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SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

Docket No. SBA-2013-0002

RIN: 3245-AG53

Microloan Program Expanded Eligibility and Other Program Changes

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Final rule.

SUMMARY: This rule finalizes the proposed rule that the U.S. Small Business Administration ("SBA") issued for the Microloan Program to accomplish the goals of expanding the pool of eligible microborrowers, increasing minimum microloan production standards, removing the requirement that Intermediaries deposit funds only in interest bearing accounts, and allowing Microloan Program Intermediaries to use credit unions as depositories for their Microloan Revolving Funds (MRFs) and Loan Loss Reserve Funds (LLRFs). The rule also includes technical amendments that conform the regulations to current statutory authority.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

Section 7(m) of the Small Business Act (15 U.S.C. 636(m)) ("Act") authorizes SBA's Microloan Program, which assists small businesses that need small amounts of financial assistance. Under the program, SBA makes direct loans to Intermediaries, as defined in §120.701(e), that use the loan proceeds to make microloans to eligible borrowers. SBA is also authorized to make grants to Intermediaries to be used for marketing, management, and technical assistance.

On March 17, 2014, SBA published a proposed rule in the Federal Register in order to clarify certain program requirements that have caused confusion and in response to feedback from existing Intermediaries. The changes proposed by SBA included: (1) revising the definition of insured depository institution in §120.701(d) to specifically include Federally-insured credit unions; (2) amending §120.707(a) to allow Intermediaries to make loans to businesses with an Associate, as defined in §120.10, who is currently on probation or parole, except in limited circumstances; (3) removing the requirement that Deposit Accounts, as defined in §120.701(a), be interest-bearing; and (4) increasing the minimum number of microloans Intermediaries are required to close and fund each year. The proposed rule also included a technical amendment to conform the regulations to current statutory authority. The comment period was open until May 16, 2014.

A summary of the comments received on the four proposed changes follows. There were no comments on the technical amendment. The final rule also includes two additional technical amendments that remove provisions with expired statutory authority, as further described below.

II. Summary of Comments Received

SBA received 19 written comments on the proposed rule during the comment period. Three of the comments addressed issues unrelated to the proposed rule changes; the remaining 16 comments were carefully considered. Commenters included several trade associations/advocacy groups and Intermediaries currently participating in the Microloan program. In general, commenters were supportive of the proposed changes. A section-by-section discussion of the comments received and the changes made follows.

A. Use of Federally-Insured Credit Unions. SBA received six comments regarding the proposal to revise the definition of insured depository institution in §120.701(d) to specifically include Federally-insured credit unions. This change would clarify that Federally-insured credit unions are approved depositories for Microloan Revolving Funds and Loan Loss Reserve Funds. Five of the commenters, including two national advocacy groups, fully supported the revision, citing the need for Intermediaries to be able to use financial institutions that best meet their needs. One commenter opposed the change based on an overall opinion that credit unions have a competitive advantage over banks.

SBA agrees that Microloan Program Intermediaries should be allowed to use the type of depository institution that best meets their needs, as long as the institution is federally insured. Proposed §120.701(d) is adopted without change.

B. Expanded Eligibility. SBA received ten comments regarding the proposal to allow Intermediaries to make loans to businesses with an Associate who is currently on probation or parole, most of which were supportive of the change. One commenter indicated that SBA should better define a "crime involving fraud or dishonesty." An industry organization requested that SBA clarify that the change would allow Intermediaries to choose to make loans to businesses with an Associate on probation or parole, but would not require Intermediaries to make such loans. The organization also indicated that one of its members felt that these particular microloans may call for a high level of collateralization. The organization also asked why this allowance was being made only for the Microloan program, and not for SBA's guaranteed business loan programs (7(a) and 504). Another commenter stated the need for a high level of trust in the borrower by the Intermediary.

Expanding eligibility for the Microloan Program will allow for increased creation of new businesses and will reduce the Federal barriers to successful reentry of formerly incarcerated individuals, who often have difficulty finding steady employment. The Agency developed this revision to the Microloan Program eligibility requirements as a result of a regulatory review conducted in connection with SBA's participation on the Federal Interagency Reentry Council. SBA's Microloan Program offers an opportunity for formerly incarcerated individuals who meet the Intermediaries' lending criteria to receive financing and technical assistance to start their own businesses.

Risk to the taxpayer is mitigated because the Intermediary makes lending decisions locally, and provides microborrowers with training and technical assistance to help them learn to manage, market, and grow their small businesses. Furthermore, unlike in SBA's 7(a) and 504 programs, microloans are not guaranteed by SBA. Intermediaries are responsible for ensuring that their borrowers repay, and Intermediaries are obligated to repay their loans to SBA regardless of the performance of the microloans funded using those loan proceeds.

