

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

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

[Docket No.: 160519444–7133–01]

RIN 0610–AA69

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

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

**ACTION:** Final rule.

**SUMMARY:** The Economic Development Administration (“EDA”), U.S. Department of Commerce (“DOC”), is issuing this final rule amending the agency’s regulations implementing the Public Works and Economic Development Act of 1965, as amended (“PWEDA”). The changes incorporate current best practices and strengthen EDA’s efforts to evaluate, monitor, and improve performance within the agency’s Revolving Loan Fund (“RLF”) program by establishing the Risk Analysis System, a risk-based management framework, to evaluate and manage the RLF program. To make RLF awards more efficient for Recipients to administer and EDA to monitor, EDA is also reorganizing the RLF regulations and making changes to improve readability and clarify those requirements that apply to the distinct phases of an RLF award. In addition, EDA is updating other parts of its regulations, including revising definitions, replacing references to superseded regulations to reflect the promulgation of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (“Uniform Guidance”), streamlining the provisions that outline EDA’s application process, and clarifying EDA’s property management regulations.

**DATES:** This rule is effective on January 2, 2018.

**ADDRESSES:** EDA posted all public comments received on the *Federal Rulemaking Portal*, [www.regulations.gov](http://www.regulations.gov), without change. For convenience, after the final rule becomes effective, EDA will update the full text of EDA’s regulations, as amended, and post it on EDA’s Web site at <https://www.eda.gov/about/regulations.htm>.

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**SUPPLEMENTARY INFORMATION:** The Department notes that the President’s Fiscal Year 2018 Budget calls for the elimination of EDA. The Department considers this final rule important to implement because the Department would need to continue to administer and monitor RLF grants in perpetuity under current statutory authorities. The regulatory changes in this final rule will enable the Department to more efficiently manage the residual RLF portfolio going forward. Likewise, additional changes made by this final rule to EDA’s general PWEDA implementing regulations would enable the Department to more effectively oversee the non-RLF residual grant portfolio to ensure that grantees continue to use projects for the purpose originally funded and to eventually execute releases of the federal interest in the property at the expiration of the useful life, often 20 years after the date of the grant award.

**Background**

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 serves as an important pillar of EDA’s investment programs by helping 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 non-profit organizations, to operate a lending program that makes loans 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.

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 RLF is replenished and new loans are extended to qualified businesses. Loans 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. The RLF Recipient’s obligation to manage the RLF continues in perpetuity because, absent statutory authority providing otherwise, under current law the Federal Interest in the RLF never expires.

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 that became effective on January 20, 2015 (79 FR 76108) (“January 2015 Final Rule”) revising the agency’s regulations and reflecting the agency’s contemporaneous practices and policies in administering its economic development assistance programs. Through the January 2015 Final Rule, EDA reorganized part 307 to help clarify award requirements and incorporate all RLF program requirements under subpart B to part 307.

On October 3, 2016, EDA published a notice of proposed rulemaking (“NPRM”) in the **Federal Register** (81 FR 68186) requesting public comments on additional proposed changes to its regulations with a particular focus on revisions to those provisions related to RLFs. The public comment period closed on December 2, 2016, and EDA received 103 submissions. This final rule responds to each of those comments, makes seven changes to the proposed regulatory language in response to the comments, and sets forth the finalized set of regulations. Additionally, because this final rule lessens the costs to RLF Recipients to comply with EDA RLF regulations as described in the Classification section, this final rule is a “deregulatory action” pursuant to the April 5, 2017, OMB guidance memorandum implementing Executive Order 13771.

### Public Comments and Summary of Differences Between the NPRM and the Final Rule

In response to the NPRM, EDA received a total of 103 submissions, inclusive of 73 comments received during a November 15, 2016 informational webinar about the NPRM. The 103 submissions addressed a total of 29 discrete issues. After careful consideration of the comments received, EDA has made seven changes to the proposed regulations contained in the NPRM. EDA's responses to the comments and the specific changes made to the final rule are summarized below.

#### *Part One: Issues That Resulted in Changes to the NPRM Regulatory Language*

##### Issue One: Renewal of Commitments Under a Comprehensive Economic Development Strategy (CEDS)

In the NPRM, EDA added language to § 303.6(b)(3)(ii) that a Planning Organization, in connection with the required submission of a revised CEDS at least every five years, "must obtain renewed commitments from participating counties or other areas within the District to support the economic development activities of the District." One non-profit commenter suggested that the last sentence should instead read, "The Planning Organization shall use its best efforts to obtain renewed commitments from participating counties or other areas within the District. . . ." The commenter also wanted EDA to add another sentence at the end "that states that the inability to secure renewed commitments shall not be a disqualifying event for preparation or approval of the CEDS."

The intent of the new language was to emphasize that for an Economic Development District (EDD) to be successful, participating counties or other areas should be active contributors to the development and implementation of the CEDS. Unfortunately, involvement by these counties and areas in the CEDS process and awareness of its associated implementation efforts may wane over time. EDA views these possible scenarios as both detrimental to regional economic development and to the value and importance of the CEDS itself. However, because the intent of this new language is to make sure all jurisdictions are aware of the CEDS and its value, not to necessarily disqualify a CEDS, EDA is modifying the proposed § 303.6(b)(3)(ii) language to incorporate the requester's suggestions. The final rule now provides that in connection

with the submission of a new or revised CEDS, the Planning Organization shall use its best efforts to obtain renewed commitments from participating counties or other areas within the District to support the economic development activities of the District. Provided the Planning Organization can document a good faith effort to obtain renewed commitments, the inability to secure renewed commitments shall not disqualify a CEDS update.

##### Issue Two: Definition of Capital Base

Two comments request that we add language to the proposed definition of "RLF Capital Base" to clarify that the RLF Capital Base excludes eligible administrative expenses. While the second sentence of the definition addresses administrative costs associated with RLF operations, it does so in the context of the two forms in which the RLF Capital Base is maintained (RLF Cash Available for Lending and outstanding loan principal).

EDA agrees that additional language in the second sentence of this definition would help clarify the fact that RLF Income used for eligible and reasonable administrative expenses is excluded from the definition although it is further explained in § 307.12(a). Accordingly, EDA has revised the definition in § 307.8 to state that 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 less any eligible and reasonable administrative expenses, 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.

##### Issue Three: Excluding Committed/ Approved Loans Not Yet Funded From Allowable Cash Percentage

One non-profit commenter requested that EDA add language to the new definition of "RLF Cash Available for Lending" in § 307.8 to ensure that loans that have been committed or approved but not yet funded are not counted as RLF Cash Available for Lending when calculating the Allowable Cash Percentage for each regional portfolio.

EDA agrees with this comment and is revising the definition of "RLF Cash Available for Lending" in the final rule to exclude loans that have been

committed or approved but not yet funded.

##### Issue Four: Auditor Certification of Accounting System

EDA received one comment from a professional organization regarding the ongoing requirement for auditor certification of a Recipient's accounting system. In the NPRM, we proposed to move from § 307.15(b) to § 307.11(a) ("*Pre-disbursement requirements*") 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. EDA proposed no substantive changes to this requirement other than to update references to 2 CFR part 200.

The comment EDA received regarding this requirement expressed concern that this requirement is unclear regarding the level of effort that would be needed by an accountant to issue a certification that an accounting system is "adequate." The comment asserted that without clearer guidance as to the meaning of this standard, accountants would be unable to comply with their obligation to "obtain sufficient relevant data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed."

EDA is persuaded that the language, as proposed, is not sufficiently clear to enable accountants to meet their mandate. However, EDA also believes that it is important to ensure that RLF Recipients are aware of their Federal financial management requirements and responsibilities. As such, EDA is revising § 307.11(a)(i) to require self-certification from the Recipient that the Recipient's accounting system meets the established criteria. This change will serve to increase the awareness of the need to maintain proper accounting systems to account for Federal funds while addressing the concerns raised regarding accountants' ability to meet their mandate under the proposed language. In addition, the adoption of the Risk Analysis System will increase EDA's ability to monitor Recipients' financial controls throughout the life of the RLF grant, providing an additional tool for ensuring compliance with these requirements.

##### Issue Five: Use of RLF Income During the Disbursement Phase

EDA received one comment expressing confusion regarding the change in the language related to the use of RLF Income earned during the

Disbursement Phase. The commenter stated its understanding that any RLF Income not used for administrative costs becomes part of the RLF Capital Base and must be loaned out to borrowers as RLF loans.

EDA believes this comment may be conflating the Disbursement and Revolving Phases. Immediately following the initial award of an RLF Grant, RLF Recipients may request drawdowns from EDA and submit appropriate evidence documenting the basis for those requests. This is known as the Disbursement Phase and is described in the Definitions section of the regulations (§ 307.8) and in § 307.11 (“*Pre-disbursement requirements and disbursement of funds to Revolving Loan Funds*”).

The previous regulations specified that RLF Income held to reimburse administrative costs did not need to be disbursed in order to draw additional Grant funds, but they did not address how to handle RLF Income not used for administrative costs. As such, the NPRM proposed revising § 307.11(c) to clarify 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 but need not be disbursed to support new loans, unless otherwise specified in the terms and conditions of the RLF Grant. EDA felt that this revision was clear that it applied to the Disbursement Phase and not to the Revolving Phase, the phase in which most RLF Recipients are currently operating and during which they are no longer requesting drawdowns for a specific RLF Grant.

