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Economic Development Administration Regulatory Revision; Proposed Rule

DEPARTMENT OF COMMERCE**Economic Development Administration****13 CFR Parts 300, 301, 302, 303, 304, 305, 306, 307, 308, 310, 311, and 314****[Docket No.: 110726429–1418–01]****RIN 0610–AA66****Economic Development Administration
Regulatory Revision****AGENCY:** Economic Development Administration, U.S. Department of Commerce.**ACTION:** Notice of proposed rulemaking; request for public comment.

SUMMARY: Through this notice of proposed rulemaking (“*NPRM*”), the Economic Development Administration (“*EDA*”), U.S. Department of Commerce (“*DOC*”), proposes and requests comments on updates to the agency’s regulations implementing the Public Works and Economic Development Act of 1965, as amended (“*PWEDA*”). On February 1, 2011, EDA published a notice requesting comments on improving the regulations. A 70-day public comment period followed from February 1, 2011 through April 11, 2011, during which EDA received approximately 170 comments. In addition, EDA conducted an internal review of its regulations. This *NPRM* addresses and incorporates public comments and agency staff suggestions to present an updated set of proposed regulations that reflects the agency’s current practices and policies in administering its economic development assistance programs. For convenience, the full text of EDA’s regulations as amended is available on EDA’s Web site at <http://www.eda.gov/>.

DATES: Written comments on this *NPRM* must be received by EDA’s Office of Chief Counsel no later than 5 p.m. Eastern Time on February 6, 2012.

ADDRESSES: Comments on the *NPRM* may be submitted through any of the following methods:

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

- *Agency Web Site:* <http://www.eda.gov/>. EDA has created an online feature for submitting comments. Follow the instructions at <http://www.eda.gov/>.

- *Mail:* Economic Development Administration, Office of Chief Counsel, Suite D–100, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230. Please indicate “Comments on EDA’s

regulations” and Docket No. 110726429–1418–01 on the envelope.

FOR FURTHER INFORMATION CONTACT:

Jamie Lipsey, Attorney Advisor, Office of Chief Counsel, Economic Development Administration, U.S. Department of Commerce, Room D–100, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4687.

SUPPLEMENTARY INFORMATION:**Background**

EDA leads the Federal economic development agenda by making strategic grants-based investments. EDA’s regulations, codified at 13 CFR chapter III, provide the framework through which the agency administers its economic development assistance programs. EDA’s programs are built on two key pillars: innovation and regional collaboration. Innovation—the process by which individuals and organizations generate new ideas and put them into practice—is the foundation of American economic growth and national competitiveness. Innovation is the key element to creating new and better jobs and a resilient economy. Regional collaboration also is essential; and Regions that work together to leverage resources and build upon their unique comparative assets are better poised for economic success. This strategic framework builds on EDA’s successful history of helping rural and urban communities leverage their unique assets by providing “bottom up” investments in infrastructure, planning, and technical assistance that promote regional collaboration, innovation, and regional innovation clusters. EDA’s investments are designed to spur innovation and investment at the local level, by providing the tools and the flexibility to build the effective public-private partnerships required for long-term success.

EDA currently is updating the agency’s regulations to ensure they reflect and incentivize innovation and collaboration and is committed to ensuring that public feedback helps shape the revised regulations. On February 1, 2011, pursuant to Executive Order 13563 “Improving Regulation and Regulatory Review”, EDA published a notice in the **Federal Register** (76 FR 5501) requesting public comments on how the agency’s regulations can better facilitate more effective economic development assistance programs that advance an innovative economy. Under the February 1, 2011 notice, comments were due no later than March 9, 2011; however, EDA published a second notice (76 FR 12616) on March 8, 2011

to extend the comment deadline until April 11, 2011, allowing for a total comment period of 70 days. EDA received approximately 170 public comments from approximately 71 commenters. In addition, EDA conducted an internal review of its regulations and received approximately 55 suggestions from agency staff.

EDA now publishes this *NPRM* to incorporate and respond to both public and agency staff comments and suggestions and to propose a revised set of regulations that reflects EDA’s current practices and policies in administering its economic development assistance programs. For the most part, comments received express opinions on 13 CFR parts 300 through 307 and 314. Capitalized terms used but not otherwise defined in this *NPRM* have the meanings ascribed to them in EDA’s current regulations (*see, e.g.*, §§ 300.3, 303.2, 307.8, 313.2, 314.1, and 315.2). For convenience, the full text of EDA’s regulations as amended is available on EDA’s Web site at <http://www.eda.gov/>.

Overview of Comments Received and Proposed Changes

EDA’s goal is to help communities and Regions transform their economies towards economic prosperity through innovation, entrepreneurship, and public-private partnerships. Since February 1, 2011, EDA has taken a critical and comprehensive look-back at its regulations to reduce burdens by removing outmoded provisions and streamlining and clarifying requirements. EDA requested both public and internal comments on the regulations and has received a number of helpful suggestions that the agency believes make sense and should be put into practice. Therefore, through this *NPRM*, EDA proposes intelligent and intuitive revisions to provide additional flexibilities to the agency’s stakeholders and support current best practices, while protecting taxpayer dollars and the Federal Interest in EDA-assisted property. These changes are designed to provide greater flexibility and local control to EDA’s Recipients and to make the regulations easier to navigate and apply.

As a result of the regulatory revision effort, EDA plans to substantially improve its regulations by removing outdated provisions; streamlining burdensome or unnecessary requirements; and including provisions that increase flexibility, encourage creative collaboration and the effective leveraging of resources, and clarify agency requirements. Regulatory

provisions EDA proposes to remove include:

- Outmoded and overly prescriptive membership requirements related to Comprehensive Economic Development Strategy (“CEDS”) Strategy Committees and District Organization governing bodies to help ensure EDA’s requirements adapt effectively to the unique qualities of all communities and Regions. *See* proposed revisions to §§ 303.6(b)(1) and 304.2(c)(2).

- The requirement that a disaster-related application must be submitted within 18 months of the relevant disaster declaration to receive a 100 percent grant rate. Applications still must be submitted in an efficient, timely manner, but EDA proposes to remove the regulatory deadline to provide additional flexibility in appropriate situations. *See* proposed revisions to Table 2 in § 301.4(b)(5).

- The unnecessary requirement that an RLF Recipient request EDA to subordinate its interest when seeking EDA’s approval to sell or securitize an RLF portfolio. *See* proposed revisions to § 307.19.

Ways the regulations have been streamlined include:

- Modernizing the CEDS requirements from a laundry-list of items to four essential planning elements. EDA will provide further content information to stakeholders through the publication of updated CEDS guidelines, which will be grounded in best practices and developed in collaboration with our economic development and research partners. We expect these changes to enhance local control and allow EDA’s planning partners to focus on strategies, performance, and outputs. *See* proposed revisions to § 303.7(b).

- Streamlining and clarifying EDA’s Property release requirements. *See* proposed revisions to § 314.10.

Flexibility has been infused throughout the regulations in a number of ways, including:

- Providing that EDA may provide a grant rate of up to 80 percent to incentivize projects that encourage broad, innovative Regional planning. *See* proposed revisions to Table 2 in § 301.4(b)(5).

- Removing unnecessary restrictions on the RLF program to enhance operations in uncertain economic conditions. *See* proposed revisions to §§ 307.17(b)(6) and 307.18(a)(1).

- Setting out EDA’s flexibilities with respect to subordinating the agency’s interest in Project Property and updating EDA’s Property regulations to help Recipients better take advantage of financing tools widely available in

today’s market—including New Markets Tax Credit (“NMTC”) arrangements. These provisions provide flexibilities while protecting the Federal Interest. *See* proposed revisions to § 314.6.

- Setting out EDA’s authority to accept an instrument other than a recorded statement to protect the Federal Interest under certain circumstances. *See* proposed revisions to § 314.8.

We have included and enhanced provisions to *facilitate coordination* and the *leveraging of Federal investments* through:

- The updated evaluation criteria, which incentivize the leveraging of resources and collaboration among all levels of government and the public and private sectors. *See* proposed revisions to § 301.8.

- The description of Infrastructure at § 301.11, which provides that EDA, through appropriate Federal Funding Opportunity (“FFO”) announcements, will advance interagency collaboration by funding Projects that demonstrate the leveraging of Federal, State, and other resources.

- Providing that EDA may provide a grant rate of up to 80 percent to incentivize Projects that demonstrate effective leveraging of other Federal Agency resources. *See* proposed revisions to Table 2 in § 301.4(b)(5).

- Providing that RLF Recipients may use any Federal loan to meet private leveraging requirements. *See* proposed revisions to § 307.15(d).

This NPRM also proposes a number of *clarifications*, including:

- A definition of *Regional Innovation Clusters* or *RICs* to define this important economic development strategy. *See* proposed revisions to § 300.3.

- Examples of innovation- and entrepreneurship-related infrastructure under the proposed description of “Infrastructure” at § 301.11.

- A description of EDA’s improved grant review and selection process. *See* proposed revisions to § 301.7.

- Updates to the data requirements that Eligible Applicants follow to demonstrate economic distress to better reflect the types and content of available data sources. *See* proposed revisions to § 301.3(a)(4).

- A revised accountability provision, which clarifies EDA’s performance expectations and reporting requirements. *See* proposed revisions to § 302.16.

- Adding subparts to EDA’s regulations at part 303 to clarify the distinctions between EDA’s Planning investments and reorganizing the RLF regulations under part 307 so that all RLF requirements are easy to find under

“Subpart B—Revolving Loan Fund Program.”

- Clarifying EDA’s Property regulations and adding helpful headings to help stakeholders navigate them. *See* proposed revisions to §§ 314.3, 314.6, and 314.7.

Although this is not strictly a regulatory issue, EDA currently is examining ways to streamline and rationalize its application requirements. EDA expects that its new application requirements will help applicants focus on the competitiveness of their proposed strategies and reduce the cost of applying for EDA assistance, while maintaining accountability for taxpayer dollars.

The following is a thematic summary of most comments received in response to the February 1, 2011 request for comments. A more detailed analysis is provided below under “Part-by-Part Analysis of Comments Received and Proposed Changes.”

Regional Innovation Clusters and Innovation and Entrepreneurship-Related Infrastructure

EDA received five comments suggesting that EDA provide a definition for the phrase “regional innovation cluster,” which is an economic development technique designed to spark job creation and help communities and Regions become more competitive in the global economy. This NPRM adds a definition of “*Regional Innovation Clusters* or *RICs*” in EDA’s set of regulatory definitions at § 300.3. In addition, EDA has emphasized the importance of using projects and techniques that advance effective innovation ecosystems in Regions throughout the U.S. and help communities support promising entrepreneurs and small businesses. EDA proposes a new regulation at § 301.11 to provide some examples of innovation- and entrepreneurship-related infrastructure Projects. Further, this NPRM proposes to specify reserved part 311 as a holding place for any regulations that may be necessary to implement the America COMPETES Reauthorization Act of 2010 (Pub. L. 111–358). Please see the sections below titled “Part 300—General Information” and “Part 301—Eligibility, Investment Rate and Application Requirements” for more detailed information.

EDA’s Distress Criteria and Match Requirements

EDA received several comments suggesting that EDA reform its Investment Rate framework. EDA understands that communities and Regions face challenging economic

conditions; however, it is the agency's experience that the current Investment Rate determination structure encourages communities to collaborate and prioritize their needs and appropriately marshals resources to distressed Regions. By ensuring that communities have "skin in the game," EDA's Investment Rate framework reinforces the need for local buy-in and participation, which improves economic development outcomes. In addition, the current structure provides EDA with needed flexibility to appropriately increase the EDA share based on Special Need and distress considerations. Therefore, EDA does not propose adjusting its Investment Rate framework through this NPRM. However, this NPRM does provide for an Investment Rate of up to 80 percent to encourage Projects that involve broad Regional planning and coordination and for Projects that effectively leverage other Federal resources. In addition, this NPRM contains a number of provisions designed to smooth connections between EDA and other Federal Agencies to ensure that stakeholders can effectively leverage Federal resources; including specifying that any Federal loan may meet an RLF's private leveraging requirements. Please see the sections below titled "Part 301—Eligibility, Investment Rate and Application Requirements" and "Part 307—Economic Adjustment Assistance Investments" for more information.

Comprehensive Economic Development Strategies, Economic Development Districts, and EDA's Planning Program

EDA received a number of comments on the regulations governing its Planning program, the requirements of CEDS, and Economic Development Districts ("EDDs"). Several comments suggest that EDA provide additional flexibilities with respect to the composition of CEDS Strategy Committees and District Organizations' governing bodies. EDA agrees and proposes revisions to §§ 303.6(b)(1) and 304.2(c)(2) to shift the focus from membership requirements to performance and outcomes, by maintaining the requirement that Strategy Committees and District Organization governing bodies represent the main economic interests of the Region, but no longer require a majority or membership threshold from any type of economic stakeholder. EDA proposes new language to clarify that these organizations must demonstrate the capacity to effectively undertake planning processes and implement strategies, as applicable. EDA expects that these changes will provide

communities and Regions the flexibility to establish planning organizations that reflect and work most effectively for their unique make-up and priorities. In accord with best practices, EDA expects that the private sector will be strongly represented on both Strategy Committees and District Organization governing bodies.

Several comments suggest that EDA simplify and streamline the content requirements of CEDS. EDA agrees with the commenters and proposes changes to § 303.7(b) to remove the "laundry list" elements of CEDS and replace them with four essential planning elements. EDA will publish CEDS guidelines that incorporate best practice recommendations of EDA's planning and research partners.

Commenters suggest increased coordination with District Organizations in a variety of ways. Some commenters suggest that EDA ensure that all implementation projects are tied to the CEDS, while others request that EDA require coordination between Eligible Applicants and the relevant District Organization. EDA values its relationship with its stakeholders, but does not make these changes because of the requirements of PWEDA. Under sections 201(b)(3) and 209(b)(2) of PWEDA (42 U.S.C. 3141 and 3149, respectively), all grants awarded under EDA's Public Works and Economic Adjustment Assistance programs must be consistent with a relevant CEDS. PWEDA does not impose this requirement upon its other programs. EDA strongly encourages collaboration and coordination amongst District Organizations and other stakeholders, but EDA is not authorized to impose such requirements. Please see the sections below titled "Part 303—Planning Investments and Comprehensive Economic Development Strategies" and "Part 304—Economic Development Districts" for more information.

Revolving Loan Fund Program

EDA received numerous comments on the agency's revolving loan fund ("RLF") program, several of which recommend that EDA set a time limit for releasing the Federal Interest in RLF grants. EDA understands that some RLF awards have been operating for a considerable length of time, some for as many as three decades, but EDA currently is not authorized to release its interest in RLF awards. EDA continues to work to achieve the necessary authorities. In addition, commenters opine that the RLF program reporting requirements are too burdensome. The semi-annual reporting requirement for

the RLF program is in place to address an audit report by the DOC's Office of Inspector General ("OIG"), which recommended that EDA undertake more rigorous oversight of the RLF program to ensure the financial integrity and sustainability of the program. Because the reporting requirements are designed to address past program issues and ensure the viability and transparency of the program, EDA declines to make wholesale changes, but intends to continue to improve the Recipient reporting system to make it more user-friendly. In addition, six comments suggest the establishment of an RLF task force to address program issues and improve communications between EDA and program stakeholders. EDA currently is in the process of establishing an internal RLF task force and expects it to begin meeting in the very near future. Please see the section below titled "Part 307—Economic Adjustment Assistance Investments" for more information.

Property Management Updates

EDA received several comments that offered ways to make the agency's Property management regulations more flexible and adaptive to today's economy. For example, some commenters suggest that EDA should subordinate its interest when a Project warrants, require a lien only on the value of the Federal Interest, and make necessary changes to facilitate the agency's participation in Projects involving NMTC arrangements and other types of financing. EDA agrees, and proposes clarifying changes to its encumbrances regulation at § 314.6 to set out EDA's subordination flexibilities. EDA also amends its recorded statement requirement at § 314.8 to allow EDA to accept alternative instruments to protect the Federal Interest in certain situations. Please see the section below titled "Part 314—Property" for more information.

Non-Regulatory Comments

EDA received a number of comments related to agency policy and process rather than EDA's regulations. For instance, several comments opined on the agency's mission and direction, two of which request that EDA continue to fund traditional infrastructure. One commenter specifically notes that EDA should fund infrastructure to help smaller communities connect more effectively to telecommunications networks and electric grids. On the other hand, another comment suggests that EDA allocate more funding to "programs and services that create jobs and less on infrastructure." Whether the scope of work of an EDA Investment

includes basic infrastructure, such as road upgrades, or business incubation technical assistance, EDA's goals remains the same: advancing the community's or Region's economic development strategy and building the capacity to create and retain jobs. EDA funds a variety of Projects to provide a broad portfolio of assistance through which Eligible Applicants can strategically meet their needs. Another comment encourages EDA to "consider the funding of operations for business incubator projects for the start-up phase." EDA generally avoids funding operations for Projects that provide business incubation, acceleration, and similar services because the agency expects Projects to be self-sustaining. To this end, proposed application requirements for Projects to construct a business, technology, or other type of incubator or accelerator, as set out in § 301.10(d) of this NPRM, are designed to help EDA ensure that these Investments will continue creating jobs once the Project period expires. However, EDA may consider an application that proposes certain eligible business incubation activities performed by an Eligible Recipient.

We received one comment noting a disconnect between EDA's encouragement of "public-private partnerships" and the agency's regulatory framework that "makes it hard to fund a project where a private entity expects to earn a profit." EDA acknowledges that private sector profit is essential to sustained economic growth and job creation; however, profit for a particular entity cannot be an objective under the terms of an EDA award. EDA's goal is not to replace private sector investment, but to spark economic development Projects that would not happen otherwise by leveraging private investment more efficiently. EDA believes the public and private sectors must work together to achieve vibrant Regional economies and encourages appropriate partnerships through its evaluation criteria, which are proposed in this NPRM at § 301.8. However, such partnerships must meet EDA's conflicts-of-interest requirements as set out at § 302.17. See the discussion under "Part 302—General Terms and Conditions for Investment Assistance" for more information.

EDA also received two comments stating that EDA's "[f]ield representatives in the states are absolutely necessary." EDA agrees, and the agency's Economic Development Representatives ("EDRs") serve every State.

EDA received several comments on its award approval process. One

commenter suggests that the agency "[s]treamline submittal and reporting procedures for smaller grants (\$100,000 or less)." EDA understands the commenter's concern; however, EDA is responsible for ensuring all requirements are met and for tracking performance on all of its awards, and so must require certain submittals and reports to ensure Federal funds are used efficiently and effectively. However, as noted above, EDA is reviewing its application requirements to reduce burdens and ensure efficiency for all Eligible Applicants. Two commenters suggest that "the amount of time it takes to get an EDA grant approved" is excessive. EDA recently undertook a comprehensive effort to improve the agency's award selection processes to shorten the amount of time between application and final award approval, while maintaining EDA's excellent customer service. The new award selection process that went into effect on October 14, 2010, greatly enhances transparency and competitiveness and significantly reduces the time it takes for EDA to evaluate an application. EDA now considers applications in quarterly funding cycles. Applications still are accepted on an ongoing basis, but instead of funding Projects on a piecemeal basis, EDA now competitively evaluates all applications received during a particular funding cycle. As a result, Eligible Applicants that submit a complete application by a funding cycle deadline are notified of EDA's selection decision within 20 business days of the deadline. *Please see* EDA's Web site at <http://www.eda.gov/PDF/Process%20Improvement%20Nov%204,%202010%20Webinar.pdf> for more information on EDA's new award selection process.

EDA received one comment stating that the new award approval process "worked" to make EDA's "programs more user friendly and efficient." However, EDA received another comment requesting that EDA "return to the rolling submission of grant requests." The commenter suggests that the new process "fails communities" that seek to attract new businesses and prospects because such prospects are "unwilling to wait until the next submittal deadline to decide if a community can provide adequate water pressure or sewer capacity." EDA's new process is designed to speed up the approval process and provide Eligible Applicants with feedback earlier. Under the new process, EDA still accepts applications on a rolling basis and generally provides feedback on an application within 15 business days of

application receipt. Although EDA makes awards on a quarterly basis, those awards are made much more efficiently. EDA believes that the new process provides Eligible Applicants and their stakeholders increased certainty, but welcomes additional comments.

The commenter also suggests that the new process "favors mega-projects that would succeed without EDA's assistance." While the new process is designed to be competitive, EDA is committed to helping distressed communities flourish, and is not interested in assisting Projects that would succeed in any case. In fact, one criterion on which EDA evaluates every application is the extent to which it assists economically distressed and underserved communities. Two commenters state that "EDA should not depend solely on a strict standard application and point grading system." While EDA's staff works hard with communities as they develop their applications, evaluating submitted applications in a standard manner is the only way to achieve objective, data-driven results. Two commenters suggest that "[r]estricting projects to those that are shovel ready [is] likely to eliminate promising projects in need of some extra funding to become a reality." EDA is committed to providing its limited resources to distressed communities so they can spark job creation and positive economic change as efficiently as possible. Waiting on projects that are not yet ready for implementation would be a disservice to communities across the U.S. EDA works closely with communities as they develop projects that are ready for consideration.

EDA received five comments requesting that EDA provide "conditional grants of funding using written documentation that lists the conditions and timeframe for meeting requirements * * *." Through the new award selection process, EDA attempts to strike a balance between cost efficiency and certainty for Eligible Applicants. Under the new process, an Eligible Applicant that submits an application sufficiently in advance of a funding cycle deadline receives an initial project analysis on the application's fit with EDA's priorities using the evaluation criteria set out in the relevant FFO and completeness, which lets the Eligible Applicant know what additional materials must be submitted before a funding cycle deadline. EDA cannot make a conditional award before a complete application is received because it is very difficult to competitively evaluate such applications. EDA strongly encourages Eligible Applicants to work with EDA

staff as early as possible to help ensure successful outcomes. In addition, as noted above, EDA is reviewing its application requirements to streamline them and ensure they are efficient and cost-effective for communities.

EDA received one comment suggesting that the “very rigid legal interpretation of scope of work compliance * * * be relaxed” as “frequently innovation efficiencies emerge after project work has begun, but these efficiencies, and the related potential for over delivering the project are not allowed because they were not specifically identified in the original project scope of work.” EDA understands that new efficiencies and synergies may emerge as a Project moves forward, and EDA staff work closely with Recipients to ensure that useful changes to a Project’s scope of work can be implemented. However, EDA must be careful to maintain the competitiveness and transparency of its grant process and ensure that any proposed changes do not affect the nature and justification of the Project as originally proposed.

EDA received one comment requesting that EDA no longer use www.grants.gov for application submissions. Application submission through www.grants.gov is a requirement across the Federal government and is designed to reduce paperwork, while making the application process simpler and more efficient. Numerous improvements have been made to www.grants.gov over the past several years, which have greatly improved system performance.

One commenter suggests that “EDA consider establishing a state-by-state grant formula.” EDA is uniquely effective because the agency can encourage Regional collaboration across State borders and work directly with communities in implementing economic development plans. EDA works closely with its State partners, and State coordination is required under EDA’s “Inter-governmental review of projects” regulation (§ 302.9). Therefore, EDA has not revised its regulations based on this comment.

EDA received several comments on post-award issues. One commenter suggests that EDA measure jobs created using a count of “pay checks to people * * * instead of the constant debate of what a job is and is not.” EDA will consider the comment in developing performance measures; however often EDA is constrained by government-wide guidance and requirements with respect to performance measures, including how to count jobs. The agency received five comments requesting that it no

longer collect information for individual background screenings using Form CD-346 (*Applicant for Funding Assistance*). EDA is required to perform this due diligence step in accordance with DOC policy, which recently was changed to require Form CD-346 from additional types of Eligible Applicants. EDA apologizes for any inconvenience, but is not authorized to change the requirement.

We received one comment suggesting that EDA had imposed “arbitrary caps on [facilities and administrative] F&A reimbursement” creating “a[n] unsustainable financial burden for research institutions.” The commenter particularly cites EDA’s FY 2010 i6 Challenge competition, which resulted in six Economic Adjustment Assistance Investments under part 307. EDA is uncertain of the precise circumstances behind the comment, but in general, if facilities and administrative costs (also referred to as indirect costs) are included in a project budget, EDA may accept the Eligible Applicant’s approved “Facilities and Administrative Cost Rate Agreement.” Nonetheless, EDA is responsible for taxpayer dollars and ensuring that Projects generate effective economic impacts. Every EDA Project represents an important opportunity to create jobs and improve the quality of life in Regions across the U.S.; therefore, EDA looks carefully at Project budgets to maximize the use of funds for direct program costs and EDA staff may work with Recipients to negotiate effective budgets. Also, note that under the University Center program, § 306.6(d) requires that 80 percent of EDA funding be allocated to direct costs of Program delivery.

One commenter suggests that “it is important [for stakeholders] to have more dialogue with senior officials within the EDA so they can hear from the field, in addition to the internal management teams.” The commenter goes on to tell of an experience with “a very well structured round table with the Assistant Secretary” that was coordinated by EDA’s Philadelphia regional office, and comments that “more of these need to occur.” EDA believes that stakeholder input and feedback is invaluable. Forums that facilitate dialogue between EDA’s senior management and economic development practitioners in the field, including face-to-face meetings, teleconferences, and webinars, are a high priority and EDA coordinates as many as possible. Over the past year, each region held a conference to share innovative ideas and best practices. We hope to continue to offer these conferences as a venue to bring together

practitioners, EDA staff and leadership, and experts to continue the important dialogue about how to continue to improve our nation’s economy. Senior management from both Headquarters and the regional offices frequently are out in the field gathering information and requesting feedback and ideas. We welcome additional suggestions for useful dialogue opportunities.

Part-by-Part Analysis of Comments Received and Proposed Changes

Specifically, this NPRM proposes the following revisions to EDA’s regulations:

Part 300—General Information

Part 300 of the regulations states EDA’s mission and highlights the policies and practices that EDA employs in order to attract private capital investments and new and better jobs to those Regions experiencing substantial and persistent economic distress. EDA seeks to help Regions become more competitive in an innovative economy. To facilitate these goals, this NPRM introduces several new terms and revises existing terms to assist readers in better understanding EDA’s requirements and ensure clarity, consistency, and technical precision.

EDA proposes revising § 300.1, which introduces EDA and sets out the agency’s mission, by inserting the term “new and better jobs” in place of the phrase “higher-skill, higher-wage jobs.” The current use of the phrase “higher-skill, higher-wage jobs” may cause confusion and suggest that EDA is only interested in “high tech” jobs or jobs that require particular skill sets. The phrase “new and better” is qualitative enough to adapt to all communities. EDA also revises § 300.2, which provides information on EDA’s Headquarters and regional offices, to replace the address “14th Street and Constitution Avenue NW.” with the more precise address “1401 Constitution Avenue NW.” in § 300.2(a). This NPRM revises the first sentence of § 300.2(b) to replace the phrase “Web site” with the word “Web site” for consistency with EDA’s current convention, the word “notice” with “applicable announcement” to provide greater clarity on the type of funding announcement that EDA issues, and the word “published” with “issued” to better describe how EDA makes such announcements public. In addition, we propose removing the word “annually,” as EDA may issue several funding announcements throughout the year.

This NPRM proposes several clarifying revisions to the “Definitions” section of EDA’s regulations at § 300.3.

First, EDA proposes revising the definitions of “*Cooperative Agreement*” and “*Grant*” in § 300.3 to specify that EDA may administer a cooperative agreement or a grant under a statute other than PWEDA. In both definitions, EDA removes the phrase “under PWEDA” and replaces the phrase “the activities contemplated in an agreement between the parties” with the phrase “a purpose or activity authorized under PWEDA or another statute” to provide greater clarity and improve sentence structure.

EDA proposes a minor change to the definition of “*Eligible Recipient*” to delete an unnecessary reference to “of part 306.” We also propose revising the definition of “*Federal Funding Opportunity*” or “*FFO*,” by replacing the phrase “the notice EDA publishes annually” with the phrase “an announcement EDA publishes during the fiscal year,” as EDA may issue several funding announcement throughout the fiscal year. In addition, for clarity, EDA proposes revising the first sentence of the definition by replacing the phrase “Web site” with “Web site” and the word “describes” with “provides;” adding the word “funding” before the word “amounts;” replacing the phrase “particular application procedures” with the phrase “application and programmatic requirements;” and replacing the phrase “special circumstances and other relevant information concerning EDA’s Investment programs for the year” with the phrase “special circumstances, and other information concerning a specific competitive solicitation for EDA’s economic development assistance programs.” EDA also corrects a grammatical error in the second sentence of the definition by replacing the phrase “EDA may also” with “EDA also may.”

EDA proposes minor punctuation and capitalization corrections to the definition of “*Federally Declared Disaster*” to remove the hyphens between “Federally” and “Declared” and “Presidentially” and “Declared” and to capitalize “Federally.” We also propose revising the definition of “*Indian Tribe*” to replace the phrase “any Indian tribe, band, nation, pueblo, or other organized group or community, including * * *” with the phrase “an entity on the list of recognized tribes published pursuant to the Federally Recognized Indian Tribe List Act of 1994 (Pub. L. 103–454) (25 U.S.C. 479a *et seq.*), as amended, and* * *” This revision does not affect EDA’s relationship with Indian Tribes in any way, but provides greater clarity and ensures the regulation comports with

the definitions of other Federal Agencies, including the U.S. Department of the Interior. In addition, we propose removing an unnecessary reference to “an EDA” from the definition of “*Investment*” or “*Investment Assistance*.” We also propose replacing “costs” with the singular “cost” in the definition of “*Investment Rate*.”

With respect to the definition of “*Local Share*” or “*Matching Share*,” we received one comment requesting that EDA “allow for Federal funds that are designated to local state agencies, to be considered as eligible matching funds for EDA funding.” EDA is working to address this issue by ensuring that Federal Agency resources can be leveraged efficiently and effectively, but is not authorized to allow all Federal funds provided to States to be used as Matching Share because of the requirements of appropriations law. All Federal funds are appropriated for particular purposes, as mandated by Congress and set out in the relevant authorizing statute, appropriation, or other Congressional statement of intent. For another Federal Agency’s funds to be used to match an EDA award, there must be such a statement of Congressional intent. In some cases Congress has indicated that other Federal funds may be used to meet EDA’s match requirement. For instance, currently one of the uses to which Community Development Block Grant (“*CDBG*”) funds provided by the U.S. Department of Housing and Urban Development “*HUD*” may be put is “payment of the non-Federal share required in connection with a Federal grant-in-aid program” undertaken as part of HUD’s Community Development program. See 42 U.S.C. 5305(a)(9). In addition, section 205 of PWEDA (42 U.S.C. 3145) authorizes EDA to supplement a grant awarded under another designated Federal program. EDA must determine that Federal funds may be used as match for another Federal grant each time funds from another Federal Agency are requested to be all or a portion of the Matching Share, including when the Federal funds are made available to a State.

In addition, we received three comments regarding costs that may be considered as Local Share or Matching Share. Two suggest that EDA consider certain pre-award costs “to verify eligibility for EDA funds” as a portion of the Matching Share and the third comment sets out the commenter’s own experience in which the agency did not allowed a particular Recipient to use purchased property as Matching Share. All costs under an award are

determined in accordance with relevant Federal cost principles, as set out in the following Office of Management and Budget (“*OMB*”) Circulars: Circular No. A–122 titled “Cost Principles for Nonprofit Organizations” (2 CFR part 230); Circular No. A–21 titled “Cost Principles for Education Institutions” (2 CFR part 220); and Circular No. A–87 titled “Cost Principles for State, Local and Indian Tribal Governments” (2 CFR part 225). EDA, in its sole discretion, may accept certain eligible costs, including pre-award costs and Recipient-provided property, as Matching Share or reimburse them consistent with the EDA-approved Investment Rate. For pre-award costs related to contracts for goods and services to be used as Matching Share, such contracts must have been procured in accordance with Federal competitive procurement requirements as set out at 15 CFR 14.43 or 24.36, as applicable. EDA is uncertain of the precise circumstances behind the comment with respect to property used as Matching Share, but we encourage all Eligible Applicants to work with EDA staff early in the application process to ensure costs are allowable. We propose non-substantive revisions to the definition of “*Local Share*” or “*Matching Share*” to replace plural references with singular ones for better sentence structure. Accordingly, we replace “Recipients” with “a Recipient,” “third parties” with “third party,” and “other Federal agencies” with “another Federal agency.”

In the definition of “*Presidentially Declared Disaster*,” we correct a punctuation error by removing the hyphen between “Presidentially” and “Declared.” With respect to the definition of “*PWEDA*,” we propose removing the unnecessary phrase “including the comprehensive amendments made by the Economic Development Reauthorization Act of 2004 (Pub. L. 108–373, 118 Stat. 1756).”

