

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

RIN: 3245-AF93

American Recovery and Reinvestment Act: America's Recovery Capital (Business Stabilization) Loan Program

AGENCY: U. S. Small Business Administration

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule implements section 506 of the American Recovery and Reinvestment Act of 2009, which authorizes SBA to establish a temporary program to guarantee loans to viable small business concerns that have a qualifying small business loan, and are experiencing immediate financial hardship. Loans made under this program, referred to as "America's Recovery Capital Loan Program" (ARC Loan Program) can be used to make principal and interest payments on existing qualifying small business loans.

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 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN: 3245-AF93 by any of the following methods:

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

- Mail: Janet A. Tasker, Office of Capital Access, Small Business Administration, 409 Third Street, SW, Washington, DC 20416.
- Hand Delivery/Courier: Janet A. Tasker, Office of Capital Access, Small Business Administration, 409 Third Street, SW, Washington, DC 20416.

SBA will post all comments on [www.regulations.gov](http://www.regulations.gov). If you wish to submit confidential business information (CBI) as defined in the User Notice at [www.regulations.gov](http://www.regulations.gov), please submit the information to Janet A. Tasker, Office of Capital Access, Small Business Administration, 409 Third Street, SW, Washington, DC 20416, or send an email to [ARClloanprogram@sba.gov](mailto:ARClloanprogram@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 as to whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Janet A. Tasker, Office of Capital Access, Small Business Administration, 409 Third Street, SW, Washington, DC 20410 or via e-mail at [ARClloanprogram@sba.gov](mailto:ARClloanprogram@sba.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background Information

The American Recovery and Reinvestment Act of 2009 (the Recovery Act), P.L. 111-5, 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. SBA is one of several agencies that are intended to play a role in achieving these goals. SBA received funding and authority through the Recovery Act for several actions to help small business

lending, including authority to establish a new temporary loan program to help troubled businesses.

One provision included in the Recovery Act is to provide SBA with temporary authority to fully guarantee loans (ARC Loans) to viable small businesses that have a qualifying small business loan(s) and are experiencing immediate financial hardship. In order to implement this change, SBA will amend the business loan regulations in 13 CFR part 120 to add the requirements which must be met by lenders and borrowers participating in the ARC Loan Program. The requirements for the ARC Loan Program will be promulgated under new section 120.398.

## II. Section by Section Analysis

Sections 120.398 (a) and (b) set forth the statutory purpose of the ARC Loan Program and define terms used in the regulation. The purpose of the ARC Loan Program is to enable SBA to guarantee loans to viable small businesses that are experiencing immediate financial hardship. SBA is applying the rules and other requirements of the 7(a) program to the ARC Loan Program except as specifically set forth in section 120.398 of the regulations. Accordingly, only 7(a) lenders may make ARC Loans. Lenders who are not currently 7(a) lenders may apply to participate in this and the 7(a) program.

The regulation defines an eligible borrower, a going concern, a viable small business, and a qualifying small business loan consistent with the requirements of the Recovery Act. The definition of eligible borrower includes the basic eligibility requirements and ineligibility provisions for small businesses contained in sections 120.100 and 120.110, respectively, of this Part. Section 1604 of the Recovery Act states

that no funds appropriated or otherwise made available in the Recovery Act may be used by any private entity for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool. Casinos and gambling establishments are currently ineligible for SBA financial assistance under section 120.110. Aquariums, zoos, golf courses and swimming pools are eligible for SBA financial assistance under the Small Business Act and the Small Business Investment Act; however, they are not eligible for assistance under the Recovery Act. For that reason, SBA has determined that small business concerns with the following primary industry North American Industry Classification System (NAICS) codes are ineligible for ARC Loans: (a) 713210 (Casinos (Except Casino Hotels)); (b) 721120 (Casino Hotels); (c) 713290 (Other Gambling Industries); (d) 713910 (Golf Courses and Country Clubs); and (e) 712130 (Zoos and Botanical Gardens). Applications submitted by small business concerns with a primary industry NAICS code of 713940 (Fitness and Recreational Sports Centers), which includes both swimming pools and other types of fitness and recreational centers, will be identified and reviewed by SBA to determine eligibility in accordance with the Recovery Act statutory restriction on assistance to swimming pools. A “going concern” is defined as a small business that is actively engaging in business with the expectation of indefinite continuance. The definition of “qualifying small business loan” incorporates the provisions of eligible uses of proceeds in section 120.120, and ineligible uses of proceeds included in sections 120.130 and 102.160(d), respectively. A “viable small business” is a going concern that is having difficulty making periodic payments of principal and interest on qualifying small business loans and/or meeting the operating expenses of the business,

