



Billing Code: 3510-24

DEPARTMENT OF COMMERCE

Economic Development Administration

13 CFR Part 311

[Docket No.: 150826785-5785-01]

RIN 0610-AA67

Innovative Technologies in Manufacturing Loan Guarantee Program

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

ACTION: Notice of proposed rulemaking; request for public comment.

SUMMARY: Through this notice of proposed rulemaking (“NPRM”), the Economic Development Administration (“EDA,” or “the Agency”), U.S. Department of Commerce (“DOC”), proposes and requests comments on the Agency’s implementation of section 26 of the Stevenson-Wydler Technology Innovation Act of 1980 (the “Stevenson-Wydler Act”), enacted as part of the America COMPETES Reauthorization Act of 2010 (“COMPETES Act”). The Stevenson-Wydler Act authorizes EDA to provide loan guarantees for obligations to small and medium-sized manufacturers for the use or production of innovative technologies. These guarantees will enable innovative technology manufacturers to obtain capital otherwise unavailable to them.

DATES: Written comments on this NPRM must be received by EDA’s Office of the Chief Counsel no later than 5 p.m. eastern time on **[insert date 90 days after date of publication in the Federal Register]**.

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

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. EDA will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

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

- *Mail:* Economic Development Administration, Office of the Chief Counsel, U.S. Department of Commerce, 1401 Constitution Avenue NW., Suite 72023, Washington, DC 20230. Please indicate “Comments on EDA’s regulations” and Docket No. 150826785-5785-01 on the envelope.

All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible.

FOR FURTHER INFORMATION CONTACT: Rachel A. Wallace, Attorney-Advisor, Office of the Chief Counsel, Economic Development Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Suite 72023, Washington, DC 20230; telephone: (202) 482-5443.

SUPPLEMENTARY INFORMATION:

Background.

Established under the Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3121 *et seq.*) (“PWEDA”), EDA’s mission is to lead the Federal economic

development agenda by promoting innovation and competitiveness, preparing American regions for growth and success in the worldwide economy. EDA makes investments in and provides technical assistance to economically distressed communities in order to facilitate job creation for U.S. workers, increase private sector investment, promote American innovation, and accelerate long-term sustainable economic growth. EDA's regulations, codified at 13 CFR parts 301 through 315, provide the framework through which the Agency administers its economic development assistance programs.

As part of the COMPETES Act enacted on January 4, 2011, section 26 of the Stevenson-Wydler Act (15 U.S.C. 3721) authorized the Secretary of Commerce "to establish a program to provide loan guarantees for obligations to small- or medium-sized manufacturers for the use or production of innovative technologies." 15 U.S.C. 3721(a). In general, the Federal loan "guarantee" represents the portion of the loan that the Federal agency will repay to the lender if the borrower defaults on its loan payments. *See* 15 U.S.C. 3721(s)(4) (definition of "Loan Guarantee"); and 3721(d) ("A loan guarantee shall not exceed an amount equal to 80 percent of the obligation . . .").

As required by the Stevenson-Wydler Act, a "loan guarantee may be made under the program only for a project that re-equips, expands, or establishes a manufacturing facility in the United States—(1) to use an innovative technology or an innovative process in manufacturing; (2) to manufacture an innovative technology product or an integral component of such a product; or (3) to commercialize an innovative product, process, or idea that was developed by research funded in whole or in part by a grant from the Federal government." 15 U.S.C. 3721(b). The Stevenson-Wydler Act defines an "innovative technology" as "a technology that is significantly improved as compared to the technology in general use in the commercial marketplace in the

United States at the time the loan guarantee is issued.” 15 U.S.C. 3721(s)(3). Similarly, the term “innovative process” is defined as “a process that is significantly improved as compared to the process in general use in the commercial marketplace in the United States at the time the loan guarantee is issued.” 15 U.S.C. 3721(s)(2).

The Secretary of Commerce has delegated the responsibility of implementing and administering the Innovative Technologies in Manufacturing (“ITM”) Program, which includes promulgating regulations as required by the Stevenson-Wydler Act (see 13 U.S.C. 3721(l)), to EDA. EDA was appropriated the following amounts for the ITM Program: in fiscal year 2012, up to \$5 million; in both of the fiscal years 2013 and 2014, \$5 million; and in fiscal year 2015, \$4 million. These amounts are “to remain available until expended,” for section 26 loan guarantees “to subsidize total loan principal, any part of which is to be guaranteed, not to exceed \$70,000,000.” See Pub. L. 112-55 (FY12); Pub. L. 113-6 (FY13); Pub. L. 113-76 (FY14); Pub. L. 113-235 (FY15). Put another way, from FY12-FY15, EDA received a total of \$14 million and up to \$19 million in no-year, appropriated funds to support a maximum of \$280 million in loans that would be subject to EDA’s guarantee.

Although EDA administered business loan programs in the past, it has been more than 30 years since the Agency has been actively engaged in the process of loan making. In 1965, Title II of PWEDA (former 42 U.S.C. 3121-3246) authorized EDA to make direct loans and guarantee loans to businesses willing to establish and expand operations in economically distressed areas for the purpose of developing land and facilities for industrial or commercial use. In addition, under the Trade Act of 1974 (former 19 U.S.C. 2341-2374), businesses adversely affected by foreign imports could apply for EDA direct loans and loan guarantees. However, by the mid-1980s EDA had essentially stopped making direct loans and guaranteeing new loans under

PWEDA. Similarly, EDA stopped administering loans under the Trade Act when the International Trade Administration's Office of Trade Assistance was created in 1982. Four years later, Congress rescinded the DOC's authority to make Trade Adjustment Assistance loans and loan guarantees in the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99-272). EDA's authority under PWEDA for making direct loans and loan guarantees was not eliminated until the enactment of the Economic Development Administration and Appalachian Regional Development Act of 1998 (Pub. L. 105-393) which reauthorized EDA's programs for the first time since 1982.

Given the loss of institutional knowledge over the years, the need to leverage existing staff resources and the unique requirements of the ITM Program, EDA adopted a multi-pronged approach to Program implementation. Seeking to gauge market demand and obtain input about how to structure the Program from the public and stakeholders, on April 17, 2013, EDA published a "Request for Comments on Developing a Program To Provide Loan Guarantees to Small- or Medium-Sized Manufacturers" in the **Federal Register** (78 FR 22801). EDA received four comments, none from lenders. In general, the commenters noted that similar Federal programs already existed that were not being fully utilized and for the ITM Program to succeed, it needed to be easily accessible.

At the same time, EDA sought out the expertise and experience of two Federal agencies with well-established business loan programs—the SBA (e.g., 7(a) loan guarantee program) and the Department of Energy (e.g., 1703 Program). Meeting with representatives of these agencies and closely examining the structure of another loan program (the Department of Agriculture's Business & Industry (B&I) Program), provided EDA with invaluable guidance and insight into best practices for standing up a loan guarantee program, including the development of program

elements such as borrower eligibility standards and lender oversight, creation of program documents such as forms and operating manuals as well as administrative components such as staffing and electronic loan processing/servicing.

In 2014, EDA hired a full-time attorney and procured a contractor with extensive Federal loan program expertise to support the Agency's implementation efforts. Equipped with the information gathered from its due diligence and the subsequent analysis, EDA modeled the structure of the ITM Program closely after SBA's 7(a) loan guarantee program (hereinafter, referred to as "SBA's 7(a) program"). Similar to SBA's 7(a) program, the ITM Program is designed to help certain creditworthy businesses—specifically, small and medium-sized manufacturers—acquire financing when they cannot otherwise obtain credit at reasonable terms. EDA, like SBA in the 7(a) context, will not make loans itself. Instead, EDA will guarantee a portion of the loan made by a participating lending institution. Thus, taxpayer funds are only paid out in the event of borrower default. This process reduces the risk to the lender (incentivizing the lender to make the loan), but not to the borrower, who remains obligated for the full debt, even in the event of default. The similarities in the two programs, as well as the significant differences attributable to EDA's own statutory requirements and policy priorities, are reflected in EDA's proposed regulatory framework, which is summarized below. EDA seeks public input through this NPRM on the proposed regulatory framework. In particular EDA seeks comment on:

- The biggest impediments to small or medium-sized manufacturers receiving a loan from a lending institution.
- Whether the EDA's ITM loan program would make it more likely for lenders to lend to manufacturers, especially small or medium-sized manufacturers.

- What lending institutions should require for a borrower to demonstrate that a market exists for an innovative technology product.
- Whether there is an existing market for small to medium-sized business loans in the innovative manufacturing sector that are not currently being met.
- What other requirements in a loan guarantee program would be necessary for a lender to offer such loans.
- The manufacturing size threshold and definition to be considered a medium-sized manufacturer.
- The typical loan size that a small-medium business in innovative manufacturing would apply for.
- Whether securing a loan through the EDA ITM program to support the use or production of innovative technologies would assist manufacturers with access to outside capital.
- Other activities and outcomes from the EDA ITM loan program that would best support innovation in the manufacturing sector.

EDA also seeks comment on the proposed regulatory text, which is summarized below.

Subpart A—General Provisions.

Subpart A serves as the foundation of the ITM Program regulations, defining key terms and outlining core programmatic elements. For example, it includes borrower eligibility criteria, types of ineligible businesses, and permissible uses of loan proceeds by borrowers. In addition, lender ethical standards, creditworthiness criteria, additional loan requirements involving personal guarantees, collateral, and bonding are explained. It should be noted that the basic eligibility criteria for both Borrowers and Lenders are similar to SBA's, but have been modified

to reflect the statutory requirements and program specific goals of the ITM Program, including the requirement that the applicant borrower be prospectively or currently engaged in an Innovative Technological Project. For the same reasons, eligible uses of ITM Program loan proceeds are different in key respects from SBA's 7(a) program. One notable difference is that unlike SBA, EDA will not permit loan proceeds to be used for working capital. Some of the more significant terms defined in this subpart are highlighted below:

- 1) *Associate*: An associate is a person or entity with a close connection to an ITM Program lender or borrower, with this legal relationship established if specific criteria are met (e.g., an associate of a lender includes an officer, director, or holder of at least a 5 percent interest of the value of the lender's stock or debt instruments, or an agent involved in the loan process). As set forth in these regulations, the existence of an associate will have ramifications for the lender or borrower, such as affecting a borrower's size for eligibility purposes and having an associate's activities imputed to the lender for conflict of interest purposes.
- 2) *Innovative Technological Project*: This term captures the requirement in Stevenson-Wydler that a loan guarantee can only be used to finance certain types of projects, emphasizing that the project must be "innovative," and "Technological in nature," produce certain products or processes (e.g., a "significantly improved product or process") and result in one of four required actions (e.g., "utilizing this innovative technology in the process of manufacturing an existing product").
- 3) *Lender*: Eligible lenders have been defined as lenders that are in good standing under the SBA Preferred Lenders Program (PLP). Under this program, SBA delegates the final credit decision and most servicing and liquidation authority and responsibility to

carefully selected lenders. Lenders are considered for PLP status based on their record with SBA, and must have demonstrated a proficiency in processing and servicing SBA-guaranteed loans. EDA will require lenders to certify that they are in good standing under the PLP at the time a loan application is submitted. Failure by a lender to certify to its status under the PLP will be grounds for denial of its participation in the ITM Program. If it is determined that a lender is not in good standing at the time of certification or at any point after a loan guarantee is approved for that lender, EDA may deny liability on that loan guarantee.

- 4) *Manufacturing*: Manufacturing includes those activities associated with the relevant six-digit manufacturing NAICS codes (311111-333999).
- 5) *Medium-sized Business*: A medium-sized business is defined relative to SBA's definition of a small business; namely, a business that has a maximum size that is twice the maximum size of a small business using the same six-digit NAICS code and same measurement standards as the calculation for a small business.
- 6) *Small Business*: If a business is "small" under SBA's size standards, the business will likewise be considered a small business for purposes of the ITM Program.

Subpart B—Requirements imposed under other laws and orders.

