

financial performance of the SBA Supervised Lender to which it applies. The reports must be certified by the officer of the reporting SBA Supervised Lender named for that purpose by action of the institution's board of directors. If the institution's board of directors has not acted to name an officer to certify the correctness of its reports of financial condition and financial performance, then the reports must be certified by the president or chief executive officer of the reporting SBA Supervised Lender.

- (d) **Waiver.** The appropriate Office of Capital Access official in accordance with Delegations of Authority may in his/her discretion waive any § 120.464 reporting requirement for SBA Supervised Lenders for good cause (including, but not limited to, where an SBA Supervised Lender has a relatively small SBA loan portfolio), as determined by SBA. SBA Supervised Lenders must request the waiver in writing and include all supporting reasons and documentation. The waiver decision of the appropriate Office of Capital Access official in accordance with Delegations of Authority is final.

[73 FR 75514, Dec. 11, 2008]

### § 120.465 Civil penalty for late submission of required reports.

- (a) **Obligation to submit required reports by applicable due dates.** SBA Supervised Lenders must submit complete reports by the due dates described in the regulations or as directed in writing by SBA. SBA considers any report that an SBA Supervised Lender sends to SBA by the applicable due date but that is submitted only in part, to have not been submitted by the applicable due date. SBA also considers any report that is postmarked by the due date to be submitted by the due date.
- (b) **Amount of civil penalty.** For each day past the due date for such report, the SBA Supervised Lender must pay to SBA a civil penalty of not more than \$7,805 per day per report. Such civil penalty continues to accrue until and including the date upon which SBA Supervised Lender submits the complete report. In determining the amount of the civil penalty to be assessed, SBA may consider the financial resources and good faith of the SBA Supervised Lender, the gravity of the violation, the history of previous violations and any such other matters as justice may require.
- (c) **Notification of amount of civil penalty.** SBA will notify the SBA Supervised Lender in writing of the amount of civil penalties imposed either upon receiving the required complete report or at such other time as SBA determines. The SBA Supervised Lender must pay this amount to SBA within 30 days of the date of SBA's written demand.
- (d) **Identification during examination.** SBA may also impose on an SBA Supervised Lender a civil penalty as described in this section if SBA discovers, during an examination pursuant to subpart I of this Part 120 or otherwise, that the SBA Supervised Lender did not submit a required report by the due date.
- (e) **Extensions of submission due dates.**
  - (1) An SBA Supervised Lender may request in writing to SBA that SBA extend its report due date. The request must reference the report and its due date, state the reasonable cause for extension, and assert how much additional time is needed in order to submit a complete report. SBA will advise SBA Supervised Lender in writing as to whether it approved or denied the extension request. If SBA determines that there is reasonable cause to grant an extension and it is not due to willful neglect, SBA will establish a new due date. Such determination as to willful neglect and reasonable cause is in SBA's discretion. SBA will consider the following factors in determining willful neglect:
    - (i) Whether the SBA Supervised Lender failed to file required reports for more than two reporting periods and

(iii) Unless subject to paragraph (a)(1)(i) or (ii) of this section, an NFRL must comply with the minimum capital requirements for NFRLs that were in effect on January 3, 2021.

(2) **For SBLCs.** For information on minimum capital requirements for SBLCs, see § 120.471.

(b) **Capital adequacy.** The board of directors (or management, if the SBA Supervised Lender is a division of another company and does not have its own board of directors) of each SBA Supervised Lender must determine capital adequacy goals; that is, the total amount of capital needed to assure the SBA Supervised Lender's continued financial viability and provide for any necessary growth. The minimum standards set in § 120.471 for SBLCs and those established in § 120.462(a)(1) for NFRLs are not to be adopted as the ideal capital level for a given SBA Supervised Lender. Rather, the minimum standards are to serve as minimum levels of capital that each SBA Supervised Lender must maintain to protect against the credit risk and other general risks inherent in its operation.