Nevertheless, EDA feels that it can provide additional clarity to this section by also addressing how repaid loan principal should be handled during the Disbursement Phase and stressing that, like RLF Income earned during this Phase, it need not be used for new loans unless otherwise specified. As a result, EDA added the words, “and principal repaid” to the fourth sentence of § 307.11(c).

#### Issue Six: Applying Allowable Cash Percentage to Recipients Based on Their Fiscal Year

Eleven commenters requested that the Allowable Cash Percentage be applied to RLF Recipients on a cycle that matches their Fiscal Year instead of the schedule proposed in the NPRM of notifying Recipients by January 1 of each year of the Allowable Cash Percentage to be applied during the ensuing calendar year.

EDA is sympathetic to this concern in light of the differences between

Recipients with varying Fiscal Years. In order to ensure that all Recipients have sufficient amount of time to comply with the Allowable Cash Percentage for their individual regions, EDA has changed proposed § 307.17(b) to now state that EDA shall notify each RLF Recipient by January 1 of each year of the Allowable Cash Percentage to be applied to lending during the Recipient’s ensuing fiscal year, rather than calendar year, beginning on or after January 1.

#### Issue Seven: Loan Quality Review

EDA received one comment regarding a regulatory provision for which no substantive change was recommended in the NPRM. Section 307.17(d), which was re-lettered from § 307.17(c), allows EDA to require an independent third party to conduct a compliance and loan quality review for an RLF Grant every three years. If required, this review is considered an administrative cost in accordance with the requirements set forth in § 307.12. The commenter suggests that this requirement creates redundancy, adds to the demands of what are already limited funds, and should be unnecessary with implementation of the Risk Analysis System.

EDA agreed with this comment and believes that this type of review can be accomplished through other mechanisms that are currently available, such as through a desk audit, site visit, or the regular audit process. Further, this provision has rarely been invoked in recent years, and so EDA identified this dormant section of the RLF regulations as appropriate for removal in an effort to further streamline EDA’s regulations. As a result, EDA has removed this paragraph in its entirety.

#### Part Two: Issues That Did Not Result in Changes to the Final Rule

Aside from the issues described above, EDA received comments on 22 issues that did not result in changes to the proposed regulations. The comments received on these issues are presented below along with our responses.

#### Issue Eight: Definition of Subrecipient

One non-profit commenter requested that EDA address in the § 300.3 definition of “Subrecipient” whether the Investment Assistance requirements that apply to a Recipient flow down to a Subrecipient. The commenter also argued that the “Recipient and Subrecipient should have the flexibility to define the obligations of each other in their own contract/agreement documentation.”

The Uniform Guidance defines the Recipient-Subrecipient relationship in 2 CFR 200.330–200.332. Generally, a Subrecipient is bound by the same terms and conditions that bind the Recipient plus any additional requirements the Recipient imposes. See 2 CFR 200.331. Because the issue raised by the commenter is already addressed in the Uniform Guidance, EDA will not make any changes to the definition of “Subrecipient,” as proposed.

#### Issue Nine: Clarification of Acceptable Alternatives to CEDS

EDA proposed language modifying § 303.7(c)(1) to clarify that EDA would accept a non-EDA funded CEDS that does not meet the four foundational elements of a CEDS in particular circumstances, such as a natural disaster or sudden and severe economic dislocation. A non-profit commenter requests further clarification in the final rule on what specific types of plans would be accepted in these circumstances.

While EDA understands the desire for more specificity, EDA has determined that the flexibility provided by the proposed language should be maintained in the final version of the regulations. In times of natural or man-made disasters or other sudden or severe events, EDA needs to be responsive to economic recovery needs. EDA’s experience demonstrates that time is of the essence in these circumstances and EDA needs the flexibility to move forward quickly with whatever documentation is available at the time. In such situations EDA would also typically notify an applicant of any areas in their plan that might need to be included to meet the CEDS equivalent requirement and allow the entity to subsequently make changes to their planning document (if applicable).

#### Issue Ten: Definitions of Real Property and Project Property

EDA proposed a simplified definition of Real Property and new definition of Project Property in the NPRM. One non-profit commenter felt that both definitions in § 314.1 are over broad and could lead to takings in violation of the Fifth Amendment to the U.S. Constitution. The commenter specifically proposed that the Real Property definition be limited to those Properties directly, as opposed to consequentially, benefitted by EDA Investment Assistance so non-participating Property is not encumbered. The commenter went on to argue that, “[a]lthough the definition may work for certain off-site improvements (wastewater plant), and

the recording of the reversionary interest may be prudent for the improvement site and any direct beneficiaries that were tied to the project and included in the grant, it is not appropriate to burden all properties via a blanket assertion of benefit.” The commenter similarly believed that the new definition of Project Property vests too much discretion in EDA to determine whether property that is acquired or improved with Investment Assistance is deemed integral to the Project and thus encumbered. The commenter urged EDA to adopt clear determining criteria and require landowner consent prior to EDA making such a determination.

EDA disagrees with the commenter’s position. Application of these definitions would not result in takings under the Fifth Amendment because EDA is not physically seizing or devaluing private property without just compensation. In fact, quite the opposite is happening: EDA is benefitting the Property (likely resulting in an increase in value). However, because the funds involved are Federal, EDA must protect the Investment by way of an encumbrance that reflects the value of EDA’s Investment. The definition of “Real Property” in § 314.1 supports this proposition because EDA only encumbers Property “. . . where the infrastructure contributes to the value of such land as a specific purpose of the Project”, not Properties that might be “consequentially” benefitted by Investment Assistance. Further, the proposed definition of “Real Property” is not substantially different than EDA’s prior definition, just simpler, and EDA has not had taking issues in the past. Land that is integral to the specific purpose of the Project, and thus would benefit from the Investment, is meticulously defined in the application and contemplated by the Recipient at the time of award. In no event would this result in a taking given these circumstances.

Additionally, EDA cannot narrow the definition of Real Property in the manner proposed by the commenter for two reasons. First, EDA has to ensure that the definition appropriately captures all types of Property (*e.g.*, fixtures, appurtenances) that EDA may need to encumber under its numerous PWEDA programs if that Property has benefitted as a result EDA’s Investment. Second, EDA at times needs to impose restrictions on benefitted Property to avoid situations where an applicant attempts to pass-through EDA Investment Assistance funds to an ineligible entity. In fact, EDA’s definition actually creates more

flexibility and more opportunities for Recipients by allowing EDA to invest in Projects that would otherwise be barred by such pass-through considerations.

In a similar vein, EDA has determined that the amount of discretion provided by the definition of Project Property is appropriate given the need to appropriately define the scope of EDA’s Investment and to then protect that Investment. Identifying those components that are required for the successful completion and operation of a Project and/or serve as the economic justification of a Project, is a necessary step to ensuring the success of a Project over its entire useful life. The applicant is protected from any takings because these elements are, again, identified in the application and contemplated by the Recipient at the time of award.

In light of the above considerations, EDA is not making any changes to the definitions of Real Property or Project Property in the final rule.

#### Issue Eleven: Constraints on RLF Lending

One commenter states that our current RLF regulations create what is in effect a niche lending program that constrains loan applicant eligibility. The commenter cites leveraging, job creation, and portfolio allocation requirements as examples of these constraints. The comment expresses the opinion that it would be good to revise these criteria to ensure that more money reaches borrowers.

EDA disagrees that the RLF regulations unduly constrain loan applicant eligibility. EDA affords RLF Recipients a great deal of flexibility in the design of their RLF Plans. Within the RLF Plan, Recipients dictate the appropriate job creation/retention criteria, portfolio allocation, and other portfolio standards and loan selection criteria. The leveraging requirement of \$2 of additional investment for each dollar of EDA RLF funding is dictated by EDA regulation and applies to the Recipient’s RLF portfolio as a whole. Nevertheless, through this final rule, EDA is actually broadening the types of funds that may be used to meet this requirement by enabling Recipients to use funds from State and local lending programs, and the non-guaranteed portions and 90 percent of the guaranteed portions of Federal loan programs. *See* § 307.15(c). In addition, if a Recipient would like to change its RLF Plan in an effort to reach more potential borrowers, it may submit an updated Plan for review and approval by EDA. As such, EDA is making no additional changes to the criteria raised by this commenter.

#### Issue Twelve: Effective Date of Regulatory Changes

EDA received eight comments asking when these regulatory changes would become effective, particularly with regard to the RLF program. Some of the commenters queried whether there should or would be a delay as a result of the transition to a new Presidential Administration. Others asked if the changes would be implemented in phases, whether they would become effective in Fiscal Year 2017, and when the first round of risk analysis ratings would be assigned.

As indicated above, these regulatory changes are the result of a long-term effort by EDA to update and streamline all of our regulations and to adopt industry best practices in an effort to strengthen and improve the RLF program. It is our view that these efforts are critical to the continued vitality of EDA’s programs and, as such, any delay would jeopardize our ability to provide effective oversight over programs that have historically helped to create jobs and spur economic growth, especially in distressed areas.

