*Loan Interest.* The right to receive the owned portion of the principal balance of the Pool Loan together with interest thereon at a per annum rate in effect from time to time in accordance with the First Lien Position 504 Loan Pool Guarantee Agreement.

*Maturity.* The maturity of the Loan Interest in the Pool that has the longest remaining term of any Loan Interest in the Pool. The maturity will change from time to time due to prepayment or default on Loan Interests in the Pool.

*Ongoing Guarantee Fee.* An annual fee collected monthly and based on the percentage of the Pool Loan amount, pursuant to section 503(C)(3)(B)(ii) of the Recovery Act, to result in a cost of the loan guarantee of zero as determined under the Federal Credit Reform Act of 1990, as amended. The funds generated by the fee serve as a reserve to pay for program losses.

*Obligor.* The obligor(s) under a Pool Note.

*Pool.* The aggregate of Loan Interests formed into a single pool by the Pool Originator in accordance with the Program. The Pool is comprised of an unguaranteed portion and an SBA-



guaranteed portion. The unguaranteed portion of the Pool backs the Pool Originator Receipt, and cannot be sold to Pool Investors. The SBA-guaranteed portion of the Pool backs the Pool Certificates sold to Pool Investors. The Seller's Loan Interest is not included in the Pool.

**Pool Assembler.** An entity that meets the qualifications of a Pool Assembler as set forth in section 120.630 of this Part and has been approved as such by SBA.

**Pool Certificate.** The document representing a beneficial fractional interest in the SBA-guaranteed portion of a Pool.

**Pooled.** When one or more Loan Interests in a Pool Loan has been put into a Pool.

**Pooling.** The transfer of one or more Loan Interests in a Pool Loan into a Pool.

**Pool Investor.** An entity which holds a Pool Certificate in accordance with Program Rules and Regulations.

**Pool Loan.** A loan that meets the Program eligibility requirements as set forth in § 120.1704 of this subpart J and has been pooled.

**Pool Loan Receivables.** Pool Loan payments, prepayments, or collections made in connection with the Pool Loan by the Obligor pursuant to Pool Note or any other Pool Loan documents or agreements, or by another person or entity made on behalf of any such Pool Loan obligor, and Liquidation Proceeds.

**Pool Note.** The document evidencing a Pool Loan.

**Pool Originator.** An entity approved by SBA to pool Loan Interests under the Program.

**Pool Originator Receipt.** The document evidencing the Pool Originator's retained ownership in a Pool it has formed under the Program.

**Premier Certified Lenders Program.** The program defined in § 120.845 of this Part.

**Program.** The program authorized by section 503 of the American Recovery and Reinvestment Act of 2009.

**Program Participant.** An entity that executes the First Lien Position 504 Loan Pool Guarantee Agreement as Seller, Pool Originator, or Pool Investor, and any successors or assignees thereof.

**Program Participant Associate.** (1) An officer, director, key employee, or holder of 20 percent or more of the value of a Program Participant's stock or debt instruments, or (2) Any individual in which one or more individuals referred to in paragraph (1) of this definition, or a spouse, or child, or sibling, or the spouse of any such individual, owns or controls at least 20 percent.

**Program Preference.** Any arrangement giving the Seller, Pool Originator, or a Program Associate or Affiliate of Seller or Pool Originator, a preference or benefit of proportion greater than its Loan Interest as compared to Pool Originator, Pool Investor, or SBA relating to the making, servicing, or liquidation of the Loan with respect to such things as repayment, collateral, guarantees, control, maintenance of a compensating balance, purchase of a certificate of deposit or acceptance of a separate or companion loan, without SBA's consent. Seller's agreement to grant a Pool Loan's Obligor a deferment in return for receiving more collateral on a different loan owned by Seller is an example of a preference.