EDA proposes removing the definition of “*Private Sector Representative*” to reflect proposed changes to the membership requirements applicable to CEDS Strategy Committees and District Organization governing bodies. Under current § 303.6(a), a CEDS Strategy Committee must include Private Sector Representatives as a majority of its membership and under § 304.2(c)(2), the governing body of a District Organization must include at least one Private Sector Representative. Under this NPRM, EDA proposes removing CEDS Strategy Committee and District Organization governing body membership threshold requirements; and proposes instead to focus on

program processes and outputs. Because the defined term “*Private Sector Representative*” is used largely in the context of these membership threshold requirements, EDA proposes to remove the definition. *See also* the proposed changes to parts 303 and 304.

EDA corrects a grammatical error in the third sentence of the definition of “*Region*” or “*Regional*” by replacing the phrase “may also” with “also may.”

In response to five comments the agency received that support a definition of regional innovation cluster, this NPRM includes a definition of “*Regional Innovation Clusters*” or “*RICs*” after the definition of “*Regional Commission*” in § 300.3. One comment requests EDA to ensure that the definition does not exclude communities that may lack the resources to form a RIC from partnering with communities that do have that capacity. Another comment notes that EDA should “make sure [the] reader understands the vertical integration of the cluster and [that] it is not just a conglomerate of like [North American Industry Classification System] NAICS [codes].” Other comments express concern regarding the implications of RICs, including two that question how RICs will work as a strategy for isolated communities “where the nearest town could be 90 to 167 miles away” and in communities that “are not accessible by roads and lack many essential infrastructure and program needs.” In addition, two comments warn that “[r]egionalism and collaboration are two words espoused at most conferences, however, there is a real need to look at these concepts and adjust as needed for particular projects” and that “while ‘regionalism’ is the buzz word * * * revitalization and progress must begin locally before it ever reaches a regional stage.” One commenter goes on to note, “government funds should not be awarded unless there are identifiable [benchmarks] to incorporate these concepts.” Another comment states that “EDA should be willing to fund existing programs that have successful track records just as much as new programs with promising projections.”

EDA thanks the commenters for their thoughtful responses and will endeavor to ensure the proposed definition of RICs addresses these concerns. EDA is striving to create a highly flexible and inclusive RIC framework that works for all types of Regions. EDA recognizes that RIC participants can and should have strategic partnerships outside of the RIC’s geographic Region and the definition emphasizes that a RIC can cross jurisdictional boundaries. EDA’s RIC-based programs are designed to

increase the capacity of distressed communities to establish a RIC and take advantage of the resources of existing RICs. Also, EDA has tried to craft the definition to emphasize vertical integration while remaining flexible by defining RICs as “networks of similar, synergistic, or complementary entities” that “have active channels for business transactions and communication.” EDA believes RICs can be integral to successful economic development strategies for many communities and continues to develop performance measures and goals to help assess the impact of RICs and build a portfolio of best practices. Also, RICs are just one strategy amongst EDA’s array of policy and program options that can be tailored to meet communities’ needs. Through the RIC framework, EDA will work closely to articulate a strategy that incorporates the attributes and challenges of all types of communities, from densely populated to very rural. We invite additional constructive comments on ways to improve the definition.

Last, EDA proposes revising the definition of “*Trade Act*” to include a reference to the statutory citation for the Trade Adjustment Assistance for Communities program. Therefore, in the definition of Trade Act, the phrase “chapters 3 and 5” is revised to read as “chapters 3, 4, and 5.” Finally, EDA adds the phrase “for purposes of EDA,” to clarify that the definition of “*Trade Act*” is specific to EDA and its programs.

Part 301—Eligibility, Investment Rate and Application Requirements

Part 301 sets forth eligibility criteria, the maximum allowable Investment Rates, and application requirements common to all PWEDA-enumerated programs (excluding Community Trade Adjustment Assistance at part 313 and Trade Adjustment Assistance for Firms (“*TAAF*”) at part 315). In general, subpart A of part 301 presents an overview of EDA’s eligibility requirements; subpart B addresses applicant eligibility; subpart C addresses Regional economic distress level requirements; subpart D sets forth maximum allowable Investment Rates and Matching Share requirements; and subpart E addresses application requirements, as well as the evaluation criteria used by EDA in selecting Projects. EDA revises the table of contents of part 301 to include a reference to new § 301.11—Infrastructure, which is described below.

We propose clarifying changes to § 301.1 to simplify the provision and

ensure it better reflects EDA’s application process. We remove the phrase “an applicant and the Project proposed by the applicant must satisfy each of” so that the provision’s introductory text simply and clearly reads “In order to receive EDA Investment Assistance, the following requirements must be met.” In addition, to better reflect EDA’s application selection process, we propose relocating the phrase “EDA must select the Eligible Applicant’s Project” from § 301.1(d) to new § 301.1(f) and rephrase it slightly to read “EDA must select the Eligible Applicant’s proposed Project.”

EDA received one comment on the agency’s economic distress level requirements, which are set out at § 301.3. The commenter expresses concern that one of the economic distress criteria to demonstrate eligibility for EDA’s Public Works and Economic Adjustment Assistance programs may disproportionately exclude rural communities where “smaller job loss numbers become huge in today’s economy.” The commenter urges “EDA to consider lowering the dislocation job requirement.” The regulation at § 301.3 tracks the requirements of section 301 of PWEDA (42 U.S.C. 3161), which requires that a Project be located in a Region that meets one or more of the following economic distress criteria in order to be eligible for EDA assistance:

- An unemployment rate that is, for the most recent 24-month period for which data are available, one percentage point greater than the national unemployment rate;
- Per capita income that is, for the most recent period for which data are available, 80 percent or less of the national average per capita income; or
- A “Special Need,” as determined by EDA.

EDA does not have the authority to adjust these requirements, but recognizes the devastation that loss of a significant number of jobs has on a smaller community. If a Region does not meet the statistical economic distress criteria set out by PWEDA, EDA may be authorized to provide assistance through its Special Need criteria as defined at § 300.3, which provide the flexibility to address a variety of sudden and severe economic dislocations.

In response to an internal comment from EDA staff, EDA proposes changes to § 301.3(a)(4) to reduce confusion regarding data sources for demonstrating economic distress. The proposed text recognizes that the U.S. Census Bureau’s American Community Survey (“*ACS*”), which is EDA’s default data source for determining distress

levels, does not include 24-month unemployment data. For clarity, EDA proposes to insert the heading *Data requirements to demonstrate economic distress levels* to § 301.3(a)(4). For distress levels based on per capita income, the regulation provides that EDA still will base its determination on ACS data, and EDA proposes making the first sentence of § 301.3(a)(4)(i) specific to per capita income by removing the reference to “the unemployment rate or * * *”. EDA also relocates the clause that currently concludes the first sentence of § 301.3(a)(4)(i), which sets out the requirement that data correspond to the geographic area upon which the Eligible Applicant is basing eligibility, to be the final sentence of the provision. EDA appropriately rephrases the sentence to remove the unnecessary word “either” so that the sentence begins “The required data must be for the Region * * *”. The remainder of the sentence remains unchanged. EDA proposes a second sentence specific to distress levels based upon the unemployment rate that reads “For economic distress levels based upon the unemployment rate, EDA will base its determination upon the most recent data published by the Bureau of Labor Statistics (“BLS”), within the U.S. Department of Labor.” EDA proposes revising the sentence of the provision that currently begins “Where a recent ACS is not available,” by replacing that introductory phrase with a clarifying introductory clause that reads “For eligibility based upon either per capita income requirements or the unemployment rate, when the ACS or BLS data, as applicable, are not the most recent Federal data available.” The remainder of the sentence remains unchanged.

In addition to the changes to § 301.3(a)(4), EDA makes a non-substantive change to § 301.3(a)(1) to remove the parentheses from around the phrase “or more.” For clarity and better sentence structure in § 301.3(a)(2), EDA replaces the phrase “economic distress criteria of paragraph (a)(1) of this section” with “economic distress criteria described in paragraph (a)(1) of this section” and the phrase “is also” with “also is.” This NPRM also proposes removing repetitive numerical references by replacing “twenty-four (24) month” with “24-month” and “one (1)” with “one” in § 301.3(a)(1)(i); replacing “eighty (80)” with “80” in § 301.3(a)(1)(ii); and replacing “one (1)” with “one” in § 301.3(c)(1).

EDA received 17 comments regarding the agency’s Investment Rate requirements, which are set out at § 301.4 and provide the framework for

the proportion of total Project costs EDA may provide. In general, § 301.4 provides that an Eligible Applicant may be eligible for a 50 percent grant rate. Applicants experiencing relatively higher levels of distress or that are subject to a Special Need may be eligible for a higher grant rate, up to 80 percent. See § 300.3 for the definition of “Special Need.” Several comments express concern regarding the 50 percent Investment Rate and suggest additional flexibilities to establish higher rates, particularly for EDA’s Planning awards and Projects in distressed communities. In addition, one internal comment suggests that EDA establish standard Investment Rates for certain Recipients of Planning awards; specifically 75 percent for District Organizations and 100 percent for Indian Tribes.

The general Investment Rate requirements in § 301.4(b)(1) implement section 204 of PWEDA (42 U.S.C. 3144), which requires a 50 percent baseline share plus an additional amount up to 80 percent “based on the relative needs of the area.” EDA is not authorized to set particular Investment Rates for Planning awards, but the agency is authorized to provide higher maximum Investment Rates for all types of awards based on a Region’s distress level, as set out in Table 1 of § 301.4(b)(1)(ii). In addition, in accordance with Table 2 in § 301.4(b)(5), EDA may establish an Investment Rate of up to 100 percent for special Projects, including Projects of Indian Tribes.

Two commenters suggest that EDA restore “EDA’s local match rate requirements to the pre-2005 levels” and two commenters support EDA’s inclusion of “the revised Federal-local cost share provisions included in S. 2778 by the U.S. Senate Committee on Environment and Public Works during the 111th Congress.” EDA understands that communities and Regions face challenging economic conditions; however, it is the agency’s experience that the current Investment Rate determination structure encourages communities to collaborate and prioritize their needs and appropriately marshals resources to distressed Regions. By ensuring that communities have “skin in the game,” EDA’s Investment Rate framework reinforces the need for local buy-in and participation, which improves economic development outcomes. In addition, the current structure provides EDA with needed flexibility to appropriately increase the EDA share based on Special Need and distress considerations. Therefore, EDA does not propose adjusting its Investment Rate framework

through this NPRM. However, this NPRM does provide additional flexibilities for higher Investment Rates, specifically, up to 80 percent to encourage Projects that involve broad Regional planning and coordination, and Projects that effectively leverage other Federal resources. Also, this NPRM contains a number of provisions designed to smooth connections between EDA and other Federal Agencies to ensure that stakeholders can effectively leverage Federal resources; including specifying that any Federal loan may meet an RLF’s private leveraging requirements.

In response to an internal comment, EDA proposes syntax changes to § 301.4(b)(1), which sets out the general requirements with regards to Investment Rates, to clarify that EDA’s grant rates generally must be determined in accordance with Table 1 of § 301.4(b)(1)(ii). EDA proposes splitting the initial sentence of the provision into two clearer sentences. In the first sentence of the provision, EDA replaces the phrase “shall, after the application of Table 1” with the phrase “shall be determined in accordance with Table 1.” EDA proposes ending the sentence at the word “subsection.” To begin the second sentence of the provision, EDA proposes adding the phrase “The maximum EDA investment rate shall” before the clause that begins with the phrase “not exceed the sum of.” In addition, EDA removes use of the variables (x) and (y) in the second sentence for clarity. These revisions do not change EDA’s current practice and only clarify the regulation to reflect the requirements of PWEDA. In addition, EDA proposes removing the second sentence of § 301.4(b)(3)(iii), to allow the Assistant Secretary to delegate authority to grant a waiver of the requirement that for Planning Investments under part 303, the Investment Rate shall be the maximum allowable under Table 1 of § 301.4(b)(1)(ii). In addition, in § 301.4(c), EDA replaces the phrase “Federal Funding Opportunity notices” with “Federal Funding Opportunity announcements” for increased clarity.

Six comments suggest that EDA use its grant rates “to re-establish Federal incentives for regional collaboration of local governments and other related entities through the national network of Economic Development Districts.” Regional collaboration in planning and implementing economic development projects is a key indicator of success, and EDA agrees that such efforts should be incentivized. Therefore, EDA revises Table 2 of § 301.4(b)(5) to authorize an Investment Rate of up to 80 percent for

Projects that involve broad Regional planning and coordination with other entities outside the Eligible Applicant's political jurisdiction or area of authority, under special circumstances as determined by EDA. In general, to demonstrate broad Regional planning and coordination, Eligible Applicants must demonstrate costs necessary for such efforts that would not ordinarily have been incurred in the course of their usual planning and Project efforts; for example, new maps and analyses because of the expanded Regional coverage. Also, EDA proposes revising Table 2 to incentivize Projects that effectively leverage other Federal Agency resources with a maximum grant rate of up to 80 percent. Note that EDA also incentivizes broad Regional collaboration through its evaluation criteria as set out at § 301.8.

Two comments recommend that EDA waive match for FEMA-declared disasters. EDA agrees that maximum flexibility is necessary in disaster situations, and therefore also amends Table 2 of § 301.4(b)(5) to clarify that EDA may provide up to a 100 percent grant rate when "EDA receives appropriations under section 703 of PWEDA (42 U.S.C. 3233)," which authorizes disaster economic recovery activities. EDA proposes a second revision to remove a deadline that applies to disaster applications. Under the current regulation, to be eligible for a 100 percent grant rate, an application for a Project to address a Presidentially Declared Disaster must be submitted within 18 months of the disaster declaration. EDA believes that the 18 month requirement may be unduly restrictive, and revises the provision to provide that EDA may provide a maximum Investment Rate of 100 percent for "Projects to address and implement post-disaster economic recovery efforts in Presidentially Declared Disaster areas in a timely manner." EDA expects that communities will respond to disasters expeditiously, and the phrase "in a timely manner" gives EDA the flexibility to set time limits appropriate to a disaster scenario.

This NPRM proposes removing repetitive numerical references throughout § 301.4 by replacing "Fifty (50)" with "50" and "thirty (30)" with "30" in § 301.4(b)(1); "one (1)" with "one" in § 301.4(b)(1)(ii); all instances of "twenty-four (24) month" with "24-month" and "1 percentage point" with "one percentage point" in Table 1 in (b)(1)(ii); "eighty (80)" with "80" in § 301.4(b)(2); "fifty (50)" with "50" in § 301.4(b)(3)(i); "eighty (80)" with "80"

in § 301.4(b)(3)(ii), and "one hundred (100)" with "100" in § 301.4(b)(4).

We propose clarifying revisions to § 301.6, which sets out the requirements for EDA to provide assistance to supplement another Federal grant, to correct capitalization errors in the section heading so that it reads "Supplementary Investment Assistance" instead of "Supplementary investment assistance." We also revise the beginning of the first sentence of § 301.6(a) to read "Pursuant to a request made by an Eligible Applicant, EDA Investment Assistance may supplement a grant" instead of "Pursuant to a request by an Eligible Applicant, EDA Investment Assistance may supplement grants" and replace the phrase "any Federal grant program" with "a Federal grant program" in the second sentence. We also revise the beginning of the first sentence of § 301.6(b) to read "For a Project that meets the economic distress criteria provided in § 301.3(a)" instead of "For Projects located in Regions meeting the criteria of § 301.3(a)" and remove the unnecessary reference to "EDA" immediately before the phrase "Investment Assistance." For clarity, in the second sentence of § 301.6(b), we replace the phrase "the combination of EDA Investment and other Federal funds" with the phrase "the EDA Investment and other Federal funds together" and insert the word "that" after provided.

This NPRM revises and reformats § 301.7(a) for clarity and to reflect EDA's improved grant-making process under the agency's Public Works and Economic Adjustment Assistance programs, which is designed to provide greater transparency and faster feedback to Eligible Applicants. EDA continues to accept applications on a continuing basis, but in general competitively evaluates all applications received in quarterly funding cycles. Note that in cases of extremely urgent distress, EDA may evaluate and select an award outside of the usual funding cycles. Also, applications under EDA's Planning, Local Technical Assistance, University Center, and Research and Evaluation programs are not subject to the funding cycle deadlines. Therefore, EDA proposes revising the first sentence of the provision by removing the second use of the phrase "Investment Assistance" immediately preceding "application," as it is unnecessary. EDA clarifies the second sentence of § 301.7(a) to specify that EDA's application, Form ED-900, is available electronically from www.grants.gov instead of on EDA's Web site. In addition, we revise the third sentence of the provision to add the introductory

phrase "In general;" remove the words "competitive and" immediately before "continuing;" and replace the concluding phrase "to respond to market forces in Regional economies" with the clause "and competitively evaluates all applications received in quarterly funding cycles throughout the fiscal year." For better sentence structure and to reduce confusion, we propose revising the fourth sentence of the provision so that it reads "Subject to the availability of funds, the timing in which EDA receives complete and competitive applications affects EDA's ability to participate in a given Project," instead of "The timing with which competitive investment opportunities arise, as determined by the criteria set forth in § 301.8, paired with the availability of funds in a given fiscal year, will affect EDA's ability to participate in any given Project." In the fifth sentence of the provision, EDA replaces the phrase "using the criteria set forth in § 301.8" with the phrase "in accord with the criteria set forth in the applicable FFO and in § 301.8" to clarify that a published FFO may contain specific evaluation criteria. In addition, in § 301.7(a)(1), EDA replaces the phrase "upon corrections" with "after corrections are made" for better sentence structure.

EDA revises § 301.8 to set out EDA's updated evaluation criteria. As set out in § 301.8(a) through (f), EDA will evaluate applications on the extent to which they:

- Ensure collaborative Regional innovation;
- Leverage public-private partnerships;
- Advance national strategic priorities;
- Enhance global competitiveness;
- Encourage environmentally sustainable development; and
- Support economically distressed and underserved communities.

EDA also proposes minor changes within the introductory text to § 301.8 to replace the phrase "EDA statutory and regulatory requirements" with "EDA's statutory and regulatory requirements" in the first sentence of the provision; replace "applicant" with "Eligible Applicant" in the second sentence; and add the introductory clause "In addition to criteria set out in the applicable FFO" and replace "one (1)" with "one" in the third sentence.

EDA received eight comments regarding the evaluation criteria. One comment requests "that EDA establish preferential selection criteria recognizing communities that are impacted by Defense Department actions such as base realignment and

closure (BRAC), specifically base closure and mission growth.” EDA does not enumerate this as an evaluation criterion because Projects involving communities impacted by military base closures or realignments, as well as defense contractor reductions-in-force and U.S. Department of Energy defense-related funding reductions, are considered under EDA’s Special Need criterion for eligibility. *See also* the definition of “*Special Need*” as set out in § 300.3 and the distress requirements of § 301.3(a). The evaluation criteria are geared towards selecting applications that best demonstrate the ability to help the impacted community grow the local economy effectively, create new and better jobs, and coherently engage local partners.

A second comment suggests that EDA’s evaluation criteria “should favor awards to regions with developing clusters that need help rather than rewarding established clusters that will continue to grow on their own.” EDA’s proposed evaluation criteria incentivize RICs, and the agency’s programs are designed to assist distressed communities; therefore, EDA anticipates helping Regions nurture developing clusters. Depending on the unique circumstances facing a Region, leveraging an established cluster may be the most effective strategy to aid a distressed Region. Another commenter requests that EDA not so heavily favor distressed communities in order to allow healthier communities to access its grant assistance. EDA’s mission is to help distressed communities become competitive, productive, and strong; and Congress mandates that appropriated funds meet those goals. EDA encourages healthy communities to mentor and share best practices with distressed communities to help develop robust Regional economies across the U.S. In addition, EDA’s Research and National Technical Assistance programs provide tools and resources that all types of communities are encouraged to access. *See* <http://www.eda.gov/Research/Research.xml> for more information.

Two comments suggest that EDA support sustainable development through “grant guidelines that reward communities for sustainable development strategies such as locating new development on previously developed land or close to existing activity centers and near transportation choices” and ensure that the agency’s rules and regulations do not contribute to development sprawl. EDA encourages such Projects through the evaluation criterion (set out at § 301.8(e)) that highlights environmentally sustainable development, and an application that

includes elements of place-based development may meet EDA’s “sustainable development” evaluation criterion. EDA strongly encourages Projects that enhance the environment and advance economic development goals and welcomes comments that offer specific ways the agency can incentivize sustainable development practices.

Another commenter suggests that “EDA consider evaluating * * * projects * * * on the extent to which they engage the full spectrum of key participants,” and illustrates the point by citing research on the creation of innovation networks. EDA realizes that having the right stakeholders at the table is crucial to a coordinated, efficient economic development program, and through its evaluation criteria set out at § 301.8, EDA encourages collaborative Regional innovation and public-private partnerships. In addition, through the agency’s initiatives to encourage commercialization and technology transfer, including the i6 Challenge competitions, EDA encourages partnerships that engage the full spectrum of necessary stakeholders, from research and development to marketing and commercialization.

Two comments suggest that EDA should not focus on Projects with indicia of success (i.e., high matching levels, clear leadership, etc.) to avoid “funding projects that do not need government assistance.” One of the commenters notes that “EDA should continue to make sure that projects have sound business plans for sustainability, but rural projects should not be held to the same economic thresholds for economic benefit because they do not have the population base and economy to support rural projects as urban projects do.” EDA is accountable for Federal funds, and to ensure that they go the furthest and provide the most benefit, EDA does assess the feasibility and job creation potential of Projects. However, EDA is sensitive to the unique economic condition of individual communities and Regions. While EDA ensures that Recipients are accountable for individual Project goals, EDA does not require any particular output or benefit threshold, and seeks to incentivize results that work for and are proportionate to each community. *See also* EDA’s revised accountability provision at § 302.16.

EDA received one overarching comment requesting that the agency adopt and announce specific award and match amounts, eligible areas, and project types. PWEDA and the agency’s implementing regulations provide an adaptable framework within which EDA

helps communities assess their present economic environment, envision their future goals and develop economic development plans accordingly, and deploy resources appropriate to effect those plans. EDA’s assistance also allows Regions to adapt to changing economic landscapes and needs. Adopting specific requirements would stymie EDA from meeting the current needs of distressed Regions and helping to implement the most effective economic development strategies. Therefore, EDA declines to make this change.

This NPRM proposes to amend § 301.9 to remove the phrase “for further consideration” in paragraph (a), which relates to a concept specific to EDA’s application selection process that was in place prior to October 14, 2010. In addition, EDA proposes minor changes to replace the phrase “based on” with “in accord with” in § 301.9(a)(2) and rephrase § 301.9(b) to read “EDA will endeavor to notify applicants as soon as practicable regarding whether their applications are selected for funding” instead of “EDA will endeavor to notify applicants regarding whether their applications are selected as soon as practicable.”

EDA proposes removing the word “construction” from the first sentence of § 301.10(c). The use of “construction” is confusing as CEDS are required for all Projects under parts 305 and 307, including non-construction implementation Projects under part 307. Note that a CEDS is not a requirement for Strategy Grant Projects and a Project located in a Special Impact Area, as specified under § 301.10(c)(1) and (2). In addition, we propose minor changes to capitalize “Federal” in § 301.10(b) to adhere to the capitalization convention of the regulations, replace the word “of” with the phrase “stated in” in the third sentence of § 301.10(c), and replace “Projects” with “A Project” in § 301.10(c)(2). In response to an internal comment from EDA staff, EDA proposes amending § 301.10 by adding new paragraph (d) to clarify the application requirements for the construction of business, technology, or other types of incubators or accelerators. Because these types of construction Investments are designed to catalyze growth in innovative sectors, EDA proposes requiring a feasibility study to evaluate the need for the Project and an operational plan based on industry best practices to ensure the Project’s longevity. EDA will provide additional information on these requirements in an applicable FFO. The information provided by such documents is crucial in helping EDA ensure that Federal

funds are put to their best use. The third sentence of new § 301.10(d) also provides that EDA may require a Recipient to demonstrate that a feasibility study has been conducted by an impartial third party, as determined by EDA.

This NPRM also adds a new section at § 301.11 to clarify that EDA funds a broad spectrum of construction and non-construction infrastructure to meet a community's strategic goals, from basic assets to innovation- and entrepreneurship-related infrastructure. Each EDA Investment is designed to meet a community where it is and help it reach its highest economic development potential. Paragraph (a) of the proposed provision provides some examples of innovation- and entrepreneurship-related infrastructure, including business incubation, business acceleration, venture development organizations, proof of concept centers, and technology transfer. Before this NPRM, these terms had not been delineated within the framework of EDA's regulations. Paragraph (b) of the proposed provision provides that EDA will seek to fund Projects that effectively leverage Federal resources and restates EDA's statutory restriction on providing funds to any for-profit entity. Proposed § 301.11 is intended to help clarify these terms and is not intended to be restrictive or exclusive.

Part 302—General Terms and Conditions for Investment Assistance

Part 302 sets forth the general terms and conditions for EDA Investment Assistance, including environmental reviews of Projects; relocation assistance and land acquisition requirements; inter-governmental review of Projects; and Recipients' reporting, recordkeeping, post-approval, and civil rights requirements.

EDA proposes a minor change to the third sentence of § 302.1 to clarify that environmental information may be obtained from the individual serving as the Environmental Officer in the appropriate regional office. EDA also capitalizes "Project" in the second sentence, and replaces the word "can" with "may" and removes "as" immediately before "listed" in the third sentence. We propose small changes to § 302.3 to replace the word "any" with "an" immediately preceding the phrase "EDA-administered program" in the first sentence of the provision and to remove the unnecessary phrase "but is not limited to" in the second sentence. We also propose removing the unnecessary phrases "but not limited to" from §§ 302.6 and 302.8. In addition, the agency proposes non-substantive

changes to § 302.9(a), which sets out the requirements for inter-governmental reviews of Projects, to replace "fifteen (15)" with "15" in the first sentence of the provision and "Eligible Applicants" with "the Eligible Applicant" and "their" with "its" in the second sentence of the provision. In addition, EDA proposes to make the regulation easier to read by separately listing the documentation required when a Recipient either does or does not receive comments from an Authority as subsections (1) and (2) under paragraph (a). In § 302.9(b), EDA makes a grammatical correction by replacing the phrase "must also" with "also must." EDA also proposes a minor change by replacing the phrase "Web site" with "website" in § 302.11.

This NPRM also proposes updating § 302.10, which implements section 606 of PWEDA (42 U.S.C. 3216) and sets out requirements regarding entities that expedite applications to EDA and restrictions on the employment of certain EDA employees by Eligible Applicants. Section 606(2) of PWEDA (42 U.S.C. 3216) sets out a post-employment restriction that requires "businesses" to refrain from offering employment to or employing certain EDA employees for a period of two years after an award of Investment Assistance. The purpose of the post-employment restriction is to prevent situations in which an Eligible Applicant uses or appears to use its employment practices to influence EDA and DOC employees with award decision-making authority. EDA recently made a policy decision to provide greater flexibility in the application of the post-employment restriction, specifically addressing Eligible Applicants where there is a greater chance of such undue influence. In general, such Eligible Applicants are smaller organizations or organizations that lack standard hiring procedures. Therefore, in the context of the post-employment restriction, EDA has determined that "businesses" means Eligible Applicants that are: (1) Non-profit organizations; (2) District Organizations of an EDA-designated EDD; and (3) for-profit organizations. In addition, EDA retains the flexibility to require another type of Eligible Applicant to execute an agreement to abide by the above-described post-employment restriction on a case-by-case basis; for example when an institution of higher education implements the EDA scope of work or activities related to the EDA scope of work through a separate non-profit organization.

EDA proposes revising § 302.10 to reflect its updated policies. Currently, both the expeditor requirements and post-employment restriction are combined in § 302.10. EDA proposes to restructure the regulation so that § 302.10(a) incorporates the expeditor requirements, which remain substantively unchanged, and § 302.10(b) incorporates the updated post-employment restriction. Accordingly, EDA revise the heading of § 302.10 to read "Attorneys' and consultants' fees, employment of expeditors, and post-employment restriction" instead of "Attorneys' and consultants' fees; employment of expeditors and administrative employees," adds the heading *Employment of expeditors* to revised § 302.10(a), and the heading *Post-employment restriction* to revised § 302.10(b). EDA makes minor clarifying corrections, replacing two instances of the word "applications" with "an application" or "the application," as applicable, in the second sentence of proposed § 302.10(a) and removing two repetitive numerical references from proposed § 302.10(b), replacing "two-year (2)" with "two-year" and "one-year (1)" with "one-year."

EDA received two comments requesting that EDA relax or waive the wage rate requirements of the Davis-Bacon Act (40 U.S.C. 3142 *et seq.*), which apply to contractors and subcontractors performing on Federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works. The Davis-Bacon Act requires contractors and subcontractors to pay any laborers and mechanics employed under the contract (or subcontract) no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area. Section 602 of PWEDA (42 U.S.C. 3212) provides that Davis-Bacon applies to all "projects assisted by the Secretary under this Act." Therefore, EDA cannot waive the wage rate requirements. Accordingly, the regulation at § 302.13 implements the Davis-Bacon requirement. EDA provides guidance and works closely with Recipients to ensure that the Davis-Bacon requirements and responsibilities are clear under the terms of an award of financial assistance.

This NPRM makes a clarifying revision to the heading of § 302.15 by inserting the word "made" immediately after the word "certifications." This NPRM revises § 302.16 to set out EDA's accountability and performance expectations, along with its reporting

requirements. Accordingly, EDA revises the heading of the provision to read “Accountability” instead of “Reports by Recipients.” EDA also adds new paragraph (d) to clarify that EDA expects Recipients to use good faith efforts to meet Project goals and set out the consequences for failure to undertake such efforts. This provision is not punitive and is not intended to discourage accurate reporting; EDA understands that at times, circumstances beyond a Recipient’s control will prevent the fulfillment of Project goals. Its purpose is to underscore the importance that a Recipient undertake the Project scope of work in good faith and with integrity. EDA works closely with its partners to make sure they have the tools and resources necessary to achieve the best economic outcomes possible. Also, EDA adds paragraph headings to § 302.16 to help the reader navigate the provision; specifically adding the header *General* to paragraph (a); *Data on Project effectiveness* to paragraph (b); *Reporting Project service benefits* to paragraph (c); and *Consequences for failure to undertake good faith efforts* to new paragraph (d). We propose removing a repetitive numerical reference in paragraph (a) by replacing “ten (10)” with “ten.” In the first sentence of paragraph (b) of the provision, EDA proposes adding the phrase “and meeting Project goals” immediately following the phrase “including alleviation of economic distress” with the parenthetical, inserting “as amended” following the reference to the Government Performance and Results Act of 1993 (“GPRA”), and adding a citation for the GPRA, specifically, Public Law 103–62.

EDA received three comments on the agency’s conflicts-of-interest requirements, which are set out at § 302.17. Under EDA’s policy, Eligible Applicants must avoid the appearance of or actual conflicts-of-interest, which generally exist when an Interested Party of a Recipient participates in a matter that has a direct and predictable effect on the Interested Party’s personal or financial interests. EDA defines “Interested Party” as “any officer, employee or member of the board of directors or other governing board of the Recipient, including any other parties that advise, approve, recommend or otherwise participate in the business decisions of the Recipient, such as agents, advisors, consultants, attorneys, accountants or shareholders. An Interested Party also includes the Interested Party’s Immediate Family and other persons directly connected to the

Interested Party by law or through a business arrangement.” See § 300.3. The comments suggest that EDA reevaluate and relax the conflicts-of-interest requirements. One commenter details how EDA’s conflicts-of-interest policy impacted a Project and was particularly concerned with the “vague” standard of an apparent conflict-of-interest and how the requirement impacts the ability of small communities to attract “well-informed and motivated residents to run for locally elected offices.”

EDA’s requirements comport with the requirements of other Federal Agencies, including DOC’s requirements set out at 15 CFR 24.36(b) or 14.42, as applicable, and are designed to maintain public trust in the efficiency and effectiveness of the agency’s grant assistance. EDA does not intend for its conflicts-of-interest policy to burden or penalize communities or to halt innovative economic development projects, but does believe that the policy is extremely important to the integrity and transparency of EDA’s programs. EDA staff work closely with Eligible Applicants to identify conflicts-of-interest issues early on and develop solutions that will keep Projects on track. This NPRM does not propose substantive changes to § 302.17, but EDA welcomes constructive comments on ways to balance the agency’s fiduciary and transparency responsibilities with the goal of implementing economic development projects. Note that this NPRM does make minor grammatical corrections by replacing “may also” with “also may” in the third sentence of § 302.17(a), replacing “shall also” with “also shall” in § 302.17 (b)(2), and removing “also” from § 302.17(c)(2). We replace “two (2)” with “two” in § 302.17(c)(3).

