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 Rules and Regulations

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 123

RIN 3245-AF46

Disaster Relief to Small Business Concerns Damaged by Drought

AGENCY: Small Business Administration.

ACTION: Interim final rule with requests for comments.

 SUMMARY: The U.S. Small Business Administration (SBA) makes economic injury disaster loans to small businesses that have been adversely affected by specific disaster events. Recent legislation authorizes SBA to make economic injury disaster loans when the disaster is (1) a drought or (2) below average water levels in the Great Lakes or on any body of water in the United States that supports commerce by small business concerns. The legislation also specifically authorizes SBA to provide economic injury disaster loan assistance to farm-related and nonfarm-related small businesses adversely affected by disasters. SBA is issuing an interim final rule because of the emergency nature of the recent legislation.

DATES: Effective Date: This rule is effective January 16, 2007.
 Comment Date: Comments must be received on or before January 16, 2007.

ADDRESSES: You may submit comments, identified by RIN 3245-AF46, by any of the following methods: (1) Federal Rulemaking Portal: <http://www.regulations.gov>, following the specific instructions for submitting comments; (2) FAX (202) 481-2226; or E-mail: Herbert.Mitchell@sba.gov;

or (3) Mail/Hand Delivery/Courier: Herbert L. Mitchell, Associate Administrator for Disaster Assistance, 409 3rd Street, SW., Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Roger B. Garland, Office of Disaster Assistance, 202-205-6734 or Roger.Garland@sba.gov.

SUPPLEMENTARY INFORMATION: SBA is amending Part 123 of Title 13 of the CFR to reflect the recent changes to the Small Business Act (Act) contained in Pub. L. 109-163, enacted on January 6, 2006 (Legislation), which broaden SBA's authority to make economic injury disaster loans (EIDL) to otherwise eligible small businesses. The Legislation has no effect on SBA's physical disaster loan program under which SBA has authority to make loans to repair, rehabilitate or replace property damaged or destroyed by a disaster.

SBA's EIDL financing is available to small businesses that have suffered substantial economic injury as a direct result of a declared disaster. A business incurs substantial economic injury if it is unable to meet its obligations as they mature or it is unable to pay its ordinary and necessary operating expenses. Neither loss of anticipated profits nor a drop in sales is considered to be substantial economic injury for EIDL purposes.

Disasters for which EIDL assistance only (not physical loan assistance) is available can be declared in two ways--(1) the Secretary of Agriculture (Secretary) can declare a natural disaster under 7 U.S.C. 1961, and (2) SBA can make an economic injury disaster

declaration based on a State Governor's certification that a minimum number of small businesses in the State have suffered substantial economic injury as a result of a disaster event. In both situations, SBA does not make physical disaster loans. Before the Legislation, if a disaster were declared, SBA would make EIDLs to eligible small businesses that suffered economic injury as a direct result of the disaster. In the case of any natural disaster (including a drought) declared by the Secretary, eligible small businesses would include farm-related small businesses, but would not include nonfarm-related small businesses. SBA excluded nonfarm-related businesses from EIDL assistance for natural disasters because the statutory authority which authorizes the Secretary to declare a natural disaster is limited to assisting farmers and ranchers (7 U.S.C. 1921 and 1961).

The Legislation amends sections 3(k) and 7(b)(2) of the Act (15 U.S.C. 632(k) and 636(b)(2)) to specify that: (1) Both farm-related and nonfarm-related small businesses will henceforth be eligible for SBA EIDL assistance regardless of the type of disaster; and (2) EIDL assistance will be available for drought disasters and for disasters triggered by below average water levels in the Great Lakes or on any body of water in the United States that supports commerce by small businesses. Although droughts may have been included in natural disasters declared by the Secretary before the Legislation, they could not be certified by a Governor of a State. Furthermore, this is the first time that below-average-water-levels in bodies of water in the United States may serve as the basis for a disaster declaration.

Accordingly, droughts and below-average-water-levels can now be considered disasters for purposes of EIDL assistance when declared by the Secretary or when declared by SBA based on the certification of a Governor of a State. No physical disaster loans are authorized in such events. Additionally, whether the disaster is drought or below average water level, or another type of disaster event, SBA is authorized to make EIDLs to affected farm-related and nonfarm-related small businesses. SBA continues to be prohibited, however, from making any type of disaster loan to agricultural enterprises, as defined in section 18 of the Act (15 U.S.C. 647). The section of the Legislation related to nonfarm-related small businesses will be reflected as a revision to SBA's SOP 50-30, and will not be incorporated in this rule.

