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## Part III

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Economic Development Administration

13 CFR Parts 300, 301, 302 et al.

Economic Development Administration Regulatory Revision; Final Rule

**DEPARTMENT OF COMMERCE****Economic Development Administration**

**13 CFR Parts 300, 301, 302, 303, 304, 305, 306, 307, 308, 310, and 314**

[Docket No.: 110726429–4508–02]

RIN 0610–AA66

**Economic Development Administration Regulatory Revision**

**AGENCY:** Economic Development Administration, U.S. Department of Commerce.

**ACTION:** Final rule.

**SUMMARY:** The Economic Development Administration (“EDA” or “Agency”), U.S. Department of Commerce (“DOC”), is amending its regulations implementing the Public Works and Economic Development Act of 1965, as amended (“PWEDA”). These comprehensive changes are intended to reflect EDA’s current practices and policies in administering its economic development assistance programs.

**DATES:** This rule is effective on January 20, 2015.

**ADDRESSES:** For convenience, the full text of EDA’s regulations as amended is available on EDA’s Web site at <http://www.eda.gov/>.

**FOR FURTHER INFORMATION CONTACT:** Stephen D. Kong, Chief Counsel, Office of the Chief Counsel, Economic Development Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., 7th Floor, Washington, DC 20230; telephone: (202) 482–4687.

**SUPPLEMENTARY INFORMATION:****Background**

The mission of EDA is to lead the Federal economic development agenda by promoting competitiveness and preparing the nation’s regions for growth and success in the worldwide economy. EDA makes investments in and provides technical assistance to economically distressed communities in order to facilitate job creation for U.S. workers, increase private sector investment, promote American innovation, and accelerate long-term sustainable economic growth. EDA’s regulations, codified at 13 CFR Chapter III, provide the framework through which the Agency administers its economic development assistance programs.

Although EDA had amended its regulations in 2006 (71 FR 56675), 2008 (73 FR 62865), and 2010 (75 FR 4262), since early 2011 the Agency has undertaken an across-the-board review

of its regulations to ensure consistency with the Agency’s emphasis on incentivizing innovation and regional collaboration and to reduce burdens on stakeholders and the public by removing outdated provisions and streamlining and clarifying existing requirements.

On December 12, 2011, EDA published a Notice of Proposed Rulemaking (“NPRM”) in the **Federal Register** (76 FR 76492) requesting public comments on EDA’s proposed changes to its regulations. Subsequently, EDA extended the deadline for submitting comments to NPRM from the original date of February 8, 2012 to February 15, 2012 (77 FR 6517).

The NPRM proposed a number of substantive and non-substantive revisions intended to ensure that the regulations reflect the Agency’s focus on innovation and regional collaboration and provide EDA’s stakeholders with the flexibility and local control needed to achieve these ends. From a programmatic standpoint, the most significant proposed changes were to the Comprehensive Economic Development Strategies requirements outlined in Part 303 and the Revolving Loan Fund program described in Part 307. The revisions proposed in the NPRM are summarized below. Capitalized terms used but not otherwise defined in this Final Rule have the meanings ascribed to them in EDA’s current regulations.

**Part 300—General Information**

- The NPRM inserted the term “new and better jobs” in place of “higher-skill, higher-wage jobs” (§ 300.1), revised EDA’s Headquarters address in Washington, DC (§ 300.2(a)), and replaced and/or deleted certain words in § 300.2(b).

- EDA also proposed changes and/or corrections to the definitions of “Cooperative Agreement,” “Grant,” “Eligible Recipient,” “Federal Funding Opportunity,” “Federally Declared Disaster,” “Indian Tribe,” “Investment or Investment Assistance,” “Investment Rate,” “Local Share or Matching Share,” “Presidentially Declared Disaster,” “Region or Regional” and “Trade Act” in § 300.3.

- In addition, EDA proposed removing the definition of “Private Sector Representative” to be consistent with proposed changes to Parts 303 and 304 and adding a definition for “Regional Innovation Clusters or RICs.”

**Part 301—Eligibility, Investment Rate and Application Requirements**

- The NPRM proposed amending § 301.1 to more accurately describe EDA’s application process.
- EDA proposed non-substantive changes to §§ 301.3(a)(1) and 301.3(c)(1).
- EDA proposed updates to § 301.3(a)(4) to clarify the data requirements Eligible Recipients must follow to demonstrate economic distress.
- The NPRM provided, via revisions to Table 2 of § 301.4(b)(5), that EDA may authorize a grant rate of up to 80 percent to incentivize Projects that encourage broad, innovative Regional planning or demonstrate effective leveraging of other Federal Agency resources.
- The NPRM proposed amending Table 2 of § 301.4(b)(5) to make clear 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.
- To provide added flexibility when warranted, EDA proposed to remove the requirement in Table 2 of § 301.4(b)(5) that a disaster-related application must be submitted within 18 months of the relevant disaster declaration to receive a 100 percent grant rate.
- The NPRM proposed removing a number of repetitive numerical references in § 301.4.
- EDA proposed clarifying, non-substantive revisions to § 301.6.
- The NPRM modified the language in § 301.7 to reflect the Agency’s improved grant review and selection process under its Public Works and Economic Adjustment Assistance programs.
- Besides minor changes to the text, EDA’s revised § 301.8 outlined EDA’s updated criteria for evaluating applications. Under the NPRM’s approach, EDA would evaluate applications based on the extent to which they: (a) Ensure regional collaboration; (b) leverage public-private partnerships; (c) advance national strategic priorities; (d) enhance global competitiveness; (e) encourage environmentally sustainable development; and (f) support economically distressed and underserved communities.
- EDA proposed minor changes to the language of § 301.9.
- In § 301.10, the NPRM provides for a new paragraph (d) that would require a feasibility study to be conducted by an impartial third party, and an operational plan for any “Project” involving the

construction of business, technology or other types of incubators or accelerators. The NPRM also proposed other clarifying revisions to § 301.10.

- EDA proposed to add a new § 301.11 entitled “Infrastructure.” In § 301.11(a), EDA provides examples of innovation- and entrepreneurship-related infrastructure and definitions of these terms, including business incubation, business acceleration, venture development organizations, proof of concept centers and technology transfer. In paragraph (b), EDA notes that it will seek to fund Projects that effectively leverage Federal, State and local resources and reiterates its prohibition under PWEDA on providing funds to any for-profit entity.

#### *Part 302—General Terms and Conditions for Investment Assistance*

- EDA proposed minor, non-substantive changes to §§ 302.1, 302.3, 302.6, 302.8, 302.9(a)-(b), and 302.11.
- EDA proposed updates to § 302.10, which includes a “post-employment” restriction on the employment of certain EDA employees by Eligible Applicants, as required by PWEDA. The NPRM provides for greater flexibility in the application of the post-employment restriction, putting particular focus on those situations where there is a greater chance of undue influence. In addition, EDA proposed restructuring this section to separate the post-employment restriction from expediter requirements, along with several minor corrections.
- EDA proposed a revision to § 302.16 outlining EDA’s accountability expectations; namely, in new paragraph (d), EDA emphasizes that it expects Recipients to use good faith efforts to meet Project goals and sets forth the ramifications should the Recipient fail to undertake such efforts. Also, the NPRM adds additional paragraph headings and several clarifying changes to the text.
- In § 302.18, EDA proposed a revision to clarify that post-approval requirements apply to all EDA awards.
- EDA proposed minor, non-substantive changes to §§ 302.17 and 302.20(b)(1).

#### *Part 303—Planning Investments and Comprehensive Economic Development Strategies*

- The NPRM proposed numerous non-substantive revisions to §§ 303.1, 303.3, 303.4, 303.6 and 303.9.
- In § 303.1, EDA proposed two substantive revisions. First, EDA proposed to replace the phrase “Private Sector Representative” with “the private sector.” Although “Private Sector Representative” was removed as a

defined term in § 300.1, EDA wanted to emphasize that it still expects the private sector to play a key role in the Regions’ planning processes. Second, EDA proposed to add “non-profit organizations” and “educational institutions” to the list of entities that EDA expects to will be actively involved in the planning process.