Subpart B discusses various laws and orders applicable to borrowers, lenders and the use of ITM Program loan proceeds. Specifically, flood insurance requirements, child support obligation compliance, flood-plain and wetlands management, lead-based paint requirements, earthquake hazard management, and coastal barrier island restrictions are addressed. In addition, this subpart emphasizes that compliance with all other generally applicable laws such as environmental, civil rights and anti-discrimination laws, is required.

Subpart C—Applicability and enforceability of loan program requirements.

Subpart C details the nature of a lender’s obligation to comply with the ITM Program requirements. Further, it emphasizes that, because of the status of lenders and borrowers as independent entities, EDA is not liable for any injury suffered as a result of a lender’s or borrower’s wrong-doing with respect to a loan.

Subpart D—Loan Applications.

Closely mirroring SBA’s 7(a) program regulations and process, subpart D describes the application process for an ITM Program loan, including the required contents of a loan application. In addition, this subpart discusses how lenders and applicants are notified of approval or denial of an application, as well as the procedures involved when a lender is seeking reconsideration of EDA’s decision to reject an application.

Subpart E—Reporting.

Subpart E outlines lender reporting requirements. In addition, it affirms the applicant’s duty to disclose any fees paid to agents assisting the applicant in obtaining the loan as well as the obligation of lenders, borrowers and EDA employees to notify the DOC Inspector General of any suspected fraud regarding an ITM Program loan.

Subpart F—Limitations on Use of Proceeds.

To prevent a potential loss-shift to EDA from an existing borrower obligation, subpart F prohibits a borrower’s use of loan proceeds to refinance unsecured or under-secured loans.

Subpart G—Maturities; Interest Rates; Loan and Guarantee Amounts.

Subpart G delineates the key parameters for loan guarantees made under the ITM Program, including the statutory maximum percentage of a loan eligible for a guarantee, which is

80 percent. The ITM Program regulations impose a loan size limit of \$10 million or, if written approval is obtained from EDA, \$15 million. This subpart also addresses loan maturities, providing that the term of a loan shall be the lesser of 30 years or 90% of the projected useful life of the financed physical asset. In addition, while covering fixed interest rate loans, this subpart provides that a lender may use a variable rate of interest, upon EDA approval after the lender's satisfaction of certain conditions with respect to the base rate, changes to the rate, amount of fluctuation from the base rate, maximum spreads and amortization.

Subpart H—Fees.

Subpart H discusses fees that can be properly charged under the ITM Program. These regulatory provisions authorize EDA to charge lenders a guarantee fee as well as a monthly servicing fee. Note that the guarantee fee may be increased if the guaranteed portion of the loan increases. Also discussed in this subpart are the fees that a lender is permitted to charge the borrower, which includes the guarantee fee after the first disbursement as well as service and late payment fees.

Subpart I—Participation Criteria.

Subpart I discusses requirements for a lender's initial and continued eligibility for participation in the ITM Program. At the outset, this subpart makes clear that EDA may enter into an authorization with a lender to make ITM program loans, which may include terms to allow for the patents and technology needed for the Innovative Technological Project to be available to complete and operate the Innovative Technological Project for any borrower, including EDA pursuant to its rights of subrogation. Among other requirements, the lender must be in good standing under the SBA Preferred Lenders Program at all times and must maintain its ability to evaluate, process, close, disburse, service, liquidate, and litigate loans in its portfolio.

One notable difference between the ITM Program and SBA's 7(a) program is that EDA does not allow a lender to securitize or otherwise sell or transfer an ITM Program loan without prior approval from EDA and the execution of a separate securitization agreement with EDA.

Subpart J—Loan Modifications and Servicing Actions.

Subpart J underscores that a lender may defer payments on a loan and can extend the maturity of a loan only with the prior written consent of EDA. With respect to loan modifications, this subpart addresses standards to which lenders must adhere (e.g., commercially reasonable manner consistent with prudent lending standards) when engaging in loan servicing, liquidation, and debt collection litigation activities. In addition, those servicing and liquidation actions that require the prior written consent of EDA (e.g., compromise of the loan principal balance; accelerating the maturity of the note) are listed.

Subpart K—EDA Purchase of Guaranteed Portion.

Subpart K applies when a lender requests that EDA honor its guarantee in a default situation. These provisions make clear that as a threshold matter such a demand will be summarily rejected by EDA unless a lender establishes, with sufficient supporting documentation, that the borrower is in uncured default on any installment for more than 60 calendar days, all reasonable workout attempts have failed, and all business personal property securing the defaulted ITM Program loan has been liquidated. With respect to a lender's debt collection efforts, this subpart sets forth the requirements for a lender's liquidation and litigation plans that must be submitted before the lender undertakes such actions, outlines EDA's policies regarding a lender's liquidation of collateral and sale of ITM Program loans, and covers circumstances when EDA will pay its pro rata share of authorized legal fees and expenses. If EDA does purchase the guaranteed portion of an ITM Program loan from the lender, this subpart

provides details about accrued interest payments and the applicable interest rate post-EDA purchase. Finally, similar to the SBA 7(a) program's "denial of liability" regulations, these regulations provide that, despite a lender's demand, EDA will be released from liability on a loan guarantee if EDA determines that one or more of ten events have occurred. Such events include a lender's failure to materially comply with any ITM Program requirement, a lender's misrepresentation (or failure to disclose) of a material fact regarding a guaranteed loan, and where a lender's improper action has put EDA at risk.

Subpart L—Enforcement Actions.

Subpart L focuses on enforcement actions that EDA can take against lenders. Discussed are proper grounds for an enforcement action (e.g., failure to maintain eligibility requirements for the SBA Preferred Lenders Program), types of enforcement actions that EDA may take (e.g., suspension or revocation from the ITM Program), and general procedures for enforcement actions against lenders (e.g., notice of action, Lender's opportunity to object, final agency decision).

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities, for the following reasons: First, the Agency emphasizes that possible participation in the ITM program by small entities, whether from the lending or borrowing side, is entirely voluntary. Second, this rulemaking is not projected to adversely impact small lenders or borrowers since it does not impose any greater burden with respect to forms, fees, due diligence, or servicing than any other Federal loan guarantee program. The application forms closely match those of already existing

loan guarantee programs, most notably SBA's 7(a) loan guarantee program, and the fees are similarly commensurate. As evidenced by these proposed regulations and forthcoming ITM program procedure manuals, reporting, due diligence, and other processes will be a stream-lined version of existing programs which will make the ITM program less burdensome for small entities to use than other programs. As such, the Chief Counsel certifies that this proposed rule will not have a significant impact on a substantial number of small entities.

Executive Orders No. 12866 and No. 13563

This proposed rule was drafted in accordance with Executive Orders 12866 and 13563. It was reviewed by the Office of Management and Budget (OMB), which found the proposed rule to be "significant" as that term is defined in Executive Order 12866 and Executive Order 13563. Accordingly, the proposed rule has undergone interagency review.

Congressional Review Act

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

Executive Order No. 13132

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

Paperwork Reduction Act

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

person be subject to a penalty for failure to comply with a collection of information subject to the PRA unless that collection displays a currently valid OMB Control Number.

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

Part or section of this final rule	Nature of Request	Form/Title/OMB Control Number
311.4; 311.5; 311.6	An applicant must provide information to demonstrate that it meets the eligibility criteria including credit availability.	ED-1920, Lender's Application
311.8; 311.9; 311.501	An applicant must provide information to show that the proceeds will be used for an eligible use.	ED-1920, Lender's Application; ED-1050, Settlement Sheet; ED-172, Account Transcripts
311.10	For property that is purchased with guaranteed funds, an applicant must supply information indicating that the criteria for leasing or renting a property is met before leasing or renting it.	ED-1920, Lender's Application
311.11; 311.801	A Lender must supply written assurances to EDA that it will abide by certain ethical requirements.	ED-1920, Lender's Application
311.6(n); 311.6(o); 311.11 (b)	An applicant must supply information and certify that there are not any conflicts of interest between the Lender, Borrower, and EDA.	ED-1919, Borrower's Information Form; ED-1920, Lender's Application
311.6(m); 311.11 (d); 311.11 (g); 311.12 (a)	An applicant must supply information and certify that it does not have any Associates who render the applicant ineligible by being incarcerated, on probation, or on parole or have been indicted for a felony or a crime of moral turpitude.	ED-1919, Borrower's Information Form; ED-1920, Lender's Application; ED-912, Statement of Personal History
311.12; 311.13 (a)	An applicant must supply adequate information to show that the Borrower (including an Operating Entity) is creditworthy and all loans are sufficiently	ED-1920, Lender's Application; ED-413, Personal Financial Statement

	sound as to reasonably assure repayment. A personal guarantee may be required of a Borrower's Associates.	
311.100; 311.101; 311.102; 311.103; 311.104; 311.105; 311.106	Applicants must supply written assurances to EDA that it will abide by the requirements imposed under other laws, restrictions, and orders.	ED-1919, Borrower's Information Form; ED-413, Personal Financial Statement
311.300; 311.801(e)	Lenders must provide information demonstrating that they are SBA Preferred Lenders in good standing.	ED-1920, Lender's Application
311.400	Lenders must agree to submit servicing reports to EDA on a monthly basis for every outstanding loan.	ED-1502, Monthly Servicing Report
311.401; 311.702; 311.703; 311.803	Applicants for ITM Program loans must identify to EDA the name of each agent that helped the applicant obtain the loan, describing the services performed, and disclosing the amount of each fee paid or to be paid by the applicant to the agent in conjunction with the performance of those services.	ED-159, Fee Disclosure and Compensation Agreement; ED-1050, Settlement Sheet
311.600	Applicants must supply adequate information to certify that the guarantee percentage is 80 percent or less of the entire loan obligation.	ED-1920, Lender's Application
311.601	An applicant must supply information and certify that the entire loan obligation is \$10 million or less unless a loan amount of up to \$15 million is approved by the Deputy Assistant Secretary on an individual case-by-case basis.	ED-1920, Lender's Application
311.602	The applicant must supply information to indicate that the loan term is the lesser of 30 years or 90% of the projected useful life of the physical asset to be financed by the obligation, as determined by the Deputy Assistant Secretary.	ED-1920, Lender's Application
311.603; 311.604	The Lender must supply written certification that it agrees to certain interest rates limits.	ED-1920, Lender's Application
311.700(a); 311.700(c)	If the Borrower seeks to increase or decrease the total loan amount or change the guarantee percentage of an ITM Program loan, the Borrower must have supplied information that indicates agreement to an increase in the guarantee fee. A Borrower must further supply written documentation	ED-2237, Approval Action Modification Form

	that indicates acknowledgment that a refund of the guarantee fee will occur only if the decrease in the loan amount happens before the first disbursement.	
311.701	Lender must supply information that shows it agrees to pay the servicing fee on a monthly basis while submitting the monthly servicing report.	ED-1502, Monthly Servicing Report
311.801 (a)(2)	Lenders must supply loan transaction data to EDA and maintain satisfactory performance as determined by EDA through analysis of that data.	ED-1502, Monthly Servicing Report
311.900; 311.901; 311.904	Before modifying loan terms, Lenders must supply the proposed modification information to EDA and request authorization from EDA to changes to loan terms including but not limited to changes in the loan amount, an extension of maturity, and any other changes to the loan that effect EDA's risk.	ED-2237, Approval Action Modification Form
311.1000(a); 311.1000(b)	A Lender must supply written confirmation that it agrees to refrain from requesting a purchase of a defaulted loan by EDA until the Borrower has been in default for a minimum of 60 days.	ED-1149, Transcript of Account
311.1000(b); 311.1004(a)	The Lender must provide the documentation to prove the loan has been closed, serviced, and liquidated in a prudent manner and in compliance with ITM program regulations.	ED-159, Fee Disclosure and Compensation Agreement; ED-1050, Settlement Sheet; ED-1149, Transcript of Account

Regulatory Text

For the reasons set forth in the preamble, EDA proposes to amend title 13, chapter III of the Code of Federal Regulations by adding part 311 to read as follows:

PART 311—INNOVATIVE TECHNOLOGIES IN MANUFACTURING LOAN GUARANTEE PROGRAM.

Subpart A – General Provisions

Sec.