SBA agrees that a clarified definition of "crime involving fraud or dishonesty" should be provided and will do so via updates to the Microloan Program Standard Operating Procedures (SOP 52 00), which provides details regarding Microloan Program operations. The SOP will provide examples of crimes involving fraud or dishonesty, such as larceny, theft, embezzlement, and forgery. As to the comment suggesting that loans to the expanded population would have to be highly collateralized due to the "inherent risk of recidivism," there was no accompanying data or research provided by the commenter that demonstrated a higher level of risk of repayment in this community. As with all other microloans, Intermediaries that choose to make loans to this newly eligible population may follow their own policies and procedures, including the same collateral policies applicable to their other borrowers, as long as they do not conflict with Microloan Program requirements. In addition, while this change to the rule expands borrower eligibility, it does not impose any requirements on Intermediaries to make loans to this newly eligible population. Proposed §120.707 is adopted without change.

C. <u>Interest Bearing Deposit Accounts</u>. SBA received seven comments regarding removal of the requirement that Microloan Revolving Funds and Loan Loss Reserve Funds be held in deposit accounts that are interest bearing. All were in full favor of removal of the restriction. The provision is adopted as proposed.

D. Increased Minimum Microloan Requirement. SBA received 13 comments regarding §120.716, which proposed to increase the minimum number of loans that an Intermediary must make each Federal fiscal year from four loans to twelve loans, and also specifically stated that Intermediaries that do not meet the minimum loan requirement are not eligible to receive new grant funding.

One commenter questioned whether it would be possible for an Intermediary to meet the minimum loan requirement during the last years of the term of the Intermediary's SBA loan, when the loan balance may not support an additional twelve loans. SBA does not believe that this comment warrants a change in the final rule, for a number of reasons. The minimum loan requirement is an overall requirement, not one based on each SBA loan to an Intermediary. The majority of Intermediaries in the Microloan program have multiple outstanding SBA loans; therefore it is rare for an Intermediary to rely on only one SBA loan as the source of its Microloan funds.

A trade organization questioned SBA's proposal to establish an across the board 12 loan minimum threshold for all lenders and suggested that SBA consider looking at other indicators in addition to the volume of loans made, such as the total amount of loans made. SBA believes that number of loans, rather than dollar volume of loans, is the most appropriate indicator for the Microloan Program. The Act specifically states that one of the purposes of the Program is to enable Intermediaries "to provide small-scale loans, particularly loans in amounts averaging not more than $10,000." (15 U.S.C. 636(m)(1)(A)(iii)(I)). In addition, the statute provides incentives, including lower costs of funds and additional grant funding, to Intermediaries that make smaller loans. Furthermore, despite the recent increase in the maximum microloan amount to $50,000, Congress did not similarly raise the average dollar amount threshold required to qualify for the incentives mentioned above.

Assuming the same number of loans per year, the volume of lending for an Intermediary with an average loan size of less than $10,000 is significantly less than the volume of lending for an Intermediary with an average loan size above $25,000. Therefore, SBA does not feel it is appropriate to measure Intermediaries based on volume of dollars loaned. Such a measure would disproportionally harm Intermediaries that make the smallest dollar loans and provide Intermediaries with an incentive to do larger loans. Given these facts, SBA believes that a standard based on number of loans is more consistent with Congressional intent than a standard based on dollar volume of loans.

The current minimum loan requirement is four loans per year. Proposed §120.716 would have gradually increased the minimum loan requirement over a three-year period to twelve loans per year. Most of the commenters generally supported increasing the minimum number of microloans from the current requirement. Five commenters supported increasing the requirement to twelve loans per year, as proposed. Several commenters supported a smaller increase in the minimum loan requirement, such as six, eight or ten loans per year. Some commenters were concerned that rural Intermediaries, small Intermediaries, and Intermediaries serving smaller geographic areas would be unable to meet a twelve loan requirement, and would therefore become ineligible to receive grant funding. Several of these commenters recommended a prorated approach to grant funding so as not to penalize the microloan borrowers of Intermediaries that fail to make the minimum required number of loans.