provided it can reasonably demonstrate its projected operation for a reasonable period beyond the six month period of payment assistance with an ARC Loan.

Section 120.398(c) establishes that the ARC Loan Program terminates when appropriated funds are exhausted or on September 30, 2010, whichever is sooner.

Section 120.398 (d) describes the permissible use of proceeds for an ARC Loan. It implements the Recovery Act requirement that an ARC Loan must be used to make periodic payments of principal and interest for up to six (6) months, on one or more existing qualifying small business loans. However, under the Recovery Act, an ARC Loan cannot be used to make payments on loans made or guaranteed by SBA prior to February 17, 2009. Loans excluded under this provision include 7(a) loans guaranteed by SBA, Development Company 504 loans/debentures guaranteed by SBA, SBA disaster loans made to small businesses, and SBA loans made to microloan intermediaries, in each case if made prior to February 17, 2009. Lenders are encouraged to defer, or, if appropriate, restructure these excluded loans to best assist the small businesses. ARC Loans may be used to make payments on loans made or guaranteed by SBA on or after February 17, 2009.

Section 120.398(e) establishes basic loan terms for ARC Loans: SBA will guaranty 100% of each ARC Loan; the interest rate on an ARC Loan shall be published by the Agency in the Federal Register; the maximum amount of an ARC Loan shall not exceed \$35,000; and the maturity shall be up to six and one-half years. In addition, a lender's disbursements of an ARC loan must be made during a period not exceeding six (6) consecutive months; the borrower will be responsible for all principal payments, but will not be required to make interest payments on the ARC Loan; SBA will make interest

payments to the lender on the ARC Loan; a borrower of an ARC loan does not have to make any repayments during the disbursement period and for twelve (12) months after final disbursement; repayment of an ARC Loan shall commence no later than thirteen (13) months after final disbursement; and the loan balance shall be fully amortized over the next five (5) years. SBA will pay interest to the lender only until the date 120 days after the earliest uncured payment default on the ARC Loan. In addition, the amounts paid by SBA for interest and/or the guarantee at the time of purchase will be adjusted to reconcile for any over- or underpayments of interest identified throughout the life of the loan. To accommodate timing delays in disbursing the ARC Loan after approval, SBA will allow up to two months after approval to begin disbursement of the ARC Loan. Once the first disbursement of an ARC Loan is made, the disbursement period may not exceed six consecutive months.

Section 120.398(f) provides that no small business may obtain more than one ARC Loan in order to ensure both a comprehensive analysis of a small business' viability as well as to ensure the availability of funding to support the maximum number of small businesses.

Section 120.398(g) provides that a holder of at least 20 percent ownership of the small business must generally guarantee the ARC Loan. This requirement is identical to the 7(a) loan program requirement.

Section 120.398(h) provides that a lender shall secure its ARC loans consistent with the collateral policies and procedures that it has established and implemented for its similarly-sized non-SBA guaranteed commercial loans. The Lender's collateral policies must be commercially reasonable and prudent. SBA will allow lenders to charge

borrowers for the direct cost of securing and liquidating collateral and SBA will reimburse lenders for the direct costs of liquidating collateral that are not reimbursed by borrowers (consistent with SBA's established practices) in the event of default. However, SBA will limit reimbursement of the direct costs of liquidation to the amount of the recovery received on an ARC Loan.

Section 120.398(i) provides that an applicant for an ARC Loan must be a creditworthy small business with a reasonable expectation of repayment, taking into consideration the following: (1) character, reputation, and credit history of the applicant (and the Operating Company, if applicable) and its Associates; (2) experience and depth of management; (3) strength of the business; (4) past earnings, current earnings, and projected cash flow; and (5) ability to repay the loan with earnings from the business.