- EDA proposed a significant restructuring of, and important substantive revisions to, § 303.6, which sets forth the process requirements for developing Comprehensive Economic Development Strategies (CEDS). In order to ensure that there exists sufficient flexibility for all types of communities and Regions, the NPRM proposed maintaining the requirement that a Strategy Committee represent the main economic interests of the Region (e.g., private sector, public officials, community leaders, private individuals, representatives of workforce development boards, institutions of higher education, minority and labor groups), but eliminated the requirement for a majority or membership threshold from any type of economic stakeholder. EDA also proposed adding language to § 303.6(b)(1) to capture any stakeholders not specifically mentioned in the list. Although the membership threshold would be removed, EDA proposed adding a sentence to emphasize that the capability of each Strategy Committee to undertake a collaborative Regional planning process is still of principal importance. Finally, besides a minor correction to § 303.6(b), EDA proposed a change to this paragraph that emphasizes broader and on-going stakeholder input in the Regional planning process. More specifically, under the proposed § 303.6(b)(2) describing the revised public comment requirements, the Planning Organization, before submission of a CEDS to EDA, must provide the public and appropriate governments and interest groups with adequate notice and opportunity to comment on the CEDS. The Planning Organization, as before, would still be required to keep the comment period open for at least 30 days. In addition, the Planning Organization must make the CEDS available in electronic or other appropriate form, throughout the comment period. Also, the updated § 303.6(b)(2) requires the Planning Organization to provide to EDA, upon request, any comments received on the CEDS and demonstrate how the comments were addressed.

- In § 303.7(b), several discrete changes were proposed for clarity purposes and to emphasize certain concepts. But the most significant

revision proposed was streamlining the CEDS requirements from a laundry-list of ten detailed items to the following four essential planning elements in § 303.7(b)(1)(i)–(iv): (a) A summary of economic development conditions of the Region; (b) an in-depth analysis of the economic and community strengths, weaknesses, opportunities and threats; (c) strategies and an implementation plan to build upon the Region’s strengths and opportunities and resolve or mitigate the weaknesses and threats facing the Region, but should not be inconsistent with applicable State and local economic development or workforce development strategies; and (d) performance measures used to evaluate the Planning Organization’s successful development and implementation of the CEDS. Moreover, as noted in the NPRM, EDA intends to provide further content to stakeholders through the publication of periodically-updated CEDS guidelines, which will be based on best practices and developed in collaboration with EDA’s economic development and research partners. All of these substantive changes are expected to enhance local control and allow EDA’s planning partners to focus on strategies, performance, and outputs.

#### *Part 304—Economic Development Districts*

- The NPRM proposed to correct minor errors and/or remove redundancies in §§ 304.1, 304.2, and 304.4, as well as make a conforming change in § 304.2(c)(2).
- To allow District Organizations to focus on an effective planning process rather than constant compliance with membership requirements, EDA proposed to revise § 304.2(c)(2) to eliminate the current membership thresholds. However, EDA’s new provision would maintain the requirement that governing bodies demonstrate that they are broadly representative of the principal economic interests of the Region and added a sentence emphasizing that governing bodies must have the capability to implement the relevant CEDS.
- In order to increase public participation in District Organization operations and provide for greater public awareness of the importance of these entities, the NPRM provided in § 304.2(c)(4) that District Organizations must meet at least twice a year, instead of only once a year.

#### *Part 305—Public Works and Economic Development Investments*

- EDA proposed minor, non-substantive revisions to §§ 305.1, 305.2(c), 305.6, and 305.8.

- The NPRM proposed substantive changes to § 305.6(a), which addresses allowable methods of procurement for construction services. EDA was seeking to ensure that Recipients, if they wished to use alternate construction procurement methods to the traditional design/bid/build approach, still followed correct procedures and that the maximum amount of project costs were allowable under applicable regulations and Federal cost principles. A proposed change to the first sentence clarifies that Recipients must obtain EDA's prior written approval before any such alternate construction procurement method can be used. The justification for using an alternate method must include a brief analysis of the appropriateness and benefits of using the method to successfully execute the Project, as well as the Recipient's past experience in using the method.

- In an apparent oversight, § 305.10 currently only addresses construction contract bid overrun procedures. To correct this problem, EDA proposed a new heading entitled "Bid Underrun and Overrun." The existing provision regarding bid underrun procedures would become a new paragraph (a). A new paragraph (b), simply codifying EDA's existing practice, would set forth EDA's procedures in the event of an overrun at construction contract bid opening. If there is an overrun, the proposed provision allows the Recipient to take deductive alternatives if provided for in the bid documents, reject all bids and re-advertise, or augment the Matching Share. But if the Recipient demonstrates to EDA's satisfaction that these options are not feasible and the Project cannot be completed otherwise, the Recipient may submit a written request to EDA for additional funding. The final decision will be in the sole discretion of EDA and considered in accordance with EDA's competitive process requirements.

- EDA also sought a change to the newly-proposed § 305.10(a) requiring the Recipient, in the event of a bid underrun, to contact EDA immediately to determine the relevant procedures.

#### *Part 306—Training, Research and Technical Assistance Investments*

- The NPRM proposed minor, non-substantive changes to §§ 306.1, 306.3, 306.4, 306.6 and 306.7.

#### *Part 307—Economic Adjustment Assistance Investments*

- Through the NPRM, EDA sought to clarify award requirements for the Economic Adjustment Assistance ("EAA") Program as well as incorporate all Revolving Loan Fund ("RLF")

requirements under Subpart B, which EDA proposed renaming "Revolving Loan Fund Program." For example, the NPRM incorporated the RLF application review and post-approval requirements under the new § 307.7 entitled "Revolving Loan Fund award requirements" in Subpart B.

- EDA proposed minor, non-substantive changes to § 307.1.

- In EDA's interim final rule published in the **Federal Register** on October 22, 2008 (73 FR 62858), EDA made clear it would no longer allow RLF Recipients to use RLF capital to guarantee loans. The NPRM proposed a revision to § 307.3(b)(2) to remove the reference to "loan guaranties" that was inadvertently missed in the 2008 regulatory revision.

- Because of an omission in § 307.4(c)(2), EDA proposed changes 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.

- Without changing the requirements applicable to EAA awards, EDA proposed relocating portions of current § 307.6 to § 307.4, making minor yet necessary additional revisions to the language of § 307.4, and making conforming changes to the table of contents of Part 307.

- The NPRM proposed redesignating the current § 307.7 as § 307.6 and incorporating redesignated § 307.6 under Subpart B. EDA also proposed a minor change to the wording of redesignated § 307.6.

- EDA also proposed an amendment to § 307.9(a)(2) to clarify the existing requirement that the RLF Recipient is responsible for complying with applicable environmental laws as outlined in § 307.10, meaning that the Recipient must adopt compliance procedures and otherwise ensure that borrowers adhere to relevant environmental laws and regulations.

- The NPRM proposed minor, non-substantive changes to §§ 307.9(b), 307.10(a)–(b), 307.11(b), (d), (e), (f), 307.12(a)–(b) and 307.13(a)–(b).

- EDA proposed additional language to § 307.14(c) to provide that EDA may waive the requirement to submit the RLF Income and Expense Statement (Form ED–209I), 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, for small RLFs as determined by the Agency. The NPRM also proposed to remove

repetitive numerical references from § 307.14(c).

- EDA proposed a revision to § 307.15(b)(1), which contains the requirement that an accountant certify to the adequacy of an RLF Recipient's accounting system before EDA can disburse funds. The proposed language, to address concerns raised in prior programmatic audits, imposes a rigorous standard 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."

- Besides removing several repetitive references in §§ 307.15(b)–(d), EDA proposed a change to § 307.15(d)(1)(iii) so that any Federal loans, not just those from the U.S. Small Business Administration's 7(a) and 504 debenture programs, can be used by the RLF Recipient to meet its leveraging requirement. In addition, the NPRM provides additional clarity by listing loans from U.S. Department of Agriculture as a type of Federal loan than can be used as leverage.

- In its current form, § 307.16(c)(1)(ii) creates an exception to EDA's capitalization utilization standard of 75 percent of RLF Capital if the RLF Recipient anticipates making large loans relative to the size of its RLF Capital base. EDA, recognizing that such an approach is a deviation from the rule, rather than an exception, proposed to delete this provision. At the same time, EDA proposed to make related conforming amendments to §§ 307.16(c)(1) and (c)(2)(i).

- EDA proposed non-substantive revisions to various portions of §§ 307.16(a), (c) and (d).

- In general, RLF Capital cannot be used to refinance existing debt, but EDA may allow the RLF Recipient to use RLF Capital to purchase the rights of a prior lien holder during a foreclosure action in order to prevent a significant loss on an RLF loan. To make use of RLF Capital in this manner, the RLF Recipient must currently demonstrate under § 307.17(b)(6)(ii) 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. To provide greater flexibility in uncertain economic conditions, EDA proposed to change the 18-month time limit to "a reasonable period of time, as determined by EDA." The NPRM also proposed to remove a repetitive numerical reference in § 307.17(c).

