



# EDA Regulatory Revisions

**Federal Register, Vol. 76, No. 235, December 7, 2011, Pages 76492-76539**

Following is a brief snapshot of the new proposed rules for the U.S. Economic Development Administration (EDA). This summary does NOT reflect the positions and views of NADO. This document is intended only for discussion purposes and to identify key policy and program issues that may impact the association's members. In addition, this summary does NOT highlight every proposed change in the proposed rulemaking. In early January 2012, NADO will be forming an EDA Rulemaking Response Task Force to assist in a more complete analysis and to compile response recommendations for consideration by the association's Board of Directors and full membership.

## ■ **EDA published a Federal Register notice on Dec. 7, 2011, as well as a strike through version on EDA.gov, outlining a series of agency rule changes**

- ▶ Public comments are due by **February 6, 2012**
- ▶ Proposed rule changes are *proposed only, not final yet*
- ▶ **Comments may be submitted to EDA via <http://edaregs.ideascale.com/> - scroll down the page and click on "Submit New Ideas" – comments will be available to the public!**
- ▶ **NADO will be forming working groups** to review modifications to EDD/CEDS, RLF awards and other provisions

## ■ **Major Themes and Issue Areas**

- ▶ Major modifications to **project application evaluation criteria and selection process**, similar to recent reforms implemented by the agency, such as quarterly review cycle
- ▶ **New match rates** for broad regional planning initiatives and projects that effectively leverage other federal agency resources
- ▶ Expanded definition of **infrastructure, especially for non-construction infrastructure**
- ▶ Streamlining of **Comprehensive Economic Development Strategy (CEDS) process**, including committee structure and strategy document requirements  
*(Please note that the agency's new CEDS content guidelines will also be very key!)*
- ▶ Increased flexibility to **EDD governance / policy board requirements (Please note that EDA proposes to eliminate the requirement for local government control of EDD policy boards!)**
- ▶ Modifications to **RLF award requirements**
- ▶ Changes and clarifications on **Federal interest in real property**

## ■ Eligibility, Investment Criteria and Match Rates

- ▶ Amendments to key definitions, including definition of **Regional Innovation Clusters (RICs)**
- ▶ Replaces the term “higher-skill, higher-wage jobs” throughout the regulations with “**new and better jobs**” to avoid perception that the agency was interested only in “high-tech” jobs
- ▶ Clarification that EDA will use the most recent data from the **Bureau of Labor Statistics (BLS) to determine economic distress levels based upon the unemployment rate** and will continue to use the American Community Survey for per capita income requirements
- ▶ **Clarifies that distress eligibility data** must be for the region where the project will be located, the geographic area where substantial direct project benefits will occur, *OR* the geographic area of poverty or high unemployment
- ▶ Major modifications to **project application evaluation criteria and process as currently practiced quarterly** (with exceptions allowed in cases of “extremely urgent distress”). Under the agency’s new project selection and review process, **EDA investments must meet one or more of the following criteria:**
  - ◆ **Ensure collaborative regional innovation** and development of growth clusters
  - ◆ **Leverage public-private partnerships**
  - ◆ **Advance national strategic priorities**, including clean energy; green technologies; sustainable manufacturing; information technology infrastructure; communities severely impacted by automotive industry restructuring; natural disaster mitigation; access to capital for small-and-medium sized and ethnically diverse enterprises; and innovations in science, health care and alternative fuel technologies
  - ◆ **Enhance global competitiveness** with high-growth businesses and innovation-based entrepreneurs
  - ◆ **Encourage environmentally sustainable development**
  - ◆ **Support economically distressed and underserved communities**
- ▶ Adds a new requirement that projects proposed for 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
- ▶ **Allows up to 80% federal share** for broad regional planning initiatives and for projects that effectively leverage other federal agency resources