EDA received one comment that the agency’s post-approval requirements regulation (§ 302.18) is confusing in that it does not specifically apply to all EDA awards. This NPRM proposes revising the regulation by removing paragraph (b), which applies only to EDA’s Economic Adjustment Assistance Investments, in its entirety. We maintain paragraph (a) in substance, but remove the unnecessary lettered designation and revise the provision to clarify that post-approval requirements apply to all EDA awards. EDA also replaces the phrase “special terms” with “special award conditions” to comport with EDA’s usual terminology.

EDA received an internal comment suggesting that EDA specify in the regulations that the requirements under the Americans with Disabilities Act (“ADA”) (42 U.S.C. 12101 *et seq.*) apply to EDA Projects. The civil rights

requirements applicable to Recipients and Other Parties are set out at § 302.20. Section 302.20 specifies that discrimination is prohibited by a Recipient or Other Party with respect to a Project receiving Investment Assistance under PWEDA or by an entity receiving Adjustment Assistance under the Trade Act, in accordance with a list of enumerated authorities. While EDA agrees that it should be clear that the ADA applies to EDA Projects, we note that the enumerated list set out at § 302.20 includes section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), which prohibits discrimination on the basis of disabilities. In addition, the requirements of the ADA are applicable to all EDA Recipients by virtue of the DOC’s Financial Assistance Standard Terms and Conditions, which apply to all non-construction awards, and EDA’s Standard Terms and Conditions for Construction Projects, which apply to all construction awards. Because discrimination on the basis of disability already is prohibited with respect to EDA Projects, we decline to make the change. EDA makes non-substantive changes in § 302.20(b)(1) by replacing “fifteen (15)” with “15,” making a minor grammatical correction by replacing “is also” with “also is,” and replacing the final usage of the term “Investment Assistance” immediately following the phrase “EDA’s final disbursement of” with “award” for simplicity.

Part 303—Planning Investments and Comprehensive Economic Development Strategies

Part 303 sets forth regulations governing EDA’s Planning program, through which the agency provides assistance to help Eligible Applicants create strategies or plans to stimulate and guide the economic development efforts of a community or Region. EDA has three distinct types of Planning Investments: (1) Partnership Planning; (2) State Planning; and (3) short-term Planning. Through EDA’s Partnership Planning Investments, the agency facilitates the development, implementation, revision, or replacement of CEDS. EDA provides Partnership Planning awards to Planning Organizations (e.g., District Organizations) serving EDA-designated EDDs (as defined in § 300.3) throughout the U.S. The EDDs are recognized by the State(s) in which they reside as multi-jurisdictional councils of governments, regional commissions, or planning and development centers. Further information on EDDs may be found on EDA’s Web site at <http://www.eda.gov/>

PDF/EDD%20List_030410.pdf. The Partnership Planning awards enable Planning Organizations to manage and coordinate the development and implementation of CEDS to address the unique needs of their respective Regions. The CEDS are central to EDA's economic development initiatives, and a proposed Project must be consistent with a relevant CEDS before EDA makes a competitive award under the Public Works or Economic Adjustment Assistance programs under parts 305 or 307. Finally, part 303 sets forth the requirements for State and short-term Planning Investments, which can help distressed Regions strategize to create and retain new and better jobs and respond quickly and effectively to sudden economic dislocations.

In response to a suggestion from EDA staff, this NPRM proposes adding subparts to part 303 to better organize and clarify the distinctions between EDA's Planning Investments. General requirements that apply to all Planning Investments are set out at §§ 303.1 through 303.5 and included under new "Subpart A—General." Requirements specific to Partnership Planning Investments are set out at §§ 303.6 and 303.7 under new "Subpart B—Partnership Planning Assistance." Similarly, requirements specific to State plans and short-term Planning Investments, §§ 303.8 and 303.9, respectively, are included under new "Subpart C—State and Short-Term Planning Assistance."

This NPRM proposes revising the heading of § 303.1 from "Purpose and scope" to "Overview of EDA's Planning Program" to clarify the content of the provision. In the final sentence of the introductory text to § 303.1, EDA proposes to replace the phrase "Private Sector Representatives" with "the private sector." As noted above under "Part 300—General Information" this NPRM proposes to remove "*Private Sector Representative*" as a defined term; however, EDA expects that the private sector will remain actively involved in Regions' planning processes. We also propose adding "non-profit organization" and "educational institutions" to the list of entities that EDA expects will be active participants in the planning process. EDA also proposes minor changes to § 303.1 to move the phrase "short-term Planning Investments" after "State plans" to comport with the order of the regulations, and to replace the phrase "higher-skill, higher-wage jobs" with "new and better jobs." EDA capitalizes "Regional" in the second sentence for consistency in the use of defined terms. In § 303.3, EDA proposes minor textual

changes to paragraph (a)(5) by replacing the phrase "higher-skill, higher wage" with "new and better" and to paragraph (c) by replacing "shall also" with "also shall." In § 303.4(a), EDA proposes replacing the sentence "Planning Investments shall function in conjunction with any other available Federal, State or local planning assistance to ensure adequate and effective planning and economical use of funds" with "Planning Investments shall be coordinated with and effectively leverage any other available Federal, State, or local planning assistance and private sector investments" for better sentence structure and to emphasize the importance of public-private partnerships. EDA also removes a redundant numerical reference from § 303.4(c), replacing "thirty-six (36) month" with "36-month."

As noted above, this NPRM proposes incorporating all Partnership Planning provisions under new "Subpart B—Partnership Planning Assistance" for increased clarity. Because the Partnership Planning Investments and CEDS process are closely linked, EDA proposes restructuring § 303.6, which currently sets out the process requirements for developing a CEDS, to incorporate a description of Partnership Planning along with the CEDS process requirements. Accordingly, this NPRM revises the heading of § 303.6 to read "Partnership Planning and the EDA-funded CEDS process" to better specify the intent of the provision. EDA proposes a description of Partnership Planning Investments at new § 303.6(a), which this NPRM titles *Partnership Planning overview*, and incorporates CEDS Strategy Committee and process requirements, which are currently set out under § 303.6(a) through (e), under § 303.6(b), which this NPRM titles *CEDS process*. EDA also appropriately renumbers proposed § 303.6(b). EDA proposes subparagraph headings within § 303.6(b) to serve as guideposts to help the reader more easily navigate the provision. Accordingly, headings to proposed § 303.6(b)(1) through (b)(5) are added to read as follows: *CEDS Strategy Committee*, *Public notice and comment*, *Reports and updates*, *Inadequate CEDS*, and *Regional Commission notification*, respectively.

EDA received five public comments suggesting that the agency provide increased flexibility with regard to the membership requirements of CEDS Strategy Committees, the requirements of which currently are set out at § 303.6(a) and that this NPRM proposes relocating to § 303.6(b)(1) as stated above. Currently, a CEDS Strategy

Committee must represent the main economic interests of the Region, and must include Private Sector Representatives as a majority of its membership. For the CEDS process and the resulting strategy to be effective, the Strategy Committee must reflect all key stakeholders from across the Region. However, EDA wishes to provide flexibility for all types of communities and Regions, and therefore, under this NPRM, EDA proposes to maintain the requirement that a Strategy Committee represent the main economic interests of the Region, including the private sector, public officials, community leaders, private individuals, representatives of workforce development boards, institutions of higher education, and minority and labor groups, but no longer requires a majority or membership threshold from any type of economic stakeholder. In addition, EDA proposes to add the clause "and others who can contribute to and benefit from improved economic development in the Region" to revised § 303.6(b)(1) to address any stakeholders that EDA's list may miss. Although EDA proposes to remove the membership threshold, the capability of each Strategy Committee to undertake a Regional planning process remains of principal importance. Accordingly, EDA adds the sentence "In addition, the Strategy Committee must demonstrate the capacity to undertake a collaborative and effective planning process." EDA will provide guidance to implement this requirement. EDA expects that every Strategy Committee will include strong private sector representation unless such representation is proscribed by State law.

One public comment and an internal comment from EDA staff suggest that EDA reform its regulations to "emphasize broader and ongoing multi-stakeholder input in the planning process." The current public review and comment requirement, as set out at § 303.6(b)(2), requires simply that CEDS be made available to the public for comment for at least 30 days before submission to EDA. EDA believes that public input is crucial to a Regional planning process and agrees that the requirement should contain further details. EDA proposes revising the regulation to combine existing § 303.6(b)(1) and (b)(2) into revised § 303.6(b)(2), which sets out revised public comment requirements. Under the revised requirements, before submission of a CEDS to EDA, the Planning Organization must provide the public and appropriate governments and interest groups with adequate notice and opportunity to comment on

the CEDS. For maximum flexibility, EDA maintains the requirement that the comment period be for at least 30 days, but goes on to specify that the Planning Organization must make the CEDS available appropriately, electronically and otherwise, throughout the comment period. The Planning Organization also must make the CEDS available in hardcopy upon request. Finally, the provision states that EDA may require the Planning Organization to provide any comments received on the CEDS and demonstrate how the comments were resolved. The proposed regulation is designed to be flexible enough to work for all communities, while providing ample guidance to gather public input.

The remainder of the CEDS process requirements remain substantively the same, and are incorporated under § 303.6(b)(3)–(5). This NPRM also removes a repetitive numerical reference, replacing “five (5)” with “five” in proposed § 303.6(b)(3)(ii).

EDA proposes textual changes to the introductory text of § 303.7(b), which frames the process and participation expectations of CEDS and introduces the content requirements. EDA revises the heading of § 303.7(b) to read “*Strategy requirements*” instead of “*Technical requirements*” to emphasize that CEDS are strategy documents and replaces the word “continuing” with the phrase “comprehensive and continuous” in the first sentence of § 303.7(b)(1). EDA proposes a second sentence to EDA highlight that CEDS must be consistent with section 302 of PWEDA (42 U.S.C. 3162), which sets out the requirements for CEDS, and that CEDS must promote Regional economic resiliency and be unique and responsive to the relevant Region.

EDA received several comments, both public and internal, on the content requirements of CEDS, which currently are set out at § 303.7(b)(1)–(10). One commenter recommends that EDA “support regional and local planning and economic visioning efforts that take into account local and regional assets.” Another commenter suggests that EDA ensure the Planning program encourages “strategic doing” by “funding strategic planning activities that begin with an initial survey of regional assets, stakeholders, and opportunities and provide a framework for activities for ongoing networking and feedback.” EDA’s Planning program and the requirements of CEDS accomplish those goals by creating an ongoing planning process that begins by evaluating current Regional baselines, setting a vision for competitiveness and

innovation, and establishing a strategy tailored to reach the Region’s goals.

Several comments suggest that the current CEDS content requirements are counterproductive in that they create “a situation in which the CEDS must be used as a place to dump data and becomes a lengthy narrative * * * of limited value to businesses and economic development practitioners” and that “plan writers spend most of their time trying to check off its boxes rather than focus on a plan that is truly relevant to the unique circumstances and assets of any given region.” The commenters suggest various ways to streamline CEDS, including four that suggest adopting the National Association of Development Organizations’ (“NADO”) Peer Standards of Excellence. One of the comments suggests that the amount of background materials required in CEDS should be reduced to “[a]llow EDDs to focus CEDS on specific strategies (put the S back in CEDS), rather than a comprehensive narrative of the region.” EDA received several comments that focus on the “project list” aspect of CEDS in current § 303.7(b)(5), which requires that CEDS include “[a] section listing all suggested Projects and the projected numbers of jobs to be created as a result thereof.” Two comments request that EDA eliminate this requirement, suggesting that it encourages the making of project laundry lists instead of catalyzing strategic thinking. Four comments suggest that any required CEDS project list should be meaningful in the EDA selection process, and one comment recommends that any project not included in a CEDS should not be considered for funding by EDA. One comment states that “[o]nly in rare and unusual circumstances should projects not prioritized in the CEDS be supported without a full CEDS amendment including public review of project priorities.”

EDA agrees with its stakeholders that the list of CEDS requirements may be counterproductive for many Regions and therefore proposes significantly streamlining § 303.7(b) from ten detailed specifications to four essential planning elements set out at § 303.7(b)(1)(i) through (iv): (1) A summary of economic development conditions of the Region; (2) an in-depth analysis of economic and community strengths, weaknesses, opportunities, and threats (commonly known as a “SWOT” analysis); (3) strategies and an implementation plan to build upon the Region’s strengths and opportunities and resolve the weaknesses and threats facing the Region, which should not be

inconsistent with applicable State and local economic development or workforce development strategies; and (4) performance measures used to evaluate the Planning Organization’s successful development and implementation of the CEDS. Lists of specific projects, including prioritized lists, will not be required in the CEDS, but may be used by the Planning Organization to illustrate the implementation of the CEDS. EDA neither encourages nor discourages such project lists in order to provide Planning Organizations the maximum flexibility to create strategies most suited to their Region.

EDA recognizes that economic development planning is a dynamic field and best practices are constantly evolving. Therefore, EDA will publish and periodically update specific CEDS content guidelines, which will be based on best practices developed in collaboration with the agency’s cutting edge planning and economic development partners as well as on leading edge research. For example, EDA expects that the relevant guidelines will include NADO’s Peer Standards of Excellence, which are strategic principles that ensure accountability and performance, while allowing for Regional flexibility and creativity. Transformative CEDS take the form of effective, agile strategies, not static lists of requirements and projects. The development and maintenance of a CEDS requires Planning Organizations to undertake an iterative process of gathering data and community input and adapting the strategy to the facts on the ground. EDA expects that these changes will ensure that CEDS remain relevant economic development strategies by allowing Planning Organizations to focus on inclusive planning processes and positive economic development results.

With respect to the comment suggesting that EDA implementation projects must be tied to the CEDS of EDDs, EDA already requires that Projects under the agency’s Public Works and Economic Adjustment Assistance programs be consistent with a relevant CEDS, per the requirements of sections 201 and 209 of PWEDA (42 U.S.C. 3141 and 3149, respectively).

Other comments suggest discrete changes, including requiring an analysis of RICs in the CEDS document and modernizing “CEDS data sets * * * to include relevant 21st Century global knowledge economy indicators and measures at the regional level.” EDA thanks the commenters and expects that these comments will be addressed through the CEDS guidelines that EDA

publishes incorporating the best practices of its economic development and research partners.

EDA received two public comments and an internal comment regarding the agency's consideration of a CEDS developed independent of EDA assistance, as set out at § 303.7(c). EDA-funded CEDS must adhere to the requirements of § 303.7(b), but the agency may accept a non-EDA funded strategy as a CEDS at the agency's discretion. Both public and internal comments suggest that consistent requirements should apply to both EDA-funded and non-EDA funded CEDS. EDA is currently reviewing the issue, and expects to address the requirements of non-EDA funded CEDS in published CEDS guidelines.

As noted above, State and short-term Planning requirements are incorporated under new "Subpart C—State and Short-Term Planning Assistance." In addition, this NPRM proposes minor changes to the first sentence of § 303.9(a), replacing the phrase "may also" with "also may," for better sentence structure, and to § 303.9(b) to remove the unnecessary phrase "but are not limited to."

In addition, EDA received two comments stating that "[d]ocumentation on how to prepare CEDS Updates, Government Performance and Results Act reports, and CEDS Annual Performance reports is ambiguous or unclear and results in a disparity among reports of EDDs." Clearer guidance on what EDA expects in these documents is an identified need. Accordingly, EDA currently is evaluating its Planning program and expects to issue updated guidance in the near future.

Part 304—Economic Development Districts

Part 304 on Economic Development Districts, which also may be referred to as a "District" or an "EDD" in § 300.3, sets forth the Regional eligibility requirements that must be satisfied in order for EDA to consider a District Organization's request to designate a Region as an EDD, including submission of an EDA-approved CEDS, and the District Organization's formation and organizational requirements. This part also contains provisions relating to termination and performance evaluations of District Organizations.

EDA corrects a punctuation error in § 304.1(c) by adding a colon (":") at the end of the phrase "Has an EDA-approved CEDS that." In addition, we remove a redundant numerical reference by replacing "one (1)" with "one" in § 304.1(a) and, for better sentence structure, replace "must also" with

"also must" in § 304.2(c)(1) and "shall also" with "also shall" in § 304.2(c)(4)(i).

Section 304.2(c)(2) sets out the requirements for governing bodies (sometimes known as "policy boards") of District Organizations. Currently, the governing body of a District Organization must be broadly representative of the principal economic interests of the Region and, unless prohibited by State or local law, must include:

- At least one Private Sector Representative;
- At least one or more Executive Directors of Chambers of Commerce, or representatives of institutions of post-secondary education, workforce development groups, or labor groups, all of which must comprise in the aggregate a minimum of 35 percent of the District Organization's governing body; and
- A simple majority of its membership who are elected officials and/or employees of a general purpose unit of State, local, or Indian tribal government who have been appointed to represent the government.

EDA received four public comments suggesting that the regulations should provide "[i]ncreased flexibility for governance structure and local control of EDD policy boards." EDA agrees that District Organizations should be focused on implementing a dynamic and effective planning process for the Region instead of meeting and maintaining membership thresholds. Therefore, we propose revisions to § 304.2(c)(2) to remove the current membership thresholds, but maintain the requirement that governing bodies demonstrate that they are broadly representative of the principal economic interests of the Region, including the private sector, public officials, community leaders, representatives of workforce development boards, institutions of higher education, minority and labor groups, and private individuals. Although EDA proposes to remove the membership thresholds, the capability of each governing body to implement the relevant CEDS remains of principal importance. Accordingly, EDA adds the sentence "In addition, the governing body must demonstrate the capacity to implement the EDA-approved CEDS." EDA will provide guidance to implement this requirement. EDA expects that every District Organization governing body will include strong private sector representation unless such representation is proscribed by State law.

EDA makes conforming changes to § 304.2(c)(2) to remove the provisions

that allow the Assistant Secretary to waive the Private Sector Representative requirement upon a Region's showing of its inability to locate such a representative and the prohibition on the Assistant Secretary's delegation of this waiver authority.

Also with respect to District Organization governing body membership requirements, one commenter suggests that EDA "expand its list of representatives able to be members of an EDD Board to include Executive Directors of Economic Development Corporations in addition to Chambers of Commerce directors." One internal comment suggests that EDA specify that the simple majority requirement can be met by special purpose as well as general purpose units of government and a second internal comment suggests that EDA reduce the 35 percent requirement to 25 percent to better fit with local board composition requirements. EDA agrees, but as EDA has revised the membership requirements of District Organization governing bodies to remove membership thresholds, these changes are no longer necessary.

In response to an internal comment, EDA revises § 304.2(c)(4) to require that governing bodies of District Organizations meet at least twice a year, instead of only once a year. EDA hopes that requiring at least two meetings a year will increase public participation in District Organization operations and help to provide increased insight into the importance of these organizations.

EDA corrects a typographical error in § 304.4(a)(3), replacing the phrase "on this chapter" with "of this chapter." In addition, this NPRM removes redundant numerical references by replacing "sixty (60)" with "60" in § 304.3(b), two instances of "three (3)" with "three" in § 304.4(a), and "one (1)" with "one" in § 304.4(b).

EDA received six comments suggesting that the agency require greater coordination between Eligible Applicants and District Organizations. Commenters provide a variety of coordination recommendations; two suggest that EDA not fund projects that are not included in a CEDS, three suggest that EDA "require coordination with Districts for projects submitted by those outside the District but proposing activities that affect a District's communities," and one suggests requiring a letter of consistency from the relevant District Organization for all projects. EDA strongly values its partnerships with District Organizations of EDDs. However, EDA does not make these changes because of the requirements of PWEDA. Under sections

201(b)(3) and 209(b) of PWEDA (42 U.S.C. 3141 and 3149, respectively), all grants awarded under EDA's Public Works and Economic Adjustment Assistance programs must be consistent with a relevant CEDS. PWEDA does not impose this requirement upon its other programs.

EDA received two comments that recommend restoring the 10 percent bonus for Eligible Applicants that demonstrate active participation with the relevant District Organization. The Economic Development Administration Reauthorization Act of 2004 (Pub. L. 108–373) removed former section 403 of PWEDA, which authorized up to a 10 percent “bonus” for certain Projects as an incentive for coordination with District Organizations. Because such use of appropriated funds is not authorized under PWEDA, EDA is unable to reinstate the bonus.

EDA also received two comments suggesting that the agency provide additional financial resources to District Organization planners and staff and provide “access to regularly scheduled professional development opportunities to [ensure] that their skill sets are at peak performance” and that they are the “best economic development professionals in a region.” One commenter suggests that EDA's University Center program be “encouraged to provide * * * professional development for District Organizations to improve and enhance their professional capacity.” EDA endeavors to fulfill the budget requirements and needs of all of its District Organizations across the U.S. The agency strongly encourages District Organization planners and staff to seek out and take advantage of professional development opportunities; and the agency strives to be a part of this by providing regional conferences and webinars throughout the year and by providing practitioner tools. *See* <http://www.eda.gov/Research/Research.xml>.

In addition, EDA agrees that collaborations across programs are essential to leveraging constrained resources and continually seeks ways to ensure its programs coordinate effectively. For example, in EDA's FY 2011 University Center program competition, EDA specified that the agency encourages University Center Projects that “present a clear plan for collaborating with and assisting other EDA investment partners, recipients, and stakeholders, including EDA-funded Economic Development Districts” and Projects that “offer a full range of economic development research and technical assistance services to EDA regional partners (e.g.,

District Organizations * * *).” *See* section I.B. of EDA's FY 2011 University Center FFO dated March 31, 2011.

Finally, one comment suggests that District Organizations provide “grant-writing support” to rural regions and that EDA provide “additional resources to support this function” and an internal comment suggests that EDA “identify ways to compensate or provide financial incentives for District Organizations that help design and process successful EDA applications.” As noted above, EDA supports such collaborations and strives to provide the resources to make them happen.

Part 305—Public Works and Economic Development Investments

Part 305 provides information about EDA's Public Works and Economic Development Investments. Section 305.1 explains the purpose and scope of these Investments. Section 305.2 specifies the scope of activities eligible for consideration under a Public Works Investment and sets forth a list of determinations that EDA must reach in order to award a Public Works Investment. Specific application requirements are set forth in § 305.3, and § 305.4 provides the requirements for Public Works Investments awarded solely for design and engineering work.

EDA proposes a minor change to § 305.1 to replace the phrase “higher-skill, higher-wage job opportunities” with “new and better job opportunities” in the last sentence of the provision. EDA also replaces the phrase “the creation of new, or the retention of existing” with the phrase “to create new or retain existing” in the second sentence of the provision for better sentence structure. Section 305.2(c) sets out the requirement that not more than 15 percent of EDA's appropriations made available for Public Works Investments be used in any one State. We received an internal comment suggesting that EDA revise § 305.2(c) by replacing the phrase “Not more than fifteen (15) percent of the annual appropriations made available to EDA to fund Public Works Investments” with the phrase “Not more than fifteen (15) percent of EDA's *total* annual appropriations to fund Public Works Investments.” The comment raises the question of whether EDA's regular annual appropriations include special or supplemental appropriations that may be used for Public Works Investments. We have examined the law on this topic and, since an agency's annual appropriations include both regular annual and any special or supplemental appropriations, the requested change does not add anything

to the phrase and therefore we decline to make it. However, EDA proposes non-substantive revisions to § 305.2(c) to remove repetitive numerical references, replacing “fifteen (15)” with “15” and “one (1)” with “one.”

Section 305.5 sets out the requirements for a request and EDA's determination that a District Organization may administer a Project on behalf of another Recipient. Section 305.5(b) provides that EDA may approve such a request either by approving the application in which the request is made or through a separate specific written approval. We received an internal comment suggesting that the reference to the separate specific written approval be removed; however, we decline to make the change as we believe the regulation is clear and that the additional language gives EDA's regional offices needed flexibility. In addition, we received two internal comments suggesting that the regulation be clarified with respect to whether competition is required when a District Organization administers a Project. PWEDA envisions a special role for District Organizations of EDDs as Regional economic development planners and leaders, and we believe the current regulations reflects that role. Therefore, we decline to make the change.

EDA received one public comment and an internal staff comment with respect to the alternate construction procurement methods set out at § 305.6(a). The commenters recommend that “construction management at risk” not be allowed as an alternate construction procurement method because such contracts are contrary to the Government-wide competitive procurement requirements (*see* DOC's regulations at 15 CFR 14.43 and 24.36, as applicable). We have considered the commenters' concern; but determined that EDA's regulation is consistent with DOC's requirements, which prescribe the procurement requirements applicable to Federal grant assistance, and decline to make the requested change. However, in response to another internal comment from EDA staff, we propose revising the first sentence of § 305.6(a) to clarify that use of an alternate procurement method is subject to EDA's approval by adding the phrase “shall seek EDA's prior written approval to” immediately following “Recipients.” EDA believes that this approval step will help ensure that Recipients follow correct procedures and that the maximum amount of Project costs are allowable under applicable regulations and Federal cost principles. Also, to provide additional clarity on the content

of the justification a Recipient must provide to use an alternate procurement method, we propose the clause “, including a brief analysis of the appropriateness and benefits of using the method to successfully execute the Project and the Recipient’s experience in using the method” to § 305.6(a)(1). For better sentence structure, EDA replaces the introductory phrase “These methods include but are not limited to” with “These alternate methods may include” in the second sentence of § 305.6(a). In addition, in § 305.6(b), EDA proposes replacing the phrase “procurement standards” with “procedures and standards” for consistency with the content of the DOC regulations at 15 CFR parts 14 and 24.

EDA proposes revisions to § 305.8 to improve sentence construction by replacing “may also” with “also may” in the second sentence of § 305.8(a) and replacing “and/or” with “or” and “is also” with “also is” in § 305.8(c). In response to an internal comment from EDA staff, we propose to add a regulatory provision regarding procedures with respect to bid overrun, the omission of which appears to simply have been an oversight. Accordingly, we propose revising the heading of § 305.10, which currently only addresses construction contract bid underrun procedures, to read “Bid underrun and overrun.” We incorporate the existing provision regarding procedures in case of bid underrun under new paragraph (a), titled *Underrun*. We add a new paragraph (b) titled *Overrun* to set out EDA’s procedures in case of an overrun at construction contract bid opening. In general, the proposed provision provides that in case of an overrun at the construction contract bid opening, the Recipient may take deductive alternatives if provided for in the bid documents, reject all bids and re-advertise, or augment the Matching Share. If the Recipient demonstrates to EDA’s satisfaction that the above options are not feasible and the Project cannot be completed otherwise, the Recipient may submit a written request to EDA for additional funding, which will be at EDA’s sole discretion and considered in accord with EDA’s competitive process requirements. The new provision on bid overrun does not add to or change current requirements; it simply clarifies EDA’s existing practice.

EDA received an internal comment suggesting that EDA specify that underrun amounts be transferred to the contingencies line item. EDA agrees that the current provision regarding bid underrun does not reflect EDA’s

procedures and revises proposed § 305.10(a) to provide that the Recipient must contact EDA immediately to determine correct procedures by replacing the phrase “the Recipient will notify EDA to determine whether Investment funds should be deobligated from the Project” with the phrase “the Recipient shall notify EDA immediately to determine relevant procedures.”

EDA received one comment requesting that EDA streamline its contract approval procedures, suggesting that the agency adopt a pre-approval system or “some dollar limit or some other threshold” that triggers EDA’s review. Section 305.11 requires EDA to “determine that the award of all contracts necessary for design and construction of the Project facilities is in compliance with the terms and conditions of the Investment award in order for the costs to be eligible for EDA reimbursement.” EDA’s contract review is intended to help Recipients navigate various Federal requirements, including DOC’s regulations (*see* 15 CFR parts 14 and 24, as applicable) and relevant OMB cost principles (*see* 2 CFR parts 220, 225, and 230, as applicable), and help EDA determine whether it can reimburse specific Project costs. EDA’s review is not intended to be burdensome and staff makes every effort to expedite the process. As the regulation is in the interest of both the agency and Recipients, EDA does not propose a substantive change.

Part 306—Training, Research and Technical Assistance

Part 306 sets out the requirements for EDA’s Local and National Technical Assistance and Research Investments. Both Local and National Technical Assistance Investments help Recipients fill the knowledge and information gaps that may prevent leaders in the public and non-profit sectors in economically distressed Regions from making optimal decisions on local economic development issues. Through the Research program, EDA invests in research and technical assistance-related Projects to promote competitiveness and innovation in distressed rural and urban Regions.

EDA received two comments on part 306. One comment states that “[c]oordinated regional research networks can provide local political, economic development and business leaders with an understanding of the regional economic context in which they operate, set policy, attract investment and attract and retain jobs,” and suggests that “[r]esearch dollars ought to be invested in building coordinated broad-based regional efforts

that provide for better dissemination and application of research findings to improve the life of Midwest residents and the competitiveness of Midwest employers.” EDA has invested extensively in RIC research and capacity building, including the *Know Your Region* project, which provides resources to help practitioners across the nation implement effective Regional economic development strategies. Please see the *Know Your Region* Web site at <http://www.knowyourregion.org/about> for more information. See EDA’s Web site at <http://www.eda.gov/AboutEDA/RIC/> for more information on EDA’s RIC efforts.

The second comment recommends that Technical Assistance program awards “be reserved for the EDDs to conduct feasibility studies, management and operation plans, and CEDS coordination to [ensure] that any investment targeted [at] RICs [includes] measures that will address the five core evaluation criteria of EDA and create value-added outcomes for the region.” An EDD is one of the Eligible Recipients listed in section 3 of PWEDA (42 U.S.C. 3122). EDA is not authorized to reserve Technical Assistance program funds for any particular group of Eligible Recipients. Therefore, we decline to make a change to the regulations; however, EDA continues to support District Organizations of EDDs in their efforts to advance new and established RICs.

We make several non-substantive changes to part 306, including rephrasing § 306.1(a) to read “Local and National Technical Assistance Investments may be awarded to” instead of “Local and National Technical Assistance Investments may.” In addition, we propose italicizing the parenthetical (“*University Centers*”) in the final sentence of § 306.4. This NPRM also removes repetitive numerical references from part 306 by replacing the phrase “twelve (12) to eighteen (18)” with “12 to 18” in § 306.3(a); “eighty (80)” with “80” in § 306.6(d); two instances of “three (3)” with “three” in § 306.7(a)(1); and “one (1)” with “one” in § 306.7(c). EDA proposes no other revisions to part 306.

Part 307—Economic Adjustment Assistance Investments

Part 307 sets out the requirements for awards under EDA’s Economic Adjustment Assistance program, which can provide a wide-range of technical assistance, planning, and infrastructure assistance in Regions experiencing adverse economic changes that may occur suddenly or over time, including strategy development, infrastructure

construction, and revolving loan fund (“RLF”) capitalization. Subpart A of part 307 details the general requirements for Economic Adjustment Assistance awards, and subpart B sets out requirements specific to the RLF program.

Through this NPRM, EDA proposes reorganizing part 307 to help clarify award requirements and incorporate all RLF program requirements under subpart B, which EDA proposes renaming the “Revolving Loan Fund Program.” Currently, certain RLF application and post-approval requirements are set out under subpart A of part 307, which may make them difficult to locate. For example, RLF-specific application review requirements are set out at § 307.4(c)(2) and RLF post-approval requirements are set out under § 307.6(d), both of which currently are under subpart A. To eliminate confusion, this NPRM incorporates the RLF application review and post-approval requirements under new § 307.7 titled “Revolving Loan Fund award requirements” in subpart B. In addition, EDA proposes non-substantive changes by removing the unnecessary phrase “but not limited to” from the first sentence of § 307.1 and removing the hyphen from the phrase “Federally Declared Disasters” in § 307.1(b).

In EDA’s interim final rule (“IFR”) published in the **Federal Register** on October 22, 2008 (73 FR 62858), EDA made revisions to clarify that it no longer allows RLF Recipients to use RLF Capital to guarantee loans. As stated in the 2008 IFR, while the authority for RLF Recipients to guarantee loans with RLF Capital has been used extremely infrequently throughout the four-decade history of the RLF program, EDA determined that loan guaranties are too risky and of limited utility, since, unlike Federal guaranties that are backed by the full faith and credit of the United States, RLF loan guaranties are backed only by the assets in the RLF. Therefore, in response to an internal comment from EDA staff, this NPRM proposes a minor revision to § 307.3(b)(2) to remove a reference to “loan guaranties” that was inadvertently missed in the last revision to the regulations.

