

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

**13 CFR Parts 300, 301, 302, 303, 304, 305, 307, 309, and 314**

[Docket No.: 160519444–6444–01]

RIN 0610–AA69

**Revolving Loan Fund Program  
Changes and General Updates to  
PWEDA Regulations**

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

**ACTION:** Notice of proposed rulemaking, request for public comment.

**SUMMARY:** Through this notice of proposed rulemaking (“NPRM”), the Economic Development Administration (“EDA”), U.S. Department of Commerce (“DOC”), proposes and requests comments on updates to the agency’s regulations implementing the Public Works and Economic Development Act of 1965, as amended (“PWEDA”). In particular, through this NPRM EDA is proposing important changes to the regulations governing the Revolving Loan Fund (“RLF”) program that are intended to reflect current best practices and strengthen EDA’s efforts to evaluate, monitor, and improve RLF performance by establishing the Risk Analysis System, a risk-based management framework, to evaluate and manage the RLF program. The proposed Risk Analysis System is modeled on the Uniform Financial Institutions Rating System, commonly known as the capital adequacy, assets, management capability, earnings, liquidity, and sensitivity (“CAMELS”) rating system, which has been used since 1979 to assess financial institutions on a uniform basis and to identify those in need of additional attention. EDA also proposes to reorganize the RLF regulations to improve their readability and clarify the requirements that apply to the distinct phases of an RLF award. In addition, EDA proposes specific changes to RLF requirements to make RLF awards more efficient for Recipients to administer and EDA to monitor.

In addition, through this NPRM EDA proposes important, but less comprehensive updates to other parts of its regulations, including revising definitions, replacing references to superseded regulations to reflect the promulgation of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements (2 CFR part 200) (“Uniform Guidance”),

streamlining the provisions that outline EDA’s application process, and clarifying EDA’s property management regulations.

**DATES:** Written comments on this NPRM must be submitted by December 2, 2016.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. EDA will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

- *Email:* [regulations@eda.gov](mailto:regulations@eda.gov). Include “Comments on EDA’s regulations” and Docket No. 160519444–6444–01 in the subject line of the message.

- *Fax:* (202) 482–5671. Please indicate “Attention: Office of Chief Counsel,” “Comments on EDA’s regulations,” and Docket No. 160519444–6444–01 on the cover page.

- *Mail:* Office of the Chief Counsel, Economic Development Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Suite 72023, Washington, DC 20230. Please indicate “Comments on EDA’s regulations” and Docket No. 160519444–6444–01 on the envelope.

**FOR FURTHER INFORMATION CONTACT:** Rachel Wallace, Attorney-Advisor, Office of the Chief Counsel, Economic Development Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Suite 72023, Washington, DC 20230; telephone: (202) 482–4687.

**SUPPLEMENTARY INFORMATION:**

**Background on EDA and the RLF Program**

EDA leads the Federal economic development agenda by promoting innovation and competitiveness, preparing American regions for growth and success in the worldwide economy. Through strategic investments that foster job creation and attract private investment, EDA supports development in economically distressed areas of the United States.

Authorized under section 209 of the Public Works and Economic Development Act of 1965 (“PWEDA”)

(42 U.S.C. 3149) the RLF program has served as an important pillar of EDA’s investment programs since the program’s establishment in 1975. The goal of the RLF program is to help communities and regions transform their economies and propel them towards economic prosperity through innovation, entrepreneurship, and public-private partnerships. Through the RLF program, EDA provides grants to eligible Recipients, which include State and local governments, political subdivisions, and nonprofit organizations to operate a lending program that offers low-interest loans and flexible repayment terms to businesses that cannot obtain traditional bank financing and to governmental entities for public infrastructure. These loans enable small businesses to expand and lead to new employment opportunities that pay competitive wages and benefits. They also help retain jobs that might otherwise be lost, create wealth, and support minority and women-owned businesses.

Since the program’s inception, EDA has funded approximately 800 RLFs nationwide, investing \$550 million in RLFs that have a combined capital base of about \$813.5 million as of September 30, 2015. These funds currently have a total of \$250 million available for lending. EDA-funded RLFs have made more than 27,000 loans to American small businesses and have leveraged more than \$12 billion non-RLF dollars. RLF Recipients report that the program has contributed to creating 340,000 jobs and retaining 307,000 jobs.

Each RLF Recipient contributes matching funds in accordance with EDA’s statutory requirements to capitalize an RLF. As loans made from this original pool of EDA and Recipient funds are repaid, the fund is replenished and new loans are extended to qualified businesses. They can also be provided to governmental entities for eligible public infrastructure. Each RLF Recipient must develop and maintain an RLF Plan to demonstrate how the fund fits specific economic development goals and how it will adequately administer the RLF throughout its lifecycle. Because RLF funds currently retain their Federal character in perpetuity, the RLF Recipient’s obligation to manage the RLF continues as long as the Federal Interest in the RLF exists.

Since February 1, 2011, EDA has taken a critical and comprehensive look-back at its regulations to reduce burdens by removing outmoded provisions and streamlining and clarifying requirements. On December 19, 2014, EDA published a Final Rule (79 FR

76108) (“2014 Final Rule”) revising the agency’s regulations and reflecting the agency’s practices and policies in administering its economic development assistance programs.

EDA’s regulations at 13 CFR part 307 set out the requirements for awards under EDA’s Economic Adjustment Assistance program, through which EDA can support a wide-range of technical assistance, planning, and infrastructure assistance in Regions experiencing adverse economic changes that may occur suddenly or over time. The types of assistance that EDA can provide through this program include strategy development, infrastructure construction, and RLF capitalization. Subpart A of part 307 details the general requirements for Economic Adjustment Assistance awards; and subpart B sets out requirements specific to the RLF program.

Through the 2014 Final Rule, EDA reorganized part 307 to help clarify award requirements and incorporate all RLF program requirements under subpart B to part 307. When developing those regulations, EDA received a number of comments on the RLF program, including several recommending that EDA set a time limit for releasing the Federal Interest in RLF awards. EDA explained that while some RLF awards have been operating for a considerable length of time—some for as many as three decades—EDA currently is not authorized to release its interest in RLF awards; however, EDA continues to actively work to obtain the necessary authorities for what is known as “defederalization” or “local control.”

Other comments remarked that the RLF program reporting requirements were too burdensome. EDA noted that the semi-annual reporting requirement for the RLF program is in place to address an audit report by the DOC’s Office of Inspector General (“OIG”), which recommended that EDA undertake more rigorous oversight of the RLF program to ensure the financial integrity and sustainability of the program. Because the reporting requirements are designed to address past program issues and ensure the viability and transparency of the program, EDA declined to make wholesale changes at that time but expressed its intent to continue to improve the RLF Recipient reporting system to make it more user-friendly. In the current set of regulatory changes, EDA proposes to move from the semi-annual reporting requirement to a frequency (either annual or semi-annual) that will be determined by each Recipient’s score in the Risk Analysis System. In addition, EDA is changing

the reporting period to be based on each Recipient’s fiscal year end.

Six comments received from the prior set of regulatory changes suggested the establishment of an RLF task force to address program issues and improve communications between EDA and program stakeholders. EDA has established such a task force, which is represented by personnel from EDA Headquarters and all six of EDA’s Regional Offices and has examined ways to address challenges that have been identified by the OIG, program stakeholders, and EDA management.

#### Overview of Proposed Changes to the RLF Program

Given this greater focus on improving the RLF program and its operations through a risk-based management framework, EDA now looks to strengthen and clarify its RLF regulations. As further detailed in this NPRM, EDA seeks to improve the agency’s ability to monitor RLF performance and provide targeted technical assistance through a risk-based management framework, better organize and clarify the RLF regulations, and make additional changes designed to clarify and streamline RLF requirements. Given the important role of this program as a driver of small business growth, job creation, and economic development, EDA seeks the public’s input and insight in the regulatory revision process.

With these goals in mind, the Part-by-Part Analysis will describe the changes to the RLF program in more detail, but the following provides a high-level overview of these changes.

- EDA proposes important definitional revisions, including adding a definition for *Disbursement phase* to go along with the existing definition of *Revolving phase* so that it is clear which requirements apply during the two phases of an RLF’s lifecycle. We also define the important term *RLF Capital Base*, which is the total value of RLF Grant assets administered by the RLF Recipient and is equal to the amount of Grant funds used to capitalize (and recapitalize, if applicable) the RLF, plus Local Share, plus RLF Income, plus Voluntarily Contributed Capital, less any loan losses and disallowances.

- EDA proposes simplifying the language explaining RLF disbursements to clarify that EDA will disburse funds in the amount needed to meet the Federal share of a new RLF loan. For example, assume an RLF Grant totals \$500 and has a Local Share requirement of 50 percent. If the RLF Recipient closes on a loan obligation worth \$30, EDA will disburse \$15.

- We add language to clarify how RLF Income is treated during the Disbursement Phase. The current regulations specify that RLF Income held to reimburse administrative costs does not need to be disbursed to draw additional Grant funds, but do not address RLF Income not used for administrative costs. Through this regulatory revision, EDA is clarifying that RLF Income earned during the Disbursement Phase must be placed in the RLF Capital Base and may be used to reimburse eligible and reasonable administrative costs and increase the RLF Capital Base. However, RLF Income earned during the Disbursement Phase need not be disbursed to support new RLF loans, unless otherwise specified in the terms and conditions of the RLF Grant.

- Consistent with EDA’s new approach to managing RLF Grants, this NPRM proposes expanding the requisite period during which RLF Income must be earned and administrative costs must be incurred from the same six-month Reporting Period to the same fiscal year. We also specify that RLF Recipients may not use funds in excess of RLF Income for administrative costs during the fiscal year unless directed to do so by EDA and add language advising RLF Recipients to keep administrative expenses to a minimum to maintain the RLF Capital Base and to specify that the percentage of RLF Income used for administrative expenses will be one of the metrics used in EDA’s Risk Analysis System. In keeping with this program management change, EDA is removing the requirement that RLF Recipients submit an RLF Income and Expense Statement (*i.e.*, Form ED-209I). The Risk Analysis System will incentivize RLF Recipients to manage RLF administrative expenses and maintain their RLF Capital Base.

- This NPRM also proposes language to describe the process of adding Voluntarily Contributed Capital to the RLF Capital Base and to clarify that such capital becomes an irrevocable part of the RLF Capital Base and may not be subsequently withdrawn or separated from the RLF.

- In response to a request from some existing Recipients, this NPRM proposes broadening the types of investments that may serve as appropriate leveraging to allow Recipients to use funds from State and local lending programs to meet the RLF leveraging requirement. Similar to allowing Federal loans to count as leveraging, if the managers of State and local lending programs are willing to provide financing to a borrower, EDA believes such financing should count towards the leveraging requirement.

- EDA proposes adopting a Risk Analysis System to evaluate and manage the performance of RLF Recipients, which would provide Recipients with a set of portfolio management and operations standards to evaluate their program and improve performance. Revised § 307.16 includes language on the proposed system, which will provide EDA with an internal tool for assessing the risk of each Recipient's loan operations and identifying RLF Recipients that require additional monitoring, technical assistance, or other action. EDA's proposed risk-based RLF management framework is modeled on the Uniform Financial Institutions Rating System (the CAMELS rating system), used by regulators to assess financial institutions and to identify those in need of extra assistance or attention. Additional details on the proposed system are provided below under the Part-by-Part Analysis. The technical aspects of this system will be described in a separate notice that will be published in the **Federal Register** at a later time. This notice will provide additional agency guidance regarding the system and the underlying metrics.

- EDA proposes adopting an Allowable Cash Percentage concept to replace the capital utilization standard. Recognizing that different regions face very different economic and access to capital conditions and that a one-size-fits-all capital utilization standard can be difficult for RLF Recipients to meet and for EDA to implement, EDA proposes eliminating the capital utilization standard, which requires Recipients to provide that at all times at least 75 percent of their RLF Capital is loaned or committed. In place of the capital utilization standard, which is based on the amount of capital that is loaned out, EDA proposes to assess RLF Recipients on the amount of cash Recipients have on hand available for lending—defined as the Allowable Cash Percentage. Each year, each EDA Regional Office will calculate the average percentage of RLF Cash Available for Lending held by each RLF Recipient in the region's RLF portfolio and will notify Recipients by January 1 each year of the Allowable Cash Percentage to be used during the ensuing year. RLF Recipients will be required to manage their repayment and lending schedules to provide that at all times, their amount of RLF Cash Available for Lending does not exceed the Allowable Cash Percentage. See the part-by-part analysis below for an example of how the Allowable Cash Percentage concept will work and

proposed revisions to §§ 307.16(c) and 307.17(b).

One feature of the move to the Allowable Cash Percentage concept is that EDA will no longer require automatic sequestration as a remedy for failure to satisfy the capital utilization standard. Given the replacement of the capital utilization standard with the more flexible Allowable Cash Percentage and the adoption of a Risk Analysis System, sequestration will be considered as one of a range of possible tools used to ensure compliance with the terms of the RLF Grant and will also be considered in EDA's Risk Analysis System.

- EDA proposes clarifying the use restrictions related to RLF Cash Available for Lending. Specifically, to address recent concerns EDA has encountered in administering the RLF program, EDA is adding language to make clear that RLF Cash Available for Lending cannot be used as collateral to obtain credit or any other type of financing without EDA's prior written approval, cannot be used to support operations or administration of the RLF Recipient, and cannot be used for any purpose that would violate EDA's property requirements set out in 13 CFR part 314.

- EDA is seeking to restructure the compliance regulations by creating a regulation that sets out actions (or failures to act) for which EDA may take appropriate compliance actions (§ 307.20) and another section listing remedies for noncompliance (§ 307.21). Restructuring the compliance regulations will help RLF stakeholders to better understand program prohibitions and the potential consequences.

### Part-by-Part Analysis of Proposed Changes

#### General

#### Part 300—General Information

Part 300 of the regulations states EDA's mission and highlights the policies and practices that EDA employs in order to attract private capital investments and new and better jobs to those Regions experiencing substantial and persistent economic distress. This NPRM proposes several clarifying revisions to the "Definitions" section of EDA's regulations at § 300.3. First, in the definition of *In-kind contribution(s)*, EDA replaces references to 15 CFR parts 14 and 24, which set out the Uniform Administrative Requirements applicable to grants and agreements with Institutions of Higher Education, Hospitals, Other Non-Profit, and Commercial Organizations and State

and Local Governments, respectively, with a reference to the uniform administrative requirements cost principles, and audit requirements set out in the Uniform Guidance. In addition, EDA proposes revising the definition of *Project* by adding a reference to "or Stevenson-Wydler" between the reference to "PWEDA" and the word "and" to clarify that EDA may provide Investment Assistance to support a Project under Stevenson-Wydler. Please see the explanation of the proposed definition of Stevenson-Wydler below for more information on this authority.

EDA proposes to revise the definition of *Recipient* by defining separately the concepts of *Co-recipients* and *Subrecipients* in EDA's programs. The term co-recipient has been used in EDA's regulations for some time, and adding a reference to the term in the Definitions section is designed to clarify that when EDA awards Investment Assistance to more than one recipient, they are known as co-recipients and are generally jointly and severally responsible for fulfilling the terms of the Investment Assistance. We also propose to introduce the term *Subrecipient* as the eligible recipient that receives a subgrant under 13 CFR part 309. The definition of *Subrecipient* in this NPRM is consistent with the definition of *Subrecipient* set out in the Uniform Guidance at 2 CFR 200.93, which is "a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program; but does not include an individual that is a beneficiary of such program. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency." Note that the Uniform Guidance defines "Non-Federal entity" as "a state, local government, Indian tribe, institution of higher education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient" and "Pass-through entity" as "a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program." See 2 CFR 200.69 and 200.74, respectively.

In addition, EDA proposes adding a definition of Stevenson-Wydler, which is the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3701 *et seq.*). The America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science ("COMPETES") Act as reauthorized in 2010 (Pub. L. 111-358 (January 4, 2011)) amended Stevenson-Wydler to add several innovation and entrepreneurship-focused provisions creating EDA offices

and/or programs, including the Office of Innovation and Entrepreneurship (15 U.S.C. 3720), the loan guarantees for innovative technologies in manufacturing (“ITM”) program (15 U.S.C. 3721), and the Regional Innovations Strategies (“RIS”) program (15 U.S.C. 3722). EDA is proposing to add a definition of Stevenson-Wydler in order to begin incorporating these programs under its regulations and proposes adding references to specific regulations throughout this part to reflect that they apply to Stevenson-Wydler. Via a future notice, EDA anticipates publishing proposed regulations at 13 CFR part 312 to reflect requirements specific to Projects funded under Stevenson-Wydler, including eligibility and matching share requirements.

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

Part 301 sets forth eligibility criteria, the maximum allowable Investment Rates, and application requirements common to all PWEDA-enumerated programs (and thus excludes Community Trade Adjustment Assistance at part 313 and Trade Adjustment Assistance for Firms (“TAAF”) at part 315). In general, subpart A of part 301 presents an overview of EDA’s eligibility requirements; subpart B addresses applicant eligibility; subpart C addresses Regional economic distress level requirements; subpart D sets forth maximum allowable Investment Rates and Matching Share requirements; and subpart E addresses application requirements, as well as the evaluation criteria used by EDA in selecting Projects.

EDA proposes adding the phrase “at its sole discretion” to the second sentence of § 301.2(b) (“*Applicant eligibility*”). § 301.2(b) requires nonprofit organizations that are applicants for investment assistance to include in their applications a resolution or letter from an authorized representative of a political subdivision of a State, acknowledging that the applicants are acting in cooperation with the officials of that subdivision. The second sentence of this paragraph allows EDA to waive this requirement for Projects of a significant Regional or national scope. By adding the phrase, “at its sole discretion,” to this second sentence, EDA is seeking to clarify that such a waiver is solely at EDA’s discretion. In the second sentence of § 301.5 (“*Matching share requirements*”), EDA proposes replacing the word “show” with the phrase “provide documentation to EDA demonstrating”

to better explain what applicants are required to provide to fulfill EDA’s Matching Share requirements. In addition, EDA proposes adding a sentence to § 301.5 to clarify that EDA retains the discretion to determine whether Matching Share documentation adequately addresses the requirements of the regulation.