Section 120.398(j) prescribes certification requirements for each ARC Loan. In addition to the certification requirements applicable to 7(a) loans generally, including, for example, the certification that the borrower is current with all Federal, state and local taxes (or is current in making payments on an executed agreement with the appropriate taxing authority) and will stay current with all such tax obligations, borrowers must submit a statement certifying that they are experiencing immediate financial hardship and provide documentation to support the certification. SBA will provide additional guidance on what constitutes immediate financial hardship in the procedural guidance and forms developed to administer the ARC Loan Program.

Section 120.398(k) was added to describe the content of an ARC Loan application. At a minimum, ARC Loan applications must include information on the nature and history of the small business, current and historical financial statements (or tax

returns) and such additional information as SBA may require. The provisions of section 120.191 do not apply to ARC Loans.

Section 120.398(l) allows lenders to use the proceeds of an ARC Loan to make periodic payments of principal and interest on a loan held by the lender, without SBA's consent. This provision is consistent with the intention of Section 506 of the Recovery Act to assist viable small businesses facing immediate financial hardship to make periodic payments of principal and interest on existing loans, whether or not held by the same lender because it is reasonable to expect that the vast majority of lenders making ARC Loans will have an established lending relationship with the borrower. This subsection also provides that certain sections in Part 120 which prohibit preferences shall not be applicable to ARC Loans. These sections are 120.10, 120.536(a)(2) and 120.925. In addition, the provisions of section 120.201 restricting refinancing do not apply to ARC Loans. Section 120.201 provides that a borrower may not use 7(a) loan proceeds to pay any creditor in a position to sustain a loss.

The Recovery Act prohibits SBA from charging any loan fees for ARC Loans. With the exception of charging borrowers for the direct costs of securing and liquidating collateral for ARC Loans, SBA has determined that lenders may not charge fees or other costs to borrowers who receive ARC Loans. Lenders are receiving 100% SBA guarantees on loans with reasonable interest rates that will be paid by SBA, made to small businesses that are experiencing financial hardships. Further, lenders are allowed to use the proceeds of ARC Loans to make periodic principal and interest payments on loans they hold and/or service, which improves their financial position relative to their original loan. This combination of factors led SBA to conclude that lender-charged fees

are not appropriate for ARC Loans or consistent with the intent of the Recovery Act. Excluded fees include, but are not limited to, points, bonus points, prepayment penalties, brokerage fees, fees for processing, origination, or application, and out of pocket expenses other than the direct costs of securing and liquidating collateral. While the Recovery Act does not prohibit SBA from charging fees to lenders on ARC Loans, SBA has determined that in order to encourage program participation, SBA will not charge any fees to lenders making ARC Loans. These provisions are included in section 120.398(m).

Section 120.398 (n) provides that Lender reporting to SBA will be consistent with requirements established by SBA from time to time for 7(a) loans and loans made under the Recovery Act.

Sections 120.398 (o) and (p) provide that ARC Loans will be serviced and liquidated by the lender originating the ARC Loan, in accordance with the practices and procedures that the Lender uses for its non-SBA guaranteed commercial loans. The practices must be commercially reasonable and consistent with prudent lending standards and in accordance with SBA Loan Program requirements defined in Section 120.10. SBA will provide additional guidance on how lenders shall service and liquidate ARC Loans in the procedural guidance developed to administer the ARC Loan Program.

Only the originating lender can request SBA to honor its guaranty if the ARC Loan goes into default. Section 120.398 (q) establishes the standards for purchasing guarantees. Lenders may request SBA to purchase an ARC Loan when there has been an uncured payment default exceeding 60 days or when the borrower has declared bankruptcy. SBA requires Lenders to submit loans for purchase no later than 120 days

after the earliest uncured payment default on the ARC Loan. Additionally, SBA may honor its guarantee and require a Lender to submit an ARC Loan for purchase at any time. Lenders are required to complete recovery actions on ARC Loans after purchase. SBA will provide additional guidance on how lenders shall request purchase of an ARC Loan in the procedural guidance developed to administer the ARC Loan Program

Section 120.398(r) provides that ARC Loans cannot be sold in the secondary market nor may a lender participate a portion of an ARC loan with another lender. As noted above, it is the originating lender who must make the request to SBA to honor its guaranty if an ARC Loan defaults.