Through the RLF program, EDA assists Regions affected by a variety of types of distress, including Regions that are Presidentially Declared Disaster areas, by supplying businesses and entrepreneurs with the gap financing necessary to start or expand their businesses. Currently, EDA’s regulation at § 307.4(c)(2) specifies that EDA will review applications to capitalize or recapitalize an RLF to assess the need

for a new or expanded public financing tool to enhance other business assistance programs and services targeting economic sectors and locations described in the CEDS. However, the provision fails to reference how EDA will assess RLF applications to address Presidentially Declared Disaster areas. Therefore, EDA proposes revisions to the text of new § 307.7(a)(1)(ii) to specify that EDA will review disaster-related RLF applications to assess the need to provide appropriate support for post-disaster economic recovery efforts in Presidentially Declared Disaster areas. In order to consolidate award requirements in a single section, this NPRM proposes relocating the remainder of text in connection with Economic Adjustment Assistance post-approval requirements, which currently are set out at § 307.6(a) through (c), to § 307.4(b) and (c) of subpart A, titled *Strategy Grants and Implementation Grants*, respectively. We also revise § 307.4(d) to refer the reader to § 307.7 for RLF award requirements and relocate the sentence specifying that funding priority considerations for Economic Adjustment Assistance may be set forth in an FFO from § 307.4(d) to § 307.4(a) and revise it to add a reference to RLF Grants. Note that these revisions do not change the requirements applicable to Economic Adjustment Assistance awards; they simply make part 307 easier to navigate. EDA also proposes conforming changes to the table of contents of part 307 to appropriately renumber the regulations affected by reorganizing part 307.

We received an internal comment suggesting that EDA replace the term “CEDS” with “strategy” throughout part 307. We decline to make the change because sections 209 and 302 of PWEDA (42 U.S.C. 3149 and 3162, respectively) refer to the requirement of a “comprehensive economic development strategy,” and we believe the current language is helpful in that it encourages the creation of CEDS, yet allows for alternatives when necessary.

EDA received an internal comment from EDA staff requesting that the “Application requirements” provision as set out at § 307.5 provide greater specificity in what is required in an application for Economic Adjustment Assistance. Section 307.5 provides guidance that follows the requirements of PWEDA and other regulations. Because of the flexibility inherent in the regulation and other tools available to provide specificity in application requirements, including FFOs, we decline to make the requested change. However, we welcome further

constructive comments on needed adjustments.

We received another internal comment suggesting changes to § 307.4(c)(i), which states that EDA will review Economic Adjustment Assistance implementation applications to ensure the applicable CEDS meets the requirements of § 303.7. The suggested change appears to suggest that CEDS are not required for non-construction implementation grants. However, CEDS are required for all Economic Adjustment Assistance implementation grants, whether they are construction or non-construction, and therefore we decline to make the change.

EDA received an internal comment suggesting that § 307.6 should be revised and that subsections (a) and (c) should be removed as Economic Adjustment Assistance post-approval requirements are set out in current § 302.18. EDA believes that the cross-references in current § 307.6 provide useful information for the various types of Economic Adjustment Assistance Projects. In addition, this NPRM proposes changes to current § 302.18 to remove the specific reference to Economic Adjustment Assistance post-approval requirements, making the cross-references even more salient. However, as noted above, through this NPRM, we propose relocating the provisions of § 307.6 to relevant portions of part 307. Accordingly, the text of current § 307.6(a) is relocated to § 307.4(b); the text of current § 307.6(b) is relocated to § 307.4(c)(2); the text of current § 307.6(c) is relocated to § 307.4(c)(3); and the text of § 307.6(d) is relocated to redesignated § 307.7(b).

We propose revising the heading of “Subpart B—Special Requirements for Revolving Loan Funds and Use of Grant Funds” to read “Subpart B—Revolving Loan Fund Program” for simplicity and to comport with the convention of the subpart setting out requirements for the University Center program in part 306. This NPRM proposes redesignating current § 307.7 as § 307.6 and incorporating redesignated § 307.6 under Subpart B. EDA also makes a minor change to the first sentence of redesignated § 307.6 to improve sentence structure, replacing “may also” with “also may.” As noted above, EDA also proposes new § 307.7 to set out RLF award requirements under Subpart B.

In response to an internal comment, EDA also proposes amending § 307.9(a)(2) to clarify the existing requirement that the RLF Recipient is responsible for complying with applicable environmental laws as set out at § 307.10, which means the Recipient must adopt compliance

procedures and ensure that borrowers adhere to relevant environmental laws and regulations. In addition, in the second sentence of § 307.9(c)(2), EDA adds the word “consolidation” between the word “merger” and the phrase “or change in the EDA-approved lending area under § 307.18” to comport with the proposed revisions to § 307.18(b) to more precisely use the terms “consolidation” and “merger.” Note that these revisions do not add to or change existing requirements. EDA proposes minor, non-substantive changes to § 307.9(b)(2)(ii) by replacing “EDA policies and requirements” with “EDA’s policies and requirements” and § 307.9(b)(3) by replacing “shall also” with “also shall” in the second sentence, § 307.9(c)(1) by replacing “five (5)” with “five,” § 307.10(a) by removing the unnecessary phrase “but not limited to” in the second sentence and replacing “must also” with “also must” in the third sentence, § 307.10(b) by adding the clarifying word “Accordingly,” to the beginning of the second sentence, § 307.11(b) and (e) by replacing three instances of “thirty (30)” with “30,” and to § 307.11(f)(2) by replacing “twenty (20)” with “20.” In addition, EDA corrects capitalization errors by revising the paragraph heading of § 307.11(d) to read *Interest-bearing account* instead of *Interest-bearing Account* and replacing “federal” with “Federal” in § 307.12(b). EDA also removes an unnecessary parenthetical reference to “(an “EDA funds account”)” in § 307.11(d), as that phrase is not used elsewhere in the regulations. In addition, EDA removes additional repetitive numerical references by replacing two instances of “six-month (6)” with “six-month” in § 307.12(a)(1) and (a)(2) and one instance of “three-year (3)” with “three-year” and two instances of “three (3) years” with “three years” in § 307.13(a), (b)(2), and (b)(3).

Nine comments express concern with EDA’s RLF reporting requirements, which are set out at § 307.14. Most comments suggest that RLF reporting is overly burdensome and request that EDA “pursue some more flexible options to minimize the reporting burdens for RLF intermediaries with a proven track record.” EDA has made numerous improvements to the RLF program in response to the OIG’s report titled *Aggressive EDA Leadership and Oversight Needed to Correct Persistent Problems in the RLF Program* (March 2007), including establishing a framework for ensuring compliance with RLF reporting requirements. In response to the OIG’s recommendations,

RLF Recipients must report to EDA on a semi-annual basis in order to maintain the proper operational and financial integrity of RLF awards established with assistance from EDA. In April 2010, EDA successfully launched the Revolving Loan Fund Management System (“*RLFMS*”), which is the agency’s central electronic management system for the program. The RLFMS greatly enhances EDA’s ability to manage the RLF program in a consistent, cohesive manner, and provides a medium for record-keeping and clear communication between agency staff and RLF Recipients. Semi-annual reports must be submitted electronically through RLFMS, which has significantly reduced paperwork and made reporting more efficient.

In addition, EDA has taken steps to make the RLF reporting form more effective and user-friendly. In June 2008, EDA issued the revised RLF semi-annual reporting form (Form ED-209) to replace the former semi-annual and annual reporting forms. Form ED-209 collects more useful information and has additional data fields to allow EDA to exercise more rigorous oversight of the RLF program. In the agency’s IFR published in the **Federal Register** on October 22, 2008 (73 FR 62858), EDA noted that the new Form ED-209 will reduce the average paperwork burden for each RLF report from 12 hours to 2.9 hours. This significant decrease results from the elimination of duplicative fields and EDA’s successful launch of RLFMS on April 1, 2010.

EDA received an internal comment from EDA staff suggesting that the agency no longer require submission of the RLF Income and Expense Statement (Form ED-209I), which is required of any RLF Recipient that uses either 50 percent or more (or more than \$100,000) of RLF Income for administrative costs in a six-month Reporting Period. See § 307.14(c). EDA surveyed agency staff members, and some reported that Form ED-209I is helpful as it does provide useful information and serves as an incentive for RLF Recipients to avoid high administrative costs. Therefore EDA declines to remove the requirement wholesale, but understands that in certain cases, particularly for RLFs that are smaller and may have relatively less RLF Income, proportionately higher administrative costs may be unavoidable. Therefore, EDA provides additional language to § 307.14(c) to provide that EDA may waive the requirement to submit Form ED-209I for small RLFs as determined by EDA. EDA expects to make such a determination on a case-by-case basis and will provide guidance on requesting a waiver.

Because EDA recently changed the RLF reporting requirements to address management and oversight issues and to ensure the administrative integrity and sustainability of the RLF program, this NPRM does not make any further substantive changes to § 307.14. This NPRM does propose removing repetitive numerical references from § 307.14(c), replacing “fifty (50)” with “50” and “six-month (6)” with “six-month.”

In response to an EDA staff comment, EDA proposes a revision to § 307.15(b)(1), which sets out the requirement that an accountant certify to the adequacy of an RLF Recipient’s accounting system before EDA can disburse funds. The current regulation requires that the certification be made by “an independent accountant familiar with the RLF Recipient’s accounting system.” This provision has raised concerns in past programmatic audits, and therefore, this NPRM proposes new language to require that the certification be made by “a qualified independent accountant who preferably has audited the RLF Recipient in accordance with OMB Circular A–133 requirements.” EDA received another internal comment suggesting that the phrase “board of directors” should be changed to “Loan Administration Board” in § 307.15(b)(2)(iii) to comport with previous regulations, FFOs, and EDA-approved RLF Plans. We decline to make this change because the term “board of directors” as used in the regulations is a generic term used to refer to the body of elected or appointed members who jointly oversee the activities of the RLF. In practice, the body sometimes has a different name, such as board of trustees, board of governors, board of managers, or executive board.

An internal comment suggests revising § 307.15(d) to clarify that private investment is not limited to a 12-month period before loan approval. We note that the January 27, 2010 final rule (75 FR 4259 at 4261) added the phrase “within twelve (12) months of approval of an RLF loan” to § 307.15(d)(1) to clarify that RLF operators may count as private leveraging any funds invested from private sources within 12 months before or after the RLF loan is made, rather than just 12 months before the loan is made. We believe that this previous revision addresses any private leveraging undertaken short of the 12-month limit. Please also see the full discussion on the provision in the January 27, 2010 final rule.

In response to another internal comment, EDA proposes revising § 307.15(d)(1)(iii) to provide that any

Federally guaranteed loan may leverage an RLF portfolio by inserting the phrase “a Federal loan, including” in between “the guaranteed portions of” and “the U.S. Small Business Administration’s.” This change provides Recipients with greater flexibility in meeting the RLF leveraging requirement with Federal resources. Currently, certain Small Business Administration (“SBA”) loans are the only Federal loans that may meet the leveraging requirement. In addition, we propose to reference U.S. Department of Agriculture loans as an example of a type of Federal loan that can be used as leverage, as many RLF stakeholders may have experience with such loans. EDA expects that these revisions will provide needed flexibility for RLF Recipients to meet RLF leveraging requirements in challenging economic conditions and will further incentivize the leveraging of Federal investments.

EDA also removes redundant numerical references by replacing “sixty (60)” with “60” in § 307.15(b)(1), two instances of “four (4)” with “four” in § 307.15(c)(1), “fourteen (14)” with “14” and “ten (10)” with “ten” in § 307.15(c)(2), “twelve (12)” with “12” in § 307.15(d)(1), and “ninety (90)” with “90” in § 307.15(d)(1)(iii).

EDA received an internal comment requesting the deletion of § 307.16(c)(1)(i), which sets out an exception to EDA’s capitalization utilization standard of 75 percent of RLF Capital in the case of an RLF Recipient that anticipates making large loans relative to the size of its RLF Capital base. The commenter notes that the exception provision is incorrectly worded and should be removed “because it gives tacit approval to make loans in excess of 25 percent of the capital base to a single borrower.” Upon consideration, EDA agrees to remove the provision, as it is incorrectly phrased as an “exception.” The relevant RLF Plan sets out the minimum and maximum amounts that the RLF Recipient may loan, and the Recipient must request EDA’s approval (with appropriate justification) for any deviation from the prescribed procedures and amounts contained in the Plan. Therefore, the provision in § 307.16(c)(1)(i) is a deviation from the rule, rather than an exception. In all cases, the Recipient must (a) adhere to prudent and appropriate underwriting standards and practices, and (b) seek EDA’s approval for any variation below the capital utilization standard set of 75 percent. Accordingly, EDA will consider the qualitative aspects of a requested deviation. The capitalization utilization standard of 75 percent is EDA’s required

floor. Therefore, this NPRM proposes to remove § 307.16(c)(1)(i) and replace the phrase “The following exceptions apply:” in paragraph (c)(1) with the introductory phrase “except that” and the text of current § 307.16(c)(1)(ii). As the removal of § 307.16(c)(1)(i) makes a list unnecessary, EDA incorporates the contents of existing (c)(1)(ii) under (c)(1).

In response to an internal comment, EDA proposes a clarifying amendment in § 307.16(d)(1)(i) to replace the phrase “business plan” with the correct defined term “RLF Plan” and corrects a grammatical error by removing the unnecessary second use of the word “and” in the subparagraph. EDA also proposes removing redundant numerical references by replacing “three (3)” with “three” in the second sentence of § 307.16(a)(1), “forty-five (45)” with “45” in § 307.16(a)(2)(i), “seventy-five (75)” with “75” in § 307.16(c)(1), and “two (2)” with “two” in the first sentence of § 307.16(c)(2)(i). This NPRM also revises § 307.16(d)(1) to remove the unnecessary parenthetical phrase “(as defined in § 314.5 of this chapter),” as that phrase already appears in § 307.16(c)(2)(i).

Generally, RLF Capital cannot be used to refinance existing debt. However, under § 307.17(b)(6)(ii), EDA may allow the RLF Recipient to use RLF Capital to purchase the rights of a prior lien holder during a foreclosure action, if such action is necessary to prevent significant loss on an RLF loan. Currently, to make such use of RLF Capital, the RLF Recipient must demonstrate that there is a high probability that the sale of assets will result in compensation sufficient to cover the RLF’s costs, plus a reasonable portion of the outstanding loan within 18 months of the refinancing. In response to a comment from EDA staff, this NPRM proposes a small change to § 307.17(b)(6)(ii) to provide greater flexibility in uncertain economic conditions by changing the 18-month time limit to “a reasonable time, as determined by EDA.” This NPRM also proposes to remove a repetitive numerical reference from § 307.17(c), replacing “three (3)” with “three” in the first sentence.

Also in response to an internal comment from EDA staff, this NPRM proposes revisions to § 307.18(a) to allow EDA to approve the addition of a new lending area (at the request of an RLF Recipient) before the full amount of the RLF Grant is disbursed to the Recipient. This change will provide EDA with needed flexibilities to respond to changing economic conditions and to quickly provide assistance in distressed areas. To effect

this amendment, we remove § 307.18(a)(1)(i), which requires that “EDA shall have disbursed the full amount of its Investment Assistance to the RLF Recipient” before new lending areas may be added, and renumber the remainder of the subparagraph accordingly, redesignating subsections § 307.18(a)(1)(ii) through (vii) as § 307.17(a)(1)(i) through (vi).

Also, as all RLF loans must be in accordance with the relevant RLF Plan, we propose a clarifying change to remove the phrase “to implement and assist economic activity” from the first sentence of § 307.18(a)(1). EDA proposes minor changes to correct a capitalization error in the heading of § 307.18(a)(1), revising it to read *Addition of lending areas* instead of *Addition of Lending Areas*; remove the unnecessary phrase “an additional” from the second sentence of § 307.18(a)(1); replace the term “fulfill” with “meet” and the phrase “Economic Adjustment Investments” with “Economic Adjustment Assistance Investments” in redesignated § 307.18(a)(1)(i); and, at the suggestion of EDA staff, replace the term “RLF Grant award agreement” in redesignated § 307.18(a)(1)(v) with the term “financial assistance award” for increased clarity and consistency.

EDA received four comments suggesting that “EDA should use its existing authority to allow for shared management, marketing, and administration of RLFs for underperforming loan funds.” EDA believes these comments suggest allowing an RLF Recipient to contract with a third party to carry out certain tasks such as shared management, marketing, and administration of RLFs, or obtaining EDA’s approval to merge an underperforming RLF award with another award to form a single RLF award. EDA currently may authorize both of these actions. If the RLF Recipient contracts with a third party to undertake these tasks, the contract must be procured in accordance with Federal competitive procurement requirements as set out at 15 CFR 14.43 or 24.36, as applicable. In addition, under § 307.18(b)(2), EDA may approve the merger of two or more RLF awards into a single RLF award. This authority can and has been used to address underperforming RLF awards. In addition, in response to an EDA staff comment, this NPRM proposes textual revisions to § 307.18(b) to more precisely use the terms “consolidation” and “merger.” For purposes of the RLF program, a “consolidation” under § 307.18(b)(1) occurs when a single RLF Recipient that has multiple RLF awards requests, and EDA approves, the

consolidation of the multiple awards into a single RLF. In contrast, a “merger” under § 307.18(b)(2) occurs when two or more RLF Recipients request, and EDA approves, the merger of their respective RLF awards to form a single RLF award. Accordingly, EDA revises the heading of § 307.18 to read “Addition of lending areas; consolidation and merger of RLFs” instead of “Addition of lending areas; merger of RLFs” and the heading of § 307.18(b) to read *Consolidation and merger of RLFs* instead of *Merger of RLFs*. In addition, EDA replaces “merger” with “consolidation” in § 307.18(b)(1)(ii) and (b)(1)(iii) and “consolidate” with “merge” in § 307.18(b)(2). These revisions do not change existing requirements; they merely clarify terminology. Finally, we propose removing repetitive numerical references, replacing “one (1)” with “one” and “two (2)” with “two” in both § 307.18(b)(1) and (b)(2).

Section 307.19 sets out the requirements for an RLF Recipient to sell or securitize RLF loans, which may be an important and efficient way of infusing an RLF with new RLF Capital. Under § 307.19, EDA may approve a Sale or Securitization of all or a portion of an RLF loan portfolio, provided that: (a) The RLF Recipient uses all proceeds from any Sale or Securitization to make additional RLF loans; (b) the RLF Recipient requests that EDA subordinate the agency’s interest in all or a portion of the RLF loan portfolio to be sold or securitized; and (c) any Sale or Securitization in which an RLF Recipient may participate complies with the Securities Act of 1933, the Securities Exchange Act of 1934, and any rule or regulation made public by the Securities and Exchange Commission. EDA received an internal comment suggesting the deletion of § 307.19(b), which sets out the subordination request requirement. The comment notes that subordination of the agency’s interest could “greatly affect the value of the portfolio, having an adverse consequence on the sale” of all or a portion of the RLF Recipient’s RLF loan portfolio. In considering the comment and the provision, EDA notes that the agency’s interest is in the proportional dollar amount of the RLF Capital base. EDA has no interest per se upon the conclusion of a Sale or Securitization, at which point its interest is limited to the cash proceeds received upon the Sale or Securitization, which the Recipient must use to make additional loans. Worded differently, EDA’s interest in the RLF loan portfolio, in relation to the RLF Capital base, is alive only up to the

point of a Sale or Securitization. If, after seeking EDA’s approval, the Recipient sells a portion of its loan portfolio, there is no “interest” for EDA to subordinate. In all cases, EDA, considering the Recipient’s request, will evaluate the provisions or conditions to the proposed Sale or Securitization vis-à-vis dictated conformance to standards and market practices. Accordingly, this NPRM eliminates paragraph (b) in § 307.19 and re-alphabetizes paragraphs (c) and (d) as (b) and (c), respectively. The commenter also suggests that EDA delete the reference to Securitizations in an effort to streamline the regulations. Although RLF portfolio Securitizations may not happen frequently, EDA declines to make this revision because the agency wishes to maintain maximum flexibility in an RLF Recipient’s ability to raise additional RLF Capital.

Two internal comments suggest that EDA remove the references to specific situations that may result in partial liquidation or disallowance of a portion of an RLF Grant as set out at § 307.20(a)(1) through (5) and suspension or termination of an RLF Grant for cause as set out in § 307.21(a)(1)(i) through (x). EDA declines to make these changes as the agency believes it is important to specify circumstances that merit partial liquidation, disallowance, suspension, and termination and because the language addressing circumstances that may warrant termination for cause were added to the regulations through the October 22, 2008 IFR at the recommendation of the OIG (73 FR 62858). However, EDA proposes removing the unnecessary phrases “but are not limited to” from the final sentence of § 307.20(a) and “but not limited to” from § 307.21(a)(1). We also remove redundant numerical references in § 307.20, replacing “one hundred and twenty (120)” with “120” in § 307.20(a)(1), “twelve (12)” with “12” in § 307.20(a)(2), and “one (1)” with “one” in § 307.20(c)(3). EDA also proposes small changes by italicizing the acronym “SEFA” and capitalizing the first instance of “Federal” in § 307.21(a)(1)(viii).

EDA received nine comments requesting that EDA “fully defederalize RLFs within the constraints of the current law.” One commenter notes the success of specific RLF Grants in meeting program goals of job creation and investment leveraging and goes on to state “[t]he continued requirement by EDA regarding reporting and guidelines seems ludicrous given the excellent performance record.” EDA appreciates that some stakeholders may be frustrated with Federal requirements on

RLF Grants that have been operating for several years, some for as many as three decades. EDA realizes the value of these grants and wishes to reduce burdens on the successful RLFs operating across the country; however, EDA currently is not authorized to release its Federal Interest in RLF awards. EDA’s authority to release its interest after 20 years (section 601(d) of PWEDA, 42 U.S.C. 3211) applies to Real Property and tangible Personal Property only, and does not apply to RLF awards, which exist in theoretic perpetuity so long as borrowers repay loans and the RLF Recipient continues to makes new loans. Although EDA currently does not have authority to release its interest in RLF awards, EDA is engaged in an ongoing effort to revise its authorities to provide greater flexibility for RLF Recipients.

EDA received two comments stating that the requirements of “Davis-Bacon should not apply to borrowers of RLF dollars” because such loans are “not grant proceeds, and the company [or relevant borrower] must repay these loans with non-tax dollars.” The wage rate requirements under the Davis-Bacon Act (40 U.S.C. 3142 *et seq.*) apply to contractors and subcontractors performing on Federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works. Under the Davis-Bacon Act, contractors and subcontractors must pay any laborers and mechanics employed under the contract (or subcontract) no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area. Section 602 of PWEDA (42 U.S.C. 3212) makes the Davis-Bacon wage requirements mandatory in all “projects assisted by the Secretary under [PWEDA].” *See also* § 302.13. Therefore, Recipients and any RLF borrower, contractor, or subcontractor must comply with Davis-Bacon prevailing wage rate requirements where RLF funds under an EDA award are used for construction work.

EDA received six comments suggesting EDA establish “an RLF Advisory Committee of RLF practitioners to assist in the development of a more streamlined and user-friendly RLF reporting system and process.” EDA has identified the need to create an internal RLF task force to improve communications and resolve program issues, and currently is in the process of establishing one. EDA expects that the task force will consist of Headquarters staff and RLF

administrators from each of the agency's six regional offices.

Part 308—Performance Incentives

Part 308 sets out EDA's performance incentives for Recipients. When a Project is constructed under projected cost, EDA may allow the Recipient to use the excess funds to either increase the Investment Rate of the Project to the maximum percentage allowable under § 301.4 for which the Project was eligible at the time of the Investment award, or further improve the Project consistent with its purpose. The terms for performance awards under EDA's Public Works and Economic Adjustment Assistance programs are set out in § 308.2 and the terms for performance awards under EDA's Planning program are set out under § 308.3.

EDA did not receive any comments on part 308, but capitalizes "Federal" in § 308.3(a)(3) to adhere to the capitalization convention of the regulations and removes repetitive numerical references throughout the part by replacing use of "ten (10)" with "ten" in § 308.2(a), "one (1)" with "one" in § 308.2(b) and § 308.3(a)(2), "three (3)" with "three" in § 308.2(c), two references to "one-hundred (100)" with "100" in § 308.2(d) and § 308.3(b), and "five (5)" with "five" in § 308.3(a).

Part 309—Redistributions of Investment Assistance

Part 309 sets out EDA's policies regarding redistributing grant funds in the form of subgrants, loans, or other appropriate assistance. Information with respect to redistributions of Investment funds for Planning, Public Works, and Training, Research, and Technical Assistance Investments is presented in § 309.1. Specifically, § 309.1(a) provides that a Recipient under any program governed by parts 303, 305, and 306 may directly expend the Investment Assistance, or, with prior EDA approval, redistribute such funds in the form of a subgrant to another Eligible Recipient that qualifies for EDA Investment Assistance under the same program part as the Recipient. All subgrants must be subject to the same terms and conditions applicable to the Recipient under the original Investment award. Subsection 309.1(b) stipulates that Investment Assistance received under parts 303 or 305 may not be redistributed to a for-profit entity.

Section 309.2 addresses redistributions under part 307 for Economic Adjustment Assistance Investments. This section reads similarly to § 309.1. However, a Recipient under part 307 may redistribute Investment funds to another

Eligible Recipient in the form of a grant or to a non-profit and private for-profit entity in the form of a loan or other appropriate assistance under subpart B of part 307. EDA did not receive any comments on and does not propose any revisions to part 309.

Part 310—Special Impact Areas

Part 310 implements section 214 of PWEDA (42 U.S.C. 3154), which authorizes the Assistant Secretary to waive the CEDS requirements of section 302 of PWEDA (42 U.S.C. 3162) for a Project that will fulfill a "pressing need" of the Region or prominently address or alleviate Regional underemployment or unemployment. Section 310.1 outlines the process for designating a Region as a Special Impact Area and § 310.2 defines what may be considered a pressing need. EDA did not receive any comments on part 310.

This NPRM proposes revising §§ 310.1 and 310.2(b) and (c) to replace "Recipient" with "Applicant," in order to clarify that designations under part 310 occur at the application stage. In addition, this NPRM proposes minor, non-substantive changes to § 310(a)(6) to replace "Federally-Declared Disaster area" with "Federally Declared Disaster area" and § 310.2(b) to replace the percentage symbol ("%") with the word "percent" for consistency with the rest of the regulations and to remove a repetitive numerical reference, replacing "twenty-four (24) month" with "24-month."

Part 311—America COMPETES

EDA proposes revising the heading of reserved part 311 to read "America COMPETES" in preparation for any regulations necessary to implement the "America Competes Reauthorization Act of 2010" ("COMPETES") (Pub. L. 111-358, January 4, 2011). EDA currently does not propose regulations to implement COMPETES.

Part 312—[Reserved]

Part 313—Community Trade Adjustment Assistance

Part 313 sets forth regulations to implement the Trade Adjustment Assistance for Communities program authorized under chapter 4 of title II of the Trade Act of 1974, as amended (19 U.S.C. 2371 *et seq.*) EDA did not receive any comments on and does not propose any revisions to part 313.

Part 314—Property

Part 314 sets forth the rules governing Property acquired or improved, in whole or in part, with EDA Investment Assistance. Through the February 1, 2011 **Federal Register** notice, EDA

sought comments on how the Property regulations could be improved to provide needed flexibilities to encourage innovative economic development projects, while still protecting taxpayer dollars and the Federal Interest. EDA received a number of helpful comments in this regard specifically recommending that EDA provide flexibility both to the Recipient to deal with grant-assisted Real Property and to enhance EDA's ability to work with new forms of financing to support job creation in distressed communities. This NPRM sets forth proposed amendments to help reach these goals, along with additional revisions designed to streamline EDA's requirements.

EDA proposes to amend the table of contents to part 314 to eliminate subparts A through D. EDA proposes this format change because the entire part contains only ten sections and dividing the ten sections into four subparts hinders comprehension. Because of the elimination of the subparts, EDA revises the section heading for § 314.8 to read "Recorded Statement for Real Property" instead of simply "Recorded Statement" as additional context is needed to clarify that § 314.8 sets out recorded statement requirements for Real Property. Similarly, as § 314.9 concerns the requirements for recordation of Personal Property interests, the section heading is revised to read "Recorded Statement for Personal Property." These changes are designed to help the reader more easily navigate part 314 and are not substantive.

EDA proposes a non-substantive revision to remove the unnecessary phrase "but not limited to" from the definition of "Real Property" in § 314.1. We received an internal comment on § 314.2, which sets out the legal tenants of EDA's Federal Interest in Project Property, suggesting that EDA should consider "parity consideration (as opposed to subordination)" to "be fair to other funders." EDA's regulations do not preclude this option; however, to make this clearer, EDA proposes clarifications to its encumbrances regulation (§ 314.6) to specify the agency's authority to accept a shared first lien position. *See proposed § 314.6(b)(1) below titled Shared first lien position.*

Section 314.3, titled *Authorized Use of Property*, provides the circumstances under which Recipients may use Property acquired or improved, in whole or in part, with Investment Assistance. An internal comment noted that EDA's regulations did not refer to the terms and conditions of the award

as the reference point for determining the purpose of a given Project. Therefore, EDA proposes dividing § 314.3(a) into two clearer sentences and replacing the phrase “only for the authorized purpose of the Project” with the phrase “only for authorized Project purposes as set out in the terms and conditions of the Investment Assistance.” The prohibition on disposing of or encumbering Project Property without EDA’s prior written authorization is now the second sentence in the provision. Also, in response to an internal comment from an EDA employee, this NPRM adds the clause “during the Estimated Useful Life of the Project” to both § 314.3(a) and (b) to clarify that EDA’s use restrictions apply only during the Estimated Useful Life of Project Property.

We received another internal comment suggesting that the regulations setting out the authorized and unauthorized uses of Project Property (§§ 314.3 and 314.4, respectively) should be “relaxed so as not to deter or discourage developers from the opportunity to make a fair recovery on their investments when they sell or lease the non-public rights-of-way.” EDA believes §§ 314.3 and 314.4 appropriately articulate the authorized and unauthorized uses of Property funded or improved by EDA assistance. EDA is proposing clarifications to its title regulation as set out at 314.7(c), which may provide needed clarification and certainty to help address this comment. In addition, we propose minor changes to add a reference to EDA’s proposed accountability provision (§ 302.16) to § 314.4(c) and remove the unnecessary phrases “but not limited to” from §§ 314.3(c) and 314.4(c). In addition, EDA proposes removing two repetitive numerical references from § 314.5(b), replacing “fifty (50) percent” with “50 percent.”

EDA received five comments suggesting various flexibilities with respect to the agency’s Property encumbrance requirements set out at § 314.6. By way of background, as trustee of appropriated taxpayer dollars, EDA safeguards the public’s interest in award assets by taking and retaining a security interest (the Federal Interest) in Property purchased or improved with grant funds. In general, Property must remain unencumbered and the Recipient must hold title to the Property for its Estimated Useful Life. In some instances, the regulations at § 314.6 have proved particularly challenging for public-private partnerships. Two of the comments suggest that EDA should be amenable to subordinating the Federal Interest if the Project will not move

forward without such action and the Recipient has a strong financial standing in the community and a proven history of meeting its obligations. In such circumstances, the Recipient’s agreement to return the grant funds in the event of default should be sufficient. EDA understands the comment and by-and-large agrees. EDA in fact added flexibility to this section in the IFR published on October 22, 2008 (73 FR 62858) to take into consideration the difference in risks posed by Recipients that are governmental bodies and Recipients that are non-profit organizations. The 2008 IFR also clarified that a key factor in determining whether to subordinate the Federal Interest is whether the Recipient requesting the subordination poses a relatively lower risk because it has demonstrated stability over time. See paragraph (b)(3)(iv) of § 314.6, which includes one of the requirements for EDA to accept an encumbrance, namely that EDA determine that there is a reasonable expectation that the Recipient will not default on its obligations. One of the comments also recommends that when a Project is designed to help a community adjust to the departure of a significant employer, it is critically important that EDA act expeditiously and allow alternate mechanisms when a lender is unwilling to subordinate its interest to EDA. The agency agrees that timeliness is important and is adding flexibility depending on whether the request for EDA to subordinate is made prior to, contemporaneous with, or after the EDA Grant award. In addition, see the discussion set out below regarding new flexibility in § 314.8 regarding forms of security as alternatives to mortgages, such as execution of a letter of credit or escrow agreement in EDA’s favor.