- The NPRM proposed amending § 307.18(a) to allow EDA to approve, at the request of an RLF Recipient, the

addition of a new lending area before the full amount of the RLF Grant is disbursed to the Recipient. To effect this revision, EDA proposed to remove § 307.18(a)(1)(i) and renumber the remainder of the subparagraph accordingly.

- To clarify that all RLF loans must be made in accordance with the RLF Plan, the NPRM also proposed removing the phrase “to implement and assist economic activity” from the first sentence of § 307.18(a)(1) as well as proposing other minor, non-substantive revisions to this subparagraph.

- EDA proposed textual changes to § 307.18(b) to help clarify the distinction between a “consolidation,” when a single RLF Recipient that has multiple RLF awards obtains EDA approval for the consolidation of the multiple awards into a single RLF, and a “merger,” when two or more RLF recipients obtain EDA approval for the merger of their respective RLF awards to form a single RLF award. The NPRM also corrects repetitive numbering found in §§ 307.18(b)(1) and (b)(2).

- EDA proposed amending § 307.19 that outlines the requirements for an RLF Recipient to sell or securitize RLF loans. Pursuant to this section, EDA may approve the Sale or Securitization of all or a portion of an RLF loan portfolio if, *inter alia*, 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. Put simply, however, if after seeking and receiving EDA approval, the RLF Recipient sells a portion of its loan portfolio, there is no “interest” for EDA to subordinate. Thus, the NPRM proposed removing paragraph (b) that contains the subordination request requirement and renumbered the other paragraphs accordingly.

- The NPRM proposed removing unnecessary phrases from §§ 307.20(a) and 307.21(a)(1), eliminating redundant numerical references in § 307.20 and making small non-substantive changes in § 307.21(a)(1)(viii).

#### Part 308—Performance Incentives

- EDA proposed minor, non-substantive revisions to §§ 308.2 and 308.3.

#### Part 310—Special Impact Areas

- The NPRM proposed minor, non-substantive changes to §§ 310.1 and 310.2(b).

#### Part 311—America COMPETES

- EDA proposed revising the heading for this Part to “America COMPETES” in preparation for any regulations needed for implementation of the

America Competes Reauthorization Act of 2010 (Pub. L. 111–358, January 4, 2011).

#### Part 314—Property

- EDA proposed to amend the table of contents for this Part, which sets forth the rules controlling property acquired or improved, in whole or in part, with EDA Investment Assistance. More specifically, EDA would eliminate Subparts A through D to enhance comprehension and revise the headings for §§ 314.8 and 314.9.

- The NPRM proposed a non-substantive revision to § 314.1.

- EDA proposed changes to § 314.3(a) to clarify that the terms and conditions of the award are the reference point for determining the purpose of a given Project. Also, the NPRM added the clause “during the Estimated Useful Life of the Project” to both §§ 314.3(a) and 314.3(b) to clarify that EDA’s use restrictions apply only during the Estimated Useful Life of Project Property.

- EDA proposed additional minor changes to §§ 314.3(c), 314.4(c) and 314.5(b).

- EDA proposed a number of revisions to § 314.6(b), which sets forth the exceptions to the general rule that Property must be free from encumbrances.

- The NPRM reorders paragraph (b) and makes appropriate changes to headings and text so that requirements will apply based on the point in time when a Recipient asks EDA to subordinate the Federal Interest (*i.e.*, Recipient has already mortgaged the Project Property before EDA’s award decision, request for subordination made at same time as award decision, or after award decision made).

- EDA proposed adding a new subsection (b)(1), titled “Shared first lien position,” to set forth the Agency’s authority to enter into an inter-creditor agreement under which EDA and another lien holder share a first lien position.

- The NPRM redesignates current § 314.6(b)(1) as subsection (b)(3) and then makes a clarifying change to the new § 314.(b)(3).

- Current § 314.6(b)(3), addressing when EDA can consider requests to subordinate its interest, is unclear whether it requires an Eligible Applicant to request subordination prior to the Grant award decision or whether it applies after EDA has awarded funds to the Recipient, or both. To provide clarity, EDA adds a new subsection (b)(4) with the heading “Encumbrances proposed proximate to Project approval,” which outlines the

requirements applicable to subordination requests made contemporaneously with the Grants award decision. The list of determinations that EDA must make to subordinate its interest are similar to those in current § 314.6(b)(3), but EDA has proposed adding the requirement that the terms and conditions of the encumbrance are acceptable to the Agency.

- EDA proposed a revision to subsection (b)(4)(i), adding the clause “and legal authority” to indicate that EDA may waive the restriction against encumbrances if it finds that there is both “good cause” to waive the restriction and legal authority to waive.

- In § 314.6(b)(4)(ii), EDA proposed to expand the availability of the equity in Project Property for other economic development projects, so long as EDA determines that those projects are consistent with EDA’s mission.

- The NPRM designates each of the requirements under subsection (b)(4)(v) with the letters “A” through “D” to improve organization, with a new subsection (b)(4)(v)(C) that requires the submission of an appraisal so that EDA can weigh the risk to the Federal Interest if EDA agrees to subordinate at a time that may be several years after the original award decision.

- EDA also proposed to add a phrase to the introductory text of subsection (b)(4) specifying that the kind of “debt” that may be the subject of a subordination request includes “time and maturity-limited debt, that finances the Project Property,” with the intention of better accommodating New Market Tax Credits and other financing mechanisms.

- The NPRM redesignated the text of current § 314.6(b)(3) as § 314.6(b)(5) and adds the heading “Encumbrances proposed after Project approval.”

- EDA proposed to amend redesignated subparagraph (b)(5) to provide additional flexibility to waive the prohibition on encumbrances subsequent to Grant award. Similar to the requirements of revised (b)(4), revised (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 of the proceeds will be used to enhance Project Property or for related activities or other activities consistent with 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. Essentially, under revised (b)(5), a Recipient can request that EDA agree to subordinate its interest when the appraised value of the Real Property provides sufficient collateral for the EDA award even if EDA takes a second lien position.

- EDA proposed numerous changes to § 314.7 to streamline EDA's title requirements and make them more understandable, including providing paragraph and subparagraph headings to act as a useful guide for Recipients and others.

- The NPRM revised the heading of § 314.7(b)(1), removes an unnecessary phrase from this subparagraph, and adds headings to subparagraphs (c)(1) through (c)(5) to clarify the exceptions to the general title requirement.

- EDA proposed adding the substance of § 314.7(c)(6) to § 314.7(c)(5) and then removing § 317.(c)(6). The change is proposed because the requirements of current subsections (c)(5) and (c)(6) are similar and 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 benefitted Real Property ultimately will be sold or leased to private parties in order to spur economic development. The requirements of the two provisions will be set forth in revised § 314.7(c)(5)(i), which will also be amended to make clear that these provisions apply to both Recipients and private Owners.

- EDA proposed removing current § 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 continued to be fulfilled, because it is inconsistent with EDA's policy on Estimated Useful Life and has created uncertainty in situations involving the sale of Property. In addition, EDA proposed removing an unnecessary phrase and a repetitive numerical reference from § 314.7(c)(5)(i).

- The NPRM proposed other revisions to current § 314.7(c)(5), a regulation that has caused confusion because it refers to both the authorized scope of the work and the Property that is to be benefitted by the scope of the work as the "Project." The proposed changes distinguish between these two different concepts by clarifying that the

Recipient is responsible for completing the "Project." The "Project" encompasses: (1) The activities to be completed under the EDA-approved scope of work and supported by the Grant; and (2) in appropriate situations, ensuring that the development of land and improvements on the Real Property is completed in accordance with the terms and conditions of the Investment Assistance. By contrast, the revisions refer to Real Property to be benefitted by the "Project" as "development of land and improvements on the Real Property to be served by or that provides the economic justification for the Project."

- EDA proposed to add a heading to § 314.7(c)(5)(i) and remove an unnecessary phrase from § 314.7(c)(5)(ii). The NPRM relocated to § 314.7(c)(5)(iii), the requirement in current § 314.7(c)(6)(i)(B) that 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 when an authorized use is to construct facilities to benefit privately owned Real Property. In addition, the NPRM relocated the statement, currently set forth in §§ 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 to new § 314.7(c)(5)(iv).

- Consistent with the removal of the subpart B designation, EDA proposed to amend the heading of § 314.8 to clarify that this section outlines the recordation requirements specifically for Real Property.

- Given the removal of the subpart C heading for Personal Property, the NPRM proposed to change the heading of § 314.9 to clarify that the requirements of this specific regulation apply only to Personal Property. EDA also proposed removing an unnecessary phrase in this section as well as specifying the security interest EDA requires with respect to Personal Property; namely, a "Uniform Commercial Code Financing Statement (Form UCC-1, as provided by State law)."