**Program Rules and Regulations.** This subpart J, as may be amended from time to time by SBA (the Program Regulations), the First Lien Position 504 Loan Pool Guarantee Agreement, any other Program agreements signed by a Program Participant, if applicable, the Guide, the Recovery Act, and the provisions of subpart H governing Third Party Loans and Third Party Lenders.

**Project.** A project as defined by § 120.802 of the Part.

**SBA.** The United States Small Business Administration, an agency of the United States Government.

**Seller.** An entity that has sold a Pool Loan to a Pool Originator to be Pooled and any successor entity that has executed the First Lien Position 504 Loan Pool Guaranty Agreement pursuant to § 120.1707.

**Seller's Pool Loan.** The Pool Loan sold to a Pool Originator pursuant to the First Lien Position 504 Loan Pool Guarantee Agreement.

**Seller Receipt.** The document that evidences a Seller's Loan Interest.

**Servicing Retention Amount.** The amount of a Pool Loan interest payment retained by Seller for servicing the Pool Loan that is payable and calculated pursuant to the First Lien Position 504 Loan Pool Guarantee Agreement.

**Weighted Average Interest Rate.** The dollar-weighted average interest rate of a Pool Certificate calculated by multiplying the interest rate of each Loan Interest in the Pool by the ratio of that Loan Interest's current outstanding principal in the SBA-guaranteed portion of the Pool (that is, the portion of the Pool Loan backing the Pool Certificates) to the current aggregate or outstanding principal of each Loan Interest in the SBA-guaranteed portion of the Pool, and adding the sum of the resulting products. The Pool Certificate interest rate will fluctuate over the life of the Pool as defaults, prepayments and

normal repayments applicable to Loan Interests in the Pool occur.

**Weighted Average Maturity.** The weighted average maturity of a Pool Certificate is a dollar weighted average maturity that is calculated by multiplying the remaining term, in months, of each Loan Interest in a Pool by the ratio of that Loan Interest's current outstanding pooled principal to the current aggregate outstanding pooled principal of all Loan Interests in the Pool, and adding the sum of the resulting products. The weighted average maturity of a Pool Certificate will fluctuate over the life of the Pool as Loan Interest defaults, prepayments and normal Loan Interest repayments occur.

#### § 120.1701 Program purpose.

As authorized by the American Recovery and Reinvestment Act of 2009 (Recovery Act), SBA establishes the Program to authorize an entity to apply for SBA's guarantee of Pools comprised of portions of First Lien Position 504 Loans backing Pool Certificates to be sold to Pool Investors. The purpose of the Program is to temporarily provide a federal guarantee for Pools of First Lien Position 504 Loans to facilitate the sale of such loans and increase the liquidity of the lenders holding the loans so that the lenders can use the sale proceeds to fund more such loans. The Program's authorization expires on February 17, 2011 and the Administrator may guarantee not more than \$3,000,000,000 of pools under this authority pursuant to section 503(c)(B)(iii) of the Recovery Act.

#### § 120.1702 Program fee.

**Ongoing Guarantee Fee.** The Ongoing Guarantee Fee is payable to SBA, and it is calculated and payable monthly from the amounts received in respect of interest on Loan Interests in the SBA-guaranteed portion of a Pool. This amount is set forth in the First Lien Position 504 Loan Pool Guarantee Agreement. This fee is used to pay program losses.

#### § 120.1703 Qualifications to be a Pool Originator.

(a) **Application to become Pool Originator.** The application to become a Pool Originator is available from the SBA and can be found on SBA's website. In order to qualify as a Pool Originator, an entity must send the application to the SBA and certify that it is a Pool Assembler or it:

(1) Is regulated by the appropriate agency as defined in section 3(a)(34)(G) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(34)(G));

(2) Meets all financial and other applicable requirements of its regulatory



authority and the Government Securities Act of 1986, as amended (Pub. L. 99-571, 100 Stat. 3208);

(3) Has the financial capability to originate acceptable pools consisting of eligible First Lien Position 504 Loans in sufficient quantity to support the issuance of Pool Certificates;

(4) Is in good standing with SBA (as the SBA determines), the Office of the Comptroller of the Currency (OCC) if it is a national bank, the Federal Deposit Insurance Corporation if it is a bank not regulated by the OCC, the Financial Institutions Regulatory Authority, if it is a member, the National Credit Union Administration if it is a credit union; and

(5) for any Pool Originator that is an SBA Lender, that the SBA Lender has satisfactory SBA performance, as determined by SBA in its sole discretion.