Funding for the ARC Loan Program is limited. In order to ensure that the ARC Loans are available to small businesses to the maximum extent possible, section 120.398(s) was included in the rule to inform ARC Loan Program participants that SBA has the right to allocate volume to providers of ARC Loans. With this provision, SBA will be able to ensure that all lenders have access to ARC Loans to support small businesses.

Section 120.398(t) provides that SBA may allow lenders to use their delegated authority to process ARC Loans. SBA will provide additional guidance on how delegated and non-delegated lenders may participate in the procedural guidance developed to administer the ARC Loan Program.

Given that the small businesses eligible for ARC Loans are experiencing immediate financial hardship, the availability of additional personal resources from alternative sources is considered remote. Section 120.398(u) was added stating that the

provisions of section 120.102 requiring a personal resources test are not applicable to ARC Loans.

Section 120.398(v) provides that the provisions of section 120.151 which limit the aggregate amount of the SBA portions of all loans to a single borrower, including the borrower's affiliates, to a certain guaranty amount are not applicable to ARC Loans.

### 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. There is an urgent need to assist viable small businesses that are experiencing financial hardships due to the current economic environment. The ARC Loan Program is designed to provide an immediate infusion of capital to small businesses to assist with making periodic payments of principal and interest. A delay in obtaining the financing needed by these small businesses will, in many cases, have a direct impact on their survivability.

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 relief on eligible debt. In addition, the Recovery Act mandates that the SBA issue emergency regulations to implement the ARC Loan Program 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 [INSERT DATE 60 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.

The ARC Loan Program is designed to provide an immediate infusion of capital to small businesses to assist with making periodic payments of principal and interest. A delay in obtaining the financing needed by these small businesses will, in many cases, have a direct impact on their survivability making it necessary to implement this rule immediately. Lenders making ARC Loans might need time to make system adjustments;

however this time is mitigated by the benefits to lenders and small businesses from immediate implementation of the ARC Loan Program.

In light of the urgent need to help small businesses sustain and survive during this economic downturn, 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, 13175 and 13132, the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612),

#### Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule constitutes a significant regulatory action for purposes of Executive Order 12866.

#### Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have 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

The SBA has determined that this interim final rule imposes reporting and recordkeeping requirements as defined by under the Paperwork Reduction Act, 44 U.S.C. Chapter 35. This additional information consists of the four forms described below that are necessary to process applications for assistance under the ARC Loan Program. SBA has submitted these information collections to OMB for review under the emergency review proceedings. Emergency review and approval will facilitate urgent implementation of the ARC Loan Program, which is expected to provide debt relief to small businesses that are currently facing financial hardship, including difficulties repaying existing debt. Delay in implementing the loan program would only exacerbate the already critical economic conditions facing these eligible small business concerns.

A. Title and Description of Information Collection: SBA Form 2315: America's Recovery Capital (ARC) Borrower Information Form.

Purpose: The information collected on this form is modeled on two currently approved information collections: OMB Control # 3245-0016, SBA's 7(a) loan application, and OMB Control #3245-0178, Statement of Personal History, which is used to collect personal information on the individuals associated with the small business loan applicant. Those two collections of information will not be discontinued; they will continue to be used for their approved purposes. The application information requested includes identifying information regarding the applicant and its principals, including indebtedness; current or previous government financing; suspension or debarment history; and certain other disclosures regarding principals' criminal history. The personal

information facilitates borrower background checks as authorized by the Section 7(a)(1)(B) of the Small Business Act, 15 U.S.C. 636(a)(1)(B).

OMB Control Number: New Collection

Description of and Estimated Number of Respondents: This information will be collected from the small business concerns that are applying for financial assistance under the ARC program. SBA estimates 12,000 small businesses will submit applications over the course of a year.

Estimated Number of Responses: Each small business concern can submit only one application under the ARC loan program; therefore the estimated number of responses is 12,000.

