

requirements, under or established pursuant to § 923.41, § 923.52, § 923.53, or § 923.55, the handling of cherries in such minimum quantities, or types of shipments, or for such specified purposes as the committee, with approval of the Secretary, may prescribe. Specified purposes under this section may include shipments of cherries for grading or packing to specified locations outside the production area and shipments to facilitate the conduct of marketing research and development projects established pursuant to § 923.45.

(c) The committee shall, with the approval of the Secretary, prescribe such rules, regulations, and safeguards as it may deem necessary to prevent cherries handled under the provisions of this section from entering the channels of trade for other than the specific purposes authorized by this section. Such rules, regulations, and safeguards may include the requirements that handlers shall file applications and receive approval from the committee for authorization to handle cherries pursuant to this section, and that such applications be accompanied by a certification by the intended purchaser or receiver that the cherries will not be used for any purpose not authorized by this section. The committee may rescind or deny to any handler the special purpose shipment certificate if proof satisfactory to the committee is obtained that cherries shipped for the purpose stated in this section were handled contrary to the provisions of this section.

#### *Proposal No. 4*

Revise § 923.41 by adding a new paragraph (c) to read as follows:

#### **§ 923.41 Assessments.**

\* \* \* \* \*

(c) If a handler does not pay any assessment within the time prescribed by the committee, the assessment may be subject to an interest or late payment charge, or both, as may be established by the Secretary as recommended by the committee. The committee may also recommend other methods of assessment collection with the approval of the Secretary.

#### *Proposal No. 5*

Amend § 923.52 by revising paragraph (a)(3) to read as follows:

#### **§ 923.52 Issuance of regulations.**

(a) \* \* \*

(3) Fix the size, capacity, weight, dimensions, markings, or pack of the container, or containers, which may be

used in the packaging or handling of cherries.

\* \* \* \* \*

#### *Proposal No. 6*

Revise § 923.25 to read as follows:

#### **§ 923.25 Acceptance.**

Any person prior to selection as a member or an alternate member of the committee shall qualify by filing with the Secretary a written acceptance of willingness to serve on the committee.

The Fruit and Vegetable Programs, Agricultural Marketing Service, proposes the following two amendments.

#### *Proposal No. 7*

Revise § 923.21 to read as follows:

#### **§ 923.21 Term of office.**

The term of office of each member and alternate member of the committee shall be for two years beginning April 1 and ending March 31. Members and alternate members shall serve in such capacities for the portion of the term of office for which they are selected and have qualified and until their respective successors are selected and have qualified. Committee members shall not serve more than three consecutive terms. Members who have served for three consecutive terms must leave the committee for at least one year before becoming eligible to serve again.

#### *Proposal No. 8*

Amend § 923.64 by adding a new sentence at the beginning of paragraph (c) to read as follows:

#### **§ 923.64 Termination**

\* \* \* \* \*

(c) The Secretary shall conduct a referendum six years after the effective date of this paragraph and every sixth year thereafter to ascertain where continuance of this part is favored by growers. \* \* \*

\* \* \* \* \*

Dated: November 3, 1999.

**Kathleen A. Merrigan,**

*Administrator, Agricultural Marketing Service.*

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## **SMALL BUSINESS ADMINISTRATION**

### **13 CFR Part 120**

#### **Business Loan Program**

**AGENCY:** Small Business Administration (SBA).

**ACTION:** Proposed rule.

**SUMMARY:** SBA proposes to amend the regulations governing Certified Development Companies ("CDCs"). This proposed rule would amend the rules governing CDC Area of Operations (the geographic area where SBA authorizes a CDC to make loans under SBA's Development Company Loan Program ("504 loan")). The proposed rule would cover an applicant requesting to become a CDC; an existing CDC applying to expand its Area of Operations within the State in which it is chartered; an existing CDC applying to expand its Area of Operations beyond the State in which it is chartered into a contiguous bi-sected local economic area ("Local Economic Area"); and an existing CDC applying to expand its Area of Operations outside the State in which it is chartered into another State beyond a Local Economic Area.

The proposed rule also revises when SBA considers a county "adequately served" (when the 504 loan activity within a county precludes the county from being available for inclusion in a new CDC's Area of Operations or an existing CDC's expansion request). In some cases, counties would be available for inclusion in a new CDC's Area of Operations or an existing CDC's expansion request under the proposed rule that are not available under the current regulations.

The proposed rule would clarify under what circumstances and conditions a CDC may contract out its management and staff functions. It also would address the purposes for which a CDC may use its net income generated in different States. The proposed rule would eliminate a limited liability company from the types of organizations that may apply to become a CDC. Finally, the proposed rule would expressly authorize CDCs to establish Loan Committees and set forth conditions under which they may be used.