- 311.1 Purpose and scope of the Innovative Technologies in Manufacturing Loan Guarantee Program.
- 311.2 Description of Innovative Technologies in Manufacturing Loan Guarantee Program.
- 311.3 Definitions.
- 311.4 Basic eligibility criteria.
- 311.5 Credit unavailable elsewhere.
- 311.6 Ineligible types of businesses.
- 311.7 Conditions required of an eligible passive entity.
- 311.8 Eligible uses of proceeds.
- 311.9 Restrictions on uses of proceeds.
- 311.10 Leasing part of a building to another business.
- 311.11 Lender ethical requirements.
- 311.12 Lending criteria.
- 311.13 Loan conditions.

Subpart B – Requirements Imposed under Other Laws and Orders

- 311.100 Flood insurance.
- 311.101 Compliance with child support obligations.
- 311.102 Flood-plain and wetlands management.
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- 311.105 Coastal barrier islands.
- 311.106 Compliance with other laws.

Subpart C – Applicability and Enforceability of Loan Program Requirements

- 311.200 Lender compliance with loan program requirements.
- 311.201 Status of lenders.
- 311.202 Status of borrowers.

Subpart D – Loan Applications

- 311.300 Applying for a loan.
- 311.301 The contents of an ITM Program application.
- 311.302 Approval or denial.
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Subpart E – Reporting

- 311.400 Monthly servicing report
- 311.401 Disclosure of fees.
- 311.402 Notifying DOC's Office of Inspector General of suspected fraud.

Subpart F – Limitations on Use of Proceeds

- 311.500 Refinancing unsecured or under-secured loans.

Subpart G – Maturities; Interest Rates; Loan and Guarantee Amounts

- 311.600 Percentage of a loan eligible for an ITM Program guarantee.
- 311.601 Loan size limits.
- 311.602 Limits on loan maturities.
- 311.603 Fixed interest rate loans.
- 311.604 Variable interest rate loans.

Subpart H – Fees

- 311.700 Guarantee fee.
- 311.701 Monthly servicing fee.
- 311.702 Fees the lender may collect from a loan applicant.
- 311.703 Fees that the lender or associate may not collect from the borrower or share with third parties.

Subpart I – Participation Criteria

- 311.800 Authorization terms.
- 311.801 Requirements for all participating lenders.
- 311.802 Preferences.
- 311.803 Other services lenders may provide borrowers.
- 311.804 Advertisement of relationship with EDA.
- 311.805 Securitization and transfer.

Subpart J – Loan Modifications and Servicing Actions

- 311.900 Deferment of payment.
- 311.901 Extension of maturity.
- 311.902 Loan moratoriums..
- 311.903 Standards for lender loan servicing, loan liquidation, and debt collection litigation.
- 311.904 Servicing and liquidation actions that require the prior written consent of EDA.

Subpart K – EDA Purchase of a Guaranteed Portion

- 311.1000 Purchase of loan guarantees.
- 311.1001 Applicable interest rate after EDA purchases the guaranteed portion of an ITM Program loan.
- 311.1002 Payment of accrued interest to the lender when EDA purchases the guaranteed portion.
- 311.1003 Earliest uncured payment default.
- 311.1004 Release of EDA's liability.
- 311.1005 Liquidation and litigation plans.
- 311.1006 Payment by EDA of legal fees and other expenses.
- 311.1007 EDA's policies concerning the liquidation of collateral and the sale of ITM Program loans.
- 311.1008 Loan asset sales.

Subpart L – Enforcement Actions

- 311.1100 Grounds for enforcement actions.
- 311.1101 Types of enforcement actions—lenders.
- 311.1102 General procedures for enforcement actions against lenders.

Authority: 15 U.S.C. 3701 et seq.; Department of Commerce Organization Order 10–4.

Subpart A – General Provisions

§ 311.1 Purpose and Scope of the Innovative Technologies in Manufacturing Loan Guarantee Program.

(a) As required by the Stevenson-Wydler Technology Innovation Act of 1980, a loan guarantee may be made under the Innovative Technologies in Manufacturing Loan Guarantee Program only for a project that re-equips, expands, or establishes a manufacturing facility in the United States: to use an innovative technology or an innovative process in manufacturing; to manufacture an innovative technology product or an integral component of such a product; or to commercialize an innovative product, process, or idea that was developed by research funded in whole or in part by a grant from the Federal government. See 15 U.S.C. 3721(b). The Stevenson-Wydler Technology Innovation Act of 1980 defines an “innovative technology” as a technology that is significantly improved as compared to the technology in general use in the commercial marketplace in the United States at the time the loan guarantee is issued. See 15 U.S.C. 3721(s)(3). Similarly, the term “innovative process” is defined as a process that is significantly improved as compared to the process in general use in the commercial marketplace in the United States at the time the loan guarantee is issued. See 15 U.S.C. 3721(s)(2).

(b) The Secretary of Commerce has delegated the responsibility of implementing and administering the Innovative Technologies in Manufacturing (“ITM”) Program, which includes

promulgating regulations as required by the Stevenson-Wydler Technology Innovation Act of 1980 (see 13 U.S.C. 3721(1)), to EDA.

§ 311.2 Description of Innovative Technologies in Manufacturing Loan Guarantee Program.

A loan is initiated by a Lender agreeing to make an ITM Program-qualifying loan to a borrower. The lender applies to the ITM Program on a loan-by-loan basis. If EDA agrees to guarantee a portion of the loan, the lender funds and services the loan. If the borrower defaults on the loan, EDA's guarantee requires EDA to purchase its portion of the outstanding balance upon demand by the lender and subject to verification that program requirements have been met.

§ 311.3 Definitions.

As used in this part, the following terms shall have the following meanings:

Act means section 26 of the Stevenson-Wydler Technology Innovation Act of 1980 (15 U.S.C. 3721 *et seq.*).

Agency means the Economic Development Administration within the U.S. Department of Commerce.

Assistant Secretary means the Assistant Secretary of Commerce for Economic Development.

Associate means the following:

(1) An *associate of a lender* means:

(i) An officer, director, or holder of 5 percent or more of the value of the lender's stock or debt instruments, or an agent involved in the loan process; or

(ii) Any entity in which one or more individuals referred to in paragraph (1)(i) of this definition or a close relative of any such individual owns or controls at least 5 percent.

(2) An *associate of a borrower* means:

(i) An officer, director, designated representative, or owner of more than 5 percent of the borrower's equity;

(ii) Any entity in which one or more individuals referred to in paragraph (2)(i) of this definition or a close relative of any such individual owns or controls at least 5 percent of the borrower's equity;

(iii) Any entity in which the borrower owns or controls at least 5 percent; or

(iv) Any entity holding convertible debt that could result in ownership of at least 5 percent of the borrower wherein the convertible debt is eligible for conversion during the time period discussed in paragraph (3) of this definition.

(3) For purposes of this definition, the time during which an associate relationship exists commences six months before the following dates and continues as long as the certification, participation agreement, or loan is outstanding:

(i) For a lender, the date of application for a loan guarantee on behalf of an applicant; or

(ii) For a borrower, the date of the loan application to EDA, or the lender.

Bank regulatory agencies means the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the Office of the Comptroller of the Currency.

Borrower means the person or persons who executed the loan instruments evidencing ITM Program-guaranteed loan.

Chief Counsel means the Chief Counsel of EDA.

Close relative means a spouse or partner; a lineal descendent, a lineal ascendant; a sibling; or the spouse of any such person.

Department of Commerce, Department, or DOC means the U.S. Department of Commerce.

Eligible passive entity means an entity or trust that does not engage in regular and continuous business activity, but does lease or otherwise provide real or personal property to an operating entity for use in the operating entity's business, and complies with the conditions set forth in § 311.7.

Guarantor means a person who executed a guarantee as security for a loan instrument executed by a borrower.

ITM Program loan proceeds means the proceeds paid to a borrower from a lender pursuant to an ITM Program loan.

Innovative technological project or project is defined as having all of the following criteria:

(1) *Innovative*, which is defined as:

- (i) A significant improvement in function, performance, reliability, or quality of a product or service in comparison to commercial technologies currently in use; and
- (ii) The ability for such products or services to be sold based on those improvements.

(2) Technological in nature, which is defined as relying on the principles of one of the following sciences: engineering, physical sciences, computer sciences, or biological sciences.

(3) Producing one of the following:

- (i) A significantly improved product or process; or
- (ii) A combination of existing products or processes that result in significantly reduced factor inputs without sacrificing product quality, production throughput, or economies of production.

(4) Resulting in one of the following actions:

- (i) Utilizing this innovative technology in the process of manufacturing an existing product;
- (ii) Utilizing an existing product where the delivery is the innovative technology;
- (iii) Manufacturing a new innovative technology; or
- (iv) Commercializing an innovative technology that was developed by research funded in part or in whole by Federal grant funding.

Lender means an institution that is a lender in good standing under the SBA Preferred Lenders Program. Additional eligible institutions may be permitted from time to time at the discretion of the Assistant Secretary.

Loan instruments means the authorization, note, instruments of hypothecation, and all other agreements and documents related to a loan.

Loan program requirements means requirements imposed upon lenders by statute, EDA regulations, any agreement executed between the lender and EDA, official EDA notices and forms applicable to the ITM Program, and loan instruments; as such requirements are issued and revised by EDA from time to time.

Manufacturing means a business with a six-digit NAICS code between 311111 - 333999, and as such other codes as the Assistant Secretary may provide and publish in the **Federal Register**.

Management official means an officer, director, general partner, manager, employee participating in management, agent, or other participant in the management of the affairs of the lender's activities.

Medium-sized business means a business that has a maximum size that is twice the maximum size of a small business using the same six-digit NAICS code and same measurement standards as the calculation for a small business.

Obligor means a person with direct liability for repaying the loan such as the borrower and any assumptor, and every person with contingent liability such as the guarantor.

Operating entity means an eligible small or medium-sized business actively involved in conducting business operations currently or about to be located on real property owned by an eligible passive entity, or using or about to use in its business operations personal property owned by an eligible passive entity.

Person means any individual, corporation, partnership, association, unit of government, or legal entity, however organized.

Preference means any arrangement giving a lender a preferred position compared to EDA relating to the making, servicing, or liquidation of a loan with respect to such things as repayment, collateral, guarantees, control, maintenance of a compensating balance, purchase of a certificate of deposit or acceptance of a separate or companion loan, without EDA's consent.

Project means an Innovative Technological Project as defined in this section.

Rentable property means the total square footage of all buildings or facilities used for business operations.

SBA or Small Business Administration means the U.S. Small Business Administration.

SBA Preferred Lenders Program means the SBA Preferred Lenders Program under 13 CFR 120.450 through 120.453.

Service provider means an entity that contracts with a lender to perform management, marketing, legal or other services.

Small business means a business that is small in size by the most current SBA size standards in effect at the time of the application under 13 CFR 121.101 and 121.102 and clarified by any EDA SOPs in effect at the time.

Small or medium-sized business means, collectively, all small businesses and all medium-sized businesses.

SOPs means EDA Standard Operating Procedures, as may be issued and revised by EDA from time to time.

§ 311.4 Basic eligibility criteria.

To be an eligible borrower, an applicant must:

- (a) Be an operating business (except for loans to eligible passive entities);
- (b) Be organized as a for profit entity;
- (c) Be located in the United States (includes territories and possessions);
- (d) Be a small or medium-sized business, when including associates;
- (e) Be prospectively or currently engaged in the manufacture of an Innovative Technological Project (except for loans to eligible passive entities);
- (f) Be able to demonstrate a need for the desired credit per § 311.5; and
- (g) Agree to use a federally-approved electronic employment eligibility verification system to verify the employment eligibility of:
 - (1) All persons hired during the contract term or by the borrower to perform employment duties within the United States; and

- (2) All persons assigned by the borrower to perform work within the United States on the project.

§ 311.5 Credit unavailable elsewhere.

EDA provides loan assistance only to applicants for whom the desired credit is not otherwise available on reasonable terms from non-Federal sources. EDA requires the lender to certify or otherwise show that the desired credit is unavailable to the applicant on reasonable terms and conditions from non-Federal sources without EDA assistance, taking into consideration the prevailing rates and terms in the community in or near where the applicant conducts business, for similar purposes and periods of time. Submission of an application to EDA by a lender constitutes certification by the lender that it has examined the credit-worthiness of the applicant, has based its certification upon that examination, and has justification in its file to support the certification.