Estimated Response Time: 10 minutes

Total Estimated Annual Hour Burden: 2,000 hours

B. Title and Description: Form 2316 (Part A): America's Recovery Capital (ARC) Loan Guaranty Request.

Purpose: This information collection is submitted by approximately non-delegated lenders seeking SBA's guarantee on an ARC loan. The information is provided along with Forms 2316 (Part B) and (Part C) to the SBA's 7(a) Loan Processing Centers.

OMB Control Number: New Collection

Description of and Estimated Number of Respondents: 400 non-delegated lenders (these lenders are a subset of the total estimated 2,000 lenders who will participate in the ARC program) who will not submit information through E-Tran.

Estimated Number of Responses: 840

Estimated Response Time: 5 minutes per response

Estimated Annual Hour Burden: 70 hours

C. Title and Description: Form 2316 (Part B): Supplemental Information for America's Recovery Capital (ARC) Loan Guaranty Request.

Purpose: Since ARC loans are specifically to be used to make payments on existing business loans, the form is designed to more easily identify which debt(s) have been reduced through the use of ARC loan proceeds. In addition, in order to facilitate required reporting under the Recovery Act, this form also collects information on the number of jobs created or retained as a result of the ARC loan financing.

OMB Control Number: New Collection

Description of and Estimated Number of Respondents: This form may be submitted by all lenders participating in the SBA's 7(a) loan program. We estimate that a total of 2,000 lenders will submit this information collection.

Estimated Number of Responses: 12,000

Estimated Response Time: 15 minutes

Total Estimated Annual Hour Burden: 3,000 hours

D. Title and Description, Form 2316 (Part C), Eligibility Information Required for America's Recovery Capital (ARC) Loan Submission.

Purpose: The information will be used to determine whether the loan application meets the eligibility criteria for an ARC Loan, as stated in this regulation.

OMB Control Number: New Collection

Description of and Estimated Number of Respondents: This form may be submitted by all lenders participating in the SBA's 7(a) loan program. We estimate that a total of 2,000 lenders will submit this information collection.

Estimated Number of Responses: 12,000

Estimated Response Time: 10 minutes

Total Estimated Annual Hour Burden: 2,000 hours

SBA invites comments on these information collections, 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 Janet A. Tasker, Office of Capital Access, Small Business Administration, 409 Third Street, SW, Washington, DC 20416.

#### 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 citation 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. Add a new undesignated center heading and new § 120.398 to subpart C to read as follows:

#### AMERICA’S RECOVERY CAPITAL (BUSINESS STABILIZATION) LOAN

#### PROGRAM – ARC LOAN PROGRAM

#### § 120.398 America’s Recovery Capital (ARC) Loan Program

(a) Purpose. The purpose of the ARC Loan Program is to enable SBA to guarantee certain loans to viable small businesses that are experiencing immediate financial hardship. Loans made under this loan program are referred to as ARC Loans and are subject to the requirements set forth in this Part for 7(a) loans except as noted in this section.

(b) Definitions.

(1) (i) Eligible Borrower is a small business concern as defined in Section 3 of the Small Business Act and § 120.100. Eligible Borrower does not include:

(A) Ineligible small businesses as listed in § 120.110; and

(B) Small business concerns with the following primary industry North American Industry Classification System (NAICS) codes:

(1) 713210 (Casinos (Except Casino Hotels));

(2) 721120 (Casino Hotels);

(3) 713290 (Other Gambling Industries);

(4) 713910 (Golf Courses and Country Clubs); and

(5) 712130 (Zoos and Botanical Gardens).

(ii) Applications submitted by small business concerns with a primary industry NAICS code of 713940 (Fitness and Recreational Sports Centers) will be identified and reviewed by SBA to determine eligibility in accordance with the statutory restriction on assistance to swimming pools.

(2) Going Concern is a small business concern actively engaging in business with the expectation of indefinite continuance.