As is the normal time frame for most regulations, these regulations will become effective 30 days after publication. EDA has issued a separate **Federal Register** notice concurrently with this final rule seeking comment on the performance measures that EDA is proposing to use for the initial round of scoring under the Risk Analysis System. We have published the final regulations at the same time as the notice on the Risk Analysis System to ensure timely stakeholder engagement and feedback as we prepare to implement this new approach.

As is described in that notice and in the NPRM, the 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’s proposed measures reflect the categories underlying the CAMELS approach for assessing the health of financial institutions but are based on data currently submitted by Recipients in their semi-annual reporting. Through the notice, EDA is soliciting feedback from the public on those measures. EDA will consider that feedback as it finalizes the measures to be used for scoring and determines the timeline for implementing the Risk Analysis approach. EDA will then

conduct active public outreach to inform all of our stakeholders on the measures, the process for assessing Recipients, and when the first round of scores will be assigned and communicated to Recipients.

#### Issue Thirteen: Releasing the Federal Interest in an RLF

Fourteen commenters requested that EDA release the Federal interest in an RLF after a specified period of time. Many of our Recipients express concern with the cost and time required to continue to comply with EDA regulations, especially auditing and reporting requirements, even after they have established a lengthy record of demonstrable competence and success in meeting the goals of the RLF program. The commenters note that continued compliance after such a long period of time can be a particularly heavy burden on small non-profit organizations.

EDA understands the challenges presented by the perpetual nature of EDA's interest in RLF assets. EDA also recognizes that many of our Recipients have been effective stewards of their RLF assets and that the RLF program has grown in value and in its ability to impact communities in distress due in large part to the efforts of our Recipients. However, while EDA has statutory authority to release its interest in Real Property and tangible Personal Property acquired with EDA grant funds after a certain period of time has elapsed, there is no such authority for EDA to release its interest in RLF assets. As such, EDA continues to pursue legislative solutions that would address this concern. In the interim, through this final rule, EDA is significantly revising its regulations to make compliance easier for our RLF Recipients, especially those demonstrating effective performance as determined through the Risk Analysis System.

#### Issue Fourteen: General Cost of Compliance

EDA received 14 comments remarking that the costs of compliance with RLF program requirements are generally high, especially for audits and attorney reviews of loan documentation. Many of these commenters also indicated that some of the regulatory changes proposed would cause these costs to rise.

Audits are required by the Uniform Guidance for Federal grant recipients and, as a result, are generally fixed costs. In addition, as explained in more detail in the below discussion of this issue, EDA believes that legal review of Recipients' loan documents is an

essential element to ensuring appropriate oversight of Recipients' use of RLF award funds. Nevertheless, as noted previously, the regulatory revisions in this final rule are designed to streamline requirements and minimize costs throughout the transition of the program to a risk-based approach to program oversight. While a few additional requirements are being added to support this new approach, other requirements are being relaxed. Examples include the allowance of alternatives to a bank turn-down letter, more options for loan leveraging, and the end to automatic sequestration. In addition, nothing in these regulatory revisions would affect the Recipients' ability to use RLF Income for administrative expenses. In fact, EDA has sought to make this process easier for Recipients by no longer requiring the Recipient to complete an RLF Income and Expense Statement (former ED-209I) and by extending the period during which RLF Income may be withdrawn from the RLF Capital Base for a purpose other than lending.

#### Issue Fifteen: Risk Analysis System

Twenty-five comments were received on various aspects of the Risk Analysis System.

One commenter stated that the Risk Analysis System runs counter to the purpose and intent of the RLF program. EDA disagrees. EDA designed the Risk Analysis System to help measure, address, and monitor risk. This system reflects current best practices and will strengthen EDA's efforts to evaluate, monitor, and improve RLF performance. In this way, it will help EDA and its RLF Recipients to fulfill the goals of the RLF program by ensuring that RLF grants continue to bring economic prosperity to communities in need.

Another comment on the Risk Analysis System expressed concern about the system possibly creating an administrative burden on Recipients and EDA regional staff through additional monitoring, financial controls, and reporting requirements. EDA anticipates that the changes made by this final rule will help ease the administrative burden on both Recipients and EDA program staff. For example, the final rule would change the reporting frequency to either annual or semi-annual, depending on each Recipient's score in the Risk Analysis System. Further, EDA is changing the reporting period to follow each Recipient's fiscal year end.

One comment stated that it is premature to adopt a Risk Analysis System until factors and rating criteria are identified. The commenter also took

the position that the provisions establishing the system should be removed from the regulations unless or until the measures are identified. EDA also received a comment that suggested that EDA use Aeris ratings as a substitute for the Risk Analysis System scores for those Recipients that are already Aeris rated. Aeris is an independent organization that provides third party assessments of community development financial institution loan funds by using a proprietary methodology based on CAMELS factors. While Recipients are not prohibited from using Aeris ratings for their own operational purposes, at this time EDA will not accept or use Aeris ratings as a substitute for its own Risk Analysis System assessments because, at this initial stage, EDA is seeking to ease the transition to this new approach for our Recipients by basing our measures on the data that is already provided through RLF reporting. Nevertheless, in a separate notice that EDA has issued concurrently with this final rule, EDA is soliciting feedback from the public on EDA's proposed Risk Analysis System performance measures and will consider that feedback, including any feedback EDA receives regarding parallels between the two approaches, as EDA launches our risk-based scoring.

Along those same lines, EDA received a comment that asked EDA to develop the framework for the Risk Analysis System in consultation with RLF Recipients. In response, EDA encourages our Recipients to review the **Federal Register** notice describing our proposed performance measures for this system and provide detailed input. EDA will consider all feedback very carefully and will notify the public of the final set of performance measures that will be used at the onset of the Risk Analysis System, as well as conduct outreach to share those performance measures and what to expect with the use of this system as EDA launches it.

With regards to the specific measures that will be used, EDA received one comment regarding percentage of RLF Income used for administrative expenses. In § 307.12(a)(4), EDA is revising the regulations on the use of RLF Income by clarifying that Recipients may not use funds in excess of RLF Income for administrative expenses unless directed to do so by EDA. EDA is also revising that provision by clarifying that the percentage of RLF Income used for administrative expenses will be one of the measures used in the Risk Analysis System to evaluate Recipients. The Risk Analysis System will thus incentivize Recipients to prudently manage administrative

expenses and maximize their RLF Capital Base reserves for lending. However, the commenter stated that using this as a measure would automatically penalize smaller Recipients (which have higher fixed costs) or Recipients that offer lower interest rates to borrowers. While EDA recognizes that some Recipients may face higher costs or generate less income than other Recipients, EDA believes that the amount of RLF Income used for administrative expenses is an important indicator of the condition of an RLF. Indeed, Recipients that spend a high amount of RLF Income on administrative expenses are more likely to face challenges in maintaining and growing their RLF Capital Base. Nevertheless, the amount of RLF Income used for administrative expenses would be one of fifteen measures used to assess Recipient performance, enabling Recipients with a potential disadvantage in this area to balance their overall scores through higher scores in other measures.

Another comment asserted that EDA should be able to determine poorly performing RLF Recipients based on the current reporting system. EDA does not believe that maintaining the status quo would represent a best practice in the loan-making community. As stated in the NPRM, since the RLF program's inception, EDA has funded over 800 RLFs nationwide, investing \$500 million in RLFs that have a combined capital base of more than \$813 million. A move to a risk-based assessment system is critical to properly managing a program of this size with limited resources and thereby ensuring the program's continued success. Moreover, the Risk Analysis System is not designed to determine which Recipients are performing poorly but rather to improve performance for the program as a whole.

EDA received a comment regarding § 307.16(b), which as proposed states, "An RLF Recipient generally will be allowed a reasonable period of time to achieve compliance with risk factors as defined by EDA." The commenter requests EDA define "reasonable period of time" in this context. EDA has chosen not to define this phrase because it will likely vary from Recipient to Recipient, depending on the identified risk factors. EDA's regional staff will work with each Recipient to determine what is "reasonable" based on that entity's individual circumstances.

Another comment sought clarification as to whether Recipients that currently have sequestered funds will be relieved of that obligation upon implementation of the final rule. The answer is yes.

These Recipients with sequestered funds will be provided guidance asking them to return their sequestered funds to their RLF Capital Base and notifying them that they will be managed from that point forward using the Allowable Cash Percentage and the Risk Analysis System.

#### Issue Sixteen: Providing Additional Funding to "A" Rated Recipients

One commenter asks if EDA would consider providing additional grant funding to Recipients that have been rated "A" through the Risk Analysis System and that have loaned out all of their funds. While the regulations do not provide for additional funding to be made automatically available to "A" rated RLFs, EDA takes a wide variety of factors into consideration when considering investment decisions, including historical performance by specific applicants.

#### Issue Seventeen: Obtaining Input From the Public Regarding the Regulatory Changes

EDA received four comments that asked us to form a committee of EDA representatives, economic development practitioners, and RLF Recipients to vet the proposed changes to the regulations before final adoption. Similarly, EDA received ten comments from individuals and organizations requesting that EDA consult with RLF practitioners in developing the Risk Analysis System and prior to finalizing these regulations, requesting outreach regarding the revised reporting form, stating that the final regulations appear different from what had previously been discussed, indicating apparent similarities between the RLF program and the Small Business Administration's Microloan program, and asking whether EDA's RLF staff would remain with EDA after the change of Administration.

