

# Rules and Regulations

Federal Register

Vol. 74, No. 222

Thursday, November 19, 2009

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## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 120

RIN 3245-AF95

#### American Recovery and Reinvestment Act: Loan Program for Systemically Important SBA Secondary Market Broker-Dealers

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

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

**SUMMARY:** This interim final rule implements certain provisions of the American Recovery and Reinvestment Act of 2009 ("Recovery Act"). This interim final rule implements Section 509 of the Recovery Act which establishes the Secondary Market Lending Authority within SBA to make loans to systemically important SBA Secondary Market broker-dealers to finance the purchase of the government guaranteed portion of loans originated, underwritten and closed under the Small Business Act and the purchase of pools of guaranteed portions of such loans.

**DATES:** *Effective Date:* This rule is effective November 19, 2009.

*Comment Date:* Comments must be received on or before February 17, 2010.

**ADDRESSES:** You may submit comments, identified by RIN: 3245-AF95 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, U.S. 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, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

SBA will post all comments on <http://www.regulations.gov>. If you wish to submit confidential business information ("CBI") as defined in the User Notice at <http://www.regulations.gov>, please submit the information to James W. Hammersley, Deputy Assistant Administrator, Office of Policy and Strategic Planning, U.S. Small Business Administration, 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 111-05, 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 ("SBA") is one of several agencies that will play a role in achieving these goals.

As authorized by the Recovery Act, this rule will establish the Secondary Market Lending Authority and a direct loan program for systemically important secondary market broker-dealers to assist with the financing of the guaranteed portion of loans originated, underwritten and closed under the Small Business Act. Recipients of these direct loans must use the proceeds to purchase guaranteed portions of 7(a) loans from participating lenders, Guaranteed Interest Certificates from Registered Holders and Guaranteed Pool Certificates from Registered Holders. The cost of the loan charged to systemically important secondary market broker-dealers will be the combination of the interest rate

referenced in 13 CFR 120.1830(e), a fee estimate to cover the probability of default, and the ongoing fee as defined in 13 CFR 120.1830(i).

When SBA Lenders sell guaranteed portions of 7(a) loans to broker-dealers through the SBA Secondary Market Program, these transactions enable SBA Lenders to obtain funds to make additional small business loans. While this market has generally recovered to pre-recession levels, offering direct loans to systemically important broker-dealers will provide an important backstop to ensure continued liquidity for the secondary market broker-dealers, which creates a market for SBA Lenders to monetize SBA guaranteed loans and use the proceeds to make new loans to small businesses. The Recovery Act requires SBA to consult with the Board of Governors of the Federal Reserve and the Secretary of the Treasury to establish a process to designate a particular broker-dealer as systemically important. SBA has determined that in order to be designated as systemically important, a broker-dealer must be a Pool Assembler in the existing SBA Secondary Market Program as defined in subpart F, § 120.600 of Chapter 13 of the Code of Federal Regulations. Pool Assemblers that are determined to be systemically important secondary market broker-dealers must be in good standing with the SBA and also satisfy the requirements of subpart F, § 120.630 of Chapter 13 of the Code of Federal Regulations. In addition, SBA will initially use historical Pool Assembler Secondary Market activity, to determine which Pool Assemblers are vital to the continued operation of the SBA Secondary Market and therefore should be designated systemically important broker-dealers. On a quarterly basis SBA will review Pool Assembler Secondary Market activity and may designate additional broker-dealers as systemically important to the SBA Secondary Market.

To ensure that this program operates in compliance with Federal credit program policy, as promulgated by OMB Circular No. A-129, SBA is implementing a "credit elsewhere" test for this program. Therefore, to qualify for a direct loan under this section, a Systemically Important SBA Secondary Market Broker-Dealer ("SISMBD") must also demonstrate that it does not have access to credit on reasonable terms

when it is applying to SBA for a loan. A SISMBD may demonstrate the lack of credit on reasonable terms by providing term sheets offered to it by potential lenders or by providing a narrative describing the steps taken by the applicant to obtain credit. This information will be reviewed by SBA as part of the credit review process for a SISMBD Loan Application. SBA will review the loan terms available to a SISMBD relative to the credit offered to similar companies in the prevailing market to determine if the terms being offered are reasonable.

## II. Section by Section Analysis of New Subpart K of Part 120

*Section 120.1800* sets forth the defined terms used in Subpart K. The defined terms in Subpart K include:

*Administrator.* The Administrator of the U.S. Small Business Administration.

*Authority.* The Secondary Market Lending Authority defined herein.

*Certificate.* The document the FTA issues representing a beneficial fractional interest in a Pool (Pool Certificate) of Section 7(a) guaranteed portions, or an undivided interest in the entire guaranteed portion of an individual 7(a) guaranteed loan (Individual Certificate).

*Collateral (or Collateral for an SISMBD Loan).* All Guaranteed Portions and Certificates (and proceeds thereof) that are purchased with SISMBD Loan proceeds, collateral assignments of the SBA Form 1086 (Secondary Market Participation Agreement) or SBA Form 1088 (Form of Detached Assignment for U.S. Small Business Administration Loan Pool or Guaranteed Interest Certificate) for all Guaranteed Portions and Certificates purchased with SISMBD Loan proceeds, agreement for Lender/FTA payment of amounts due under the Guaranteed Portions and Certificates, and any other asset that is pledged to secure an SISMBD Loan.

*Commitment Letter.* The document or documents containing the terms and conditions, including the total dollar limit, under which SBA agrees to lend money for a specific period of time to a Systemically Important SBA Secondary Market Broker-Dealer defined in Section 120.1810 and pursuant to Section 509 of the American Recovery and Reinvestment Act of 2009.

*FTA.* SBA's fiscal and transfer agent.

*Guaranteed Portion.* That portion of a SBA 7(a) loan sold in an SBA Secondary Market transaction. This guaranteed portion of a 7(a) loan once sold is certificated, carries a guarantee backed by the full faith and credit of the United States and bestows upon the Registered Holder the right to receive payments.

*Individual Certificate.* The instrument representing a beneficial interest in the entire guaranteed portion of an individual 7(a) loan sold in the SBA Secondary Market. It is backed by the full faith and credit of the United States.

*Loan Advance Request Form.* The form approved by SBA wherein an SISMBD requests a specific dollar advance under the SISMBD's loan agreement that will be used to purchase certain guaranteed portions or Certificates. This amount, when added to the balance outstanding of the SISMBD's existing SISMBD Loan, must be equal to or less than the loan amount. SBA will advance the lesser of the principal balance or the price paid for a Guaranteed Portion or a Certificate.

*Loan Agreements.* Collectively, any loan agreement executed between SBA and the SISMBD that contains the basic terms and conditions which control the SISMBD Loan, together with any notes, security documentation, custodial agreement, and any other ancillary documentation executed in connection therewith, including by reference, the regulations and other documents referenced in the regulations.

*On-going Subsidy Fee.* An annual fee collected monthly, based on the outstanding SISMBD Loan balance, pursuant to section 509(F) of the Recovery Act, to result in a cost of the direct loan of zero, as determined under the Federal Credit Reform Act of 1990, as amended. The funds generated by the fee serve as a reserve for program losses. The fee will be published in a notice by SBA prior to the commencement of the Program and from time to time thereafter. SBA will communicate the On-going Subsidy Fee to the systemically important broker-dealers.

*Pool Assembler.* A financial institution that is authorized by SBA to: (1) Organize and package Pools by acquiring SBA guaranteed portions of 7(a) loans from Lenders or Certificates from Registered Holders; (2) resell fractional interests in the Pools to Registered Holders; and (3) direct the FTA to issue Certificates.

*Pool Certificate (or Guaranteed Pool Certificate).* The instrument representing a beneficial fractional interest in a Pool of SBA guaranteed portions of 7(a) loans. Pool Certificates carry a timely payment guarantee which is backed by the full faith and credit of the United States.

*Pool.* The aggregate of SBA Section 7(a) guaranteed portions of loans formed into a single pool by the Pool Assembler in accordance with the SBA Secondary Market laws, regulations and Program Guide.