Also under the Legislation, if a Governor of a State certifies to SBA that a disaster exists which affects the minimum number of small businesses, SBA has 30 days to respond in writing with its decision as to whether it will make EIDLs to otherwise eligible small businesses, and the reasons for such decision. In a House Committee Report issued several years ago with respect to a drought relief bill similar to the Legislation, Congress acknowledged that SBA has always had a good response record, but it wanted to ensure the continuation of such a record by placing a time frame in the law. See H. Rep. 107-230, 107th Cong., 2d Sess. (2002). To implement the 30-day response requirement in the Legislation, SBA is adding a sentence to section 123.3 which provides that, after it receives a Governor's certification of a disaster, it has an obligation to respond within 30

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days with its decision and the underlying reasons.

The Small Business Act (15 U.S.C. 632(k)) defines a disaster to be a sudden event. Because the Legislation defines disasters to include events, specifically drought and below average water levels, that are not sudden, SBA is adding, after the fourth sentence of section 123.2 of SBA's regulations, the following language:

For purposes of EIDL assistance only, the definition of a disaster includes droughts and below average water levels in the Great Lakes or on any body of water in the United States that supports commerce by small business concerns.

SBA understands that there is no simple uniform quantitative criterion for defining drought or water shortage impacts that works well in all regions, seasons, and climates in the United States. Accordingly, SBA wants to clarify that, when a Governor provides a certification of a disaster based on a finding of drought, the supplementary information accompanying the certification must include findings which show that conditions during the incident period meet or exceed the U.S. Drought Monitor (USDM) standard of "severe" (Intensity level D-2 to D-4). The USDM is updated weekly by the U.S. Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), and is available at <http://drought.unl.edu/dm/monitor>. SBA will rely on the USDM to understand when a drought begins

and ends in specific parts of the country. With respect to below average water levels, the supplementary information accompanying the certification must include findings which establish long-term average water levels based on recorded historical data, show that current water levels are below long-term average levels, and demonstrate that economic injury has occurred as a direct result of the low water levels.

Justification for Publishing an Interim Final Rule

In general, SBA publishes a rule for public comment before issuing a final rule, in accordance with the Administrative Procedure Act, 5 U.S.C. 553 and 13 CFR 101.108. The Administrative Procedure Act,

however, does provide an exception from the general rule where the agency finds good cause to omit public participation. 5 U.S.C. 553(c)(3)(B). The good cause requirement is satisfied when prior public participation can be shown to be impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim final rule without soliciting public comment. In addition, section 123.3 of SBA regulations states that SBA ``reserves the right to change the rules in this part, without advance notice, by publishing interim emergency regulations in the Federal Register.'' (13 CFR 123.1)

Since a disaster can strike at any moment it is critical that the SBA has regulations in place that can respond quickly to assist those affected by the disaster. Historically a disaster is defined to be a sudden event, whereas drought and below average water levels do not occur suddenly. The Legislation requires the SBA to treat a drought and below average water levels as disasters and provide EIDL loans to both farm related and non-farm related small business concerns. Accordingly, SBA finds that good cause exists to publish this rule as an interim final rule in light of the congressional intent and the need to make economic injury disaster loans available to businesses that have suffered economic injury, but that do not qualify under existing rules. Advance solicitation of comments for this rulemaking would be impracticable and contrary to the public interest, as it would delay the delivery of critical assistance to these businesses. Any such delay could be prejudicial to the affected businesses and contrary to the legislative intent. It is likely that some could be forced to cease operations before a rule could be enacted under standard notice and comment rulemaking procedures.

Although this rule is being published as an interim final rule pursuant to 5 U.S.C. 553(b)(3)(B), comments are solicited from interested members of the public. These comments must be submitted on or before January 16, 2007. SBA will then consider these comments and the need for making any amendments raised by these comments.

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

The interim final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, for the purposes of Executive Order 13132, SBA determines that this interim final rule has no federalism implications warranting preparation of a federalism assessment.

The Office of Management and Budget (OMB) has determined that this rule constitutes a significant regulatory action under Executive Order 12866. The new legislation expands SBA's definition of disaster, as defined in Section 3(k) of the Small Business Act (15 U.S.C. 632), to include drought and below average levels in the Great Lakes, or on any body of water in the United States that supports commerce by small business concerns.