(b) *Approval by SBA.* An entity may not submit applications to form Pools to the CSA until SBA has approved its application to become a Pool Originator.

(c) *Conduct of business by Pool Originator.* An entity continues to qualify as a Pool Originator so long as it:

(1) Meets the eligibility standards in paragraph (a) of this section;

(2) Conducts its business in accordance with SBA regulations and accepted securities or banking industry practices, ethics, and standards;

(3) Maintains its books and records in accordance with generally accepted accounting principles or in accordance with the guidelines of the regulatory body governing its activities; and

(4) Has not been suspended or terminated from the Program by SBA.

#### § 120.1704 Pool Loans eligible for Pooling.

(a) *General Pool Loan eligibility requirements.* For a First Lien Position 504 Loan to be eligible for Pooling it must:

(1) Be a loan that is:

(i) A Third Party Loan as defined in § 120.801(c)(3);

(ii) Made by a private sector lender acceptable to SBA in its sole discretion; and

(iii) Secured by a first lien on the Project Property as defined in § 120.801 of this chapter;

(2) Be part of a 504 financing that is comprised of only one Third Party Loan and one CDC 504 loan; the CDC 504 loan must be funded by a Debenture that was been sold on or after February 17, 2009;

(3) Be Current and have been Current for the six-month-period immediately prior to the date the Pool is formed or for the life of the Pool Loan, whichever time period is shorter;

(4) Have been made and closed in a commercially reasonable manner, consistent with prudent lending standards;

(5) Be part of a completed 504 financing, funded by a 504 debenture, which means that the Pool Loan must be fully disbursed and the debenture funding the related loan by a CDC must have been sold on or after February 17, 2009; and

(6) Not be:

(i) To a business deriving more than one-third of its gross annual revenue from legal gambling activities;

(ii) To a casino, gambling establishment, or casino hotel;

(iii) For financing the acquisition, construction or renovation of an aquarium, zoo, golf course, or swimming pool; or

(iv) To a business covered by a six-digit North American Industry Classification System (NAICS) code for casinos—713210 (“Casinos (Except Casino Hotels)”); casino hotels—721120 (“Casino Hotels”); other gambling institutions—713290 (“Other Gambling Industries”); golf courses—713910 (“Golf Courses and Country Clubs”); or aquariums and zoos—712130 (“Zoos and Botanical Gardens”).

(b) *SBA review of a Pool Loan prior to pool formation.* SBA has the right to review any Pool Loan before a Loan Interest in it is added to a Pool, and SBA may prohibit the Pool’s formation as proposed based on SBA’s review in SBA’s sole discretion. In the event SBA decides to review Pool Loan documents related to a Loan Interest prior to the requested Pool formation, that Loan Interest may not be added to the Pool until SBA reviews and approves the Pool Loan for such purpose. Copies of Pool Loan documents related to underwriting and origination, and any other Pool Loan-related documents SBA may, in its sole discretion, request to review in writing, must be sent to SBA’s Sacramento Pool Loan Processing Center. The Pool Originator must identify and SBA must review Pool Loan documents before a Loan Interest is added to a Pool if:

(1) The Pool Loan is to a business within NAICS code 713940 covering Fitness and Recreational Sports Centers; (If SBA determines that a Pool Loan has had any of its proceeds used for any of the restricted purposes listed above, the Pool Loan will be prohibited from being part of a Pool.)