*Premium.* Any amount in excess of the principal balance of a Guaranteed Portion or of a Certificate balance.

*Program.* The program authorized by Section 509 of the American Recovery and Reinvestment Act of 2009.

*Registered Holder.* The Certificate owner listed in the FTA's records.

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

*SBA Secondary Market.* Consists of the sale of Certificates, representing either the entire guaranteed portion of an individual 7(a) guaranteed loan or an undivided interest in a Pool consisting of the SBA guaranteed portions of a number of 7(a) guaranteed loans. Transactions involving interests in Pools or the sale of individual guaranteed portions of loans are governed by the contracts entered into by the parties, SBA's Secondary Market Program Guide, and Subpart F of Chapter 13 of the Code of Federal Regulations.

*Secondary Market Lending Authority.* The office established under Section 509(c) of the American Recovery and Reinvestment Act of 2009 to provide loans to systemically important SBA Secondary Market broker-dealers to be used for the purpose of financing the inventory of the government guaranteed portion of loans, originated, underwritten and closed under the Small Business Act or pools of such loans.

*SISMBD.* Systemically Important Secondary Market Broker-Dealer, as defined in Section 120.1810 of Chapter 13 of the Code of Federal Regulations.

*SISMBD Loan.* A direct loan made by SBA to a Systemically Important SBA Secondary Market Broker-Dealer to assist with the financing of the purchase and sale of the Guaranteed Portion of loans originated, underwritten and closed under Section 7(a) of the Small Business Act. Recipients of an SISMBD Loan must use the proceeds for the sole purpose of purchasing guaranteed portions of 7(a) loans from SBA Lenders or Certificates from Registered Holders.

*SISMBD Loan Application.* The application, in the form approved by SBA wherein an SISMBD applies for an SISMBD Loan.

Section 120.1801 describes the Program purpose for the Secondary Market Lending Authority. The purpose of the Program is for SBA to temporarily make direct loans to broker-dealers to ensure the continued operation of the SBA Secondary Market for small business loans guaranteed by SBA during the current economic environment. Such broker-dealers are referred to in the Recovery Act as

Systemically Important SBA Secondary Market Broker-Dealers.

Section 120.1802 explains how a broker-dealer may participate in the SISMBD Loan Program. In order to obtain a loan, a broker-dealer must be a Pool Assembler in SBA's Secondary Market Program and have been designated as systemically important to the continued operation of the SBA Secondary Market Program. A Pool Assembler with an SISMBD designation must also submit a written loan application, execute the required loan documents and satisfy all other SBA requirements.

Section 120.1810 defines a systemically important SBA Secondary Market broker-dealer as a Pool Assembler that has routinely engaged in the purchase and sale of the Guaranteed Portion of 7(a) loans or pools of Guaranteed Portions originated, underwritten and closed under the Small Business Act.

Section 120.1820 describes the eligibility requirements for an SBA designation as a systemically important SBA Secondary Market broker-dealer. To be eligible a broker-dealer must be a Pool Assembler; satisfy all of the requirements of Section 120.630 of Subpart F of this Title; have not been suspended or terminated by SBA; not be currently the subject of or eligible for an SBA suspension or termination procedure; engaged in a specific dollar volume of SBA Secondary Market purchases of Guaranteed Portions from SBA Lenders and Certificates from Registered Holders, and have sold a specific percentage of the total dollar volume of sales of Pools in the SBA Secondary Market during the same timeframe. On a quarterly basis SBA will review Pool Assembler Secondary Market activity and may designate additional broker-dealers as systemically important to the SBA Secondary Market.

Section 120.1821 provides that SBA will notify each systemically important SBA Secondary Market broker-dealer in writing of its designation.

Section 120.1822 describes the initial SISMBD Loan application process. All loan requests must be submitted to SBA in writing accompanied by a statement of the loan amount that is being requested, financial statements dated within 120 days of the application including a copy of its most recent outside audit report, a balance sheet, an income and expense statement and a schedule of its secured debt obligations, applicant's IRS tax identification number, information demonstrating that credit is not available to the applicant on reasonable terms from private

sources and any other information demonstrating the applicant is creditworthy and has the resources to repay the loan. SBA will review the terms available to a SISMBD relative to the credit offered to similar companies in the prevailing market to determine if the terms being offered are reasonable.

Section 120.1823 explains that prior to approving an SISMBD Loan request or advance request application, SBA will consider the creditworthiness of the applicant. Specific evidence that an applicant is not creditworthy includes but is not limited to: Insolvency as defined in the Bankruptcy Code, failure to adhere to the terms of a previous SISMBD Loan or advance request, excessive dependence on borrowed funds, violations of the SBA Secondary Market rules, regulations or procedures, the effect any affiliates of the SISMBD may have on the ultimate repayment ability of the SISMBD or any other relevant factor indicating a less than satisfactory condition or lack of repayment ability.

The presence of one or more of these characteristics will not necessarily mean that an SISMBD is not creditworthy but may cause the partial or complete denial of an SISMBD Loan application.

Section 120.1824 describes the SBA process to notify applicants that an SISMBD Loan request or a request for an advance under a revolving SISMBD Loan has been approved or denied. If a loan request is approved, the SISMBD will receive a Commitment Letter containing the loan terms and conditions. If a loan request or an advance request is denied, the SISMBD will receive a written statement from SBA including reasons for the denial.

Section 120.1825 specifies the process for reconsideration of an SISMBD Loan or advance request denial decision. An applicant may request reconsideration of a denied loan request or advance request within 30 days of receipt of a denial notice. All requests for reconsideration must be submitted to the Director of the Secondary Market Lending Authority. To prevail, the applicant must demonstrate that it has overcome all reasons for the loan request denial. If the reconsideration is denied, a second and final reconsideration may be considered by the Chief Financial Officer.

Section 120.1830 explains that SISMBD Loans will be revolving lines of credit that are collateralized by the Collateral with full recourse against the borrower. SISMBDs will obtain disbursements under the loan by requesting advances when needed to purchase Guaranteed Portions from SBA Lenders or Certificates from Registered

Holders. The section also describes the basic terms and conditions of an SISMBD Loan. The Recovery Act provides there is no statutory limit to the maximum loan size for a loan to an SISMBD, subject to the discretion of the Administrator. SBA will establish a revolving line of credit loan limit when the SISMBD initially applies for a loan based on the SISMBD's purchases in the SBA Secondary Market during the immediately prior twelve month period. The total dollar limit on the revolving line of credit will be a minimum of \$10,000,000 and no greater than seventy-five percent (75%) of the total dollar amount of SISMBD's purchases in the SBA Secondary Market during the twelve (12) month period of time immediately prior to the loan application, without the written permission of the Director of the Secondary Market Lending Authority. As security for repayment of an SISMBD Loan, the SISMBD must pledge to SBA all Guaranteed Portions and all Certificates that it purchases with the SISMBD Loan proceeds and grant SBA a first lien security interest in the Guaranteed Portions and the Certificates. The SISMBD will assign to SBA all borrower payments on the Guaranteed Portions that back the Certificates that are pledged as collateral for the SISMBD Loan. Interest on SISMBD Loans shall not exceed the Federal Funds target rate as established by the Federal Reserve Board of Governors plus 25 basis points. If for any reason an SISMBD is unable to make payment to SBA when due, SBA may, among other things, accelerate the maturity date of the SISMBD Loan and demand payment in full. An SISMBD Loan maturity date must be no later than February 16, 2013. The On-going Subsidy Fee for an SISMBD Loan is the amount necessary to allow this program to operate at a zero subsidy based on the rules implementing the Federal Credit Reform Act of 1990. SBA will communicate the On-going Subsidy Fee to each of the systemically important broker-dealers.

Section 120.1831 explains that there is no limit to the frequency with which an SISMBD may borrow under the Secondary Market Loan Program unless the Administrator determines that doing so would create an undue risk of loss to SBA or the United States. In order to mitigate the risk of loss, SBA has determined that an SISMBD may request an unlimited number of loans or advances up to the total dollar limit stated in the Commitment Letter. SISMBD Loans will be structured as a

revolving line of credit with a borrowing base.