EDA recognizes the tremendous value of soliciting the opinions of stakeholders when undertaking changes to our regulations and programs. EDA prides ourselves on our close working relationship with communities and organizations across the nation. Two years ago, EDA developed an internal RLF Working Group with representatives from each of our Regional offices, legal counsel, and our national performance programs division. EDA also reached out to other Federal agencies for insight and best practices. While EDA appreciates the interest in forming a committee to provide input, EDA feels that the publication of the NPRM and the November 15, 2016 webinar conducted to discuss the proposed regulatory

changes provided us with even broader access to the views of stakeholders than would have been the case with a committee limited to select members of the public. In addition, as EDA has noted previously, EDA intends to continue our outreach to and discussions with our Recipients and other stakeholders as EDA implements these changes, including those regarding our reporting form and the Risk Analysis System measures, and pursue other tools for improving the RLF program. As indicated during our informational webinar, our commitment to our Recipients and the nation will not change.

#### Issue Eighteen: Allowable Cash Percentage

EDA received 15 comments on the newly introduced Allowable Cash Percentage definition, including two that were addressed above (Issues Two and Three), and one that was supportive of this new approach as a replacement for the capital utilization standard.

Another comment submitted from an entity in American Samoa expressed its view that regional calculations are not the fairest approach to calculating the Allowable Cash Percentage. EDA acknowledges this concern and intends to review the relevant data and refine its measures as appropriate. In the meantime, failure to comply with the Allowable Cash Percentage will be one factor among many that will be used to assess risk and performance within a Recipient's RLF portfolio, so it alone is not determinative of a final risk score.

Another commenter suggested that EDA set a threshold or boundary on the floating Allowable Cash Percentage. EDA responds by noting that it expressly created the Allowable Cash Percentage to avoid rigid thresholds and the inflexibility that existed with the Capital Utilization standard. Instead, with the Allowable Cash Percentage, EDA establishes a floating rate based on year-by-year fluctuations in economic conditions across regions in order to introduce flexibility that did not exist before and to address the challenges associated with the Capital Utilization standard and automatic sequestration. Nevertheless, the revised §§ 307.20 and 307.21 establish a threshold by listing as a form of noncompliance the holding of 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.

One comment expressed concern about the "subjectivity and vagueness of the proposed change with the Allowable

Cash Percentage,” adding that this “could be to the advantage of the RLF, especially if it is close to the requirement (but not quite there) on its utilization rate, depending on EDA’s response.” Another commenter stated that this change could put newer RLF Recipients at an immediate disadvantage, necessitating some mechanism to even the playing field for those Recipients. EDA understands that newer RLF Recipients may not have the same level of experience as Recipients that have been operating RLF programs for longer periods of time. However, the Allowable Cash Percentage is based on an objective calculation: The average percent of the RLF Capital Base maintained as RLF Cash Available for Lending by RLF Recipients in each regional office’s portfolio of RLF Grants over the previous year. In addition, as EDA noted in the NPRM, EDA recognizes that different regions face very different economic conditions and variations in access to capital 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 is now reversing 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—the Allowable Cash Percentage. Moreover, Recipients will be assessed against a range of measures, of which compliance with the Allowable Cash Percentage is just one. In the end, effective management and compliance with all RLF regulations will help prevent any single Recipient from being disadvantaged by the applicable Allowable Cash Percentage.

Another comment on this issue suggested that EDA establish exceptions to the Allowable Cash Percentage and allow for situations where cash becomes available for early loan pay-offs or a “Force major event occur[s] in a RLF area.” EDA believes that these types of exceptions can be handled through individual compliance actions and do not necessitate explicit carve-outs. Also, the Allowable Cash Percentage is designed to accommodate fluctuations in economic conditions across regions as well as in cash flows within Recipients.

Other comments addressed the removal of those provisions requiring automatic sequestration as part of the transition from the capital utilization standard to the Allowable Cash Percentage. One commenter generally expressed its support of this change. Another asserted that this change is unnecessary because the language

regarding sequestration was permissive rather than mandatory because it provides that if a Recipient failed to satisfy the capital utilization standard for two consecutive Reporting Periods, EDA “may” require the Recipient to deposit excess funds in an interest-bearing account. While this provision used the word “may” rather than “must” or “shall,” in practice and under these circumstances, EDA regularly required Recipients to sequester excess cash. EDA removed this requirement in order to stress that, in accordance with the shift to the use of a Risk Analysis System, sequestration will be considered as one of a range of possible tools for ensuring compliance with the terms of the RLF Grant.

#### Issue Nineteen: Defining “Prudent Lending Practices”

EDA received two different comments regarding the use of “Prudent Lending Practices.” One asked if EDA would define “Prudent Lending Practices.” The other stated that “Prudent Lending Practices” cause Recipients to not make certain loans, may cause a Recipient’s Capital Base to occasionally exceed 25 percent, and to be penalized for being prudent.

“Prudent Lending Practices” are currently defined in § 307.8 as generally accepted underwriting and lending practices for public loan programs, based on sound judgment to protect Federal and lender interests. Prudent Lending Practices include loan processing, documentation, loan approval, collections, servicing, administrative procedures, collateral protection and recovery actions. Prudent Lending Practices provide for compliance with local laws and filing requirements to perfect and maintain a security interest in RLF collateral. The NPRM proposed no changes to this definition, and EDA makes none with this final rule.

With regards to the second comment on this issue, EDA does not penalize Recipients for making higher risk loans. As noted in the NPRM and in this final rule, EDA established the RLF program expressly to assist borrowers who are considered higher risk and cannot obtain credit from traditional financial institutions. Nevertheless, in order to ensure effective oversight and compliance with the fiduciary obligations of a Recipient that lends out Federal Grant funds, EDA felt it necessary to continue to apply a prudent lending standard. EDA also points out that EDA has removed the capital utilization standard, which required Recipients to ensure that at least 75 percent of their RLF Capital was

loaned or committed at all times. This should resolve this commenter’s concerns about its Capital Base exceeding the 25 percent threshold imposed by the old standard.

#### Issue Twenty: Reporting

EDA received 15 comments regarding reporting requirements. At least one commenter expressed support for the change to a reporting cycle based on the Recipient’s fiscal year cycle.

One commenter asked whether Recipients could continue to report semi-annually if they want to do so. If a Recipient qualifies for annual reporting based on their assessment through the Risk Analysis System, EDA would direct the Recipient to not submit semi-annual reports. While EDA has introduced this new, longer reporting cycle for Recipients who score as the highest performers according to the Risk Analysis System, in part, to ease the reporting burden on those Recipients, EDA was also motivated to make this change in an effort to ease the administrative burden on EDA’s Regional staff, given the large number of RLFs which they must monitor. As a result, EDA would not accept semi-annual reports from Recipients that are placed on an annual reporting cycle.

#### Issue Twenty-One: Legal Certification of Loan Documents

EDA received 31 comments regarding the proposed revision to the requirement for legal certification of loan documents. In the NPRM, EDA proposed moving the requirement for legal counsel review of standard RLF loan documents from § 307.15 to § 307.11(a) and, in the process, revised it 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 come directly from the RLF Recipient’s legal counsel rather than have the Recipient certify as to counsel review. Commenters complained that this revision could be costly and require additional time for Recipients to comply. A number of the commenters also appeared to believe this to be an on-going requirement through the life of the RLF.

EDA notes that this requirement is for the *standard* set of loan documents used by the RLF and referenced in the RLF Plan, not for the particular loan documents used for each loan made by the RLF. In moving this regulation to § 307.11(a), which lists pre-disbursement requirements, EDA intended to make clear that the legal certification was a one-time requirement

to be completed before EDA disburses RLF funds to the Recipient. EDA agrees that certification on an ongoing basis could be financially prohibitive. Recipients are free, however, to obtain legal review of their loan documents on a more frequent basis if desired. In light of the above, EDA believes that the revised language and its new location make this requirement sufficiently clear. As a result, EDA made no additional changes to this provision in the final rule.

#### Issue Twenty-Two: EDA-Provided Loan Documents

Six comments asked whether EDA would supply or possibly mandate template loan documents for use by all Recipients with their borrowers. EDA does not plan on providing or mandating templates for this purpose because each Recipient must comply with its own local and State lending laws, which can vary from Recipient to Recipient.

#### Issue Twenty-Three: Evidence Demonstrating Lack of Available Credit

Six commenters asked for examples of other evidence that could be provided as an alternative to a bank turn-down letter, as required by § 307.11(a)(1)(ii)(H). In the NPRM, EDA proposed replacing the requirement that RLF Recipients obtain and borrowers provide a signed bank turn-down letter to demonstrate that credit was not otherwise available with a more general requirement for evidence demonstrating that credit is not otherwise available on terms and conditions permitting the completion or successful operation of the activity to be financed. EDA broadened this requirement to help those borrowers who were unable to obtain a turn-down letter. EDA feels that providing specific examples of alternative documentation would undermine this goal. However, Recipients will outline in their RLF Plans what types of documentation would be approved for this purpose and can work with their Regional RLF Administrator to incorporate into the specific RLF's Plan further examples of what documentation may be sufficient for that particular RLF.