Baseline Costs: SBA is unable to estimate the exact costs associated with including EIDL assistance loans for droughts and below average water level areas because the program is new and SBA has not collected relevant information or statistics on drought and below average water levels in the past. However SBA has been able to estimate some costs related to the \$9 million ceiling set forth in the Legislation for certain EIDL assistance to non-farm related small businesses, which information is provided below. Other drought and low water assistance has no funding ceiling, and so without further data SBA is unable to analyze the costs related to such assistance. Therefore SBA is asking for public comments and any information related to the cost, benefits and distributional effects of this rule.

The Legislation authorizes a maximum of \$9 million for each of four years (2005-2008) to provide EIDL assistance to nonfarm-related small business concerns for economic injury caused by drought. Using a subsidy rate of 14.64%, program outlays would be estimated at a maximum of \$61.5 million annually. An analysis of EIDL loans approved from 2001 to 2006 shows an average loan size of approximately \$150,000. Given the maximum annual program outlay, this would result in loans to approximately 410 nonfarm-related small businesses per year.

The change would result in minimal additional overhead costs, limited to the marginal costs of making an additional standard EIDL. Because the change is limited to expansion of eligibility for the current loan program, there are few implementation costs not already incurred under the normal course of business.

The disaster loan program has been evaluated under the Program Assessment Rating Tool (PART). The results of the fiscal 2004 evaluation resulted in an assessment that the Disaster Loan Program was EFFECTIVE.

Alternatives: The legislative change is mandatory and specific in its amendment of the Act's definition of disaster (Section 3(k)), to add drought and below average water levels in the Great Lakes or any body of water in the U.S. that supports commerce by small

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business. As a result of the Legislation, there are no significant implementation alternatives.

Best Available Means to Reach Objectives: Since the legislative language is specific with respect to changing the definition of disaster, the best available means to comply with the Legislation is to make the changes using standard operating procedures presently in effect.

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.

SBA has determined that this interim final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., Chapter 35. The Governor's request is already approved by the Office of Management and Budget as an informal collection, OMB Control Number 3245-0121.

Because the rule is an interim final rule, there is no requirement for SBA to prepare an Initial Regulatory Flexibility Act (IRFA) analysis. The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, 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 an IRFA which describes whether the impact of the rule will have a significant economic impact on a substantial number of small entities. However, the RFA requires analysis of a rule only where notice and comment rulemaking are required. Rules are exempt from Administrative Procedure Act (APA) notice and comment requirements and therefore from the RFA requirements when the agency for good cause finds (and incorporates the finding and a brief statement of reasons in the rules issued) that notice and public procedure thereon is impracticable, unnecessary, or contrary to the public interest. In this case it would be contrary to the public interest to delay the promulgation of the rule.

List of Subjects in 13 CFR Part 123

Disaster assistance, Loan programs--business, Small businesses.

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For the reasons set forth in the preamble, SBA amends part 123 of title 13 of the Code of Federal Regulations as follows:

PART 123--DISASTER LOAN PROGRAM

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1. The authority citation for part 123 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(b), 636(c); Pub. L. 102-395, 106 Stat. 1828, 1864; and Pub. L. 103-75, 107 Stat. 739; and Pub. L. 106-50, 113 Stat. 245.

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2. Amend Sec. 123.2 by adding, after the fourth sentence, new sentences to read as follows:

Sec. 123.2 What are disaster loans and disaster declarations?

* * * However, for purposes of economic injury disaster loans only, they do include droughts and below average water levels in the Great Lakes or on any body of water in the United States that supports commerce by small businesses. * * *

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3. Amend Sec. 123.3(a)(5) by adding sentences at the end to read as follows:

Sec. 123.3 How are disaster declarations made?

(a) * * *

(5) * * * When a Governor certifies with respect to a drought or to below average water levels, the supporting documentation must include findings which show that conditions during the incident period meet or exceed the U.S. Drought Monitor (USDM) standard of "severe" (Intensity level D-2 to D-4). The USDM may be found at <http://drought.unl.edu/dm/monitor>. With respect to below average water levels,

the supplementary information accompanying the certification must include findings which establish long-term average water levels based on recorded historical data, show that current water levels are below long-term average levels, and demonstrate that economic injury has occurred as a direct result of the low water levels. Not later than 30 days after SBA receives a certification by a Governor, it shall respond in writing with its decision and its reasons.

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Dated: December 8, 2006.
Steven C. Preston,
Administrator.

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