Section 120.1832 states that there is no minimum or maximum loan advance amount for an SISMBD Loan. Because availability under the SISMBD Loan is capped as set forth in 120.1830, the amount of any loan advance cannot exceed the available credit under the SISMBD Loan.

Section 120.1833 explains when an SISMBD may request an increase in the loan amount. SBA will consider a request for an increase in an SISMBD Loan amount if the applicant can show the increase is essential to its continued participation in the SBA Secondary Market. Applicants must request a loan increase by submitting an application to the Director of the Secondary Market Lending Authority by January 31, 2011.

Section 120.1834 discusses the SBA fee that covers any projected Program losses as required under the Federal Credit Reform Act of 1990. This fee is required to fund a reserve to fully cover estimated Program losses, as required under section 509(F) of the Recovery Act, and consistent with the Federal Credit Reform Act of 1990, as amended. The fee is called the On-going Subsidy Fee.

Section 120.1840 discusses the allowable uses of proceeds of an SISMBD Loan. It implements the Recovery Act requirement that SISMBD Loan proceeds must be used solely to purchase the Guaranteed Portion from SBA Lenders, Individual Certificates or Pool Certificates. SBA will not advance more than the purchase price of the Guaranteed Portions or the Certificate. Thus, if the Guaranteed Portion or Certificates are purchased at a discount to the principal balance, SBA will not advance more than the purchase price. SBA will not finance the purchase of Guaranteed Portions or Certificates unless the Guaranteed Portions or Certificates carry an interest rate equal to or greater than the interest rate payable to SBA under the SISMBD Loan. SISMBD Loan proceeds shall not be used to purchase any Premium portion of a purchase price that is paid to a selling SBA Lender or Registered Holder or any other individual or entity. SISMBD Loan proceeds shall not be used to refinance existing debt of the SISMBD, finance existing inventory of the SISMBD, or for any purpose other than as set forth in this Section.

Section 120.1850 discusses how SBA will hold the collateral for an SISMBD Loan. SBA or its authorized agent will physically hold all Collateral and will obtain a first lien security interest in all Certificates pledged as collateral. Pursuant to the Recovery Act, SBA or its

expressly authorized agent shall maintain all collateral for SISMBD Loans in a custodial account. Certificates held as collateral must be in paper, not book entry form.

Section 120.1860 describes the loan disbursement process. When an SISMBD requires an advance from its SISMBD Loan to fund a secondary market purchase, it will submit a written request for an advance to the FTA along with the SBA Form 1086 or 1088 for processing. The FTA will notify SBA that a particular SISMBD requests an advance of a certain amount on a specific settlement date to purchase a Guaranteed Portion, Individual Certificate, or Pool Certificate. Disbursement to the FTA is contingent upon receipt by SBA, the FTA or SBA's settlement agent or custodian of the Guaranteed Portions or Certificates being purchased and any other Collateral required by SBA and verification of the required first lien position. On the settlement date for the secondary market transaction, SBA will wire funds to the FTA. FTA will use loan proceeds and any Premium payment from SISMBD to pay the SBA Lender or Registered Holder the purchase price. SBA will not advance more than the purchase price of the loan or Certificate if the loan or Certificate is purchased at a discount to the principal balance. Upon settlement the FTA, SBA, SBA's settlement agent and the administrator of the custodial account will register the loan advance and collateral pledge on their respective books and records.

Section 120.1870 establishes that SISMBDs must utilize their own funds or other borrowed funds to cover any Premium paid for a Guaranteed Portion or a Certificate. The SISMBD must send Premium payments to the FTA on the settlement date. The FTA will forward Premium payments to the SBA Lender or Registered Holder along with the funds borrowed from SBA for the Certificate being purchased. In this program, "Premium" is defined as any amount in excess of the principal balance of a Guaranteed Portion or of a Pool Certificate balance.

Section 120.1880 describes the SISMBD Loan repayment mechanism. Payments on any Guaranteed Portion or Certificate that is purchased with SISMBD Loan proceeds will be assigned to SBA and used to repay the SISMBD Loan. These payments are collected by the FTA. The FTA will forward such payments to SBA. In addition, when the SISMBD forms a Pool with Certificates pledged as Collateral for an SISMBD Loan or transfers a pledged Certificate, all proceeds, including the principal

and accrued interest balance of the SISMBD Loan associated with the pledged Certificates must be repaid to SBA as payment on the SISMBD Loan before SBA will release any Collateral and terminate its security interest therein. In this program, "Premium" is defined as any amount in excess of the principal balance of a Guaranteed Portion or of a Pool Certificate balance.

Section 120.1881 explains how payments on the Collateral are allocated between the SISMBD borrower and repayment of the SISMBD Loan. Unless otherwise provided in the Loan Agreements for a particular SISMBD Loan, any payment on Collateral is assigned to SBA and must be used to repay the SISMBD Loan.

Section 120.1882 explains what happens if funds to make required loan payments are not generated from the Collateral. The SISMBD is responsible for all interest and principal payments on an SISMBD Loan. If SBA does not receive full and timely remittances from the Collateral or an SISMBD borrower, it may enforce its rights against the SISMBD borrower and the Collateral as set forth in the Loan Agreements, related documents, and applicable law. An SISMBD will have a 30-day grace period during which to make a supplemental payment if remittances from the Collateral are not sufficient to cover the SISMBD Loan payments when they are due. After the grace period, if the loan remains delinquent, SBA may enforce its rights to the Collateral and against the SISMBD.

Section 120.1890 establishes the maximum maturity for SISMBD Loans. The maximum maturity for all SISMBD Loans will be determined by SBA but must be no later than February 16, 2013. If the maturity of the Collateral is shorter than the maturity of the SISMBD Loan, the SISMBD Loan will be due and payable upon payment in full of the Collateral. If the SISMBD Loan has a balance on its maturity date, the SISMBD must pay the loan in full and obtain possession of the Collateral, or SBA will exercise its rights as described in 120.1830(g) and 120.1882(a).

Section 120.1891 explains what happens if an SISMBD is ineligible to receive an SISMBD Loan or an advance. If an SISMBD that has received funds from an SISMBD Loan is found to be ineligible for the loan or is found to have knowingly breached a representation, the SISMBD must repay the loan in full upon demand by SBA or SBA will exercise its rights as described in 120.1830(g).

Section 120.1892 explains what happens if an SISMBD does not use SISMBD Loan funds for a statutorily

mandated purpose. If the Administrator finds that an SISMBD has used loan proceeds for any purpose other than to finance the inventory of the government guaranteed portion of loans originated, underwritten, and closed under Section 7(a) of the Small Business Act or Pools of such loans, the Administrator shall demand immediate repayment of any outstanding loans to the SISMBD; prohibit the SISMBD, its affiliates, or any future corporate manifestation of the SISMBD from using the SBA Secondary Market Lending Authority; report to Congress the identity of any borrower found by the Administrator to have misused funds made available under the Secondary Market Loan Program; and take any other actions the Administrator, in consultation with the Attorney General of the United States, deems appropriate.

Section 120.1893 describes the SISMBD Loan recipient's responsibilities to collect, maintain and report certain information to SBA or other authorized governmental authorities upon request. SISMBD Loan recipients *will also* have reporting requirements related to section 1512 of the Recovery Act. SBA will provide additional separate guidance on the Recovery Act reporting requirements.

Section 120.1900 explains the last date on which SBA may approve an SISMBD Loan is February 16, 2011 and the date by which all outstanding SISMBD Loans must be paid in full, which is February 16, 2013. All SISMBD Loan requests must be received by the Director of the Secondary Market Lending Authority by January 31, 2011.

### 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 *first* 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 SBA issue emergency regulations and 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. 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 financing for broker-dealers vital to the continued operation of the SBA Secondary Market by reason of their purchase and sale of the government Guaranteed Portion of loans, or pools of loans, originated, underwritten and closed under the Small Business Act. In addition, the program has a limited life, so it is important to make the program effective in a timely manner.

SBA finds 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, 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 retroactive or preemptive effect.