(3) Qualifying Small Business Loan is a loan previously made to an Eligible Borrower for any of the purposes set forth in § 120.120 and not for any of the purposes set forth in § 120.130 or 120.160(d). Qualifying Small Business Loans may include credit card obligations, capital leases for major equipment and vehicles, notes payable to vendors or suppliers, loans in the first lien position made by commercial lenders in connection with the Development Company Loan Program (504), home equity loans used to finance business operations, other loans to small businesses made without an SBA

guaranty, and loans made by or with an SBA guaranty on or after February 17, 2009. Loans made or guaranteed by SBA before February 17, 2009 are not Qualifying Small Business Loans for the purposes of the ARC Loan Program. A Qualifying Small Business Loan may not be used as the basis for more than one ARC Loan but ARC Loans may be used to pay multiple Qualifying Small Business Loans.

(4) Viabile small business is a small business that is a Going Concern but which is having difficulty making periodic payments of principal and interest on Qualifying Small Business Loan(s) and/or meeting operating expenses of the business although it can reasonably demonstrate its projected continued operation for a reasonable period beyond the six month period of payment assistance with an ARC Loan.

(c) Period of program. The ARC Loan Program is authorized through September 30, 2010, or until appropriated funds are exhausted, whichever is sooner.

(d) Use of proceeds. Loans made under the ARC Loan Program are for the sole purpose of making periodic payments of principal and interest (including default interest), in full or in part, for up to six (6) months, on one or more existing Qualifying Small Business Loans. ARC Loan proceeds cannot be used to make payments on loans made or guaranteed by SBA prior to February 17, 2009.

(e) Loan terms.

(1) Guaranty percentage. ARC Loans are 100% guaranteed by SBA.

(2) Maximum loan size. An ARC Loan may not exceed \$35,000.

(3) Interest rate. The interest rate for ARC Loans will be published by SBA in the Federal Register.

(4) Loan maturity. An ARC Loan may be made with a maturity of up to six and one-half years.

(5) Disbursement period. The disbursement period for an ARC Loan is up to six consecutive months.

(6) Loan payments.

(i) Borrower's payments. The borrower will be responsible for all principal payments.

(ii) Payment of interest by SBA. SBA will make periodic interest payments to the lender on ARC Loans. Interest will accrue only until the date 120 days after the earliest uncured payment default on the ARC Loan. However, the amount paid by SBA on a defaulted ARC Loan, when it honors its guarantee, will be adjusted to reconcile for any overpayments or underpayments of interest previously paid to the Lender. Interim adjustments to interest paid by SBA to lenders may be made during the term of the ARC Loan and interest payments due the Lender will be adjusted to accommodate the interim interest adjustments.

(iii) Deferral period. No principal repayment is required during the disbursement period or for 12 months following the final loan disbursement.

(iv) Repayment period. The borrower will be required to pay the loan principal over five years beginning in the 13th month following the final loan disbursement. The ARC Loan balance will be fully amortized over the five year repayment period. Balloon payments may not be required by lenders. The borrower may prepay all or a portion of the principal during the life of the loan without penalty.

(f) Number of ARC Loans per small business. No small business may obtain more than one ARC Loan, but the proceeds of the ARC loan may be used to pay more than one Qualifying Small Business Loan.

(g) Personal guarantees. Holders of at least a 20 percent ownership interest in the borrower generally must guarantee the ARC Loan.

(h) Collateral. SBA requires each lender to follow the collateral policies and procedures that it has established and implemented for similarly-sized non-SBA guaranteed commercial loans. The lender's collateral policies must be commercially reasonable and prudent. Lenders will certify that the collateral policies applied to the ARC Loan meet this standard. Lenders may charge borrowers the direct cost of securing and liquidating collateral for ARC Loans. SBA will reimburse Lenders for the direct cost of liquidating collateral that are not reimbursed by the borrower in the event of default. Reimbursement of the direct costs of liquidation by SBA to the Lender is limited to the amount of the recovery received on the ARC Loan.

(i) Credit criteria. To be approved for an ARC Loan, the applicant must be a creditworthy small business with a reasonable expectation of repayment, taking into consideration the following:

- (1) Character, reputation, and credit history of the applicant (and the Operating Company, if applicable) and its Associates;
- (2) Experience and depth of management;
- (3) Strength of the business;
- (4) Past earnings, current earnings, and projected cash flow; and
- (5) Ability to repay the loan with earnings from the business.

