

U. S. SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

RIN: 3245-AF91

504 Loan Program Debt Refinancing

AGENCY: U. S. Small Business Administration

ACTION: Interim final rule with request for comments

SUMMARY: This interim final rule implements section 504 of the American Recovery and Reinvestment Act of 2009 (Recovery Act), which authorizes projects approved for financing under Title V of the Small Business Investment Act to include a limited amount of debt refinancing if the project involves the expansion of a small business concern and meets certain other conditions. This interim final rule makes the existing 504 Loan Program rules consistent with section 504 of the Recovery Act.

DATES: Effective Date: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment Date: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN: 3245-AF91 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Andrew McConnell Jr., Small Business Administration, Office of Financial Assistance, 409 Third Street, SW, 8th Floor, Washington, DC 20416.

- Hand Delivery/Courier: Andrew McConnell Jr., Small Business Administration, Office of Financial Assistance, 409 Third Street, SW, 8th Floor, Washington, DC 20416.

SBA will post all comments on www.regulations.gov.

If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please submit the information to Kelly Wilcox , Office of Performance Management, 409 Third Street, SW, 6th Floor, Washington, DC 20416, or send an email to Andrew McConnell, Jr. at andrew.mcconnell@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: Andrew B. McConnell, Jr. at andrew.mcconnell@sba.gov or 202-205-7238.

SUPPLEMENTARY INFORMATION:

I. Background Information

The American Recovery and Reinvestment Act of 2009 , P.L. 111-05, 123 Stat. 115 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 are intended to play a role in achieving these goals. The SBA received funding and authority through the Recovery Act to modify existing loan programs or establish new loan programs to help re-invigorate small business lending. It

is expected that SBA's actions will increase access to affordable credit for small businesses through the agency's 7(a) and 504 loan programs, unfreeze the secondary market for SBA guaranteed loans, help small businesses struggling with existing debt, and allow greater investment in high-growth small businesses. The changes made to SBA's programs by the Recovery Act include: temporary reduction or elimination of fees in the 7(a) and 504 loan guarantee programs; creation of a temporary 90 percent guarantee loan program; creation of a temporary Secondary Market Guarantee Authority to provide a Federal guarantee for pools of first lien 504 loans that are to be sold to third-party investors; new authority for refinancing community development loans under the 504 program; revision of the job creation goals of the 504 program; simplification of the maximum leverage limits and aggregate investment limits required of Small Business Investment Companies; temporary authority to provide loans on a deferred basis to viable small business concerns that have a qualifying small business loan and are experiencing immediate financial hardship; a temporary increase in the surety bond maximum amount; and establishment of a Secondary Market Lending Authority to make loans to systemically important broker dealers in SBA's 7(a) secondary market.

With respect to the authority for debt refinancing in the 504 program, as amended by the Recovery Act, section 502(7)(A) of the Small Business Investment Act of 1958 (SBIA) allows financing approved for a 504 loan to include a limited amount of qualified debt refinancing, and section 502(7)(B) of the SBIA provides that the limited amount of qualified refinancing may not exceed 50 percent of the project cost of the expansion of a small business concern. As the 504 program is intended to assist the small business concern in expanding its business, this interim final rule broadly defines the phrase

“project involves expansion of a small business concern” to include any project that involves the acquisition, construction or improvement of land, building or equipment for use by the small business concern. Section 502(7)(B) also sets forth certain conditions that a project must meet in order to be eligible for debt refinancing, and these conditions are included in this interim final rule with some additional definitions.

In addition, to protect the integrity of the 504 program and to minimize the risk to SBA of this new refinancing authority, SBA is amending the regulations to provide that certain loans cannot be approved under the authority delegated to CDCs under the Premier Certified Lenders Program (PCLP), if the applications include: (1) waiving the requirement set forth in new section 120.882(e)(2) that the collateral securing refinanced debt must also secure the 504 loan; (2) approving a good cause exception to the general requirement set forth in the new section 120.882(e)(5) that there be at least a 10 percent reduction in the installment amount attributable to the debt being refinanced; and (3) refinancing loans held by the same CDC, the Third Party Lender financing the new project, or affiliates of either.