#### 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

SBA has determined that this rule imposes additional 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 a collection of information under the OMB emergency processing procedures regulation, 5 CFR 1320.13. Respondents will be required to provide to SBA the information necessary to participate in the SBA SISMBD Loan program and enable the Agency to assess, among other things, a broker-dealer's creditworthiness and resources available to repay the loan; its inability to obtain credit on reasonable terms from private sources; recent audited financial statements; external audit reports; and schedule of outstanding debt obligations. The SISMBD Loan applicants will also be required to submit quarterly and annual reports. The quarterly report will contain information on the SISMBD's SBA Secondary Market activity, loan usage and updated financial statements. The annual reports will include audited financial statements, and address the

SISMBDs' SBA Secondary Market activities, including the number of Guaranteed Portions they have purchased from SBA lenders and Certificates they have purchased from Registered Holders, as well as those Guaranteed Portions and Certificates they have purchased using SISMBD Loan proceeds.

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 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 collections 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.

Please send comments by the closing date for comment for this interim final rule to SBA Desk Officer, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20503 and to James W. Hammersley, Deputy Assistant Administrator, Office of Policy and Strategic Planning, Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

*Title: Systemically Important Secondary Market Broker-Dealer Data Collection.*

*OMB Control Number:* To be determined; new collection.

*Description and Estimated Number of Respondents:* Respondents are SBA Loan Pool Assemblers that are determined to be systemically important. SBA estimates that there will no more than eight (8) firms affected by these rules.

*(a) Application for SISMBD Loan or increase in the loan amount.*

*Frequency and Estimated Number of Responses:* There will be a total of one application per SISMBD. In addition, it is estimated that there will a total of 4 requests for a loan increase per year. Total estimated responses, 12.

*Estimated Time per Response:* It is estimated each SISMBD will need approximately 20 hours to complete the application including gathering and compiling the supporting documents, for a total annual estimate of 240 hours. Total estimated annual hours, 32.

*Estimated Hourly Cost to Respondents:* Although actual secondary market transactions will be conducted by the broker-dealers, this information collection will likely be completed by bond trading associates. Their estimated average annual salary is \$40,000.00. Their hourly rate is calculated to be about \$20.00. It is estimated that it will cost about \$400.00 per response, or an annual total of \$4,800.

*(b) Request for an advance under a SISMBD Loan.*

*Frequency and Estimated Number of Responses:* There will be a total of four advances per SISMBD per year.

*Estimated Time per Response:* It is estimated each SISMBD will need approximately 1 hour to complete the request for an advance including gathering and compiling the supporting documents, for a total annual estimate of 32 hours.

*Estimated Hourly Cost to Respondents:* Although actual secondary market transactions will be conducted by the broker-dealers, this information collection will likely be completed by bond trading associates. Their estimated average annual salary is \$40,000.00. Their hourly rate is calculated to be about \$20.00. It is estimated that it will cost about \$20.00 per response, or an annual total of \$640.00.

*(c) Secondary Market Activity Report Frequency and Estimated Number of Responses:* Reports are due from each SISMBD quarterly, for an annual total of 32 reports from all SISMBDs.

*Estimated Time per Response:* 2 hours per report, for an annual total of 64 hours.

*Estimated Hourly Cost to Respondents:* It is anticipated that most of this reporting would be automatically generated and submitted by bond trading associates. Their estimated average annual salary is \$40,000.00. Their hourly rate is calculated to be about \$20.00. It is estimated that it will cost respondents \$40.00 per reporting, for an annual total of \$1,280 for all SISMBDs.

*(d) Annual Report Frequency and Estimated Number of Responses:* One report is due from each SISMBD annually.

*Estimated Time per Response:* 3 hours for an annual total of 24 hours.

*Estimated Hourly Cost:* It is assumed that the recipient's annual audited financial statements would be done regardless of this reporting requirement and that the respondent would be simply sending in a copy. It is anticipated that most of the burden hours would be used in preparing the

recertification and the annual activity report. These remittances would be performed by the bond trading assistances. Their estimated average annual salary is \$40,000.00. Their hourly rate is calculated to be about \$20.00. It is estimated that it will cost all respondents an annual total of \$480.

*Total Annual Hour Burden for Collection:* 360.

*Total Cost Burden for Collection:* \$7,200.00.

#### 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 is revised to read as follows:

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

■ 2. Add a new Subpart K to read as follows:

#### Subpart K—Establishment of an SBA Direct Loan Program for Systemically Important Secondary Market Broker-Dealers (SISMBD Loan Program)

Sec.

120.1800 Definitions used in Subpart K.

120.1801 Program purpose.

120.1802 How does a broker-dealer participate in the SISMBD Loan Program?

120.1810 What is a Systemically Important SBA Secondary Market Broker-Dealer (SISMBD)?

120.1820 What are the basic eligibility requirements for SBA designation as a Systemically Important Secondary Market Broker-Dealer?

120.1821 What is the process to obtain designation as a Systemically Important Secondary Market Broker-Dealer?

120.1822 What is the process to apply for an SISMBD Loan.

- 120.1823 Creditworthiness.
- 120.1824 How will an SISMBD receive notice of an approval or denial of a loan or a request for an advance under an SISMBD Loan?
- 120.1825 May an SISMBD request reconsideration after denial?
- 120.1830 What are the terms and conditions of an SBA loan to an SISMBD?
- 120.1831 Is there a limit to the number of SISMBD Loans or advances that an SISMBD may request from SBA?
- 120.1832 What is the minimum and maximum SISMBD Loan advance amount?
- 120.1833 May an SISMBD request an increase in the loan amount?
- 120.1834 What fees are associated with an SISMBD Loan?
- 120.1840 What are the allowable uses of proceeds of an SISMBD Loan?
- 120.1850 Will the Collateral be held by SBA?
- 120.1860 How will the SISMBD Loan be disbursed?
- 120.1870 How does the SISMBD provide funds for the Premium?
- 120.1880 How will the loan be repaid?
- 120.1881 How are payments on the Collateral allocated between the SISMBD borrower and repayment of the SISMBD Loan?
- 120.1882 What happens if funds to make required loan payments are not generated from the Collateral?
- 120.1890 What is the maturity on an SISMBD Loan from SBA?
- 120.1891 What happens if an SISMBD is ineligible to receive an SISMBD Loan or an advance?
- 120.1892 What happens if an SISMBD does not use SISMBD Loan funds for a statutorily mandated purpose?
- 120.1893 Data collections and reporting.
- 120.1900 When does the Secondary Market Lending Authority Program end?

#### § 120.1800 Definitions used in subpart K.

- (a) *Administrator*. The Administrator of the U.S. Small Business Administration.
- (b) *Authority*. The Secondary Market Lending Authority defined herein.
- (c) *Certificate*. The document the FTA issues representing a beneficial fractional interest in a Pool (Pool Certificate), or an undivided interest in the entire guaranteed portion of an individual 7(a) guaranteed loan (Individual Certificate).
- (d) *Collateral (or Collateral for a SISMBD Loan)*. All Guaranteed Portions and Certificates (and proceeds thereof) that are purchased with SISMBD Loan proceeds, collateral assignments of the SBA Form 1086 (Secondary Market Participation Agreement) or SBA Form 1088 (Form of Detached Assignment for U.S. Small Business Administration Loan Pool or Guaranteed Interest Certificate) for all Guaranteed Portions and Certificates purchased with SISMBD Loan proceeds, the agreement

for Lender/FTA payment of amounts due under the Guaranteed Portions and Certificates, and any other asset that is pledged to secure an SISMBD Loan.

(e) *Commitment Letter*. The document or documents containing the terms and conditions under which SBA agrees to lend money for a specific period of time to a Systemically Important SBA Secondary Market Broker-Dealer defined in Section 120.1810 of Subpart K and pursuant to Section 509 of the American Recovery and Reinvestment Act of 2009.

(f) *FTA*. SBA's fiscal and transfer agent.

(g) *Guaranteed Portion*. That portion of an SBA 7(a) loan sold in an SBA Secondary Market transaction. This guaranteed portion of a 7(a) loan once sold is certificated, carries a guarantee backed by the full faith and credit of the United States and bestows upon the Registered Holder the right to receive payments.