§ 311.6 Ineligible types of businesses.

For those businesses that satisfy basic eligibility criteria under § 311.304, the following types of businesses are still deemed ineligible:

- (a) Non-profit entities (for-profit subsidiaries are eligible);
- (b) Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors;
- (c) Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (except eligible passive entities under § 311.7);
- (d) Life insurance companies;

- (e) Businesses located in a foreign country (businesses in the U.S. owned by aliens may qualify);
- (f) Pyramid sale distribution plans;
- (g) Businesses deriving more than one-third of gross annual revenue from legal gambling activities;
- (h) Businesses engaged in any illegal activity;
- (i) Private clubs and businesses which limit the number of memberships for reasons other than capacity;
- (j) Government-owned entities (except for businesses owned or controlled by a Native American tribe);
- (k) Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting;
- (l) Consumer and marketing cooperatives (producer cooperatives are eligible);
- (m) Businesses with an associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude;
- (n) Businesses in which the lender, or any of its associates owns an equity interest;
- (o) Businesses for which common ownership between the borrower and lender:
 - (1) Existed within six months of the submission of any of the loan instruments by the borrower and lender; or
 - (2) Commences existence between the borrower and lender at any time during the loan term;
- (p) Businesses that:
 - (1) Present live performances of a prurient sexual nature; or

- (2) Derive directly or indirectly more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;

(q) Unless waived by EDA for good cause:

- (1) Business that have previously defaulted on a Federal loan or federally assisted financing, resulting in the Federal Government or any of its agencies or departments sustaining a loss in any of its programs, and businesses owned or controlled by an applicant or any of its associates which previously owned, operated, or controlled a business that defaulted on a Federal loan (or guaranteed a loan that was defaulted) and caused the Federal Government or any of its agencies or departments to sustain a loss in any of its programs. EDA reserves the right to waive this exception for a good cause, including any cases where the loss was paid in full. If a loss is paid in full then the loss may be processed using standard procedures. For purposes of this section, a compromise agreement shall also be considered a loss; or

- (2) Business that have an outstanding delinquent Federal debt;

(r) Businesses primarily engaged in political or lobbying activities; and

(s) Business not prospectively or currently engaged in the manufacture of an Innovative Technological Project (except for loans to eligible passive entities).

§ 311.7 Conditions required of an eligible passive entity.

An eligible passive entity must use loan proceeds to acquire or lease, and/or improve or renovate, real or personal property (including eligible refinancing), that it leases to one or more

operating entities for conducting the operating entity's business (references to operating entity in paragraphs (a) and (b) of this section mean each operating entity). Any ownership structure or legal form may qualify as an eligible passive entity.

(a) Conditions that apply to all legal forms:

- (1) The operating entity must be an eligible small or medium-sized business, and the proposed use of the proceeds must be an eligible use if the operating entity were obtaining the financing directly;
- (2) The eligible passive entity (with the exception of a trust) and the operating entity each must be a small or medium-sized business under the appropriate size standards defined in § 311.3;
- (3) The lease between the eligible passive entity and the operating entity must be in writing and must be subordinated to any security interest EDA may have on the property. Also, the eligible passive entity (as landlord) must furnish as collateral for the loan an assignment of all rents paid under the lease;
- (4) The lease between the eligible passive entity and the operating entity, including options to renew exercisable solely by the operating entity, must have a remaining term at least equal to the term of the loan;
- (5) The operating entity must be a guarantor or co-borrower with the eligible passive entity. In an ITM Program loan that includes the purchase of other assets, including intangible assets, for the operating entity's use, the operating entity must be a co-borrower; and

(6) The eligible passive entity and the operating entity must guarantee the loan (the trustee shall execute the guarantee on behalf of any trust).

(b) Additional conditions that apply to trusts. The eligibility status of the trustor will determine trust eligibility. All donors to the trust will be deemed to have trustor status for eligibility purposes. A trust qualifying as an eligible passive entity may engage in other activities as authorized by its trust agreement. The trustee must warrant and certify that the trust will not be revoked or substantially amended for the term of the loan without the consent of EDA. The trustor must guarantee the loan. For purposes of this section, the trustee shall certify to EDA that:

- (1) The trustee has authority to act;
- (2) The trust has the authority to borrow funds, pledge trust assets, and lease the property to the operating entity;
- (3) The trustee has provided accurate, pertinent language from the trust agreement confirming the above; and
- (4) The trustee has provided and will continue to provide EDA with a true and complete list of all trustors and donors.

§ 311.8 Eligible uses of proceeds.

A borrower must use an ITM Program loan for sound business purposes. The uses of proceeds are prescribed in each loan's loan instruments. A borrower may use ITM Program loan proceeds to:

- (a) Acquire land (by purchase or lease);
- (b) Improve a site (e.g., grading, streets, parking lots, landscaping), including up to 5 percent for community improvements such as curbs and sidewalks;

- (c) Purchase one or more existing buildings;
- (d) Convert, expand, or renovate one or more existing buildings;
- (e) Construct one or more new buildings;
- (f) Acquire (by purchase or lease) and install fixed assets;
- (g) Refinance existing debt for eligible uses;
- (h) Purchase inventory, supplies, and/or raw materials; and/or
- (i) License or purchase licenses to the necessary intellectual property related to the Innovative Technological Project such as patents, trademarks, etc., as long as the licensure or purchased license will be used to make a product or improve a process consistent with an Innovative Technological Project.

§ 311.9 Restrictions on uses of proceeds.

EDA will not authorize nor may a borrower use loan proceeds for the following purposes (including the replacement of funds used for any such purpose):

- (a) Payments, distributions, or loans to associates of the borrower (except for ordinary compensation for services rendered);
- (b) Refinancing a debt that was not incurred for uses indicated in § 311.8;
- (c) Floor plan financing or other revolving line of credit;
- (d) Investments in real or personal property acquired and held primarily for sale, lease, or investment;
- (e) A purpose that does not benefit the small or medium-sized business;
- (f) Operating working capital;
- (g) Paying past-due Federal, State, and local payroll taxes; or
- (h) Any use restricted by any provision under this part.

§ 311.10 Leasing part of a building to another business.

A borrower may permanently lease up to 49 percent of the rentable property to one or more tenants if the borrower permanently occupies and uses no less than 51 percent of the rentable property for the Innovative Technological Project or Projects. The Projects need not be owned solely by the borrower as long as they are bona fide Projects. If the borrower is an eligible passive entity that leases 100 percent of the new building's space to one or more operating entities, the operating entity, or operating entities together, must follow the same rule set forth in this paragraph.

§ 311.11 Lender ethical requirements.

Lenders must act ethically and exhibit good character. Ethical indiscretion of an associate of a lender will be attributed to the lender. A lender must promptly notify EDA if it obtains information concerning the unethical behavior of an associate. The following are examples of such unethical behavior. A lender may not:

- (a) Self-deal;
- (b) Have a real or apparent conflict of interest with a business with which it is dealing (including any of its associates or an associate's close relatives) or EDA;
- (c) Own an equity interest in a business that has received or is applying to receive EDA credit support (during the term of the loan or within 6 months prior to the loan application);
- (d) Be incarcerated, on parole, or on probation;
- (e) Knowingly misrepresent or make a false statement to EDA;
- (f) Engage in conduct reflecting a lack of business integrity or honesty;

- (g) Be a convicted felon, or have an adverse final civil judgment (in a case involving fraud, breach of trust, or other similar conduct) that would cause the public to question the lender's business integrity, taking into consideration such factors as the magnitude, repetition, harm caused, and remoteness in time of the activity or activities in question;
- (h) Accept funding from any source that restricts, prioritizes, or conditions the types of businesses that the lender may assist under an EDA program;
- (i) Fail to disclose to EDA all relationships between the business and its associates (including close relatives of associates), the lender, and/or the lenders financing the Innovative Technological Project of which the lender is aware or should be aware;
- (j) Fail to disclose to EDA whether the loan will:
 - (1) Reduce the exposure of a lender or an associate of a lender in a position to sustain a loss;
 - (2) Directly or indirectly finance the purchase of real estate, personal property or services (including insurance) from the lender or an associate of the lender;
 - (3) Repay or refinance a debt due a lender or an associate of a lender; or
 - (4) Require the business or an associate (including close relatives of associates), to invest in the borrower (except for institutions which require an investment from all members as a condition of membership, such as a Production Credit Association);
- (k) Issue a real estate forward commitment to a builder or developer;

- (l) Cease being prospectively or currently engaged in the manufacture of an Innovative Technological Project (except for loans to eligible passive entities); or
- (m) Engage in any activity that impairs, restricts, or otherwise limits the lender's objective judgment in evaluating the loan.

§ 311.12 Lending criteria.

The borrower (including an operating entity) must be creditworthy. Loans must be sufficiently sound as to reasonably assure repayment. When reviewing ITM Program applications, EDA will consider the follow factors of an applicant's, an applicant's associates, and any guarantors of the applicant:

- (a) Character, reputation, and credit history;
- (b) Experience and depth of management;
- (c) Strength of the business;
- (d) Past earnings, projected cash flow, and future prospects;
- (e) Ability to repay the loan with earnings from the business;
- (f) Sufficient invested equity to operate on a sound financial basis;
- (g) Potential for long-term success;
- (h) Nature and value of collateral (although inadequate collateral will not be the sole reason for denial of a loan request); and
- (i) The effect any associates may have on the ultimate repayment ability of the applicant.

§ 311.13 Loan conditions.

The following requirements are normally required for all ITM Program loans:

- (a) *Personal guarantees.* Holders of at least a 5 percent ownership interest must guarantee a percentage of the loan, as determined by the lender. For loans over \$10 million, a personal guarantee will be determined by EDA. EDA, in its discretion, consulting with the lender, may require other appropriate individuals to guarantee the loan as well.
- (b) *Appraisals.* Lenders shall use a prudent policy that is substantially comparable to non-guaranteed commercial loans.
- (c) *Hazard Insurance.* EDA requires hazard insurance on all collateral. Lenders may use prudent policy that is similar to those requirements for substantially comparable non-guaranteed commercial loans.
- (d) *Collateral.* Lenders shall use a prudent policy that is substantially comparable to non-guaranteed commercial loans.
- (e) *Bonding requirements.* On loans that finance construction, the lender must use a construction management company or the borrower must supply a 100 percent payment and performance bond and builder's risk insurance, unless waived by EDA.

Subpart B – Requirements Imposed under Other Laws and Orders.

§ 311.100 Flood insurance.

Under the Flood Disaster Protection Act of 1973 (Sec. 205(b) of Pub. L. 93-234 (42 U.S.C. 4000 *et seq.*)), a loan recipient must obtain flood insurance if any building (including mobile homes), machinery, or equipment acquired, installed, improved, constructed, or renovated with the ITM Program loan proceeds is located in a special flood hazard area. The requirement applies also to any inventory, fixtures, or furnishings contained or to be contained in

the building. Mobile homes on a foundation are buildings. If required, lenders must notify borrowers that flood insurance must be maintained.

§ 311.101 Compliance with child support obligations.

Any holder of 50% or more of the ownership interest in the borrower must certify that he or she is not more than 60 days delinquent on any obligation to pay child support arising under:

- (a) An administrative order;
- (b) A court order;
- (c) A repayment agreement between the holder and a custodial parent; or
- (d) A repayment agreement between the holder and a State agency providing child support enforcement services.

§ 311.102 Flood-plain and wetlands management.

- (a) All loans must conform to requirements of Executive Orders 11988, “Flood Plain Management” (3 CFR, 1977 Comp., p. 117) and 11990, “Protection of Wetlands” (3 CFR, 1977 Comp., p. 121). Lenders must comply with requirements applicable to them. Applicants must show:
 - (1) Whether the location for which financial assistance is proposed is in a floodplain or wetland;
 - (2) If it is in a floodplain, that the assistance is in compliance with local land use plans; and
 - (3) That any necessary construction or use permits will be issued.
- (b) Generally, there is an 8-step decision making process with respect to:
 - (1) Construction or acquisition, other than of a building;

(2) Repair and restoration equal to more than 50% of the market value of a building; or

(3) Replacement of destroyed structures.