#### Issue Twenty-Four: Fidelity Bond Coverage

EDA received one comment regarding the requirement for Recipients to maintain fidelity bond coverage. The comment requested an exemption for public bodies, including State entities, from the mandates on the amount of coverage appropriate for Recipients. EDA does not agree that such an

exemption should be established. In the NPRM, EDA proposed a change to this requirement to provide that the minimum amount of coverage must equal the maximum loan amount allowed for in the EDA-approved RLF Plan. Our intent was to make this requirement easier for Recipients to follow. EDA also believed that this amount was reasonable. For these reasons, EDA made no additional changes to this requirement, which applies to all Recipients without exception.

#### Issue Twenty-Five: RLF Income/ Administrative Expenses

Fifteen comments expressed support for the revisions expanding the requisite period to charge administrative expenses against RLF Income from the same six-month Reporting Period to the same fiscal year. EDA sought this change as one of many designed to ease the burden on its RLF Recipients. This support helps to confirm that this change will meet that goal.

#### Issue Twenty-Six: Voluntarily Contributed Capital

EDA received two comments expressing confusion regarding Voluntarily Contributed Capital. These asserted that when a non-Federal Recipient contributes capital that exceeds the Local Share, this excess capital should not be treated as part of the Capital Base. In the commenters' view, the Recipient should have the opportunity to deposit, maintain, and withdraw these funds at its discretion from a separate bank account that is not governed by EDA guidelines and regulations. EDA respectfully disagrees with this position. As indicated in the newly added definition of "Voluntarily Contributed Capital" in § 307.8 and the language added to § 307.12(d), EDA considers funds that are voluntarily injected into the RLF an irrevocable component of the Capital Base and therefore subject to EDA regulations and policies. EDA added this language in response to past confusion about such infusions of additional funds. The scenario described exemplifies this confusion, as it appears to describe a form of leveraged funds, rather than Voluntarily Contributed Capital. In an additional effort to clarify the handling of Voluntarily Contributed Capital, the NPRM described our proposal to add a requirement that any Recipient wishing 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. EDA believes that this added language is

sufficient to prevent any further confusion on this matter.

#### Issue Twenty-Seven: Inclusion of RLFs in the Schedule of Expenditures for Federal Awards

EDA received three comments that asked whether RLFs would continue to be included in the Schedule of Expenditures of Federal Awards ("SEFA"). In the NPRM, EDA proposed 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 to show the fair market value of an RLF loan portfolio. This provision had created confusion in the past with some RLF Recipients, who understood it to mean that the inclusion of a loan loss reserve also applied to the SEFA, which is the list of expenditures for each Federal award covered by the Recipient's financial statements and which must be reviewed as part of the audit process. This may result in inaccurate RLF valuations in the SEFA. EDA attempted to resolve this confusion by adding a sentence to § 307.15(a)(2) clearly stating that loan loss reserves were not to be used to reduce the nominal value of the RLF in the SEFA. EDA feels that this language is sufficiently clear to demonstrate the RLFs shall continue to be included in the SEFA.

#### Issue Twenty-Eight: Loan Leveraging Requirement

Seven commenters submitted their views on the loan leveraging requirements laid out in § 307.15(c). This paragraph requires Recipients to ensure funding from additional sources at a ratio of \$2 of additional funding to every \$1 of RLF loans. The requirement applies to Recipients' entire RLF portfolio, rather than to individual loans, and is effective for the duration of the RLF. Some of the comments on this issue asserted that this requirement is difficult to meet. The NPRM proposed some changes to this paragraph in an effort to clarify and broaden the possible sources of funds used for leveraging the RLF portfolio. With these changes, Recipients may 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. Our hope is that these revisions, now finalized, will make it easier for Recipients to achieve the required amount of leveraging.

The remaining comments on this issue expressed confusion over the difference between leverage, Voluntarily Contributed Capital, and Local Share (or Matching Share). Each of these concepts



has a distinct meaning, and EDA believes the differences are sufficiently spelled out in the regulations. As stated in the first sentence of § 307.15(c), “RLF loans must leverage additional investment of at least two dollars for every one dollar of such RLF loans.” Local Share (or Matching Share) is defined in § 300.3 as “the non-EDA funds and any In-Kind Contributions that are approved by EDA and provided by a Recipient or third party as a condition of an Investment.” Thus, while leveraging refers to a condition of an RLF loan, Local Share refers to a condition of the RLF Grant from EDA. Voluntarily Contributed Capital is defined in § 307.8 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.

Issue Twenty-Nine: Release of Federal Interest

A non-profit commenter suggested modifications to a sentence in EDA’s existing regulations that was unchanged in the NPRM and represents longstanding EDA practice. Specifically, the commenter contended that § 314.10(b) should provide that the Assistant Secretary “shall 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 current language makes this release permissive (“may”) instead of mandatory (“shall”). The commenter believed that the release should be ministerial instead of discretionary. The commenter also desired a defined protocol for obtaining a release and documentation of such protocols in the Award itself so Recipients can monitor their own compliance and avoid delays in obtaining the release at the end of the Project’s useful life.

The use of “may” in the current regulation parallels section 601(d)(2) of PWEDA, which provides that EDA “may release” any real property interest in connection with a grant after the expiration of the 20-year useful life. See 42 U.S.C. 3211(d)(2). Further, the discretion provided to EDA to release the interest, or not as the case may be, is important to ensure that the Recipient is in compliance with all terms and conditions of the grant between the award of the Investment Assistance and the expiration of the useful life, as well

as to make certain that the covenants that extend beyond EDA’s release are properly recorded. See new 13 CFR 314.10(b), (c), (d)(3) and (e)(3). EDA declines to establish particular protocols because it is incumbent on the Recipient to request EDA remove the interest and procedures vary by jurisdiction. EDA does make Recipients aware of these general release requirements in the mortgage documents that are filed to record EDA’s interest.

#### Overview of Final Rule

Below EDA describes the regulatory revisions made by the final rule, including those changes discussed above that were in response to public comments and other minor consistency edits that were made throughout.

#### Part 300—General Information

EDA is making several clarifying revisions to the “Definitions” section of EDA’s regulations at § 300.3. These revisions are:

- 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 for Federal Awards.

- EDA revises 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.

- EDA revises the definition of *Recipient* by defining separately the concepts of *Co-recipients* and *Subrecipients* in EDA’s programs 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 and to introduce the term *Subrecipient* as the eligible recipient that receives a subgrant under 13 CFR part 309.

- EDA adds a definition of *Stevenson-Wydler*, which is the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3701 *et seq.*) to incorporate the EDA programs created by the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Reauthorization Act of 2010 (“COMPETES Act”) (Pub. L. 111–358

(January 4, 2011)), which amended Stevenson-Wydler to add 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 Innovation Program (15 U.S.C. 3722), the centerpiece of which is the Regional Innovation Strategies (“RIS”) Program.

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

EDA has added the phrase “at its sole discretion” to the second sentence of § 301.2(b) (“*Applicant eligibility*”). Section 301.2(b) requires non-profit 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 clarifying that such a waiver is solely at EDA’s discretion.

In the second sentence of § 301.5 (“*Matching share requirements*”), EDA is 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 has added 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.

EDA is simplifying § 301.7(a) (“*Investment assistance application*”) to state that for all of EDA’s Investment Assistance programs, application submission requirements and evaluation procedures and criteria will be set out in published Federal Funding Opportunity (“FFO”) announcements. Currently, the application and selection process under the Public Works and Economic Adjustment Assistance programs is a two-phase process that requires the submission of a proposal followed by a complete application. There are no submission deadlines and proposals and applications are accepted on an ongoing basis.

Likewise, EDA is revising § 301.8 (“*Application evaluation criteria*”) to remove specific evaluation criteria currently set out in paragraphs (a) through (f) from the regulation and to specify that program-specific evaluation criteria will be set out in applicable

FFOs. This will allow EDA additional flexibility to respond to changing economic conditions.

In § 301.11 (“*Infrastructure*”), EDA has added 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*

EDA has revised § 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 “non-profit 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 § 302.20 (“*Civil rights*”), 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” to clarify that nondiscrimination requirements apply to any type of assistance provided under Stevenson-Wydler.

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 § 302.20(a)(2), EDA adds 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.

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

EDA has made clarifications and modifications to its Planning program:

- Modifies § 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.

- Removes the last sentence of § 303.6(b)(1) as superfluous and revising 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.

- Adds sentences to § 303.6(b)(3)(ii) to encourage participating counties or other areas within the EDD to remain engaged in the planning process.

- Revises § 303.7(c)(1) by, 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. This change is designed to emphasize that a non-EDA funded CEDS should include all elements of an EDA-funded CEDS and, at the same time, to reflect that 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.