(h) *Individual Certificate*. The instrument representing a beneficial interest in the Guaranteed Portion of an individual 7(a) loan sold in the SBA Secondary Market Program and carries a guarantee which is backed by the full faith and credit of the United States.

(i) *Loan Advance Request Form*. The form approved by SBA wherein an SISMBD requests a specific dollar amount that will be used to purchase certain guaranteed portions or Certificates. This amount, when added to the balance outstanding of the SISMBD's existing SISMBD Loan, must be equal to or less than the SISMBD loan amount.

(j) *Loan Agreements*. Collectively, any loan agreement executed between SBA and the SISMBD that contains the basic terms and conditions which control the SISMBD Loan, together with any notes, security documentation, custodial agreement, and any other ancillary documentation executed in connection therewith, including by reference, the regulations and other documents referenced in the regulations.

(k) *On-going Subsidy Fee*. An annual fee collected monthly, based on the outstanding SISMBD loan balance, pursuant to section 509(F) of the Recovery Act, to result in a cost of the direct loan of zero, as determined under the Federal Credit Reform Act of 1990, as amended. These funds generated by the fee serve as a reserve for program losses. The fee will be published in a notice by SBA prior to the commencement of the Program and from time to time thereafter. SBA will communicate the SBA On-going Subsidy Fee to the systemically important broker-dealers.

(l) *Pool Assembler*. A financial institution that is authorized by SBA to:

(1) Organize and package Pools by acquiring SBA guaranteed portions of 7(a) loans from Lenders or Individual Certificates from Registered Holders;

(2) Resell fractional interests in the Pools to Registered Holders; and

(3) Direct the FTA to issue Certificates.

(m) *Pool Certificate*. The instrument representing a beneficial fractional interest in a Pool of SBA guaranteed portions of 7(a) loans. Pool Certificates are backed by the SBA guaranteed portions of 7(a) loans comprising a Pool and carry a timely payment guarantee which is backed by the full faith and credit of the United States.

(n) *Pool*. The aggregate of SBA guaranteed portions of loans formed into a single pool by the Pool Assembler in accordance with the SBA Secondary Market laws, regulations and Program Guide.

(o) *Premium*. Any amount in excess of the principal balance of a Guaranteed Portion or of a Certificate balance.

(p) *Program*. The program authorized by Section 509 of the American Recovery and Reinvestment Act of 2009.

(q) *Registered Holder*. The Certificate owner listed in the FTA's records.

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

(s) *SBA Secondary Market*. Consists of the sale of Certificates, representing either the entire guaranteed portion of an individual 7(a) guaranteed loan or an undivided interest in a Pool consisting of the SBA guaranteed portions of a number of 7(a) guaranteed loans. Transactions involving interests in Pools or the sale of individual guaranteed portions of loans are governed by the contracts entered into by the parties, SBA's Secondary Market Program Guide, and Subpart F of Chapter 13 of the Code of Federal Regulations.

(t) *Secondary Market Lending Authority*. The office established under Section 509(c) of the American Recovery and Reinvestment Act of 2009 to provide loans to systemically important SBA Secondary Market broker-dealers to be used for the purpose of financing the inventory of the government guaranteed portion of loans originated, underwritten and closed under the Small Business Act or pools of such loans.

(u) *SISMBD*. Systemically Important SBA Secondary Market Broker-Dealer, as defined in Section 120.1810 of this Subpart K of Chapter 13 of the Code of Federal Regulations.

(v) *SISMBD Loan Application*. The application, in the form approved by SBA, wherein an SISMBD applies for an SISMBD Loan.

(w) *SISMBD Loan*. A direct loan made by SBA to a Systemically Important SBA Secondary Market Broker-Dealer to assist with the financing of the purchase and sale of Guaranteed Portion of loans originated, underwritten and closed under Section 7(a) of the Small Business Act. Recipients of an SISMBD loan must use the proceeds for the sole purpose of purchasing Guaranteed Portions of 7(a) loans from SBA Lenders and Individual Certificates or Pool Certificates from Registered Holders.

(x) *On-going Subsidy Fee*. An annual fee collected monthly, based on the outstanding SISMBD loan balance, pursuant to section 509(F) of the Recovery Act, to result in a cost of the direct loan of zero, as determined under the Federal Credit Reform Act of 1990, as amended. The funds generated by this fee serve as a reserve for program losses. The fee will be published in a notice by SBA prior to the commencement of the Program and from time to time thereafter.

#### **§ 120.1801 Program purpose.**

Section 509 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) authorizes SBA to temporarily make direct loans to broker-dealers to ensure the continued operation of the SBA Secondary Market for 7(a) small business loans guaranteed by SBA. Such broker-dealers are referred to in the Recovery Act as Systemically Important SBA Secondary Market Broker-Dealers.

#### **§ 120.1802 How does a broker-dealer participate in the SISMBD Loan Program?**

A Pool Assembler must meet the eligibility requirements in § 120.1820, submit an SISMBD Loan Application to SBA that includes the information specified in § 120.1822, obtain a written loan commitment from SBA, execute, among other documents, Loan Agreements, and satisfy all other SBA requirements. The Loan Agreements provide further details on the requirements that apply to an SISMBD seeking an SISMBD Loan.

#### **§ 120.1810 What is a Systemically Important SBA Secondary Market Broker-Dealer (SISMBD)?**

A systemically important SBA Secondary Market broker-dealer as a Pool Assembler that has routinely engaged in the purchase and sale of the Guaranteed Portion of 7(a) loans or pools of Guaranteed Portions originated, underwritten and closed under the Small Business Act.

#### **§ 120.1820 What are the basic eligibility requirements for SBA designation as a Systemically Important Secondary Market Broker-Dealer?**

(a) To be eligible for an SBA designation as an SISMBD a broker-dealer must:

(1) Be a Pool Assembler as defined in Subpart F Section 120.600 of this Part 120;

(2) Satisfy all of the requirements of Section 120.630 this Part 120;

(3) Have not been suspended or terminated, and not be currently the subject of or eligible for an SBA suspension or termination procedure; and

(4) Have engaged in a specific dollar volume of SBA Secondary Market purchases of Guaranteed Portions from SBA Lenders and Certificates from Registered Holders and have sold a specific percentage of the total dollar volume of sales of Pools in the SBA Secondary Market during the same timeframe.

(b) Pool Assemblers that are unable to meet the requirements in paragraph (a) of this section at the commencement of the Program may qualify at a later date. On a quarterly basis SBA will review Pool Assembler Secondary Market activity and may designate additional broker-dealers as systemically important to the SBA Secondary Market.

#### **§ 120.1821 What is the process to obtain designation as a Systemically Important Secondary Market Broker-Dealer?**

(a) SBA will determine which Pool Assemblers are Systemically Important SBA Secondary Market Broker-Dealers (SISMBDs) and will notify each in writing.

(b) Once a Pool Assembler has been designated as an SISMBD, the designation will remain valid until February 16, 2011. After designation as an SISMBD, the Pool Assembler may apply for an SISMBD Loan following the procedures set forth in 120.1822 herein.

#### **§ 120.1822 What is the process to apply for an SISMBD Loan?**

(a) To apply for an SISMBD Loan, an SISMBD must submit an SISMBD Loan Application to the Director of the Secondary Market Lending Authority.

(b) The SISMBD Loan Application contains the following information:

(1) Information demonstrating the applicant is creditworthy and has the resources to repay the loan;

(2) A statement of the amount requested;

(3) Applicant's IRS tax identification number;

(4) A copy of applicant's most recent financial statements dated within 120 days of the application that was

prepared by an accountant, including a copy of its most recent outside audit report, a balance sheet, an income and expense statement and a schedule of its secured debt obligations; and

(5) A narrative describing the efforts undertaken by the firm to obtain credit on reasonable terms from private sources. This narrative must include name of the institution and a contact person for each lender contacted and should also include term sheets provided by potential lenders.

#### **§ 120.1823 Creditworthiness.**

(a) Prior to approval of any SISMBD Loan Application or any advance under an SISMBD Loan, SBA shall consider the creditworthiness of the SISMBD. The SISMBD must be creditworthy in order to be approved for an SISMBD Loan or any advance under an SISMBD Loan.