In response to these comments, SBA has reduced the minimum loan requirement from twelve loans to ten loans and modified the rule to provide a corrective action process and possible eligibility for reduced grants for Intermediaries that make less than the minimum required number of loans. As in the proposed rule, there will be a gradual ramp-up period: six microloans in fiscal year 2016, eight microloans in fiscal year 2017, and ten microloans in fiscal year 2018 and thereafter. SBA also added a provision to clarify that the minimum loan requirement for fiscal year 2015 remains four microloans. Based on average loan data for active Intermediaries (i.e., Intermediaries that make at least four loans per year) over the past five years, approximately 61 active Intermediaries would need to increase loan production in order to meet the proposed rule requirement of twelve loans per year. Using this same data, 51 active Intermediaries would need to increase production to meet the requirement of ten loans per year. This represents a 16% decrease in the number of Intermediaries that will be affected by the new loan production requirement of ten loans per year. Section 120.716(a) has been revised to incorporate this lower minimum loan requirement.

In addition, SBA has revised §120.716(b) to include a corrective action process for Intermediaries that do not meet the minimum loan requirement. SBA determines whether an Intermediary is eligible for grant funding based on the number of microloans made in the previous Federal fiscal year. Under the proposed rule, an Intermediary that did not make the minimum number of microloans in the previous year would be ineligible for any grant funds. In response to comments received on the proposed rule, SBA revised §120.716(b) to allow Intermediaries that do not meet the minimum loan requirement to submit corrective action plans to SBA. An Intermediary that submits an acceptable corrective action plan may be awarded a reduced grant. This change makes it possible for Intermediaries that have not met the minimum loan requirement, but are taking steps to improve loan production, to still receive some grant funding. Conditions for reduced grants and details on corrective action plan submission requirements will be provided in the Microloan SOP.

Several commenters also pointed out that it could be difficult for a new Intermediary to make the required number of loans per year, and suggested an exception for these Intermediaries. In response to these comments, SBA revised §120.716(a) to provide that a new Intermediary is not required to meet the minimum loan requirement during the year it enters the program.

Another commenter asked whether an Intermediary that has multiple loans from SBA is required to meet minimum loan requirements for each such SBA loan. The minimum loan requirement is an overall requirement; it does not increase based on the number of loans the Intermediary has outstanding from SBA.

An advocacy group that supported the proposed minimum loan requirement nonetheless raised a concern that an increase in the minimum loan requirement might create a gap in the availability of funds for businesses in need of larger loans in the $20,000 to $50,000 range, because Intermediaries would make more small-dollar loans in order to meet the requirements. SBA does not anticipate that Intermediaries with average loan sizes of $20,000 or more (which currently make up 39% of all Intermediaries) will significantly alter their lending practices as a result of the increased loan production requirements. Furthermore, none of the comments from current Intermediaries indicated that average loan sizes would be likely to change as a result of the increased loan requirement.

III. Additional Technical Amendments

The final rule revises §120.712(d), Intermediaries eligible to receive additional grant monies, to remove subparagraph (1), which provided additional grant eligibility for an Intermediary that makes at least 25 percent of its loans to small businesses located in or owned by residents of an Economically Distressed Area. The authority to provide additional grants to such Intermediaries expired on October 1, 1997. See Public Law 103-403, section 208(c). Under current statutory authority, only Intermediaries that maintain a microloan portfolio averaging $10,000 or less, defined as Specialized Intermediaries in §120.701, are eligible to receive additional grant funding.

The final rule also removes the definition of Economically Distressed Area in §120.701(b), because that term was only present in former §120.712(c) and (d)(1). As stated above, subparagraph (1) of §120.712(d) was removed because the statutory authority for the provision expired. Similarly, as stated in the proposed rule, the authority for §120.712(c) was removed from the statute in 2010.

These additional technical amendments serve only to conform program regulations to current SBA statutory authority; they do not change existing Agency practice, nor do they have any effect on program participants.

Compliance with Executive Orders 12866, 12988, 13132, and 13563, the Paperwork Reduction Act (44 U.S.C. Ch.35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)

Executive Order 13563 and Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule is a significant regulatory action for purposes of Executive Order 12866. However, this is not a major rule under the Congressional Review Act, 5 U.S.C. 800. A Regulatory Impact Analysis was published in the proposed rule. In summary, the regulatory objectives include: allowing Federally-insured credit unions to hold MRF and LLRF accounts; allowing any Microloan Program Intermediary to make a microloan (loan of $50,000 or less) to a business with an Associate who is on probation or parole; removing the requirement that the Microloan Revolving Fund (MRF) and Loan Loss Reserve Fund (LLRF) be held in interest bearing deposit accounts; increasing the minimum number of loans that an Intermediary must make annually in order to qualify for grant funding; and, adding technical amendments that conform the regulations to current statutory authority. No comments were received regarding the Regulatory Impact Analysis.