- In § 314.10, EDA proposed to streamline the procedures for the release of the Federal Interest in connection with EDA-assisted Property.

- The NPRM reorganizes § 314.10 to add a new § 314.10(a), which provides additional information on EDA's practice in establishing the Estimated Useful Life of Projects. Since 1999, EDA has typically established useful lives between 15 and 20 years, depending on the nature of the asset.

- EDA proposed to redesignate current paragraph (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 the date of the award, as new paragraph (d) accompanied by a clarifying heading, additional clarifying language and removal of a repetitive reference.

- EDA proposed to delete the content of current paragraph (b) as unnecessary and replace it with new language that outlines 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, so long as the Recipient has made a good faith effort to fulfill the terms and conditions of the award, as determined by EDA. Accordingly, EDA would also revise the heading of new § 314.10(b).

- The NPRM proposed to remove, revise and relocate certain portions of current § 314.10(c). The new paragraph (c) would provide that EDA can release its interest before the expiration of the Estimated Useful Life of Project Property only if the Agency receives compensation for the fair market value of the Federal Interest, and would have a new heading.

- EDA proposed to remove the content of current § 314.10(c)(1)(ii), 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. In the NPRM, EDA acknowledged that this prohibition may not be required and in fact, may serve to prevent religious institutions from fully participating 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.

- Paragraph (e), as proposed by EDA in the NPRM, would provide that EDA may not approve a release of its interest if the Agency lacks the legal authority to do so (including under the Establishment Clause), 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. Reserving such authority would allow EDA to review its legal authority to release the Federal Interest at the time of the request.

- 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. Additionally,

upon consideration of the public comments and EDA's own review, EDA is reserving its proposed change to the covenant requirements for releasing Federal interest in new § 314.10(e)(2) and (3). Thus, EDA proposed to retain the content of current § 314.10(c)(1)(i), but relocate the provision to new paragraph §§ 314.10(e)(3).

EDA did not propose any changes to Parts 309 ("Redistributions of Investment Assistance"), 311–312 ("Reserved"), 313 ("Community Trade Adjustment Assistance") and 315 ("Trade Adjustment Assistance for Firms").

### Summary of Final Rule

After careful review of the public comments received and additional internal deliberations, EDA has determined that the policy and legal rationales underlying the changes proposed in NPRM remain compelling. Thus, with one exception, EDA has not made any substantive changes to the NPRM in this Final Rule.

With respect to § 314.10(e) addressing EDA's review process and requirements for releasing the Federal Interest in Property, EDA will revise the language proposed in the NPRM. More specifically, for the reasons outlined below (*see* Agency Response to Topic 18), in the final version of § 314.10(e) EDA will: (a) Delete the reference to "governing Establishment Clause law" in (e)(2); and (b) retain the express prohibition on using Property acquired or improved with Investment Assistance for "inherently religious activities in violation of applicable Federal law" that is provided for in the current rule at §§ 314.10(c)(1)(ii) and (d)(2)(i)(A). While it maintains its legal position on the validity of the proposed change to this requirement, EDA would like to further examine its options at this time.

### Summary of Comments and EDA's Responses

EDA received over 120 comments from a variety of respondents on the NPRM. Most of the comments supported EDA's proposals. They believed that the flexibility provided by the changes would have a significant positive impact on the quality of EDA projects, which would now better reflect regional composition and needs. The comments, organized by topic and directly followed by a specific Agency response, are discussed and addressed in further detail below.

#### *Comment Topic 1: Regulatory Review Process and Purpose of Regulations*

Multiple commenters provided general feedback on EDA's approach to

amending its regulations. Several commenters provided specific, strict rules that they would like to see applied, now and in the future, to EDA's regulatory review process (*e.g.*, mandatory schedule of review, requirement for EDA to immediately remove provisions once they become obsolete, cutting regulatory language by 10% to enhance comprehension). Others were of the view that EDA should draft its regulations with the overarching goal of supporting communities and businesses.

#### *Agency Response to Topic 1*

EDA is committed to ensuring that its regulations provide a framework and the flexibility needed to allow the Agency's programs and resources to be leveraged to respond to current and future economic conditions in communities across the nation. EDA aims to ensure that all regulations are clear and as easy-to-follow and implement as possible, while balancing the need to ensure sufficient oversight and controls on the expenditure of Federal funds and the needs to be good stewards of taxpayer resources. EDA reviews its regulations periodically to determine whether, and if so, how, updates or adjustments are needed to best support businesses and communities across the nation, and to ensure that EDA's operations are conducted in an appropriate manner that balances the need for efficient and streamlined processes with sufficient controls and due diligence. EDA will maintain its existing approach of reviewing and updating regulations on an as-needed basis, rather than instituting universal sunsets or rigid timelines, in order to ensure business continuity. It is essential that effective regulatory provisions remain in place while the time-consuming, yet necessary, dialogue on whether certain requirements should be added or removed from EDA's regulatory scheme moves forward. Overall, EDA emphasizes that this regulatory revision represents a significant clarification and streamlining of the requirements (*e.g.*, composition of CEDS Strategy Committees, CEDS content requirements) contained in previous regulations.

#### *Comment Topic 2: Third-Party Feasibility Analysis for Incubators*

EDA received three comments expressing concern with the Agency's new proposed § 301.10(d) that would require a feasibility study when proposing the development of a business incubator.

#### *Agency Response to Topic 2*

Despite these concerns, EDA will move forward with the revision. EDA believes that business incubators can play a pivotal role in a community's job development effort by stimulating and nurturing business enterprises. Incubators have been proven to increase the probability of survival and growth of small businesses at a precarious time in their formation. Because support of these activities closely parallels EDA's objectives, the number of funding requests for incubators is increasing. However, EDA's experience has demonstrated that there are best practices that are strong predictors of incubator (and other innovation-focused projects) success that should be considered during the project selection phase. In particular, EDA believes that a feasibility study is a critical element in the grant-making process by helping EDA understand and confirm the market demand for the specific start-up companies proposed for incubation (*e.g.*, technology, general business, biotechnology, manufacturing, etc.) while demonstrating that there are adequate resources to operate the incubator.

Although there was no objection from the commenters regarding EDA's additional substantive requirement in § 301.10(d) that projects proposing construction of an incubator must include an operational plan, EDA notes that verification of the financial health of the incubator and a clear management direction (including tenant selection, graduation policies, etc.) are also helpful in determining the future success and sustainability of the incubator.

#### *Comment Topic 3: Use of American Community Survey ("ACS") Data*

One commenter noted the difficulty, especially in rural areas, of using ACS data to capture a reliable picture of economic distress and urged EDA to rely on more current data.

#### *Agency Response to Topic 3*

Pursuant to the proposed and now final § 301.3(a)(4)(i), EDA requires, for eligibility purposes, applications for Investment Assistance to document the Region's per capita income from a variety of possible sources. While EDA strongly encourages and prefers the use of the ACS, EDA recognizes that for some communities, this is not the most current Federal data available. EDA's regulations are designed to provide flexibility in such circumstances for an applicant to use other, more current Federal data. In those rare cases where

no other Federal data is available, applicants may use the most current State data available. However, EDA requires the ACS or other Federal data in the first instance as it provides a more consistent mechanism to evaluate and compare economic distress across applications.

*Comment Topic 4: Investment Rates and Matching Share*

Several commenters expressed the need for grant rates higher than the traditional 50%. These commenters collectively praised EDA's proposal to amend Section 301.4 to authorize an Investment Rate of up to 80 percent for Projects that: (a) 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; and/or (b) effectively leverage other Federal Agency resources.

*Agency Response to Topic 4*

EDA emphasizes that both the existing and revised regulations provide authority for applying a higher Federal grant rate than 50% under certain conditions. EDA remains committed to evaluating current economic conditions and adjusting regulation requirements, including those for Matching Share, as necessary to ensure that distressed communities have ample opportunity to compete for assistance as part of the Agency's grant competitions. EDA, by amending § 301.4(b)(5) to permit up to a 100% grant rate for projects to be funded by appropriations authorizing disaster economic recovery activities, also recognizes that in the wake of a disaster event, securing matching funds can be difficult and that there is a need for flexibility in the regulations to be able to provide timely assistance to impacted communities that they can effectively leverage.

*Comment Topic 5: Quarterly Cycle v. Rolling Admissions*

EDA received a number of comments about the pros and cons of the Agency's quarterly cycle approach and their view that improvements should continue to be made to the grant awarding and monitoring process.