(c) EDA may determine for the following types of actions, on a case-by-case basis, that the full 8-step process is not warranted and that only the first step (determining if a proposed action is in the base floodplain) need be completed:

(1) Actions located outside the base floodplain;

(2) Repairs, other than to buildings, that are less than 50% of the market value of the building;

(3) Replacement of building contents, materials, and equipment;

(4) Hazard mitigation measures; or

(5) EDA loan assistance of \$1,500,000 or less, including ITM Program loans.

§ 311.103 Lead-based paint.

If loan proceeds are for the construction or rehabilitation of a residential structure, lead-based paint may not be used on any interior surface, or on any exterior surface that is readily accessible to children under the age of seven years.

§ 311.104 Earthquake hazards.

When loan proceeds are used to construct a new building or an addition to an existing building, the construction must conform with the “National Earthquake Hazards Reduction Program (“NEHRP”) Recommended Provisions for the Development of Seismic Regulations for New Buildings” (which can be obtained from the Federal Emergency Management Agency, Publications Office, Washington, DC) or a code identified by EDA as being substantially equivalent.

§ 311.105 Coastal barrier islands.

Neither lenders nor EDA may make or guarantee any loan within the Coastal Barrier Resource System as a part of the ITM Program.

§ 311.106 Compliance with other laws.

All ITM Program loans are subject to all applicable laws, including (without limitation) all applicable environmental laws as well as civil rights laws and laws prohibiting discrimination on the grounds of race, color, national origin, religion, sex, marital status, disability or age. EDA may request agreements or evidence to support or document compliance with these laws, including reports required by applicable statutes or the regulations in this chapter.

Subpart C – Applicability and Enforceability of Loan Program Requirements.

§ 311.200 Lender compliance with loan program requirements.

Lenders must comply and maintain familiarity with loan program requirements for the ITM Program, as such requirements are revised from time to time. Loan program requirements in effect at the time that a lender takes an action in connection with a particular loan govern that specific action. For example, although loan closing requirements in effect when a lender closes a loan will govern the closing actions, a lender's liquidation actions on the same loan are subject to the liquidation requirements in effect at the time that a liquidation action is taken.

§ 311.201 Status of lenders.

Lenders and their contractors are independent entities that are responsible for their own actions with respect to a loan. EDA has no responsibility or liability for any claim by a borrower, guarantor or other party alleging injury as a result of any allegedly wrongful action taken by a lender, an employee, an agent, or a contractor of a lender.

§ 311.202 Status of borrowers.

Borrowers and their contractors are independent entities that are responsible for their own actions with respect to a loan. EDA has no responsibility or liability for any claim by any entity alleging injury as a result of any allegedly wrongful action taken by a borrower, an employee, an agent, or a contractor of a borrower.

Subpart D – Loan Applications.

§ 311.300 Applying for a loan.

An applicant for a loan seeking to participate in the ITM Program should apply to a lender who is an SBA preferred lender.

§ 311.301 The contents of an ITM Program application.

For most ITM Program loans, EDA requires that an ITM Program application contain, among other things, a description of the history and nature of the business, the amount and purpose of the loan, the lender's credit memorandum, the collateral offered for the loan, current financial statements, historical financial statements (or tax returns if appropriate) for the past three fiscal years, IRS tax verification, and a business plan, when applicable. Personal histories and financial statements may be required from the applicant and associates of the applicant (and the operating entity, if applicable).

§ 311.302 Approval or denial.

The lender will receive written notice of acceptance or rejection for participation in the ITM Program by EDA, and will pass the decision on to the applicant. Notice of rejection will include the reasons for rejection.

§ 311.303 Reconsideration after rejection.

If a lender believes the reasons for rejection have been overcome, the lender may submit a request for reconsideration to EDA along with a detailed written explanation of how the loan

applicant has overcome the reason(s) for the rejection. The request must be submitted to EDA within 6 months of the rejection. Any request submitted more than 90 days after the date of the rejection must include current financial statements. The request for reconsideration will be reviewed by two officials designated by the Assistant Secretary. If the two officials agree on a decision (acceptance or rejection), the decision will be final. If the two officials do not agree, the Assistant Secretary will make the final decision. In either case, EDA will inform the lender, in writing, of the final decision.

Subpart E – Reporting.

§ 311.400 Monthly servicing report.

Lenders must submit a servicing report to EDA on a monthly basis for every loan outstanding. EDA may request such loan servicing information including principal and interest payments, fee payments, loan status, and any additional information as the Assistant Secretary sees fit. Lenders may collect and store loan data using a prudent policy similar to their policy for non-guaranteed commercial loans.

§ 311.401 Disclosure of fees.

An applicant for an ITM Program loan must identify to EDA the name of each agent that helped the applicant obtain the loan, describing the services performed, and disclosing the amount of each fee paid or to be paid by the applicant to the agent in conjunction with the performance of those services. Form ED-159 provides full limitations on fee amounts and eligible services.

§ 311.402 Notifying DOC’s Office of Inspector General of suspected fraud.

Lenders, borrowers, and EDA employees must notify the Department’s Office of Inspector General of any information of which they are aware indicating that fraud may have

occurred in connection with an ITM Program loan. Send the notification to the U.S. Department of Commerce, Office of Inspector General, 1401 Constitution Avenue NW., Washington, DC 20230, telephone (202) 482-4661.

Subpart F – Limitations on Use of Proceeds.

§ 311.500 Refinancing unsecured or under-secured loans.

A borrower may not use ITM Program loan proceeds to pay any creditor in a position to sustain a loss causing a shift to EDA of all or part of a potential loss from an existing debt.

Subpart G – Maturities; Interest Rates; Loan and Guarantee Amounts

§ 311.600 Percentage of a loan eligible for an ITM Program guarantee.

EDA's guarantee percentage must not exceed the applicable percentage established in the Act. The maximum allowable guarantee percentage on a loan shall not exceed an amount equal to 80 percent of the obligation, as determined at the time at which the loan guarantee is issued.

§ 311.601 Loan size limits.

The maximum size for a loan that is eligible for the ITM Program is \$10 million; however, loans as large as \$15 million may be approved by the Assistant Secretary on a case-by-case basis.

§ 311.602 Limits on loan maturities.

The term of a loan shall be the lesser of 30 years or 90% of the projected useful life, as determined by the Assistant Secretary or designee, of the physical asset to be financed by the obligation.

§ 311.603 Fixed interest rate loans.

A loan may have a fixed interest rate based on EDA's maximum allowable rates as published periodically in the **Federal Register**.

§ 311.604 Variable interest rate loans.

A Lender may use a variable rate of interest, upon EDA's approval. EDA shall approve the use of a variable interest rate under the following conditions:

- (a) *Frequency.* Any change in the interest rate may only occur on the first calendar day of a month, with the first change allowed in the first month following initial disbursement. The new rate will use the base rate (see paragraph (c) of this section) in effect on the first business day of the month.
- (b) *Range of fluctuation.* The amount of fluctuation shall be equal to the movement in the base rate. The difference between the initial rate and the ceiling rate may be no greater than the difference between the initial rate and the floor rate.
- (c) *Base rate.* The base rate will be one of the following:
 - (i) The prime rate as printed in a national financial newspaper published each business day;
 - (ii) The 3-month London Interbank Offered Rate (LIBOR) as printed in a national financial newspaper published each business day; or
 - (iii) Five-year Treasuries as printed in the Federal Reserve's H.15 release, as in effect on the first business day of the month.
- (d) *Maximum spreads.* The maximum spread will be defined based on the base rate. A spread of 2.75 percentage points for prime rate, 5.75 percentage points for LIBOR rate, or 4.75 percentage points for Treasury rate will be the maximum allowed, unless otherwise decided by the Assistant Secretary and published in the **Federal Register**.

- (e) *Amortization.* A lender is required to reamortize the loan on the first calendar day of the month following an interest rate change so that the loan will be paid off by the maturity date of the note, as amended. With prior approval of EDA, the lender may use a different amortization schedule; however, EDA does not permit amortization schedules that involve balloon notes or balloon payments.
- (f) *Accrual method.* Lenders may use either a 30/360 or actual/365 accrual method for ITM Program loans (actual/366 in leap years). Actual/360 and other methods may not be used.

Subpart H – Fees.

§ 311.700 Guarantee fee.

- (a) *Amount of guarantee fee.* The guarantee fee that the lender must pay to EDA shall be published in the **Federal Register** prior to the first day of a fiscal year. Should the loan guarantee amount increase, the amount of the guarantee fee will correspondingly increase.
- (b) *When the guarantee fee is payable.* The Lender must pay the guarantee fee to EDA within 90 days after EDA gives its loan approval. The lender may charge the borrower the fee after the lender has made the first disbursement of the loan. The borrower may use the loan proceeds to pay the guarantee fee. The first disbursement, however, must not be made solely or primarily to pay the guarantee fee.
- (c) *Refund of guarantee fee.* EDA will refund the guarantee fee if the lender has not made any disbursement and the lender requests in writing the refund and cancellation of the EDA guarantee. If any disbursements have been made, the entire fee will be retained.

(d) *Payment of the guarantee fee.* The borrower may use non-revolving working capital loan proceeds to reimburse the lender for the guarantee fee. If the guarantee fee is not paid, EDA may terminate the guarantee.

(e) *Acceptance of the guarantee fee.* Acceptance of the guarantee fee by EDA shall not waive any right of EDA arising from the lender's misconduct or violation of any provision of this part, the guarantee agreement, the authorization, or other loan documents.

§ 311.701 Monthly servicing fee.

A lender must pay an on-going monthly servicing fee to EDA for each guaranteed loan it makes. If the servicing fee is not paid, EDA may terminate the guarantee. Acceptance of the servicing fee by EDA does not waive any right of EDA arising from a lender's or borrower's negligence, misconduct or violation of any provision of these regulations or the loan instruments. The servicing fee that the lender must pay to EDA shall be published in the **Federal Register** prior to the first day of a fiscal year and is due at the time of the monthly servicing report. Fees collected on a loan in which EDA refuses to pay the guarantee will not be refunded. The servicing fee cannot be charged to the borrower. EDA may institute a late fee charge for delinquent payments of the servicing fee to cover administrative costs associated with collecting delinquent fees.

§ 311.702 Fees the lender may collect from a loan applicant.

The lender may charge borrowers fees that are consistent with prudent policy and similar in all material respects to the fees assessed against non-guaranteed commercial loans. The fees contemplated in this section may include service and packaging fees, extraordinary servicing fees, out-of-pocket expenses, late payment fees, and prepayment fees, among others.

§ 311.703 Fees that the lender or associate may not collect from the borrower or share with third parties.

The lender or its associates may not:

- (a) Require the applicant or borrower to pay the lender, an associate, or any party designated by either, any fees or charges for goods or services, including insurance, as a condition for obtaining an ITM Program loan (unless permitted by this part);
- (b) Charge an applicant any commitment, bonus, broker, commission, referral or similar fee;
- (c) Charge points or add-on interest; or
- (d) Charge the borrower for legal services, unless they are hourly charges for requested services actually rendered.

Subpart I—Participation Criteria

§ 311.800 Authorization terms.

EDA may enter into an authorization with a lender to make ITM Program loans. Such an authorization does not obligate EDA to participate in any specific proposed loan that a lender may submit. The existence of an authorization does not limit EDA's rights to refuse to guarantee a specific loan or establish general ITM Program policies. An authorization shall include such detailed terms and conditions as the Assistant Secretary determines appropriate to:

- (a) Protect the interests of the United States in the event of default; and
- (b) Ensure all the patents and technology necessary are available to complete and operate the Innovative Technological Project for any borrower, including EDA in subrogation of the borrower as discussed in § 311.1000.

§ 311.801 Requirements for all participating lenders.