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

In § 304.2(c)(2), EDA is replacing the word “including” with the phrase “which may include” to indicate that the private sector, public officials, community leaders, representatives of workforce development boards, institutions of higher education, minority and labor groups, and private individuals should be included insofar as they represent principal economic interests of the Region and to reinforce the message that 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*

EDA has made two minor changes to part 305 to reflect the promulgation of the Uniform Guidance. Specifically, in paragraph (b) of § 305.6 (“*Allowable methods of procurement for construction services*”) and paragraph (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*

EDA has made no changes to part 306 with this rule.

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

EDA has made multiple changes to subpart B in its efforts to strengthen and clarify 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 changes designed to clarify and streamline RLF requirements. These changes are as follows:

- In § 307.6 (“*Revolving Loan Funds established for business lending*”), EDA is 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. These changes should remove confusion about the applicability of the RLF regulations to other types of lending. In addition, in the second sentence of § 307.6, EDA has added 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 has added language to clarify the compliance obligations for RLF Grants and update the reference to the location of the Compliance Supplement. In § 307.7(b), EDA adds 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), EDA replaces 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, EDA replaced 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 has added several new definitions and revised existing definitions to implement the proposed risk-based framework to manage RLF Grants. Specifically, EDA has added new definitions for the terms: Allowable Cash Percentage, Disbursement Phase, Risk Analysis System, RLF Capital Base, RLF Cash Available for Lending, RLF Recipient, and Voluntarily Contributed Capital. The definitions are set out in the regulatory text below.

In addition, EDA is revising the definitions of the following existing terms:

—In the existing definition of

*Recapitalization Grants*, EDA replaces the phrase “capital base of an RLF” with the term “RLF Capital Base” for clarity.

—In the existing definition of *Reporting Period*, EDA is changing 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.”

—In the definition of *RLF Income*, EDA is deleting as repetitive the parenthetical “(excluding interest earned on excess funds pursuant to § 307.16(c)(2))” in the first sentence of the definition and corrected 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)”.

- EDA is reorganizing the regulations by placing all pre-disbursement and Disbursement Phase requirements into § 307.11. To accomplish this, EDA is revising 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”. In addition, the timing language in § 307.11(a) that formerly read “Prior to any disbursement of EDA funds, RLF Recipients are required to provide in a form acceptable to EDA” is being 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 EDA is revising the regulations to list the certifications and evidence required before EDA will make an initial disbursement of Grant funds. This change reconciles what were different and sometimes conflicting timing requirements on these certifications.

- In addition, EDA has moved the following two provisions from § 307.15(b), which formerly set 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 (now § 307.11(a)(1)(i)); and (2) the requirement that the Recipient certify that the standard loan documents are in place and have been reviewed by legal counsel (now § 307.11(a)(1)(ii)).

- With respect to the requirement regarding accountant certification of the RLF Recipient’s accounting system, in re-locating this requirement, EDA is also revising it so it no longer requires certification directly from an accountant. This requirement now reads: “Certification from the RLF Recipient that the Recipient’s accounting system is adequate to identify, safeguard, and account for the entire RLF Capital Base, outstanding RLF loans, and other RLF operations.” This change serves to increase the awareness of the need to maintain proper accounting systems to account for Federal funds while addressing the concerns raised regarding accountants’ ability to meet their mandate under the proposed language. EDA believes that this language, coupled with the increased scrutiny provided through the Risk Analysis System, will serve as an effective tool for ensuring compliance with Federal financial management requirements.

- With respect to the certification regarding legal counsel review of standard RLF loan documents formerly set out at § 307.15(b)(2), in relocating the requirement to § 307.11(a)(1)(ii), EDA also replaces 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”. This change not only streamlines this process but also ensures 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.

- In § 307.11(a)(1)(ii)(H), EDA replaced 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 as redundant the requirement for RLF Plans that alternative evidence to a signed bank turn-down letter be allowed.

- The provision regarding evidence of fidelity bond coverage remains in place in § 307.11(a), but is redesignated as § 307.11(a)(1)(iii). In addition, EDA is removing the phrases “the greater of” and “, or 25 percent of the RLF Capital base” from redesignated § 307.11(a)(1)(iii), thereby revising the provision to establish the minimum amount of coverage required as the maximum loan amount allowed for the EDA-approved RLF Plan, and removing the alternative approach permitting coverage of at least 25 percent of the RLF Capital Base. This alternative was difficult to meet as it had required Recipients to regularly change the amount of fidelity bond coverage to remain in compliance, while also yielding approximately the same amount of coverage.

- EDA has also added language following § 307.11(a)(1)(iii), in new § 307.11(a)(2), 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 new § 307.13(b)(3) where EDA underscores that the RLF Recipient must maintain records to document compliance with these requirements. EDA also makes conforming changes to incorporate these requirements into a list format. Because EDA is moving the language regarding the accountant certification from § 307.15 to § 307.11, EDA is removing the language in § 307.11(a)(2) that cited to the certification required under § 307.15.

- In order to simplify the language regarding the amount of Grant fund disbursements in the first sentence of § 307.11(c), EDA is 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”.

- EDA is adding new language to § 307.11(c) to clarify 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. EDA is also adding language clarifying that repaid loan principal, like RLF Income, must be placed in the RLF Capital Base during the Disbursement Phase and can be used to reimburse administrative costs during this Phase. Section 307.11(c) now reads as set out in the regulatory text below.

- EDA is making a non-substantive revision to § 307.11(d) to capitalize the word “Grant”.

- EDA has placed 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 removed former § 307.17(d) and re-numbered 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) to reflect that In-Kind Contributions are rarely necessary or reasonable for accomplishment of the RLF program and that most RLF Local Share is cash.

- In addition, to consolidate all pre-disbursement and disbursement requirements into § 307.11, EDA is 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 redesignating them as § 307.11(g) and (h), respectively. EDA also makes non-substantive conforming changes to reflect defined terms and

correct cross-references because of this reorganization. Specifically, EDA is replacing the phrase “initial RLF Capital Base” with “RLF Grant” in the final sentence of redesignated § 307.11(g)(1) to clarify the corpus of funds to which the lending schedule applies; replacing the cross-reference to “§ 307.16(b)” in redesignated § 307.11(g)(2)(iii) with a reference to “paragraph (h) of this section” to reflect the reorganization of these provisions; correcting a typo by replacing the plural “requests” with a singular “request” in the last sentence of redesignated § 307.11(h)(1); and dividing redesignated § 307.11(h)(2) into two sentences for clarity and emphasis.

- EDA is renaming the title of § 307.12 to “*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. EDA has also added the introductory phrase “During the Revolving Phase,” to the first sentence of § 307.12(a).

- EDA is 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), EDA is replacing the word, “incurred” with “accrued,” and, in § 307.12(a)(1) and (2), EDA replaced the phrase “six-month Reporting Period” with the phrase “fiscal year of the RLF Recipient.” In § 307.12(a)(3), EDA replaces the phrase “Reporting Period” with “fiscal year”. In addition, EDA is making 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), EDA replaces the phrase “RLF Capital base” with the proposed defined term “RLF Capital Base”.

- EDA is replacing former § 307.12(a)(4), which required the submission of an RLF Income and Expense Statement (*i.e.*, Form ED-209I), with language that prohibits RLF Recipients from using funds in excess of RLF Income for administrative costs in a Recipient’s fiscal year unless directed to do so by EDA, 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 measure under the Risk Analysis System.

- In § 307.12(b), which outlines compliance guidance for charging costs against RLF Income, EDA makes 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. Accordingly and in compliance with the Uniform Guidance, 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 is adding 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), EDA makes 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, EDA is updating the cross reference to “§ 307.21” to reflect the reorganization of the noncompliance provisions.

- EDA is also adding new § 307.12(d) to introduce additional clarifying language regarding the treatment of the new defined term Voluntarily Contributed Capital. In addition to adding a definition to clarify the process for contributing such additional capital to an RLF and to explain how the additional capital is treated once added to the RLF Capital Base, EDA has also added 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.

- EDA is revising the 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), EDA is deleting the phrase “last semi-annual” between the phrase “date of the” and the word “report” and replaced “Reporting Period” with “fiscal year”. In addition, EDA is 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 redesignated as new § 307.13(b)(2).

- EDA is removing the stipulation that all RLF reports be submitted to EDA on a semi-annual basis, thereby permitting EDA to establish a reporting frequency (annual or semi-annual) based on the objective risk presented by a given RLF, and allowing EDA to more closely monitor RLF program performance and engage with RLF Recipients to identify and address existing and potential challenges. Accordingly, EDA is revising the title of § 307.14 to read “*Revolving Loan Fund report*” and in § 307.14(a), replacing 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 now requires 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. As such, in § 307.14(b), EDA is removing the adjective “semi-annual” and added the phrase “and that the information provided is complete and accurate.”

- EDA is 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).

- As noted previously, because EDA no longer requires the submission of an RLF Income and Expense Statement, EDA is removing § 307.14(c) in its entirety.

- EDA is 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, 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 Schedule of Expenditures of Federal Awards. In addition, in the first sentence of § 307.15(a)(2), EDA replaces 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 is revising § 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.

- EDA is renaming § 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). This paragraph is now named “RLF leveraging”. In addition, EDA is replacing the phrase “private investment” with “additional investment” in § 307.15(c)(1) and added new § 307.15(c)(1)(iv) to read “Loans from other State and local lending programs.” This addition will 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.