This NPRM proposes to simplify § 301.7(a) (“*Investment assistance application*”) to state that for all of EDA’s Investment Assistance programs, application submission requirements and evaluation procedures criteria will be set out in published Federal Funding Opportunity (“FFO”) announcements. In 2011, EDA moved to an application and selection process that required a single application that was competitively evaluated in quarterly funding cycles under its Public Works and Economic Adjustment Assistance programs. After evaluating the impact of this process on applicants and staff, EDA is again adjusting the application and selection process under the Public Works and Economic Adjustment Assistance programs to return to a two-phase process that requires the submission of a proposal followed by a complete application. As more fully explained in the FY 2016 Economic Development Assistance Programs (“EDAP”) FFO, which is available on [www.grants.gov](http://www.grants.gov), there are no submission deadlines and proposals and applications are accepted on an ongoing basis. All submissions under the Public Works and Economic Adjustment Assistance programs must proceed through a two-phase review process where the first phase allows applicants to submit a shorter proposal through which EDA can provide an initial analysis on whether the applicant’s project is responsive to the EDAP FFO and the second phase allows EDA to evaluate the competitiveness of a complete application against specified evaluation criteria. Proposals will be reviewed by EDA within 30 days of receipt; and following the proposal review, complete applications will be reviewed within 60 days of receipt.

The application procedures for EDA’s other programs, including the Planning, Local Technical Assistance, University Center, and Research and Evaluation programs, will be specified in applicable FFOs. To avoid engraining a particular process in a regulation, EDA simply revises § 301.7(a) to provide that for EDA Investment Assistance programs, application submission requirements and evaluation procedures and criteria will be specified in FFOs published on the EDA Web site and at [www.grants.gov](http://www.grants.gov).

Likewise, EDA revises § 301.8 (“*Application evaluation criteria*”) to remove specific evaluation criteria as currently set out in subsections (a) through (f) from the regulation and to specify that program-specific evaluation criteria will be set out in applicable FFOs. EDA has found that including specific evaluation criteria in the regulation can be confusing. Providing that EDA will set appropriate evaluation criteria in FFOs allows EDA additional flexibility to respond to changing economic conditions.

In § 301.11 (“*Infrastructure*”), EDA proposes adding the parenthetical (“*e.g., roads, sewers, and water lines*”) in the second sentence of § 301.11(a) to provide several core examples of “basic economic development assets” referenced in the sentence.

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

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

As noted above under the description of changes to part 300, EDA administers several programs authorized under Stevenson-Wydler. EDA proposes revising § 302.5 (“*Relocation assistance and land acquisition policies*”) to add a reference to Stevenson-Wydler by adding the phrase “or any other types of assistance” between “Investment Assistance” and “under PWEDA” and a reference to “, and Stevenson-Wydler” between “Trade Act” and “(States and political subdivisions of States. . . .)”. EDA also corrects a typo by replacing the phrase “nonprofits organizations” with “nonprofit organizations”. EDA revises § 302.6 (“*Additional requirements; Federal policies and procedures*”), to replace references to 15 CFR parts 14 and 24 with a reference to “2 CFR part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards”. In addition, EDA proposes adjustments to § 302.20 (“*Civil rights*”) to clarify that nondiscrimination requirements apply to any type of assistance provided under Stevenson-Wydler. Specifically, in § 302.20(a), EDA adds a reference to “or Stevenson-Wydler” between the reference to “PWEDA” and the phrase “or by an entity”, as well as the phrase “or any other type of assistance under Stevenson-Wydler” between the reference to “Trade Act” and the phrase

“in accordance with the following authorities”. In § 302.20(d) regarding written assurances of compliance with nondiscrimination requirements, EDA adds a reference to “and Stevenson-Wydler” between “PWEDA” and “all Other Parties”, as well as a reference to “or any other type of assistance under Stevenson-Wydler” between “Trade Act” and the phrase that begins with “must submit to EDA”.

In addition, in § 302.20(a)(2), EDA proposes adding a reference to Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 *et seq.*), which proscribe discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution. Practically speaking, such discrimination has long been prohibited under EDA’s programs, because various other provisions prohibit discrimination on this basis, which have been incorporated under the regulation at § 302.20(a)(2), as have the DOC’s regulations at 15 CFR part 8a, which implement Title IX of the Education Amendments of 1972, as amended. However, a direct reference to Title IX of the Education amendments of 1972, as amended has been missing, and we add that via this NPRM.

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

Part 303 sets forth regulations governing EDA’s Planning program, through which the agency provides assistance to help Eligible Applicants create strategies or plans to stimulate and guide the economic development efforts of a community or Region. EDA has three distinct types of Planning Investments: (1) Partnership Planning; (2) State Planning; and (3) Short-Term Planning. Through EDA’s Partnership Planning Investments, the agency facilitates the development, implementation, revision, or replacement of Comprehensive Economic Development Strategies (“CEDS”). EDA provides Partnership Planning awards to Planning Organizations (*e.g.*, District Organizations) serving as EDA-designated Economic Development Districts (“EDD”) (as defined in § 300.3) throughout the U.S. The EDDs are recognized by the State(s) in which they reside as multijurisdictional councils of governments, regional commissions, or planning and development centers. The Partnership Planning awards enable Planning Organizations to manage and coordinate the development and implementation of CEDS to address the

unique needs of their respective Regions. The CEDS are central to EDA’s economic development initiatives, and a proposed Project must be consistent with a relevant CEDS before EDA makes a competitive award under the Public Works or Economic Adjustment Assistance programs under parts 305 or 307. Finally, part 303 sets forth the requirements for State and Short-Term Planning Investments, which can help distressed Regions strategize to create and retain new and better jobs and respond quickly and effectively to sudden economic dislocations.

In this NPRM, EDA proposes minor clarifications and modifications to the Planning program. First, EDA proposes to modify § 303.6(b)(1) to replace “including” with “which may include” to clarify that the CEDS Strategy Committee has the discretion to determine which parties represent the main economic interests of the Region. Those parties may include some but not all of the listed entities. Second, as a result of the broad discretion conferred upon the CEDS Strategy Committee to determine which parties represent the main economic interests of the Region, the last sentence of § 303.6(b)(1) is now superfluous. As such, EDA proposes to remove the last sentence and to revise that section to clarify that Indian Tribes and State officials may be represented on the CEDS Strategy Committee, along with all other groups listed, when representative of the economic interests of the region. Third, in accordance with § 303.6 (“*Partnership Planning and the EDA-funded CEDS process*”), Planning Organizations of EDDs must submit a revised CEDS to EDA at least every five years as specified under § 303.6(b)(3)(ii). To ensure that participating counties or other areas within the EDD remain engaged in the planning process, EDA proposes to require that Planning Organizations obtain renewed commitments to support the economic development activities of the District from such counties or areas as part of the five-year renewal. Therefore, we propose adding the sentence, “In connection with the submission of a new or revised CEDS, the Planning Organization must obtain renewed commitments from participating counties or other areas within the District to support the economic development activities of the District,” to § 303.6(b)(3)(ii).

In addition, in accordance with subsection (c)(1) of § 303.7 (“*Requirements for Comprehensive Economic Development Strategies*”), EDA may accept a non-EDA funded CEDS, even if such a strategy does not contain all elements required of an EDA-funded

CEDS. The 2011 NPRM and the 2014 Final Rule streamlined the content requirements of CEDS from a laundry-list of ten detailed items to the following four essential planning elements in § 303.7(b)(1)(i) through (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. Because EDA has consolidated required CEDS elements to include those that are generally considered to be foundational for a successful planning process, EDA wants to emphasize that a non-EDA funded CEDS should include all elements of an EDA-funded CEDS. However, in particular circumstances, such as a natural disaster or sudden and severe economic dislocation, EDA will accept a non-EDA funded CEDS that does not include the foundational CEDS elements. With this in mind, EDA proposes revisions to § 303.7(c)(1), specifically in the first sentence replacing the phrase “without fulfilling all the requirements of paragraph (b) of this section” with the phrase “so long as it includes all of the elements listed in paragraph (b) of this section” and adding the new sentence “In certain circumstances, EDA may accept a non-EDA funded CEDS that does not contain all the elements listed in paragraph (b) of this section” between the existing first and second sentences of this provision.

#### Part 304—Economic Development Districts

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

In the 2011 NPRM and 2014 Final Rule, in response to comments that

organizational requirements applicable to District Organizations should be more flexible to allow the groups to focus on effective strategy development and implementation rather than meeting membership thresholds, EDA revised subsection (c)(2) of § 304.2 (“*District Organizations: Formation, organizational requirements and operations*”), to remove the current membership thresholds, but maintain the requirement that governing bodies demonstrate that they are broadly representative of the principal economic interests of the Region. However, in making this change, EDA inadvertently used language that can be interpreted to require that all District Organizations include members from certain sectors; specifically, the phrase in § 304.2(c)(2) that reads “*including* the private sector, public officials, community leaders, representatives of workforce development boards, institutions of higher education, minority and labor groups, and private individuals” (emphasis on the word “*including*” added). EDA proposes replacing the word “*including*” in this sentence with the phrase “*which may include*” to indicate that these groups should be included insofar as they represent principal economic interests of the Region. Each District Organization must continue to demonstrate that its governing body is broadly representative of the principal economic interest of the Region and that it has the capacity to implement the EDA-approved CEDS.

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

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

EDA proposes two minor changes to Part 305 in this NPRM to reflect the promulgation of the Uniform Guidance. Specifically, in sub-section (b) of § 305.6 (“*Allowable methods of procurement for construction services*”) and sub-section (c) of § 305.8 (“*Recipient-furnished equipment and materials*”), EDA replaces the references to “15 CFR parts 14 or 24, as applicable” with a reference to “2 CFR part 200”.

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

Part 306 sets out the requirements for EDA’s Local and National Technical Assistance and Research Investments. Local and National Technical Assistance Investments help Recipients fill the knowledge and information gaps that may prevent leaders in the public and non-profit sectors in economically distressed Regions from making optimal decisions on local economic development issues. Through the Research program, EDA invests in research and technical assistance-related Projects to promote competitiveness and innovation in distressed rural and urban Regions. EDA does not propose any changes to part 306 through this NPRM.

#### Part 307—Economic Adjustment Assistance Investments

Part 307 sets out the requirements for awards under EDA’s Economic Adjustment Assistance program, which can provide a wide-range of technical assistance, planning, and infrastructure assistance in Regions experiencing adverse economic changes that may occur suddenly or over time, including strategy development, infrastructure construction, and Revolving Loan Fund (“RLF”) capitalization. Subpart A of part 307 details the general requirements for Economic Adjustment Assistance awards, and subpart B sets out requirements specific to the RLF program. As noted above in the Overview of Proposed Changes to the RLF Program, a focus of this NPRM is strengthening and clarifying EDA’s RLF regulations to improve the agency’s ability to monitor RLF performance and provide targeted technical assistance through a risk-based management framework and propose changes designed to clarify and streamline RLF requirements. Given the important role of this program as a driver of small business growth, job creation, and economic development, EDA seeks the public’s input and insight in the regulatory revision process.

Specifically, EDA proposes to clarify the language in § 307.6 (“*Revolving Loan Funds established for business lending*”) by removing the reference to “business” lending in the title to that section, as well as the phrase in the second sentence of the provision regarding subpart B’s application to “business lending activities” and the phrase “to accommodate non-business RLF awards” regarding the application of special award conditions in the third sentence of the provision. By removing this language, we seek to clarify that

both public infrastructure and business lending activities are subject to subpart B and that special award conditions may be used to provide appropriate modifications to either type of lending. While the current regulations state that RLFs may be used for business and other types of lending, the language we propose to remove created confusion about the applicability of the RLF regulations to other types of lending. In addition, in the second sentence of § 307.6, we add the phrase “EDA-funded” between the phrase “apply to” and the acronym “RLFs” to clarify that the RLF regulations in subpart B to part 307 apply to EDA-funded RLFs.

In § 307.7 (“*Revolving Loan Fund award requirements*”), EDA proposes additional language to clarify the compliance obligations for RLF Grants and update the reference to location of the Compliance Supplement, which was changed with the promulgation of the Uniform Guidance. Specifically, in addition to part 307, RLF Recipients must comply with relevant provisions of parts 300 through 303, 305, and 314 of 13 CFR chapter III, which set forth EDA’s general definitions, general terms and conditions for Investment Assistance, Planning requirements, Public Works requirements, and property management requirements. Therefore, in § 307.7(b), EDA proposes adding the phrase “, as well as relevant provisions of parts 300 through 303, 305, and 314 of this chapter,” between the phrases “set forth in this part” and “and in the following publications”. In addition, in § 307.7(b)(2), we replace the reference to “OMB Circular A–133” as the location of the Compliance Supplement with “, which is Appendix XI to 2 CFR part 200” and with respect to the electronic availability of the Compliance Supplement, we replace the general reference to the OMB Web site with the more specific site where all OMB circulars, including the Compliance Supplement, are located.

In § 307.8 (“*Definitions*”), EDA proposes adding several new definitions and revising existing definitions as we implement the proposed risk-based framework to manage RLF Grants. Specifically, we propose adding new definitions for the following terms:

- *Allowable Cash Percentage* as “the average percentage of the RLF Capital Base maintained as RLF Cash Available for Lending by RLF Recipients in each EDA regional office’s portfolio of RLF Grants over the previous year.” This defined concept will serve as a replacement for the concept of the capital utilization standard, which is currently found in § 307.16(c) and requires RLF Recipients to manage their



repayment and lending schedules to provide that at all times, at least 75 percent of the RLF Capital is loaned or committed. The Allowable Cash Percentage will be defined annually by each EDA Regional Office for that region's RLF Grants based on the previous year's average percentage of unloaned and uncommitted cash held by the region's portfolio of RLFs. See the description of proposed changes to sub-section (c) of § 307.16(c) ("*Risk Analysis System*") and sub-section (b) of § 307.17 ("*Requirements for Revolving Loan Fund Cash Available for Lending*") below for more information on how the Allowable Cash Percentage concept will work.

- *Disbursement Phase* as "the period of loan activity where Grant funds awarded have not been fully disbursed to the RLF Recipient." While EDA's regulations have indicated that particular requirements apply during the time period when EDA is disbursing funds to an RLF Recipient, the term has never been defined. EDA proposes defining *Disbursement phase* to clarify the specific requirements that apply during this phase of an RLF's life cycle, including that RLF Income earned during the Disbursement Phase is not required to be used for new RLF loans, unless otherwise specified in the terms and conditions of the RLF Grant. See the description of proposed revisions to § 307.11 ("*Pre-Disbursement Requirements and Disbursement of Revolving Loan Funds*") for requirements applicable to the Disbursement Phase.

- *Risk Analysis System* as "a set of metrics defined by EDA to evaluate a Recipient's administration of its RLF Grant and that may include but is not limited to capital, assets, management, earnings, liquidity, strategic results, and financial controls." EDA is introducing a risk-based management framework that will be used to evaluate a Recipient's administration of its RLF Grant and that may include the following metrics: Capital, assets, management, earnings, liquidity, strategic results, and financial controls. This is a new approach based on the CAMELS rating system used to assess financial institutions and to identify those in need of additional attention. See the discussion of proposed revised § 307.16 ("*Risk Analysis System*") for more information on EDA's proposed risk-based approach to managing RLF Grants.

- *RLF Capital Base* as "the total value of RLF Grant assets administered by the RLF Recipient. It is equal to the amount of Grant funds used to capitalize (and recapitalize, if applicable) the RLF, plus Local Share, plus RLF Income, plus

Voluntarily Contributed Capital, less any loan losses and disallowances. Except as used to pay for eligible and reasonable administrative costs associated with the RLF's operations, the RLF Capital Base is maintained in two forms at all times: As RLF Cash Available for Lending and as outstanding loan principal." Currently, the term *RLF Capital* is used and defined as an equation of "Grant funds plus Local Share plus RLF Income, less any amount used for eligible and reasonable costs necessary to administer the RLF and any amount of loan principal written off." While the current regulations define *RLF Capital* to apparently comprise all RLF assets, the regulations also refer to the "capital base of an RLF" or the "RLF Capital base", without defining that concept (see the current definition of *Recapitalization Grants* at § 307.8 (defining *Recapitalization Grants* as "additional Grant funds to increase the capital base of an RLF") and the current regulations at §§ 307.11(a)(1) (requiring the amount of fidelity bond coverage to be at least "25 percent of the RLF Capital base"), 307.12(a) (requiring RLF Income to "be placed into the RLF Capital base" and providing that RLF Income earned in one period cannot be "withdrawn from the RLF Capital base in a subsequent Reporting Period for any purpose other than lending without the prior written consent of EDA"), and 307.16 (stating that the usual lending schedule "requires that the RLF Recipient lend the entire amount of the initial RLF Capital base within three years of Grant award" and allowing different capital utilization rate based on the size of the "RLF Capital base"). EDA proposes introducing a definition of RLF Capital Base so that this important concept is clearly defined.

- *RLF Cash Available for Lending* as "the portion of the RLF Capital Base that is held in cash and available to make loans." As specified in the definition of RLF Capital Base, RLF assets are maintained in two forms at all times: Held by the RLF Recipient as cash available for lending and as outstanding loan principal. EDA is proposing this new definition to clarify requirements applicable to the part of the RLF Capital Base that is currently unloaned or uncommitted and available to make loans. See the discussion of proposed revised § 307.17 ("*Requirements for Revolving Loan Fund Cash Available for Lending*") for more information on the requirements applicable to RLF Cash Available for Lending.

- *RLF Recipient* as "the Eligible Recipient that receives an RLF Grant to

manage an RLF in accordance with an RLF Plan, Prudent Lending Practices, the terms and conditions of the RLF Grant, and all applicable policies, laws, and regulations." While this term is used throughout the existing regulations, it was not previously defined and EDA thinks it will be useful as a defined term.