*Agency Response to Topic 5*

Under the present system, EDA accepts applications for review four times a year, based on the quarters of the Federal fiscal year (*i.e.*, October to December, January to March, April to June, and July to September). The NPRM proposed an amendment to § 301.7(a) to reflect the Agency's current

practice. At this time, EDA will continue with the quarterly application cycle process and adopt § 301.7(a) as proposed.

EDA is committed to process improvements that will enhance the Agency's efficiency and effectiveness in working with communities to support economic development projects in rural and urban communities across the nation. Implementing more specific deadlines and an established response framework and timeline is an important part of this process improvement. While EDA recognizes that in some cases the quarterly cycle process limits the Agency's ability to move quickly to support time-sensitive economic development objectives, overall this approach provides a level of transparency and accountability to stakeholders that many communities have appreciated. Moreover, processes do exist for grant applications to be considered for "out-of-cycle" consideration if the circumstances warrant. EDA will continue to implement steps to make applying and administering awards more streamlined and more efficient.

EDA's regulations are intended to outline core requirements, with specific process improvements and priorities being articulated through specific funding opportunities, program guidance, and related materials. EDA is moving forward with its regulatory changes under this approach and is committed to ensuring that while improvements are made to streamline the organization's processes it does not deleteriously impact the Agency's ability to support rural and urban communities. Importantly, as it continues to consider process improvements EDA strives to implement and advance best practices. However, contrary to one of the public comments, EDA's support for best practices is not intended to constrain the adoption and implementation of novel approaches that may serve as the best practices for tomorrow. Instead, EDA emphasizes best practices because they provide the empirical foundation needed for the prudent consideration of new ideas and which contribute, ultimately, to successful Agency investments.

*Comment Topic 6: Grant Award Notification*

The position of one commenter is that the regulations should require that the Economic Development District (EDD) be notified before all others when an award decision on a project is made by EDA.

*Agency Response to Topic 6*

EDA does not believe that the protocol for notification of award decisions warrants documentation in the regulations. However, EDA would like to highlight that the Agency appreciates the hard work that applicants invest in completing applications for EDA assistance. As such, EDA is committed to the timely notification of its grant award decisions. EDA encourages all of its stakeholders, including the EDDs, to stay in close communication with the appropriate Economic Development Representative or Economic Development Specialist throughout the application process in order to successfully address all their information needs while staying abreast of the latest developments.

*Comment Topic 7: Regional Innovation Clusters and Innovation- and Entrepreneurship-Related Infrastructure*

In the NPRM, EDA proposed a definition in § 300.3 for the phrase "regional innovation cluster" (RIC), an important economic development strategy designed to spark job creation and help communities and Regions become more competitive in the global economy. EDA also proposed adding a new section, § 301.11, to make clear that EDA funds a broad portfolio of construction and non-construction infrastructure to meet a community's strategic goals, from basic assets to innovation- and entrepreneurship-related infrastructure. In proposed § 301.11(a), for the first time EDA provided some examples of innovation and entrepreneurship-related infrastructure, including business incubation, business acceleration, venture development organizations, proof of concept centers and technology transfer.

These proposed changes engendered a number of comments. They were generally supportive of EDA's explicit recognition of RICs and the flexibility provided by the Agency's description of non-traditional infrastructure. Two commenters, however, were concerned that the definitions and examples proposed in §§ 300.3 and 300.11(a) were too narrow and thus, might foreclose the funding of certain Projects.

*Agency Response to Topic 7*

EDA will adopt the definition of RICs and the new § 300.11, as proposed. In response to the concerns expressed by the commenters, EDA emphasizes that the amendments will not prevent potential, innovation- and entrepreneurship-related infrastructure projects from being funded. Instead,



EDA's regulations will simply provide necessary context by clarifying the meaning of key terms and the type of investments that may be supported. The definitions and examples do not in any way limit what type or scope of investment may be construed to support innovation- and entrepreneurship-related infrastructure, nor do they assume that a cluster, an empirically defined, measurable concept based on independent research and analysis, will only need hard infrastructure investments. EDA agrees with the other commenters that investments supporting a broad range of infrastructure activities may fall into the category of innovation- and entrepreneurship-related infrastructure, and that clusters require both hard and soft infrastructure to thrive. EDA's regulations are designed to allow flexibility in funding announcements, guidance and other policy documents so that EDA remains nimble and best able to support diverse Project types from both rural and urban communities across the nation.

*Comment Topic 8: Attorneys and Consultants of Eligible Applicants*

EDA received a comment that § 302.10(a) should be amended to require that the Eligible Applicant certify the name of the law firm or consulting firm retained by the Eligible Applicant to expedite its Investment Assistance application rather than the name of the specific individual(s) that performed the work.

*Agency Response to Topic 8*

EDA is not adopting this recommendation in the Final Rule. Having a specific name allows the Agency to more easily contact those involved on the project if necessary. Also, this requirement allows the Agency to better monitor and otherwise ensure that the Eligible Applicant, because of the activities or relationships of the entities providing assistance on the application, does not itself have a conflict of interest.

*Comment Topic 9: Composition of CEDS Strategy Committees and District Organization Governing Bodies*

EDA proposed, and now revises §§ 303.6(b)(1) and 304.2(c)(2) to provide additional flexibilities with respect to the composition of CEDS Strategy Committees and District Organization governing bodies (also referred to as "EDD policy boards"). These revisions will properly shift the focus of these entities from membership structure to performance and outcomes by maintaining the requirement that CEDS

Strategy Committees and District Organization governing bodies represent the main 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 will no longer require a majority or membership threshold from any type of economic stakeholder. However, the new regulations make clear that these organizations are still expected to retain strong private sector representation and must continue to demonstrate the capacity to effectively undertake planning processes and implement strategies, as applicable.

EDA received numerous comments addressing these provisions. Most commenters supported the new streamlined requirements because Planning Organizations and District Organizations will now have more flexibility to appoint committees and boards, respectively, which better reflect their own unique local qualities and priorities. By contrast, others expressed their view that the current composition requirements should stay the same, with a particular focus on maintaining the requirement for majority representation of elected officials or designated appointees on District Organization governing bodies because of their accountability to the general public.

*Agency Response to Topic 9*

As noted above, EDA agrees with those supporting new, less restrictive composition requirements. EDA is committed to ensuring that its regulations provide a general framework and the flexibility needed to respond to current and future economic conditions in communities across the nation. EDA believes (and the new regulations require) that effective economic development planning needs the input of multiple sectors (e.g., private, public, non-profit, educational) to reflect regional interests effectively. By removing the requirement for specific sector percentages (i.e., majority private sector representation for CEDS Strategy Committees and majority public sector representation for EDD boards), EDA intends to empower communities to decide how best to structure these entities to meet the varying needs and priorities of each Region while ensuring broad stakeholder input is achieved. EDA believes that the flexibility to develop regional composition based on regional economic interests and dynamics will better contribute to the overall effectiveness of the planning process.

*Comment Topic 10: CEDS Content Requirements*

The NPRM proposed streamlining the rigid list of required CEDS items in § 303.7(b) to four essential planning elements. A number of commenters praised the more concise and flexible format of the proposed content requirements, while two were of the view that the existing list of guidelines should not be simplified because they encouraged thoughtful deliberation and provided needed structure in the planning process. EDA also received comments requesting more guidance from EDA with respect to developing the content of the CEDS.

*Agency Response to Topic 10*

EDA, on balance, believes that the static list of ten CEDS requirements may be of limited value and even counterproductive to many Regions attempting to develop dynamic, responsive and relevant economic development strategies, and will adopt the proposed changes to § 303.7(b) in the final regulations. Nor does this Final Rule preclude inclusion of lists of proposed projects in the CEDS (see Agency Response to Topic 12).

Moreover, EDA emphasizes that it is in the process of developing new CEDS Content Guidelines to help regional Planning Organizations prepare more impactful CEDS. The Content Guidelines will offer suggestions on what should be included in each of the required sections (as outlined in the regulations), and recommends tools, resources and examples to help in the development of the CEDS document. EDA has sought the review and feedback of key stakeholders such as the National Association of Development Organizations (NADO) and its members in developing the Content Guidelines, which will be released shortly after publication of this Final Rule.

*Comment Topic 11: CEDS Public Comment Requirement*

EDA received a number of comments that were generally supportive of EDA's proposed changes to the CEDS public review and comment period requirement in § 303.6(b)(2). Instead of keeping the existing bare-bones requirement intact—namely, that the CEDS be made available to the public for comment for at least 30 days before submission to EDA—EDA proposed adding more details to the requirement. While maintaining the mandate that the comment period be for at least 30 days, the NPRM specified that the Planning Organization must provide the public and appropriate governments and

interest groups with adequate notice and opportunity to comment, make the CEDS available electronically or otherwise throughout the period, and that the Planning Organization, upon request by EDA, provide to EDA any comments received on the CEDS and demonstrate how those comments were resolved.