The debt refinancing authorized by the Recovery Act is available for loan applications received by SBA on or after the effective date of this rulemaking. Applications received or loans approved prior to that date may be modified to include debt refinancing provided that the related debenture has not been funded.

II. Section by Section Analysis

Section 120.882 SBA adds new paragraphs (e) and (f) to 120.882 to implement the new authority for refinancing community development loans under the 504 loan program. These new provisions set forth the terms and conditions under which

refinancing will be permitted in the 504 program, and define the phrase “project involves expansion of a small business concern” to include any project that involves the acquisition, construction or improvement of land, building or equipment for use by the small business concern.

Section 120.884. SBA amends § 120.884(a) to provide an exception to the general prohibition against using proceeds of the 504 loan for debt refinancing. In addition, current paragraphs (b) and (c) will be redesignated as (c) and (d), respectively, and a new paragraph (b) will be added to provide that a CDC may not use 504 loan proceeds to pay any creditor in a position to sustain a loss causing a shift to SBA of all or part of a potential loss from an existing debt.

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. This new refinancing authority will offer a significant opportunity for expanding businesses, allowing them to restructure existing debt into new 504 guaranteed loans that will expand their businesses and create jobs. It also has the potential to quickly free up critical capital for small business owners across the country, allowing them to continue to expand and stimulate the economy. This rule also amends the existing rules to make them consistent with section 504 of the Recovery Act, which was enacted and took effect on February 17, 2009. Advance solicitation of comments for this rulemaking would be unnecessary, impracticable, contrary to the public interest, and would harm those small businesses that need immediate access to capital.

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 [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. 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. As this rule is implementing new authority and is liberalizing the 504 program's current requirements, there is no need for the public to adjust its behavior before the rule takes effect. SBA

therefore 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.

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 has retroactive effect and does not have 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

The SBA has determined that this rule imposes additional reporting and recordkeeping requirements under the Paperwork Reduction Act, 44 USC Chapter 35. In order to make debt refinancing available as quickly as possible to assist those most impacted by the severe economic conditions facing the Nation, the agency has submitted

three amended information collections to Office of Management and Budget (OMB) for review and approval under the emergency processing procedures in 5 CFR 1320.13. Respondents will be required to collect and provide to SBA certain information to support an application for debt refinancing under the section 504 loan program. This information is necessary to determine whether the application satisfies the conditions set forth in the Recovery Act and the implementing regulations and policies. The respondents also will be required to note on a closing document the amount approved for refinancing under the new regulations. The title, description and number of respondents, estimated annual cost and hour burdens imposed on the respondents, as a result of this collection of information, are outlined below.

I. Title: Application for Section 504 Loan (SBA Form 1244)

OMB Control Number: 3245-0071

Description and Estimated Number of Respondents: This information collection will be submitted by the small businesses seeking to obtain financing, including the debt refinancing loans available as a result of the Recovery Act. SBA estimates a total of 9,100 small businesses will use this information collection.

Estimated Number of Responses: SBA estimates one application per small business concern; therefore this estimated total is also 9,100.

Estimated Time per Response: For applications submitted through the Abridged Standard Method, the current estimate is 2.08 hours per response; and for non-Abridged Standard method, 2.25 hours. As a result of the additional underwriting burden for the debt refinancing option SBA estimates these burdens to increase to 2.25 and 2.45 hours respectively.

Total Estimated Hour Burden: 21,210

II. Title: Eligibility Information Required for PCLP Submission (SBA Form 2234C)

OMB Control Number: 3245-0346

Description and Estimated Number of Respondents: Lenders in the Certified Development Company (CDC) Program (also referred to as the 504 Loan Program).

There are currently 27 of these lenders.

Estimated Number of Responses: 1700

Estimated Time per Response: The current estimated burden is 40 minutes per response. As a result of the Recovery Act, the Agency estimates this burden to increase to 55 minutes.

Total Estimated Annual Hour Burden: 1275 hours

III. Title: Servicing Agent Agreement (SBA Form 1506)

OMB Control Number: 3245-0193

Description and Estimated Number of Respondents: This information is provided by the borrower, and Certified Development Company. Based on historical use of this form, SBA estimates 8,779 respondents annually.