- *Voluntarily Contributed Capital* as "an RLF Recipient's voluntary infusion of additional non-EDA funds into the RLF Capital Base that is separate from and exceeds any Local Share that is required as a condition of the RLF Grant. Voluntarily Contributed Capital is an irrevocable addition to the RLF Capital Base and must be administered in accordance with EDA regulations and policies." EDA proposes adding this definition to clarify that, as of the effective date of these regulations, Voluntarily Contributed Capital is an RLF Recipient's voluntary infusion of additional RLF capital that is separate from and exceeds any Matching Share that is required as a condition of the RLF Grant. This definition is being added to clarify the process for contributing additional capital to an RLF and to explain how the additional capital is treated once added to the RLF Capital Base. In particular, once added, such capital will be considered irrevocable and will become part of the RLF Capital Base.

In addition, we propose revising the definitions of the following existing terms:

- In the existing definition of *Recapitalization Grants*, we propose replacing the phrase "capital base of an RLF" within the proposed defined term "RLF Capital Base" for clarity.

- In the existing definition of *Reporting Period*, EDA proposes to change the Reporting Period to align with each RLF Recipient's fiscal year end in order to ensure consistency between RLF reports using Form ED-209 and annual audit reports by replacing the phrase "means the period from April 1st to September 30th or the period from October 1st to March 31st" with the phrase "is based on the RLF Recipient's fiscal year end and is on an annual or semi-annual basis as determined by EDA." EDA will specify an RLF Recipient's reporting frequency as either on an annual or semi-annual basis, which will be based in part on the Recipient's score under the Risk Analysis System. See also § 307.14(a) ("*Revolving Loan Fund report*") for revisions regarding the frequency of reports.

- In the definition of *RLF Income*, we propose clarifying the language excluding repayments of principal and

interest earned on excess funds that are remitted to the U.S. Treasury by noting that these are excluded pursuant to § 307.20(h). Therefore, we delete as repetitive the parenthetical “(excluding interest earned on excess funds pursuant to § 307.16(c)(2))” in the first sentence of the definition and correct a citation in the final sentence of the definition by replacing the reference to “§ 307.16(c)(2)(i)” with a reference to “§ 307.20(h)”.

In addition, EDA proposes to better organize the regulations by placing all pre-disbursement and Disbursement Phase requirements into § 307.11. To accomplish this, EDA revises the title of the section to read “Pre-Disbursement Requirements and Disbursement of funds to Revolving Loan Funds” from “Disbursement of funds to Revolving Loan Funds”. The timing language in § 307.11(a) that currently reads “Prior to any disbursement of EDA funds, RLF Recipients are required to provide in a form acceptable to EDA” is revised to read “Within 60 calendar days before the initial disbursement of EDA funds, the RLF Recipient must provide the following in a form acceptable to EDA”, and then we revise the regulations to list the certifications and evidence required before EDA will make an initial disbursement of Grant funds. Currently, the regulations place different and sometimes conflicting timing requirements on these certifications. Specifically, under current § 307.11(a), RLF Recipients must submit evidence of fidelity bond coverage and the independent accountant’s certification regarding the RLF Recipient’s accounting system, respectively, before any disbursement of EDA funds. In contrast, current § 307.15(b)(1) requires the Recipient to submit the independent accountant’s certification regarding the RLF Recipient’s accounting system within 60 days prior to the initial disbursement of EDA funds, and current § 307.15(b)(2) requires the RLF Recipient’s certification regarding standard loan documents before the disbursement of any EDA funds). In practice, while RLF Recipients must maintain these standards throughout the duration of an RLF’s operations, the certifications and evidence are only required before the initial disbursement of EDA funds. Therefore, EDA is reconciling the timing of the requirements and clarifying that these items are required within 60 calendar days before the initial disbursement of EDA funds by revising the language of § 307.11(a).

In addition, we propose moving the following two provisions from § 307.15(b), which currently sets out

pre-disbursement requirements regarding loan and accounting system documents, to § 307.11(a) titled “Pre-disbursement requirements”: (1) The requirement that a qualified independent accountant certify as to the adequacy of the RLF Recipient’s accounting system to identify, safeguard, and account for the entire RLF Capital Base, outstanding RLF loans, and other RLF operations (as proposed § 307.11(a)(1)); and (2) the requirement that the Recipient certify that the standard loan documents are in place and have been reviewed by legal counsel (as proposed § 307.11(a)(2)). See the proposed deletions at § 307.15(b) and appropriate re-lettering of that provision.

With respect to the certification regarding legal counsel review of standard RLF loan documents currently set out at § 307.15(b)(2), in relocating the requirement to § 307.15(a)(2), EDA proposes a revision to require the certification that standard loan documents are adequate and comply with the terms and conditions of the RLF Grant, RLF Plan, and applicable State and local law to come directly from the RLF Recipient’s legal counsel rather than have the Recipient certify as to counsel review. This change will not only streamline this process but also ensure that the Recipient’s legal counsel reviewed the standard loan documents and verified that those documents are adequate and in compliance with the applicable requirements. Therefore, in rewording this provision, we propose replacing the phrase “the Recipient shall certify that standard RLF loan documents reasonably necessary or advisable for lending are in place and that these documents have been reviewed by legal counsel” with “The RLF Recipient’s certification that standard RLF loan documents reasonably necessary or advisable for lending are in place and a certification from the RLF Recipient’s legal counsel.”

In the same section, we also propose removing the requirement that a signed bank turn-down letter be included in each loan package. We propose replacing the requirement that RLF Recipients obtain and borrowers provide a signed bank turn-down letter to demonstrate that credit is not otherwise available with the more general requirement for evidence demonstrating that credit is not otherwise available on terms and conditions that permit the completion or successful operation of the activity to be financed. This revision allows EDA to remove the requirement that alternative evidence to a signed bank

turn-down letter be allowed in the RLF Plan.

The provision regarding evidence of fidelity bond coverage will remain in place in § 307.11(a), but will be re-lettered as § 307.11(a)(3). In addition, EDA revises the provision to establish minimum amount of coverage required as the maximum loan amount allowed for the EDA-approved RLF Plan. The existing regulation allows the minimum amount of coverage to be equal to the greater of the maximum permissible loan amount or 25 percent of the RLF Capital base. In practice, the alternative approach permitting coverage of at least 25 percent of the RLF Capital Base requires Recipients to regularly change the amount of fidelity bond coverage to remain in compliance. Also, the two alternative approaches to determining the amount of required coverage are likely to yield approximately the same amount. EDA seeks to simplify this requirement and reduce the burden on Recipients by removing the phrases “the greater of” and “, or 25 percent of the RLF Capital base” from re-lettered § 307.11(a)(3).

We also add language following § 307.11(a)(3) to clarify that the RLF Recipient must maintain the adequacy of the RLF’s accounting system and standard RLF loan documents, as well as records and documentation to demonstrate that these requirements are met, throughout the RLF’s operation. This maintenance language includes a cross-reference to proposed § 307.13(b)(3) where we underscore that the RLF Recipient must maintain records to document compliance with these requirements. This NPRM also proposes conforming language changes to incorporate these requirements into a list format. Because we are moving the language regarding the accountant certification from § 307.15 to § 307.11, this NPRM removes the language in § 307.11(a)(2) that cited to the certification required under § 307.15. Finally, we make a minor change to re-lettered § 307.11(a)(1) to reflect the promulgation of the Uniform Guidance, replacing the reference to “OMB Circular A–133 requirements” with “the audit requirements set out as subpart F to 2 CFR part 200”. See proposed revisions to §§ 307.11(a) and 307.15.

In § 307.11(c), we simplify the language regarding the amount of Grant fund disbursements. EDA believes that the current language is overly complicated and causes undue confusion. The revised language clarifies that EDA will disburse funds in the amount needed to meet the Federal share of a new RLF loan. EDA will continue to disburse Grant funds as the



RLF Recipient closes on loan obligations. For example, assume an RLF Grant has a Matching Share requirement of 50 percent. If the RLF Recipient closes on a loan obligation worth \$30, EDA will disburse \$15. Therefore, EDA proposes replacing the phrase “not to exceed the difference, if any, between the RLF Capital and the amount of a new RLF loan, less the amount, if any, of the Local Share required to be disbursed concurrent with Grant funds” with the phrase “be the amount required to meet the Federal share requirement of a new RLF loan” in the first sentence of § 307.11(c).

In addition, EDA proposes new language to § 307.11(c) to clarify how RLF Income is treated during the Disbursement Phase. The current regulations specify that RLF Income held to reimburse administrative costs does not need to be disbursed to draw additional Grant funds, but do not address RLF Income not used for administrative costs. Through this regulatory revision, EDA is clarifying that RLF Income earned during the Disbursement Phase must be placed in the RLF Capital Base and may be used to reimburse eligible and reasonable administrative costs and increase the RLF Capital Base; however, RLF Income earned during the Disbursement Phase need not be disbursed to support new RLF loans, unless otherwise specified in the terms and conditions of the RLF Grant. See proposed revisions to § 307.11(c).

In addition, EDA proposes a non-substantive revision to § 307.11(d) to capitalize the word “Grant.”

This NPRM locates all provisions that set out Local Share requirements in § 307.11(f), which requires re-locating the substance of the provision at § 307.17(d) regarding use of In-Kind Contributions to satisfy Local Share requirements. Accordingly, EDA proposes removing current § 307.17(d) and re-numbering the regulation accordingly. In revised § 307.11(f), EDA adds the phrase “, which must be specifically authorized in the terms and conditions of the RLF Grant and may be used to provide technical assistance to borrowers or for eligible RLF administrative costs,” between the term “In-Kind Contributions” and the phrase “and cash Local Share” in the first sentence of § 307.11(f)(2). EDA notes that because the purpose of the RLF program is to provide capital to borrowers that cannot otherwise access credit, EDA rarely determines that In-Kind Contributions are necessary and reasonable for accomplishment of the RLF program and, therefore, most RLF

Local Share is cash. See proposed revisions to §§ 307.11(f) and 307.17(d).

In addition, to consolidate all pre-disbursement and disbursement requirements into § 307.11, EDA proposes relocating the provisions regarding loan closing and disbursement schedules, as well as time schedule extensions, from § 307.16(a) and (b), respectively, to § 307.11 and re-lettering them as § 307.11(g) and (h), respectively. We also propose non-substantive conforming changes to reflect defined terms and correct cross-references because of this reorganization. Specifically, EDA replaces the phrase “initial RLF Capital Base” with “RLF Grant” in the final sentence of re-lettered § 307.11(g)(1) to clarify the corpus of funds to which the lending schedule applies; replaces the cross-reference to “§ 307.16(b)” in re-lettered § 307.11(g)(2)(iii) with a reference to “paragraph (h) of this section” to reflect the reorganization of these provisions; corrects a typo by replacing the plural “requests” with a singular “request” in the last sentence of re-lettered § 307.11(h)(1); and breaks re-lettered § 307.11(h)(2) into two sentences for clarity and emphasis. See proposed revisions to §§ 307.11(g), 307.11(h), and 307.16(a) and (b).

In keeping with EDA’s effort to clarify the distinct requirements that apply during the Disbursement and Revolving Phases of an RLF, we propose to rename the title of § 307.12 “*Revolving Loan Fund Income requirements during the Revolving Phase; payments on defaulted and written off Revolving Loan Fund loans; Voluntarily Contributed Capital*” to clarify that the provision describes certain requirements that apply during the Revolving Phase of the RLF and addresses other topics, rather than solely setting out RLF Income requirements. We also add the introductory phrase “During the Revolving Phase,” to the first sentence of § 307.12(a). In addition, EDA is providing additional flexibilities in using RLF Income to cover administrative costs. Currently, RLF Income earned during one six-month Reporting Period must be used to cover administrative costs accrued during that same six-month period. EDA is extending the time period during which RLF Income must be used to cover accrued administrative costs to a full fiscal year. Accordingly, EDA proposes revising § 307.12(a) to clarify that RLF Income earned in one fiscal year of the RLF Recipient must be used to cover administrative costs accrued during the same fiscal year, instead of the same six-month Reporting Period. Accordingly, in § 307.12(a)(1), we replace the word,

“incurred” with “accrued,” and, in § 307.12(a)(1) and (2), we replace the phrase “six-month Reporting Period” with the phrase “fiscal year of the RLF Recipient.” In § 307.12(a)(3), we replace the phrase “Reporting Period” with “fiscal year.” In addition, we make a non-substantive change in § 307.12(a)(1) to add the phrase “is earned” after “Such RLF Income” to clarify that RLF Income is earned by the RLF Recipient as opposed to administrative costs, which are incurred by the RLF Recipient. In addition, in § 307.12(a)(3), we replace the phrase “RLF Capital base” with the proposed defined term “RLF Capital Base.”

Furthermore, under EDA’s current regulations, an RLF Recipient may use 100 percent of RLF Income incurred in a six-month Reporting Period to cover administrative expenses by submitting an RLF Income and Expense Statement (*i.e.*, Form ED-209I). EDA proposes to no longer require the RLF Income and Expense Statement, but to clearly specify that RLF Recipients may not use funds in excess of RLF Income for administrative costs during the RLF Recipient’s fiscal year unless directed to do so by EDA. While EDA would no longer require Recipients to submit the RLF Income and Expense Statement, Recipients would continue to account for their RLF Income and administrative expenses through their regular ED-209 reporting. EDA also proposes language advising that RLF Recipients are expected to keep administrative expenses to a minimum to maintain the RLF Capital Base available for lending and to specify that the percentage of RLF Income used for administrative expenses will be one of the performance metrics used in EDA’s Risk Analysis System. Under the proposed Risk Analysis System, RLF Recipients will be incentivized to manage their expenses in order to maintain their RLF Capital Base, and EDA will work proactively with Recipients to help maintain their RLF Capital Base and, through the annual report and audit, to monitor use of RLF Income. Given EDA’s proposal to move to a risk-based management framework and the agency’s efforts to encourage Recipients to use RLF Income to maintain the RLF Capital Base, as described above, EDA will no longer require the RLF Income and Expense Statement, which will reduce the reporting burden on Recipients. Accordingly, EDA replaces current § 307.12(a)(4), which requires the submission of an RLF Income and Expense Statement, with proposed language that prohibits RLF Recipients from using funds in excess of RLF

Income for administrative costs in a Recipient's fiscal year, sets the expectation that administrative costs should be kept to a minimum, and states that the percentage of RLF Income used for administrative costs will be a metric under the Risk Analysis System. See proposed revisions to § 307.12(a)(4) and the deletion of the current provision at § 307.14(c), which sets out the requirement for the RLF Income and Expense Statement.

In § 307.12(b), which sets out compliance guidance for charging costs against RLF Income, EDA proposes revisions to reflect the promulgation of the Uniform Guidance. Specifically, in revised § 307.12(b)(1), EDA specifies that for RLF Grants made or recapitalized on or after December 26, 2014, the RLF Recipient must comply with the administrative and cost principles set out in 2 CFR part 200. In revised § 307.12(b)(2), EDA specifies that for RLF Grants awarded before December 26, 2014, unless otherwise indicated in the terms of the Grant, the RLF Recipient must comply with the cost principles set out in 2 CFR parts 225 (for State, local, and Indian tribal governments); 230 (for non-profit organizations other than institutions of higher education, hospitals, and other organizations); or 220 (for educational institutions), as applicable. EDA proposes a new § 307.12(b)(3) to specify that regardless of when an RLF Grant was awarded or recapitalized, the audit requirements set out as subpart F to 2 CFR part 200 apply to audits of the RLF Recipient for fiscal years beginning on or after December 26, 2014, as does the Compliance Supplement, as appropriate.

In § 307.12(c), we propose minor adjustments to clarify that the prioritization of payments on RLF loans includes payments on both defaulted RLF loans and those that have been written off, adding the phrase "and written off" to the heading of § 307.12(c) and the first sentence of the provision between the word "defaulted" and the phrase "RLF loan". In addition, we propose revising the cross reference to "§ 307.20" in the provision to "§ 307.21" to reflect the proposed reorganization of the noncompliance provisions. See proposed revisions to § 307.12(c).

We also propose adding new § 307.12(d) to introduce additional clarifying language regarding the treatment of the proposed defined term Voluntarily Contributed Capital. As noted above, in addition to proposing a definition to clarify the process for contributing additional capital to an RLF and to explain how the additional

capital is treated once added to the RLF Capital Base, we also propose adding a provision within the section on pre-disbursement and disbursement requirements to specify that when an RLF Recipient wishes to add additional capital to the RLF Capital Base, the Recipient must submit a written request that specifies the source of the funds to be added. Upon approval by EDA, the Voluntarily Contributed Capital becomes an irrevocable part of the RLF Capital Base and may not be subsequently withdrawn or separated from the RLF. This should help prevent situations when the sources of Voluntarily Contributed Capital subsequently seek to retrieve the funds that were, in effect, commingled with the rest of the Capital Base, making it difficult—if not impossible—to separate out those additional funds and to determine the local and Federal shares. See proposed revisions to §§ 307.8 and 307.12(d).

EDA proposes to revise RLF reporting requirements to specify that records for administrative expenses must be kept for three years from the submission date of the last report that covers the fiscal year in which the costs were recorded, rather than the last semi-annual report that covers the Reporting Period in which the costs were incurred. Therefore, in § 307.13(b)(2), we propose deleting the phrase "last semi-annual" between the phrase "date of the" and the word "report" and replace the defined term "Reporting Period" with "fiscal year". In addition, we propose revising § 307.13(a)(3) to specify that, consistent with the requirements of § 307.11(a), for the duration of RLF operations, Recipients must retain records to demonstrate the adequacy of the RLF's accounting system, that standard RLF loan documents are in place, and that sufficient fidelity bond coverage is maintained. In addition, the existing requirement to make records available for inspection is re-lettered as new § 307.13(a)(4). See proposed revisions to § 307.13.