Similarly, a third comment suggests that EDA should consider compromising its lien position in certain cases because a bank sometimes cannot afford to take less than a first lien position when there simply is not sufficient equity coverage. In such circumstances, it is important for EDA to agree to a second position in order to engender more economic development opportunities. As noted above, EDA agrees and has added additional flexibility to § 314.6 (see discussion below). The fourth comment suggests that EDA require a first position lien only on the portion of the Project financed by EDA, allowing the Recipient to encumber the remainder of the equity in Project Property to obtain additional capital. This comment appears to suggest that EDA should

consider subordinating its interest in real estate after issuance of the Grant to allow the Recipient to obtain additional financing, which could then enable the Recipient to finance more job-creating projects. EDA’s ability to revise the regulations to accommodate this comment is constrained by legal considerations. To the extent the terms and conditions of the award do not contemplate consideration of subordination subsequent to the Grant award, which is EDA’s current practice, the agency would need to demonstrate the financial benefit to the Federal government in agreeing to subordinate its interest. Federal law prohibits EDA from agreeing to cede the Federal Interest in Property without receiving fair compensation in return unless specifically authorized by statute. The Supreme Court established this principle in *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294 (1941), in what is sometimes referred to as the “quid pro quo” doctrine. The *Royal Indemnity* Court held that the:

[p]ower to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted.

This ruling established that no Federal government agent can give up something of value without receiving equal value in return absent express authority to do so. Hence, in order to give EDA authority to release its interest at the request of a Recipient, EDA either needs to receive fair value in return or obtain additional discretion from Congress under PWEDA to release the Federal Interest in such circumstances. Nonetheless, in appropriate circumstances, such as when the appraised value of the Property substantially exceeds the amount of EDA’s Investment, there would appear to be little risk for EDA to accept a subordinate position, provided the value of the Property continues to cover the risk of default. The agency will consider adding flexibility in the terms and conditions of the Investment Assistance to enable EDA to consider requests for subordination once a Grant award has been made. In such cases, EDA would not be ceding a vested government property interest, but simply exercising discretion built in at the time of the award.

The fifth comment suggests that EDA should reform its financing framework to help Projects take advantage of New Markets Tax Credit (“NMTC”) programs. Because NMTC arrangements generally

are in place over a seven-year period. Projects involving the tax credits raise novel issues about whether EDA will subordinate its interest at a time subsequent to the initial award decision. EDA's regulations currently do not contemplate the possibility that EDA would presently agree to agree in the future to subordinate its interest. In a time of severe budgetary constraints at all three levels of government (Federal, State, and local), EDA agrees that it must explore additional ways to leverage current levels of assistance.

In light of these comments, EDA amends § 314.6 to provide additional flexibility in subsection (b), which sets out exceptions to the general rule that Property must be free of encumbrances. For clarity, EDA is reordering subsection (b) to set out appropriate requirements that apply based on the point in time when a Recipient requests EDA to agree to subordinate the Federal Interest; namely, whether the Recipient already has mortgaged the Project Property before EDA's award decision, or is making the request for subordination simultaneously with EDA's award decision or after the award decision already has been made. EDA relocates existing paragraph (b)(1) and redesignates it as (b)(3) as provided below. EDA also proposes adding new paragraph (b)(1), titled *Shared first lien position*, to set out EDA's authority to enter into an inter-creditor agreement under which EDA and another lien holder share a first lien position. In light of the requirements applicable to requests for subordination, whenever possible, EDA ordinarily will prefer to subordinate its first lien position to a shared first-lien position with a lender pursuant to an inter-creditor agreement. EDA revises the paragraph heading of current paragraph (b)(2), which concerns encumbrances in connection with water, sewer, and other utility projects, to read *Utility encumbrances*.

As noted above, EDA clarifies its requirements for subordinating the Federal Interest based on when the subordination is requested under proposed paragraphs (b)(3) through (b)(5). Current paragraph (b)(1) is re-designated as paragraph (b)(3) and is amended to add the heading *Pre-existing encumbrances* and to delete the phrase "Recipient-owned Property that is subject to an encumbrance" and substitute the phrase "Encumbrances already in place" for increased clarity and ease of comprehension.

Under current § 314.6(b)(3), EDA can consider requests to subordinate its interest, provided that: (1) There is good cause; (2) all proceeds from the other financing will be used only for the

Project or related activities; (3) the grantor or lender will not provide funds without the security of a lien on the Property; and (4) there is a reasonable expectation that the Recipient will not default on its obligations. As drafted, this paragraph is unclear whether it requires an Eligible Applicant to request subordination prior to the Grant award decision or whether it also applies after EDA has awarded funds to the Recipient, or both. To provide clarity, EDA adds a new paragraph (b)(4) with the heading *Encumbrances proposed proximate to Project approval*, which sets out requirements applicable to requests for subordination made contemporaneously with the Grant award decision. New paragraph (b)(4) provides that upon an Applicant's request, EDA may subordinate its interest in conjunction with the Grant decision when EDA determines that: (1) There is good cause and legal authority to waive the general requirement; (2) all the proceeds will be used to enhance Project Property or for related activities or other activities consistent with the purpose of EDA's programs; (3) the grantor or lender will not provide funds without the security of a lien; (4) the terms and conditions of the encumbrance are satisfactory to EDA; and (5) the risk of the encumbrance is acceptable based on a number of factors, including the approximate value of the Project Property at the time the encumbrance is requested and the financial strength of the Recipient. The list of determinations that EDA must make to subordinate its interest are similar to the existing list as set out at current § 314.6(b)(3); however, EDA has added the requirement that the terms and conditions are satisfactory to the agency. In addition, EDA proposes to revise the text of paragraph (b)(4)(i) to add the clause "and legal authority" to indicate that EDA may waive the restriction against encumbrances if it finds there is both "good cause" to waive the restriction and legal authority to waive. EDA is making this change because of the need to review such requests in light of the "quid pro quo" principle noted above. In paragraph (b)(4)(ii), EDA is broadening its authority to facilitate the availability of the equity in Project Property provided the request is consistent with the mission of the agency. Accordingly, EDA adds the phrase "or other activities that EDA determines are authorized under PWEDA" to ensure that to the extent equity is used to support other economic development projects, such projects are consistent with EDA's programs. In addition, EDA adds a new

requirement designated as paragraph (b)(4)(v)(C) to require the submission of an appraisal so that EDA can weigh the risk to the Federal Interest if the agency agrees to subordinate at a time that may be several years after the original award decision.

In addition, EDA designates each of the requirements under paragraph (b)(4)(v) with the letters "A" through "D," to improve the organization of the provision. The introductory text to paragraph (b)(4) also specifies that the kind of "debt" that may be the subject of a subordination request includes "time or maturity-limited debt that finances the Project Property." EDA includes this phrase to better accommodate NMTC and other financing mechanisms, which may require EDA to agree to subordinate its interest at a future date when needed to support the financial structure of the tax credits, which often require refinancing at the conclusion of the credit allowance period (see the NMTC program Web page on the U.S. Department of the Treasury's Web site at http://www.cdfifund.gov/what_we_do/programs_id.asp?programID=5).

The text of current paragraph (b)(3) is re-designated as (b)(5). This NPRM proposes to revise re-designated paragraph (b)(5) to provide additional flexibility to waive the prohibition on encumbrances subsequent to the grant award. This new flexibility is intended to address the comment regarding the possible use by a Recipient of the equity in grant-assisted Property to sponsor additional economic development. As amended, this paragraph will enable a Recipient to request EDA agree to subordinate its interest when the appraised value of the Real Property provides ample collateral for the EDA award even if EDA takes a second lien position. This NPRM adds the heading *Encumbrances proposed after Project approval* to new § 314.6(b)(5) and amends the introductory text to read, "Encumbrances proposed to be incurred after Project approval where all of the following are met:" Similar to the requirements set out at revised paragraph (b)(4), revised paragraph (b)(5) provides that EDA may subordinate its interest after grant award when EDA determines that: (1) There is good cause and legal authority to waive the general requirement; (2) all the proceeds will be used to enhance Project Property or for related activities or other activities consistent with the purpose of EDA's programs; (3) the grantor or lender will not provide funds without the security of a lien; (4) the terms and conditions of the encumbrance are satisfactory to EDA;

and (5) the risk of the encumbrance is acceptable based on a number of factors, including the approximate value of the Project Property at the time the encumbrance is requested, and the financial strength of the Recipient.

Several internal comments noted that EDA's title regulation at § 314.7 "is dense and the source of much confusion." One commenter suggests that the provision "should be more specific about how the Recipient and private property owners are to comply [with certain portions of the provision]." EDA agrees and proposes a number of changes to streamline the requirements and make them more readily understandable, including providing paragraph and subparagraph headings to act as guideposts as the reader navigates the regulation. To this effect, EDA proposes to revise the heading of § 314.7(a) to read *General title requirement* instead of simply *General* and to add a heading to § 314.7(b)(1) to read *Disclosure of encumbrances*. Within § 314.7(c), EDA also adds subparagraph headings as guideposts for explaining the exceptions to the general title requirement. Accordingly, the following headings are added to § 314.7(c)(1) through (c)(5): *Real Property acquisition, Leasehold interests, Railroad right-of-way construction, Public highway construction, and Construction of Recipient-owned facilities to serve Recipient or privately owned Real Property*, respectively. EDA expects that these headings will help the reader locate information more efficiently and make the regulation easier to understand. We also propose removing the unnecessary phrase "but not limited to" from § 314.7(b)(1).

With one exception noted below, EDA does not propose substantive changes to the exceptions to the agency's general title requirement; however, EDA proposes adding the substance of § 314.7(c)(6) to § 314.7(c)(5) and then removing § 314.7(c)(6). EDA proposes this revision because subsections (c)(5) and (6) address analogous situations where the EDA-approved purpose of a Project is to construct facilities that benefit Real Property owned by the Recipient (§ 314.7(c)(5)) or privately owned Real Property (§ 314.7(c)(6)), where the benefited Real Property ultimately will be sold or leased to private parties in order to spur economic development. The requirements of the two provisions are similar, and, as set out in revised § 314.7(c)(5)(i), in both cases the Recipient or private Owner must demonstrate that the Recipient or Owner holds title prior to disbursement

of EDA funds; the Recipient must provide assurances that the Project and the development of the Real Property to be served by the Project will be completed in accordance with the terms of the Investment Assistance; during the Estimated Useful Life, the sale or lease of the Project or of Real Property to be served by the Project must be for Adequate Consideration and the terms and conditions of the Project must continue to be fulfilled; and the Recipient must agree that any failure to complete the Project or the development of the Real Property to be served by the Project constitutes a failure on behalf of the Recipient. This NPRM also makes conforming changes to paragraph (c)(5)(i) of § 314.7 to clarify that these provisions apply to both Recipients and private Owners.

The one substantive change to § 314.7 affects an identical provision currently set out in sub-paragraph (i)(D) of § 314.7(c)(5) and 314.7(c)(6). In response to a suggestion by EDA staff, this NPRM proposes removing the provision in § 314.7(c)(5)(i)(D), which provides that 10 years after an award is made, EDA may waive the requirement that a sale of Project Property during the Estimated Useful Life be for Adequate Consideration and that the purpose of the award continue to be fulfilled. This provision is inconsistent with EDA's policy on Estimated Useful Life and causes confusion in situations involving the sale of Property. When EDA added the provision in the IFR published on August 11, 2005 (70 FR 47002), EDA invited the public to comment on whether the new provision would be useful. At the time, EDA received no comments on the provision and since the provision was added, EDA has never had occasion to use it. Accordingly, EDA proposes removing the phrase in § 314.7(c)(5)(i)(D) that reads "; provided, however, that EDA may waive this provision for any sale or lease occurring after the ten (10) year anniversary of the award date of the Investment Assistance." In addition, EDA removes the unnecessary phrase "but not limited to" from § 314.7(c)(5)(i) and one repetitive numerical reference from § 314.7(c)(5)(i)(E), replacing "five (5) year" with "five-year."

The current regulation at § 314.7(c)(5) refers to both the authorized scope of work and the Property that is to be benefitted by the scope of work as the "Project." In certain circumstances, the failure to distinguish between the "Project" supported by the EDA grant, such as water and sewer infrastructure leading to an industrial park, and the real estate underlying that industrial park which is connected by that

infrastructure, makes it difficult to comprehend exactly what the regulation requires. This broader interpretation of what constitutes the "Project" is inconsistent with the definition of "Project" in § 300.3, which defines the term to mean the "proposed or authorized activity (or activities) the purpose of which fulfills EDA's mission and program requirements as set forth in PWEDA and this chapter and which may be funded in whole or in part by EDA Investment Assistance." This NPRM proposes revisions to § 314.7(c)(5) to distinguish between these two different concepts by clarifying that the Recipient is responsible for completing the Project, which indicates the activities to be completed under the EDA-approved scope of work and supported by the grant, and in appropriate situations, also is responsible for ensuring that the development of land and improvements on the Real Property to be served by or that provides the economic justification for the Project is completed in accordance with the terms and conditions of the Investment Assistance. The revisions refer to Real Property to be benefitted by the Project as "the development of land and improvements on the Real Property to be served by or that provides the economic justification for the Project." The revisions insert this clause with appropriate phrasing into § 314.7(c)(5)(i)(C), (D), and (E).

This NPRM proposes adding a useful heading that reads *Additional conditions on sale or lease* to § 314.7(c)(5)(i), which sets out the existing requirement that EDA may condition the sale or lease of Recipient or Privately owned Real Property improved or benefitted by a Project on the satisfaction of additional EDA requirements by the Recipient, Owner, purchaser, or lessee, as appropriate. This NPRM also proposes removing the unnecessary phrase "but not limited to" from § 314.7(c)(5)(ii). In addition, under current § 314.7(c)(6)(i)(B), when an authorized use of the Project is to construct facilities to benefit privately owned Real Property, the Recipient and Owner must agree to use the Real Property improved or benefitted by the EDA Investment Assistance only for authorized uses of the Project and consistent with the terms and conditions of the Investment Assistance. EDA proposes to relocate this requirement to new § 314.7(c)(5)(iii), titled with a descriptive heading that reads *Agreement between Recipient and Owner*. For clarity, EDA also proposes relocating the statement currently set out at § 314.7(c)(5)(i)(F) and (c)(6)(i)(F)

that EDA may deem that a violation of § 314.7(c)(5) constitutes an Unauthorized Use of Project Property as new § 314.7(c)(5)(iv).

EDA received one comment suggesting that the agency not require a Recipient to hold title in all cases, allowing “long term or low cost leases for important community projects.” EDA recognizes that it is not always realistic for the Recipient to hold title, and the agency’s exception to the title requirement set out at § 314.7(c)(2), titled *Leasehold interests*, allows EDA to determine that a long-term leasehold interest for at least as long as the Estimated Useful Life of Project Real Property may meet the title requirement in certain circumstances.

In light of the elimination of the subpart B designation, EDA amends the heading of § 314.8 by adding the phrase “for Real Property” after the word “statement” to clarify that this section sets out recordation requirements specifically for Real Property. In addition, EDA proposes adding new paragraph (d) to provide that EDA may choose to accept an alternate instrument to protect EDA’s interest in Project Property, such as an escrow agreement or a letter of credit. EDA seeks comments from economic development practitioners on whether this language will help facilitate innovative Projects.

In light of the removal of the subpart C heading for Personal Property, the phrase “Recorded statement” in the heading of § 314.9 is replaced with the phrase “Recorded statement for Personal Property” to clarify that the requirements of the regulation apply only to Personal Property. In response to an internal comment, EDA proposes to amend the first sentence in § 314.9 to better explain the form of the security interest EDA requires with respect to Personal Property. Accordingly, the phrase “security interest” is replaced with the phrase “Uniform Commercial Code Financing Statement (Form UCC–1, as provided by State law)” in the first sentence of the provision. In addition, EDA proposes removing the unnecessary phrase “but not limited to” following the word “including” in the first sentence of the provision.

EDA received two public comments regarding the length of EDA’s interest in Project Property. One commenter suggests that EDA’s “20 year lien position on real estate deals” is too long in today’s economy and another commenter suggests that EDA “choose estimated useful lives for facility projects that would increase the potential for effective and profitable economic development over the short and long term * * * based on factual

circumstances, replacement policies, or industry practices.” The commenter recommends that Recipients “would be responsible for delineating the reasons for a shorter useful life based on certain material criteria established by the EDA.” EDA has carefully reviewed its authorities and regulations and determined that it has the flexibility to set an Estimated Useful Life for its Investments based on the expected level of effort to create jobs. As the Federal Interest normally is coterminous with the useful life of Project Property, EDA’s interest generally will be extinguished at the expiration of a Project’s useful life. The Economic Development Administration and Appalachian Regional Development Reform Act of 1998 (Pub. L. 105–393) added section 601(d) to PWEDA (42 U.S.C. 3211) to allow EDA to release its interest in Real or Personal Property after 20 years. This amendment was designed to provide EDA with additional flexibilities to release its interest in Project Property, particularly as some Projects implicated 40-year Estimated Useful Lives, not to mandate a minimum 20-year useful life for all Project Property. EDA’s current general practice is to establish an Estimated Useful Life of 20 years for new construction and 15 years for rehabilitation, although EDA may establish an Estimated Useful Life of more or less than those timeframes when appropriate depending on the circumstances of a particular Investment.

While EDA understands the comment, EDA’s regulations currently do not prescribe the appropriate length of the Estimated Useful Life of Project Property, which EDA establishes on a case-by-case basis by means of a special award condition. As this matter is better handled on a case-by-case basis, EDA does not need to address the matter by regulation.

In addition, EDA received an internal comment suggesting that EDA revise § 314.10, which sets out the procedures for releasing EDA’s Property interest, “by providing some relief of the 20-year period under certain circumstances, such as providing relief if the project met or exceeded its projected performance after 9 years (which is the last year EDA reports on project performance for purposes of the Government Performance Results Act) or reducing the value of the residual Federal Interest over time.” Section 314.10(a) currently provides that at the request of a Recipient and before the expiration of the Estimated Useful Life of a Project, EDA may release its interest in Project Property 20 years after the Investment Assistance was awarded. As

noted above, EDA has the authority to set an Estimated Useful Life commensurate with job creation and economic development expectations of a particular Project. Once EDA establishes the Estimated Useful Life and secures the Federal Interest for its duration, EDA obtains the benefit of that security for the entire Estimated Useful Life. EDA is constrained by law from ceding something of value without obtaining equal value in return unless expressly authorized by statute. EDA is able to release its interest after 20 years because section 601(d)(2) of PWEDA provides such specific authority. Accordingly, EDA declines to make the textual change to § 314.10 requested by the commenter.

However, with a view to providing Recipients greater flexibility to deal with Project Property, EDA is proposing revisions to § 314.10 to streamline procedures for the release of the Federal Interest in connection with EDA-assisted Property. This NPRM reorganizes § 314.10 to add new § 314.10(a), which provides additional information regarding EDA’s practice in establishing the Estimated Useful Life of Projects. This paragraph notes specifically EDA’s historical practice before 1999 in establishing Estimated Useful Lives for periods of 40 years or more. Since 1999, EDA typically establishes useful lives between 15 and 20 years, depending on the nature of the asset. Current paragraph (a) is redesignated as new paragraph (d). EDA proposes to delete current paragraph (b), which announced the release of the Federal Interest with the Local Public Works and Capital Investment program that EDA conducted from 1976 until 1978, in its entirety. Since the regulation that added this provision in February 1999 was a simple announcement of the release, there is no current need to repeat the provision in the proposed rule. EDA replaces the content of paragraph (b) with a new paragraph to set out the general rule that upon written request, EDA may release the Federal Interest in Project Property at the expiration of the Project’s Estimated Useful Life, provided that the Recipient has made a good faith effort to fulfill the terms and conditions of the award, as determined by EDA. Accordingly, EDA revises the heading of § 314.10(b) to read *Release of Property after the expiration of the Estimated Useful Life* instead of *Exception*.

This NPRM proposes to remove and relocate certain portions of the content of current paragraph (c) and revises the paragraph to provide that EDA can release its interest before the expiration of the Estimated Useful Life of Project

Property only if it receives compensation for the fair market value of the Federal Interest. Accordingly, EDA revises the heading of § 314.10(c) to read *Release prior to expiration of the Estimated Useful Life* instead of *Unauthorized Use*. This paragraph refers to a similar statement in § 314.4, but repeats it here in order to place all of the provisions relating to release of the Federal Interest in the same regulation. Please see below for a detailed explanation of content revisions to current § 314.10(c). EDA also redesignates current § 314.10(a), which details the process for EDA's release of the Federal Interest before the expiration of the Estimated Useful Life but at least 20 years after date of award, as § 314.10(d). EDA adds a clarifying heading to read *Release of certain Property after 20 years* and the introductory phrase "In accord with section 601(d)(2) of PWEDA" to redesignated paragraph (d). Also, EDA adds the clause "that exceeds 20 years" immediately following the phrase "before the expiration of the Estimated Useful Life of a Project" to further clarify EDA's practice. Additionally, EDA removes one repetitive numerical reference in newly designated § 314.10(d) by replacing "twenty (20)" with "20."

EDA is removing the content of current paragraph (c)(1)(ii) of § 314.10, which provides that notwithstanding the release of the Federal Interest, Project Property may not be used for inherently religious activities prohibited by applicable Federal law. EDA included this subsection in the regulation in 1999 to address the legal requirements of and *Tilton v. Richardson*, (403 U.S. 672 (1971)), which held with respect to a grant program to support the construction of educational facilities and notwithstanding express statutory authority to release the Federal government's interest in grant property 20 years after the date of the award that, if such property had value, it remained subject to the requirements of the Establishment Clause of the First Amendment to the U.S. Constitution (U.S. Const. amend. I). Since *Tilton* was announced, the courts have made a number of important distinctions to Establishment Clause jurisprudence. Importantly, the Office of Legal Counsel ("OLC") at the U.S. Department of Justice issued an opinion in a question regarding the Old North Church, which is the historic property where Robert Newman hung lanterns to alert Paul Revere of oncoming British troops; Revere's warnings to colonial militias

led to the battles of Lexington and Concord (2003 WL 21246893 (O.L.C.) (April 30, 2003)). The OLC opinion discusses whether the Government retains the flexibility to assist religious institutions to carry out secular purposes in certain circumstances. In the Old North Church opinion, OLC distinguished the grant program under its review, the U.S. Department of the Interior's Save America's Treasures program, from the educational program under review in *Tilton*. OLC concluded that there was no Constitutional bar to the use of historic preservation grants for the preservation of historic properties that satisfy the generally applicable criteria for funding under the program. The opinion may be found on the OLC Web site at <http://www.justice.gov/olc/OldNorthChurch.htm>.

The transactional analysis at the heart of the opinion suggests that the prohibition currently set out at § 314.10(c)(1)(ii) may not be required and may, to the contrary, serve to disfavor religious institutions from full participation in EDA's economic development assistance programs by treating them as less than equal in their ability to obtain a release of the Federal Interest. Similar to OLC's analysis of the legal effect of providing support for improvements to the historic church of Paul Revere in return for guaranteed public access, EDA does not make Investments to improve properties to ensure their availability as educational resources as was the case with the buildings at the heart of *Tilton*. Rather, the purpose of an EDA Investment is to support the job-creating activities of the Recipient to help counter the economic distress of the Region. It is entirely appropriate that EDA establish a reasonable timeframe in which it expects a Recipient to pursue its efforts to create jobs. As EDA reports on the performance of its programs for purposes of the GPRA at the third, sixth, and ninth anniversaries of the date of the award, it makes sense for EDA to secure its Investment by using the concept of Estimated Useful Life to ensure EDA receives the benefit of its bargain in making the funding decision. As noted above, EDA typically establishes an Estimated Useful Life of between 15 and 20 years, well in excess of the nine-year GPRA reporting timeframe. Inasmuch as EDA programs support the construction of economic development related Projects, such as a job training facility or business incubation center, there would appear to be less potential concern on Establishment Clause grounds.

While EDA is removing the provisions currently set out in § 314.10(c)(1)(ii), the agency need not decide the underlying legal issue as part of this regulation. New paragraph (e) includes an important limitation that a release of the Federal Interest is not automatic, but requires EDA's express approval. In determining whether to agree to release the Federal Interest, this paragraph provides expressly that EDA may not approve a release if the agency lacks legal authority to do so, including governing Establishment Clause law; if the Recipient has not performed in accordance with the terms and conditions of the Investment or has used Project Property in violation of §§ 314.3 or 314.4; or other such factors as EDA deems appropriate. With this reservation of authority, EDA will review its legal authority to release the Federal Interest at the time of the request. In general, EDA will not release the Federal Interest in the case of a Recipient's poor or non-performance under the terms and conditions of the Investment Assistance or the Recipient's violation of the terms and conditions applicable to the Investment Assistance. EDA may refuse to release its interest if EDA determines that the Recipient has failed to carry out the scope of work or a portion thereof under the Investment Assistance (e.g., if the Recipient constructs a building to be used as a training center, but does not obtain necessary State and local permits and approvals so that the building can be used for the purpose authorized under the Investment Assistance). In addition, EDA may refuse to release its interest if EDA determines that the Recipient has used Project Property for an unauthorized use in violation of §§ 314.3 or 314.4. For example, if the Recipient's incidental use of Project Property under § 314.3(f) does interfere with the scope of the Project or violates applicable law, including the requirement that Project Property not be used in violation of nondiscrimination requirements or for inherently religious activities prohibited by applicable Federal law. If EDA determines it is legally constrained from releasing the Federal Interest, all Project requirements will continue to apply until EDA determines that all requirements and expectations of the Investment Assistance have been fulfilled.

However, notwithstanding any release of the Federal Interest under § 314.10, in accordance with DOC's regulations at 15 CFR part 8, compliance with nondiscrimination requirements is a continuing obligation. Therefore, EDA is retaining the content of § 314.10(c)(1)(i).

EDA proposes relocating the provision to new paragraph § 314.10(e)(3).

In addition to comments regarding specific regulatory provisions, EDA received three comments with respect to EDA's overall policies regarding property management. One commenter suggests that EDA consider "[p]articipating mortgages and joint ventures for buildings. * * * [w]inners could offset losers and result in new opportunities and profit." EDA assumes that the commenter is suggesting that EDA enter into participating mortgages with its Recipients. Generally speaking, a participating mortgage is a mortgage loan under which the lender is entitled to share in the rental or resale proceeds from a property owned by the borrower or mortgagor. EDA lacks the authority to make a regulatory change to carry out this suggestion because PWEDA does not authorize profit as part of an EDA award, and all award benefits accrue to the community in terms of job creation and economic diversification. Under current government-wide procedures, however, any income generated under the Project generally is directed to accomplish further Project objectives. *See also* the requirements of "program income" at 15 CFR 14.24 or 24.25, as applicable.

EDA received two comments suggesting that EDA create an "alternate" mechanism to provide a "gap financing vehicle which could be a letter of credit or the like that would be sufficient to a bank" for critical, time-sensitive Projects. While complex Projects that incorporate a variety of financing types may take a longer time to be approved, EDA is committed to acting on applications in an expeditious manner and recently converted its grant processes to a quarterly cycle with

award decisions to be made within 20 business days of each funding cycle deadline. EDA's statutory authority, PWEDA, does not permit EDA to make financial assistance available through a letter of credit. Accordingly, EDA is unable to provide an applicant with an irrevocable "promise to pay" by issuing such a document in advance of EDA's approval process.

Part 315—Trade Adjustment Assistance for Firms

Part 315 sets forth regulations to implement the TAAF program authorized under chapters 3 and 5 of title II of the Trade Act of 1974, as amended (19 U.S.C. 2341 *et seq.*) EDA did not receive any comments on and does not propose any revisions to part 315.

Classification

Prior notice and opportunity for public comment are not required for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis has not been prepared.

Executive Order No. 12866

The Office of Management and Budget (OMB) has determined that this proposed rule is significant for purposes of Executive Order 12866.

Congressional Review Act

This NPRM is not major under the Congressional Review Act (5 U.S.C. 801 *et seq.*)

Executive Order No. 13132

Executive Order 13132 requires agencies to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in Executive Order 13132 to include regulations that 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." It has been determined that this proposed rule does not contain policies that have federalism implications.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) ("PRA") requires that a Federal agency consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from OMB for each collection of information it conducts, sponsors, or requires through regulations. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the PRA unless that collection displays a currently valid OMB Control Number.

The following table provides a complete list of the collections of information (and corresponding OMB Control Numbers) set forth in this proposed rule. These collections of information are necessary for the proper performance and functions of EDA.