**DATES:** Submit comments on or before December 8, 1999.

**ADDRESSES:** Comments should be mailed to Jane Palsgrove Butler, Associate Administrator for Financial Assistance, Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

**FOR FURTHER INFORMATION CONTACT:** Gail H. Hepler, (202) 205-7530.

**SUPPLEMENTARY INFORMATION:** When Title V of the Small Business Investment Act of 1958—Loans to State and Local Development Companies—was enacted by Public Law 85-699 on August 21, 1958, it defined a Development Company as "an enterprise \* \* \* formed for the purpose

of furthering economic development of its community and environs, and with authority to promote and assist the growth and development of small-business concerns in the areas covered by their operations \* \* \* A local development company is a corporation chartered under any applicable State corporation law to operate in a specified area within a State \* \* \* A local development company shall be principally composed of and controlled by persons residing or doing business in the locality \* \* \* (13 CFR part 108, section 2, as of January 1, 1967).

When the § 503 Development Company Loan Program was authorized in 1980, its purpose was to provide financing through corporations "formed by local citizens whose primary purpose is to improve their community's economy. They assist in the planned economic growth of the community by promoting and assisting the development of small business concerns in their area." (Legislative History, Pub. L. 100-590, p.22. It continues "to qualify for this program, a development company must be chartered in the State where it intends to operate \* \* \* (id, p.23))

Since the inception of the Certified Development Company Program ("504 Program"), no CDC has been certified to operate permanently in more than one State, except for relatively few circumstances when a CDC's operations are in a Local Economic Area. Regulations published on August 10, 1982, permitted a CDC to operate within two States if "(i) a State line bisects a city, in which case the 503 company may operate city-wide or (ii) the 503 company has obtained prior written approval to operate within a contiguous economic area, as determined by SBA, which crosses a State line." Since this regulation was published, of the 270 active CDCs, only nine have applied for and received approval by SBA to have their permanent Areas of Operations cross State lines to include a contiguous bi-sected local economic area. The permanent Area of Operations of the other 261 CDCs are within their State of incorporation.

Prior to the regulations published on March 1, 1996, all counties within a CDC's Area of Operations had to be contiguous. The only exception was Statewide CDCs that were intended to cover those counties not covered by local CDCs. Many States did not (and continue to not) have Statewide CDCs. Therefore, many of those States had counties that were not covered by any CDC resulting in the small businesses in those counties not having access to the CDC Program. To accommodate these

small businesses, the regulations for the program were modified on July 23, 1987, to permit the temporary expansion of a CDC's Area of Operations for up to 1 year, to include an area underserved by the 504 Program. In such cases, the CDC needed prior SBA approval of each loan. The temporary expansion could be renewed by the district office. The CDC was exempt from a CDC's membership and Board requirements in the temporary area. (The regulation permitting temporary expansions was replaced as of March 1, 1996, by § 120.839, case-by-case extension, which permitted a CDC to apply to make an individual loan for a 504 project outside of its Area of Operations to the SBA district office serving the area under certain circumstances.)

The district offices were authorized to approve temporary expansions for up to 1 year so that small businesses could have access to the program where there were no existing CDCs. Under this regulation, CDCs received temporary authority to operate in other contiguous counties in their States or in a Local Economic Area in an adjoining State. If the CDC wanted to expand its permanent Area of Operations to include the temporary area, it had to comply with the regulations governing the eligibility requirements for CDCs including membership and board representation. Often, CDCs were better able to assess whether or not they wanted a particular geographic area permanently by temporarily marketing and doing projects in it. Some decided not to include the area permanently and withdrew; others permanently expanded into the areas. In other cases, new CDCs or other local CDCs were approved by SBA to include these areas in their permanent Areas of Operations.

During the mid-1990s, three CDCs temporarily expanded beyond their State of incorporation and beyond a Local Economic Area. In each case, local CDCs covering these areas were inactive or did not exist and the SBA district offices wanted their small businesses to have access to the 504 Program. When the temporary authority expired, one CDC sponsored a new CDC incorporated in the State to service the area with the required membership and board representation. The application was approved. However, the other two CDCs submitted applications to expand to include their temporary areas in their permanent Areas of Operations. Since, in each case, the areas were beyond the CDC's State of incorporation and beyond a Local Economic Area, SBA could not consider these requests under its existing regulations.

However, given the low 504 lending volume in several parts of the country, SBA believes that it is in the best interests of underserved communities to permit active CDCs in good standing to permanently expand their Areas of Operations beyond their State of incorporation and beyond a Local Economic Area. SBA proposes to call such a CDC a "Multi-State CDC" (a CDC that is operating as a foreign corporation in another State and is permitted by SBA under certain circumstances to include in the CDC's permanent Area of Operations counties in that State that are located beyond a Local Economic Area). At the same time, SBA wants to ensure that the congressional intent for CDCs is followed and that they are formed by local citizens whose primary purpose is to improve their community's economy. Therefore, the proposed regulations would require the following:

1. The requirements in § 120.822, Membership, must be met separately for the Area of Operations within the State in which the CDC is incorporated and each additional State in which it operates as a Multi-State CDC.