#### *Agency Response to Topic 11*

EDA is adopting this change in the Final Rule. EDA is committed to a high level of transparency and accountability in its programs. Public participation, as a key component of the planning process, is viewed as critical to the success of the CEDS process. The more detailed requirement in the Final Rule reinforces the importance of a robust, broad-based participatory process that is inclusive of the economic interests of multiple stakeholders while at the same time, providing Planning Organizations with some degree of flexibility in determining what is adequate and appropriate in terms of input.

#### *Comment Topic 12: CEDS Project Lists/Project Consistency with CEDS*

The NPRM proposed streamlining CEDS requirements outlined in § 303.7(b) from ten detailed specifications to four essential planning elements. One of the specifications EDA proposed removing was the “project list,” which requires that a CEDS include “[a] section listing all suggested Projects and the projected numbers of jobs to be created as a result thereof.” Multiple comments were received about EDA’s proposal to no longer require a project list in the CEDS document. Many of these respondents objected to this proposed change, expressing their view that listing specific projects was an important and unique part of the CEDS process that ensured that the project was critical to the Region. In a related concern, a number of these respondents expressed their disapproval of EDA’s proposed revision § 301.8 that would remove the specific references that an EDA project “be part of an overarching, long-term Comprehensive Economic Development Strategy . . .” and “demonstrate [ ] a high degree of local commitment.”

#### *Agency Response to Topic 12*

Despite the concerns voiced by the commenters, EDA will adopt the new § 303.7(b), as proposed. Although a listing of projects is no longer required, the proposed regulations do not prohibit the CEDS contents from including a list of projects. EDA firmly believes that a successful CEDS should be a strategy-driven plan based on regional visioning,

prioritized actions and performance outcomes rather than a stand-alone list of projects and programs. This is not to say, however, that the CEDS should not include an action or implementation plan. EDA recommends that a strong CEDS include a robust action plan with a collection of worthwhile capacity building activities. However, the action plan should not simply be a list of projects and programs. Nor should it exclusively reflect those activities which EDA alone could support. The action plan should include a wide-range of activity types (housing, transportation, environmental, etc.) and must be clearly linked to the strategic direction within the plan. The emphasis of the CEDS should be on its strategic direction—and any subsequent actions should flow from the corresponding goals and objectives. The action plan should provide a guide to prioritizing resources and efforts. It should not be used to limit the identification and implementation of other projects and activities that effectively align with the strategic direction that was established as part of the vision goals and objectives within the CEDS.

We also disagree with the commenters’ suggestions regarding § 301.8 and maintain the revisions proposed in the NPRM. First, EDA believes that the updated evaluation criteria does not diminish the Agency’s emphasis on projects that demonstrate local commitment and in fact, are geared towards selecting projects that best reflect the ability to help the impacted community grow the local economy effectively, create new and better jobs and coherently engage local partners. Second, even with the proposed elimination of the regulatory language, EDA is not eliminating the need for certain projects to be aligned with a CEDS. PWEDA itself requires projects under EDA’s Public Works and EAA programs to be consistent with a relevant CEDS. *See* 42 U.S.C. 3141, 3149.

#### *Comment Topic 13: CEDS Consistency with Other Plans*

As discussed above, EDA proposed streamlining the CEDS content requirements in § 303.7(b) from a laundry-list of ten items to four essential planning elements. One of these proposed elements was “[s]trategies and an implementation plan to build upon the Region’s strengths and opportunities and resolve the weaknesses and threats facing the Regions, which should not be inconsistent with applicable State and local economic development or workforce development strategies.” A number of respondents felt that the

language in the regulation that states that the CEDS “should not be inconsistent” with other strategies is misleading and should be clarified because it implies that CEDS are somehow subordinate to, or developed after, other plans.

#### *Agency’s Response to Topic 13*

EDA does not see any ambiguity in the language of the proposed rule and thus, adopts such language in the Final Rule. EDA is highly committed to the process of cross-pollination when it comes to crafting impactful CEDS. EDA believes that related plans should build upon and be linked to each other to leverage existing information and approaches while avoiding duplication and actions or activities that may be at cross-purposes. The language in proposed (and now final) § 303.7(b) was not intended to suggest that CEDS were secondary to, or must await the development of, other plans. Instead, this element was intended to promote the concept that other community and regional planning efforts, if already crafted, should be used to inform the development or update of the CEDS as appropriate, and vice versa.

#### *Comment Topic 14: RLF Audits*

EDA received several comments on the proposed new requirement that the certification of prudent management of RLF funds be made by “a qualified independent accountant who preferably has audited the RLF Recipient in accordance with OMB Circular A–133 requirements.” The commenters expressed concern with the change to § 307.15(b)(1), arguing that in many Regions it would be difficult and costly to find a firm qualified, and even willing because of liability issues, to make such a certification.

#### *Agency’s Response to Topic 14*

EDA disagrees with the position of the commenters, and the proposed language will be adopted in the Final Rule. The concerns of the commenters are speculative, and in any event, issues raised in prior programmatic audits have created the need for the revision. EDA also emphasizes that it is the Agency’s aim to ensure that all regulations are clear and as easy to follow and implement as possible, while also balancing the need to ensure sufficient oversight and controls on the expenditure of Federal funds and the need to be good stewards of taxpayer resources. RLF audits are governed by OMB Circular A–133, and are required either when a Recipient expends \$500,000 or more in combined Federal funds from all Federal agencies in a

given year or when the thresholds outlined by program specific A-133 compliance supplementals are met. EDA's A-133 Compliance Supplemental for the RLF program provides specific instruction on how RLF funds should be used to calculate towards the \$500,000 expenditure threshold requirement. EDA's definition of prudent management is not prescriptive of specific activities that must be followed and is not intended to limit the scope of the audit beyond conformity to OMB Circular A-133.

EDA notes that on December 26, 2013, the Office of Management and Budget (OMB) issued the Final Rule to the "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards" (78 FR 78590). This rule, commonly known as the "Super Circular," streamlines a number of OMB Circulars, including A-133, into a single, comprehensive guidance document and has important implications for Federal grant-making entities, Federal grant recipients, and applicants for Federal grant assistance. For example, the Super Circular raises the threshold for compliance audits of Federal grant recipients from \$500,000 to \$750,000 per fiscal year. The Super Circular, although effective on December 26, 2013, provided that Federal agencies have until December 26, 2014 to promulgate regulations implementing this guidance. When DOC finalizes its Department-wide regulations, EDA will take appropriate steps to amend its own regulations and issue additional policy guidance to its stakeholders.

One of the above commenters also expressed concern that the requirement that the certification be made within 60 days before "the initial disbursement of EDA funds" is ambiguous. EDA believes that the language is clear: The certification is only required prior to the initial disbursement, not after each subsequent disbursement.

#### *Comment Topic 15: RLF Advisory Committee*

One commenter points out that in the narrative of the proposed rule, EDA acknowledged that it had "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." (76 FR 76512). The commenter suggested that any EDA RLF task force should include external members as well.

#### *Agency's Response to Topic 15*

We agree with the commenter's opinion that feedback from practitioners and others outside of EDA would

benefit the RLF program, but there is no current need for a specific regulatory change or provision to address this issue. EDA is committed to a high-level of transparency and accountability in its programs. Although EDA has identified the need to create an internal task force to improve communications and resolve RLF program issues, public participation is viewed as critical to the success of the initiative. EDA believes that the process improvements require the input of multiple sectors (e.g., private, public, non-profit) and intends to interact with our external stakeholders to better contribute to the overall effectiveness of the RLF program.

#### *Comment Topic 16: RLF Flexibility*

Several comments were received regarding the need for flexibility in the RLF program and alternative uses of RLF funds. For example, one commenter suggested that EDA outline a process in its regulations for converting RLF funds into an approved public infrastructure investment.

#### *Agency's Response to Topic 16*

Although at this time EDA will not be incorporating any of these proposals into its Final Rule, EDA emphasizes that it is committed to ensuring its regulations provide a general framework and the flexibility needed to respond to current and future economic conditions in communities across the nation. Within the confines of its statutory authority, 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 will continue this process going forward to ensure that EDA's operations are conducted in an appropriate manner that balances the need for efficient and streamlined processes with sufficient controls and due diligence.

#### *Comment Topic 17: RLF Defederalization*

Multiple commenters provided feedback on the need to release the Federal interest in RLF assets after all of the initial funds have been fully disbursed.