(b) Specific evidence of a lack of creditworthiness includes but is not limited to: Insolvency as defined in the Bankruptcy Code, failure to adhere to the terms of a previous SISMBD Loan, excessive dependence on borrowed funds, violations of the SBA Secondary Market rules, regulations and procedures, the effect any affiliates of the SISMBD may have on the ultimate repayment ability of the SISMBD, or any other relevant factor indicating a less than satisfactory condition or lack of repayment ability. The presence of one or more of these characteristics will not necessarily mean that an SISMBD is not creditworthy but may cause the partial or complete denial of a SISMBD Loan application.

#### **§ 120.1824 How will an SISMBD receive notice of an approval or denial of a loan or request for an advance under an SISMBD Loan?**

(a) Applicants will receive notice of approval or denial of an SISMBD Loan or a request for an advance under such loan by SBA through written correspondence.

(b) If a loan request is approved, SBA will issue a Commitment Letter.

(c) Notice of a denial will include the specific reasons for the decision.

(d) SBA reserves the right to reject any request for a loan or an advance, in whole or in part, in its sole discretion.

#### **§ 120.1825 May an SISMBD request reconsideration after denial?**

(a) An applicant may request reconsideration of a denied loan request or a denied request for an advance within 30 days of receipt of a denial notice. All requests for reconsideration must be submitted to the Director of the Secondary Market Lending Authority. To prevail, the applicant must present



written information to demonstrate that it has overcome all reasons for the denial of a loan request or advance request. After 30 days from receipt of a denial notice, a new loan application or advance request, as appropriate, is required.

(b) If the application is denied a second time, a second and final request for reconsideration may be submitted to the SBA Chief Financial Officer. The request must give specific reasons why the decline action should be reversed. All requests must be received within 30 days of the decline action.

(c) The decision of the SBA Chief Financial Officer is final.

**§ 120.1830 What are the terms and conditions of an SBA loan to an SISMBD?**

(a) *Loan structure.* Credit extensions under the SISMBD Loan Program will be in the form of revolving lines of credit loans that are fully collateralized by Guaranteed Portions and Certificates but with full recourse against the borrower. SISMBDs will obtain funds under the SISMBD Loan by requesting advances when needed to purchase Guaranteed Portions from SBA Lenders or Certificates from Registered Holders.

(b) *Loan amount.* There is no statutory limit to the maximum loan size for a loan to a SISMBD, subject to the discretion of the Administrator. SBA has determined that the minimum loan size will be \$10,000,000 and the maximum size of a SISMBD Loan at the time of loan approval will be equal to seventy-five percent (75%) of the total dollar amount of an SISMBD's purchases in the SBA Secondary Market during the twelve (12) month period of time immediately prior to SISMBD Loan Application receipt. The Director of the Secondary Market Lending Authority may approve a higher SISMBD Loan amount if he/she determines that additional lending capacity is essential to the continued participation of the SISMBD in the SBA Secondary Market in accordance with 120.1833(a).

(c) *Repayment terms.* The monthly payments of principal and interest on the Certificates that are pledged as collateral for the SISMBD Loan, any partial or full prepayments on such collateral, and any SBA Lender purchases of defaulted loans will be assigned by the SISMBD to SBA and will be paid by the Lender into a segregated account at the FTA under SBA's ownership and control and applied to the SISMBD Loan. All proceeds from the sale of any pledged Collateral as described in § 120.1880(b) in this Subpart K must be paid by the purchaser to SBA or its agent to reduce the loan balance before any collateral is

released. To the extent that SBA is required to make a payment on its guaranty of a Certificate, SBA will reduce the SISMBD Loan balance by the amount of the guaranty payment.

(d) *Prepayments.* SISMBD Loans will be pre-payable in whole or in part at the option of the borrower.

(e) *Interest rate.* SISMBD Loans shall have variable interest rates not to exceed the Federal Funds target rate as established by the Federal Reserve Board of Governors plus 25 basis points. The first change may occur on the first calendar day of the month following the initial disbursement using the base rate of the Federal Funds rate established by the Federal Reserve Board of Governors in effect on the first business day of that month. After the initial interest rate change, changes may occur no more often than monthly on the first calendar day of each month.

(f) *Collateral.* All SISMBD Loans must be fully collateralized. As security for repayment of an SISMBD Loan, the SISMBD must pledge to SBA all Guaranteed Portions and Certificates (and the proceeds thereof) that it purchases with the SISMBD Loan proceeds and must grant SBA a first lien security interest in the Guaranteed Portions and Certificates (and the proceeds thereof). Additionally, the SISMBD must provide SBA with a collateral assignment, of the SBA Form 1086 (Secondary Market Participation Agreement) or SBA Form 1088 (Form of Detached Assignment for U.S. Small Business Administration Loan Pool or Guaranteed Interest Certificate) for all Guaranteed Portions and Certificates purchased with SISMBD Loan proceeds. The SISMBD must also assign to SBA the payment of amounts due under the Guaranteed Portions and Certificates. All collateral documents must be executed and recorded and the first lien position verified before SBA will disburse funds under the SISMBD Loan. Substitution of collateral during the term of the loan generally will not be allowed. The SISMBD may not grant any junior security interests in the Collateral during the term of the SISMBD Loan.

(g) *Default.* If for any reason an SISMBD is unable to make payment to SBA when due or any other event of default as described in the Loan Agreements occurs, SBA may, among other things, terminate availability under the SISMBD Loan, accelerate the SISMBD Loan, demand payment in full, and avail itself of any and all rights and remedies available under the Loan Agreements or otherwise available under the law.

(h) *Term.* The SISMBD may continue to seek advances under an approved and fully documented SISMBD Loan until January 31, 2011. An SISMBD Loan maturity date must not exceed February 16, 2013.

(i) *On-going subsidy fee.* An annual fee will be collected monthly, based on the outstanding SISMBD Loan balance, pursuant to section 509(F) of the Recovery Act, to result in a cost of the direct loan of zero, as determined under the Federal Credit Reform Act of 1990, as amended. The funds generated by the fee serve as a reserve for program losses. The fee will be published in a notice by SBA prior to the commencement of the Program and from time to time thereafter. SBA will communicate the Ongoing Subsidy Fee to the systemically important broker-dealers.

(j) *Closing and execution of loan documents.* Prior to the expiration of the Commitment Letter, SBA will schedule a closing on the SISMBD Loan. At closing, the SISMBD will be required to execute Loan Agreements, including but not limited to, a loan agreement, promissory note, security agreement, custodial agreement and other documents as required in SBA's sole discretion.

(k) *Review prior to advances.* Prior to approving an advance request under an SISMBD Loan, SBA will require the SISMBD to represent and warrant that:

(1) There has been no material adverse change in the SISMBD's financial condition, ownership structure or control persons or the overall nature of business since the approval of the SISMBD's loan application and

(2) The SISMBD is not subject to any regulatory action and is not under civil or criminal investigation. SBA may conduct a review or require the SISMBD to provide information to verify the representations and warranties.

**§ 120.1831 Is there a limit to the number of SISMBD Loans or advances that an SISMBD may request from SBA?**

No, there is no limit to the frequency in which an SISMBD may borrow under the Secondary Market Loan Program unless the Administrator determines that doing so would create an undue risk of loss to SBA or the United States. In order to mitigate the risk of loss, SBA has determined that an SISMBD may request an unlimited number of loans or advances as long as the balance outstanding on the SISMBD Loan does not exceed the total dollar limit stated in the Commitment Letter. SISMBD Loans will be structured as a revolving line of credit.

**§ 120.1832 What is the minimum and maximum SISMBD Loan advance amount?**

There is no minimum or maximum loan advance amount. Because availability under the SISMBD Loan is capped as set forth in 120.1830, the amount of any loan advance cannot exceed the available credit identified in the Commitment Letter.

**§ 120.1833 May an SISMBD request an increase in the loan amount?**

(a) SBA will consider a request for an increase in the maximum amount of an SISMBD Loan as identified in the Commitment Letter if the applicant can show the increase is essential to its continued participation in the SBA Secondary Market.

(b) Applicants must request a loan increase by submitting an application to the Director of the Secondary Market Lending Authority by January 31, 2011.