(c) **Capital plan.**

(1) The board of directors of each SBA Supervised Lender must establish, adopt, and maintain a formal written capital plan. The plan must include any interim capital targets that are necessary to achieve the SBA Supervised Lender's capital adequacy goals as well as the minimum capital standards. The plan must address any projected dividend goals, equity retirements, or any other anticipated action that may decrease the SBA Supervised Lender's capital. The plan must set forth the circumstances in which capital retirements (e.g., dividends, distributions of capital or purchase of treasury stock) can occur. In addition to factors described above that must be considered in meeting the minimum standards, the board of directors must also address the following factors in developing the SBA Supervised Lender's capital adequacy plan:

(i) Management capability;

(ii) Quality of operating policies, procedures, and internal controls;

(iii) Quality and quantity of earnings;

(iv) Asset quality and the adequacy of the allowance for loan losses within the loan portfolio;

(v) Sufficiency of liquidity; and

(vi) Any other risk-oriented activities or conditions that warrant additional capital (e.g., portfolio growth rate).

(2) An SBA Supervised Lender must keep its capital plan current, updating it at least annually or more often as operating conditions may warrant.

(d) **Certification of compliance.** Within 45 days of the end of each fiscal quarter, each SBA Supervised Lender must furnish the SBA with a calculation of capital and certification of compliance with its minimum capital requirement as set forth in §§ 120.471, 120.472, or 120.474, as applicable, for SBLCs and as established in § 120.462(a)(1) for NFRLs. The SBA Supervised Lender's chief financial officer must certify the calculation to be correct. The quarterly calculation and certification of compliance may be included in the SBA Supervised Lender's Quarterly Condition Report.

(e) **Capital impairment.** An SBA Supervised Lender must meet its minimum regulatory capital requirement and avoid capital impairment. Capital impairment exists if an SBA Supervised Lender fails to meet its minimum regulatory capital requirement under §§ 120.471, 120.472, and 120.474 for SBLCs or as established in § 120.462(a)(1) for NFRLs. An SBA Supervised Lender must provide the appropriate Office of Capital Access official in accordance with Delegations of Authority written notice of any failure to meet

- (b) Operations and internal controls. Each SBA Supervised Lender's board of directors (or management, if the SBA Supervised Lender is a division of another company and does not have its own board of directors) must adopt an internal control policy which provides adequate direction to the institution in establishing effective control over and accountability for operations, programs, and resources. The internal control policy must, at a minimum:
- (1) Direct management to assign responsibility for the internal control function (covering financial, credit, credit review, collateral, and administrative matters) to an officer or officers of the SBA Supervised Lender;
  - (2) Adopt and set forth procedures for maintenance and periodic review of the internal control function; and
  - (3) Direct the operation of a program to review and assess the SBA Supervised Lender's assets. The asset review program policies must specify the following:
    - (i) Loan, loan-related asset, and appraisal review standards, including standards for scope of selection for review (of any such loan, loan-related asset or appraisal) and standards for work papers and supporting documentation;
    - (ii) Asset quality classification standards consistent with the standardized classification systems used by the Federal Financial Institution Regulators;
    - (iii) Specific internal control requirements for the SBA Supervised Lender's major asset categories (cash and investment securities), lending, and the issuance of debt;
    - (iv) Specific internal control requirements for the SBA Supervised Lender's oversight of Lender Service Providers; and
    - (v) Standards for training to implement the asset review program.
- (c) An SBA Supervised Lender must have qualified full-time professional management including, but not limited to, a chief executive officer or the equivalent to manage daily operations, and a chief credit/risk officer. An SBA Supervised Lender must also have at least one other part-time professional employee (which may be a shared employee of the lender's affiliates) qualified by training and experience to carry out its business plan. An SBA Supervised Lender is expected to sustain a sufficient level of lending activity in its lending area, which means obtaining at least four 7(a) loan approvals during two consecutive fiscal years. This paragraph only applies to SBA Supervised Lenders that make or acquire a 7(a) loan after January 4, 2021, or to any SBA Supervised Lender approved after such date, including in the event of a change of ownership or control of an SBA Supervised Lender.
- (d) An NFRL may only make or acquire 7(a) loans in the state in which its primary state regulator is located, except that an NFRL's lending area may include a local trade area that is contiguous to such state (e.g., a city or metropolitan statistical area that is bisected by a state line) if the NFRL receives SBA's prior written approval. This paragraph applies to all NFRLs on or after January 4, 2021, including in the event of approval of a new NFRL or a change of ownership or control of an NFRL; provided however, that if SBA has approved any NFRL to make 7(a) loans out of their state, then this paragraph will apply on or after January 4, 2022.