This NPRM proposes removing the stipulation that all RLF reports be submitted to EDA on a semi-annual basis, which will permit EDA to establish a reporting frequency (annual or semi-annual) based on the objective risk presented by a given RLF, allowing EDA to more closely monitor RLF program performance and engage with RLF Recipients to identify and address existing and potential challenges. Accordingly, EDA proposes revising the title of § 307.14 to read "*Revolving Loan Fund report*" and in § 307.14(a), replaces the phrase "must complete and submit a semi-annual report in

electronic format, unless EDA approves a paper submission" with "must complete and submit an RLF report, using Form ED-209 or any successor form, in a format and frequency as required by EDA."

To improve the accuracy and quality of the information provided during the regular reporting process, EDA proposes requiring that RLF Recipients certify as part of their regular reporting to EDA that the RLF is operating in accordance with their RLF Plan and that the information being provided is complete and accurate. In § 307.14(b), we remove the adjective "semi-annual" and add the phrase "and that the information provided is complete and accurate." In addition, EDA proposes deleting the second sentence of § 307.14(b) to clarify that proposals to modify RLF Plans cannot be made through the reporting process. Such modifications can only be done by separate notification to EDA as described in § 307.9(c). Finally, as noted previously in this NPRM, because EDA proposes to no longer require the submission of an RLF Income and Expense Statement, EDA removes § 307.14(c) in its entirety.

EDA proposes clarifying the provision permitting the inclusion of a loan loss reserve in an RLF Recipient's financial statements, in accordance with generally accepted accounting principles ("GAAP") to show the fair market value of an RLF loan portfolio. This provision has created confusion on the part of some RLF Recipients, who understood it to mean that the inclusion of a loan loss reserve also applied to the Schedule of Expenditures of Federal Awards ("SEFA"), which is the list of expenditures for each Federal award covered by the Recipient's financial statements and must be reviewed as part of the audit process. While GAAP permits the inclusion of a loan loss reserve in financial statements, subpart F to 2 CFR part 200, which sets out the requirements for handling audits of Federal grant programs, specifically prohibits the inclusion of a loan loss reserve in the SEFA. As a result, RLF Recipients that understood the loan loss reserve provision of the RLF regulations to apply to the SEFA ultimately provided inaccurate (and undervalued) RLF valuations in the SEFA. EDA hopes to resolve this confusion by adding a sentence to the end of § 307.15(a)(2) that clearly provides that loan loss reserves are non-cash entries only and shall not be used to reduce the nominal value of the RLF in the SEFA. In addition, the current regulations allow a loan loss reserve to be recorded to "show the fair market value of the RLF's loan portfolio". In the first sentence of

§ 307.15(a)(2), EDA proposes replacing the phrase “fair market” with “adjusted current” to allow a loan loss reserve to be recorded as a non-cash entry to show the adjusted current value, which will more accurately reflect how RLF portfolios are valued. In addition, EDA revises § 307.15(a)(1) to reflect the promulgation of the Uniform Guidance, replacing the reference to “in OMB Circular A–133” with “the audit requirements set out as subpart F to 2 CFR part 200” and, after the reference to the Compliance Supplement, adding the phrase “which is Appendix XI to 2 CFR part 200,” to help the reader locate the Supplement.

Proposed § 307.15(c), which was re-lettered from § 307.15(d) to reflect the relocation of loan and accounting systems certification requirements to § 307.11(a), sets out the requirements for RLF leveraging and enumerates investments that qualify as leverage. Recipients are currently required to ensure funding from additional sources at a ratio of \$2 of additional funding to every \$1 of RLF loans. This applies to the whole RLF portfolio, rather than for individual loans, and is effective for the duration of the RLF. EDA proposes to broaden RLF leveraging requirements to enable Recipients to use funds from State and local lending programs, in addition to the non-guaranteed portions and 90 percent of the guaranteed portions of Federal loan programs. Similar to allowing Federal loans to count as leveraging, if the managers of State and local lending programs are willing to provide financing to a borrower, EDA believes that such financing should count towards the leveraging requirement. To better reflect the content of this provision, EDA proposes renaming § 307.15(c) “RLF leveraging” and replacing the phrase “private investment” with “additional investment” in § 307.15(c)(1). In addition, we propose adding new § 307.15(c)(1)(iv) to read “Loans from other State and local lending programs.”

As noted throughout the NPRM, EDA proposes adopting a Risk Analysis System to evaluate and manage the performance of RLF Recipients to make the RLF program more effective and efficient. Such an approach is designed to provide Recipients with a set of portfolio management and operations standards to evaluate their RLF program and improve performance. It will also provide EDA with an internal tool for assessing the risk of each Recipient’s loan operations and identifying RLF Recipients that require additional monitoring, technical assistance, or other action. This approach to risk-based analysis and management is

modeled on the Uniform Financial Institutions Rating System (the “CAMELS” rating system), used by regulators to assess financial institutions and to identify those in need of extra assistance or attention. The CAMELS system produces a composite rating by examining six components: Capital adequacy, asset quality, management, earnings, liquidity, and sensitivity to market risk. EDA proposes using factors that will likely include capital, assets, management, earnings, liquidity, strategic results, and financial controls, and to use the information and data currently required to be submitted by RLF Recipients in regular reporting to assign risk analysis ratings to each RLF. Scores will be assigned for each factor on a numerical scale of one to three, with three being the highest score. The scores will be totaled to determine each RLF Recipient’s classification as A, B, or C, with an A classification describing the highest performers, B identifying those who are generally managing their program well but who may need some assistance on one or more areas, and C labelling those Recipients that face serious challenges with their programs and require significant improvement. Recipients classified as B or C will generally be given a reasonable amount of time to become compliant with the relevant requirements and improve their score. However, persistent noncompliance may result in EDA undertaking appropriate compliance actions, including requiring a corrective action plan, disallowing Grant funds, or suspending or terminating the RLF Grant. As such, EDA proposes replacing EDA’s current management scheme, which mainly consists of the capital utilization standard (see additional details on changes to this standard below) and monitoring loan default rates, with the Risk Analysis System. Accordingly, through this NPRM we propose completely revising § 307.16 to name it “Risk Analysis System” and to locate the description of the Risk Analysis System in paragraph (a) and its compliance framework in paragraph (b). As noted above, this NPRM proposes relocating current paragraphs (a) and (b) of § 307.16, which set out requirements for loan closing and disbursement schedules and time schedule extensions, respectively, as proposed paragraphs (g) and (h) to § 307.11. We also propose removing paragraphs (c) and (d) of § 307.16, which set out the capital utilization standard (to be replaced by the proposed concept of the Allowable Cash Percentage, as more fully explained below) and EDA’s

system for monitoring loan default rates, respectively.

Consistent with EDA’s revisions to its Definitions section, this NPRM revises § 307.17 to incorporate proposed defined terms and better specify EDA’s requirements related to the proposed defined term “RLF Cash Available for Lending.” As such, EDA proposes revising the title of § 307.17 to read “Requirements for Revolving Loan Fund Cash Available for Lending” and replacing the term *RLF Capital* with the proposed defined term *RLF Cash Available for Lending* in the first sentence of § 307.17(a) and the heading and first sentence of paragraph (c) and paragraph (c)(6)(ii) of § 307.17. In addition, we add the phrase “shall be deposited and held in an interest-bearing account by the Recipient and” following “RLF Cash Available for Lending shall be” in the first sentence of § 307.17(a) to clarify how RLF Recipients must maintain RLF Cash Available for Lending.

In addition, through this NPRM, EDA proposes adopting the concept of an *Allowable Cash Percentage*, which will be considered in the Risk Analysis System, to replace the capital utilization standard, which requires Recipients to manage their lending and repayment schedules so that at all times at least 75 percent of their RLF Capital is loaned or committed. Noncompliance with the capital utilization standard frequently triggered sequestration as a remedy. Although EDA encourages RLF Recipients to prudently make capital available as much as possible, EDA recognizes that different regions face very different economic and access to capital conditions and that a one-size-fits-all capital utilization standard can be difficult for RLF Recipients to meet and for EDA to implement. To help resolve this, EDA proposes to reverse the standard on which RLF Recipients will be assessed from the amount of capital that is loaned or committed to the amount of cash Recipients have on hand available for lending—defined as the *Allowable Cash Percentage*.

Each year, each EDA Regional Office will calculate the average percentage of RLF Cash Available for Lending across their RLF portfolio and will notify RLF Recipients by January 1 of each year of the *Allowable Cash Percentage* to be used during the ensuing year. RLF Recipients will be required to manage their repayment and lending schedules to provide that at all times, their amount of RLF Cash Available for Lending does not exceed the *Allowable Cash Percentage*. For example, assume an EDA Regional Office’s RLF portfolio is made up of five awards. Based on their

2015 RLF reports, the percentage of each RLF's RLF Capital Base that was held as RLF Cash Available for Lending was as follows:

RLF 1—RLF Capital Base of \$4,500,000, of which \$1,200,000 was held as RLF Cash Available for Lending;

RLF 2—RLF Capital Base of \$7,600,000, of which \$2,800,000 was held as RLF Cash Available for Lending;

RLF 3—RLF Capital Base of \$1,670,000, of which \$630,000 was held as RLF Cash Available for Lending;

RLF 4—RLF Capital Base of \$13,872,930, of which \$2,974,025 was held as RLF Cash Available for Lending; and

RLF 5—RLF Capital Base of \$5,423,000, of which \$900,000 was held as RLF Cash Available for Lending.

Based on these numbers, on January 1, 2016, the EDA Regional Office would inform all RLF Recipients in the region's RLF portfolio that the Allowable Cash Percentage is 26 percent (the sum of RLF Cash Available for Lending for the 5 RLFs (\$8,504,025) divided by the sum of the RLF Capital Base for the 5 RLFs (\$33,065,930) and that they must manage their lending and repayment schedules throughout 2016 so that at all times their RLF Cash Available for Lending does not exceed 26 percent. EDA also proposes to revise its compliance framework on this issue. As noted above, noncompliance with the capital utilization standard frequently triggered automatic sequestration. Given the replacement of the capital utilization standard with the more flexible Allowable Cash Percentage and the adoption of a Risk Analysis System, EDA proposes to no longer require automatic sequestration of what is currently referred to as "excess funds," the difference between the actual percentage of RLF Capital loaned and the capital utilization standard. With this change, noncompliance with the Allowable Cash Percentage will be considered in EDA's Risk Analysis System and may affect the RLF Recipient's ranking in the system. In addition, rather than being applied automatically, sequestration will be considered as one of a range of possible tools used to ensure compliance with the terms of the RLF Grant.

Accordingly, EDA revises § 307.17 (b) to set out the requirements for the Allowable Cash Percentage and re-letters existing § 307.17(b), which has been revised to set out restrictions on RLF Cash Available for Lending, as § 307.17(c) and existing § 307.17(c), which provides that EDA may require an independent third party to conduct a compliance and loan quality review, as new § 307.17(d).

In addition, to address recent concerns EDA has encountered in administering the RLF program, we propose clearly stating that RLF Cash Available for Lending may not be used to: (1) Serve as collateral to obtain credit or any other type of financing without EDA's prior written approval; (2) support operations or administration of the RLF Recipient; or (3) undertake any activity that would violate the requirements found in 13 CFR part 314, including § 314.3 ("Authorized Use of Property") and § 314.4 ("Unauthorized Use of Property"). Using RLF funds in these ways has long been prohibited by EDA's regulations; however, EDA proposes to clearly state these prohibitions and add them as new paragraphs (c)(7), (8), and (9) to § 307.17.

Finally, we propose minor clarifying changes to the list of transactions for which RLF Cash Available for Lending may not be used. Specifically, in re-lettered § 307.17(c)(3), we replace the sentence "Provide for borrowers' required equity contributions under other Federal Agencies' loan programs" with "Provide a loan to a borrower for the purpose of meeting the requirements of equity contributions under another Federal Agency's loan program". In addition, in the second sentence of re-lettered § 307.17(c)(6)(ii), we replace the phrase "RLF Capital" with "RLF funds" and the phrase "reasonable period of time, as determined by EDA" with "reasonable time frame approved by EDA". As noted above, current § 307.17(d) is being removed to locate all provisions regarding In-Kind Contributions within proposed § 307.11(f).

This NPRM clarifies that EDA can approve multiple New Lending Area requests with respect to a given RLF. Recipients may request changes to their original or approved Lending Areas to address changes within the local economy or to respond to a burgeoning need. Currently, the regulations state that once EDA approves a New Lending Area, it remains in place indefinitely. EDA is simply adding language to specify that the New Lending Area remains in place until EDA approves a subsequent request for a New Lending Area. In § 307.18(a)(2), we add the introductory phrase "Following EDA approval," and replace the concluding phrase "shall remain in place indefinitely following EDA approval" with "shall remain in place until EDA approves a subsequent request for a New Lending Area".

We also propose clarifying language to distinguish between the addition of lending areas and mergers of RLFs. EDA

proposes removing the word, "merged," from the discussion of additional lending areas in the second sentence of § 307.18(a)(1) to clarify that merging RLFs and adding lending areas are two different transactions. EDA is also clarifying the terminology in § 307.18(b)(1) used to describe a consolidated RLF by replacing the word "surviving" with the word "combined". This change is designed to make clearer the distinction between consolidations, which involve a single RLF Recipient, and mergers, which involve multiple RLF Recipients.

For clarity, this NPRM completely reorganizes the compliance regulations by separating them into one section describing what actions are considered noncompliance (§ 307.20 with the proposed title "*Noncompliance*") and another section listing remedies for noncompliance (§ 307.21 with the proposed title "*Remedies for noncompliance*"). This reorganization is designed to help all RLF stakeholders understand problematic practices and appropriate remedies. See proposed revisions to §§ 307.20 and 307.21. In connection with this, we propose revising the list of problematic practices that could result in disallowances of a portion of an RLF. EDA proposes to remove the following from this list to reflect their incorporation into the Risk Analysis System: (1) Having RLF loans that are more than 120 days delinquent; and (2) having excess cash sequestered for 12 months or longer without an EDA-approved extension request. Procedures for dealing with delinquent loans are also covered in Part 2 of the RLF Plan. With regards to excess sequestered cash, as discussed above, the automatic sequestration of funds is now being addressed by the Risk Analysis System and the use of an Allowable Cash Percentage. However, EDA does reserve the right to take appropriate compliance action if an RLF Recipient holds RLF Cash Available for Lending so that it is 50 percent or more of the RLF Capital Base without an EDA-approved extension request.

We also clarify the provision regarding a Recipient's duty to compensate the Federal Government for the Federal Share of the RLF Grant in the event that the Recipient requests termination of the Grant. The current regulations state that the Recipient requesting termination must compensate the Federal Government for the Federal share of the RLF "property, including the current value of all outstanding RLF loans." EDA seeks to make this regulation clearer and easier to comply with by requiring the Recipient to compensate for the Federal

share of the RLF Capital Base, including the monetary value of all outstanding loan principal. See proposed revisions to § 307.21(d).

We also remove the provision that required Recipients, after termination of an RLF Grant, to seek EDA approval to retain and use for other economic development activities the RLF Recipients' share of RLF Income generated by the RLF. By removing this provision, EDA is clarifying that Recipients do not need to seek EDA approval to use their share of funds returned to them following termination of an RLF. See proposed revisions to § 307.21(d).

#### Part 308—Performance Incentives

Part 308 sets out EDA's performance incentives for Recipients. When a Project is constructed under projected cost, EDA may allow the Recipient to use the excess funds to either increase the Investment Rate of the Project to the maximum percentage allowable under § 301.4 for which the Project was eligible at the time of the Investment award, or further improve the Project consistent with its purpose. The terms for performance awards under EDA's Public Works and Economic Adjustment Assistance programs are set out in § 308.2 and the terms for performance awards under EDA's Planning program are set out under § 308.3. EDA does not propose any changes to part 308.

#### Part 309—Redistributions of Investment Assistance

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

Section 309.2 ("*Redistributions under part 307*") addresses redistributions under part 307 for Economic

Adjustment Assistance Investments. This section reads similarly to § 309.1. However, a Recipient under part 307 may redistribute Investment funds to another Eligible Recipient in the form of a grant or to a non-profit and private for-profit entity in the form of a loan or other appropriate assistance under subpart B of part 307.

In both §§ 309.1 and 309.2, EDA proposes language to clarify EDA's practice of requiring the Eligible Recipient under the original award to comply with special award conditions and Subrecipient (in accordance with the proposed defined term at § 300.3) to provide appropriate certifications of compliance with relevant legal requirements. Accordingly, EDA proposes adding the sentence "EDA may require the Eligible Recipient under the original Investment award to agree to special award conditions and the Subrecipient to provide appropriate certifications to ensure the Subrecipient's compliance with legal requirements" to §§ 309.1(a) and 309.2(b). In addition, we propose adding language to refer to the proposed defined term Subrecipient in § 300.3 by adding the phrase "generally referred to as a Subrecipient," to the first sentence of § 309.1(a) and § 309.2(a)(1).

#### Part 310—Special Impact Areas

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

#### Parts 311 and 312 [Reserved]

#### Part 313—Community Trade Adjustment Assistance

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

#### Part 314—Property

Part 314 sets forth the rules governing Property acquired or improved, in whole or in part, with EDA Investment Assistance. As proposed in the 2011 NPRM and finalized in the 2014 Final Rule, EDA revised part 314 to make it easier to navigate and understand,

including clarifying EDA's requirements on encumbrances in § 314.6 and streamlining the procedures for the release of the Federal Interest in connection with EDA-assisted Property in § 314.10. Through this NPRM, EDA proposes minor revisions to further clarify terminology and its authority to release the Federal Interest 20 years after the date of the award of Investment Assistance.

Specifically, for clarity and to conform to the proposed changes to the RLF program, EDA adds a phrase to clarify that *Personal Property* includes the *RLF Capital Base*, adding the phrase "including the RLF Capital Base as defined at § 307.8" to the definition of *Personal Property* set out at § 314.1. In addition, for clarity and to avoid repetitive language throughout part 314, we propose adding a definition of *Project Property*. The 2011 NPRM introduced the concept of Project Property, but did not define it.