- ▶ Maintains the current definitions for traditional infrastructure yet **adds a new section outlining examples of innovation-and entrepreneurship-related infrastructure (including non-construction infrastructure)**. EDA also stresses its focus on federal interagency collaboration on these projects, as well as the importance of leveraging non-EDA resources to provide entrepreneurs with access to early stage capital. **Following are the agency's examples of innovation-and entrepreneurship-related infrastructure:**
  - ◆ **Business incubation**, both physical facilities and business support services
  - ◆ **Business acceleration**, both physical facilities and an array of business support services
  - ◆ **Venture Development Organization**, focused on nurturing and growing high-growth, innovation-based start-up companies
  - ◆ **Proof of Concept Center**, serving as a hub of collaborative and entrepreneurial activity designed to accelerate the commercialization of innovations into the marketplace
  - ◆ **Technology transfer**
  
- ▶ Among existing application evaluation criteria, **deletes specific references that “projects be part of an overarching long-term Comprehensive Economic Development Strategy...”** and **“demonstrates a high degree of local commitment.”** *EDA states the reference to a project being consistent with an approved EDA CEDS is clearly required under the PWEDA Act*
  
- ▶ **Clarifies the two-year post-employment restriction for EDA employees** to include future employment with non-profit organizations, Economic Development Districts and for-profit entities, as well as special conditions for institutions of higher education
  
- ▶ Adds new section clarifying the agency's process for implementing actions following a grantee's **failure to undertake good faith efforts**. This includes possibilities of discontinued reimbursement of funds pending correction; suspension or termination of the investment assistance; required reimbursement of the EDA share of the project; and instituted formal government-wide debarment and suspension of proceedings

## ■ Planning and CEDS Requirements

- ▶ Places a new emphasis that EDA-funded planning activities 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
  
- ▶ **Makes major reforms to the CEDS process for Partnership Planning grantees**
  - ◆ **Eliminates requirement that private sector representatives** make up a majority control of CEDS Strategy Committee membership, plus no longer mandates

membership threshold from any type of economic stakeholder (unless such representation is proscribed by State law)

- **Replaces previous membership requirements with new language specifying** that the **CEDS Strategy Committee must represent the main economic interests of the region**, including the **private sector**, public officials, community leaders, **private individuals**, representatives of workforce development boards, institutions of higher education, minority and labor groups, and **others who can contribute to and benefit from improved economic development in the relevant region**
- **Adds requirement that CEDS Strategy Committee** be able to demonstrate the capacity **“to undertake a collaborative and effective planning process”**
- **Adds new public notice and comment requirements** before the submission of the CEDS to EDA, including at least a 30 day public comment period, availability of CEDS in hardcopy upon request, and potential for EDA to require planning organizations to provide any comments received and demonstrate how the comments were resolved
- Clarifies that each CEDS must be the result of a **comprehensive and continuous** economic development planning process

▶ **New CEDS Strategy document and element requirements**

- Stresses that each CEDS must **promote regional economic resiliency and be unique and responsive to the relevant region**
- **Replaces the previous laundry list of CEDS elements** with four key points
  1. A **summary** of economic development **conditions** of the region
  2. An **in-depth SWOT analysis** for the region
  3. **Strategies and implementation plan** to build upon the region's strengths and opportunities, **which should not be inconsistent with applicable state and local economic development or workforce development strategies (What if CEDS is the first and/or main strategy!)**
  4. Performance measures used to evaluate the planning organization's successful development and implementation of the CEDS
- **Removes requirements for lists of specific projects**, including prioritized lists, to be included in the CEDS. **HOWEVER, EDA notes that it neither encourages nor discourages such project lists in order to provide maximum flexibility for planning organizations**

- ◆ **Highlights the key point that EDA will be publishing more detailed CEDS content guidelines** which will be based on best practices (including NADO's Peer Standards of Excellence recommendations) ***This is the real key to future EDA requirements for the CEDS process and document!***

## ■ Economic Development Districts (EDDs)

- ▶ **Removes current requirement that EDD policy boards have at least a simple majority of its membership who are local elected or appointed government officials**
- ▶ **Removes requirements that EDD policy boards include at least one private sector representative and one or more representatives** from Chambers of Commerce, institutions of post-secondary education, workforce development groups, or labor groups, all of which must aggregate a minimum of 35 percent of the EDD's governing body
- ▶ **Replaces EDD policy board representation requirements with new broader language** that the governing body must represent the main 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**
- ▶ Adds new provision that EDD governing bodies **must demonstrate the capacity to implement the EDA-approved CEDS**. EDA will be providing additional guidance to implement this requirement, noting that the agency expects that every EDD governing body **"will include strong private sector representation unless proscribed by State law."**
- ▶ Requires EDD governing bodies to meet **at least twice** each year, rather than annually