*[73 FR 75512, Dec. 11, 2008, as amended at 85 FR 78213, Dec. 4, 2020]*

## **§ 120.461 What are SBA's additional requirements for SBA Supervised Lenders concerning**

its minimum capital requirement within 30 calendar days of the month-end in which the impairment occurred. Unless otherwise waived by the appropriate Office of Capital Access official in accordance with Delegations of Authority in writing, an SBA Supervised Lender may not present any loans to SBA for guaranty until the impairment is cured. SBA may waive the presentment prohibition for good cause as determined by SBA in its discretion. In the case of differences in calculating capital or capital requirements between the SBA Supervised Lender and SBA, SBA's calculations will prevail until differences between the two calculations are resolved.

(f) **Capital restoration plan** –

- (1) **Filing requirement.** An SBA Supervised Lender must file a written capital restoration plan with SBA within 45 days of the date that the SBA Supervised Lender provides notice to SBA under paragraph (d) of this section or receives notice from SBA (whichever is earlier) that the SBA Supervised Lender has not met its minimum capital requirement, unless SBA notifies the SBA Supervised Lender in writing that the plan is to be filed within a different time period.
- (2) **Plan content.** An SBA Supervised Lender must detail the steps it will take to meet its minimum capital requirement; the time within which each step will be taken; the timeframe for accomplishing the entire capital restoration; and the person or department at the SBA Supervised Lender charged with carrying out the capital restoration plan.
- (3) **SBA response.** SBA will provide written notice of whether the capital restoration plan is approved or not or whether SBA will seek additional information. If the capital restoration plan is not approved by SBA, the SBA Supervised Lender will submit a revised capital restoration plan within the timeframe specified by SBA.
- (4) **Amendment of capital restoration plan.** An SBA Supervised Lender that has submitted an approved capital restoration plan may, after prior written notice to and approval by SBA, amend the plan to reflect a change in circumstance. Until such time as a proposed amendment has been approved, the SBA Supervised Lender must implement the capital restoration plan as approved prior to the proposed amendment.
- (5) **Failure.** If an SBA Supervised Lender fails to submit a capital restoration plan that is acceptable to SBA within its discretion within the required timeframe, or fails to implement, in any material respect as determined by SBA in its discretion, its SBA approved capital restoration plan within the plan timeframe, SBA may undertake enforcement actions under § 120.1500.

[73 FR 75512, Dec. 11, 2008, as amended at 85 FR 78213, Dec. 4, 2020]

### **§ 120.463 Regulatory accounting—What are SBA's regulatory accounting requirements for SBA Supervised Lenders?**

- (a) **Books and records.** The books and records of an SBA Supervised Lender must be kept on an accrual basis in accordance with Generally Accepted Accounting Principles (GAAP) as promulgated by the Financial Accounting Standards Board (FASB), supplemented by Regulatory Accounting Principles (RAP) as identified by SBA in Policy, Procedural or Information Notices, from time to time.
- (b) **Annual audit.** Each SBA Supervised Lender must have its financial statements audited annually by a certified public accountant experienced in auditing financial institutions. The audit must be performed in accordance with generally accepted auditing standards as adopted by the Auditing Standards Board of the American Institute of Certified Public Accountants (AICPA) for non-public companies and by the

Public Company Accounting Oversight Board (PCAOB) for public companies. Annually, the auditor must issue an audit report with an opinion as to the fairness of the SBA Supervised Lender's financial statements and their compliance with GAAP.

(c) **Auditor qualifications.** The audit shall be conducted by an independent certified public accountant who:

- (1) Is registered or licensed to practice as a certified public accountant, and is in good standing, under the laws of the state or other political subdivision of the United States in which the SBA Supervised Lender's principal office is located;
- (2) Agrees in the engagement letter with the SBA Supervised Lender to provide the SBA with access to and copies of any work papers, policies, and procedures relating to the services performed;
- (3)
  - (i) Is in compliance with the AICPA Code of Professional Conduct; and
  - (ii) Meets the independence requirements and interpretations of the Securities and Exchange Commission and its staff;
- (4) Has received a peer review or is enrolled in a peer review program, that meets AICPA guidelines; and
- (5) Is otherwise acceptable to SBA.