(j) Statement of hardship. In addition to the certifications required for 7(a) loans generally, ARC Loan recipients must submit a statement certifying that they are experiencing immediate financial hardship and provide documentation to support the certification.

(k) Loan application. The provisions of § 120.191 do not apply for ARC Loans. A lender making an ARC Loan will provide an application with information on the small business that includes the nature and history of the business, current and historical financial statements (or tax returns), and other information that SBA may require.

(l) Preferences and refinancing. A lender may make an ARC Loan to an Eligible Borrower that intends to use the proceeds of the ARC Loan to make periodic payments of principal and interest on a Qualifying Small Business Loan that is owned or serviced by that same lender. The provisions of §§ 120.10, 120.536(a)(2) and 120.925 with regard to Preference for repayments without prior SBA approval do not apply to ARC Loans. The provisions of § 120.201 restricting refinancing also do not apply to ARC Loans.

(m) Loan fees. Neither the lender nor SBA shall impose any fees or direct costs on a borrower of an ARC Loan, except that lenders may charge borrowers for the direct costs of securing and liquidating collateral for the ARC Loan. Fees include, but are not limited to, points, bonus points, prepayment penalties, brokerage fees, fees for processing, origination, or application, and out of pocket expenses (other than the direct costs of securing and liquidating collateral). SBA will not impose any fees on a lender making an ARC Loan.

(n) Lender reporting. Lenders shall report on its ARC Loans in accordance with requirements established by SBA from time to time for 7a loans and loans made under the American Recovery and Reinvestment Act of 2009.

(o) Loan servicing. Each originating lender shall service all of its ARC Loans in accordance with the existing practices and procedures that the Lender uses for its non-SBA guaranteed commercial loans. In all circumstances, such practices and procedures must be commercially reasonable and consistent with prudent lending standards and in accordance with SBA Loan Program Requirements as defined in § 120.10. SBA's prior written consent is required for servicing actions that may have significant exposure implications for SBA. SBA may require written notice of other servicing actions it considers necessary for portfolio management purposes.

(p) Liquidations. Each Lender shall be responsible for liquidating any defaulted ARC Loan originated by the Lender. ARC Loans will be liquidated in accordance with the existing practices and procedures that the Lender uses for its non-SBA guaranteed commercial loans. In all circumstances, such practices and procedures must be commercially reasonable and consistent with prudent lending standards and in accordance with SBA Loan Program Requirements as defined in Section 120.10. Loans with de minimis value may, at the Lender's request and with SBA's approval, be liquidated by SBA or its agent(s). Significant liquidation actions taken on ARC Loans must be documented. The reimbursement of liquidation related fees by SBA to the Lender is limited to the amount of the recovery on the ARC Loan.

(q) Purchase requests. Any purchase request to SBA to honor its guaranty on a defaulted ARC Loan shall be made by the originating lender. Lenders may request SBA

to purchase an ARC Loan when there has been an uncured payment default exceeding 60 days or when the borrower has declared bankruptcy. SBA requires Lenders to submit loans for purchase no later than 120 days after the earliest uncured payment default on the ARC Loan. Additionally, SBA may honor its guarantee and require a Lender to submit an ARC Loan for purchase at any time. Except as noted above, the Lender is required to complete all recovery actions on the ARC Loan after purchase.

(r) Prohibition on secondary market sales and loan participations. A lender may not sell an ARC loan into the secondary market nor may a lender participate a portion of an ARC loan with another lender.

(s) Loan volume. SBA reserves the right to allocate loan volume under the ARC Loan Program among Lenders (as defined in § 120.10).

(t) Delegated authority. SBA may allow lenders to use their delegated authority to process ARC Loans.

(u) Personal resources test. The personal resources test provisions of § 120.102 do not apply to ARC Loans.

(v) Statutory loan limit. The provisions of § 120.151 do not apply to ARC Loans.

Karen G. Mills,  
Administrator

[FR Doc. 2009-13480 Filed 06/08/2009 at 8:45 am; Publication Date: 06/09/2009]