- EDA has adopted 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 will 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 intends to use 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 reserved for 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 characterizing those Recipients that face serious challenges with their programs and require significant improvement. Recipients categorized 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. EDA has issued a separate **Federal Register** Notice concurrently with this final rule seeking comment on the set of performance measures that EDA is proposing to use for the initial round of scoring under the Risk Analysis System.

- To implement this transition, EDA is replacing EDA’s current management scheme, which consists primarily 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, EDA is completely revising § 307.16 to name it “Risk Analysis System” and incorporates a description of the Risk Analysis System in paragraph (a) and its compliance framework in paragraph (b). As noted above, the final rule is relocating former paragraphs (a) and (b) of § 307.16, which sets out requirements for loan closing

and disbursement schedules and time schedule extensions, respectively, as paragraphs (g) and (h) to § 307.11. EDA also removes paragraphs (c) and (d) of the former § 307.16, which outlines the capital utilization standard and EDA's system for monitoring loan default rates, respectively, in order to incorporate the new concept of Allowable Cash Percentage (explained more fully below in the discussion of changes made to § 307.17).

- EDA is revising the title of § 307.17 to read “*Requirements for Revolving Loan Fund Cash Available for Lending*” and is replacing the term *RLF Capital* with the newly 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, EDA adds 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, EDA is inserting the requirements for Allowable Cash Percentage in new § 307.17(b) and is re-lettering former § 307.17(b), which has been revised to lay out restrictions on RLF Cash Available for Lending, as § 307.17(c). Through this change, EDA is adopting the concept of an *Allowable Cash Percentage*, which will be a component of the Risk Analysis System, to replace the capital utilization standard, which previously required 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. The Allowable Cash Percentage reflects EDA's approach to address the fact 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. 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 Recipient's ensuing fiscal 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. Whereas noncompliance with the capital utilization standard frequently triggered automatic sequestration, with the more

flexible Allowable Cash Percentage approach and the adoption of a Risk Analysis System, EDA will 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. Instead, sequestration will be considered as one of a range of possible tools used to ensure compliance with the terms of the RLF Grant.

- In § 307.17(c), EDA has added language 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*”). These requirements are being added as new paragraphs (c)(7), (8), and (9) to § 307.17.

- EDA is making minor clarifying changes to the list of transactions for which RLF Cash Available for Lending may not be used. Specifically, in redesignated § 307.17(c)(3), EDA replaces 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 redesignated § 307.17(c)(6)(ii), EDA replaces 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, former § 307.17(d) is now removed so all provisions regarding In-Kind Contributions are located in § 307.11(f).

- EDA has removed former paragraph (e) in § 307.17, which provided for compliance and loan quality reviews by independent third parties. This provision was deemed unnecessary as this type of review could be accomplished through other mechanisms already available.

- EDA is clarifying that it can approve changes to a Lending Area at the request of an RLF Recipient by adding language to specify that an approved Lending Area remains in place until EDA approves a subsequent request for a New Lending Area. In § 307.18(a)(2), EDA added the introductory phrase “Following EDA approval,” and replaced 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”.

- EDA has also made revisions to distinguish between the addition of lending areas and mergers of RLFs. EDA is 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, EDA has reorganized the compliance regulations by separating them into one section describing what actions are considered noncompliance (new § 307.20 with the title “*Noncompliance*”) and another section listing remedies for noncompliance (new § 307.21 with the title “*Remedies for noncompliance*”). This reorganization is designed to help all RLF stakeholders understand problematic practices and appropriate remedies.

- EDA also revised the list of problematic practices that could result in disallowances of a portion of an RLF. EDA has removed 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. Despite being removed from the list of practices that could result in a disallowance, EDA will continue to monitor loan delinquency through the Risk Analysis System and by reviewing the procedures for dealing with delinquent loans as set out in each RLF Recipient's 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 (including requiring sequestration) 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.

- EDA has also clarified 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 (§ 307.21(d)). EDA revised this regulation to make it clearer that the Recipient must compensate for the Federal share of the RLF Capital Base, including the monetary value of all outstanding loan principal.

- EDA has also removed 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.

#### *Part 308—Performance Incentives*

EDA is making no changes to part 308.

#### *Part 309—Redistributions of Investment Assistance*

EDA has made several revisions to part 309, which sets forth EDA's policies regarding redistributing grant funds in the form of subgrants, loans, or other appropriate assistance. In both §§ 309.1 and 309.2, EDA clarifies EDA's practice of requiring the Eligible Recipient under the original award to comply with special award conditions and any Subrecipient (in accordance with the newly defined term at § 300.3) to provide appropriate certifications of compliance with relevant legal requirements. Accordingly, EDA has added 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, EDA has added language to refer to the newly 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*

EDA is making no changes to part 310.

#### *Parts 311 and 312—[Reserved]*

#### *Part 313—Community Trade Adjustment Assistance*

EDA is making no revisions to part 313.

#### *Part 314—Property*

EDA is making revisions to multiple provisions in part 314 to clarify

terminology and its authority to release the Federal Interest 20 years after the date of the award of Investment Assistance. The changes are, as set out in the NPRM, as follows:

- For clarity and to conform to the changes made to the RLF program, EDA is adding 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, EDA has added a definition of *Project Property* to read as set out in the regulatory text below.

- In addition, EDA has simplified 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, EDA is replacing the word "improved" in the second sentence of the definition with the word "served" and removing the phrase "that are not situated on or under the land". EDA has also put the exemplar list of infrastructure projects "such as roads, sewer, and water lines" in parentheses and removed 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*"), EDA is adding 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), EDA is 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, EDA has 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, EDA has replaced the phrase "and is often reflected by" with the phrase "The Recipient typically must secure the Federal Interest through".

- In § 314.2(b), EDA replaces the phrase "Property acquired or improved, in whole or in part, with Investment

Assistance" with the newly defined term Project Property. In addition, to highlight that nondiscrimination requirements continue to apply even if the Federal Government is compensated for the Federal Share, EDA has added 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*"), EDA has revised the title of the regulation to read "Authorized Use of Project Property" to reflect the newly defined term Project Property. EDA has also divided former 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, EDA has moved the sentence that addresses replacement Real Property that was formerly the final sentence of § 314.3(e) into new § 314.3(f) and redesignated the regulation accordingly, redesignating current § 314.3(f) as new § 314.3(g). In addition, EDA has added paragraph headings to help the reader better navigate the section and find information more quickly. Accordingly, EDA added 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), EDA has replaced 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), EDA added 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, EDA has added the phrase "undermine the economic purpose for which the Investment was made" between "otherwise" and "or adversely" to clarify that in addition to 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*"), EDA has revised the title of the regulation to read "Unauthorized Use of Project Property" to reflect the newly defined term "Project Property." In addition, EDA has added 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), EDA has made 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 part 14 or 24 with “2 CFR part 200”. EDA has made 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 EDA is adding the word “Project” before two instances of the word “Property”, replacing “its interest” with “the Federal Interest”, and capitalizing the word “Government” in “Federal Government”. In the final sentence of the paragraph, EDA has capitalized “Government” in “Federal Government” and added 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 has added two new sentences to explain EDA’s usual practice of relying on a certified appraisal prepared by a licensed appraiser to determine the fair market value of Project Property and has also provided 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, the amount paid by a transferee, or tax assessments. 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 wanted to provide for this situation. Therefore, EDA has added 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 has added 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*”), EDA has revised 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 defined term “Project Property”. In addition, in the exception that permits encumbrances only to secure a grant or loan made by a governmental body, EDA has added 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, EDA has added 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 added “, 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 has revised § 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, that 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 also 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 renumbered these three requirements as § 314.6(b)(3)(i), (ii), and (iii), respectively.

- EDA is making minor stylistic changes to § 314.6(b)(4)(v)(B) and (b)(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), EDA has replaced 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 has added language to paragraph (a) to highlight 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 is adding the introductory phrase “Except in those limited circumstances identified in paragraph (c) of this section” to the first sentence. In addition, EDA has relocated 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, EDA is including a reference to the definition of Real Property in § 314.1 to the first sentence of the paragraph. EDA has also broken into a separate sentence the requirement that the Recipient maintain title at all times during the Estimated Useful Life of the Project, which EDA is placing as the second sentence of the paragraph. EDA has replaced the phrase “Real Property required for a project” with the defined term “Project Real Property” in both the first and third sentences of § 314.7(a).

- Throughout paragraph (c) of § 314.7, which outlines the exceptions to EDA’s title requirement, EDA has replaced the phrase “the Real Property required for a Project” with “Project Real Property”. EDA has added 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), added “Project” before “Real Property” twice in § 314.7(c)(1), and capitalized “Government” in “Federal Government” in § 314.7(c)(1)(ii). In § 314.7(c)(4), which clarifies the



exception for the title requirement when a Project includes construction on government-owned roads, EDA has made additional non-substantive 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, EDA has maintained 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, EDA is making 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 paragraph (c)(5)(i)(A), EDA is replacing the phrase “required for such Project” with the clarifying phrase “intended for sale or lease” and has added a cross-reference to the appropriate title requirements by adding the phrase “in accordance with paragraphs (c)(5)(i)(C) through (E) of this section” to the end of the paragraph. In paragraph (c)(5)(i)(B), EDA has replaced “required for such Project” with “intended for lease”, and in paragraph (c)(5)(iii) EDA has capitalized “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, EDA has replaced three instances of “EDA’s interest” with “the Federal Interest” and use the defined term “Project Real Property” as appropriate, including using the term in the heading of the section 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 is revising 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 provision. In addition, EDA uses the term “Project Personal Property” appropriately throughout the provision, including in the title to the section, inserting “Project” before the phrase “Personal Property, acceptable in form and substance to EDA” in the first sentence of the section, and replacing “Personal Property acquired or improved as part of the Project” with “all Project Personal Property” in the second sentence of the section, and replacing “EDA’s interest” with “the Federal Interest” in the first sentence to the regulation.