Therefore, in the definitions section at § 314.1, this NPRM adds a definition of Project Property to read as follows: "*Project Property* means all Property that is acquired or improved, in whole or in part, with Investment Assistance and is required, as determined by EDA, for the successful completion and operation of a Project and/or serves as the economic justification of a Project. As appropriate to specify the type of Property to which they are referring, subparts B and C of this part refer to Project Property as 'Project Real Property' or 'Project Personal Property.'" In addition, this NPRM proposes simplifying the definition of *Real Property* to clarify that, in the context of part 314 and for the purposes of EDA Investment Assistance, Real Property may include Property that is served by the construction of Project infrastructure, where such infrastructure is not located on or under the Property. Accordingly, we replace the word "improved" in the second sentence of the definition with the word "served" and remove the phrase "that are not situated on or under the land". We also propose putting the exemplar list of infrastructure projects "such as roads, sewer, and water lines" in parentheses and removing the phrase "but not limited to" from the exemplar list because it is unnecessary. Removing "but not limited to" is not substantive and does not make the list exclusive.

In § 314.2 ("*Federal Interest*"), we add a sentence to the beginning of paragraph (a) to set out the general expectation that title to Project Property vests upon acquisition with the Recipient. In addition, in the now second sentence of § 314.2(a), we propose replacing the

phrase “Property that is acquired or improved, in whole or in part, with Investment Assistance” with the newly defined term Project Property. For clarity, we split the sentence regarding the purpose of the Federal Interest and how it is secured into two sentences and replace the word “secures” in the now third sentence with the word “ensures” and also add the phrase “EDA Project requirements, including those related to” between “ensures compliance with” and “the purpose, scope, and use of a Project”. With respect to the method by which Recipients must secure the Federal Interest, we replace the phrase “and is often reflected by” with the phrase “The Recipient typically must secure the Federal Interest through”.

In § 314.2(b), we replace the phrase “Property acquired or improved, in whole or in part, with Investment Assistance” with the newly defined term Project Property. In addition, to flag that nondiscrimination requirements continue to apply even if the Federal Government is compensated for the Federal Share, we add the phrase “except as provided in § 314.10(e)(3) regarding nondiscrimination requirements” to the end of § 314.2(b).

In § 314.3 (“*Authorized Use of Property*”), we propose revising the title of the regulation to read “Authorized Use of Project Property” to reflect the newly defined term Project Property. We also break current paragraph (e), which addresses requirements for replacement Personal Property and Real Property into two separate paragraphs that address the requirements of the different types of Property. Accordingly, we move the sentence that addresses replacement Real Property that is currently the final sentence of § 314.3(e) into new § 314.3(f) and re-number the regulation accordingly, re-designating current § 314.3(f) as new § 314.3(g). In addition, EDA adds helpful paragraph headings to help the reader better navigate the section and find information more quickly. Accordingly, we add the heading “*General*” to § 314.3(a), “*Project Property that is no longer needed for Project purposes*” to § 314.3(b), “*Real Property for sale or lease*” to § 314.3(c), “*Property transfers and Successor Recipients*” to § 314.3(d), “*Replacement Personal Property*” to § 314.3(e), “*Replacement Real Property*” to § 314.3(f), and “*Incidental use of Project Property*” to § 314.3(g).

In both § 314.3(a) and (b), we replace the phrase “Property acquired or improved, in whole or in part, with Investment Assistance” with the newly defined term Project Property and in the first sentence of both § 314.3(d) and (g), we add the word “Project” before

“Property” to incorporate the newly defined term Project Property. Finally, in § 314.3(g), which addresses under what circumstances EDA can approve an incidental use of Project Property, we add the phrase “undermine the economic purpose for which the Investment was made” between “otherwise” and “or adversely” to clarify that as well as not adversely affecting the economic useful life of the Property, an approved incidental use of Project Property must not undermine the purpose of the Investment.

In § 314.4 (“*Unauthorized Use of Property*”), we propose revising the title of the regulation to read “Unauthorized Use of Project Property” to reflect the newly defined term “Project Property”. In addition, EDA proposes adding helpful paragraph headings to help the reader navigate the regulation, adding the heading “*Compensation of Federal Share upon an Unauthorized Use of Project Property*” to § 314.4(a), “*Additional Unauthorized Uses of Project Property*” to § 314.4(b), and “*Recovery of the Federal Share*” to § 314.4(c). In § 314.4(a), this NPRM proposes minor clarifying changes, specifically replacing “EDA’s interest” with “the Federal Interest”, capitalizing the word “Government” as used in the term “Federal Government”, replacing “Property acquired or improved in whole or in part with Investment Assistance” with the newly defined term “Project Property”, and replacing a reference to 15 CFR parts 14 or 24 with 2 CFR part 200. We make similar clarifying changes to § 314.4(b), replacing “EDA’s interest” with “the Federal Interest” and “Real Property or tangible personal property acquired or improved with EDA Investment Assistance” with the phrase “Project Real Property or tangible Project Personal Property”. Finally, in § 314.4(c), in the first sentence we add the word “Project” before two instances of the word “Property”, replace “its interest” with “the Federal Interest”, and capitalize the word “Government” in “Federal Government”. In the final sentence of the paragraph, EDA proposes capitalizing “Government” in “Federal Government” and adding a reference to the ongoing requirement that Project Property not be used in violation of nondiscrimination requirements even after the compensation of the Federal Share by adding the phrase “, except for the nondiscrimination requirements set forth in § 314.10(d)(3)” to the end of the paragraph.

Section 314.5 (“*Federal Share*”) addresses the portion of Project Property attributable to EDA’s Investment

Assistance. In § 314.5(a), EDA proposes adding two new sentences to explain EDA’s usual practice of relying on a certified appraiser prepared by a licensed appraiser to determine the fair market value of Project Property and also provide that in certain extraordinary circumstances, and at the agency’s sole discretion, EDA may rely on an alternative method to determine the fair market value, such as the amount of the award of Investment Assistance or the amount paid by a transferee. EDA recognizes that in certain, very unusual circumstances, such as when Property is located in an extremely remote location or, for whatever reasons, there are no buyers for similar Property, it may be impossible or cost prohibitive to obtain a certified appraisal and wishes to provide for this situation. Therefore, EDA proposes adding the following sentences to the paragraph: “EDA may rely on a current certified appraisal of the Project Property prepared by an appraiser licensed in the State where the Project Property is located to determine the fair market value. In extraordinary circumstances and at EDA’s sole discretion, where EDA is unable to determine the current fair market value, EDA may use other methods of determining the value of Project Property, including the amount of the award of Investment Assistance or the amount paid by a transferee.” In addition, EDA adds the word “Project” before “Property” in the first sentence of the paragraph and the phrase “or other valuation as determined by EDA” between “fair market value” and “of the Property” in the final sentence of the paragraph.

In § 314.6 (“*Encumbrances*”), this NPRM proposes revising paragraph (a) to replace the phrase “Recipient-owned Property acquired or improved in whole or improved in whole or in part with Investment Assistance” with the newly proposed defined term “Project Property”. In addition, in the exception provision to the requirement that there be no encumbrances on Project Property regarding encumbrances to secure a grant or loan made by a governmental body, EDA proposes adding the phrase “so long as the Recipient discloses such an encumbrance in writing as part of its application for Investment Assistance or as soon as practicable after learning of the encumbrance” to reflect the requirement that the Recipient expeditiously disclose any such encumbrance to EDA. In § 314.6(b)(3) on pre-existing encumbrances, we add the phrase “and disclosed to EDA” between “in place” and “at the time” to



underscore that the Recipient must disclose pre-existing encumbrances to EDA and add “, in its sole discretion,” to underscore that the approval of pre-existing encumbrances is at EDA’s discretion. In addition, because pre-existing encumbrances pose the same risks to Project Property as other types of encumbrances, EDA revises § 314.6(b)(3) to incorporate certain requirements from the subparagraphs setting out requirements for encumbrances proposed both proximate to and after Project approval: Namely, for EDA to approve a pre-existing encumbrance, in addition to the requirement that EDA determine that the requirements of § 314.7(b) are met, EDA must determine that the terms and conditions of the encumbrance are satisfactory and that there is a reasonable expectation that the Recipient will not default on its obligations. EDA rennumbers these three requirements as § 314.6(b)(1)(i), (ii), and (iii), respectively.

With respect to § 314.6(b)(4) and (5), which set out the requirements for EDA’s approval of encumbrances proposed proximate to Project approval and encumbrances proposed after Project approval, respectively, while EDA does not propose any changes to the regulatory text, in the preamble to the 2011 NPRM and the 2015 Final Rule, EDA repeatedly referred to revisions to § 314.6 to clarify the requirements for EDA to subordinate its interest in Project Property. However, the regulatory text sets out the requirements for EDA to approve any type of encumbrance on Project Property, regardless of the priority of the Federal Interest and whether EDA agrees to subordinate or not, and through this preamble, EDA confirms that this read is correct. EDA must undertake the analyses required under § 314.6(b) for encumbrances proposed on Project Property regardless of whether EDA’s position in such Property changes.

In addition, we propose minor style changes to § 314.6(b)(4)(v)(B) and (5)(v)(B) to add the phrase “A Recipient that is a” to the beginning of the subparagraph to maintain the parallel nature of the list. In addition, in § 314.5(c), we replace the phrase “Recipient-owned Property” with “Project Property”. As specified in the government-wide grant regulations set out at 2 CFR part 200 and noted in the proposed revisions to § 314.2(a), Project Property generally vests upon acquisition in the Recipient, and so the adjective “Recipient-owned” is unnecessary.

In § 314.7 (“Title”), EDA proposes adding language to paragraph (a) to flag that certain limited exceptions apply to the title requirement, make the provision more readable, and refer directly to the definition of Real Property set out in § 314.1. As such, EDA adds the introductory phrase “Except in those limited circumstances identified in paragraph (c) of this section” to the first sentence. In addition, we relocate the temporal requirement of when title must be obtained to the beginning of the sentence by adding “, at the time Investment Assistance is awarded” between “in paragraph (c) of this section” and “the Recipient”. For clarity with respect to EDA’s requirements, we include a reference to the definition of Real Property in § 314.1 by adding the clause “, which, as noted in § 314.1 in the definition of ‘Real Property’ includes land that is served by the construction of Project infrastructure (such as roads, sewers, and water lines) and where the infrastructure contributes to the value of such land as a specific purpose of the Project” to the first sentence of the paragraph. We also break the requirement that the Recipient maintain title at all times during the Estimated Useful Life of the Project into a separate sentence, which we place as the second sentence of the paragraph. This NPRM proposes replacing the phrase “Real Property required for a project” with the proposed defined term “Project Real Property” in both the first and third sentences of § 314.7(a).

Throughout paragraph (c) of § 314.7, which sets out the exceptions to EDA’s title requirement, we replace the phrase “the Real Property required for a Project” with “Project Real Property”. EDA proposes adding the clause “at the time Investment Assistance is awarded and at all times during the Estimated Useful Life of the Project” to the introductory sentence at § 314.7(c), add “Project” before “Real Property” twice in § 314.7(c)(1), and capitalize “Government” in “Federal Government” in § 314.7(c)(1)(i). In § 314.7(c)(4), which clarifies the exception for the title requirement when a Project includes construction on a government-owned road, EDA proposes clarifying changes to replace the phrase “public highway” with the more descriptive “State or local government owned roadway or highway” in the heading, first sentence of § 314.7(c)(4), and first clause of § 314.7(c)(4)(ii)(B). To avoid excessive wordiness, we maintain the phrase “public highway” where it exists in the remainder of the provision, but revise it

to read “public roadway or highway” and note that the exception in this provision is intended to apply to State or local government owned roadways or highways.

In § 314.7(c)(5)(i), which sets out EDA’s requirements when the purpose of a Project is to construct facilities to serve Recipient or privately owned Real Property, we propose clarifying syntax changes to revise the phrase “Real Property, including industrial or commercial parks, for sale or lease” to read “Project Real Property, including industrial or commercial parks, so that the Recipient or Owner may sell or lease”. In subparagraph (i)(A) of the provision, we replace the phrase “required for such Project” with the clarifying phrase “intended for sale or lease” and add a cross-reference to the appropriate title requirements by adding the phrase “in accordance with paragraphs (C), (D), and (E) of this section” to the end of the subparagraph. In subparagraph (i)(B), EDA replaces “required for such Project” with “intended for lease”, and in subparagraph (iii) we capitalize “Owner”.

Section 314.8 (“Recorded Statement for Project Real Property”) sets out requirements for recording the Federal Interest in Project Real Property. Throughout the provision we replace three instances of “EDA’s interest” with “the Federal Interest” and use the defined term “Project Real Property” as appropriate, using the term in the heading of the regulation and replacing “the Property acquired or improved in whole or in part with the EDA Invest Assistance” in paragraph (a), “Real Property” in paragraph (b), and “Project Property” in paragraph (d).

In § 314.9 (“Recorded statement for Personal Property”), EDA revises the provision to clarify that the recorded statement, which is generally a Uniform Commercial Code Financing Statement (“Form UCC-1”), provides notice of the Federal Interest in Project Personal Property, but does not create a lien on the Property by inserting the phrase “provide notice of the Federal Interest in all Project Personal Property by executing” between “the Recipient shall” and “a Uniform Commercial Code Financing Statement” in the first sentence of the regulation. In addition, we use the term “Project Personal Property” appropriately throughout the provision, including in the title to the regulation, inserting “Project” before the phrase “Personal Property, acceptable in form and substance to EDA” in the first sentence of the regulation, and replacing “Personal Property acquired or improved as part of the Project” with



“all Project Personal Property” in the second sentence of the regulation, and replace “EDA’s interest” with “the Federal Interest” in the first sentence to the regulation.

Section 314.10 (“*Release of EDA’s Property Interest*”) sets out EDA’s procedures for releasing the agency’s interest in Project Property. This NPRM proposes replacing the term “EDA’s Property Interest” with “the Federal Interest” in the titles of both subpart D and § 314.10 and throughout § 314.10 for clarity and consistency. This change does not implicate any substantive change to the Federal Government’s undivided equitable reversionary interest in award property, but is intended for consistency throughout these regulations and with 2 CFR part 200. In addition, in § 314.10(a), EDA replaces the phrase “Property acquired or improved with Investment Assistance” with “Project Property” for consistency with the proposed defined term at § 314.1 and its usage throughout part 314. In addition, EDA proposes removing the portions of paragraph (a) that provide background on EDA’s historical practice for establishing the Estimated Useful Life of specific Projects. It is accurate that since 1999, EDA has typically established useful lives of between 15 and 20 years, depending on the nature of the asset. As EDA noted in the 2011 NPRM, the Economic Development Administration and Appalachian Regional Development Reform Act of 1998 (Pub. L. 105–393) added section 601(d) to PWEDA (42 U.S.C. 3211(d)) to allow EDA to release its interest in Real or Personal Property after 20 years. This amendment was designed to provide EDA with additional flexibilities to release its interest in Project Property, particularly as some Projects implicated 40-year Estimated Useful Lives, not to mandate a minimum 20-year useful life for all Project Property. Although these regulatory provisions provided useful background, they were not necessary for the regulation and we believe maintaining this history in the preamble is sufficient. Accordingly, we remove the concluding clause of the second sentence and the third sentence of paragraph (a) and combine the first and second sentence of the paragraph to read “As provided in § 314.2 of this chapter, the Federal Interest in Project Property extends for the duration of the Estimated Useful Life of the Project, which is determined by EDA at the time of Investment award.” We also simplify the final sentence in paragraph (a), replacing the phrase “govern the manner of obtaining” with the word

“obtain” and adding the phrase “in Project Property” at the end of the sentence following the phrase “of the Federal Interest”.

In paragraph (b), which sets out EDA’s procedures for releasing the Federal Interest after the expiration of the Estimated Useful Life, we revise the paragraph heading to read “*Release of the Federal Interest*” instead of “*Release of Property*” to more accurately reflect the content of the provision, correct a typo in the second sentence by adding the word “the” between “in writing by” and “Recipient”, and add a sentence to the end of the paragraph that provides a helpful cross reference to § 314.10(e), which sets out the limitations and covenants of use that are applicable to any release of the Federal Interest.

In paragraph (c), which sets out the EDA’s procedures for releasing the Federal Interest before the expiration of the Estimated Useful Life, which release requires compensation of the Federal Interest, we correct a typo in the paragraph heading by adding the word “the” between “prior to” and “expiration”. In addition, as more fully explained in the description of revisions to paragraph (e) below, we add a clause to clarify that when EDA releases the Federal Interest after receiving compensation for such interest, EDA has no further interest in the property, except for specific nondiscrimination requirements. Accordingly, we add a concluding clause to the final sentence of the paragraph to read “and will have no further interest in the ownership, use, or Disposition of the Property, except for the nondiscrimination requirements set forth in paragraph (e)(3) of this section.”

Paragraph (d) of § 314.10 sets out EDA’s procedures for releasing the Federal Interest before the expiration of the Estimated Useful Life, but at least 20 years after the award of Investment Assistance, as authorized under section 601(d)(2) of PWEDA. This authority is generally applicable when the Estimated Useful Life is long (*i.e.*, 30 or 40 years) and when the Recipient has complied with all terms of the award of Investment Assistance and the economic development benefits of the award have been achieved. To clarify the intent of this paragraph, EDA revises the heading to read “*Release of the Federal Interest before the expiration of the Estimated Useful Life, but 20 years after the award of Investment Assistance*”. In addition, we make additional clarifying changes throughout the paragraph. In the first sentence of the paragraph, we replace the phrase “that exceeds 20 years” with “, but where 20 years have elapsed since

the award of Investment Assistance”. In addition, to clarify the determinations that EDA will make in this situation, EDA adds the following concluding phrase to the paragraph “if EDA determines: (1) The Recipient has made a good faith effort to fulfill all terms and conditions of the award of the award of Investment Assistance; and (2) The economic development benefits as set out in the award of Investment Assistance have been achieved.” As with paragraph (b), EDA has added a sentence to the end of this paragraph that provides a necessary cross reference to § 314.10(e), which sets out the limitations and covenants of use that are applicable to any release of the Federal Interest.