A lender must be in good standing under the SBA Preferred Lenders Program at all times to have any loans be eligible for the ITM Program. In addition, the lender must:

- (a) Have a continuing ability to evaluate, process, close, disburse, service, liquidate, and litigate loans in its portfolio including, but not limited to:
 - (1) Not being under any capital limitations by the FDIC to support ITM Program lending activities (for lenders with a Federal Financial Institution Regulator, meeting capital requirements for an adequately capitalized financial institution is considered sufficient); and
 - (2) Maintaining satisfactory performance, as determined by EDA in its discretion. Factors may include, but are not limited to historical performance measures (such as default rate, purchase rate, and loss rate), timely and accurate remittance of fees and monthly servicing reports, loan volume to the extent it impacts performance measures, and other performance-related measurements and information (such as contribution toward EDA's ITM Program mission);
- (b) Be open to the public for the making of such loans (not be a financing subsidiary, engaged primarily in financing the operations of an affiliate);
- (c) Have continuing good character and reputation, and otherwise meet and maintain the ethical requirements of § 311.11;
- (d) Be supervised and examined by:
 - (1) A Federal Financial Institution Regulator,

- (2) A state banking regulator satisfactory to the SBA Preferred Lenders Program, or
 - (3) SBA in its capacity under the SBA Preferred Lenders Program;
- (e) Certify that it is in good standing with SBA Preferred Lenders Program and, as applicable, with an SBA lender's state regulator satisfactory to the SBA Preferred Lenders Program and Federal Financial Institution Regulator;
- (f) Operate in a safe and sound condition using commercially reasonable lending policies, procedures, and standards employed by prudent lenders in the SBA Preferred Lenders Program; and
- (g) Allow the Assistant Secretary and the Comptroller General of the United States, or their duly authorized representatives, access to records and other pertinent documents for the purpose of conducting an audit in a reasonable and timely manner.

§ 311.802 Preferences.

An agreement to participate under the Act may not establish any preferences in favor of the lender.

§ 311.803 Other services lenders may provide borrowers.

Subject to § 311.11 lenders, their associates, or the designees of either may provide services to and contract for goods with a borrower only after full disbursement of the loan to the business or to an account not controlled by the lender, its associate, or the designee. A lender, an associate, or a designee providing such services must do so under a written contract with the borrower, based on time and hourly, or fee for service charges, and must maintain time and billing records for examination by EDA. Fees cannot exceed those charged by established professional consultants providing similar services.

§ 311.804 Advertisement of relationship with EDA.

A Lender may refer in its advertising to its participation with EDA. The advertising may not:

- (a) State or imply that the lender, or any of its borrowers, has or will receive preferential treatment from EDA;
- (b) Be false or misleading; or
- (c) Make use of DOC's or EDA's seals, emblems, insignias, or logos.

§ 311.805 Securitization and transfer.

No participating lender may securitize or otherwise, sell all or a participating portion of an ITM Program loan, or pledge an ITM Program loan without seeking and obtaining approval from the Assistant Secretary and executing a separate securitization agreement with EDA prior to securitizing. Securitization is governed by the provisions of that agreement, any related SOPs, and EDA's relevant regulations.

Subpart J – Loan Modifications and Servicing Actions

§ 311.900 Deferment of payment.

The lender may request, and EDA may agree, to defer principal, interest, or both principal and interest payments on a loan for a stated period of time, and use such other methods as it considers necessary and appropriate to help in the successful operation of the borrower.

§ 311.901 Extension of maturity.

EDA may agree to extend the maturity of a loan for up to 10 years beyond its original maturity if the extension will aid in the orderly repayment of the loan provided that the borrower maintains sufficient collateral.

§ 311.902 Loan moratoriums.

EDA may assume a borrower's obligation to repay principal and interest on a loan by agreeing to make the payments to the Lender on behalf of the borrower under terms and conditions set by EDA. This relief is called a “moratorium.” Complete information concerning this program may be obtained from EDA.

§ 311.903 Standards for lender loan servicing, loan liquidation, and debt collection litigation.

- (a) *Service using prudent lending standards.* Lenders must service ITM Program loans in their portfolio no less diligently than their non-ITM Program portfolio, and in a commercially reasonable manner, consistent with prudent lending standards, and in accordance with loan program requirements. Lenders that maintain an ITM Program loan portfolio must adhere to the same prudent lending standards for loan servicing followed by commercial lenders on loans without a government guarantee.
- (b) *Liquidate using prudent lending standards.* Lenders must liquidate and conduct debt-collection litigation for ITM Program loans in their portfolio no less diligently than for their non-ITM Program portfolio. Lenders must do so in a prompt, cost-effective and commercially reasonable manner, consistent with prudent lending standards, and in accordance with loan program requirements and with any EDA approval of either a liquidation or litigation plan or any amendment of such a plan. Lenders that do not maintain a non-ITM Program loan portfolio must adhere to the same prudent lending standards followed by commercial lenders that liquidate loans without a government guarantee. They must also agree to operate in accordance with

loan program requirements and with any EDA approval of either a liquidation or litigation plan or any amendment of such a plan.

- (c) *EDA rights to take over servicing or liquidation.* EDA may, in its sole discretion, undertake the servicing, liquidation and/or litigation of any ITM Program loan. If EDA elects to service, liquidate, and/or litigate a loan, it will notify the relevant lender in writing, and, upon receiving such notice, the lender must assign the loan instruments to EDA and provide any needed assistance to allow EDA to service, liquidate, and/or litigate the loan. EDA will notify the borrower of the change in servicing. EDA may use contractors to perform these actions.

§ 311.904 Servicing and liquidation actions that require the prior written consent of EDA.

- (a) *Actions by lenders.* Except as otherwise provided in a supplemental authorization with a lender, EDA must give its prior written consent before a lender takes any of the following actions:
- (1) Increases the principal amount of a loan above that authorized by EDA at loan origination.
 - (2) Confers a preference on the lender or engages in an activity that creates a conflict of interest.
 - (3) Compromises the principal balance of a loan.
 - (4) Takes title to any property in the name of EDA.
 - (5) Takes title to environmentally contaminated property, or takes over operation and control of a business that handles hazardous substances or hazardous wastes.

- (6) Transfers, sells or pledges a loan.
- (7) Substantially alters the terms or conditions of any loan instrument.
- (8) Releases collateral so as to cause the liquidation value of the remaining collateral to be less than 110% of the remaining outstanding balance of the loan.
- (9) Accelerates the maturity of the note.
- (10) Compromises or releases any claim against any borrower or obligor, or against any guarantor, standby creditor, or any other person that is contingently liable for moneys owed on the loan.
- (11) Accepts a workout plan to restructure the material terms and conditions of a loan that is in default or liquidation.
- (12) Takes any action for which prior written consent is required by a loan program requirement.

(b) *Documentation requirements.* For all servicing/liquidation actions not requiring EDA's prior written consent, Lenders must document the justifications for their decisions and retain those and any supporting documents in their file for future EDA review to determine if the actions taken by the lender were prudent, commercially reasonable, and compliant with all ITM Loan Program Requirements.

Subpart K – EDA Purchase of a Guaranteed Portion

§ 311.1000 Purchase of loan guarantees.

- (a) *When EDA will purchase.* A lender may demand in writing that EDA honor its guarantee if the Borrower is in uncured default on any installment for more than 60 calendar days (or less if EDA agrees), all reasonable workout attempts have

failed, and all business personal property securing the defaulted ITM Program loan has been liquidated. The borrower must be in uncured default for at least 60 days prior to the lender beginning any liquidation. A lender may also submit a request for purchase of a defaulted ITM Program loan when a borrower files for Federal bankruptcy as long as a period of at least 60 days has elapsed since the last full installment payment. If a borrower cures a default before a lender requests purchase by EDA, the lender's right to request purchase on that default lapses. EDA considers liquidation of business personal property collateral to be completed when a lender has exhausted all prudent and commercially reasonable efforts to collect upon these assets. In addition, EDA, in its sole discretion, may purchase the guaranteed portion of a loan at any time whether in default or not, with or without the request from a lender.

- (b) *Documentation for purchase.* EDA will not purchase its guaranteed portion of a loan from a lender unless the lender has submitted to EDA documentation that EDA deems sufficient to allow EDA to determine whether purchase of the guarantee is warranted under § 311.1004.
- (c) *No waiver of EDA's rights.* Purchase by EDA of the guaranteed portion of a loan, or of a portion of EDA's guarantee of a loan, either through a negotiated agreement with a lender or otherwise, does not waive any of EDA's rights to recover from the responsible lender any money paid on the guarantee based upon the occurrence of any of the events set forth in § 311.1004 in connection with that loan.
- (d) *EDA's rights of subrogation.* If EDA makes a payment under § 311.1000, EDA shall be subrogated to the rights, as specified in the loan instruments, of the recipient of

the payment or related agreements. EDA's rights with respect to any property acquired pursuant to the loan instruments or related agreement shall be superior to the rights of any other person with respect to that property. These rights include, if appropriate, the authority (notwithstanding any other provisions of the law):

- (1) To complete, maintain, operate, lease, or otherwise dispose of any property acquired pursuant to such loan guarantee or related agreement; or
- (2) To permit the borrower, pursuant to an agreement with EDA, to continue to pursue the purposes of the project if the Assistant Secretary determines that such an agreement is in the public interest.

§ 311.1001 Applicable interest rate after EDA purchases the guaranteed portion of an ITM Program loan.

When EDA purchases the guaranteed portion of a fixed interest rate loan, the rate of interest remains as stated in the note. On loans with a variable interest rate, the interest rate that the Borrower owes will be at the rate in effect at the time of the earliest uncured payment default, or the rate in effect at the time of purchase if no default has occurred.

§ 311.1002 Payment of accrued interest to the lender when EDA purchases the guaranteed portion.

- (a) *Rate of interest.* If EDA purchases the guaranteed portion from a lender, it will pay accrued interest at:
 - (1) The rate in the note if it is a fixed rate loan; or
 - (2) The rate in effect on the date of the earliest uncured payment default, or of EDA's purchase (if there has been no default).

(b) *Payment to lender.* EDA will pay up to a maximum of 180 days interest to a lender at the time of guarantee purchase.

§ 311.1003 Earliest uncured payment default.

The earliest uncured payment default is the date of the earliest failure by a borrower to pay a regular installment of principal and/or interest when due. Payments made by the borrower before a lender makes its request to EDA to purchase are applied to the earliest uncured payment default with payment first applied to outstanding accrued interest then principal. If the installment is paid in full, the earliest uncured payment default date will advance to the next unpaid installment date. If a borrower makes any payment after the lender makes its request to EDA to purchase, the earliest uncured payment default date does not change because the lender has already exercised its right to request purchase.

§ 311.1004 Release of EDA's liability.

- (a) EDA is released from liability on a loan guarantee (in whole or in part, within EDA's exclusive discretion), if any of the events below occur:
- (1) The lender has failed to comply materially with any loan program requirement for ITM Program loans.
 - (2) The lender has failed to make, close, service, or liquidate a loan in a prudent manner;
 - (3) The lender's improper action or inaction has placed EDA at risk;
 - (4) The lender has failed to disclose a material fact to EDA regarding a guaranteed loan in a timely manner;
 - (5) The lender has misrepresented a material fact to EDA regarding a guaranteed loan;

- (6) EDA has received a written request from the lender to terminate the guarantee;
 - (7) The lender has not paid the guarantee fee within the period required under EDA rules and regulations;
 - (8) The lender has failed to request that EDA purchase a guarantee within 180 days after the maturity date of the loan. Notwithstanding, if the lender is conducting liquidation or debt collection litigation in connection with a loan that has matured, EDA will be released from its guarantee only if the lender fails to request that EDA purchase the guarantee within 180 days after the completion of the liquidation or debt collection litigation;
 - (9) The lender has failed to use required EDA forms or exact electronic copies; or
 - (10) The borrower has paid the loan in full.
- (b) If EDA determines, at any time, that any of the events set forth in paragraph (a) of this section occurred in connection with that loan, EDA is entitled to recover any moneys paid on the guarantee plus interest from the lender responsible for those events.
- (c) If the lender's loan documentation or other information indicates that one or more of the events in paragraph (a) of this section occurred, EDA may undertake such investigation as it deems necessary to determine whether to honor or deny the guarantee, and may withhold a decision on whether to honor the guarantee until the completion of such investigation.