- Section 314.10 (“*Release of EDA’s Property Interest*”) describes EDA’s procedures for releasing the agency’s interest in Project Property. EDA is 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 to ensure consistency within EDA’s own regulations as well as with 2 CFR part 200. In addition, in § 314.10(a), EDA is replacing 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 has removed the portions of paragraph (a) that provide background on EDA’s historical practice for establishing the Estimated Useful Life of specific Projects. Although this historical language provided useful background, it is not necessary for the regulation. 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, EDA has removed the concluding clause of the second sentence and the third sentence of paragraph (a) and combined 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.” EDA has also simplified 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 § 314.10(b), which sets forth EDA’s procedures for releasing the Federal Interest after the expiration of the Estimated Useful Life, EDA has revised the paragraph heading to read “*Release of the Federal Interest*” instead of “*Release of Property*” to more accurately reflect the content of the provision, corrected a typo in the second sentence by adding the word “the” between “in writing by” and “Recipient”, and added a sentence to the end of the paragraph that provides a helpful cross reference to § 314.10(e), which lays out the limitations and covenants of use that are applicable to any release of the Federal Interest.

- In § 314.10(c), which outlines EDA’s procedures for releasing the Federal Interest before the expiration of the Estimated Useful Life, which release requires compensation of the Federal Interest, EDA has corrected 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, EDA has added 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, EDA has added a concluding clause to the final sentence of the paragraph to read “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.”

- 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 has revised 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*”. EDA has made additional clarifying changes throughout the paragraph. In the first sentence of the paragraph, EDA is replacing the phrase “that exceeds 20 years” with “, but where 20 years have elapsed since the award of Investment Assistance”. In addition, EDA has clarified that in order to release the Federal interest in such a situation, EDA must determine that the Recipient has made a good faith effort to fulfill all terms and conditions of the award of Investment Assistance; and that 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 is making 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 has changed 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.

• EDA has made revisions to paragraphs (e)(2) and (3) to make the points above as clear as possible. Specifically, EDA has added 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 paragraph (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 paragraph (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 in place—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 January 2015 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 2015 Final Rule appears to have inadvertently amended certain language in § 314.10 that created ambiguity and unintended consequences that necessitates these changes. Paragraph (e)(3) is being 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, EDA has added 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 paragraph (e)(3). In addition, where paragraph (e)(3) specifies the requirements for avoiding any discriminatory use of Project Property, EDA has removed 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*

EDA has made no revisions to part 315.

#### **Classification**

##### *Regulatory Flexibility Act*

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 Orders No. 12866, 13563, and 13771*

This final rule was drafted in accordance with Executive Orders 12866, 13563, and 13771. It was reviewed by the Office of Management and Budget (“OMB”), which found the final rule to be “significant” as defined by Executive Orders 12866 and 13563. Accordingly, the final rule has undergone interagency review.

This final rule lessens the costs to RLF Recipients to comply with EDA RLF regulations, as discussed further below. It is therefore a “deregulatory action” pursuant to the April 5, 2017, OMB guidance memorandum implementing Executive Order 13771.

Further, as EDA has determined that this final rule will result in reduced costs, it may be used to offset other regulations consistent with the provisions of Executive Order 13771, which requires that incremental costs associated with a new regulation be

offset by a commensurate reduction in existing regulatory costs. This action results in an overall annual cost reduction of \$961,673 after calculating the costs of revisions to four cost categories. First, because under the final rule RLF Recipients will need to submit fewer reports to EDA each year, and those reports will be easier to complete and review using a revised form, RLF reporting costs are projected to decrease by \$518,956 annually. Note that by including the cost reduction associated with a form revision in this deregulatory action, EDA will not claim a separate offset in the separate Paperwork Reduction Act notice that solicits public comment on the revised form (Form ED-209). Second, EDA projects that it will cost an additional \$520,000 per year for RLF Recipients to conduct required audits. Third, RLF Recipient compliance costs are projected to fall by \$430,068 annually because the risk-based oversight framework will address RLF compliance issues earlier and more efficiently. Fourth, EDA oversight and monitoring costs will fall by \$532,650 per year due to the expected reduction in required oversight caused by the transition to a risk-based framework that will identify RLF issues earlier and allow them to be resolved more efficiently. The net present value of such costs for a five-year period is

\$4,578,544 if a discount rate of three percent is applied and \$4,092,989 if a discount rate of seven percent is applied; both calculations are conducted pursuant to OMB Circular A-4, Regulatory Analysis (Sept. 17, 2003).

*Congressional Review Act*

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

*Executive Order No. 13132*

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 final 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 rule. These collections of information are necessary for the proper performance and functions of EDA. The final rule does not include a new information collection requirement and will, thus, use the previously approved ED-209 form to collect information relevant to the grant performance. Nevertheless, EDA is proceeding simultaneously to seek public comments to and OMB approval of updates to the ED-209 to reflect the changes made in this final rule.

The following table provides a complete list of the collections of information (and corresponding OMB Control Numbers) set forth in this rule. These collections of information are necessary for the proper performance and functions of EDA. The final rule does not include a new information collection requirement and will, thus, use the previously approved ED-209 form to collect information relevant to the grant performance. Nevertheless, EDA is proceeding simultaneously to seek public comments to and OMB approval of updates to the ED-209 to reflect the changes made in this final rule.

Part or section of this final 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. 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). ED-209, RLF Report (0610-0095).
307.14(b) .....		

**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, Reporting and recordkeeping

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 amends 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)* and *Project*; and
- c. Adding definitions for *Stevenson-Wydler* and *Subrecipient* 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.

\* \* \* \* \*

*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 citation for part 301 continues to read as follows:

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

- 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 part 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) of § 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 paragraphs (a) introductory text, (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 shall use its best efforts to obtain renewed commitments from participating counties or other areas within the District to support the economic development activities of the District. Provided the Planning Organization can document a good faith effort to obtain renewed commitments, the inability to secure renewed commitments shall not disqualify a CEDS update.

\* \* \* \* \*

■ 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 INVESTMENTS

■ 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 of procurement for 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 apply to EDA-funded RLFs. Special award conditions may contain appropriate modifications of these requirements.

■ 22. Revise paragraphs (b) introductory text and (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:

\* \* \* \* \*

(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 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 measures 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 less any eligible and reasonable administrative expenses, 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 as cash and available to make loans. This excludes loans that have been committed or approved but have not yet been funded.

*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.

\* \* \* \* \*

*Voluntary 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. Revise the section heading and paragraphs (a), (c), (d), and (f)(2) and add paragraphs (g) and (h) to § 307.11 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) Certification from the RLF Recipient that the Recipient's accounting 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 and principal repaid 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 and principal repaid 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. Revise the section heading, paragraphs (a) and (b), and the heading and introductory text of paragraph (c) and add paragraph (d) to § 307.12 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) *Revolving Loan Fund Income requirements during the Revolving Phase.* 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 measures 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 paragraph (b) 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's 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. Amend § 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 revision and addition 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, 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);

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

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

The revisions 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 Recipient's ensuing fiscal 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").

■ 31. Revise paragraphs (a)(1) introductory text, (a)(2), (b)(1) introductory text, (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, 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:

(1) *First*, for any third party liquidation costs;

(2) *Second*, for the payment of EDA's Federal Share; and

(3) *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) *Distribution of proceeds upon termination.* 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 paragraph (a) of § 309.1 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 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 as follows:

■ a. Revise the definition of *Personal Property*;

■ b. Add the definition of *Project Property* in alphabetical order; and

■ c. Revise the definition of *Real Property*.

The revisions and addition 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 referenced, this part refers 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 and paragraph (a), add a heading to paragraph (b), and revise paragraphs (b) introductory text and (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, 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 paragraph (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 the introductory text of paragraph (a) of § 314.5 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) of this section, 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) *Unauthorized encumbrances.* 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) introductory text, (c)(1)(ii), (c)(2) introductory text, (c)(4) heading and introductory text, (c)(4)(ii)(B), (c)(4)(iii), and (c)(5)(i) and (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 the section heading and paragraphs (a), (b), and (d) of § 314.8 to read as follows:

#### § 314.8 Recorded statement for Project 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 in 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) of § 314.10 to read as follows:

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

(a) *General.* As provided in § 314.2, 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 (b) 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 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: November 15, 2017.

**Dennis Alvord,**

*Deputy Assistant Secretary for Regional Affairs, performing the non-exclusive duties of the Assistant Secretary of Commerce for Economic Development.*

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