Finally, in paragraph (e), EDA makes needed corrections and clarifications to limitations of use and required covenants applicable to a release of the Federal Interest. When EDA releases its interest at the expiration of the Estimated Useful Life under § 314.10(b) or releases its interest before the expiration of the Estimated Useful Life but after at least 20 years have elapsed since the award of Investment Assistance under § 314.10(d), two use limitations on Project Property survive the release: (1) Such Property may not be used for explicitly religious purposes; and (2) such Property may not be used in violation of the nondiscrimination requirements set out in § 302.20. However, in the above two scenarios, if compensation is made to EDA of the Federal Interest at the time of the release or anytime thereafter, the requirement that Project Property not be used for explicitly religious purposes will be extinguished. Similarly, when EDA releases the Federal Interest before the expiration of the Estimated Useful Life and upon compensation of the Federal Interest, the requirement that Project Property not be used for explicitly religious purposes no longer remains. Note that while § 314.10 currently makes references to “inherently religious purposes,” EDA is proposing changing these references to “explicitly religious purposes” to be consistent with recent rulemakings by nine other Federal agencies implementing Executive Order 13559. *See, e.g.*, 28 CFR 38.5(a) (Department of Justice); 81 FR 19358–59. The term “explicitly religious activities” clarifies that the prohibition is against external, observable activities, and not directed against the religious motivation an entity may have in providing services.

Through this NPRM, EDA proposes revisions to subparagraphs (e)(2) and (3) to make the points above clear. Specifically, we add a final sentence to

paragraph (e)(2) clarifying that when requesting release of the Federal Interest, the Recipient must disclose the future intended use of the Real Property. New subparagraph (e)(2)(i) clarifies that a Recipient not intending to use the Real Property or tangible Personal Property for explicitly religious activities will be required to execute and record a covenant prohibiting use of the Real Property for explicitly religious activities. New subparagraph (e)(2)(ii) clarifies the requirements for a Recipient that intends or foresees the use of Real Property or tangible Personal Property for explicitly religious activities. In this case, EDA may require the Recipient to compensate the agency for the Federal Interest to obtain a release and resulting waiver of the “explicitly religious activities” prohibition, and recommends that any such Recipient contact EDA well in advance of requesting a release. It is important to recognize that the structure now proposed—payment of the Federal Interest excusing the Recipient from having to comply with the religious use prohibition but not excusing continued compliance with the non-discrimination prohibition—was actually in place before EDA’s most recent Final Rule became effective on January 20, 2015. As became clear in the past year when the agency was confronted with several situations involving the religious use prohibition, the January 20, 2015 Final Rule appears to have inadvertently amended certain language in § 314.10 that created ambiguity and unintended consequences that necessitates the proposed changes. Subparagraph (e)(3) is revised so that it specifies the requirement that Real Property or tangible Personal Property not be used in violation of the nondiscrimination requirements of § 302.20. Therefore, we add the clause “, including a release upon a Recipient’s compensation for the Federal Share” between “under this section” and “a Recipient must” in the first sentence of (e)(3). In addition,

where (e)(3) specifies the requirements for avoiding any discriminatory use of Project Property, we remove two instances of the phrase “for inherently religious activities prohibited by applicable Federal law and” from the first and second sentences. EDA emphasizes that the differing treatments of the religious use covenant and non-discrimination covenant, which has been part of EDA’s regulatory framework for a number of years, is in our view justified by the fact that different legal authorities control the agency’s obligations in each situation.

**Part 315—Trade Adjustment Assistance for Firms**

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

**Classification**

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

**Executive Order No. 12866 and No. 13563**

This proposed rule was drafted in accordance with Executive Orders 12866 and 13563. The Office of Management and Budget (OMB) has determined that this proposed rule is significant for purposes of Executive Order 12866 and Executive Order 13563. Accordingly, the rule has undergone interagency review.

**Congressional Review Act**

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

**Executive Order No. 13132**

Executive Order 13132 requires agencies to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in Executive Order 13132 to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” It has been determined that this proposed rule does not contain policies that have federalism implications.

**Paperwork Reduction Act**

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

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

Part or section of this proposed rule	Nature of request	Form/title/OMB control number
307.14(a) .....	All RLF Recipients must submit reports to EDA in a format designated by EDA.	ED-209, RLF Report (0610-0095).
307.14(b) .....	All Recipients must certify as part of the report that the RLF is operating in accordance with the RLF Plan and that the information provided is complete and accurate.	ED-209, RLF Report (0610-0095).

**List of Subjects**

**13 CFR Part 300**

Distressed region, Financial assistance, Headquarters, Regional offices.

**13 CFR Part 301**

Applicant and application requirements, Economic distress levels, Eligibility requirements, Grant

administration, Grant programs, Investment rates.

**13 CFR Part 302**

Civil rights, Conflicts-of-interest, Environmental review, Federal policy

and procedures, Fees, Intergovernmental review, Post-approval requirements, Pre-approval requirements, Project administration, Reporting and audit requirements.

13 CFR Part 303

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

13 CFR Part 304

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

13 CFR Part 305

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

13 CFR Part 307

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

13 CFR Part 309

Redistributions of investment assistance, Subgrants, Subrecipients.

13 CFR Part 314

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

Regulatory Text

For the reasons discussed above, EDA proposes to amend 13 CFR, chapter III as follows:

**PART 300—GENERAL INFORMATION**

■ 1. Revise the authority citation of part 300 to read as follows:

**Authority:** 42 U.S.C. 3121; 42 U.S.C. 3122; 42 U.S.C. 3211; 15 U.S.C. 3701; Department of Commerce Organization Order 10–4.

■ 2. Amend § 300.3 by:

■ a. Adding a definition for *Co-Recipient* in alphabetical order;

■ b. Revising the definitions of *In-Kind Contribution(s)*, *Project*, and *Recipient*; and

■ c. Adding definitions for *Stevenson-Wydler* and *Sub-Recipient* in alphabetical order.

The revisions and additions read as follows:

**§ 300.3 Definitions.**

\* \* \* \* \*

*Co-Recipient* means one of multiple Recipients awarded Investment Assistance under a single award. Unless otherwise provided in the terms and

conditions of the Investment Assistance, each Co-Recipient is jointly and severally liable for fulfilling the terms of the Investment Assistance.

\* \* \* \* \*

*In-Kind Contribution(s)* means non-cash contributions, which may include contributions of space, equipment, services and assumptions of debt that are fairly evaluated by EDA and that satisfy applicable Federal Uniform Administrative Requirements and cost principles as set out in 2 CFR part 200.

\* \* \* \* \*

*Project* means the proposed or authorized activity (or activities) the purpose of which fulfills EDA's mission and program requirements as set forth in PWEDA or Stevenson-Wydler and this chapter and which may be funded in whole or in part by EDA Investment Assistance.

\* \* \* \* \*

*Recipient* means an entity receiving EDA Investment Assistance, including any EDA-approved successor to the entity.

\* \* \* \* \*

*Stevenson-Wydler*, for purposes of EDA, means the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3701 *et seq.*).

*Subrecipient* means an Eligible Recipient that receives a redistribution of Investment Assistance in the form of a subgrant, under part 309 of this chapter, from another Eligible Recipient to carry out part of a Federal program.

\* \* \* \* \*

**PART 301—ELIGIBILITY, INVESTMENT RATE AND APPLICATION REQUIREMENTS**

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

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

■ 4. Revise paragraph (b) of § 301.2 to read as follows:

**§ 301.2 Applicant eligibility.**

\* \* \* \* \*

(b) An Eligible Applicant that is a non-profit organization must include in its application for Investment Assistance a resolution passed by (or a letter signed by) an authorized representative of a general purpose political subdivision of a State, acknowledging that it is acting in cooperation with officials of such political subdivision. EDA, at its sole discretion, may waive this cooperation requirement for certain Projects of a

significant Regional or national scope under parts 306 or 307 of this chapter. See §§ 306.3(b), 306.6(b), and 307.5(b) of this chapter.

■ 5. Revise § 301.5 to read as follows:

**§ 301.5 Matching share requirements.**

The required Matching Share of a Project's eligible costs may consist of cash or In-Kind Contributions. In addition, the Eligible Applicant must provide documentation to EDA demonstrating that the Matching Share is committed to the Project, will be available as needed and is not or will not be conditioned or encumbered in any way that would preclude its use consistent with the requirements of the Investment Assistance. EDA shall determine at its sole discretion whether the Matching Share documentation adequately addresses the requirements of this section.

■ 6. Revise paragraph (a) of § 301.7 to read as follows:

**§ 301.7 Investment Assistance application.**

(a) For all EDA Investment Assistance programs, including the Public Works, Economic Adjustment Assistance, Planning, Local Technical Assistance, Research and National Technical Assistance, and University Center programs, EDA will publish an FFO that specifies application submission requirements and evaluation procedures and criteria. Each FFO will be published on the EDA Web site and at <http://www.grants.gov>. All forms required for EDA Investment Assistance may be obtained electronically from <http://www.grants.gov> or from the appropriate regional office.

\* \* \* \* \*

■ 7. 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. EDA will also review applications for conformance with program-specific evaluation criteria set out in the applicable FFO.

■ 8. Revise the introductory text of paragraph (a) to § 301.11 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 basic economic development assets as described in §§ 305.1 and 305.2 of this chapter (e.g., roads, sewers, and water lines), as well as infrastructure that supports innovation and entrepreneurship. The following are examples of innovation and entrepreneurship-related infrastructure that support job creation:

\* \* \* \* \*

**PART 302—GENERAL TERMS AND CONDITIONS FOR INVESTMENT ASSISTANCE**

■ 9. Revise the authority citation of part 302 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; 15 U.S.C. 3701; Department of Commerce Delegation Order 10–4.

■ 10. Revise § 302.5 to read as follows:

**§ 302.5 Relocation assistance and land acquisition policies.**

Recipients of EDA Investment Assistance or any other types of assistance under PWEDA, the Trade Act, and Stevenson-Wydler (States and political subdivisions of States and non-profit organizations, as applicable) are subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Pub. L. 91–646; 42 U.S.C. 4601 *et seq.*). See 15 CFR part 11 and 49 CFR part 24 for specific compliance requirements.

■ 11. 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 2 CFR part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

■ 12. Revise the introductory text to paragraph (a) and paragraphs (a)(2) and (d) of § 302.20 to read as follows:

**§ 302.20 Civil rights.**

(a) Discrimination is prohibited by a Recipient or Other Party (as defined in paragraph (b) of this section) with respect to a Project receiving Investment Assistance under PWEDA or Stevenson-Wydler or by an entity receiving Adjustment Assistance (as defined in § 315.2 of this chapter) under the Trade Act or any other type of assistance

under Stevenson-Wydler, in accordance with the following authorities:

\* \* \* \* \*

(2) 42 U.S.C. 3123 (proscribing discrimination on the basis of sex in Investment Assistance provided under PWEDA), 42 U.S.C. 6709 (proscribing discrimination on the basis of sex under the Local Public Works Program), Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 *et seq.*) (proscribing discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution), and the Department’s implementing regulations found at 15 CFR part 8a;

\* \* \* \* \*

(d) All Recipients of Investment Assistance under PWEDA and Stevenson-Wydler, all Other Parties, and all entities receiving Adjustment Assistance under the Trade Act or any other type of assistance under Stevenson-Wydler must submit to EDA written assurances that they will comply with applicable laws, EDA regulations, Department regulations, and such other requirements as may be applicable, prohibiting discrimination.

\* \* \* \* \*

**PART 303—PLANNING INVESTMENTS AND COMPREHENSIVE ECONOMIC DEVELOPMENT STRATEGIES**

■ 13. 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.

■ 14. Revise paragraphs (b)(1) and (b)(3)(ii) of § 303.6 to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

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

\* \* \* \* \*

(3) \* \* \*

(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. In connection with the submission of a new or revised CEDS, the Planning Organization must obtain renewed commitments from participating counties or other areas within the District to support the economic development activities of the District.

\* \* \* \* \*

■ 15. Revise paragraph (c)(1) of § 303.7 to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(1) In determining the acceptability of a CEDS prepared independently of EDA Investment Assistance or oversight for Projects under parts 305 and 307 of this chapter, EDA may in its discretion determine that the CEDS is acceptable so long as it includes all of the elements listed in paragraph (b) of this section. In certain circumstances, EDA may accept a non-EDA funded CEDS that does not contain all the elements listed in paragraph (b) of this section. In doing so, EDA shall consider the circumstances surrounding the application for Investment Assistance, including emergencies or natural disasters and the fulfillment of the requirements of section 302 of PWEDA.

\* \* \* \* \*

**PART 304—ECONOMIC DEVELOPMENT DISTRICTS**

■ 16. 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.

■ 17. Revise paragraph (c)(2) of § 304.2 to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(2) The District Organization must demonstrate that its governing body is broadly representative of the principal economic interests of the Region, which may include 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.

\* \* \* \* \*

## PART 305—PUBLIC WORKS AND ECONOMIC DEVELOPMENT DISTRICTS

■ 17. 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.

■ 18. Revise paragraph (b) of § 305.6 to read as follows:

### § 305.6 Allowable methods for procurement of construction services.

\* \* \* \* \*

(b) For all procurement methods, the Recipient must comply with the procedures and standards set forth in 2 CFR part 200.

■ 19. Revise paragraph (c) of § 305.8 to read as follows:

### § 305.8 Recipient-furnished equipment and materials.

\* \* \* \* \*

(c) Acquisition of Recipient-furnished equipment or materials under this section also is subject to the requirements of 2 CFR part 200.

## PART 307—ECONOMIC ADJUSTMENT ASSISTANCE INVESTMENTS

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

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

■ 21. Revise § 307.6 to read as follows:

### § 307.6 Revolving Loan Funds established for 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 EDA-funded RLFs. Special award conditions may contain appropriate modifications of these requirements.

■ 22. Revise the introductory text of paragraph (b) and paragraph (b)(2) of § 307.7 to read as follows:

### § 307.7 Revolving Loan Fund award requirements.

\* \* \* \* \*

(b) RLF Grants shall comply with the requirements set forth in this part, as well as relevant provisions of parts 300 through 303, 305, and 314 of this chapter and in the following publications:

(1) \* \* \*

(2) The Compliance Supplement, which is appendix XI to 2 CFR part 200 and is available on the OMB Web site at [https://www.whitehouse.gov/omb/circulars\\_default](https://www.whitehouse.gov/omb/circulars_default).

■ 23. Amend § 307.8 as follows:

■ a. Add definitions for *Allowable Cash Percentage* and *Disbursement Phase* in alphabetical order;

■ b. Revise the definitions of *Recapitalization Grants* and *Reporting Period*;

■ c. Add a definition for *Risk Analysis System* in alphabetical order;

■ d. Remove the definition of *RLF Capital*;

■ e. Add definitions for *RLF Capital Base* and *RLF Cash Available for Lending* in alphabetical order;

■ f. Revise the definition of *RLF Income*; and

■ g. Add definitions for *RLF Recipient* and *Voluntarily Contributed Capital* in alphabetical order.

The additions and revisions read as follows:

### § 307.8 Definitions.

\* \* \* \* \*

*Allowable Cash Percentage* means the average percentage of the RLF Capital Base maintained as RLF Cash Available for Lending by RLF Recipients in each EDA regional office's portfolio of RLF Grants over the previous year.

\* \* \* \* \*

*Disbursement Phase* means the period of loan activity where Grant funds awarded have not been fully disbursed to the RLF Recipient.

\* \* \* \* \*

*Recapitalization Grants* are Investments of additional Grant funds to increase the RLF Capital Base.

*Reporting Period*, for purposes of this subpart B only, is based on the RLF Recipient's fiscal year end and is on an annual or semi-annual basis as determined by EDA.

\* \* \* \* \*

*Risk Analysis System* refers to a set of metrics defined by EDA to evaluate a Recipient's administration of its RLF Grant and that may include but is not limited to capital, assets, management, earnings, liquidity, strategic results, and financial controls.

*RLF Capital Base* means the total value of RLF Grant assets administered by the RLF Recipient. It is equal to the amount of Grant funds used to capitalize (and recapitalize, if applicable), the RLF, plus Local Share, plus RLF Income, plus Voluntarily Contributed Capital, less any loan losses and disallowances. Except as used to pay for eligible and reasonable

administrative costs associated with the RLF's operations, the RLF Capital Base is maintained in two forms at all times: As RLF Cash Available for Lending and as outstanding loan principal.

*RLF Cash Available for Lending* means the portion of the RLF Capital Base that is held in cash and available to make loans.

*RLF Income* means interest earned on outstanding loan principal and RLF accounts holding RLF funds, all fees and charges received by the RLF, and other income generated from RLF operations. An RLF Recipient may use RLF Income only to capitalize the RLF for financing activities and to cover eligible and reasonable costs necessary to administer the RLF, unless otherwise provided for in the Grant agreement or approved in writing by EDA. RLF Income excludes repayments of principal and any interest remitted to the U.S. Treasury pursuant to generally accepted accounting principles (GAAP) and § 307.20(h).

*RLF Recipient* means the Eligible Recipient that receives an RLF Grant to manage an RLF in accordance with an RLF Plan, Prudent Lending Practices, the terms and conditions of the RLF Grant, and all applicable policies, laws, and regulations.

\* \* \* \* \*

*Voluntarily Contributed Capital* means an RLF Recipient's voluntary infusion of additional non-EDA funds into the RLF Capital Base that is separate from and exceeds any Local Share that is required as a condition of the RLF Grant. Voluntary Contributed Capital is an irrevocable addition to the RLF Capital Base and must be administered in accordance with EDA regulations and policies.