(2) The Pool Loan was part of a 504 financing involving a 504 loan that was processed under SBA’s Premier Certified Lenders Program; or

(3) The Project the Pool Loan financed included the refinancing of existing debt

owed to the Seller or Third Party Lender (not including interim financing associated with the Project).

#### § 120.1705 Pool formation requirements.

(a) *Initiation of Pool formation.* Only an entity approved by SBA to be a Pool Originator under the Program that continues to qualify to be a Pool Originator pursuant to this subpart may initiate the formation of a Pool. The Pool Originator creates the Pool subject to Program Rules and Regulations, including the parameters set forth in the Guide, and SBA approval.

(b) *Adjustment of Pool requirements.* SBA may adjust the Pool characteristics periodically based on program experience and market conditions and will publish a revised version of the Guide in the **Federal Register** to implement such adjustments. Any such adjustments shall not affect Pools formed prior to the adjustment.

(c) *When the Pool Originator is the Seller.* When a Pool Originator proposes to form a Pool involving a Pool Loan it owns, it must execute the First Lien Position 504 Loan Pool Guarantee Agreement as Pool Originator and as Seller and, consequently, will be subject to all applicable Program Rules and Regulations pertaining to both roles.

(d) *When the Pool Originator does not own the Pool Loan.* When a Pool Originator proposes to form a Pool involving a Pool Loan it does not own, it must purchase the Loan Interest it proposes to pool from a Seller that owns the whole Pool Loan and that has the servicing rights. The Pool Originator must purchase the Loan Interest and take it into inventory or settle the purchase of the Loan Interest through the CSA concurrently with the formation of the Pool. The entity selling the Loan Interest to the Pool Originator must execute the First Lien Position 504 Loan Pool Guarantee Agreement as Seller and, consequently, will be subject to all applicable Program Rules and Regulations pertaining to a Seller. The Pool Originator must also execute the First Lien Position 504 Loan Pool Guaranty Agreement.

(e) *What CSA must receive prior to Pool formation.* Before the CSA may carry out its responsibilities relating to the formation of a Pool, it must receive:

(1) From the Pool Originator: A properly completed First Lien Position 504 Loan Pool application form, First Lien Position 504 Loan Guarantee Agreement, and any other documentation which SBA may require, if applicable; and

(2) All cost reimbursement due and payable to the CSA prior to Pool formation owed by the Participants

participating in the formation of the Pool.

**§ 120.1706 Pool Originator's retained interest in Pool.**

The Pool Originator must retain an ownership interest in any Pool it has formed that is equal to at least 5% of the aggregate of the total outstanding principal balance of each Pool Loan with a Loan Interest in the Pool as calculated at the time of Pool formation. Such interest will decline with Loan Interest payments, prepayments, defaults and any other early termination. At Pool formation, the CSA will issue the Pool Originator a Pool Originator Receipt evidencing the Pool Originator's retained interest in the Pool. The Pool Originator may not sell, pledge, participate, or otherwise transfer its Pool Originator Receipt or any interest therein for the life of the Pool.

**§ 120.1707 Seller's retained Loan Interest.**

The Seller must retain a 15% or greater Loan Interest in each of its loans included in a Pool. At Pool formation, the CSA will issue the Seller a Seller Receipt evidencing the Seller's retained ownership in the Pool Loan. With SBA's written permission, the Seller may sell the Seller Receipt and Servicing Retention Amount in whole, but not in part, to a single entity at one time. The Seller may not sell less than 100% of the Seller Receipt and Servicing Retention Amount, and may not sell a participation interest in any portion of any of its Pooled loans. In addition, in order to complete such sale, Seller must have the purchaser of its rights to the Pool Loan execute the First Lien Position 504 Loan Pool Guarantee Agreement as Seller and deliver the executed original to the CSA.