(d) **Change of auditor.** If an SBA Supervised Lender discharges or changes its auditor, it must notify SBA in writing within ten days of the occurrence. Such notification must provide:

- (1) The name, address, and telephone number of the discharged auditor; and
- (2) If the discharge/change involved a dispute over the financial statements, a reasonably detailed statement of all the reasons for the discharge or change. This statement must set out the issue in dispute, the position of the auditor, the position of the SBA Supervised Lender, and the effect of each position on the balance sheet and income statement of the SBA Supervised Lender.

(e) **Specific accounting requirements.**

- (1) Each SBA Supervised Lender must maintain an allowance for losses on loans and other assets that is sufficient to absorb all probable and estimated losses that may reasonably be expected based on the SBA Supervised Lender's historical performance and reasonably-anticipated events. Each SBA Supervised Lender must maintain documentation of its loan loss allowance calculations and analysis in sufficient detail to permit the SBA to understand the assumptions used and the application of those assumptions to the assets of the SBA Supervised Lender.
- (2) The unguaranteed portions of loans determined to be uncollectible must be charged-off promptly. If the portion determined to be uncollectible by the SBA Supervised Lender is different from the amount determined by its auditors or the SBA, the SBA Supervised Lender must charge-off such amount as the SBA may direct.
- (3) Each SBA Supervised Lender must classify loans as:
  - (i) "Nonaccrual," if any portion of the principal or interest is determined to be uncollectible and
  - (ii) "Formally restructured," if the loan meets the "troubled debt restructuring" definition set forth in FASB Statement of Financial Accounting Standards No. 15, Accounting by Debtors and Creditors for Troubled Debt Restructurings.

- (4) When one loan to a borrower is classified as nonaccrual or formally restructured, all loans to that borrower must be so classified unless the SBA Supervised Lender can document that the loans have independent sources of repayment.
- (f) **Valuing loan servicing rights and residual interests.** Each SBA Supervised Lender must account for loan sales transactions and the valuation of loan servicing rights in accordance with GAAP. At the end of each quarter, the SBA Supervised Lender must review for reasonableness the existing environmental assumptions used in the valuation. Particular attention must be given to interest rate and repayment rate assumptions. Assumptions considered no longer reasonable must be modified and modifications must be reflected in the valuation and must be documented and supported by a market analysis. Work papers reflecting the analysis of assumptions and any resulting adjustment in the valuation must be maintained for SBA review in accordance with § 120.461. SBA may require an SBA Supervised Lender to use industry averages for the valuation of servicing rights.

[73 FR 75513, Dec. 11, 2008]

### § 120.464 Reports to SBA.

- (a) An SBA Supervised Lender must submit the following to SBA:
  - (1) **Annual Report.** Within three months after the close of each fiscal year, each SBA Supervised Lender must submit to SBA two copies of an annual report including audited financial statements as prepared by a certified public accountant in accordance with § 120.463. Specifically, the annual report must, at a minimum, include the following:
    - (i) Audited balance sheet;
    - (ii) Audited statement of income and expense;
    - (iii) Audited reconciliation of capital accounts;
    - (iv) Audited source and application of funds;
    - (v) Such footnotes as are necessary to an understanding of the report;
    - (vi) Auditor's letter to management on internal control weaknesses; and
    - (vii) The auditor's report.
  - (2) **Quarterly Condition Reports.** By the 45th calendar day following the end of each calendar quarter, each SBA Supervised Lender must submit a Quarterly Condition Report in a form and content as the SBA may prescribe from time to time. At a minimum, the Quarterly Condition Report must include the SBA Supervised Lender's quarterly financial statements, which may be internally prepared. The SBA Supervised Lender must apply uniform definitions to categories of nonperforming loans and include recovery amounts on liquidated loans. SBA may, on a case-by-case basis, depending on an SBA Supervised Lender's size and the quality of its assets, adjust the requirements for content and frequency of filing Quarterly Condition Reports.
  - (3) **Legal and Administrative Proceeding Report.** Each SBA Supervised Lender must report any legal or administrative proceeding by or against the SBA Supervised Lender, or against any officer, director or employee of the SBA Supervised Lender for an alleged breach of official duty, within ten business