- (d) Any information provided to EDA by a lender or other party will not prejudice, or be construed as any waiver of, EDA's right to deny liability for a guarantee if one or more of the events listed in paragraph (a) of this section occur.
- (e) Unless EDA provides written notice to the contrary, the lender remains responsible for all loan servicing and liquidation actions until EDA honors its guarantee in full.

§ 311.1005 Liquidation and litigation plans.

- (a) *EDA oversight.* EDA may monitor or review liquidation through the review of liquidation plans that lenders must submit to EDA for approval prior to undertaking liquidation, and through liquidation wrap-up reports that lenders must submit to EDA at the completion of liquidation. EDA will monitor debt collection litigation, such as judicial foreclosures, bankruptcy proceedings and other state and Federal insolvency proceedings, through the review of litigation plans, as set forth in this section.
- (b) *Liquidation plan.* A lender must, prior to undertaking any liquidation, submit a written proposed liquidation plan to EDA and receive EDA's written approval of that plan.
- (c) *Litigation plan.* A lender must obtain EDA's prior approval of a litigation plan before proceeding with any Non-Routine Litigation, as defined in paragraph (c)(1) of this section. EDA's prior approval is not required for routine litigation, as defined in paragraph (c)(2) of this section.
 - (1) Non-routine litigation includes:
 - (i) All litigation where factual or legal issues are in dispute and require resolution through adjudication;

(ii) Any litigation where legal fees are estimated to exceed \$10,000;

(iii) Any litigation involving a loan where a lender has an actual or potential conflict of interest with EDA; and

(iv) Any litigation involving an ITM Program loan where the lender has made or is servicing a separate loan to the same borrower or an associate of the borrower that is not an ITM Program loan.

(2) Routine litigation means uncontested litigation, such as non-adversarial matters in bankruptcy and undisputed foreclosure actions, having estimated legal fees not exceeding \$10,000.

(d) *Decision by EDA to take over litigation.* If a lender is conducting, or proposes to conduct, debt collection litigation on an ITM Program loan, EDA may take over the litigation if EDA determines that the outcome of the litigation could adversely affect EDA's administration of the ITM Program or that the Government is entitled to legal remedies that are not available to the Lender. Examples of cases that could adversely affect EDA's administration of the ITM Program include, but are not limited to, situations where EDA determines that:

- (1) The litigation involves important governmental policy or program issues;
- (2) The case is potentially of great precedential value or there is a risk of adverse precedent to the Government;
- (3) The lender has an actual or potential conflict of interest with EDA;
- (4) The legal fees of the lender's outside counsel are unnecessary, unreasonable, or not customary in the locality; or

(5) The litigation adversely affects EDA's financial interest in the loan.

(e) *Amendments to a liquidation or litigation plan.* Lenders must submit an amended liquidation or litigation plan to address any material changes arising during the course of the liquidation or litigation that were not addressed in the original plan or an amended plan. Lenders must obtain EDA's written approval of the amended plan prior to taking any further liquidation or litigation action. Examples of such material changes that would require the approval of an amended plan include, but are not limited to:

- (1) Changes arising during the course of routine litigation that transform the litigation into non-routine litigation, such as when the debtor contests a foreclosure or when the actual legal fees incurred exceed \$10,000;
- (2) If EDA has approved a litigation plan where anticipated legal fees exceed \$10,000, or has approved an amended plan, and thereafter the anticipated or actual legal fees increase by more than 15 percent of the amount in the plan most recently approved by EDA; or
- (3) If EDA has approved a liquidation plan, or an amended plan, and thereafter the anticipated or actual costs of conducting the liquidation increase by more than 15 percent of the amount in the plan most recently approved by EDA.

(f) *Limited waiver of need for a written liquidation or litigation plan.* EDA may, in its sole discretion, and upon request by a Lender, waive the requirements of paragraphs (b), (c), or (e) of this section if the following conditions are met:

- (1) One of the following extraordinary circumstances exists to warrant such a waiver:
 - (i) Expeditious action is needed to avoid the potential risk of loss on the loan or dissipation of collateral exists;
 - (ii) An immediate response is required to litigation by a borrower, guarantor or third party; or
 - (iii) Any other urgent reason as determined by EDA arises;
- (2) The lender obtains EDA's written consent to such waiver before undertaking the palliative emergency action, if at all practicable;
- (3) EDA's waiver will apply only to the specific action(s) that the lender has identified to EDA as being necessary to address the emergency; and
- (4) The lender, as soon after the emergency as is practicable, submits a written liquidation or litigation plan to EDA or, if appropriate, a written amended plan, and may not take further liquidation or litigation action without written approval of such plan or amendment by EDA.

(g) *Appeals.* A lender that made loans under its authority that disagrees with EDA's decision pertaining to an original or amended liquidation plan, other than such portions of the plan that address litigation matters, may appeal this decision in writing within 30 days of the decision to an official designated by the Assistant Secretary. That official will review the original decision and make a final decision based on the information submitted with the original request and any additional information provided by the lender. The additional information should address any concerns identified by the initial reviewing official. If the issue under discussion is

part of a litigation plan, the Chief Counsel for EDA will review the initial decision and any additional information submitted by the bank and make a final decision on the appeal.

§ 311.1006 Payment by EDA of legal fees and other expenses.

(a) *Legal fees EDA will not pay.* (1) EDA will not pay legal fees or other costs that a Lender incurs:

(i) In asserting a claim, cross claim, counterclaim, or third-party claim against EDA or in defense of an action brought by EDA, unless payment of such fees or costs is otherwise required by Federal law.

(ii) In connection with actions of a lender's outside counsel for performing non-legal liquidation services, unless authorized by EDA prior to the action.

(iii) In taking actions that solely benefit a lender and that do not benefit EDA, as determined by EDA.

(2) EDA will not pay legal fees or other costs a lender incurs in the defense of, or pay for any settlement or adverse judgment resulting from, a suit, counterclaim, or other claim by any borrower, guarantor, or other party that seeks damages based upon a claim that the lender breached any duty or engaged in any wrongful actions, unless EDA expressly directed the lender to undertake the allegedly wrongful action that is the subject of the suit, counterclaim or other claim.

(b) *Legal fees EDA may decline to pay.* In addition to any right or authority EDA may have under law or contract, EDA may, in its discretion, decline to pay a lender for

all, or a portion, of legal fees and/or other costs incurred in connection with the liquidation and/or litigation of an ITM Program loan under any of the following circumstances:

- (1) EDA determines that the lender failed to perform liquidation or litigation promptly and in accordance with commercially reasonable standards, in a prudent manner, or in accordance with any loan program requirement or EDA approvals of either a liquidation or litigation plan or any amendment of such a plan.
- (2) A lender fails to obtain prior written approval from EDA for any liquidation or litigation plan, or for any amended liquidation or litigation plan, or for any action set forth in § 311.902, when such approval is required by these regulations or a loan program requirement.
- (3) If EDA has not specifically approved fees or costs identified in an original or amended liquidation or litigation plan under § 311.1005, and EDA determines that such fees or costs are not reasonable, customary or necessary in the locality in question. In such cases, EDA will pay only such fees as it deems are necessary, customary and reasonable in the locality in question.

(c) *Appeals—liquidation costs.* A lender that disagrees with a decision by EDA to decline to reimburse all, or a portion, of the fees and/or costs incurred in conducting liquidation may appeal this decision in writing within 30-calendar days of the decision to an official designated by the Assistant Secretary. The official designated by the Assistant Secretary will make the final decision. If the issue under discussion

involves litigation expenses, the decision-making official will consult with the Chief Counsel prior to making a final determination.

- (d) *Appeals—litigation costs.* A lender that disagrees with a decision by EDA to decline to reimburse all, or a portion, of the legal fees and/or costs incurred in conducting debt collection litigation may appeal this decision in writing within 30 calendar days of the decision to an official designated by the Assistant Secretary. The appeal may include additional information to assist in reaching a final decision. The final decision will be made by an official designated by the Assistant Secretary who was not involved in the initial decision. This official will consult with the Chief Counsel prior to making a final determination.

§ 311.1007 EDA’s policies concerning the liquidation of collateral and the sale of ITM Program loans.

- (a) *Liquidation policy.* EDA or the lender, with approval of EDA, may liquidate collateral securing a loan if the loan is in default.
- (b) *Sale and conversion of loans.* Without the consent of the borrower, EDA may sell ITM Program loans to qualified bidders by means of competitive procedures at publicly advertised sales. Bidder qualifications will be set for each sale in accordance with the terms and conditions of each sale.
- (c) *Disposal of collateral and assets acquired through foreclosure or conveyance.* EDA or the lender, with the consent of EDA, may sell real and personal property (including contracts and claims) pledged to secure a loan that is in default in accordance with the provisions of the related security instrument.

- (1) *Competitive bids or negotiated sales.* Generally, EDA will offer loan collateral and acquired assets for public sale through competitive bids at auctions or sealed bid sales. The lender may use negotiated sales if consistent with its usual practice for similar non-EDA assets.
 - (2) *Lease of acquired property.* EDA and the lender will consider proposals for a lease if it appears a property cannot be sold advantageously and the lease may be terminated on reasonable notice upon receipt of a favorable purchase offer.
- (d) *Recoveries and security interests shared.* EDA and the lender will share pro rata (in accordance with their respective interests in a loan) all loan payments or recoveries, including proceeds from asset sales, all reasonable expenses (including advances for the care, preservation, and maintenance of collateral securing the loan and the payment of senior lienholders), and any security interest or guarantee (excluding EDA's guarantee) which the lender or EDA may hold or receive in connection with a loan.
- (e) *Guarantors.* Guarantors of financial assistance have no rights of contribution against EDA on an ITM Program loan. EDA is not deemed to be a co-guarantor with any other guarantors.

§ 311.1008 Loan asset sales.

- (a) *General.* Loan asset sales are governed by this section.
- (b) The lender will be deemed to have consented to EDA's sale of the loan (guaranteed and unguaranteed portions) in an asset sale conducted or overseen by EDA upon the occurrence of:

- (1) EDA's purchase of the guaranteed portion from the lender, provided however, that if EDA purchased the guaranteed portion pursuant to §§ 311.1000 through 311.1003 prior to the lender's completion of all liquidation actions with respect to the loan, then EDA will not sell such loan in an asset sale until nine months from the date of EDA's purchase; or
 - (2) EDA receives written consent from the lender.
- (c) For loans identified in paragraph (b)(1) of this section, the lender may request that EDA withhold the loan from an asset sale if the lender submits a written request to EDA within 15 business days of EDA's purchase of the guaranteed portion of the loan from the registered holder and if such request addresses the issues described in this subparagraph. The lender's written request must advise EDA of the status of the loan, the lender's plans for workout and/or liquidation, including any pending sale of loan collateral or foreclosure proceedings arranged prior to EDA's purchase that already are underway, and the lender's estimated schedule for restructuring the loan or liquidating the collateral. EDA will consider the lender's request and, based on the circumstances, EDA in its sole discretion may elect to defer including the loan in an asset sale in order to provide the lender additional time to complete the planned restructuring and/or liquidation actions.
- (d) After EDA has purchased the guaranteed portion of a loan from the lender, the lender must continue to perform all necessary servicing and liquidation actions for the loan up to the point the loan is transferred to the purchaser in an asset sale. The lender also must cooperate and take all necessary actions to effectuate both the asset sale and the transfer of the loan to the purchaser in the asset sale.

Subpart L – Enforcement Actions

§ 311.1100 Grounds for enforcement actions.