**§ 120.1834 What fees are associated with an SISMBD Loan?**

The borrower must pay to SBA an Ongoing Subsidy Fee which will cover SBA's subsidy costs associated with the SISMBD Loan Program.

**§ 120.1840 What are the allowable uses of proceeds of an SISMBD Loan?**

(a) The SISMBD must use loan proceeds solely to purchase Guaranteed Portions from SBA Lenders, Individual Certificates or Pool Certificates from Pool Assemblers or Registered Holders.

(b) SBA will not advance more than the purchase price of the Guaranteed Portions or the Certificate. Thus, if the Guaranteed Portion or Certificates are purchased at a discount to the principal balance, SBA will not advance more than the purchase price.

(c) SBA will not finance the purchase of Guaranteed Portions or Certificates unless the Guaranteed Portions or Certificates carry an interest rate equal to or greater than the interest rate payable to SBA under the SISMBD Loan.

(d) The SISMBD Loan proceeds shall not be used to purchase any Premium portion of a purchase price that is paid to a selling SBA Lender, Registered Holder, or any other individual or entity.

(e) SISMBD Loan proceeds shall not be used to refinance existing debt of the SISMBD, finance existing inventory of the SISMBD, or for any purpose other than as set forth in this Section.

**§ 120.1850 Will the Collateral be held by SBA?**

Yes, SBA or its expressly authorized agent will take physical possession of all Collateral. SBA or its expressly authorized agent shall maintain all

Collateral for SISMBD Loans in a custodial account. Certificates held as Collateral must be in paper, not book entry form.

**§ 120.1860 How will the SISMBD Loan be disbursed?**

(a) Loan proceeds will be disbursed to the FTA by SBA to be applied to the purchase price for the Guaranteed Portions or Certificates being purchased by the SISMBD. Disbursement to the FTA is contingent upon receipt by SBA, the FTA or SBA's settlement agent or custodian of the Guaranteed Portions or Certificates being purchased and any other Collateral required by SBA and verification of the required first lien position. SBA will advance the principal amount or the purchase price of the Guaranteed Portion or the Certificate, whichever is less. Thus, if the loan is purchased at a discount to the principal balance, SBA will not advance more than the purchase price.

(b) Provided an SISMBD has executed all required loan documents, when an SISMBD requests an advance under its SISMBD Loan, it will submit a written Loan Advance Request Form to the FTA and SBA along with the SBA Form 1086 or 1088 for processing. The FTA will notify SBA that a particular SISMBD requests an advance of a certain amount of funds on a specific settlement date to purchase: a Guaranteed Portion which will be evidenced by an Individual Certificate, a Pool Certificate, or an existing Individual Certificate. Provided that the SISMBD has met all of the terms and conditions of the Loan Agreements, related documents, and these regulations, and is not in default under the loan documents, on the settlement date for the SBA Secondary Market transaction, SBA will wire the funds to the FTA. The FTA will use loan proceeds and any Premium payment from the SISMBD to pay the SBA Lender or Registered Holder the purchase price.

(c) The SISMBD must identify the SBA Lender or Registered Holder expected to deliver to SBA or its settlement agent the Guaranteed Portions or Certificates that are being purchased with SISMBD Loan proceeds, and upon delivery the Guaranteed Portions or Certificates will become Collateral for the SISMBD Loan.

(d) On the SBA Secondary Market transaction settlement date, the SBA Lender or Registered Holder will deliver the purchased Guaranteed Portion or Certificate to the FTA or SBA's settlement agent. The FTA or SBA's settlement agent will use loan proceeds and any Premium payment from SISMBD to pay the SBA Lender or the

Registered Holder the purchase price upon delivery of all Guaranteed Portions or Certificates that collateralize the SISMBD Loan to the FTA or SBA's settlement agent and the Guaranteed Portions or Certificates will be placed in a custodial account.

(e) Upon settlement the FTA, SBA, SBA's settlement agent and the administrator of the custodial account will register the loan advance and collateral pledge on their respective books and records.

**§ 120.1870 How does the SISMBD provide funds for the Premium?**

If the SISMBD is paying a Premium for a Guaranteed Portion, an Individual Certificate or a Pool Certificate, it must use its own funds or other borrowed funds to cover the Premium. The SISMBD must send Premium payments to the FTA on or before the settlement date. The FTA will forward Premium payments to the selling SBA Lender or Registered Holder along with the SISMBD Loan funds. In this program, "Premium" is defined as any amount in excess of the principal balance of a Guaranteed Portion or of a Certificate balance.

**§ 120.1880 How will the loan be repaid?**

(a) The monthly payments of principal and interest, any partial or full repayments, and any Lender purchases of defaulted loans on Certificates that have been pledged as collateral to secure an SISMBD Loan will be assigned by the SISMBD and will be paid by the Lender into a segregated account at the FTA under SBA's ownership and control. The FTA will forward such payments to SBA or its loan servicing agent as directed by SBA. The payments will be used to repay the SISMBD Loan.

(b) When the SISMBD forms a Pool with Certificates pledged as Collateral for an SISMBD Loan or transfers a pledged Certificate, all proceeds, including the principal and accrued interest balance of the SISMBD Loan associated with the pledged Certificates, must be repaid to SBA as payment on the SISMBD Loan before SBA will approve the transfer, release any Collateral and terminate its security interest therein. SBA will not approve any transfers of Guaranteed Portions or Certificates at less than the par value or the original purchase price of the specific Guaranteed Portion or Certificate.

(c) To the extent that SBA is required to make a payment on its guaranty of a Certificate, SBA will reduce the SISMBD Loan balance.

(d) If the SISMBD Loan has a balance when a payment is required or when the SISMBD Loan matures, the SISMBD may make any required payment, pay the loan in full if it has matured and obtain possession of the Collateral, or SBA may exercise its rights under the Loan Agreements which may include terminating availability under the loan, accelerating the loan and demanding full repayment from the SISMBD, and selling all Collateral. The proceeds from the sale of the Collateral will be used to repay the SISMBD Loan and the SISMBD will be responsible for any remaining unpaid loan deficiency balance.

**§ 120.1881 How are payments on the Collateral allocated between the SISMBD borrower and repayment of the SISMBD Loan?**

Unless otherwise provided in the Loan Agreements for a particular SISMBD Loan, any payment on Collateral must be assigned to SBA and must be used to repay the SISMBD Loan.

**§ 120.1882 What happens if funds to make required loan payments are not generated from the Collateral?**

(a) The SISMBD is responsible for all principal and interest payments on an SISMBD Loan. If SBA does not receive full and timely remittances from the Collateral or the SISMBD borrower, SBA may enforce its rights against the SISMBD and the Collateral as set forth in the Loan Agreements, related documents and applicable law.

(b) An SISMBD will have a 30 day grace period during which to make a supplemental payment if remittances from the Collateral are not sufficient to cover the SISMBD Loan payments when they are due. After the grace period, if the loan remains delinquent, SBA may enforce its rights as set forth in paragraph (a) of this section.

**§ 120.1890 What is the maturity on a SISMBD Loan from SBA?**

The maximum maturity for an SISMBD Loan will be determined by SBA but must be no later than February 16, 2013. If the maturity of the Collateral is shorter than the maturity of the SISMBD Loan, the SISMBD Loan will be due and payable upon payment in full of the Collateral. If the SISMBD Loan has a balance on its maturity date, the SISMBD must pay the loan in full or SBA will exercise any or all of its rights as described in § 120.1830(g) or § 120.1882(a).

**§ 120.1891 What happens if an SISMBD is ineligible to receive an SISMBD Loan or an advance?**

If an SISMBD that has received funds from an SISMBD Loan or an advance is found to be ineligible for the loan or any advance under the loan or is found to have knowingly breached a representation, the SISMBD must immediately repay the loan in full upon demand by SBA or SBA will exercise its rights as described in § 120.1830(g).