## ■ Public Works

- ▶ Clarifies that justifications for the proposed method for procurement of construction services **must include a brief analysis of the appropriateness and benefits of using the method and the recipient's experience in using the method**
- ▶ Adds new section outlining process and policies for dealing with **cost overruns**

## ■ RLF Award Requirements

- ▶ **Regroups RLF award requirements** into a consolidation section for better ease of use
- ▶ **Adds new section outlining RLF application review priorities**, including need for a new or expanded public financing tool; types of financing activities anticipated; and capacity of the RLF organization to succeed
- ▶ Reinforces that RLF organizations must comply with **EDA's RLF Standard Terms and Conditions, and OMB Circular A-133**
- ▶ Clarifies that RLF intermediaries must ensure **RLF recipients comply with appropriate federal environmental requirements**
- ▶ Adds new language to require that the certification of the 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"**
- ▶ **Allows the agency to waive requirement to submit Form ED-209** (Income and Expense Statement) for RLFs with a small capital base / small RLFs, as determined by EDA
- ▶ Provides that **any federally guaranteed loan may leverage an RLF portfolio**, allowing RLF intermediaries greater flexibility in meeting the RLF leveraging requirement with federal resources – previously EDA only referenced SBA 7(a) and 504 loans
- ▶ Clarifies requirements for **capitalization utilization standard**
- ▶ Notes that EDA may allow a RLF Recipient to use RLF capital to purchase the rights of a prior lien holder during a foreclosure action under certain cases and **changes the current 18-month time lime to a "reasonable time, as determined by EDA"**
- ▶ Allows EDA to approve the **addition of a new lending area** (at the request of an RLF Recipient) **before the full amount of the RLF Grant is disbursed** to the Recipient
- ▶ Explains the difference between the **consolidation of RLFs** (RLF intermediary that has multiple EDA RLF awards and desires to consolidate into one single RLF award) **vs. merger of RLFs** (two or more EDA RLF intermediaries desiring to merge their respective RLF awards into a single RLF award)

- ▶ EDA notes that it is **creating an internal RLF task force** in the near future to explore further improvements to the agency's management of the program. *While EDA acknowledges the request of NADO and others to form an external advisory committee, the proposed rulemaking is silent on the implementation of this important recommendation*

## ■ America Competes

- ▶ Reserves a new section of the regulations related to the implementation of the "America Competes Reauthorization Act of 2010" ("COMPETES") (P.L. 111-358).

## ■ Federal Interest in Real Property

- ▶ Revises table of contents and format for section – **if you are interested in EDA's specific rules and guidance on Federal Interest in Real Property, we strongly suggest the reader to review in-depth the explanations and details outlined in the Federal Register, Vol. 76, No. 235, December 7, 2011, pages 76513-76519 and 76536-76539**
- ▶ Proposes clarification to agency's encumbrances regulation to **specify that agency's authority to accept a shared first lien position**
- ▶ Clarifies that EDA's **use restrictions apply only during the Estimated Useful Life of Project Property**
- ▶ Adds flexibility on the issue of subordination, depending on whether the **"request for EDA to subordinate is made prior to, contemporaneous with, or after the EDA Grant award"**
- ▶ Expands **flexibility regarding forms of security as alternatives to mortgages**, such as execution of a letter of credit or escrow agreement in EDA's favor
- ▶ Adds new flexibility language for exceptions to the general rule that property must be free of encumbrances – this is intended to help **projects take advantage of New Market Tax Credit (NMTC) programs** and other emerging innovative finance tools
- ▶ **Requires the submission of an appraisal** so that EDA can weigh the risk to the federal interest

## NADO REMINDERS

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