A description of the need for this regulatory action and the benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563, were included in the Regulatory Impact Analysis under Executive Order 12866. The changes would impact approximately 50 Microloan Intermediaries that generally make fewer than 10 loans per year but more than three loans. It is anticipated that the costs to the Intermediaries will be only those associated with the operating expenses associated with making and servicing an increased number of loans. SBA does not anticipate any impact on the program's subsidy model and believes that Intermediaries will continue to make prudent lending decisions. SBA also anticipates improved use of resources as more microloans are made.

Based on the analysis of the Federal Interagency Reentry Council from 2010 (http://csgjusticecenter.org/nrrc/facts-and-trends/) there are some 4.9 million probationers and parolees. Therefore, SBA believes that the regulatory changes will expand access to capital for people who are not easily employable, but who have the capacity to operate a small business, will reduce program costs, and better utilize taxpayer dollars.

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

SBA has determined that this final rule 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. Therefore, for the purpose of Executive Order 13132, SBA has determined that this final rule has no federalism implications warranting preparation of a federalism assessment.

Executive Order 13563

Executive Order (E.O.) 13563 reaffirms the principles of E.O. 12866 while calling for improvements to promote predictability, reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 further emphasizes that regulations be based in the best available science and that the rulemaking process allow for public participation and the open exchange of ideas. This rule has been developed consistent with these requirements and is written with the idea of reducing the number and burden of regulations.

The Microloan Program operates through SBA lending partners, which are Intermediary lenders. Prior to publication of the proposed rule, the Agency presented the proposals in meetings which allowed it to reach the vast majority of Microloan Program participants and stakeholder trade associations. In this way, the Agency was able to gain valuable insight, guidance, and suggestions from interested parties.

Paperwork Reduction Act, 44 U.S.C., Ch.35

As discussed above, in response to comments received, SBA is making a change in the final rule that will require Intermediaries that are not in compliance with the minimum loan standards to submit a corrective action plan to the Agency as a condition of receiving a grant. Section 120.716(b). However, this change does not impose a new reporting requirement. Currently, SBA may require microloan Intermediaries that are generally not in compliance with program requirements to submit a corrective plan outlining how the Intermediary intends to resolve its noncompliance issues. This requirement is covered under OMB-approved information collection number 3245-0365, SBA Lender, Microloan Intermediary, and NTAP Reporting Requirements.

Regulatory Flexibility Act, 5 U.S.C. 601-612

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, requires administrative agencies to consider the economic impact of their actions on small entities, including small businesses, small nonprofit businesses, and small local governments. The RFA requires the Agency to prepare a regulatory flexibility analysis describing the economic impact that the rule will have on small entities, or certify that the rule will not have a significant economic impact on a substantial number of small entities.

SBA has determined that although the rulemaking will impact all of the approximately 145 Intermediaries, such impact will not be significant. All of the Intermediaries are small nonprofit or quasi-governmental entities. Approximately 63 existing Intermediaries (43 percent), including Intermediaries that are not currently active, will be required to increase loan production in order to meet new minimum lending requirements. To minimize hardship, SBA will increase the minimum lending requirement in a graduated fashion: six microloans in 2016, 8 microloans in 2017, and 10 microloans in 2018 and thereafter. This graduated increase will provide Intermediaries with time to ramp up loan production to meet the higher requirements. SBA anticipates that a small number of Intermediaries may choose to end their participation in the Microloan Program as a result of the new requirements. However, these entities are making so few loans, and generating such a small amount of revenue from these microloans, that exiting the program will not cause a significant economic impact for the Intermediaries or for potential borrowers. The 63 affected Intermediaries represent an estimated 315 total microloans for approximately $5.3 million, or 5 microloans per Intermediary. Over the past five years, the Microloan Program has averaged 4,180 microloans totaling $49.3 million. Therefore, even if all of the affected Intermediaries left the program, the impact would reduce microloan volumes by just 7.5 percent in terms of number of loans and 10.9 percent in terms of volume of loans. These estimates assume that all 63 impacted Intermediaries would leave the Program. SBA believes that the number of Intermediaries choosing to leave the Program would actually be significantly less, further reducing potential economic impact. In addition, although failure to meet the minimum loan requirement is grounds for an enforcement action under

§120.1425, SBA does not currently anticipate using the minimum loan requirement as the sole basis for taking enforcement actions against Intermediaries.

SBA estimates that entities leaving the program will lose approximately $23,000 in annual revenue associated with microloans that would have been made under the SBA Microloan Program. The $23,000 represents approximate annual interest and fee income for five microloans of $17,000. An organization making just five microloans a year is not sustainable and must rely on other sources of income to operate. Microloan Intermediaries average more than $1.25 million in annual revenues; $23,000 in lost revenue represents less than 2 percent of total annual revenues per affected Intermediary.