■ 24. In § 307.11, revise the section heading and paragraphs (a), (c), (d), and (f)(2) and add paragraphs (g) and (h) to read as follows:

### § 307.11 Pre-disbursement requirements and disbursement of funds to Revolving Loan Funds.

(a) *Pre-disbursement requirements.* (1) Within 60 calendar days before the initial disbursement of EDA funds, the RLF Recipient must provide the following in a form acceptable to EDA:

(i) A certification from a qualified independent accountant who preferably has audited the RLF Recipient's accounting system in accordance with the audit requirements set out as subpart F to 2 CFR part 200 that such system is adequate to identify, safeguard, and account for the entire RLF Capital Base, outstanding RLF loans, and other RLF operations.

(ii) The RLF Recipient's certification that standard RLF loan documents reasonably necessary or advisable for lending are in place and a certification from the RLF Recipient's legal counsel that the loan documents are adequate and comply with the terms and conditions of the RLF Grant, RLF Plan, and applicable State and local law. The standard loan documents must include, at a minimum, the following:

- (A) Loan application;
- (B) Loan agreement;
- (C) Board of directors' meeting minutes approving the RLF loan;
- (D) Promissory note;
- (E) Security agreement(s);
- (F) Deed of trust or mortgage (as applicable);
- (G) Agreement of prior lien holder (as applicable); and
- (H) Evidence demonstrating that credit is not otherwise available on terms and conditions that permit the completion or successful operation of the activity to be financed.

(iii) Evidence of fidelity bond coverage for persons authorized to handle funds under the RLF Grant award in an amount sufficient to protect the interests of EDA and the RLF. At a minimum, the amount of coverage shall be the maximum loan amount allowed for in the EDA-approved RLF Plan.

(2) The RLF Recipient is required to maintain the adequacy of the RLF's accounting system and maintain and update standard RLF loan documents at all times during the duration of the RLF's operation. In addition, the RLF recipient must maintain sufficient fidelity bond coverage as described in this subsection for the duration of the RLF's operation. The RLF Recipient shall maintain records and documentation to demonstrate the requirements set out in this paragraph (a) are maintained for the duration of the RLF's operation. *See also* § 307.13(b)(3).

\* \* \* \* \*

(c) *Amount of disbursement.* The amount of a disbursement of Grant funds shall be the amount required to meet the Federal share requirement of a new RLF loan. RLF Income held during the disbursement phase may be used to reimburse eligible administrative costs. RLF Income earned during the Disbursement Phase must be placed in the RLF Capital Base and may be used to reimburse eligible and reasonable administrative costs, provide the requirements of § 307.12(a) and (b) are met, and increase the RLF Capital Base. RLF Income earned during the Disbursement Phase is not required to be used for new RLF loans, unless

otherwise specified in the terms and conditions of an RLF Grant.

(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.

\* \* \* \* \*

(f) \* \* \*

(2) When an RLF has a combination of In-Kind Contributions, which must be specifically authorized in the terms and conditions of the RLF Grant and may be used to provide technical assistance to borrowers or for eligible RLF administrative costs, 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.

(g) *Loan closing and disbursement schedule.* (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 RLF Grant within three years of the Grant award.

(2) If an RLF Recipient fails to meet the prescribed lending schedule, EDA may de-obligate the non-disbursed balance of the RLF Grant. EDA may allow exceptions where:

- (i) Closed Loans approved prior to the schedule deadline will commence and complete disbursements within 45 days of the deadline;
- (ii) Closed Loans have commenced (but not completed) disbursement obligations prior to the deadline; or
- (iii) EDA has approved a time schedule extension pursuant to paragraph (h) of this section.

(h) *Time schedule extensions.* (1) RLF Recipients shall promptly inform EDA in writing of any condition that may adversely affect their ability to meet the prescribed schedule deadlines. RLF Recipients must submit a written request to EDA for continued use of Grant funds beyond a missed deadline for disbursement of RLF funds. RLF Recipients must provide good reason for the delay in their extension request by demonstrating that:

- (i) The delay was unforeseen or beyond the control of the RLF Recipient;
- (ii) The financial need for the RLF still exists;

(iii) The current and planned use and the anticipated benefits of the RLF will remain consistent with the current CEDS and the RLF Plan; and

(iv) The proposal of a revised time schedule is reasonable. An extension request must also provide an explanation as to why no further delays are anticipated.

(2) EDA is under no obligation to grant a time extension. In the event an extension is denied, EDA may de-obligate all or part of the unused Grant funds and terminate the Grant.

■ 25. In § 307.12, revise the section heading, paragraphs (a) and (b), and the paragraph heading and introductory text of paragraph (c), and add paragraph (d) to read as follows:

**§ 307.12 Revolving Loan Fund Income requirements during the Revolving Phase; payments on defaulted and written off Revolving Loan Fund loans; Voluntarily Contributed Capital.**

(a) During the Revolving Phase, RLF Income must be placed into the RLF Capital Base for the purpose of making loans or paying for eligible and reasonable administrative costs associated with the RLF's operations. RLF Income may fund administrative costs, provided:

(1) Such RLF Income is earned and the administrative costs are accrued in the same fiscal year of the RLF Recipient;

(2) RLF Income earned, but not used for administrative costs during the same fiscal year of the RLF Recipient is made available for lending activities;

(3) RLF Income shall not be withdrawn from the RLF Capital Base in a subsequent fiscal year for any purpose other than lending without the prior written consent of EDA; and

(4) An RLF Recipient shall not use funds in excess of RLF Income for administrative costs unless directed otherwise in writing by EDA. In accordance with EDA's RLF Risk Analysis System, RLF Recipients are expected to keep administrative costs to a minimum in order to maintain the RLF Capital Base. The percentage of RLF Income used for administrative expenses will be one of the metrics used in EDA's RLF Risk Analysis System to evaluate RLF Recipients. *See also* § 307.16.

(b) *Compliance guidance.* When charging costs against RLF Income, RLF Recipients must comply with applicable Federal Uniform Administrative Requirements, cost principles, and audit requirements as detailed in this provision and in the terms and conditions of the RLF Grant.

(1) *For RLF Grants made on or after December 26, 2014.* For RLFs awarded

on or after December 26, 2014 or for RLFs that have received one or more Recapitalization Grants on or after December 26, 2014, the RLF Recipient must comply with the administrative and cost principles in 2 CFR part 200 (“Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards”).

(2) *For RLF Grants made before December 26, 2014.* For RLFs awarded before December 26, 2014, unless otherwise indicated in the terms of the Grant, the RLF Recipient must comply with the following cost principles:

(i) 2 CFR part 225 (OMB Circular A–87 for State, local, and Indian tribal governments),

(ii) 2 CFR part 230 (OMB Circular A–122 for non-profit organizations other than institutions of higher education, hospitals or organizations named in OMB Circular A–122 as not subject to such Circular), and

(iii) 2 CFR part 220 (OMB Circular A–21 for educational institutions).

(3) *For all RLF Grants.* For all RLF Grants, regardless of when they were awarded, the audit requirements set out as subpart F to 2 CFR part 200 apply to audits of the RLF Recipient fiscal years beginning on or after December 26, 2014. In addition, the Compliance Supplement, which is appendix XI to 2 CFR part 200, applies as appropriate.

(c) *Priority of payments on defaulted and written off RLF loans.* When an RLF Recipient receives proceeds on a defaulted or written off RLF loan that is not subject to liquidation pursuant to § 307.21, such proceeds shall be applied in the following order of priority:

\* \* \* \* \*

(d) *Voluntarily Contributed Capital.* An RLF Recipient that wishes to inject additional capital into the RLF Capital Base to augment the amount of resources available to lend must submit a written request that specifies the source of the funds to be added. Once an RLF Recipient elects to commit Voluntarily Contributed Capital and upon approval by EDA, the Voluntarily Contributed Capital becomes an irrevocable part of the RLF Capital Base and may not be subsequently withdrawn or separated from the RLF.

■ 26. Revise § 307.13 as follows:

■ a. Revise paragraph (b)(2);

■ b. Redesignate paragraph (b)(3) as paragraph (b)(4); and

■ c. Add new paragraph (b)(3).

The revisions and additions read as follows:

**§ 307.13 Records and retention.**

\* \* \* \* \*

(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 report that covers the fiscal year in which such costs were claimed.

(3) Consistent with § 307.11(a), for the duration of RLF operations, maintain records to demonstrate:

(i) The adequacy of the RLF’s accounting system to identify, safeguard, and account for the entire RLF Capital Base, outstanding RLF loans, and other RLF operations;

(ii) That standard RLF loan documents reasonably necessary or advisable for lending are in place; and

(iii) Evidence of fidelity bond coverage for persons authorized to handle funds under the Grant award in an amount sufficient to protect the interests of EDA and the RLF.

\* \* \* \* \*

■ 27. Revise § 307.14 to read as follows:

**§ 307.14 Revolving Loan Fund report.**

(a) *Frequency of reports.* All RLF Recipients, including those receiving Recapitalization Grants for existing RLFs, must complete and submit an RLF report, using Form ED–209 or any successor form, in a format and at a frequency as required by EDA.

(b) *Report contents.* RLF Recipients must certify as part of the RLF report to EDA that the RLF is operating in accordance with the applicable RLF Plan and that the information provided is complete and accurate.

■ 28. Amend § 307.15 as follows:

■ a. Revise paragraph (a);

■ b. Remove paragraph (b);

■ b. Redesignate paragraphs (c) and (d) as paragraphs (b) and (c), respectively; and

■ c. Revise the paragraph heading of newly redesignated paragraph (c) and paragraph (c)(1).

The revisions and additions read as follows:

**§ 307.15 Prudent management of Revolving Loan Funds.**

(a) *Accounting principles.* (1) RLFs shall operate in accordance with generally accepted accounting principles (“GAAP”) as in effect in the United States and the provisions outlined in the audit requirements set out as subpart F to 2 CFR part 200 and the Compliance Supplement, which is appendix XI to 2 CFR part 200, as applicable.

(2) In accordance with GAAP, a loan loss reserve may be recorded in the RLF Recipient’s financial statements to show the adjusted current value of an RLF’s loan portfolio, provided this loan loss

reserve is non-funded and is represented by a non-cash entry. However, loan loss reserves shall not be used to reduce the value of the RLF in the Schedule of Expenditures of Federal Awards (“SEFA”) required as part of the RLF Recipient’s audit requirements under 2 CFR part 200.

\* \* \* \* \*

(c) *RLF leveraging.* (1) RLF loans must leverage additional 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, additional investment must be made within 12 months of approval of an RLF loan, as part of the same business development project, and may include:

(i) Capital invested by the borrower or others;

(ii) Financing from private entities;

(iii) The non-guaranteed portions and 90 percent of the guaranteed portions of any Federal loan; or

(iv) Loans from other State and local lending programs.

\* \* \* \* \*

■ 29. Revise § 307.16 to read as follows:

**§ 307.16 Risk Analysis System.**

(a) EDA shall evaluate and manage RLF recipients using a Risk Analysis System that will focus on such risk factors as: Capital, assets, management, earnings, liquidity, strategic results, and financial controls. Risk analysis ratings of each RLF Recipient’s RLF program shall be conducted at least annually and will be based on the most recently submitted Form ED–209 RLF report.

(b) An RLF Recipient generally will be allowed a reasonable period of time to achieve compliance with risk factors as defined by EDA. However, persistent noncompliance with these factors and their limits as identified through EDA’s Risk Analysis System over multiple Reporting Periods may result in EDA taking appropriate remedies for noncompliance as detailed in § 307.21.

■ 30. Revise § 307.17 to read as follows:

**§ 307.17 Requirements for Revolving Loan Fund Cash Available for Lending.**

(a) *General.* RLF Cash Available for Lending shall be deposited and held in an interest-bearing account by the Recipient and used for the purpose of making RLF loans that are consistent with an RLF Plan or such other purposes approved by EDA. To ensure that RLF funds are used as intended, each loan agreement must clearly state the purpose of each loan.



(b) Allowable Cash Percentage. EDA shall notify each RLF recipient by January 1 of each year of the Allowable Cash Percentage that is applicable to lending during the ensuing calendar year. During the Revolving Phase, RLF Recipients must manage their repayment and lending schedules so that at all times they do not exceed the Allowable Cash Percentage.

(c) Restrictions on use of RLF Cash Available for Lending. RLF Cash Available for Lending shall not be used to:

- (1) Acquire an equity position in a private business;
- (2) Subsidize interest payments on an existing RLF loan;
- (3) Provide a loan to a borrower for the purpose of meeting the requirements of equity contributions under another Federal Agency's loan programs;
- (4) Enable borrowers to acquire an interest in a business either through the purchase of stock or through the acquisition of assets, unless sufficient justification is provided in the loan documentation. Sufficient justification may include acquiring a business to save it from imminent closure or to acquire a business to facilitate a significant expansion or increase in investment with a significant increase in jobs. The potential economic benefits must be clearly consistent with the strategic objectives of the RLF;
- (5) Provide RLF loans to a borrower for the purpose of investing in interest-bearing accounts, certificates of deposit, or any investment unrelated to the RLF; or
- (6) Refinance existing debt, unless:

(i) The RLF Recipient sufficiently demonstrates in the loan documentation a "sound economic justification" for the refinancing (e.g., the refinancing will support additional capital investment intended to increase business activities). For this purpose, reducing the risk of loss to an existing lender(s) or lowering the cost of financing to a borrower shall not, without other indicia, constitute a sound economic justification; or

(ii) RLF Cash Available for Lending 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 funds 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 time frame approved by EDA following the date of refinancing.

(7) Serve as collateral to obtain credit or any other type of financing without EDA's prior written approval;

(8) Support operations or administration of the RLF Recipient; or

(9) Undertake any activity that would violate the requirements found in part 314 of this chapter, including § 314.3 ("Authorized Use of Property") and § 314.4 ("Unauthorized Use of Property").

(d) 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.

■ 31. Revise paragraphs (a)(1) introductory text, (a)(2), (b)(1), (b)(1)(i), and (b)(2)(i) of § 307.18 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 RLF Plan. An RLF Recipient may add a lending area (an "Additional Lending Area") to its existing lending area to create a new lending area (the "New Lending Area") only with EDA's prior written approval and subject to the following provisions and conditions:

\* \* \* \* \*

(2) Following EDA approval, the New Lending Area designation shall remain in place until EDA approves a subsequent request for a New Lending Area.

(b) \* \* \*

(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 combined RLF with EDA's prior written approval and provided:

(i) It is up-to-date with all reports in accordance with § 307.14;

\* \* \* \* \*

(2) \* \* \*

(i) The replacement RLF Recipient is up-to-date with all reports in accordance with § 307.14;

\* \* \* \* \*

■ 32. Revise § 307.20 to read as follows:

**§ 307.20 Noncompliance.**

EDA will take appropriate compliance actions as detailed in § 307.21 for the RLF Recipient's failure to operate the RLF in accordance with the RLF Plan, the terms and conditions of the RLF

Grant, or this subpart, including but not limited to:

(a) Failing to obtain prior EDA approval for material changes to the RLF Plan, including provisions for administering the RLF;

(b) Failing to submit an updated RLF Plan to EDA in accordance with § 307.9(c);

(c) Failing to submit timely progress, financial, and audit reports in the format required by the RLF Grant and § 307.14, including the Form ED-209 RLF report;

(d) Failing to manage the RLF Grant in accordance with Prudent Lending Practices, as defined in § 307.8;

(e) Holding RLF Cash Available for Lending so that it is 50 percent or more of the RLF Capital Base for 24 months without an EDA-approved extension request based on other EDA risk analysis factors or other extenuating circumstances;

(f) Making an ineligible loan;

(g) Failing to disburse the EDA funds in accordance with the time schedule prescribed in the RLF Grant;

(h) Failing to sequester funds or remit the interest on EDA's portion of the sequestered funds to the U.S. Treasury, as directed by EDA;

(i) Failing to comply with the audit requirements set forth in subpart F to 2 CFR part 200 and the related Compliance Supplement, including reference to the correctly valued EDA RLF Federal expenditures in the SEFA, timely submission of audit reports to the Federal Audit Clearinghouse, and the inclusion of the RLF program as an appropriately audited program;

(j) Failing to implement timely resolutions to audit findings or questioned costs contained in the annual audit, as applicable;

(k) Failing to comply with an EDA-approved corrective action plan to remedy persistent noncompliance with RLF-related findings;

(l) Failing to comply with the conflicts of interest provisions set forth in § 302.17; and

(m) Making unauthorized use of RLF Cash Available for Lending in violation of § 307.18(c).

■ 33. Revise § 307.21 to read as follows:

**§ 307.21 Remedies for noncompliance.**

(a) General. If an RLF Recipient fails to operate the RLF in accordance with the RLF Plan, the terms and conditions of the RLF Grant, or this subpart, as detailed in § 307.20, as appropriate in the circumstances, EDA may require one or more of the following actions, as appropriate in the circumstances:

- (1) Increased reporting requirements;
- (2) Implementation of a corrective action plan;

- (3) A special audit;
- (4) Sequestration of RLF funds;
- (5) Repayment of ineligible loans or other costs to the RLF;
- (6) Transfer or merger of the RLF in accordance with § 307.18;
- (7) Suspension of the RLF Grant; or
- (8) Termination of the RLF Grant, in whole or in part.

(b) *Disallowance of a portion of an RLF Grant, liquidation.* 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) Holding RLF Cash Available for Lending so that it is 50 percent or more of the RLF Capital Base for 24 months without an EDA-approved extension request;
- (2) Failing to disburse the EDA funds in accordance with the time schedule prescribed in the RLF Grant; or
- (3) Determining that it does not wish to further invest in the RLF or cannot maintain operations at the degree originally contemplated upon receipt of the RLF Grant and requests that a portion of the RLF Grant be disallowed, and EDA agrees to the disallowance.

(c) *Termination or suspension.* To maintain effective control over and accountability of RLF Grant funds and assets, EDA shall determine the manner and timing of any suspension or termination action. EDA may require the RLF Recipient to repay the Federal Share in a lump-sum payment or enter into a Sale, or EDA may agree to enter into a repayment agreement with the RLF Recipient for repayment of the Federal Share.