**§ 120.1892 What happens if an SISMBD does not use SISMBD Loan funds for a statutorily mandated purpose?**

If the Administrator finds that an SISMBD has used loan proceeds for any purpose other than to finance the inventory of the government guaranteed portion of loans originated, underwritten, and closed under Section 7(a) of the Small Business Act or Pools of such loans, the Administrator shall:

- (a) Demand immediate repayment of any outstanding loans to the SISMBD;
- (b) Prohibit the SISMBD, its affiliates, or any future corporate manifestation of the SISMBD from using the SBA Secondary Market Lending Authority;
- (c) Report to Congress the identity of any borrower found by the Administrator to have misused funds made available under the Secondary Market Loan Program; and
- (d) Take any other actions the Administrator, in consultation with the Attorney General of the United States, deems appropriate.

**§ 120.1893 Data collections and reporting.**

- (a) *Data—general.* A recipient of an SISMBD Loan shall maintain such records as may be prescribed by SBA to:
- (1) Disclose the manner in which an SISMBD Loan is used;
  - (2) Determine:
    - (i) The total outstanding loan amount;
    - (ii) The total amount repaid on the loan;
    - (iii) The aggregate value of assets held as collateral for the SISMBD Loan; and
    - (iv) The amount of any defaults or delinquencies that occurred on the loan;
  - (3) Demonstrate compliance with the requirements of this part; and
  - (4) Evaluate the impact of the SISMBD Loan Program on its SBA Secondary Market activity.

(b) *Access to records.* An SISMBD Loan recipient must submit such financial and SBA Secondary Market activity reports, records, statements, and documents at such times, in such forms, and accompanied by such reporting data, as required by SBA, the SBA Office of the Inspector General, or other authorized government personnel upon request or upon a request by their duly

authorized representatives to ensure compliance with the requirements of this Subpart and to evaluate the impact of the SISMBD Loan Program. SBA or other authorized government personnel and their duly authorized representatives, shall have full and free access to SISMBD offices and facilities and all books, documents, records, and financial statements relating to the use of SISMBD Loan proceeds during normal business hours and may copy such documents as they deem appropriate.

(c) *Retention of records.* A recipient of an SISMBD Loan shall comply with all SBA mandated record retention requirements.

(d) *Review.* (1) At least annually, SBA will review the SBA Secondary Market activity of an SISMBD Loan recipient.

(2) A loan recipient shall submit a report of SBA Secondary Market activity, SISMBD Loan usage and updated financial statements within 45 days after the end of each calendar quarter, or within some other period after the end of each calendar quarter as may be agreed to in the Loan Agreements with information requested by SBA.

(3) A recipient shall submit a report within 60 days after the end of each Federal fiscal year, or by such alternative deadline as may be agreed to in the Loan Agreements or as required by the Recovery Act on: information on the number of Guaranteed Portions it purchased from SBA Lenders; information describing the manner in which SISMBD Loan proceeds were used. SBA will use such information to verify that loan proceeds were used in a manner consistent with the Loan Agreements, the Recovery Act and these regulations; certification that an SISMBD continues to meet the eligibility requirements described in Section 120.1820 of this Subpart; and its most recent audited financial statements prepared by an independent certified public accountant. Such statements shall cover the operations of the recipient's most recently completed fiscal year.

(4) SBA may make reports described in paragraph (d)(2) and (d)(3) of this section available for public inspection.

(e) *Reporting requirements.* SISMBD Loan recipients will have reporting requirements related to section 1512 of the Recovery Act. SBA will provide additional separate guidance on the Recovery Act reporting requirements.

**§ 120.1900 When does the Secondary Market Lending Authority Program end?**

The last date on which a loan under this program can be approved is

February 16, 2011, unless Congress extends the SISMBD Loan Program. All loan applications must be received at SBA no later than January 31, 2011. Loans must be paid in full by no later than February 16, 2013.

**Karen G. Mills,**  
Administrator.

[FR Doc. E9-27743 Filed 11-17-09; 11:15 am]

BILLING CODE 8025-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Parts 71 and 93

[Docket No.: FAA-2009-0837; Airspace Docket No. 09-AWA-2; Amendment Nos. 71-34, 93-94]

RIN 2120-AJ59

#### Modification of the New York, NY, Class B Airspace Area; and Establishment of the New York Class B Airspace Hudson River and East River Exclusion Special Flight Rules Area

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

**ACTION:** Final rule.

**SUMMARY:** This action makes a minor modification to the New York, NY, Class B airspace area by adjusting the floor of Class B airspace above a portion of the Hudson River to 1,300 feet above mean sea level (MSL). Additionally, this action establishes a Special Flight Rules Area (SFRA) over the Hudson River and East River to mandate certain pilot operating practices for flight within the Hudson River and East River Class B airspace Exclusions. The FAA is taking this action to enhance the safety of flight operations in the New York Class B airspace Exclusion areas.

**DATES:** These amendments are effective 0901 UTC, November 19, 2009. The Director of the **Federal Register** approves the incorporation by reference of the 14 CFR part 71 amendment in this action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** For technical questions concerning this rule, contact Paul Gallant, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-8783.

For legal questions concerning this rule, contact Lorelei Peter, Office of the Chief Counsel, AGC-220, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3134.

#### SUPPLEMENTARY INFORMATION:

##### Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under this section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This section also provides for the FAA to prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for: (1) Navigating, protecting, and identifying aircraft; (2) protecting individuals and property on the ground; (3) using the navigable airspace efficiently; and (4) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

##### Background

On August 8, 2009, a midair collision occurred between a helicopter and a single-engine, fixed-wing aircraft operating in accordance with visual flight rules (VFR) over the Hudson River near Hoboken, New Jersey. The collision occurred beneath the New York Class B airspace area in an area commonly referred to as the Hudson River Class B airspace Exclusion. This accident prompted the FAA and the National Transportation Safety Board (NTSB) to examine the airspace configuration and pilot procedures that apply in the vicinity of the incident.

The Hudson River Exclusion extends along the Hudson River between the vicinity of the George Washington Bridge, on the north, and the Verrazano-Narrows Bridge on the south. The Exclusion extends from the surface of the Hudson River up to the base of the overlying New York Class B airspace area. Currently, the floor of Class B airspace along the Hudson River varies between an altitude above 1,100 feet MSL and 1,500 feet MSL. The Exclusion effectively is a "cutout" from the New York Class B airspace area and permits

pilots to fly through the area without an air traffic control (ATC) clearance.

The East River Class B Exclusion extends between the east and west banks of the East River from Governors Island to the north tip of Roosevelt Island. The exclusion extends from the surface of the river up to the base of the overlying Class B airspace.

In light of the accident on August 11, 2009, the FAA issued Notice to Airmen (NOTAM) number 9/3952 strongly advising pilots to follow the long-standing recommended procedures for aircraft operating in the Hudson River and East River Exclusion areas. Specifically, these procedures request that aircraft operating in the area:

- Not exceed 140 knots indicated airspeed;
- Turn on anticollision, position, navigation and/or landing lights; and
- Self announce on frequency 123.075 for the East River and 123.05 for the Hudson River.

The NOTAM emphasized that the above recommendations do not relieve pilots of compliance with applicable regulations, including regulations concerning minimum safe altitudes and see-and-avoid responsibilities.

On August 14, 2009, the FAA formed a task force to review current procedures for VFR flight operations in the New York City area. A goal of the review was to identify safety enhancements to flight operations in the Hudson River area. The task force developed eight recommendations which were included in the *Review of New York Visual Flight Rules Airspace: Task Force Report*, dated August 28, 2009. A copy of the report was placed in rulemaking docket for the notice of proposed rulemaking (NPRM). Two of the eight recommendations (numbers one and five) require rulemaking action to: (1) Modify the floor of Class B airspace over a portion of the Hudson River; and (2) mandate compliance with the previously recommended procedures for flight in the Hudson River and East River Exclusion areas. Those two recommendations are the subject of this rulemaking action.

Based on its preliminary findings, the NTSB issued a number of recommendations that are similar to those developed by the FAA task force. The NTSB recommendations are also available for viewing in the rulemaking docket for the NPRM.

##### Summary of the NPRM

In view of the FAA task force recommendations discussed above, the FAA issued a NPRM that was published on September 16, 2009 (74 FR 47495). The NPRM proposed to amend 14 CFR