## records?

- (a) **Report filing.** All SBA Supervised Lender-specific reports (including all SBLC-only reports) must be filed with the appropriate Office of Capital Access official in accordance with Delegations of Authority.
- (b) **Maintenance of records.** An SBA Supervised Lender must maintain at its principal business office accurate and current financial records, including books of accounts, minutes of stockholder, directors, and executive committee meetings, and all documents and supporting materials relating to the SBA Supervised Lender's transactions. However, securities held by a custodian pursuant to a written agreement are exempt from this requirement.
- (c) **Permanent preservation of records.** An SBA Supervised Lender must permanently preserve in a manner permitting immediate (one business day) retrieval the following documentation for the financial statements and other reports required by § 120.464 (and the accompanying certified public accountant's opinion):
  - (1) All general and subsidiary ledgers (or other records) reflecting asset, liability, capital stock and additional paid-in capital, income, and expense accounts;
  - (2) All general and special journals (or other records forming the basis for entries in such ledgers); and
  - (3) The corporate charter, bylaws, application for determination of eligibility to participate with SBA, and all minutes books, capital stock certificates or stubs, stock ledgers, and stock transfer registers.
- (d) **Other preservation of records.** An SBA Supervised Lender must preserve for at least 6 years following final disposition of each individual SBA loan:
  - (1) All applications for financing;
  - (2) Lending, participation, and escrow agreements;
  - (3) Financing instruments; and
  - (4) All other documents and supporting material relating to such loans, including correspondence.
- (e) **Electronic preservation.** Records and other documents referred to in this section may be preserved electronically if the original is available for retrieval within 15 working days.

[73 FR 75512, Dec. 11, 2008]

## § 120.462 What are SBA's additional requirements on capital maintenance for SBA Supervised Lenders?

- (a) **Minimum capital requirements –**
  - (1) **For NFRLs.**
    - (i) Beginning on January 4, 2024, each NFRL that makes or acquires a 7(a) loan must maintain the minimum capital required by its state regulator, or \$2,500,000, whichever is greater.
    - (ii) Any NFRL approved on or after January 4, 2021, including in the event of a change of ownership or control, must maintain the minimum capital requirement set forth in paragraph (a)(1)(i) of this section.

days after initiating or learning of the proceeding, and also must notify the SBA of the terms of any settlement or final judgment. The SBA Supervised Lender must include such information in any reporting required under other provisions of SBA regulations.

- (4) **Stockholder Reports.** Each SBA Supervised Lender must submit to SBA a copy of any report furnished to its stockholders in any manner, within 30 calendar days after submission to stockholders, including any prospectus, letter, or other document, concerning the financial operations or condition of the SBA Supervised Lender.
  - (5) **Reports of Changes.** Each SBA Supervised Lender must submit to SBA a summary of any changes in the SBA Supervised Lender's organization or financing (within 30 calendar days of the change), such as:
    - (i) Any change in its name, address or telephone number;
    - (ii) Any change in its charter, bylaws, or its officers or directors (to be accompanied by a statement of personal history on the form approved by SBA);
    - (iii) Any change in capitalization, including such types of change as are identified in this part 120;
    - (iv) Any changes affecting an SBA Supervised Lender's eligibility to continue to participate as an SBA Supervised Lender; and
    - (v) Notice of any pledge of stock (within 30 calendar days of the transaction) if 10 percent or more of the stock is pledged by any person (or group of persons acting in concert) as collateral for indebtedness.
  - (6) **Report of Changes in Financial Condition.** In addition to other reports required under this part 120, each SBA Supervised Lender must submit a report to SBA on any material change in financial condition. The SBA Supervised Lender must submit such report promptly, but no later than ten days after its management becomes aware of such change (except as provided for in § 120.462(d)). Failure to promptly notify SBA concerning a material change in financial condition may lead to enforcement action.
  - (7) **Other Reports.** Each SBA Supervised Lender must submit such other reports as SBA from time to time may in writing require.
- (b) **Preparing financial reports for filing.** Each SBA Supervised Lender must prepare financial reports:
- (1) In accordance with all applicable laws, regulations, procedures, standards, and such instructions and specifications and in such form and media format as may be prescribed by SBA from time to time;
  - (2) On an accrual basis, in accordance with GAAP principles and such other accounting requirements, standards, and procedures as may be prescribed by the SBA from time to time;
  - (3) That contain all applicable footnotes in accordance with GAAP principals, one of which includes a brief analysis of how the SBA Supervised Lender complies with SBA's capital regulations, as applicable; and
  - (4) In such manner as to facilitate the reconciliation of these reports with the books and records of the SBA Supervised Lender.
- (c) **Responsibility for assuring the accuracy of filed financial reports.** Each financial report filed with SBA must be certified as having been prepared in accordance with all applicable regulations, SOPs, notices, and instructions and to be a true, accurate, and complete representation of the financial condition and