**§ 120.1708 Pool Certificates.**

(a) *SBA Guarantee of Pool Certificates.* SBA guarantees to a Pool Investor the timely payment of principal and interest installments and any prepayment or other recovery of principal to which the Pool Investor is entitled. If an Obligor misses a scheduled payment pursuant to the terms of the Pool Note underlying a Loan Interest backing a Pool Certificate, SBA, through the CSA, will make advances to maintain the schedule of interest and principal payments to the Pool Investor. If SBA makes such payments, it is subrogated fully to the rights satisfied by such payment.

(b) *SBA guarantee backed by full faith and credit.* SBA's guarantee of the Pool Certificate is backed by the full faith and credit of the United States.

(c) *SBA purchase of a Loan Interest.* SBA will determine whether to purchase a Loan Interest backing a Pool Certificate with an underlying Pool Note that is 60 days or more in arrears. SBA reserves the right to purchase a Loan Interest from a Pool at any time.

(d) *Self-liquidating.* A Pool Certificate represents a fractional beneficial interest in a Pool that is self-liquidating by Pool Loan Receivables and/or SBA Loan Interest payment or redemption.

(e) *Pool Certificate form.* The CSA prepares the Pool Certificate. SBA must approve the form and terms of the Pool Certificate.

(f) *Pool Certificate registration.* A Pool Certificate must be registered with the CSA.

(g) *Face amount of Pool Certificate.* The face amount of a Pool Certificate cannot be less than a minimum amount as specified in the Guide, and the dollar amount of Pool Certificates must be in increments which SBA will specify in the Guide (except for one Pool Certificate for each Pool). SBA may change these requirements based upon an analysis of market conditions and program experience, and will publish any such change in the Federal Register.

(h) *Basis of payment for Pool Certificates.* All payments on a Pool Certificate are due pursuant to terms, conditions, and percentages set forth or referenced therein and are based on the unpaid principal balance of the Pool represented by the Pool Certificate. Any Pool Loan Receivables applicable to a Loan Interest in the SBA-guaranteed portion of a Pool will be passed through to the appropriate Pool Investors with the regularly scheduled payments to such Pool Investors.

(i) *Pool Certificate interest rate.* A Pool Certificate must have a Weighted Average Interest Rate.

(j) *Pool Certificate maturity.* A Pool Certificate must have a Maturity and a Weighted Average Maturity.

(k) *Early Pool Certificate redemption.* SBA, or the CSA on behalf of SBA, may redeem a Pool Certificate prior to its Maturity because of Obligor prepayment and/or SBA purchase of all Loan Interests in the Pool backing the Pool Certificate.

**§ 120.1709 Transfers of Pool Certificates.**

(a) *Transfer of Pool Certificates.* A Pool Certificate is transferable. A transfer of a Pool Certificate must comply with Article 8 of the Uniform Commercial Code of the State of New York. The seller may use any form of assignment acceptable to SBA and the CSA. The CSA may refuse to issue a Pool Certificate until it is satisfied that the documents of transfer are complete.

(b) *Transfer on CSA records.* In order for the transfer of a Pool Certificate to be effective, the CSA must reflect the transfer on its records.

(c) *Contents of letter of transmittal for Pool Certificate.* A letter of transmittal must accompany each Pool Certificate which a Pool Investor submits to the CSA for transfer. The Pool Investor must supply the following information in the letter:

- (1) Pool number;
- (2) Pool Certificate number;
- (3) Name of purchaser of Pool Certificate;
- (4) Address and tax identification number of the purchaser;
- (5) Name, e-mail address and telephone number of the person handling or facilitating the transfer; and
- (6) Instructions for the delivery of the new Pool Certificate.

(d) *CSA transfer cost recovery.* At the same time a Pool Investor submits a letter of transmittal for a Pool Certificate pursuant to this section, it must send to the CSA sufficient funds to cover its cost for this service. The CSA will supply the transfer information to the Pool Investor.

**§ 120.1710 Central servicing of the Program.**

(a) *Pool Certificates and Receipts issued at Pool formation.* As part of its role as Central Servicing Agent for the Pool, at Pool formation, CSA issues a Seller Receipt to the Seller, a Pool Originator Receipt to the Pool Originator, and a Pool Certificate to each Pool Investor.