(d) *Termination, liquidation upon termination.* When EDA approves the termination of an RLF Grant, EDA must make all efforts to recover the pro rata Federal Share (as defined in § 314.5 of this chapter). EDA may assign or transfer assets of the RLF to an RLF Third Party for liquidation. The following terms will govern any liquidation:

- (1) EDA shall have sole discretion in choosing the RLF Third Party;
- (2) The RLF Third Party may be an Eligible Applicant or a for-profit organization not otherwise eligible for Investment Assistance;
- (3) EDA may enter into an agreement with the RLF Third Party to liquidate the assets of one or more RLFs or RLF Recipients;

- (4) EDA may allow the RLF Third Party to retain a portion of the RLF assets, consistent with the agreement referenced in paragraph (d)(3) of this section, as reasonable compensation for services rendered in the liquidation; and
- (5) EDA may require additional reasonable terms and conditions.

(e) *Distribution of proceeds.* The proceeds resulting from any liquidation upon termination shall be distributed in the following order of priority:

- (i) *First*, for any third party liquidation costs;
- (ii) *Second*, for the payment of EDA's Federal Share; and
- (iii) *Third*, if any proceeds remain, to the RLF Recipient.

(f) *RLF Recipient's request to terminate.* EDA may approve a request from an RLF Recipient to terminate an RLF Grant. The RLF Recipient must compensate the Federal Government for the pro rata Federal Share of the RLF Capital Base.

(g) Upon termination, distribution of proceeds shall occur in accordance with § 307.21(e).

#### PART 309—REDISTRIBUTIONS OF INVESTMENT ASSISTANCE

- 34. The authority citation for part 309 continues to read as follows:

**Authority:** 42 U.S.C. 3154c; 42 U.S.C. 3211; Department of Commerce Delegation Order 10-4.

- 35. Revise § 309.1(a) to read as follows:

##### § 309.1 Redistributions under parts 303, 305 and 306.

(a) *General.* Except as provided in paragraph (b) of this section, a Recipient of Investment Assistance under parts 303, 305 or 306 of this chapter may directly expend such Investment Assistance or, with prior EDA approval, may redistribute such Investment Assistance in the form of a subgrant to another Eligible Recipient, generally referred to as a Subrecipient, that qualifies for Investment Assistance under the same part of this chapter as the Recipient, to fund required components of the scope of work approved for the Project. All subgrants made pursuant to this section shall be subject to the same terms and conditions applicable to the Recipient under the original Investment Assistance award and must satisfy the requirements of PWEDA and of this chapter. EDA may require the Eligible Recipient under the original Investment award to agree to special award conditions and the Subrecipient to provide appropriate certifications to

ensure the Subrecipient's compliance with legal requirements.

\* \* \* \* \*

- 36. Revise paragraphs (a)(1) and (b) of § 309.2 to read as follows:

##### § 309.2 Redistributions under part 307.

(a) \* \* \*

(1) A subgrant to another Eligible Recipient, generally referred to as a Subrecipient, that qualifies for Investment Assistance under part 307 of this chapter; or

\* \* \* \* \*

(b) All redistributions of Investment Assistance made pursuant to this section shall be subject to the same terms and conditions applicable to the Recipient under the original Investment Assistance award and must satisfy the requirements of PWEDA and of this chapter. EDA may require the Eligible Recipient under the original Investment Award to agree to special award conditions and the Subrecipient to provide appropriate certifications to ensure the Subrecipient's compliance with legal requirements.

#### PART 314—PROPERTY

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

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

- 38. Amend § 314.1 by:
  - a. Revising the definition of *Personal Property*;
  - b. Adding the definition of *Project Property in alphabetical order*; and
  - c. Revising the definition of *Real Property*.

The revisions and additions read as follows:

##### § 314.1 Definitions.

\* \* \* \* \*

*Personal Property* means all tangible and intangible property other than Real Property, including the RLF Capital Base as defined at § 307.8.

*Project Property* means all Property that is acquired or improved, in whole or in part, with Investment Assistance and is required, as determined by EDA, for the successful completion and operation of a Project and/or serves as the economic justification of a Project. As appropriate to specify the type of Property to which they are referring, subparts B and C of this part refer to Project Property as "Project Real Property" or "Project Personal Property".

\* \* \* \* \*

*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 served by the construction of Project infrastructure (such as roads, sewers and water lines) where the infrastructure contributes to the value of such land as a specific purpose of the Project.

\* \* \* \* \*

■ 39. Revise § 314.2 to read as follows:

**§ 314.2 Federal Interest.**

(a) Subject to the obligations and conditions set forth in this part and in relevant provisions of 2 CFR part 200, Project Property vests upon acquisition in the recipient (or, if approved by EDA, in a Co-recipient or Subrecipient). Project Property shall be held in trust by the Recipient for the benefit of the Project for the Estimated Useful Life of the Project, during which period EDA retains an undivided equitable reversionary interest in the Property (the "Federal Interest"). The Federal Interest ensures compliance with EDA Project requirements, including those related to the purpose, scope, and use of a Project. The Recipient typically must secure the Federal Interest through a recorded lien, statement, or other recordable instrument setting forth EDA's Property interest in a Project (e.g., a mortgage, covenant, or other statement of EDA's Real Property interest in the case of a Project involving the acquisition, construction, or improvement of a building. See § 314.8.).

(b) When the Federal government is fully compensated for the Federal Share of Project Property, the Federal Interest is extinguished and the Federal Government has no further interest in the Property, except as provided in § 314.10(e)(3) regarding nondiscrimination requirements.

■ 40. Revise § 314.3 to read as follows:

**§ 314.3 Authorized use of Project Property.**

(a) *General.* During the Estimated Useful Life of the Project, the Recipient or Owner must use any Project Property 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) *Project Property that is no longer needed for Project purposes.* Where EDA and the Recipient determine during the Estimated Useful Life of the Project that Project Property is 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) *Real Property for sale or lease.* 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.

(d) *Property transfers and Successor Recipients.* EDA, in its sole discretion, may approve the transfer of any Project Property from a Recipient to a Successor Recipient (or from one Successor Recipient to another Successor Recipient). The Recipient will remain responsible for complying with the rules of this part and the terms and conditions of the Investment Assistance for the period in which it is the Recipient. Thereafter, the Successor Recipient must comply with the rules of this part and with the same terms and conditions as were applicable to the Recipient (unless such terms and conditions are otherwise amended by EDA). The same rules apply to EDA-approved transfers of Property between Successor Recipients.

(e) *Replacement Personal Property.* When acquiring replacement Personal Property of equal or greater value than Personal Property originally acquired with Investment Assistance, the Recipient may, with EDA's approval, trade in such Personal Property originally acquired or sell the original Personal Property and use the proceeds for the acquisition of the replacement Personal Property; provided that the replacement Personal Property is for use in the Project. The replacement Personal Property is subject to the same requirements as the original Personal Property.

(f) *Replacement Real Property.* In extraordinary and compelling circumstances, the Assistant Secretary may approve the replacement of Real Property used in a Project.

(g) *Incidental use of Project Property.* With EDA's prior written approval, a Recipient may undertake an incidental use of Project Property that does not interfere with the scope of the Project or the economic purpose for which the Investment was made; provided that the Recipient is in compliance with applicable law and the terms and conditions of the Investment Assistance, and the incidental use of the Property will not violate the terms and conditions of the Investment Assistance

or otherwise undermine the economic purpose for which the Investment was made or adversely affect the economic useful life of the Property. Eligible Applicants and Recipients should contact the appropriate regional office (whose contact information is available via the Internet at <http://www.eda.gov>) for guidelines on obtaining approval for incidental use of Property under this section.

■ 41. Revise the section heading, paragraph (a), the introductory text of paragraph (b) and paragraph (c) of § 314.4 to read as follows:

**§ 314.4 Unauthorized Use of Project Property.**

(a) *Compensation of Federal Share upon an Unauthorized Use of Project Property.* Except as provided in §§ 314.3 (regarding the authorized use of Property) or 314.10 (regarding the release of the Federal Interest in certain Property), or as otherwise authorized by EDA, the Federal Government must be compensated by the Recipient for the Federal Share whenever, during the Estimated Useful Life of the Project, any Project Property is Disposed of, encumbered, or no longer used for the purpose of the Project; provided that for equipment and supplies, the requirements of 2 CFR part 200, including any supplements or amendments thereto, shall apply.

(b) *Additional Unauthorized Uses of Project Property.* Additionally, prior to the release of the Federal Interest, Project Real Property or tangible Project Personal Property may not be used:

\* \* \* \* \*

(c) *Recovery of the Federal Share.* Where the Disposition, encumbrance, or use of any Project Property violates paragraphs (a) or (b) of this section, EDA may assert the Federal Interest in the Project 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, except for the nondiscrimination requirements set forth in § 314.10(d)(3).

■ 42. Revise § 314.5(a) to read as follows:

§ 314.5 Federal Share.

(a) For purposes of this part, "Federal Share" means that portion of the current fair market value of any Project Property attributable to EDA's participation in the Project. EDA may rely on a current certified appraisal of the Project Property prepared by an appraiser licensed in the State where the Project Property is located to determine the fair market value. In extraordinary circumstances and at EDA's sole discretion, where EDA is unable to determine the current fair market value, EDA may use other methods of determining the value of Project Property, including the amount of the award of Investment Assistance or the amount paid by a transferee. The Federal Share shall be the current fair market value or other valuation as determined by EDA of the Property after deducting:

\* \* \* \* \*

■ 43. Revise paragraphs (a), (b)(3), (b)(4)(v)(B), (b)(5)(v)(B), and (c) of § 314.6 to read as follows:

§ 314.6 Encumbrances.

(a) General. Except as provided in paragraph (b) of this section or as otherwise authorized by EDA, Project Property must not be used to secure a mortgage or deed of trust or in any way otherwise encumbered, except to secure a grant or loan made by a Federal Agency or State agency or other public body participating in the same Project, so long as the Recipient discloses such an encumbrance in writing as part of its application for Investment Assistance or as soon as practicable after learning of the encumbrance.

(b) \* \* \*

(3) Pre-existing encumbrances. Encumbrances already in place and disclosed to EDA at the time EDA approves the Project where EDA, in its sole discretion, determines that:

(i) The requirements of § 314.7(b) are met;

(ii) Consistent with paragraphs (b)(4)(iv) and (b)(5)(iv) of this section, the terms and conditions of the encumbrance are satisfactory; and

(iii) Consistent with paragraphs (b)(4)(v) and (b)(5)(v), there is a reasonable expectation that the Recipient will not default on its obligations.

(4) \* \* \*

(v) \* \* \*

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

\* \* \* \* \*

(5) \* \* \*

(v) \* \* \*

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

\* \* \* \* \*

(c) Encumbering Project Property, other than as permitted in this section, is an Unauthorized Use of the Property under § 314.4.

■ 44. Revise paragraphs (a), (c) introductory text, (c)(1), (c)(1)(ii), (c)(2) introductory text, (c)(4) introductory text, (c)(4)(ii)(B), (c)(4)(iii), (c)(5)(i), and (c)(5)(iii) of § 314.7 to read as follows:

§ 314.7 Title.

(a) General title requirement. Except in those limited circumstances identified in paragraph (c) of this section, at the time Investment Assistance is awarded, the Recipient must hold title to Project Real Property, which, as noted in § 314.1 in the definition of "Real Property" includes land that is served by the construction of Project infrastructure (such as roads, sewers, and water lines) and where the infrastructure contributes to the value of such land as a specific purpose of the Project. The Recipient must maintain title to Project Real Property 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 Project Real Property (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.

\* \* \* \* \*

(c) Exceptions. The following are exceptions to the requirements of paragraph (a) of this section that the Recipient hold title to Project Real Property at the time Investment Assistance is awarded and at all times during the Estimated Useful Life of the Project.

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

\* \* \* \* \*

(ii) EDA, in its sole discretion, determines that the terms and

conditions of the purchase agreement adequately safeguard the Federal Government's interest in the Project Real Property.

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

\* \* \* \* \*

(4) State or local government owned roadway or highway construction. When the Project includes construction on a State or local government owned roadway or 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 roadway or highway, provided that:

\* \* \* \* \*

(ii) \* \* \*

(B) If at any time during the Estimated Useful Life of the Project any or all of the improvements in the Project within the State or local government owned roadway or highway are relocated for any reason pursuant to requirements of the owner of the public roadway or highway, the Recipient shall be responsible for accomplishing such relocation, including expending the Recipient's own funds as necessary, so that the Project continues as authorized by the Investment Assistance; and

(iii) The Recipient obtains all written authorizations (i.e., State or county permit(s)) necessary for the Project to be constructed within the public roadway or highway, copies of which shall be submitted to EDA. Such authorizations shall contain no time limits that EDA determines substantially restrict the use of the public roadway or highway for the Project during the Estimated Useful Life of the Project.

(5) \* \* \*

(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 Project Real Property, including industrial or commercial parks, so that the Recipient or Owner may sell or lease parcels of the Project Real Property 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 Project Real Property, the Recipient or Owner, as applicable, provides evidence sufficient to EDA that it holds title to the Project Real Property intended for sale or lease prior to the disbursement of any portion of the Investment Assistance and will retain title until the sale of the Property in accordance with

paragraphs (c)(5)(i)(C) through (E) of this section;

(B) In cases where an authorized purpose of the Project is to lease Project Real Property, the Recipient or Owner, as applicable, provides evidence sufficient to EDA that it holds title to the Project Real Property intended for lease prior to the 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 Project 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 Project 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

\* \* \* \* \*

(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 benefitted 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.

\* \* \* \* \*

■ 45. Revise paragraphs (a), (b), and (d) of § 314.8 to read as follows:

**§ 314.8 Recorded statement for Real Property.**

(a) For all Projects involving the acquisition, construction, or improvement of a building, as determined by EDA, the Recipient shall execute a lien, covenant, or other statement of the Federal Interest in such Project Real Property. The statement shall specify the Estimated Useful Life of the Project and shall include, but not be limited to, the Disposition, encumbrance and Federal Share requirements. The statement shall be satisfactory in form and substance to EDA.

(b) The statement of the Federal Interest must be perfected and placed of

record in the Real Property records of the jurisdiction in which the Project Real Property is located, all in accordance with applicable law.

\* \* \* \* \*

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

■ 46. Revise § 314.9 to read as follows:

**§ 314.9 Recorded statement for Project 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 provide notice of the Federal Interest all Project Personal Property by executing a Uniform Commercial Code Financing Statement (Form UCC-1, as provided by State law) or other statement of the Federal Interest in the Project 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 all Project Personal Property, except as otherwise provided in this part.

■ 47. Revise the section heading and paragraphs (a) through (d), (e)(2), and the introductory text to paragraph (e)(3) to read as follows:

**§ 314.10 Procedures for release of the Federal Interest.**

(a) *General.* As provided in § 314.2 of this chapter, the Federal Interest in Project Property extends for the duration of the Estimated Useful Life of the Project, which is determined by EDA at the time of Investment award. 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 obtain a release of the Federal Interest in Project Property.

(b) *Release of the Federal Interest 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 the Recipient. For a Project in which a Recorded Statement as provided for in §§ 314.8 and 314.9 of this chapter has been recorded, EDA will provide for the release by executing an instrument in recordable form. The release will terminate the Investment as of the date of its execution and satisfy the Recorded Statement. See paragraph (e) of this section for limitations and covenants of use that are applicable to any release of the Federal Interest.

(c) *Release prior to the 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 section. EDA may release the Federal Interest in connection with such Property only upon receipt of full payment in compensation of the Federal Interest and thereafter will have no further interest in the ownership, use, or Disposition of the Property, except for the nondiscrimination requirements set forth in paragraph (e)(3) of this section.

(d) *Release of the Federal Interest before the expiration of the Estimated Useful Life, but 20 years after the award of Investment Assistance.* 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, but where 20 years have elapsed since the award of Investment Assistance, EDA may release any Real Property or tangible Personal Property interest held by EDA, if EDA determines:

- (1) The Recipient has made a good faith effort to fulfill all terms and conditions of the award of Investment Assistance; and
- (2) The economic development benefits as set out in the award of

Investment Assistance have been achieved.

(3) See paragraph (e) of this section for limitations and covenants of use that are applicable to any release of the Federal Interest.

(e) \* \* \*

(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; and other such factors as EDA deems appropriate. When requesting a release of the Federal Interest pursuant to this section, the Recipient will be required to disclose to EDA the intended future use of the Real Property or the tangible Personal Property for which the release is requested.

(i) A Recipient not intending to use the Real Property or tangible Personal Property for explicitly religious activities following EDA's release will be required to execute a covenant of use.

A covenant of use with respect to Real Property shall be recorded in the jurisdiction where the Real Property is located in accordance with § 314.8. A covenant of use with respect to items of tangible Personal Property shall be perfected and recorded in accordance with applicable law, with continuances re-filed as appropriate. See § 314.9. A covenant of use shall (at a minimum) prohibit the use of the Real Property or the tangible Personal Property for explicitly religious activities in violation of applicable Federal law.

(ii) EDA may require a Recipient (or its successors in interest) that intends or foresees the use of Real Property or tangible Personal Property for explicitly religious activities following the release of the Federal Interest to compensate EDA for the Federal Share of such Property. If such compensation is made, no covenant with respect to explicitly religious activities will be required as a condition of the release. EDA recommends that any Recipient who intends or foresees the use of Real Property or tangible Personal Property (including by successors of the

Recipient) for explicitly religious activities to contact EDA well in advance of requesting a release pursuant to this section.

(3) Notwithstanding any release of the Federal Interest under this section, including a release upon a Recipient's compensation for the Federal Share, a Recipient must ensure that Project Property is not used 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 any purpose that would violate the nondiscrimination requirements set forth in § 302.20 of this chapter.

\* \* \* \* \*

Dated: September 12, 2016.

**Roy K.J. Williams,**

*Assistant Secretary of Commerce for Economic Development.*

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