Part or section of this proposed rule	Nature of request	Form/title/OMB control number
301.2; 301.10	With an application for Investment Assistance, a non-profit Eligible Applicant must include a resolution passed by an authorized representative of a political subdivision of a State.	ED-900, Application for Investment Assistance (0610-0094)
301.3(a); 301.10; 305.3(a)(1)	An Eligible Applicant must substantiate Regional eligibility and justify the requested EDA Investment Assistance based on, for example, the unemployment rate, per capita income levels, or a Special Need (as determined by EDA) in the Region in which the Project will be located. The Eligible Applicant also must identify and submit to EDA the source of data used to substantiate Regional eligibility (e.g., ACS or BLS data, other Federal data for the Region in which the Project will be located, or data available through the State government).	ED-900, Application for Investment Assistance (0610-0094)
301.4(b)(1)(i); 305.3(a)(1)	An Eligible Applicant must provide information on the severity of the Region's unemployment and its duration, the per capita income levels, and extent of the Region's unemployment or outmigration.	ED-900, Application for Investment Assistance (0610-0094)
301.4(b)(4)	An Eligible Applicant for a Project under part 306 must provide information to show that the Project merits an increase to the Investment Rate because of the Project's infeasibility without such an increase, or because the Project will be of no or only incidental benefit to the Eligible Applicant.	ED-900, Application for Investment Assistance (0610-0094)

Part or section of this proposed rule	Nature of request	Form/title/OMB control number
301.5; 301.10	An Eligible Applicant must provide information to show that Matching Share funds will be available for the Project.	ED-900, Application for Investment Assistance (0610-0094)
301.10(c)	An Eligible Applicant for a Project under parts 305 or 307 must include with its application for Investment Assistance a CEDS acceptable to EDA (pursuant to part 303) or otherwise incorporate by reference a current CEDS that EDA approves for the proposed Project.	ED-900, Application for Investment Assistance (0610-0094)
301.10(d)	An Eligible Applicant for a Project to construct a business, technology, or other type of incubator or accelerator, must include a feasibility study demonstrating the need for the Project and an operational plan based on industry best practices demonstrating the Eligible Applicant's plan for ongoing successful operations.	ED-900, Application for Investment Assistance (0610-0094)
302.7(a)	Recipients must submit requests for amendments to Investment awards in writing to EDA for approval and provide information and documentation as EDA deems necessary.	Award Amendment Request (0610-0102)
302.9(a)	An Eligible Applicant must furnish comments on the Project from the relevant governmental authority in the Region or proof of efforts to obtain comments if none were provided by the governmental authority.	ED-900, Application for Investment Assistance (0610-0094)
302.10(a)	An Eligible Applicant must certify to EDA the names of any persons engaged by or on behalf of the Eligible Applicant for the purpose of expediting Investment Assistance applications made to EDA.	ED-900, Application for Investment Assistance (0610-0094)
302.14(a)	Recipients shall keep records of the amount and disposition of awards of Investment Assistance, the total cost of the Project, the amount and nature of the portion of the Project costs provided by other sources and other records that would facilitate an effective audit.	Audits of States, Local Governments, and Non-Profit Organizations, OMB Circular A-133
302.15	An Eligible Applicant must certify (and submit evidence thereof satisfactory to EDA) that it meets the requirements for receiving Investment Assistance.	ED-900, Application for Investment Assistance (0610-0094)
302.16(b)	Recipients are required to submit reports consisting of data-specific evaluations of the Project's effectiveness.	GPRA Performance Validation Forms (0610-0098)
302.16(c)	EDA may require a Recipient to provide a "Project service map" and other information in order to determine which segments of the Region are being assisted with the Investment Assistance.	Project Service Map (0610-0102)
302.20(d)	Recipients and Other Parties must submit written assurances to EDA that they will comply with nondiscrimination laws and regulations.	ED-900, Application for Investment Assistance (0610-0094)
303.9(c)	Eligible Applicants for short-term Planning Investment Assistance must provide performance measures acceptable to EDA, and provide EDA with progress reports during the term of the Planning Investment.	GPRA Performance Validation Forms (0610-0098)
304.1; 304.4(a)	To have a Region certified as an EDD, a District Organization must submit information showing that the Region contains at least one area subject to the relevant economic distress criteria, is able to foster development on a larger scale than in a single area, has an EDA-approved CEDS, and obtains commitments from a majority of the relevant counties and States.	Comprehensive Economic Development Strategies and Planning Investments (0610-0093)
304.2(c)(2); 304.4(b)	The District Organization must demonstrate that its governing body is broadly representative of the principal economic interests of the Region.	ED-900, Application for Investment Assistance (0610-0094); Comprehensive Economic Development Strategies and Planning Investments (0610-0093)
304.2(c)(4)	The District Organization must notify the public of its annual meetings, its decisions, the results of programs, and as reasonably requested, the results of audited statements, annual budgets, and minutes of public meetings.	Comprehensive Economic Development Strategies and Planning Investments (0610-0093)
305.2(b); 305.3(a)(3)	An Eligible Applicant must show that a Public Works Project will promote: the growth of industrial or commercial plants, the creation of long-term employment opportunities primarily for low-income families, and the fulfillment of the Region's pressing needs.	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096)
305.4(c)	In order to receive any portion of the Investment Assistance for design and engineering work, an Eligible Applicant must submit and certify information that documents compliance with Investment award requirements of all design and engineering contracts.	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096)
305.5	In order to allow a District Organization to administer the Project for another Recipient, the Recipient must make this request and submit information to EDA showing that the Recipient does not have the current staff capacity to administer the Project, the District Organization would be more effective than another local business or organization, the District Organization would not subcontract the work, and the costs of District Organization administration will not exceed allowable costs were the Recipient administering it.	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096)

Part or section of this proposed rule	Nature of request	Form/title/OMB control number
305.6	A Recipient shall seek EDA's prior written approval to use an alternate construction procurement method to the traditional design/bid/build. If an alternate method is used, the Recipient must submit to EDA for approval a construction services procurement plan and the Recipient must use a design professional to oversee the process.	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096)
305.7	The Recipient may use "in-house forces" for design, construction, inspection, legal services, or other work on the Project if it submits a sufficient justification to EDA.	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096)
305.8(a); 305.8(b)	Recipients of EDA construction awards must obtain prior approval for the use of furnished equipment and materials. Requests must show that costs claimed for furnished equipment and materials are competitive with local market costs for similar equipment and materials.	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096)
305.9	An EDA construction award Recipient must submit information to EDA regarding why phasing is necessary, a description of the phasing, related costs and schedules, and certification that the Recipient will pay for overruns and that it is capable of paying for incurred costs before the first disbursement.	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096)
305.10(a)	If at the construction contract bid opening, the lowest responsive bid is less than total Project cost, the Recipient will notify EDA to determine relevant procedures.	Construction Investments (0610-0096)
305.10(b)	In case of an overrun at construction contract bid opening, the Recipient may take deductive alternatives if provided for in the bid documents, reject all bids and re-advertise if there is a rational basis to believe that such action will result in a lower bid, or augment the Matching Share by an amount sufficient to cover the excess cost. If EDA determines that these options are not feasible, the Recipient may submit a written request for additional EDA funding.	Construction Investments (0610-0096)
305.11	Recipients may issue a notice permitting construction under contract to commence prior to an EDA determination of award compliance and eligibility for cost reimbursement, but will proceed at their own risk until EDA review and concurrence. The EDA regional office may request information from the Recipient to make a determination of award compliance.	Construction Investments (0610-0096)
305.12	EDA requires a Recipient to erect a Project sign or signs at the Project construction site to indicate that the Federal government is participating in the Project. The regional office will provide mandatory specifications for Project signage.	Construction Investments (0610-0096)
305.13	Recipients involved in a contract change order must submit them to EDA for review.	Construction Investments (0610-0096)
306.2	EDA selects Projects for Local and National Technical Assistance based on the criteria in part 301 and the extent to which the Eligible Applicant demonstrates that the Project will achieve more specific objectives in the Region (as set forth in §306.2) and meets the criteria in the applicable FFO.	ED-900, Application for Investment Assistance (0610-0094)
306.5	EDA provides Investment Assistance to University Center Projects based on the selection criteria in part 301, the competitive selection process outlined in the applicable FFO, and the extent to which the Eligible Applicant demonstrates other more specific, related criteria.	ED-900, Application for Investment Assistance (0610-0094)
307.5(a)	Each application for Economic Adjustment Assistance must include or incorporate by reference (if so approved by EDA) a CEDS.	ED-900, Application for Investment Assistance (0610-0094)
307.9	All RLF Recipients must submit to EDA an RLF Plan	RLF Standard Terms and Conditions (0610-0095)
307.11(a)	Prior to the disbursement of EDA funds, RLF Recipients must provide in a form acceptable to EDA evidence of fidelity bond coverage and evidence of certification in accordance with §307.15(b)(1).	RLF Standard Terms and Conditions (0610-0095)
307.11(e)	If the Recipient receives Grant funds and the RLF loan disbursement is subsequently delayed beyond 30 days, the Recipient must notify the applicable grants officer and return such non-disbursed funds to EDA.	RLF Standard Terms and Conditions (0610-0095)
307.13(a)	RLF Recipients must maintain Closed Loan files and all related documents, books of account, computer data files, and other records over the term of the Closed Loan and for a three-year period from the date of final disposition of such Closed Loan.	RLF Standard Terms and Conditions (0610-0095)
307.13(b)	RLF Recipients must maintain adequate accounting records to substantiate the amount of RLF Income expended for eligible administrative costs and retain records of administrative expenses incurred for activities and equipment relating to the operation of the RLF.	RLF Standard Terms and Conditions (0610-0095)
307.14(a)	All RLF Recipients must submit semi-annual reports in electronic format to EDA, unless EDA approves a paper submission.	ED-209, Semi-Annual Report (0610-0095)

Part or section of this proposed rule	Nature of request	Form/title/OMB control number
307.14(b)	All RLF Recipients must certify as part of the semi-annual report that the RLF is operating in accordance with the RLF Plan, and describe any modifications to the RLF Plan to ensure effective use of the RLF.	ED-209, Semi-Annual Report (0610-0095) ED-209A, Annual Report (0610-0095)
307.14(c)	An RLF Recipient using either fifty percent or more (or more than \$100,000) of RLF Income for administrative costs in a 12-month reporting period must submit a completed Income and Expense Statement annually to the appropriate EDA regional office. EDA may waive this requirement for an RLF Grant with a small RLF Capital Base.	ED-209I, Income and Expense Statement (0610-0095)
307.15(b)(1)	Within 60 days prior to the initial disbursement of EDA funds, a qualified independent accountant who preferably has audited the RLF Recipient in accordance with OMB Circular A-133 requirements, shall certify to EDA and the Recipient that such system is adequate to identify, safeguard, and account for all RLF operations.	RLF Standard Terms and Conditions (0610-0095)
307.15(b)(2)	Prior to the disbursement of any EDA funds, an RLF Recipient must certify that standard loan documents necessary for lending are in place and that these documents have been reviewed by its legal counsel for adequacy and compliance with the terms and conditions of the Grant and applicable State and local law.	RLF Standard Terms and Conditions (0610-0095)
307.16(b)	Recipients must promptly notify EDA in writing of any condition that may adversely affect their ability to meet prescribed schedule deadlines. Recipients must submit a written request for continued use of Grant funds beyond a missed deadline for disbursement of RLF funds.	RLF Standard Terms and Conditions (0610-0095)
307.19	With prior approval from EDA, a Recipient may enter into a Sale or Securitization of all or a portion of its RLF loan portfolio.	RLF Standard Terms and Conditions (0610-0095)
307.21(b)	EDA may approve a request from a Recipient to terminate an RLF Grant.	RLF Standard Terms and Conditions (0610-0095)
part 310	Upon the application of an Eligible Applicant, EDA may designate the Region which the Project will serve as a Special Impact Area and waive the CEDS requirement if the Eligible Applicant demonstrates that its proposed Project will directly fulfill a pressing need and assist in preventing excessive unemployment.	Comprehensive Economic Development Strategies and Planning Investments (0610-0093)
314.3(f)	With EDA's prior written approval, a Recipient may undertake an incidental use of Property that does not interfere with the scope of the Project or the economic purpose for which the Investment was made, provided it satisfies the conditions set forth in §314.3(f).	Property Management 0610-0103
314.6(b)	In order to use EDA-funded Property to secure a mortgage or deed of trust or encumber the Property, the Recipient must provide information that satisfies one or more of the exceptions set forth in §314.6(b).	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096)
314.7(a) and (c)	The Recipient must provide information that satisfies EDA that the Recipient has title to the Real Property and all easements, rights-of-way, permits, or long-term leases, unless it can provide information proving it meets an exception to the rule.	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096)
314.7(b)	The Recipient must provide information regarding all encumbrances on the Real Property to EDA.	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096)
314.8	Recipients must execute a lien, covenant, or other statement of EDA's interest in all Property acquired or improved with EDA Investment Assistance and record it in the proper jurisdiction.	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096)
314.9	Recipients must execute a security interest or other statement of EDA's interest in Personal Property acquired or improved by EDA funds and record the interest in accordance with applicable law.	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096)
314.10	If a Recipient wishes for EDA to release its Real Property or tangible Personal Property interest before or after the expiration of the Property's Estimated Useful Life, it must submit a request for such release to EDA. EDA's release is not automatic and may require some action on behalf of the Recipient.	Property Management 0610-0103
315.5(b)	Current or prospective TAACs must submit either a new or amended application to EDA, along with a proposed budget, narrative scope of work, and other information as may be requested by EDA.	ED-900, Application for Investment Assistance (0610-0094)
315.5(c)	TAACs must submit information regarding performance to be evaluated by EDA.	GPRA Performance Validation Form (0610-0098)
315.6(a)(1); 315.7; 315.8	Firms must provide specific information to EDA in order to be certified for participation in the TAAF program.	ED-840P, Petition by a Firm for Certification of Eligibility to Apply for Trade Adjustment Assistance (0610-0091)

Part or section of this proposed rule	Nature of request	Form/title/OMB control number
315.6(a)(2); 315.6(a)(3); 315.16	A Certified Firm must submit an Adjustment Proposal to EDA for approval. If EDA approves the Adjustment Proposal, the Firm may then request Adjustment Assistance from the TAAC.	ED-840P, Petition by a Firm for Certification of Eligibility to Apply for Trade Adjustment Assistance (0610-0091)
315.9	In order to have a public hearing, a Person with a Substantial Interest in an accepted petition for TAAF certification must submit a request that follows this section's procedures.	ED-840P, Petition by a Firm for Certification of Eligibility to Apply for Trade Adjustment Assistance (0610-0091)
315.12	Each TAAC shall keep records disclosing the use of all TAAF funds ..	GPRA Performance Validation Form (0610-0098)

List of Subjects

13 CFR Part 300

Distressed region, Financial assistance, Headquarters, Regional offices.

13 CFR Part 301

Applicant and application requirements, Economic distress levels, Eligibility requirements, Grant administration, Grant programs, Investment rates.

13 CFR Part 302

Civil rights, Conflicts-of-interest, Environmental review, Federal policy and procedures, Fees, Inter-governmental review, Post-approval requirements, Pre-approval requirements, Project administration, Reporting and audit requirements.

13 CFR Part 303

Award and application requirements, Comprehensive economic development strategy, Planning, Short-term planning investments, State plans.

13 CFR Part 304

District modification and termination, Economic development district, Organizational requirements, Performance evaluations.

13 CFR Part 305

Award and application requirements, Economic development, Public works, Requirements for approved projects.

13 CFR Part 306

Award and application requirements, Performance evaluations, Research, Technical assistance, Training, University centers.

13 CFR Part 307

Award and application requirements, Economic adjustment assistance, Income, Liquidation, Merger, Pre-loan requirements, Record and reporting requirements, Revolving loan fund, Sales and securitizations, Termination.

13 CFR Part 308

Performance awards, Planning performance awards.

13 CFR Part 310

Excessive unemployment, Special impact area, Special need.

13 CFR Part 311

America COMPETES.

13 CFR Part 314

Authorized use, Federal interest, Federal share, Property, Property interest, Release, Title.

Regulatory Text

For reasons stated in the preamble, this NPRM proposes amending title 13, chapter III of the *Code of Federal Regulations* as follows:

PART 300—GENERAL INFORMATION

1. The authority citation for part 300 continues to read as follows:

Authority: 42 U.S.C. 3121; 42 U.S.C. 3122; 42 U.S.C. 3211; Department of Commerce Organization Order 10-4.

2. Revise § 300.1 to read as follows:

§ 300.1 Introduction and mission.

EDA was created by Congress pursuant to the Public Works and Economic Development Act of 1965 to provide financial assistance to both rural and urban distressed communities. EDA's mission is to lead the Federal economic development agenda by promoting innovation and competitiveness, preparing American regions for growth and success in the worldwide economy. EDA will fulfill its mission by fostering entrepreneurship, innovation, and productivity through Investments in infrastructure development, capacity building, and business development in order to attract private capital investments and new and better jobs to Regions experiencing substantial and persistent economic distress. EDA works in partnership with distressed Regions to address problems associated with long-term economic distress as well as to assist those Regions experiencing sudden and severe

economic dislocations, such as those resulting from natural disasters, conversions of military installations, changing trade patterns, and the depletion of natural resources. EDA Investments generally take the form of Grants to or Cooperative Agreements with Eligible Recipients.

3. Revise § 300.2 to read as follows:

§ 300.2 EDA Headquarters and regional offices.

(a) EDA's Headquarters Office is located at: U.S. Department of Commerce, Economic Development Administration, 1401 Constitution Avenue NW., Washington, DC 20230.

(b) EDA has regional offices throughout the United States and each regional office's contact information may be found on EDA's Internet Web site at <http://www.eda.gov> or in the applicable announcement of Federal Funding Opportunity issued by EDA. Please contact the appropriate regional office to learn about EDA Investment opportunities in your Region.

4. Amend § 300.3 to:

a. Revise the definition of *Cooperative Agreement*, paragraph (7) of the definition of *Eligible Recipient*, and the definition of *Federal Funding Opportunity* or *FFO*, *Federally-Declared Disaster*, *Grant*, *Indian Tribe*, *Investment* or *Investment Assistance*, *Investment Rate*, *Local Share* or *Matching Share*, *Presidentially-Declared Disaster*, *PWEDA*, *Region* or *Regional*, and *Trade Act*;

b. Add a definition of *Regional Innovation Clusters* or *RICs* in alphabetical order; and

c. Remove the definition of *Private Sector Representative*.

§ 300.3 Definitions.

* * * * *

Cooperative Agreement means the financial assistance award of EDA funds to an Eligible Recipient where substantial involvement is expected between EDA and the Eligible Recipient in carrying out a purpose or activity authorized under PWEDA or another statute. See 31 U.S.C. 6305.

* * * * *

Eligible Recipient * * *

(7) Private individual or for-profit organization, but only for Training, Research, and Technical Assistance Investments pursuant to § 306.1(d)(3) of this chapter.

* * * * *

Federal Funding Opportunity or *FFO* means an announcement EDA publishes during the fiscal year at <http://www.grants.gov> and on EDA's Internet Web site at <http://www.eda.gov> that provides the funding amounts, application and programmatic requirements, funding priorities, special circumstances, and other information concerning a specific competitive solicitation for EDA's economic development assistance programs. EDA also may periodically publish FFOs on specific programs or initiatives.

Federally Declared Disaster means a Presidentially Declared Disaster, a fisheries resource disaster pursuant to section 312(a) of the Magnuson-Stevens Fishery Conservation and Management Act, as amended (16 U.S.C. 1861a(a)), or other Federally declared disasters pursuant to applicable law.

Grant means the financial assistance award of EDA funds to an Eligible Recipient under which the Eligible Recipient bears responsibility for carrying out a purpose or activity authorized under PWEDA or another statute. See 31 U.S.C. 6304.

* * * * *

Indian Tribe means an entity on the list of recognized tribes published pursuant to the Federally Recognized Indian Tribe List Act of 1994, as amended (Pub. L. 103-454) (25 U.S.C. 479a *et seq.*), and any Alaska Native Village or Regional Corporation (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*). This term includes the governing body of an Indian Tribe, non-profit Indian corporation (restricted to Indians), Indian authority, or other non-profit Indian tribal organization or entity; provided that the Indian tribal organization or entity is wholly owned by, and established for the benefit of, the Indian Tribe or Alaska Native Village.

* * * * *

Investment or *Investment Assistance* means a Grant or Cooperative Agreement entered into by EDA and a Recipient.

Investment Rate means, as set forth in § 301.4 of this chapter, the amount of the EDA Investment in a particular Project expressed as a percentage of the total Project cost.

Local Share or *Matching Share* means the non-EDA funds and any In-Kind

Contributions that are approved by EDA and provided by a Recipient or third party as a condition of an Investment. The Matching Share may include funds from another Federal Agency only if authorized by statute that allows such use, which may be determined by EDA's reasonable interpretation of such authority.

Presidentially Declared Disaster means a major disaster or emergency declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5121 *et seq.*).

* * * * *

PWEDA means the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3121 *et seq.*).

* * * * *

Region or *Regional* means an economic unit of human, natural, technological, capital, or other resources, defined geographically. Geographic areas comprising a Region need not be contiguous or defined by political boundaries, but should constitute a cohesive area capable of undertaking self-sustained economic development. For the limited purposes of determining economic distress levels and Investment Rates pursuant to part 301 of this chapter, a Region also may comprise a specific geographic area defined solely by its level of economic distress, as set forth in §§ 301.3(a)(2) and 301.3(a)(3) of this chapter.

* * * * *

Regional Innovation Clusters or *RICs* means networks of similar, synergistic, or complementary entities that support a single industry sector and its various supply chains. In general, RICs:

(1) Are based on a geographic area that may cross municipal, county, and other jurisdictional boundaries;

(2) May include catalysts of innovation and drivers of Regional economic growth, such as universities, government research centers, and other research and development resources;

(3) Have active channels for business transactions and communication; and

(4) Depend upon specialized infrastructure, labor markets, and services that build on the unique competitive assets of a location, including talent, technology, services, and hard and soft infrastructure, to spur innovation, job creation, and business expansion.

* * * * *

Trade Act, for purposes of EDA, means title II, chapters 3, 4, and 5, of the Trade Act of 1974, as amended (19 U.S.C. 2341 *et seq.*).

* * * * *

PART 301—ELIGIBILITY, INVESTMENT RATE AND APPLICATION REQUIREMENTS

5. The authority section for part 301 continues to read as follows:

Authority: 42 U.S.C. 3121; 42 U.S.C. 3141–3147; 42 U.S.C. 3149; 42 U.S.C. 3161; 42 U.S.C. 3175; 42 U.S.C. 3192; 42 U.S.C. 3194; 42 U.S.C. 3211; 42 U.S.C. 3233; Department of Commerce Delegation Order 10–4.

6. Amend § 301.1 to:

a. Revise the introductory text and paragraphs (d) and (e); and

b. Add new paragraph (f) to read as follows:

§ 301.1 Overview of eligibility requirements.

In order to receive EDA Investment Assistance, the following requirements must be met:

* * * * *

(d) The Eligible Applicant must satisfy the formal application requirements set forth in subpart E of this part;

(e) The Project must meet the general requirements set forth in part 302 (General Terms and Conditions for Investment Assistance) and the specific program requirements (as applicable) set forth in part 303 (Planning Investments and Comprehensive Economic Development Strategies), part 304 (Economic Development Districts), part 305 (Public Works and Economic Development Investments), part 306 (Training, Research and Technical Assistance Investments), or part 307 (Economic Adjustment Assistance Investments) of this chapter; and

(f) EDA must select the Eligible Applicant's proposed Project.

7. Revise paragraphs (a)(1), (a)(2), (a)(4) introductory text, (a)(4)(i), and (c)(1) of § 301.3 to read as follows:

§ 301.3 Economic distress levels.

(a) *Part 305 (Public Works and Economic Development Investments) and part 307 (Economic Adjustment Assistance Investments).*

(1) Except as otherwise provided by this paragraph (a), for a Project to be eligible for Investment Assistance under parts 305 or 307 of this chapter, the Project must be located in a Region that, on the date EDA receives an application for Investment Assistance, is subject to one or more of the following economic distress criteria:

(i) An unemployment rate that is, for the most recent 24-month period for which data are available, at least one percentage point greater than the national average unemployment rate;

(ii) Per capita income that is, for the most recent period for which data are

available, 80 percent or less of the national average per capita income; or

(iii) A Special Need, as determined by EDA.

(2) A Project located within an Economic Development District, which is located in a Region that does not meet the economic distress criteria described in paragraph (a)(1) of this section, also is eligible for Investment Assistance under parts 305 or 307 of this chapter if EDA determines that the Project will be of "substantial direct benefit" to a geographic area within the District that meets the criteria of paragraph (a)(1) of this section. For this purpose, a Project provides a "substantial direct benefit" if it provides significant employment opportunities for unemployed, underemployed or low-income residents of the geographic area within the District.

* * * * *

(4) *Data requirements to demonstrate economic distress levels.* EDA will determine the economic distress levels pursuant to this subsection at the time EDA receives an application for Investment Assistance as follows:

(i) For economic distress levels based upon per capita income requirements, EDA will base its determination upon the most recent American Community Survey ("ACS") published by the U.S. Census Bureau. For economic distress levels based upon the unemployment rate, EDA will base its determination

upon the most recent data published by the Bureau of Labor Statistics ("BLS"), within the U.S. Department of Labor. For eligibility based upon either per capita income requirements or the unemployment rate, when the ACS or BLS data, as applicable, are not the most recent Federal data available, EDA will base its decision upon the most recent Federal data from other sources (including data available from the Census Bureau and the Bureaus of Economic Analysis, Labor Statistics, Indian Affairs, or any other Federal source determined by EDA to be appropriate). If no Federal data are available, an Eligible Applicant must submit to EDA the most recent data available from the State. The required data must be for the Region where the Project will be located (paragraph (a)(1) of this section), the geographic area where substantial direct Project benefits will occur (paragraph (a)(2) of this section), or the geographic area of poverty or high unemployment (paragraph (a)(3) of this section), as applicable.

* * * * *

(c) * * *

(1) Contain at least one geographic area that fulfills the economic distress criteria set forth in paragraph (a)(1) of this section and is identified in an approved CEDS; and

* * * * *

8. Revise paragraphs (b)(1) introductory text, (b)(1)(ii), (b)(2), (b)(3)(i) through (iii), (b)(4) introductory text, (b)(5), and (c) of § 301.4 as follows:

§ 301.4 Investment rates.

* * * * *

(b) *Maximum Investment Rate—*

(1) *General rule.* Except as otherwise provided by this paragraph (b) or paragraph (c) of this section, the maximum EDA Investment Rate for all Projects shall be determined in accordance with Table 1 in paragraph (b)(1)(ii) of this subsection. The maximum EDA Investment Rate shall not exceed the sum of 50 percent, plus up to an additional 30 percent based on the relative needs of the Region in which the Project is located, as determined by EDA.

* * * * *

(ii) *Table 1.* Table 1 of this paragraph sets forth the maximum allowable Investment Rate for Projects located in Regions subject to certain levels of economic distress. In cases where Table 1 produces divergent results (*i.e.*, where Table 1 produces more than one maximum allowable Investment Rate based on the Region's levels of economic distress), the higher Investment Rate produced by Table 1 shall be the maximum allowable Investment Rate for the Project.

TABLE 1

Projects located in Regions in which:	Maximum allowable investment rates (percentage)
(A) The 24-month unemployment rate is at least 225% of the national average; or	80
(B) The per capita income is not more than 50% of the national average	80
(C) The 24-month unemployment rate is at least 200% of the national average; or	70
(D) The per capita income is not more than 60% of the national average	70
(E) The 24-month unemployment rate is at least 175% of the national average; or	60
(F) The per capita income is not more than 65% of the national average	60
(G) The 24-month unemployment rate is at least one percentage point greater than the national average; or	50
(H) The per capita income is not more than 80% of the national average	50

(2) *Projects subject to a Special Need.* EDA shall determine the maximum allowable Investment Rate for Projects subject to a Special Need (as determined by EDA pursuant to § 301.3(a)(1)(iii)) based on the actual or threatened overall economic situation of the Region in which the Project is located. However, unless the Project is eligible for a higher Investment Rate pursuant to paragraph (b)(5) of this section, the maximum allowable Investment Rate for any Project subject to a Special Need shall be 80 percent.

(3) * * *

(i) The minimum Investment Rate for Projects under part 303 of this chapter shall be 50 percent.

(ii) Except as otherwise provided in paragraph (b)(3)(iii) of this section or in paragraph (b)(5) of this section, the maximum allowable Investment Rate for Projects under part 303 of this chapter shall be the maximum allowable Investment Rate set forth in Table 1 for the most economically distressed county or other equivalent political unit (e.g., parish) within the Region. The

maximum allowable Investment Rate shall not exceed 80 percent.

(iii) In compelling circumstances, the Assistant Secretary may waive the application of the first sentence in paragraph (b)(3)(ii) of this section.

(4) *Projects under part 306.* Except as otherwise provided in paragraph (b)(5) of this section, the maximum allowable Investment Rate for Projects under part 306 of this chapter shall generally be determined based on the relative needs (as determined under paragraph (b)(1) of this section) of the Region which the

Project will serve. As specified in section 204(c)(3) of PWEDA, the Assistant Secretary has the discretion to

establish a maximum Investment Rate of up to 100 percent where the Project:

* * * * *

(5) *Special Projects*. Table 2 of this paragraph sets forth the maximum allowable Investment Rate for certain special Projects as follows:

TABLE 2

Projects	Maximum allowable investment rates (percentage)
Projects that involve broad Regional planning and coordination with other entities outside the Eligible Applicant's political jurisdiction or area of authority, under special circumstances determined by EDA	
Projects that effectively leverage other Federal Agency resources	80
Projects of Indian Tribes	100
Projects for which EDA receives appropriations under section 703 of PWEDA (42 U.S.C. 3233) and Projects to address and implement post-disaster economic recovery efforts in Presidentially Declared Disaster areas in a timely manner	100
Projects of States or political subdivisions of States that the Assistant Secretary determines have exhausted their effective taxing and borrowing capacity, or Projects of non-profit organizations that the Assistant Secretary determines have exhausted their effective borrowing capacity	100
Projects under parts 305 or 307 that receive performance awards pursuant to § 308.2 of this chapter	100
Projects located in a District that receive planning performance awards pursuant to § 308.3 of this chapter	100

(c) Federal Funding Opportunity announcements may provide additional Investment Rate criteria and standards to ensure that the level of economic distress of a Region, rather than a preference for a geographic area or a specific type of economic distress, is the primary factor in allocating Investment Assistance.

9. Revise the section heading, paragraph (a) introductory text and paragraph (b) of § 301.6 to read as follows:

§ 301.6 Supplementary Investment Assistance.

(a) Pursuant to a request made by an Eligible Applicant, EDA Investment Assistance may supplement a grant awarded in another “designated Federal grant program,” if the Eligible Applicant qualifies for financial assistance under such program, but is unable to provide the required non-Federal share because of the Eligible Applicant’s economic situation. For purposes of this section, a “designated Federal grant program” means a Federal grant program that:

* * * * *

(b) For a Project that meets the economic distress criteria provided in § 301.3(a), the Investment Assistance, combined with funds from a designated Federal grant program, may be at the maximum allowable Investment Rate, even if the designated Federal grant program has a lower grant rate. If the designated Federal grant program has a grant rate higher than the maximum EDA Investment Rate, the EDA Investment and other Federal funds together may exceed the EDA Investment Rate, provided that the EDA share of total funding does not exceed

the maximum allowable Investment Rate.

10. Revise paragraph (a) of § 301.7 as follows:

§ 301.7 Investment Assistance application.

(a) The EDA Investment Assistance process begins with the submission of an application. The *Application for Investment Assistance* (Form ED-900 or any successor form) may be obtained electronically from <http://www.grants.gov> or from the appropriate regional office. In general, EDA accepts applications on a continuing basis and competitively evaluates all applications received in quarterly funding cycles throughout the fiscal year. Subject to the availability of funds, the timing in which EDA receives complete and competitive applications affects EDA’s ability to participate in a given Project. EDA will evaluate all applications in accord with the criteria set forth in the applicable FFO and in § 301.8 and will:

(1) Return the application to the applicant for specified deficiencies and suggest resubmission after corrections are made; or

(2) Deny the application for specifically stated reasons and notify the applicant.

* * * * *

11. Revise § 301.8 to read as follows:

§ 301.8 Application evaluation criteria.

EDA will screen all applications for the feasibility of the budget presented and conformance with EDA’s statutory and regulatory requirements. EDA will assess the economic development needs of the affected Region in which the proposed Project will be located (or will service), as well as the capability of the Eligible Applicant to implement the

proposed Project. In addition to criteria set out in the applicable FFO, EDA will consider the degree to which an Investment in the proposed Project will satisfy one or more of the following criteria:

(a) *Ensures collaborative Regional innovation*. The Investment will support the development and growth of innovation clusters based on existing Regional competitive strengths. Such initiatives must engage stakeholders; facilitate collaboration among urban, suburban, and rural (including Tribal) areas; provide stability for economic development through long-term intergovernmental and public/private collaboration; and support the growth of existing and emerging industries.

(b) *Leverages public-private partnerships*. The Investment will use both public and private sector resources and leverage complementary investments by other government/public entities or non-profit organizations.

(c) *Advances national strategic priorities*. The Investment will encourage job growth and business expansion in clean energy; green technologies; sustainable manufacturing; information technology infrastructure; communities severely impacted by automotive industry restructuring; natural disaster mitigation and resiliency; access to capital for small- and medium-sized and ethnically diverse enterprises; and innovations in science, health care, and alternative fuel technologies.

(d) *Enhances global competitiveness*. The Investment will support high-growth businesses and innovation-based entrepreneurs to expand and compete in global markets.

(e) *Encourages environmentally sustainable development.* The Investment will encompass best practices in “environmentally sustainable development,” broadly defined to include projects that enhance environmental quality and develop and implement green products, processes, and buildings as part of the green economy.

(f) *Supports economically distressed and underserved communities.* The Investment will strengthen diverse communities that have suffered disproportionate economic and job losses or are rebuilding to become more competitive in the global economy.

12. Revise § 301.9 to read as follows:

§ 301.9 Application selection criteria.

(a) EDA will review completed application materials for compliance with the requirements set forth in PWEDA, this chapter, the applicable FFO, and other applicable Federal statutes and regulations. From those applications that meet EDA’s technical and legal requirements, EDA will select applications based on the:

- (1) Availability of funds;
- (2) Competitiveness of the applications in accord with the criteria set forth in § 301.8; and
- (3) Funding priority considerations identified in the applicable FFO.

(b) EDA will endeavor to notify applicants as soon as practicable regarding whether their applications are selected for funding.

13. Amend § 301.10 to revise paragraphs (b), (c) introductory text, and (c)(2), and add paragraph (d) to read as follows:

§ 301.10 Formal application requirements.

* * * * *

(b) Identify the sources of funds, both eligible Federal and non-EDA, and In-Kind Contributions that will constitute the required Matching Share for the Project (*see* the Matching Share requirements under § 301.5); and

(c) For Projects under parts 305 or 307 of this chapter, include a CEDS acceptable to EDA pursuant to part 303 of this chapter or otherwise incorporate by reference a current CEDS that EDA approves for the Project. The requirements stated in the preceding sentence shall not apply to:

* * * * *

(2) A Project located in a Region designated as a Special Impact Area pursuant to part 310 of this chapter.

(d) Projects that propose the construction of a business, technology, or other type of incubator or accelerator, must include a feasibility study demonstrating the need for the Project

and an operational plan based on industry best practices demonstrating the Eligible Applicant’s plan for ongoing successful operations. EDA will provide further guidance in the applicable FFO. EDA may require the Recipient to demonstrate that the feasibility study has been conducted by an impartial third party, as determined by EDA.

14. Add § 301.11 to subpart E of part 301 to read as follows:

§ 301.11 Infrastructure.

(a) EDA will fund both construction and non-construction infrastructure necessary to meet a Region’s strategic economic development goals and needs, which in turn results in job creation. This includes infrastructure to develop and upgrade basic economic development assets as described in §§ 305.1 and 305.2 of this chapter, such as utility facilities, as well as infrastructure that supports innovation and entrepreneurship. The following are examples of innovation- and entrepreneurship-related infrastructure that support job creation:

(1) *Business Incubation.* Business incubation includes both physical facilities and business support services to advance the successful development of start-up companies by providing entrepreneurs with an array of targeted resources and services.

(2) *Business Acceleration.* Business acceleration includes both physical facilities and an array of business support services to help new and existing businesses develop new processes or products, get products and services to market more efficiently, expand market opportunities, or increase sales and exports.