(b) *CSA fiscal transfer responsibilities.* All Pool Loan Receivables on a Pool Loan received by the CSA must be forwarded by it to pay the Servicing Retention Amount, Ongoing Guarantee Fee, Seller Receipt, Pool Originator Receipt, Pool Certificates, any SBA-purchased Loan Interest, and any other payment applicable to the Pooling of such Pooled Loan, in accordance with Program Rules and Regulations.

(c) *Administration of the Pool Certificates.* CSA must administer each Pool Certificate. It shall maintain a registry of Pool Investors and other information as SBA requires. CSA registers all Pool Certificates. This means it issues, transfers title to, and redeems them. It shall maintain a registry of Pool Investors and other information as SBA requires. In fulfilling its obligation to keep the central registry current, the CSA may, with SBA's approval, obtain any necessary information from the parties involved in the Program.

(d) *CSA Monthly Report.* CSA must provide SBA with a list, by Pool, of each

Loan Interest with an underlying Pool Note that is 60 days or more in arrears on a monthly basis.

**§ 120.1711 Suspension or termination of Program participation privileges.**

(a) *Participant suspension or termination.* The SBA may suspend or terminate the privilege of a Participant, and/or any Associate or Affiliate of the Participant, to sell, purchase, broker, or deal in Pool Loans, Loan Interests, or Pool Certificates under the Program if any such Participant or its Associate or Affiliate has:

(1) Failed to comply materially with any requirement imposed by the Program Rules and Regulations or other SBA rules and regulations; or

(2) Made a material false statement or failed to disclose a material fact to SBA.

(b) *Additional rules for suspension or termination of Pool Originator.* In addition to the conditions set forth in paragraph (a) above, SBA may also suspend or terminate the Program participation privileges of a Pool Originator if the Pool Originator (and/or its Associates):

(1) Does not comply with any of the requirements in 120.1703(a) or (c);

(2) Has been revoked or suspended it from engaging in the securities business by its supervisory agency, or is under investigation for a practice which SBA considers, in its sole discretion, to be relevant to its fitness to participate in the Program;

(3) Has been indicted or otherwise formally charged with, or convicted of, a felony, or a misdemeanor which, in SBA's sole discretion, bears on its fitness to participate in the Program;

(4) Has received an adverse civil judgment that it has committed a breach of trust or a violation of a law or regulation protecting the integrity of business transactions or relationships; or

(5) Has been suspended or terminated as a Pool Assembler under 120.631.

(c) *Suspension procedures.* SBA may undertake suspension or enforcement actions under this section using the procedures set forth in § 120.1600(a).

**§ 120.1712 Seller responsibilities with respect to Seller's Pool Loan.**

Seller shall remain obligated for servicing and liquidating Seller's Pool Loan until the Pool Loan is repaid in full unless SBA provides written approval or notice to the contrary.

**§ 120.1713 Seller's Pool Loan origination.**

SBA is entitled to recover from the Seller losses incurred by SBA on its guarantee of a Pool if such losses resulted because Seller's Pool Loan was

not made and closed in a commercially reasonable manner, consistent with prudent lending standards, and in accordance with any applicable Program Rules and Regulations.

**§ 120.1714 Seller's Pool Loan servicing.**

Subject to § 120.1718 of this subpart J, the Seller must service Seller's Pool Loan in a commercially reasonable manner, consistent with prudent lending standards, and in accordance with applicable Program Rules and Regulations. The Seller receives the Servicing Retention Amount for servicing the Seller's Pool Loan.

**§ 120.1715 Seller's Pool Loan liquidation.**

Subject to § 120.1718 of this subpart J, the Seller must liquidate and conduct debt collection litigation for Seller's Pool Loan in a prompt, cost-effective and commercially reasonable manner, consistent with prudent lending standards, in accordance with applicable Program Rules and Regulations, and with SBA approval of a liquidation plan and any litigation plan, and any amendment of either such a plan, if applicable.