- (a) *Agreement.* By making ITM Program loans, EDA lenders automatically agree to the terms, conditions, and remedies in the loan program requirements, as promulgated or issued from time to time and as fully set forth in the authorization or other applicable participation, guaranty, or supplemental agreement.
- (b) *Scope.* Upon determination that the grounds applicable to an enforcement action exist, EDA may undertake one or more of the actions listed in § 311.1101 or as otherwise authorized by law.
- (c) *General grounds for enforcement actions.* Except as provided in paragraphs (d) and (e) of this section, the grounds that may trigger an enforcement action against a lender include:
 - (1) Failure to maintain eligibility requirements for SBA Preferred Lenders Program;
 - (2) Failure to comply materially with any requirement imposed by ITM Program requirements;
 - (3) Making a material false statement or failure to disclose a material fact to EDA. A material fact includes but is not limited to any fact that is necessary to make a statement not misleading in light of the circumstances under which the statement was made;
 - (4) Not performing underwriting, closing, disbursing, servicing, liquidation, litigation or other actions in a commercially reasonable and prudent manner for an ITM Program loan;

- (5) Failure within the time period specified to correct an underwriting, closing, disbursing, servicing, liquidation, litigation, or reporting deficiency, or failure in any material respect to take other corrective action, after receiving notice from EDA of a deficiency and the need to take corrective action;
- (6) Engaging in a pattern of uncooperative behavior or taking an action that EDA determines is detrimental to an EDA program, that undermines management or administration of a program, or that is not consistent with standards of good conduct. Prior to issuing a notice of a proposed enforcement action or immediate suspension under § 311.1101 based upon this paragraph, EDA must send prior written notice to the Lender explaining why the lender's actions were uncooperative, detrimental to the program, undermined EDA's management of the program, or were not consistent with standards of good conduct. The prior notice must also state that the lender's actions could give rise to a specified enforcement action, and provide the Lender with a reasonable time to cure the deficiency before any further action is taken;
- (7) Repeated failure to correct continuing deficiencies;
- (8) Unauthorized disclosure of reports, any ratings assigned to the lender by EDA, or confidential information;
- (9) Indictment on felony or fraud charges of an officer, or loan agent involved with ITM Program loans for the lender;
- (10) As otherwise authorized by law;

- (11) Upon a determination by EDA that one or more of the grounds in paragraph (c) of this section, as applicable, exist and that immediate action is needed to prevent significant impairment of the integrity of the ITM Program;
 - (12) Upon a determination by EDA that one or more of the grounds in paragraph (c) of this section exists and that immediate action is needed to prevent significant impairment of the integrity of the ITM Program; and
 - (13) Any other reason that EDA determines may increase EDA's financial risk.
- (d) *Grounds required for certain enforcement actions against lenders.* The grounds that are required to take enforcement action are:
- (1) *For ITM Program suspensions and revocations—*
 - (i) False statements knowingly made in any required written submission to EDA; or
 - (ii) An omission of a material fact from any written submission required by EDA; or
 - (iii) A willful or repeated violation of EDA regulations; or
 - (iv) A willful or repeated violation of any condition imposed by EDA with respect to any application, request, or agreement with EDA; or
 - (v) A violation of any cease and desist order of EDA.
 - (2) *For ITM Program immediate suspension—*EDA may suspend a lender, effective immediately, if in addition to meeting the grounds set forth in paragraph (d)(1) of this section, the Assistant Secretary finds

extraordinary circumstances requiring immediate action in order to protect the financial or legal position of the United States.

- (3) *For cease and desist orders—*
 - (i) A violation of EDA regulations, or
 - (ii) Where a lender is or is about to engage in any acts or practices that will violate EDA's regulations.
- (4) *For an emergency cease and desist order—*
 - (i) Where grounds for cease and desist order are met,
 - (ii) The Assistant Secretary finds extraordinary circumstances, and
 - (iii) EDA must act expeditiously to protect the financial or legal position of the United States.
- (5) *For transfer of loan portfolio—*
 - (i) Where a court has appointed a receiver; or
 - (ii) The lender is either not in compliance with capital requirements or is insolvent. A lender is insolvent within the meaning of this provision when all of its capital, surplus, and undivided profits are absorbed in funding losses and the remaining assets are not sufficient to pay and discharge its contracts, debts, and other obligations as they come due.
- (6) *For transfer of servicing activity—*
 - (i) Where grounds for transfer of loan portfolio are met; or
 - (ii) Where the lender is otherwise operating in an unsafe and unsound condition.

§ 311.1101 Types of enforcement actions—lenders.

Upon a determination that the grounds set forth in § 311.110 exist, EDA may undertake, in its discretion, one or more of the following enforcement actions for each of the types of lenders listed. EDA will take such action in accordance with procedures set forth in § 311.1102. If enforcement action is taken under this section and the lender fails to implement required corrective action in any material respect within the required timeframe in response to the enforcement action, EDA may take further enforcement action, as authorized by law. EDA's decision to take an enforcement action will not, by itself, invalidate a guarantee previously provided by EDA.

- (a) *Enforcement actions against lenders—*(1) *Imposition of portfolio guarantee dollar limit.* EDA may limit the maximum dollar amount that EDA will guarantee on the lender's ITM Program loans.
- (2) *Suspension or revocation from EDA program.* EDA may suspend or revoke a lender's authority to participate in the ITM Program, including the authority to make, service, liquidate, or litigate ITM Program loans. Section 311.1100(d)(1) sets forth the grounds for EDA program suspension or revocation of a lender.
- (3) *Immediate suspension.* EDA may suspend, effective immediately, a lender's authority to participate in the ITM Program, or the authority to make, service, liquidate, or litigate ITM Program loans. Section 311.1100(d)(2) sets forth both the grounds for immediate suspension of delegated authority for all lenders and grounds for immediate suspension of a lender.

- (4) *Debarment.* In accordance with 2 CFR parts 180 and 2700, EDA may take any necessary action to debar a person, as defined in § 311.3, including but not limited to an officer, a director, a general partner, a manager, an employee, an agent, or other participant in the affairs of a lender's ITM Program-related operations.
- (5) *Other actions available under law.* EDA may take all other enforcement actions against lenders available under law.

(b) *Enforcement actions specific to lenders.* In addition to those enforcement actions listed in paragraph (a) of this section, EDA may take any one or more of the following enforcement actions specific to lenders:

- (1) *Cease and desist order.* EDA may issue a cease and desist order against the lender. The cease and desist order may either require the lender to take a specific action, or to refrain from a specific action. The cease and desist order may be issued as effective immediately (or as a proposal for order).
- (2) *Prohibited actions.* EDA may prohibit a management official from participating in management of the ITM Program loan or from reviewing, approving, closing, servicing, liquidating or litigating any ITM Program loan, or any other activities of the lender while the removal proceeding is pending in order to protect a lender or the interests of EDA.
- (3) *Initiate request for appointment of receiver.* EDA may make application to a district court to take exclusive jurisdiction of a lender and appoint a trustee or receiver to hold or administer the portfolio of ITM Program loans and sell such loans to a third party, and/or take possession of

servicing activities of ITM Program loans and sell such servicing rights to a third party.

- (4) *Civil monetary penalties for report filing failure.* EDA may seek civil penalties of not more than \$5,000 a day against a lender that fails to file any regular or special report by its due date as specified by regulation or EDA written directive.

§ 311.1102 General procedures for enforcement actions against lenders.

- (a) *In general.* Except as otherwise set forth for the enforcement actions listed in paragraphs (b) and (c) of this section, EDA will follow the procedures listed below.

- (1) *EDA's notice of enforcement action.* (i) When undertaking an immediate suspension under § 311.1101 or prior to undertaking an enforcement action set forth in § 311.1101, EDA will issue a written notice to the affected lender identifying the proposed enforcement action or notifying it of an immediate suspension. The notice will set forth in reasonable detail the underlying facts and reasons for the proposed action or immediate suspension. If the notice is for a proposed or immediate suspension, EDA will also state the scope and term of the proposed or immediate suspension.

- (ii) If a proposed enforcement action or immediate suspension is based upon information obtained from a third party other than the lender, EDA's notice of proposed action or immediate suspension will provide copies of documentation received from such third party, or the

name of the third party in case of oral information, unless EDA determines that there are compelling reasons not to provide such information. If compelling reasons exist, EDA will provide a summary of the information it received to the lender.

(2) *Lender's opportunity to object.* (i) A lender that desires to contest a proposed enforcement action or an immediate suspension must file, within 30 calendar days of its receipt of the notice or within some other term established by EDA in its notice, a written appeal to the appropriate EDA official identified in the notice. Notice will be presumed to have been received within five calendar days of the date of the notice unless the Lender can provide compelling evidence to the contrary.

(ii) The lender's appeal must set forth in detail all grounds known to the Lender to contest the proposed action or immediate suspension and all mitigating factors, and must include documentation that the lender believes is most supportive of its appeal. A lender must exhaust this administrative remedy in order to preserve its appeal to a proposed enforcement action or an immediate suspension.

(iii) If a lender can reasonably demonstrate, as determined by EDA, that the lender does not understand the justification given by EDA in its notice of the action, the agency will provide clarification. EDA will provide the requested clarification in writing to the lender or notify the lender in writing that EDA has determined that such clarification is not necessary. EDA, in its sole discretion, will further advise in writing

whether the lender may have additional time to present its appeal to the notice. Requests for clarification must be made to the appropriate EDA official identified in the notice in writing and received by EDA within the 30 calendar day timeframe or the timeframe given by the notice for response.

(iv) A lender may request additional time to respond to EDA's notice if it can show that there are compelling reasons why it is not able to respond within the 30-day timeframe or the response timeframe given by the notice. If such requests are submitted to the agency, EDA may, in its sole discretion, provide the requesting lender with additional time to respond to the notice of proposed action or immediate suspension. Requests for additional time to respond must be made in writing to the appropriate EDA official identified in the notice and received by EDA within the 30 calendar day timeframe or the response timeframe given by the notice.

(v) Prior to the issuance of a final decision by EDA, if a lender can show that there is newly discovered material evidence that, despite the lender's exercise of due diligence, could not have been discovered within the timeframe given by EDA to respond to a notice, or that there are compelling reasons beyond the lender's control as to why it was not able to present a material fact or argument to EDA, and that the lender has been prejudiced by not being able to present such

information, the lender may submit such information to EDA and request that the Agency consider such information in its final decision.

(3) *EDA's notice of final agency decision where lender filed appealed the proposed action or immediate suspension.*

(i) If the affected lender timely appeals a proposed enforcement action other than an immediate suspension in accordance with this section, EDA must issue a written notice of final decision to the affected lender advising whether EDA is undertaking the proposed enforcement action and setting forth the grounds for the decision. EDA will issue such a notice of decision within 90 calendar days of either receiving the appeal or from when additional information is provided under paragraph (a)(2)(v) or (a)(3)(iii) of this section, whichever is later, unless EDA provides notice that it requires additional time.

(ii) If the affected lender timely appeals a notice of immediate suspension, EDA must issue a written notice of final decision to the affected lender within 30 calendar days of receiving the appeal advising whether EDA is continuing with the immediate suspension, unless EDA provides notice that it requires additional time. If the lender submits additional information to EDA (under paragraph (a)(2)(v) or (a)(3)(iii) of this section) after submitting its appeal but before EDA issues its final decision, EDA must issue its final decision within 30 calendar days of receiving such information, unless EDA provides notice that it requires additional time.

- (iii) Prior to issuing a notice of decision, EDA may request additional information from the affected lender or other parties and conduct any other investigation it deems appropriate. If EDA determines, in its sole discretion, to consider an untimely appeal, it must issue a notice of final decision pursuant to this paragraph (a)(3).
- (4) *EDA's notice of final agency decision where no appeal was filed or an untimely appeal was not considered.* If EDA chooses not to consider an untimely appeal or if the affected lender fails to file a written appeal to a proposed enforcement action or an immediate suspension, and if EDA continues to believe that such proposed enforcement action or immediate suspension is appropriate, EDA must issue a written notice of final decision to the affected lender that EDA is undertaking one or more of the proposed enforcement actions against the lender or that an immediate suspension of the lender will continue. Such a notice of final decision need not state any grounds for the action other than to reference the lender's failure to file a timely appeal, and represents the final agency decision.
- (5) *Appeals.* A lender may appeal the final agency decision only in the appropriate Federal District Court.

Dated: August 30, 2016

Roy K.J. Williams
Assistant Secretary of Commerce for Economic Development

[FR Doc. 2016-22284 Filed: 9/20/2016 8:45 am; Publication Date: 9/21/2016]