(3) *Venture Development Organization.* A venture development organization (“VDO”) works to ensure that Regional economies operate as smoothly and efficiently as possible in support of innovation-based entrepreneurship. A VDO may make strategic investments of time, talent, and other resources toward innovation, entrepreneurship, and technology to help nurture and grow promising companies and ideas, thereby promoting and taking advantage of the innovation assets of a Region and addressing the needs of the high-growth, innovation-oriented start-up companies in the Region.

(4) *Proof of Concept Center.* A proof of concept center serves as a hub of collaborative and entrepreneurial activity designed to accelerate the commercialization of innovations into the marketplace. Such centers support innovation-based, high growth entrepreneurship through a range of

services, including technology and market evaluation, business planning and mentorship, network development, and early stage access to capital.

(5) *Technology Transfer.* Technology transfer is the process of transferring scientific findings from one organization to another for the purpose of further development and commercialization.

The process typically includes: Identifying new technologies; protecting technologies through patents and copyrights; and forming development and commercialization strategies, such as marketing and licensing, for existing private sector companies or creating start-up companies based on the technology.

(b) In general, successful Projects, including innovation- and entrepreneurship-related infrastructure, require the engagement of a broad range of Regional stakeholders and resources. Therefore through appropriate FFOs, EDA will seek to advance interagency coordination by funding Projects that demonstrate effective leveraging of other Federal Agency resources based on a Region’s strategic economic development goals and needs. For all types of Projects, EDA assistance may not be used to provide direct venture capital to a for-profit entity because of the restrictions set out in section 217 of PWEDA (42 U.S.C. 3154c) and part 309 of this chapter. Nonetheless, EDA may consider an application more competitive if it includes measures to address the need to provide entrepreneurs with access to early stage capital outside of the proposed EDA Project budget. *See* § 301.8(b).

PART 302—GENERAL TERMS AND CONDITIONS FOR INVESTMENT ASSISTANCE

15. The authority citation for part 302 continues to read as follows:

Authority: 19 U.S.C. 2341 *et seq.*; 42 U.S.C. 3150; 42 U.S.C. 3152; 42 U.S.C. 3153; 42 U.S.C. 3192; 42 U.S.C. 3193; 42 U.S.C. 3194; 42 U.S.C. 3211; 42 U.S.C. 3212; 42 U.S.C. 3216; 42 U.S.C. 3218; 42 U.S.C. 3220; 42 U.S.C. 5141; Department of Commerce Delegation Order 10–4.

16. Revise § 302.1 to read as follows:

§ 302.1 Environment.

EDA will undertake environmental reviews of Projects in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190; 42 U.S.C. 4321 *et seq.*, as implemented under 40 CFR chapter V) (“NEPA”), and all applicable Federal environmental statutes, regulations, and Executive Orders. These authorities include the

implementing regulations of NEPA requiring EDA to provide public notice of the availability of Project-specific environmental documents, such as environmental impact statements, environmental assessments, findings of no significant impact, and records of decision, to the affected or interested public, as specified in 40 CFR 1506.6(b). Depending on the Project's location, environmental information concerning specific Projects may be obtained from the individual serving as the Environmental Officer in the appropriate EDA regional office listed in the applicable FFO.

17. Revise the introductory text of § 302.3 to read as follows:

§ 302.3 Project servicing for loans, loan guaranties and Investment Assistance.

EDA will provide Project servicing to borrowers who received EDA loans or EDA-guaranteed loans and to lenders who received EDA loan guaranties under an EDA-administered program. Project servicing includes loans made under PWEDA prior to the effective date of the Economic Development Administration Reform Act of 1998, the Trade Act, and the Community Emergency Drought Relief Act of 1977 (Pub. L. 95–31; 42 U.S.C. 5184 note).

* * * * *

18. Revise § 302.6 to read as follows:

§ 302.6 Additional requirements; Federal policies and procedures.

Recipients are subject to all Federal laws and to Federal, Department, and EDA policies, regulations, and procedures applicable to Federal financial assistance awards, including 15 CFR part 14, the Uniform Administrative Requirements for Grants and Cooperative Agreements with Institutions of Higher Education, Hospitals, Other Non-Profit and Commercial Organizations, and 15 CFR part 24, the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, as applicable.

19. Revise § 302.8 to read as follows:

§ 302.8 Pre-approval Investment Assistance costs.

Project activities carried out before approval of Investment Assistance shall be carried out at the sole risk of the Eligible Applicant. Such activity is subject to the rejection of the application, the disallowance of costs, or other adverse consequences as a result of non-compliance with EDA or Federal requirements, including procurement requirements, civil rights requirements, Federal labor standards, or Federal environmental, historic preservation, and related requirements.

20. Revise § 302.9 to read as follows:

§ 302.9 Inter-governmental review of projects.

(a) When an Eligible Applicant is not a State, Indian Tribe, or other general purpose governmental authority, the Eligible Applicant must afford the appropriate general purpose local governmental authority (the “Authority”) in the Region a minimum of 15 days to review and comment on a proposed Project under EDA’s Public Works and Economic Development program or a proposed construction Project or RLF Grant under EDA’s Economic Adjustment Assistance program. Under these programs, the Eligible Applicant shall furnish the following with its application:

(1) If no comments are received from the Authority, a statement of efforts made to obtain such comments; or

(2) If comments are received from the Authority, a copy of the comments and a statement of any actions taken to address such comments.

(b) As required by 15 CFR part 13 and Executive Order 12372, “Intergovernmental Review of Federal Programs,” as amended, if a State has adopted a process under Executive Order 12372 to review and coordinate proposed Federal financial assistance and direct Federal development (commonly referred to as the “single point of contact review process”), all Eligible Applicants also must give State and local governments a reasonable opportunity to review and comment on the proposed Project, including review and comment from area-wide planning organizations in metropolitan areas, as provided for in 15 CFR part 13.

21. Revise § 302.10 to read as follows:

§ 302.10 Attorneys’ and consultants’ fees, employment of expeditors, and post-employment restriction.

(a) *Employment of expeditors.* Investment Assistance awarded under PWEDA shall not directly or indirectly reimburse any attorneys’ or consultants’ fees incurred in connection with obtaining Investment Assistance and contracts under PWEDA. Such Investment Assistance shall not be awarded to any Eligible Applicant, unless the owners, partners, or officers of the Eligible Applicant certify to EDA the names of any attorneys, agents, and other persons engaged by or on behalf of the Eligible Applicant for the purpose of expediting an application made to EDA in connection with obtaining Investment Assistance under PWEDA and the fees paid or to be paid to the person(s) for expediting the application.

(b) *Post-employment restriction.* (1) In general, any Eligible Applicant that is a

non-profit organization, District Organization, or for-profit entity, for the two-year period beginning on the date on which the Investment Assistance under PWEDA is awarded to the Eligible Applicant, must refrain from employing, offering any office or employment to, or retaining for professional services any person who, on the date on which the Investment Assistance is awarded or within the one-year period ending on that date:

(i) Served as an officer, attorney, agent, or employee of the Department; and

(ii) Occupied a position or engaged in activities that the Assistant Secretary determines involved discretion with respect to the award of Investment Assistance under PWEDA.

(2) In addition to the types of Eligible Applicants noted in this paragraph (b), EDA may require another Eligible Applicant to execute an agreement to abide by the above-described post-employment restriction on a case-by-case basis; for example, when an institution of higher education implements activities under or related to the Investment Assistance through a separate non-profit organization or association.

22. Revise § 302.11 to read as follows:

§ 302.11 Economic development information clearinghouse.

Pursuant to section 502 of PWEDA, EDA maintains an economic development information clearinghouse on its Internet Web site at <http://www.eda.gov>.

23. Revise the heading of § 302.15 to read as follows:

§ 302.15 Acceptance of certifications made by Eligible Applicants.

* * * * *

24. Revise § 302.16 to read as follows:

§ 302.16 Accountability.

(a) *General.* Each Recipient must submit reports to EDA at intervals and in the manner that EDA shall require, except that EDA shall not require any report to be submitted more than ten years after the date of closeout of the Investment Assistance.

(b) *Data on Project effectiveness.* Each report must contain a data-specific evaluation of the effectiveness of the Investment Assistance provided in fulfilling the Project’s purpose (including alleviation of economic distress and meeting Project goals) and in meeting the objectives of PWEDA. Data used by a Recipient in preparing reports shall be accurate and verifiable as determined by EDA, and from independent sources (whenever

possible). EDA will use this data and report to fulfill its performance measurement reporting requirements under the Government Performance and Results Act of 1993, as amended (Pub. L. 103–62) and to monitor internal, Investment, and Project performance through an internal performance measurement system.

(c) *Reporting Project service benefits.* To enable EDA to determine the economic development effect of a Project that provides service benefits, EDA may require the Recipient to submit a Project service map and information from which to determine whether services are provided to all segments of the Region being assisted.

(d) *Consequences for failure to undertake good faith efforts.* (1) The Recipient must undertake good faith efforts to fulfill the purpose of the Project as set out in the terms and conditions of the Investment Assistance and must report regularly on Project goals. In the event that EDA determines that the Recipient is failing to make good faith efforts to meet these goals, or otherwise is failing to meet its obligations under the Investment Assistance, EDA shall take necessary actions to protect EDA's interest in the Project, including the following:

(i) Discontinue disbursement of funds pending correction;

(ii) Suspend the Investment Assistance;

(iii) Terminate the Investment Assistance;

(iv) Require reimbursement of the EDA share of the Project; or

(v) Institute formal Government-wide debarment and suspension proceedings against the Recipient.

(2) Before making a determination under this subsection, EDA shall provide the Recipient with reasonable notice and opportunity to respond. A determination under this subsection is final and cannot be appealed.

25. Revise paragraphs (a), (b)(2), and (c)(2) and (3) of § 302.17 to read as follows:

§ 302.17 Conflicts of interest.

(a) *General.* It is EDA's and the Department's policy to maintain the highest standards of conduct to prevent conflicts of interest in connection with the award of Investment Assistance or its use for reimbursement or payment of costs (e.g., procurement of goods or services) by or to the Recipient. A conflict of interest generally exists when an Interested Party participates in a matter that has a direct and predictable effect on the Interested Party's personal or financial interests. A conflict also may exist where there is an appearance

that an Interested Party's objectivity in performing his or her responsibilities under the Project is impaired. For example, an appearance of impairment of objectivity may result from an organizational conflict where, because of other activities or relationships with other persons or entities, an Interested Party is unable to render impartial assistance, services, or advice to the Recipient, a participant in the Project, or to the Federal government. Additionally, a conflict of interest may result from non-financial gain to an Interested Party, such as benefit to reputation or prestige in a professional field.

(b) * * *

(2) An Interested Party also shall not, directly or indirectly, solicit or accept any gift, gratuity, favor, entertainment, or other benefit having monetary value, for himself or herself or for another person or entity, from any person or organization which has obtained or seeks to obtain Investment Assistance from EDA.

* * * * *

(c) * * *

(2) A Recipient of an RLF Grant shall not lend RLF funds to an Interested Party; and

(3) Former board members of a Recipient of an RLF Grant and members of his or her Immediate Family shall not receive a loan from such RLF for a period of two years from the date that the board member last served on the RLF's board of directors.

26. Revise § 302.18 to read as follows:

§ 302.18 Post-approval requirements.

A Recipient must comply with all financial, performance, progress report, and other requirements set forth in the terms and conditions of the Investment Assistance, including any special award conditions and applicable Federal cost principles (collectively, "*Post-Approval Requirements*"). A Recipient's failure to comply with Post-Approval Requirements may result in the disallowance of costs, termination of the Investment Assistance award, or other adverse consequences to the Recipient.

27. Revise paragraph (b)(1) of § 302.20 to read as follows:

§ 302.20 Civil rights.

* * * * *

(b) *Definitions.*

(1) For purposes of this section, an "*Other Party*" means an "other party subject to this part," as defined in 15 CFR 8.3(l), and includes an entity which (or which is intended to) creates and/or saves 15 or more permanent jobs as a result of Investment Assistance; provided that such entity also is either

specifically named in the application as benefiting from the Project, or is or will be located in an EDA building; port; facility; or industrial, commercial, or business park constructed or improved in whole or in part with Investment Assistance prior to EDA's final disbursement of award funds.

* * * * *

PART 303—PLANNING INVESTMENTS AND COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGIES

28. The authority citation for part 303 continues to read as follows:

Authority: 42 U.S.C. 3143; 42 U.S.C. 3162; 42 U.S.C. 3174; 42 U.S.C. 3211; Department of Commerce Organization Order 10–4.

29. Designate §§ 303.1 through 303.5 as subpart A and add a heading for subpart A to read as follows:

Subpart A—General

30. Revise the section heading and introductory text of § 303.1 to read as follows:

§ 303.1 Overview of EDA's Planning Program.

The purpose of EDA Planning Investments is to provide support to Planning Organizations for the development, implementation, revision, or replacement of Comprehensive Economic Development Strategies, and for related State plans and short-term Planning Investments designed to create and retain new and better jobs, particularly for the unemployed and underemployed in the nation's most economically distressed Regions. EDA's Planning Investments support partnerships with District Organizations, Indian Tribes, community development corporations, non-profit Regional planning organizations, and other Eligible Recipients. Planning activities supported by these Investments must be part of a continuous process involving the active participation of the private sector, public officials, non-profit organizations, educational institutions, and private citizens, and include:

* * * * *

31. Revise paragraphs (a)(5) and (c) of § 303.3 to read as follows:

§ 303.3 Application requirements and evaluation criteria.

(a) * * *

(5) Feasibility of the proposed scope of work to create and retain new and better jobs through implementation of the CEDS.

* * * * *

(c) For Planning Investment awards to a State, the Assistant Secretary also

shall consider the extent to which the State will integrate and coordinate its CEDS with local and Economic Development District plans.

* * * * *

32. Revise paragraphs (a) and (c) of § 303.4 to read as follows:

§ 303.4 Award requirements.

(a) Planning Investments shall be coordinated with and effectively leverage any other available Federal, State, or local planning assistance and private sector investments.

* * * * *

(c) EDA will provide a Planning Investment for the period of time required to develop, revise or replace, and implement a CEDS, generally in 36-month renewable Investment project periods.

33. Designate §§ 303.6 and 303.7 as subpart B and add a heading for subpart B to read as follows:

Subpart B—Partnership Planning Assistance

34. Revise § 303.6 to read as follows:

§ 303.6 Partnership Planning and the EDA-funded CEDS process.

(a) *Partnership Planning overview.* Partnership Planning Investments support a nationwide network of Planning Organizations to provide comprehensive economic development planning services to distressed Regions. EDA makes Partnership Planning Investments to enable Planning Organizations to manage and coordinate the development and implementation of CEDS to address the unique needs of their respective Regions.

(b) *CEDS process.* If EDA awards Investment Assistance to a Planning Organization to develop, revise, or replace a CEDS, the Planning Organization must follow the procedures set forth in this section:

(1) *CEDS Strategy Committee.* The Planning Organization must appoint a Strategy Committee. The Strategy Committee must represent the main economic interests of the Region, including the private sector, public officials, community leaders, private individuals, representatives of workforce development boards, institutions of higher education, minority and labor groups, and others who can contribute to and benefit from improved economic development in the relevant Region. In addition, the Strategy Committee must demonstrate the capacity to undertake a collaborative and effective planning process. The Strategy Committee representing Indian Tribes or States may vary.

(2) *Public notice and comment.* The Planning Organization must develop and submit to EDA a CEDS that complies with the requirements of § 303.7. Before submission of the CEDS to EDA, the Planning Organization must provide the public and appropriate governments and interest groups in the relevant Region with adequate notice of and opportunity to comment on the CEDS. The comment period shall be at least 30 days and the Planning Organization shall make the CEDS readily available through appropriate means of distribution, electronically and otherwise, throughout the comment period. The Planning Organization also shall make the CEDS available in hardcopy upon request. EDA may require the Planning Organization to provide any comments received and demonstrate how the comments were resolved.

(3) *Reports and updates.*

(i) After obtaining EDA approval of the CEDS, the Planning Organization must submit annually an updated CEDS performance report to EDA.

(ii) The Planning Organization must submit a new or revised CEDS to EDA at least every five years, unless EDA or the Planning Organization determines that a new or revised CEDS is required earlier due to changed circumstances.

(iii) Any updated CEDS performance report that results in a change of the requirements set forth in § 303.7(b)(1)(iii) of the EDA-accepted CEDS or any new or revised CEDS, must be available for review and comment by the public in accordance with paragraph (b)(2) of this section.

(4) *Inadequate CEDS.* If EDA determines that implementation of the CEDS is inadequate, it will notify the Planning Organization in writing and the Planning Organization shall submit to EDA a new or revised CEDS.

(5) *Regional Commission notification.* If any part of a Region is covered by one or more of the Regional Commissions as set forth in section 404 of PWEDA, the Planning Organization shall ensure that a copy of the CEDS is provided to the Regional Commission(s).

35. Revise paragraph (b) of § 303.7 to read as follows:

§ 303.7 Requirements for Comprehensive Economic Development Strategies.

* * * * *

(b) *Strategy requirements.* (1) A CEDS must be the result of a comprehensive and continuous economic development planning process, developed with broad-based and diverse public and private sector participation. Consistent with section 302 of PWEDA, each CEDS must promote Regional economic

resiliency and be unique and responsive to the relevant Region. Each CEDS must include:

(i) A summary of economic development conditions of the Region;

(ii) An in-depth analysis of economic and community strengths, weaknesses, opportunities, and threats (commonly known as a “SWOT” analysis);

(iii) Strategies and an implementation plan to build upon the Region’s strengths and opportunities and resolve the weaknesses and threats facing the Region, which should not be inconsistent with applicable State and local economic development or workforce development strategies; and

(iv) Performance measures used to evaluate the Planning Organization’s successful development and implementation of the CEDS.

(2) EDA will publish and periodically update specific CEDS content guidelines.

* * * * *

36. Designate §§ 303.8 and 303.9 as subpart C and add a heading for subpart C to read as follows:

Subpart C—State and Short-Term Planning Assistance

37. Revise paragraphs (a) introductory text and (b) of § 303.9 to read as follows:

§ 303.9 Requirements for short-term Planning Investments.

(a) In addition to providing support for CEDS and State plans, EDA also may provide Investment Assistance to support short-term planning activities. EDA may provide such Investment Assistance to:

* * * * *

(b) Eligible activities may include updating a portion of a CEDS, economic analysis, development of economic development policies and procedures, and development of economic development goals.

* * * * *

PART 304—ECONOMIC DEVELOPMENT DISTRICTS

38. The authority citation for part 304 continues to read as follows:

Authority: 42 U.S.C. 3122; 42 U.S.C. 3171; 42 U.S.C. 3172; 42 U.S.C. 3196; Department of Commerce Organization Order 10–4.

39. Revise paragraph (a) and the introductory text to paragraph (c) of § 304.1 to read as follows:

§ 304.1 Designation of Economic Development Districts: Regional eligibility.

* * * * *

(a) Contains at least one geographic area that is subject to the economic

distress criteria set forth in § 301.3(a)(1) of this chapter and is identified in an approved CEDS;

* * * *

(c) Has an EDA-approved CEDS that:

* * * *

40. Revise paragraphs (c)(1), (c)(2), and (c)(4)(i) of § 304.2 to read as follows:

§ 304.2 District Organizations: Formation, organizational requirements and operations.

* * * *

(c) *Organization and governance.*

(1) Each District Organization must meet the requirements of this paragraph (c) concerning membership composition, the maintenance of adequate staff support to perform its economic development functions, and its authorities and responsibilities for carrying out economic development functions. The District Organization's board of directors (or other governing body) also must meet these requirements.

(2) The District Organization must demonstrate that its governing body is broadly representative of the principal economic interests of the Region, including the private sector, public officials, community leaders, representatives of workforce development boards, institutions of higher education, minority and labor groups, and private individuals. In addition, the governing body must demonstrate the capacity to implement the EDA-approved CEDS.

* * * *

(4) * * *

(i) The District Organization must hold meetings open to the public at least twice a year and also shall publish the date and agenda of such meetings sufficiently in advance to allow the public a reasonable time to prepare in order to participate effectively.

* * * *

41. Revise paragraph (b) introductory text of § 304.3 to read as follows:

§ 304.3 District modification and termination.

* * * *

(b) *Termination.* EDA may, upon 60 days prior written notice to the District Organization, member counties, and other areas determined by EDA and each affected State, terminate a Region's designation as an Economic Development District when:

* * * *

42. Revise paragraphs (a) introductory text, (a)(3), and (b) of § 304.4 to read as follows:

§ 304.4 Performance evaluations.

(a) EDA shall evaluate the management standards, financial accountability and program performance of each District Organization within three years after the initial Investment award and at least once every three years thereafter, so long as the District Organization continues to receive Investment Assistance. EDA's evaluation shall assess:

* * * *

(3) The implementation of the CEDS, including the District Organization's performance and contribution towards the retention and creation of employment, as set forth in § 303.7 of this chapter.

(b) For peer review, EDA shall ensure the participation of at least one other District Organization in the performance evaluation on a cost-reimbursement basis.

PART 305—PUBLIC WORKS AND ECONOMIC DEVELOPMENT INVESTMENTS

43. The authority citation for part 305 continues to read as follows:

Authority: 42 U.S.C. 3211; 42 U.S.C. 3141; Department of Commerce Organization Order 10–4.

44. Revise § 305.1 to read as follows:

§ 305.1 Purpose and scope.

Public Works and Economic Development Investments (“*Public Works Investments*”) intend to help the nation's most distressed communities revitalize, expand, and upgrade their physical infrastructure to attract new industry, encourage business expansion, diversify local economies, and generate or retain long-term private sector jobs and investments. The primary goal of these Investments is to create new or retain existing, long-term private sector job opportunities in communities experiencing significant economic distress as evidenced by chronic high unemployment, underemployment, low per capita income, outmigration, or a Special Need. These Investments also intend to assist communities in attracting private capital investment and new and better job opportunities and to promote the successful long-term economic recovery of a Region.

45. Revise paragraph (c) of § 305.2 to read as follows:

§ 305.2 Award requirements.

* * * *

(c) Not more than 15 percent of the annual appropriations made available to EDA to fund Public Works Investments may be made in any one State.

46. Revise paragraphs (a) introductory text, (a)(1), and (b) of § 305.6 to read as follows:

§ 305.6 Allowable methods of procurement for construction services.

(a) Recipients shall seek EDA's prior written approval to use alternate construction procurement methods to the traditional design/bid/build procedures (including lump sum or unit price-type construction contracts). These alternate methods may include design/build, construction management at risk, and force account. If an alternate method is used, the Recipient shall submit to EDA for approval a construction services procurement plan and the Recipient must use a design professional to oversee the process. The Recipient shall submit the plan to EDA prior to advertisement for bids and shall include the following, as applicable:

(1) Justification for the proposed method for procurement of construction services, including a brief analysis of the appropriateness and benefits of using the method to successfully execute the Project and the Recipient's experience in using the method;

* * * *

(b) For all procurement methods, the Recipient must comply with the procedures and standards set forth in 15 CFR parts 14 or 24, as applicable.

47. Revise paragraphs (a) and (c) of § 305.8 to read as follows:

§ 305.8 Recipient-furnished equipment and materials.

* * * *

(a) EDA must approve any use of Recipient-furnished equipment and materials. EDA may require that major equipment items be subject to a lien in favor of EDA and also may require a statement from the Recipient regarding expected useful life and salvage value of such equipment;

* * * *

(c) Acquisition of Recipient-furnished equipment or materials under this section also is subject to the requirements of 15 CFR parts 14 or 24, as applicable.

48. Revise § 305.10 to read as follows:

§ 305.10 Bid underrun and overrun.

(a) *Underrun.* If at the construction contract bid opening, the lowest responsive bid is less than the total Project cost, the Recipient shall notify EDA immediately to determine relevant procedures.

(b) *Overrun.*

(1) In the case of an overrun at the construction contract bid opening, the Recipient may:

(i) If provided for in the bid documents, take deductive alternatives

to eliminate certain Project elements in case of insufficient funds in the exact order shown on the invitation for bid until at least one of the responsive bids, less deductive alternative(s), results in a price within the budget for that item of work;

(ii) Reject all bids and re-advertise if there is a rational basis to expect that re-advertising will result in a lower bid; or

(iii) Augment the Matching Share by an amount sufficient to cover the excess cost. The Recipient must furnish a letter to EDA identifying the source of the additional funds and confirming that the Matching Share meets the requirements of § 301.5 of this chapter.

(2) If the Recipient demonstrates to EDA's satisfaction that the options listed in paragraph (b)(1) of this section are not feasible and the Project cannot be completed otherwise, the Recipient may submit a written request to EDA for additional funding in accordance with applicable EDA guidance. The award of additional Investment Assistance is at EDA's sole discretion and will be considered in accord with EDA's competitive process requirements. EDA's consideration of a request for additional Investment Assistance does not indicate approval.

PART 306—TRAINING, RESEARCH AND TECHNICAL ASSISTANCE INVESTMENTS

49. The authority citation for part 306 continues to read as follows:

Authority: 42 U.S.C. 3147; 42 U.S.C. 3196; 42 U.S.C. 3211; Department of Commerce Organization Order 10–4.

50. Revise paragraph (a) introductory text of § 306.1 to read as follows:

§ 306.1 Purpose and scope.

(a) Local and National Technical Assistance Investments may be awarded to:

* * * * *

51. Revise paragraph (a) of § 306.3 to read as follows:

§ 306.3 Application requirements.

(a) EDA will provide Investment Assistance under this subpart for the period of time required to complete the Project's scope of work, generally not to exceed 12 to 18 months.

* * * * *

52. Revise § 306.4 to read as follows:

§ 306.4 Purpose and scope.

The University Center Economic Development Program is intended to help improve the economies of distressed Regions. Institutions of higher education have many assets, such as faculty, staff, libraries,

laboratories, and computer systems that can address local economic problems and opportunities. With Investment Assistance, institutions of higher education establish and operate research centers ("University Centers") that provide technical assistance to public and private sector organizations with the goal of enhancing local economic development.

53. Revise paragraph (d) of § 306.6 to read as follows:

§ 306.6 Application requirements.

* * * * *

(d) At least 80 percent of EDA funding must be allocated to direct costs of program delivery.

54. Revise paragraphs (a)(1) and (c) of § 306.7 to read as follows:

§ 306.7 Performance evaluations of University Centers.

(a) * * *

(1) Evaluate each University Center within three years after the initial Investment award and at least once every three years thereafter, so long as such University Center continues to receive Investment Assistance; and

* * * * *

(c) For peer review, EDA shall ensure the participation of at least one other University Center in the performance evaluation on a cost-reimbursement basis.

PART 307—ECONOMIC ADJUSTMENT ASSISTANCE INVESTMENTS

55. The authority citation of part 307 continues to read as follows:

Authority: 42 U.S.C. 3211; 42 U.S.C. 3149; 42 U.S.C. 3161; 42 U.S.C. 3162; 42 U.S.C. 3233; Department of Commerce Organization Order 10–4.

56. Revise the introductory text and paragraph (b) of § 307.1 to read as follows:

§ 307.1 Purpose.

The purpose of Economic Adjustment Assistance Investments is to address the needs of communities experiencing adverse economic changes that may occur suddenly or over time, including those caused by:

* * * * *

(b) Federally Declared Disasters;

* * * * *

57. Revise paragraph (b)(2) of § 307.3 as follows:

§ 307.3 Use of Economic Adjustment Assistance Investments.

* * * * *

(b) * * *

(2) Provision of business or infrastructure financing through the

capitalization of Recipient-administered Revolving Loan Funds ("RLFs"), which may include loans and interest rate buy-downs to facilitate business lending activities;

* * * * *

58. Amend § 307.4 to:

a. Revise paragraphs (a), (b), (c)(2), and (d); and

b. Add paragraph (c)(3) to read as follows:

§ 307.4 Award requirements.

(a) *General.* EDA will select Economic Adjustment Assistance Projects in accordance with part 301 of this chapter and the additional criteria provided in paragraphs (b), (c), and (d) of this section, as applicable. Funding priority considerations for Economic Adjustment Assistance, including RLF Grants, may be set forth in an FFO.

(b) *Strategy Grants.* EDA will review Strategy Grant applications to ensure that the proposed activities conform to the CEDS requirements set forth in § 303.7 of this chapter. Strategy Grants shall comply with the applicable provisions of part 303 of this chapter.

(c) * * *

(2) Implementation Grants involving construction shall comply with the provisions of subpart B of part 305 of this chapter.

(3) Implementation Grants that do not involve construction shall comply with the applicable provisions of subpart A of part 306 of this chapter.

(d) *See* § 307.7 for RLF award requirements.

§ 307.6 [Removed]

59. Remove § 307.6.

60. Revise the heading of subpart B to read as follows:

Subpart B—Revolving Loan Fund Program

61. Redesignate § 307.7 as § 307.6 and revise newly redesignated § 307.6 to read as follows:

§ 307.6 Revolving Loan Funds established for business lending.

Economic Adjustment Assistance Grants to capitalize or recapitalize RLFs most commonly fund business lending, but also may fund public infrastructure or other authorized lending activities. The requirements in this subpart B apply to RLFs established for business lending activities. Special award conditions may contain appropriate modifications of these requirements to accommodate non-business RLF awards.

62. Add § 307.7 to read as follows:

§ 307.7 Revolving Loan Fund award requirements.

(a) For Eligible Applicants seeking to capitalize or recapitalize an RLF, EDA will review applications for the following, as applicable:

(1) Need for a new or expanded public financing tool to:

(i) Enhance other business assistance programs and services targeting economic sectors and locations described in the CEDS; or

(ii) Provide appropriate support for post-disaster economic recovery efforts in Presidentially Declared Disaster areas;

(2) Types of financing activities anticipated; and

(3) Capacity of the RLF organization to manage lending activities, create networks between the business community and other financial providers, and implement the CEDS.

(b) RLF Grants shall comply with the requirements set forth in this part and in the following publications:

(1) EDA's RLF Standard Terms and Conditions; and

(2) The Compliance Supplement to OMB Circular A-133. The Compliance Supplement is available via the Internet at <http://www.omb.gov>.

63. Revise paragraphs (a)(2), (b)(2)(ii), (b)(3), (c)(1), and (c)(2) of § 307.9 to read as follows:

§ 307.9 Revolving Loan Fund Plan.

* * * * *

(a) * * *

(2) Part II of the Plan titled "Operational Procedures" must serve as the RLF Recipient's internal operating manual and set out administrative procedures for operating the RLF consistent with "Prudent Lending Practices," as defined in § 307.8, the RLF Recipient's environmental review and compliance procedures as set out in § 307.10, and EDA's conflicts of interest rules set out in § 302.17 of this chapter.

(b) * * *

(2) * * *

(ii) Financing policies and portfolio standards that are consistent with EDA's policies and requirements; and

(3) The Plan must demonstrate an adequate understanding of commercial loan portfolio management procedures, including loan processing, underwriting, closing, disbursements, collections, monitoring, and foreclosures. It also shall provide sufficient administrative procedures to prevent conflicts of interest and to ensure accountability, safeguarding of assets, and compliance with Federal and local laws.

(c) * * *

(1) An RLF Recipient must update its Plan as necessary in accordance with

changing economic conditions in the Region; however, at a minimum, an RLF Recipient must submit an updated Plan to EDA every five years.

(2) An RLF Recipient must notify EDA of any change(s) to its Plan. Any material modification, such as a merger, consolidation, or change in the EDA-approved lending area under § 307.18, a change in critical management staff, or a change to the strategic purpose of the RLF, must be submitted to EDA for approval prior to any revision of the Plan. If EDA approves the modification, the RLF Recipient must submit an updated Plan to EDA in electronic format, unless EDA approves a paper submission.

64. Revise paragraphs (a) and (b) of § 307.10 to read as follows:

§ 307.10 Pre-loan requirements.

(a) RLF Recipients must adopt procedures to review the impacts of prospective loan proposals on the physical environment. The Plan must provide for compliance with applicable environmental laws and other regulations, including parts 302 and 314 of this chapter. The RLF Recipient also must adopt procedures to comply, and ensure that potential borrowers comply, with applicable environmental laws and regulations.

(b) RLF Recipients must ensure that prospective borrowers, consultants, or contractors are aware of and comply with the Federal statutory and regulatory requirements that apply to activities carried out with RLF loans. Accordingly, RLF loan agreements shall include applicable Federal requirements to ensure compliance and RLF Recipients must adopt procedures to diligently correct instances of non-compliance, including loan call stipulations.

* * * * *

65. Revise paragraphs (b), (d), (e), and (f)(2) of § 307.11 to read as follows:

§ 307.11 Disbursement of funds to Revolving Loan Funds.