#### *Agency's Response to Topic 17*

EDA recognizes the challenges presented by the present requirement that EDA maintain its interest in RLF assets in theoretic perpetuity. One result of particular concern to stakeholders is that RLFs must then comply with reporting and audit requirements in perpetuity. However, unlike the case

with Real Property and tangible Personal Property, currently there is no statutory authority for EDA to release its interest in RLF assets.

However, the RLF program has grown significantly in its capital base because of its longevity and continues to support its original purpose of fostering economic development and supporting businesses and communities throughout the nation. Recognizing the value of the program and the need to reduce burdens when appropriate, EDA will continually review its regulations to determine whether updates or adjustments can be made to provide greater flexibility for RLF Recipients.

#### *Comment Topic 18: Inherently Religious Activities*

EDA received three comments on its proposal to modify § 314.10(c)(1)(ii), which required that Real or tangible Personal Property "acquired or improved with Investment Assistance [from EDA] . . . not be used . . . [f]or inherently religious activities prohibited by applicable Federal law." EDA proposed to modify this language to read, in new § 314.10(e)(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."

The commenters object to this change on the grounds that it would violate the Establishment Clause of the United States Constitution (U.S. Const. amend. I), and may allow sectarian organizations that receive EDA funds to use such Federal money for religious purposes. More specifically, as summarized by one of the commenters, they contend that "the current rule [prior § 314.10(c)(1)(ii)] prohibits entities from using property built or rehabilitated with taxpayer funding for religious activities," while the proposed rule "would abolish this current—constitutionally necessary—provision." Two of the commenters also argue that EDA's reliance on a 2003 opinion from the Department of Justice's Office of Legal Counsel ("OLC") on whether grant money could be used to restore the Old North Church in Boston, Massachusetts, Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, 27 Op. O.L.C. 91, 2003 WL 21246893 (April 30, 2003) ("Old North Church opinion"),

was misplaced. Rather, they argue, the U.S. Supreme Court decision in *Tilton v. Richardson*, 403 U.S. 672 (1971) is controlling here. There, as we noted in the NPRM, the Supreme Court held that recipients of Federal grants cannot use that grant money to purchase or renovate a building that is later used for religious or sectarian purposes, even after the expiration of the 20-year useful life period of the Federal government's interest in the acquired property. All three commenters claim that the regulatory change EDA proposed contradicts this Supreme Court precedent, and thus, violates the Establishment Clause.

#### *Agency's Response to Topic 18*

EDA disagrees that the revision proposed would fundamentally alter the current provision. First, EDA notes that the proposed text would have specifically required EDA to take into account the current law on the Establishment Clause. It states that, "In determining whether to release the Federal Interest, EDA will review EDA's legal authority to release its interest, including governing Establishment Clause law." This proposed change would not, therefore, have ignored EDA's constitutional obligations, but rather reinforced them. Nor would the proposed clause have prevented EDA from taking any action it could take under the current rules, such as prohibiting a grantee from using for any religious or sectarian purpose any buildings that were constructed, purchased, or renovated using Federal funds. Instead, the proposed provision would have allowed EDA to take into account the specific situation of any grantee seeking a release of EDA's interest in Property acquired or improved using EDA funding. If EDA found or believed that the Property may be used for a religious or sectarian purpose following the release, EDA could refuse to release its interest, require the grantee to file a covenant on the Property upon release that the property will not be used for a religious or sectarian purpose, or require the Recipient to compensate EDA for the Federal Share of such Property.

Moreover, the proposed amendment to EDA's regulations is not precluded by *Tilton* or subsequent Federal case law on the Establishment Clause. The language in the NPRM would have specifically required EDA to take into account any Establishment Clause concerns raised by the release of the Federal Interest on a case-by-basis. *Tilton* does not preclude this kind of case-by-case review.

Were Property, previously acquired or improved with EDA funding and after the project's useful life, sold by a grantee to a church or religious organization for its then fair market value, there would be no violation of the Establishment Clause as there could be no subsidy of any religious activity through the EDA grant. OLC's *Old North Church* opinion also indicates that there are certain circumstances in which the Establishment Clause does not preclude the use of federal grants to maintain buildings that are used in part for religious purposes.

The proposed regulation at § 314.10(e)(2) would have allowed EDA to take all of the relevant circumstances into account. If a Recipient that has otherwise fulfilled the terms of the grant award asks for a release of Federal Interest on the Property, EDA would have been required to consider current Establishment Clause jurisprudence, and could impose restrictions on the future use of the Property for religious or sectarian purposes, as appropriate to the circumstances presented. For example, if a church or faith-based organization is the grantee and seeks to have EDA release its interest on Property it purchased, built, or renovated using, in part, EDA-provided funds, then EDA could require the organization to execute a covenant on the land prohibiting the future use of the Property for any religious or sectarian use as long as the organization owns the Property, prior to or contemporaneously with the release of EDA's interest in the Property. EDA could also seek to have the religious organization or successor-in-interest compensate EDA for the Federal Share of such Property, as current § 314.10(d)(2)(ii) already allows. Conversely, if a non-sectarian grantee seeks a release of the Federal interest after 20 years and after fulfilling the terms of its grant, under the proposed rule EDA could have allowed the release without the above conditions of future use, if EDA's due diligence indicates that the Property will not be used for religious purposes.

Overall, the commenters overstate the effect of EDA's proposed change for § 314.10. We agree with the commenters that Federal grant funds or money cannot be awarded for religious or sectarian purposes, but the rule as proposed does not change EDA's obligation to ensure that such an event does not occur. Rather, it recognizes that a blanket prohibition on the use of Property that has been disposed of by the grant Recipient in an arm's length transaction for its then-fair market value, whether during or after its useful

life, would not be appropriate. In such a case, EDA's interest in the Property—the performance of the terms of a grant to help create jobs—has been fulfilled and terminated. The proposed rule would allow EDA to take into account such case-specific circumstances within the boundaries set by governing Establishment Clause law.

Nevertheless, despite our disagreement with the position of the commenters, EDA will not adopt proposed § 314.10(e)(2) in its entirety, but may do so in the future. EDA is sensitive to the legal and practical ramifications of a change to our regulatory language that involves the Establishment Clause. Thus, we wish to proceed carefully, deliberately, and in a fashion consistent with the approaches of other agencies in the Executive Branch. We will continue to review this change, but in the interim EDA will: (a) Remove the reference to "governing Establishment Clause law" in proposed § 314.10(e)(2); and (b) restore in (e)(2) and (e)(3) the express prohibition on using Property acquired or improved with Investment Assistance for "inherently religious activities in violation of applicable Federal law" that is provided for in the current rule at §§ 314.10(c)(1)(ii) and (d)(2)(i)(A), but otherwise retain the remainder of proposed § 314.10(e) in the final version.

#### **Classification**

##### *Regulatory Flexibility Act*

As noted in the NPRM, prior notice and opportunity for public comment are not legally required for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). However, as matter of policy, EDA put the rule out for notice and comment because it constituted a comprehensive regulatory overhaul.

Nevertheless, 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 not applicable to this Final Rule. Therefore, a regulatory flexibility analysis has not been prepared.

##### *Executive Orders No. 12866 and No. 13563*

This rule was drafted in accordance with Executive Orders 12866 and 13563. It was reviewed by the Office of Management and Budget (OMB), which found the rule to be "significant" according to Executive Order 12866 and Executive Order 13563. Accordingly,

the rule has undergone interagency review.

#### *Congressional Review Act*

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

#### *Executive Order No. 13132*

It has been determined that this Final Rule does not contain policies with federalism implications as that term is defined in under Executive Order 13132.

#### *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 Final Rule. These collections of information are necessary for the proper performance and functions of EDA.

Part or section of this final rule	Nature of request	Form/title/OMB control No.
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).
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

Part or section of this final rule	Nature of request	Form/title/OMB control No.
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 the 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 the Investment awards 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 the allowable costs were the Recipient administering it.	ED-900, Application for Investment Assistance (0610-0094); Construction Investments (0610-0096).
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).

Part or section of this final rule	Nature of request	Form/title/OMB control No.
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).
307.14(b) .....	All 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).

Part or section of this final rule	Nature of request	Form/title/OMB control No.
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-2091, 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).



Part or section of this final rule	Nature of request	Form/title/OMB control No.
315.6(a)(1); 315.7; 315.8. 315.6(a)(2); 315.6(a)(3); 315.16.	Firms must provide specific information to EDA in order to be certified for participation in the TAAF program. 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). 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, Organization and functions (Government agencies), Regional offices.

### 13 CFR Part 301

Applicant requirements, Application requirements, Economic distress levels, Eligibility requirements, Investment rates, Match share requirements.