**§ 120.1716 Required SBA approval of servicing actions.**

Seller shall not, without prior written consent of SBA, take the following actions with respect to Seller's Pool Loan:

(a) Make or consent to any substantial alteration in the terms ("substantial" includes, but is not limited to, any changes to the principal amount or interest rate);

(b) Accelerate the maturity;

(c) Sue; or

(d) Waive or release any claim.

Guidance on other servicing actions, some of which may need prior SBA approval, is provided in the Guide.

**§ 120.1717 Seller's Pool Loan deferments.**

Without the prior written consent of SBA, Seller, at the request of Obligor, may grant one deferment of Obligor's scheduled payments for a continuous period not to exceed three months of past or future installments. Seller shall immediately notify CSA of any payment deferment and that notification shall include:

(a) The SBA Pool Loan number;

(b) The Obligor's name;

(c) The terms of such deferment;

(d) The date Obligor is to resume payment; and

(e) Reconfirmation of the basis of interest calculation (e.g. 30/360 or Actual Days/365).

**§ 120.1718 SBA's right to assume Seller's responsibilities.**

SBA may, in its sole discretion, undertake the servicing, liquidation and/or litigation of Seller's Pool Loan at any time and, in such event, Seller must take any steps necessary to facilitate the assumption by SBA of such responsibilities, which can be transferred by SBA at its discretion to a contractor, agent or other entity, and such steps shall include, among other things, providing or assigning to SBA any documents requested by SBA within 15 calendar days of Seller's receipt of such request. SBA will notify the Obligor of the change in servicing.

**§ 120.1719 SBA's right to recover from Seller.**

SBA is entitled to recover from Seller any monies paid on SBA's guarantee of a Pool Certificate backed in part by Seller's Pool Loan, plus interest, if SBA in its sole discretion determines that any of the following events has occurred:

(a) Seller's improper action or inaction has put SBA at risk;

(b) Seller has failed to disclose a material fact to SBA regarding a Seller's Pool Loan in a timely manner;

(c) Seller has misrepresented a material fact to SBA regarding Seller's Pool Loan;

(d) Seller has failed to comply materially with § 120.1720 of this subpart;

(e) SBA has received a written request from Seller to terminate the SBA's guarantee on the Loan Interest in Seller's Pool Loan;

(f) Seller has failed to comply materially with Program Rules and Regulations; or

(g) Seller has failed to make, close, service or liquidate Seller's Pool Loan in a prudent manner.

**§ 120.1720 SBA's right to review Pool Loan documents.**

In the event that SBA purchases a Loan Interest in Seller's Pool Loan, Seller must provide to SBA copies of the Pool Loan collateral documents, Pool Loan underwriting documents, and any other documents SBA may require in writing within 15 calendar days of a written request from SBA (which SBA will review in connection with its efforts to determine if Seller is obligated to reimburse SBA pursuant to this subpart). A Seller's failure to provide the requested documentation may constitute a material failure to comply with the Program Rules and Regulations and may lead to an action for recovery under § 120.1719. SBA will also evaluate a Seller's continued

participation in the Program and may restrict further sales under the Program until SBA determines that the Seller has provided sufficient documentation.

**§ 120.1721 SBA's right to investigate.**

SBA may undertake such investigation as it deems necessary to determine whether it is entitled to seek recovery from the Seller and Seller agrees to take whatever actions are necessary to facilitate such investigation.

**§ 120.1722 SBA's offset rights.**

SBA shall have the right to offset any amount owed by Lender to SBA, including, without limitation, an offset against CSA's obligation to pay Lender pursuant to any Section 504 First Mortgage Loan Pool Guarantee Agreement.

**§ 120.1723 Pool Loan receivables received by Seller.**

Any Pool Loan Receivables received by Seller in connection with obligations under Seller's Pool Loan must be forwarded by Seller to CSA within two business days of receipt of collected funds.