Estimated Number of Responses: 8,403.

Estimated Time per Response: 1 hour based on current burden response rate; only de minimis increase is expected as a result of the Recovery Act changes, since they require little or no additional effort from lenders. .

Total Estimated Annual Hour Burden: 8,403

SBA invites comments 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 Andrew McConnell Jr., Small Business Administration, Office of Financial Assistance, 409 Third Street, SW, 8th Floor, Washington, DC 20416. If SBA receives approval for of its emergency approval request, it will be followed by a request for clearance under normal procedures in accordance with 5 CFR 1320.10. Any comments received will be addressed at that time.

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); Pub.L. 111-5, 123 Stat. 115.

2. Amend § 120.882 by adding new paragraphs (e) and (f) to read as follows:

§ 120.882 Eligible Project Costs for 504 loans.

* * * * *

(e) If the project involves expansion of a small business concern, any amount of existing indebtedness that does not exceed 50 percent of the project cost of the expansion may be refinanced and added to the expansion cost if:

(1) The proceeds of the indebtedness were used to acquire land, including a building situated thereon, to construct a building thereon, or to purchase equipment. The assets acquired must be eligible for financing under the 504 loan program;

(2) The existing indebtedness is collateralized by fixed assets. The 504 eligible fixed assets collateralizing any debt to be refinanced or relating to the portion of debt being refinanced in the case of a partial refinance must also collateralize the 504 Loan unless SBA approves a waiver due to extraordinary circumstances. PCLP CDCs may not use their delegated authority to approve a loan requiring this waiver;

(3) The existing indebtedness was incurred for the benefit of the small business concern for which any new Project costs are incurred. Existing 7(a) and 504 loans may be refinanced under this section in accordance with SBA policies or procedures;

(4) The financing will be used only for refinancing existing indebtedness or

costs relating to the project financed;

(5) The financing will provide a substantial benefit to the borrower when prepayment penalties, financing fees, and other financing costs are accounted for. For purposes of this paragraph, “substantial benefit” means that the portion of the new installment amount attributable to the debt being refinanced must be at least 10 percent less than the existing installment amount(s). Prepayment penalties, financing fees, and other financing costs must also be added to the amount being refinanced in calculating the percentage reduction in the new installment payment. Exceptions to the 10% reduction requirement may be approved by the D/FA or designee for good cause. PCLP CDCs may not use their delegated authority to approve a loan requiring this exception;

(6) The borrower has been current on all payments due on the existing debt for not less than 1 year preceding the date of refinancing. For purposes of this section, “date of refinancing” refers to the date the 504 loan is approved by SBA. Any unremedied delinquency after approval must be reported to SBA as an adverse change;

(7) The financing under section 504 will provide better terms or rate of interest than the existing indebtedness on the date of refinancing. For purposes of this paragraph, “better terms or rate of interest” may include longer maturity (but always commensurate with the assets’ useful life), a lower interest rate committed on the Third Party Lender Loan or projected on the 504 loan, improved collateral conditions, or less restrictive loan covenants.

(8) The authority to approve the refinancing of same institution debt must be approved by SBA and is not delegated to the PCLP CDCs. For the purposes of this

paragraph, “same institution debt” means any debt of the CDC or the Third Party Lender financing the new project, or of affiliates of either.

(f) For the purposes of paragraph (e), the phrase “project involves expansion of a small business concern” includes any project that involves the acquisition, construction or improvement of land, building or equipment for use by the small business concern.

3. Amend § 120.884 as follows:

(a) Revise paragraph (a);

(b) Redesignate paragraphs (b) and (c) as (c) and (d) respectively; and

(c) Add new paragraph (b).

§ 120.884 Ineligible costs for 504 loans.

* * * * *

(a) Debt refinancing (other than interim financing), except as provided in § 120.882(e).

(b) A CDC may not use 504 loan proceeds to pay any creditor in a position to sustain a loss causing a shift to SBA of all or part of a potential loss from an existing debt.

* * * * *

Date: _____

Karen G. Mills
Administrator