(ii) If SBA provided the SBA Supervised Lender notice of the failure to file and the SBA Supervised Lender failed to respond or failed to provide a reasonable explanation for the filing failure in its response.

(2) If SBA disapproves the extension, the due date remains the same. The civil penalty accrues regardless of whether the SBA Supervised Lender files an extension request. If SBA approves the extension, SBA will waive the civil penalty that has accrued so far for that particular report. However, a new civil penalty will accrue if the SBA Supervised Lender does not submit a complete report by the new due date established by SBA.

(f) **Requests for reduction or exemption.**

(1) An SBA Supervised Lender may request a reduction or exemption from the civil penalty in writing to SBA. The request must reference the required report, its due date and the amount sought for reduction, and state in detail the reasons for the reduction. SBA will consider the following factors:

(i) Whether there is reasonable cause for failure to file timely and it was not due to willful neglect;

(ii) Whether the SBA Supervised Lender has demonstrated to SBA's satisfaction that it has modified its internal procedures to comply with reporting requirements in the future; and

(iii) Whether the SBA Supervised Lender has demonstrated to SBA's satisfaction, based on financial information fully disclosed together with its request, that it would have difficulty paying the civil penalty assessed.

(2) SBA must also determine that a reduction or exemption is not inconsistent with the public interest or the protection of SBA.

(3) SBA may in writing approve the exemption, reduce the civil penalty, or deny the exemption.

(4) If SBA grants the reduction request or denies the reduction or exemption, the SBA Supervised Lender must pay the amount owed within 30 days of the letter date. Civil penalties will accrue while the request is pending.

(g) **Reconsideration of decisions.** An SBA Supervised Lender may request in writing to the Associate Administrator for Capital Access (AA/CA) to reconsider its request for extension, reduction, or exemption. The reconsideration request must be received by SBA within 30 days of the date of the letter denying the SBA Supervised Lender's original request. SBA will not consider untimely requests. The SBA Supervised Lender must include any additional information or documentation to support its reconsideration request. SBA will issue a written decision on the reconsideration request. The decision is a final agency decision. If on reconsideration, a civil penalty remains due, the SBA Supervised Lender must pay to SBA the civil penalty within 30 days of the written decision or as otherwise directed. Civil penalties will continue to accrue while the reconsideration request is pending.

(h) **Other enforcement actions.** SBA may seek additional remedies for failure to timely file reports as authorized by law.

(i) **Exception for affiliate of SBLC.** Civil penalties under this section do not apply to any affiliate of an SBLC that procures at least 10% of its annual purchasing requirements from small manufacturers.

[73 FR 75515, Dec. 11, 2008, as amended at 81 FR 31491, May 19, 2016; 82 FR 9969, Feb. 9, 2017; 83 FR 7363, Feb. 21, 2018; 84 FR 12061, Apr. 1, 2019; 85 FR 13727, Mar. 10, 2020; 86 FR 52957, Sept. 24, 2021; 87 FR 28758, May 11, 2022; 88 FR 50005, Aug. 1, 2023]