**§ 120.1724 Servicing and liquidation expenses.**

All ordinary and reasonable expenses of servicing and liquidating Seller's Pool Loan shall be paid by, or be recoverable from, Obligor, and all such ordinary and reasonable expenses incurred by Seller or SBA which are not recoverable from Obligor shall be shared ratably by Seller, SBA, and the Pool Originator pursuant to the applicable percentages set forth in the First Lien Position 504 Loan Pool Guarantee Agreement.

**§ 120.1725 No Program Preference by Seller or Pool Originator.**

The Seller and the Pool Originator must not establish a Program Preference, which is defined in 13 CFR 120.10.

**§ 120.1726 Pool Certificates a Seller cannot purchase.**

Neither a Seller, nor any of its Program Associates or Affiliates, may purchase a Pool Certificate that is backed by a Loan Interest in a Pool Loan that the Seller, or any of its Program Associates or Affiliates, originated or owned, and, in the event such purchase occurs, SBA's guarantee shall not be in effect with respect to any such Pool Certificate.

Dated: October 26, 2009.

**Karen G. Mills,**  
Administrator.

[FR Doc. E9-26211 Filed 10-28-09; 11:15 am]

BILLING CODE 8025-01-P

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. FAA-2009-1000; Directorate Identifier 2009-NM-164-AD; Amendment 39-16070; AD 2008-10-07 R1]

RIN 2120-AA64

**Airworthiness Directives; Boeing Model 747-100, 747-100B, 747-100B SUD, 747-200B, 747-200C, 747-200F, 747-300, 747SR, and 747SP Series Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Final rule; request for comments.

**SUMMARY:** The FAA is revising an existing airworthiness directive (AD), which applies to all Boeing Model 747-100, 747-100B, 747-100B SUD, 747-200B, 747-200C, 747-200F, 747-300, 747SR, and 747SP series airplanes. That AD currently requires revising the FAA-approved maintenance program by incorporating new airworthiness limitations (AWLs) for fuel tank systems to satisfy Special Federal Aviation Regulation No. 88 requirements. That AD also requires the initial inspection of certain repetitive AWL inspections to phase in those inspections, and repair if necessary. This AD clarifies the intended effect of the AD on spare and on-airplane fuel tank system components. This AD results from a design review of the fuel tank systems. We are issuing this AD to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

**DATES:** This AD is effective November 16, 2009.

On June 12, 2008 (73 FR 25977, May 8, 2008), the Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD.

We must receive any comments on this AD by December 14, 2009.

**ADDRESSES:** You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor,

Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

• *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H-65, Seattle, Washington 98124-2207; telephone 206-544-5000, extension 1; fax 206-766-5680; e-mail [me.boecom@boeing.com](mailto:me.boecom@boeing.com); Internet <https://www.myboeingfleet.com>.

**Examining the AD Docket**

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Douglas Bryant, Aerospace Engineer, Propulsion Branch, ANM-140S, Seattle Aircraft Certification Office, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 917-6505; fax (425) 917-6590.

**SUPPLEMENTARY INFORMATION:**

**Discussion**

On April 28, 2008, we issued AD 2008-10-07, amendment 39-15513 (73 FR 25977, May 8, 2008). That AD applies to all Boeing Model 747-100, 747-100B, 747-100B SUD, 747-200B, 747-200C, 747-200F, 747-300, 747SR, and 747SP series airplanes. That AD requires revising the FAA-approved maintenance program by incorporating new airworthiness limitations (AWLs) for fuel tank systems to satisfy Special Federal Aviation Regulation No. 88 requirements. That AD also requires the initial inspection of certain repetitive AWL inspections to phase in those inspections, and repair if necessary. That AD resulted from a design review of the fuel tank systems. The actions specified in that AD are intended to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which, in combination with flammable fuel vapors, could result in a fuel tank