* * * * *

(b) *Timing of request for disbursements.* An RLF Recipient shall request disbursements of Grant funds only to close a loan or disburse RLF funds to a borrower. The RLF Recipient must disburse the RLF funds to a borrower within 30 days of receipt of the Grant funds. Any Grant funds not disbursed within the 30 day period shall be refunded to EDA pursuant to paragraph (e) of this section.

* * * * *

(d) *Interest-bearing account.* All grant funds disbursed by EDA to the RLF Recipient for loan obligations incurred

but not yet disbursed to an eligible RLF borrower must be deposited and held in an interest-bearing account by the Recipient until an RLF loan is made to a borrower.

(e) *Delays.* If the RLF Recipient receives Grant funds and the RLF loan disbursement is subsequently delayed beyond 30 days, the RLF Recipient must notify the applicable grants officer and return such non-disbursed funds to EDA. Grant funds returned to EDA shall be available to the RLF Recipient for future draw-downs. When returning prematurely drawn Grant funds, the RLF Recipient must clearly identify on the face of the check or in the written notification to the applicable grants officer "EDA," the Grant award number, the words "Premature Draw," and a brief description of the reason for returning the Grant funds.

(f) * * *

(2) When an RLF has a combination of In-Kind Contributions and cash Local Share, the cash Local Share and the Grant funds will be disbursed proportionately as needed for lending activities, provided that the last 20 percent of the Grant funds may not be disbursed until all cash Local Share has been expended. The full amount of the cash Local Share shall remain for use in the RLF.

66. Revise paragraphs (a)(1), (a)(2), and (b) introductory text of § 307.12 to read as follows:

§ 307.12 Revolving Loan Fund Income.

(a) * * *

(1) Such RLF Income and the administrative costs are incurred in the same six-month Reporting Period;

(2) RLF Income that is not used for administrative costs during the six-month Reporting Period is made available for lending activities;

* * * * *

(b) *Compliance guidance.* When charging costs against RLF Income, RLF Recipients must comply with applicable Federal cost principles and audit requirements as found in:

* * * * *

67. Revise paragraphs (a) introductory text, (b)(2), and (b)(3) of § 307.13 to read as follows:

§ 307.13 Records and retention.

(a) *Closed Loan files and related documents.* The RLF Recipient shall maintain Closed Loan files and all related documents, books of account, computer data files, and other records over the term of the Closed Loan and for a three-year period from the date of final disposition of such Closed Loan. The

date of final disposition of a Closed Loan is the date:

* * * * *

(b) * * *

(2) Retain records of administrative expenses incurred for activities and equipment relating to the operation of the RLF for three years from the actual submission date of the last semi-annual report that covers the Reporting Period in which such costs were claimed.

(3) Make available for inspection retained records, including those retained for longer than the required period. The record retention periods described in this section are minimum periods and such prescription does not limit any other record retention requirement of law or agreement. In no event will EDA question claimed administrative costs that are more than three years old, unless fraud is at issue.

68. Revise paragraph (c) of § 307.14 to read as follows:

§ 307.14 Revolving Loan Fund semi-annual report and Income and Expense Statement.

* * * * *

(c) *RLF Income and Expense Statement.* An RLF Recipient using either 50 percent or more (or more than \$100,000) of RLF Income for administrative costs in a six-month Reporting Period must submit to EDA a completed Income and Expense Statement (Form ED-209I or any successor form) for that Reporting Period in electronic format, unless EDA approves a paper submission. EDA may waive this requirement for an RLF Grant with a small RLF Capital base, as determined by EDA.

69. Revise paragraphs (b)(1), (c)(1), (c)(2), and (d)(1) introductory text, and (d)(1)(iii) of § 307.15 to read as follows:

§ 307.15 Prudent management of Revolving Loan Funds.

* * * * *

(b) * * *

(1) Within 60 days prior to the initial disbursement of EDA funds, a qualified independent accountant who preferably has audited the RLF Recipient in accordance with OMB Circular A-133 requirements, shall certify to EDA and the RLF Recipient that such system is adequate to identify, safeguard, and account for all RLF Capital, outstanding RLF loans, and other RLF operations.

* * * * *

(c) * * *

(1) *General rule.* An RLF Recipient may make loans to eligible borrowers at interest rates and under conditions determined by the RLF Recipient to be appropriate in achieving the goals of the RLF. The minimum interest rate an RLF

Recipient may charge is four percentage points below the lesser of the current money center prime interest rate quoted in the *Wall Street Journal*, or the maximum interest rate allowed under State law. In no event shall the interest rate be less than the lower of four percent or 75 percent of the prime interest rate listed in the *Wall Street Journal*.

(2) *Exception.* Should the prime interest rate listed in the *Wall Street Journal* exceed 14 percent, the minimum RLF interest rate is not required to be raised above 10 percent if doing so compromises the ability of the RLF Recipient to implement its financing strategy.

(d) * * *

(1) RLF loans must leverage private investment of at least two dollars for every one dollar of such RLF loans. This leveraging requirement applies to the RLF portfolio as a whole rather than to individual loans and is effective for the duration of the RLF's operation. To be classified as leveraged, private investment must be made within 12 months of approval of an RLF loan, as part of the same business development project, and may include:

* * * * *

(iii) The non-guaranteed portions and 90 percent of the guaranteed portions of a Federal loan, including the U.S. Small Business Administration's 7(A) loans and 504 debenture loans and U.S. Department of Agriculture loans.

* * * * *

70. Revise paragraphs (a)(1), (a)(2)(i), (c)(1), (c)(2)(i), (d)(1) introductory text, and (d)(1)(i) of § 307.16 to read as follows:

§ 307.16 Effective utilization of Revolving Loan Funds.

(a) * * *

(1) RLF loan activity must be sufficient to draw down Grant funds in accordance with the schedule prescribed in the award conditions for loan closings and disbursements to eligible RLF borrowers. The schedule usually requires that the RLF Recipient lend the entire amount of the initial RLF Capital base within three years of the Grant award.

(2) * * *

(i) Closed Loans approved prior to the schedule deadline will commence and complete disbursements within 45 days of the deadline;

* * * * *

(c) * * *

(1) During the Revolving Phase, RLF Recipients must manage their repayment and lending schedules to provide that at all times at least 75

percent of the RLF Capital is loaned or committed, except that EDA may require an RLF Recipient with an RLF Capital base in excess of \$4 million to adopt a Plan that maintains a proportionately higher percentage of its funds loaned.

(2) * * *

(i) *Sequestration of excess funds.* If the RLF Recipient fails to satisfy the capital utilization standard for two consecutive Reporting Periods, EDA may require the RLF Recipient to deposit excess funds in an interest-bearing account. The portion of interest earned on the account holding excess funds attributable to the Federal Share (as defined in § 314.5 of this chapter) of the RLF Grant shall be remitted to the U.S. Treasury. The RLF Recipient must obtain EDA's written authorization to withdraw any sequestered funds.

* * * * *

(d) * * *

(1) EDA shall monitor the RLF Recipient's loan default rate to ensure proper protection of the Federal Share of the RLF property, and request information from the RLF Recipient as necessary to determine whether it is collecting loan repayments and complying with the financial obligations under the RLF Grant. Such information may include:

(i) A written analysis of the RLF Recipient's portfolio, which shall consider the Recipient's RLF Plan, loan and collateral policies, loan servicing and collection policies and procedures, the rate of growth of the RLF Capital base, and

* * * * *

71. Revise paragraphs (b)(6)(ii) and (c) of § 307.17 to read as follows:

§ 307.17 Uses of capital.

* * * * *

(b) * * *

(6) * * *

(ii) RLF Capital will finance the purchase of the rights of a prior lien holder during a foreclosure action which is necessary to preclude a significant loss on an RLF loan. RLF Capital may be used for this purpose only if there is a high probability of receiving compensation from the sale of assets sufficient to cover an RLF's costs plus a reasonable portion of the outstanding RLF loan within a reasonable period of time, as determined by EDA, following the date of refinancing.

(c) *Compliance and Loan Quality Review.* To ensure that the RLF Recipient makes eligible RLF loans consistent with its RLF Plan or such other purposes approved by EDA, EDA

may require an independent third party to conduct a compliance and loan quality review for the RLF Grant every three years. The RLF Recipient may undertake this review as an administrative cost associated with the RLF's operations provided the requirements set forth in § 307.12 are satisfied.

* * * * *

72. Amend § 307.18 to revise the section heading, the heading of paragraph (b), and paragraphs (a)(1), (b)(1) introductory text, (b)(1)(ii), (b)(1)(iii), and (b)(2) introductory text to read as follows:

§ 307.18 Addition of lending areas; consolidation and merger of RLFs.

(a)(1) *Addition of lending areas.* An RLF Recipient shall make loans only within its EDA-approved lending area, as set forth and defined in the RLF Grant and the Plan. An RLF Recipient may add a lending area (an “*Additional Lending Area*”) to its existing lending area to create a new merged lending area (the “*New Lending Area*”) only with EDA's prior written approval and subject to the following provisions and conditions:

(i) The Additional Lending Area must meet the economic distress criteria for Economic Adjustment Assistance Investments under this part and in accordance with § 301.3(a) of this chapter;

(ii) Prior to EDA's disbursement of additional funds to the RLF Recipient (for example, through a recapitalization), EDA shall determine a new Investment Rate for the New Lending Area based on the criteria set forth in § 301.4 of this chapter;

(iii) The RLF Recipient must demonstrate that the Additional Lending Area is consistent with its CEDS, or modify its CEDS for any such Additional Lending Area, in accordance with § 307.9(b)(1);

(iv) The RLF Recipient shall modify its Plan to incorporate the Additional Lending Area and revise its lending strategy, as necessary;

(v) The RLF Recipient shall execute an amended financial assistance award, as necessary; and

(vi) The RLF Recipient fulfills any other conditions reasonably requested by EDA.

* * * * *

(b) *Consolidation and merger of RLFs—*

(1) *Single RLF Recipient.* An RLF Recipient with more than one EDA-funded RLF Grant may consolidate two or more EDA-funded RLFs into one

surviving RLF with EDA's prior written approval and provided:

* * * * *

(ii) It demonstrates a rational basis for undertaking the consolidation (for example, the lending area(s) and borrower criteria identified in different RLF Plans are compatible, or will be compatible, for all RLFs to be consolidated);

(iii) It amends and consolidates its Plan to account for the consolidation of RLFs, including items such as the New Lending Area (including any Additional Lending Area(s)), its lending strategy, and borrower criteria;

* * * * *

(2) *Multiple RLF Recipients.* Two or more RLF Recipients may merge their EDA-funded RLFs into one surviving RLF with EDA's prior written approval and provided:

* * * * *

73. Amend § 307.19 to remove paragraph (b), redesignate paragraphs (c) and (d) as paragraphs (b) and (c), and revise newly designated paragraph (c) to read as follows:

§ 307.19 RLF loan portfolio Sales and Securitizations.

* * * * *

(c) Except as provided in paragraph (b), no provision of this section supersedes or otherwise affects the application of the “securities laws” (as such term is defined in section 3(a)(47) of the Exchange Act) or the rules, regulations or orders issued by the Commission or a self-regulatory organization under the Commission.

74. Revise paragraphs (a) introductory text, (a)(1), (a)(2), and (c)(3) of § 307.20 to read as follows:

§ 307.20 Partial liquidation; liquidation upon termination.

(a) *Partial liquidation or disallowance of a portion of an RLF Grant.* If the RLF Recipient engages in certain problematic practices, EDA may disallow a corresponding proportion of the Grant or direct the RLF Recipient to transfer loans to an RLF Third Party for liquidation. Problematic practices for which EDA may disallow a portion of an RLF Grant and recover the pro-rata Federal Share (as defined in § 314.5 of this chapter) include the RLF Recipient:

(1) Having RLF loans that are more than 120 days delinquent;

(2) Having excess cash sequestered for 12 months or longer and EDA has not approved an extension request;

* * * * *

(c) * * *

(3) EDA may enter into an agreement with the RLF Third Party to liquidate

the assets of one or more RLFs or RLF Recipients;

* * * * *

75. Revise paragraphs (a)(1) introductory text and (a)(1)(viii) of § 307.21 to read as follows:

§ 307.21 Termination of Revolving Loan Funds.

(a)(1) EDA may suspend or terminate an RLF Grant for cause, including the RLF Recipient's failure to:

* * * * *

(viii) Comply with the audit requirements set forth in OMB Circular A–133 and the related Compliance Supplement, including reference to the correctly valued EDA RLF Federal expenditures in the Schedule of Expenditures of Federal Awards (“*SEFA*”), timely submission of audit reports to the Federal Audit Clearinghouse, and the correct designation of the RLF as a “major program” (as that term is defined in OMB Circular A–133);

* * * * *

PART 308—PERFORMANCE INCENTIVES

76. The authority citation for part 308 continues to read as follows:

Authority: 42 U.S.C. 3151; 42 U.S.C. 3154a; 42 U.S.C. 3154b; Department of Commerce Delegation Order 10–4.

77. Revise paragraphs (a), (b) introductory text, (c), and (d) of § 308.2 to read as follows:

§ 308.2 Performance awards.

(a) A Recipient of Investment Assistance under parts 305 or 307 of this chapter may receive a performance award in connection with an Investment made on or after the date of enactment of section 215 of PWEDA in an amount not to exceed 10 percent of the amount of the Investment award.

(b) To receive a performance award, a Recipient must demonstrate Project performance in one or more of the areas listed in this paragraph, weighted at the discretion of the Assistant Secretary:

* * * * *

(c) A Recipient may receive a performance award no later than three years following the Project's closeout.

(d) A performance award may fund up to 100 percent of the cost of an eligible Project or any other authorized activity under PWEDA. For the purpose of meeting the non-Federal share requirement of PWEDA or any other statute, the amount of a performance award shall be treated as non-Federal funds.

* * * * *

78. Revise paragraphs (a) introductory text, (a)(2), (a)(3), and (b) of § 308.3 to read as follows:

§ 308.3 Planning performance awards.

(a) A Recipient of Investment Assistance awarded on or after the date of enactment of section 216 of PWEDA for a Project located in an EDA-funded Economic Development District may, at the discretion of the Assistant Secretary, receive a planning performance award in an amount not to exceed five percent of the amount of the applicable Investment award if EDA determines before closeout of the Project that:

* * * * *

(2) The Project demonstrated exceptional fulfillment of one or more components of, and is otherwise in accordance with, the applicable CEDS, including any job creation or job retention requirements; and

(3) The Recipient demonstrated exceptional collaboration with Federal, State, and local economic development entities throughout the development of the Project.

(b) The Recipient shall use the planning performance award to increase, up to 100 percent, the Federal share of the cost of a Project under this chapter.

* * * * *

PART 310—SPECIAL IMPACT AREAS

79. The authority citation for part 310 continues to read as follows:

Authority: 42 U.S.C. 3154; Department of Commerce Organization Order 10–4.

80. Revise the introductory text of § 310.1 to read as follows:

§ 310.1 Special Impact Area.

Upon the application of an Eligible Applicant, and with respect to that Eligible Applicant's Project only, the Assistant Secretary may designate the Region which the Project will serve as a Special Impact Area if the Eligible Applicant demonstrates that its proposed Project will:

* * * * *

81. Revise paragraphs (a)(6), (b), and (c) introductory text of § 310.2 to read as follows:

§ 310.2 Pressing need; alleviation of unemployment or underemployment.

(a) * * *

(6) Has been designated as a Federally Declared Disaster area; or

* * * * *

(b) For purposes of this part, excessive unemployment exists if the 24-month unemployment rate is at least 225 percent of the national average or the per capita income is not more than 50

percent of the national average. A Region demonstrates excessive underemployment if the employment of a substantial percentage of workers in the Region is less than full-time or at less skilled tasks than their training or abilities would otherwise permit. Eligible Applicants seeking a Special Impact Area designation under this criterion must present appropriate and compelling economic and demographic data.

(c) Eligible Applicants may demonstrate the provision of useful employment opportunities by quantifying and evidencing the Project's prospective:

* * * * *

82. Revise the heading of reserved part 311 to read as follows:

PART 311—AMERICA COMPETES [RESERVED]

PART 314—PROPERTY

83. The authority citation for part 314 continues to read as follows:

Authority: 42 U.S.C. 3211; Department of Commerce Organization Order 10–4.

84. Amend part 314 so that §§ 314.1 through 314.6 are no longer designated as subpart A. and remove the heading "Subpart A—General."

85. Revise the definition of *Real Property* in § 314.1 to read as follows:

§ 314.1 Definitions.

* * * * *

Real Property means any land, whether raw or improved, and includes structures, fixtures, appurtenances, and other permanent improvements, excluding moveable machinery and equipment. Real Property includes land that is improved by the construction of Project infrastructure such as roads, sewers, and water lines that are not situated on or under the land, where the infrastructure contributes to the value of such land as a specific purpose of the Project.

* * * * *

86. Revise paragraphs (a), (b), and (c) of § 314.3 to read as follows:

§ 314.3 Authorized Use of Property.

(a) During the Estimated Useful Life of the Project, the Recipient or Owner must use any Property acquired or improved in whole or in part with Investment Assistance only for authorized Project purposes as set out in the terms and conditions of the Investment Assistance. Such Property must not be Disposed of or encumbered without EDA's prior written authorization.

(b) Where EDA and the Recipient determine during the Estimated Useful Life of the Project that Property acquired or improved in whole or in part with Investment Assistance is no longer needed for the original purpose of the Investment Assistance, EDA, in its sole discretion, may approve the use of such Property in other Federal grant programs or in programs that have purposes consistent with those authorized by PWEDA and by this chapter.

(c) Where EDA determines that the authorized purpose of the Investment Assistance is to develop Real Property to be leased or sold, such sale or lease is permitted provided it is for Adequate Consideration and the sale is consistent with the authorized purpose of the Investment Assistance and with all applicable Investment Assistance requirements, including nondiscrimination and environmental compliance.

* * * * *

87. Revise paragraph (c) of § 314.4 to read as follows:

§ 314.4 Unauthorized Use of Property.

* * * * *

(c) Where the Disposition, encumbrance, or use of any Property violates paragraphs (a) or (b) of this section, EDA may assert its interest in the Property to recover the Federal Share for the Federal government and may take such actions as authorized by PWEDA and this chapter, including the actions provided in §§ 302.3, 302.16, and 307.21 of this chapter. EDA may pursue its rights under paragraph (a) of this section and this paragraph (c) to recover the Federal Share, plus costs and interest. When the Federal government is fully compensated for the Federal Share, the Federal Interest is extinguished as provided in § 314.2(b), and EDA will have no further interest in the ownership, use, or Disposition of the Property.

88. Revise paragraph (b) of § 314.5 to read as follows:

§ 314.5 Federal Share.

* * * * *

(b) The Federal Share excludes that portion of the current fair market value of the Property attributable to acquisition or improvements before or after EDA's participation in the Project, which are not included in the total Project costs. For example, if the total Project costs are \$100, consisting of \$50 of Investment Assistance and \$50 of Matching Share, the Federal Share is 50 percent. If the Property is disposed of when its current fair market is \$250, the Federal Share is \$125 (i.e., 50 percent of

\$250). If \$10 is spent to put the Property into salable condition, the Federal Share is \$120 (i.e., 50 percent of (\$250 – \$10)).

89. Revise paragraph (b) of § 314.6 to read as follows:

§ 314.6 Encumbrances.

* * * * *

(b) *Exceptions.* Subject to EDA's approval, which will not be unreasonably withheld or unduly delayed, paragraph (a) of this section does not apply in the following circumstances:

(1) *Shared first lien position.* EDA, at its discretion, may approve an encumbrance on Project Property where a lien holder and EDA enter into an inter-creditor agreement pursuant to which EDA and the other lien holder share a first lien position on terms satisfactory to EDA.

(2) *Utility encumbrances.* Encumbrances arising solely from the requirements of a pre-existing water or sewer facility or other utility encumbrances, which by their terms extend to additional Property connected to such facilities.

(3) *Pre-existing encumbrances.* Encumbrances already in place at the time EDA approves the Project, where EDA determines that the requirements of § 314.7(b) of this chapter are met.

(4) *Encumbrances proposed proximate to Project approval.* Encumbrances required to secure debt, including time and maturity-limited debt, that finances the Project Property at the same proximate time that EDA approves the Project when all of the following are met:

(i) EDA, in its sole discretion, determines that there is good cause and legal authority to waive paragraph (a) of this section;

(ii) All proceeds secured by the encumbrance on the Property shall be available only to the Recipient and shall be used only for the Project for which the Investment Assistance applies, for related activities of which the Project is an essential part, or other activities that EDA determines are authorized under PWEDA;

(iii) A grantor or lender will not provide funds without the security of a lien on the Property;

(iv) The terms and conditions of the encumbrance are satisfactory to EDA; and

(v) There is a reasonable expectation, as determined by EDA, that the Recipient will not default on its obligations. In determining whether an expectation is reasonable for purposes of this paragraph, EDA shall take into account whether:

(A) A Recipient that is a non-profit organization is joined in the Project with a co-Recipient that is a public body and all co-Recipients are jointly and severally responsible;

(B) The non-profit organization is financially strong and is an established organization with sufficient organizational life to demonstrate stability over time;

(C) The approximate value of the Project Property so that the total amount of all debt plus the Federal share of cost as reflected on the EDA Investment award, and any amendments as applicable, does not exceed the value of the Project Property as improved; and

(D) Such other factors as EDA deems appropriate.

(5) *Encumbrances proposed after Project approval.* Encumbrances proposed to be incurred after Project approval where all of the following are met:

(i) EDA, in its sole discretion, determines that there is good cause and legal authority to waive paragraph (a) of this section;

(ii) All proceeds secured by the encumbrance on the Property shall be available only to the Recipient and shall be used only for the Project for which the Investment Assistance applies, for related activities of which the Project is an essential part, or other activities that EDA determines are authorized under PWEDA;

(iii) A grantor or lender will not provide funds without the security of a lien on the Property;

(iv) The terms and conditions of the encumbrance are satisfactory to EDA; and

(v) There is a reasonable expectation, as determined by EDA, that the Recipient will not default on its obligations. In determining whether an expectation is reasonable for purposes of this paragraph, EDA shall take into account whether:

(A) A Recipient that is a non-profit organization is joined in the Project with a co-Recipient that is a public body and all co-Recipients are jointly and severally responsible;

(B) The non-profit organization is financially strong and is an established organization with sufficient organizational life to demonstrate stability over time;

(C) The Recipient's equity in the Project Property based on the appraised value of the Project Property at the time the encumbrance is requested so that the total amount of all debt plus the Federal share of cost as reflected on the EDA Investment award, and any amendments as applicable, does not

exceed the value of the Project Property as improved; and

(D) Such other factors as EDA deems appropriate.

* * * * *

90. Amend part 314 so that §§ 314.7 and 314.8 are no longer designated as subpart B, and remove the heading "Subpart B—Real Property."

91. Amend § 314.7 as:

a. Revise paragraph (a), the heading of (b), paragraphs (b)(1) introductory text, (c)(1) introductory text, (c)(2) introductory text, (c)(3), (c)(4) introductory text, and (c)(5); and

b. Remove paragraph (c)(6) to read as follows:

§ 314.7 Title.

(a) *General title requirement.* The Recipient must hold title to the Real Property required for a Project at the time the Investment Assistance is awarded or as provided by paragraph (c) of this section and must maintain title at all times during the Estimated Useful Life of the Project, except in those limited circumstances as provided in paragraph (c) of this section. The Recipient also must furnish evidence, satisfactory in form and substance to EDA, that title to Real Property required for a Project (other than property of the United States) is vested in the Recipient and that any easements, rights-of-way, State or local government permits, long-term leases, or other items required for the Project have been or will be obtained by the Recipient within an acceptable time, as determined by EDA.

(b) *Disclosure of encumbrances.*

(1) The Recipient must disclose to EDA all encumbrances, including the following:

* * * * *

(c) * * *

(1) *Real Property acquisition.* Where the acquisition of Real Property required for a Project is contemplated as part of an Investment Assistance award, EDA may determine that an agreement to the Recipient to purchase the Real Property will be acceptable for purposes of paragraph (a) of this section if:

* * * * *

(2) *Leasehold interests.* EDA may determine that a long-term leasehold interest for a period not less than the Estimated Useful Life of the Real Property required for a Project will be acceptable for purposes of paragraph (a) of this section if:

* * * * *

(3) *Railroad right-of-way construction.* When a Project includes construction within a railroad's right-of-way or over a railroad crossing, EDA may find it acceptable for the work to be completed

by the railroad and for the railroad to continue to own, operate, and maintain that portion of the Project, if required by the railroad; and provided that, the construction is a minor but essential component of the Project.

(4) *Public highway construction.* When the Project includes construction on a public highway the owner of which is not the Recipient, EDA may allow the Project to be constructed in whole or in part in the right-of-way of such public highway, provided that:

* * * * *

(5) *Construction of Recipient-owned facilities to serve Recipient or privately owned Real Property.*

(i) *General.* At EDA's discretion, when an authorized purpose of the Project is to construct Recipient-owned facilities to serve Recipient or privately owned Real Property, including industrial or commercial parks, for sale or lease to private parties, such ownership, sale, or lease, as applicable, is permitted so long as:

(A) In cases where an authorized purpose of the Project is to sell Real Property, the Recipient or Owner, as applicable, provides evidence sufficient to EDA that it holds title to the Real Property required for such Project prior to the disbursement of any portion of the Investment Assistance and will retain title until the sale of the Property;

(B) In cases where an authorized purpose of the Project is to lease Real Property, the Recipient or Owner, as applicable, provides evidence sufficient to EDA that it holds title to the Real Property required for such Project prior to the EDA disbursement of any portion of the Investment Assistance and will retain title for the entire Estimated Useful Life of the Project;

(C) The Recipient provides adequate assurances that the Project and the development of land and improvements on the Recipient or privately owned Real Property to be served by or that provides the economic justification for the Project will be completed according to the terms of the Investment Assistance;

(D) The sale or lease of any portion of the Project or of Real Property served by the Project or that provides the economic justification for the Project during the Project's Estimated Useful Life must be for Adequate Consideration and the terms and conditions of the Investment Assistance and the purpose(s) of the Project must continue to be fulfilled after such sale or lease; and

(E) The Recipient agrees that EDA may deem the termination, cessation, abandonment, or other failure on behalf

of the Recipient, Owner, purchaser, or lessee (as the case may be) to complete the Project or the development of land and improvements on Real Property served by or that provides the economic justification for the Project by the five-year anniversary of the award date of the Investment Assistance constitutes a failure on behalf of the Recipient to use the Real Property for the economic purposes justifying the Project.

(ii) *Additional conditions on sale or lease.* EDA also may condition the sale or lease on the satisfaction by the Recipient, Owner, purchaser, or lessee (as the case may be) of any additional requirements that EDA may impose, including EDA's pre-approval of the sale or lease.

(iii) *Agreement between Recipient and Owner.* In addition to paragraphs (c)(5)(i) and (ii) of this section, when an authorized purpose of the Project is to construct facilities to serve privately owned Real Property, the Recipient and the Owner must agree to use the Real Property improved or benefited by the EDA Investment Assistance only for the authorized purposes of the Project and in a manner consistent with the terms and conditions of the EDA Investment Assistance for the Estimated Useful Life of the Project.

(iv) *Unauthorized Use and compensation of Federal Share.* EDA may deem that a violation of this paragraph (c)(5) by the Recipient, Owner, purchaser, or lessee (as the case may be) constitutes an Unauthorized Use of the Real Property and the Recipient must agree to compensate EDA for the Federal government's Federal Share of the Project in the case of such Unauthorized Use.

92. Amend § 314.8 to revise the section heading and add paragraph (d) to read as follows:

§ 314.8 Recorded statement for Real Property.

* * * * *

(d) In extraordinary circumstances and at EDA's sole discretion, EDA may choose to accept another instrument to protect EDA's interest in Project Property, such as an escrow agreement or letter of credit, provided that EDA determines such instrument is adequate and a recorded statement in accord with paragraph (a) of this section is not reasonably available. The terms and provisions of the relevant instrument shall be satisfactory to EDA in EDA's sole judgment. The costs and fees for escrow services and letters of credit shall be paid by the Recipient.

93. Amend part 314 so that § 314.9 is no longer designated as subpart C, and

remove the heading "Subpart C—Personal Property."

94. Revise § 314.9 to read as follows:

§ 314.9 Recorded statement for Personal Property.

For all Projects which EDA determines involve the acquisition or improvement of significant items of Personal Property, including ships, machinery, equipment, removable fixtures, or structural components of buildings, the Recipient shall execute a Uniform Commercial Code Financing Statement (Form UCC-1, as provided by State law) or other statement of EDA's interest in the Personal Property, acceptable in form and substance to EDA, which statement must be perfected and placed of record in accordance with applicable law, with continuances re-filed as appropriate. Whether or not a statement is required by EDA to be recorded, the Recipient must hold title to the Personal Property acquired or improved as part of the Project, except as otherwise provided in this part.

95. Amend part 314 so that § 314.10 is no longer designated as subpart D, and remove heading "Subpart D—Release of EDA's Property Interest."

96. Revise § 314.10 to read as follows:

§ 314.10 Procedures for release of EDA's Property interest.

(a) *General.* As provided in § 314.2 of this chapter, the Federal Interest in Property acquired or improved with Investment Assistance extends for the duration of the Estimated Useful Life of the Project. While EDA determines the length of the Estimated Useful Life at the time of Investment award, in recent years, the length generally extends for 15 to 20 years, depending on the nature of the improvement. Prior to 1999, the Estimated Useful Life of some Projects, such as water and wastewater Projects, could extend for 40 years or more. Upon request of the Recipient, EDA will release the Federal Interest in Project Property upon expiration of the Estimated Useful Life as established in the terms and conditions of the Investment Assistance and in accord with the requirements of this section and part. This section provides procedures to govern the manner of obtaining a release of the Federal Interest.

(b) *Release of Property after the expiration of the Estimated Useful Life.* At the expiration of a Project's Estimated Useful Life and upon the written request of a Recipient, the Assistant Secretary may release the Federal Interest in Project Property if EDA determines that the Recipient has

made a good faith effort to fulfill all terms and conditions of the Investment Assistance. The determination provided for in this paragraph shall be established at the time of the Recipient's written request and shall be based, at least in part, on the facts and circumstances provided in writing by the Recipient. For a Project in which a Recorded Statement as provided for in §§ 314.8 and 314.9 of this chapter has been recorded, EDA will provide for the release by executing an instrument in recordable form. The release will terminate the Investment as of the date of its execution and satisfy the Recorded Statement.

(c) *Release prior to expiration of the Estimated Useful Life.* If the Recipient will no longer use the Project Property in accord with the requirements of the terms and conditions of the Investment within the time period of the Estimated Useful Life, EDA will determine if such use by the Recipient constitutes an Unauthorized Use of Property and require compensation for the Federal Interest as provided in § 314.4 and this part. EDA may release the Federal Interest in connection with such Property upon receipt of full payment in compensation of the Federal Interest.

(d) *Release of certain Property after 20 years.* In accord with section 601(d)(2) PWEDA, upon the request of a Recipient and before the expiration of the Estimated Useful Life of a Project that exceeds 20 years, EDA may release any Real Property or tangible Personal Property interest held by EDA, in connection with Investment Assistance after the date that is 20 years after the date on which the Investment Assistance was awarded.

(e) *Limitations and Covenant of Use.*

(1) EDA's release of the Federal Interest pursuant to this section is not automatic; it requires EDA's approval, which will not be withheld except for good cause or as otherwise required by law, as determined in EDA's sole discretion. As deemed appropriate, EDA may require the Recipient to take some action as a condition of the release.

(2) In determining whether to release the Federal Interest, EDA will review EDA's legal authority to release its interest, including governing Establishment Clause law; the Recipient's performance under and conformance with the terms and conditions of the Investment Assistance; any use of Project Property in violation of §§ 314.3 or 314.4 of this part; and other such factors as EDA deems appropriate.

(3) Notwithstanding any release of the Federal Interest under this section, a Recipient must ensure that Project Property is not used in violation of nondiscrimination requirements. See Department of Commerce regulations at 15 CFR part 8. Accordingly, upon the release of the Federal Interest, the Recipient must execute a covenant of use that prohibits use of Real Property or tangible Personal Property for any purpose that would violate the nondiscrimination requirements set forth in § 302.20 of this chapter.

(i) With respect to Real Property, the Recipient must record a covenant under this subsection in the jurisdiction where the Real Property is located in accordance with § 314.8.

(ii) With respect to items of tangible Personal Property, the Recipient must perfect and record a covenant under this subsection in accordance with applicable law, with continuances refiled as appropriate, in accordance with § 314.9.

Dated: November 21, 2011.

John Fernandez,

Assistant Secretary for Economic Development, Economic Development Administration.

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