No comments were received regarding economic impact except that some small Intermediaries indicated concern that they would not be able to appropriately serve rural areas. This concern has been addressed in the final rule by reducing the minimum loan requirement from twelve loans to ten loans per year and providing a corrective action process by which Intermediaries that do not meet the minimum loan requirement may still be eligible for grant funding at a reduced amount. Accordingly, the SBA Administrator hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 13 CFR Part 120

Community development, Equal employment opportunity, Loan programs-business, Reporting and recordkeeping requirements, Small Business.

For reasons stated in the preamble, the U.S. Small Business Administration amends 13 CFR Part 120 as follows:

PART 120 – BUSINESS LOANS

1. The authority citation for 13 CFR Part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), (b)(14), (h), and note 636(a), (h), and (m), 650, 687(f), 696(3), and 697(a) and (e); Pub. Law 111-5, 123 Stat. 115, Pub. Law 111-240, 124 Stat 2504.

2. In §120.701, remove paragraph (b) and redesignate paragraphs (c) through (i) as paragraphs (b) through (h) respectively, and revise newly redesignated paragraph (c) to read as follows:

<u>§120.701 Definitions.</u>

* * * * *

(c) <u>Insured depository institution</u> means any Federally insured bank, savings association, or credit union.

* * * * *

3. Amend §120.707 by revising paragraph (a) to read as follows:

<u>§120.707 What conditions apply to loans by Intermediaries to Microloan borrowers?</u>

(a) Except as otherwise provided in this paragraph, an Intermediary may only make Microloans to small businesses eligible to receive financial assistance under this part. A borrower may also use Microloan proceeds to establish a nonprofit child care business. An Intermediary may also make Microloans to businesses with an Associate who is currently on probation or parole; provided, however, that the Associate is not on probation or parole for an offense involving fraud or dishonesty or, in the case of a child care business, is not on probation or parole for an offense against children. Proceeds from Microloans may be used only for working capital and acquisition of materials, supplies, furniture, fixtures, and equipment. SBA does not review Microloans for creditworthiness.

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4. Amend § 120.709 by revising the first sentence to read as follows:

§120.709 What is the Microloan Revolving Fund?

The Microloan Revolving Fund ("MRF") is a Deposit Account into which an Intermediary must deposit the proceeds from SBA loans, its contributions from non-Federal sources, and payments from its Microloan borrowers. * * *

5. Amend §120.710 by revising paragraph (a) to read as follows:

§120.710 What is the Loan Loss Reserve Fund?

(a) General. The Loan Loss Reserve Fund ("LLRF") is a Deposit Account which an Intermediary must establish to pay any shortage in the MRF caused by delinquencies or losses on Microloans.

* * * * *

6. Amend §120.712 by removing paragraph (c) and redesignating paragraphs (d) and (e) as paragraphs (c) and (d) respectively, and revising newly redesignated paragraph (c) to read as follows:

§120.712 How does an Intermediary get a grant to assist Microloan borrowers?

* * * * *

(c) Intermediaries eligible to receive additional grant monies. An Intermediary may receive an additional SBA grant equal to five percent of the outstanding balance of all loans received from SBA (with no obligation to contribute additional matching funds) if the Intermediary is a Specialized Intermediary.

* * * * *

7. Add new §120.716 to read as follows:

§120.716 What is the minimum number of loans an Intermediary must make each Federal fiscal year?

(a) Minimum loan requirement. Intermediaries must close and fund the required number of microloans per year (October 1 – September 30) as follows, except that an Intermediary entering the program will not be required to meet the minimum in that year:

(1) For fiscal year 2015, four microloans,

(2) For fiscal year 2016, six microloans,

(3) For fiscal year 2017, eight microloans, and

(4) For fiscal years 2018 and thereafter, ten microloans per year.

(b) Intermediaries that do not meet the minimum loan requirement are not eligible to receive new grant funding unless they submit a corrective action plan acceptable to SBA, in its discretion. Intermediaries that have submitted acceptable corrective action plans may receive a reduced grant at SBA's discretion.

8. Amend §120.1425 by revising paragraph (d)(2) to read as follows:

§120.1425 Grounds for enforcement actions – Intermediaries participating in the Microloan Program and NTAPs.

* * * * *

(d) * * *

(2) Failure to close and fund the required number of microloans per year under §120.716.

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Maria Contreras-Sweet,
Administrator.

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