### 13 CFR Part 302

Civil rights, Community development, 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, Technical assistance..

### 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, Community development, Grant programs—housing and community development, Performance evaluations, Research, Technical assistance, Training, University centers.

### 13 CFR Part 307

Award and application requirements, Business and industry, Economic adjustment assistance, Grant programs, Income, Liquidation, Merger, Pre-loan

requirements, Reporting and recordkeeping requirements, Revolving loan fund, Sales and securitizations, Termination.

### 13 CFR Part 308

Business and industry, Community development, Performance awards, Planning performance awards.

### 13 CFR Part 310

Excessive unemployment, Special impact area, Special need.

### 13 CFR Part 314

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

## Regulatory Text

For the reasons discussed above, EDA is 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 by:

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

■ b. Removing the definition of *Private Sector Representative*;

■ c. Revising the definitions of *PWEDA*, and *Region* or *Regional*;

■ d. Adding in alphabetical order a definition of *Regional Innovation Clusters* or *RICs*; and

■ e. Revising the definition of *Trade Act*;

The revisions and addition read as follows:

### § 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 citation 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.

### Subpart A—General

■ 6. Amend § 301.1 by revising the introductory text and paragraphs (d) and (e) and adding 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.

### Subpart C—Economic Distress Criteria

■ 7. In § 301.3, revise paragraphs (a)(1) and (2), (a)(4) introductory text, (a)(4)(i), and (c)(1) 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

\* \* \* \* \*

**Subpart D—Investment Rates and Matching Share Requirements**

■ 8. In § 301.4, revise paragraphs (b)(1) introductory text, (b)(1)(ii), (b)(2), (b)(3)(i) through (iii), (b)(4) introductory text, (b)(5), and (c) to read 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 section. 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:

(i) \* \* \*

(ii) \* \* \*

(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, and 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. In § 301.6, revise the section heading and paragraphs (a) introductory text and (b) 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.

**Subpart E—Application Requirements; Evaluation Criteria**

■ 10. In § 301.7, revise paragraph (a) to read 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. I § 301.10, 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 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 used to develop and upgrade basic economic development assets as described in §§ 305.1 and 305.2 of this chapter, 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 and program requirements, 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. In § 302.3, revise the introductory text 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 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. In § 302.17, revise paragraphs (a), (b)(2), and (c)(2) and (3) 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. In § 302.20, revise paragraph (b)(1) 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 under the following heading:

**Subpart A—General**

- 30. In § 303.1, revise the section heading and introductory text 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. In § 303.3, revise paragraphs (a)(5) and (c) 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. In § 303.4, revise paragraphs (a) and (c) 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 under the following heading:

**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 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 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. In § 303.7, revise paragraph (b) to read as follows:

**§ 303.7 Requirements for Comprehensive Economic Development Strategies.**

\* \* \* \*

(b) *Strategy requirements.* (1) A CEDS must be the result of a continuing 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 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 development 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 under the following heading:

**Subpart C—State and Short-Term Planning Assistance**

■ 37. In § 303.9, revise paragraphs (a) introductory text and (b) 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. In § 304.1, revise paragraph (a) and paragraph (c) introductory text 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. In § 304.2, revise paragraphs (c)(1) and (2) and (c)(4)(i) 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. In § 304.3, revise paragraph (b) introductory text 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. In § 304.4, revise paragraphs (a) introductory text, (a)(3), and (b) 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.

**Subpart A—General**

■ 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 (as defined in § 301.11 of this chapter) 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. In § 305.2, revise paragraph (c) 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. In § 305.6, revise paragraphs (a) introductory text, (a)(1), and (b) 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 part 14 or 24, as applicable.

- 47. In § 305.8, revise paragraphs (a) and (c) 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 part 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 to 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. In § 306.1, revise paragraph (a) introductory text to read as follows:

**§ 306.1 Purpose and scope.**

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

\* \* \* \* \*

- 51. In § 306.3, revise paragraph (a) 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.

\* \* \* \* \*

**Subpart B—University Center Economic Development Program**

- 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. In § 306.6, revise paragraph (d) 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. In § 306.7, revise paragraphs (a)(1) and (c) 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 remains 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.

**Subpart A—General**

- 56. In § 307.1, revise the introductory text and paragraph (b) 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 Disaster;

\* \* \* \* \*

- 57. In § 307.3, revise paragraphs (b)(1) and (2) to read as follows:

**§ 307.3 Use of Economic Adjustment Assistance Investments.**

\* \* \* \* \*

(b) \* \* \*

(1) Infrastructure (as defined in § 301.11 of this chapter) improvements, such as site acquisition, site preparation, construction, rehabilitation and equipping of facilities;

(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. In § 307.4, revise paragraphs (a), (b), and (c)(2), add paragraph (c)(3), and revise paragraph (d) 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

##### § 3017.7 [Redesignated as § 307.6]

■ 61. Redesignate § 307.7 as § 307.6, placing it in subpart B, 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 new § 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. In § 307.9, revise paragraphs (a)(2), (b)(2)(ii), (b)(3), and (c)(1) and (2) 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. In § 3017.10, revise paragraphs (a) and (b) 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. In § 307.11, revise paragraphs (b), (d), (e), and (f)(2) 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. In § 307.12, revise paragraphs (a)(1) and (2) and (b) introductory text 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. In § 307.13, revise paragraphs (a) introductory text and (b)(2) and (3) 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. In § 307.14, revise paragraph (c) 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. In § 307.15, revise paragraphs (b)(1), (c)(1), (c)(2), (d)(1) introductory text, and (d)(1)(iii) 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. In § 307.16, revise paragraphs (a)(1), (a)(2)(i), (c)(1), (c)(2)(i), (d)(1) introductory text, and (d)(1)(i) 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 detailed information on any loan in default; and

\* \* \* \*

■ 71. In § 307.17, revise paragraphs (b)(6)(ii) and (c) 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. In § 307.18, revise the section heading, paragraph (a)(1), paragraph (b) heading, and paragraphs (b)(1) introductory text, (b)(1)(ii) and (iii), and (b)(2) introductory text to read as follows:

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

(a)(1) 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. In § 307.19, remove paragraph (b), redesignate paragraphs (c) and (d) as paragraphs (b) and (c), respectively, 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. In § 307.20, revise paragraphs (a) introductory text, (a)(1) and (2), and (c)(3) 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. In § 307.21, revise paragraphs (a)(1) introductory text and (a)(1)(viii) 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. In § 308.2, revise paragraphs (a), (b) introductory text, (c), and (d) 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. In § 308.3, revise paragraphs (a) introductory text, (a)(2) and (3), and (b) 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. In § 310.1, revise the introductory text 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. In § 310.2, revise paragraphs (a)(6), (b), and (c) introductory text 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:

\* \* \* \* \*

## PART 314—PROPERTY

■ 82–83. The authority citation for part 314 continues to read as follows:

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

### Subpart A [Removed]

■ 84. Remove the designation of subpart A for §§ 314.1 through 314.6.

■ 85. In § 314.1, revise the definition of *Real Property* 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. In § 314.3, revise paragraphs (a), (b), and (c) 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 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. In § 314.4, revise paragraph (c) to read as follows:

**§ 314.4 Unauthorized Use of Property.**

\* \* \* \* \*

(c) Where the Disposition, encumbrance or use of any Property violates paragraph (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. In § 314.5, revise paragraph (b) 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. In § 314.6, revise paragraph (b) 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.

\* \* \* \* \*

**Subpart B [Removed]**

■ 90. Remove the designation of subpart B for §§ 314.7 and 314.8.

■ 91. In § 314.7:

■ a. Revise paragraph (a);

■ b. Add a paragraph (b) heading;

■ c. Revise paragraphs (b)(1)

introductory text, (c)(1) introductory

text, (c)(2) introductory text, (c)(3), (c)(4) introductory text, and (c)(5); and

■ d. Remove paragraph (c)(6).

The revisions and addition 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 for 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. In § 314.8, 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 Recipient.

**Subpart C [Removed]**

■ 93. Remove the designation of subpart C for § 314.9.

■ 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.

#### **Subpart D [Removed]**

■ 95. Remove the designation of subpart D for § 314.10.

■ 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 Recipient's written request and shall be based, at least in part, on the facts and circumstances provided in writing by 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) of 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 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 for inherently religious activities in violation of applicable Federal law and in violation of nondiscrimination requirements set forth in § 302.20 of this chapter. 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 inherently religious activities prohibited by applicable Federal law and 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: December 4, 2014.

**Roy K.J. Williams,**  
*Assistant Secretary for Economic Development.*

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