2. The requirements in § 120.823, CDC Board of Directors, must be met separately for the State in which the CDC is incorporated and for each additional State in which it operates as a Multi-State CDC. In addition, in order for the Board of Directors ("Board") to maintain the appearance of independence and objectivity regarding the loan decisions, CDC staff or management must not be voting members of the Board. This will eliminate any appearance of a conflict of interest.

3. Each State must have a separate Loan Committee comprised of members residing or working in that State, and representing at least three of the four membership groups (government organizations responsible for economic development in the Area of Operations in the State; financial institutions that provide commercial long-term fixed asset financing in the Area of Operations in the State; community organizations dedicated to economic development in the Area of Operations in the State; and businesses in the Area of Operations in the State) including at least one member with commercial loan experience acceptable to SBA. In order for the Loan Committee to maintain the appearance of independence and objectivity regarding loan decisions, CDC staff or management must not be voting members of the Loan Committee. Again, this will eliminate any appearance of a conflict of interest.

4. The CDC's Board must ratify, at least quarterly, the actions of its Loan Committees. As well as meeting the general regulatory requirements of a CDC's Board, the Board must have equal voting representation from the State in which the CDC is incorporated and each of the States the CDC operates in as a Multi-State CDC.

5. The CDC may apply to expand only in those counties that meet the criteria of § 120.835(a) as proposed in this regulation.

6. The CDC, upon the request of SBA, must provide evidence that the net income generated in any State where the CDC is operating as a Multi-State CDC is being invested in that State.

7. Any loans approved by SBA for a Multi-State CDC will not be considered in the calculations under §§ 120.810(a) and 120.835(a). In other words, in determining whether a county is "adequately served" for purposes of a new CDC's Area of Operations or an existing CDC's expansion request, the 504 loans approved for a Multi-State CDC will not be used as part of the calculation if the new CDC or expanding CDC is incorporated within the State.

The proposed regulations require board and membership representation from each State in which a Multi-State CDC proposes to operate to ensure that the CDC's community economic development efforts will be properly tailored to meet the needs of the communities it serves and that the CDC does not evolve primarily into a loan packager. Local membership, Board, and Loan Committee representation are more likely to identify businesses with the greatest potential for increasing or retaining local employment and helping the community's economy. For example, a local Loan Committee would more likely know if the approval of an application from a new business, such as a hotel, would help other nearby businesses or, instead, would risk the business's failure, or cause other, established hotels to fail, due to a surplus of hotels in the area.

The proposed regulations also re-introduce the concept of a Local Economic Area previously stated in § 108.503-1(c)(i) prior to March 1, 1996. It would permit a CDC to apply for an Area of Operations that crosses State lines without meeting the above requirements when the contiguous areas that lie in different States are part of the same "local economic area." The same Local Economic Area would mean that the employees and customers of the businesses in that area work and live in that economic area as if there is no State line dividing it. Re-introducing the concept in the regulations will help

differentiate this type of expansion from the proposed one in which a CDC incorporated in one State is applying to expand as a Multi-State CDC into another State.

The proposed rule revises the definition for "Area of Operations" and adds definitions for "Multi-State CDC" and "Local Economic Area" to § 120.802.

Under the proposed rule, for a 24-month period after a new CDC has been approved to operate in a county in its State of incorporation or an existing CDC has been approved to expand into an area within its State of incorporation, SBA will not accept an application to include the county in the Area of Operations of a new CDC or an application from an existing CDC to expand into that county. This would give the CDC that received permission to operate in the counties an opportunity to recoup up-front costs of establishing itself in the new area.

The proposed regulations would also change §§ 120.810 and 120.835 to permit a new CDC or an existing CDC incorporated in a State to apply to operate in a county within that State with a population of 100,000 or more, even if the county is being "adequately served" by an existing CDC incorporated in that State. Currently, if a CDC is doing one 504 loan per year per 100,000 population averaged over 24 months in a particular county, another CDC may not apply to include that county in its Area of Operations. Under the current regulations, the county is "adequately served." The proposed regulations would permit SBA to consider an application for that county from another CDC incorporated in that State if the county has a population of 100,000 or more and there is only one CDC incorporated in that State that includes that county in its permanent Area of Operations. This will give small businesses more choices.

The proposed rule further amends §§ 120.810 and 120.835 to direct an applicant for certification as a new CDC and for expansion within its State of incorporation or into a Local Economic Area to apply to the SBA district office serving the area where the CDC's headquarters is located. The current regulation requires an applicant to apply to the district office serving a proposed area of operations. If a CDC is applying to expand into another State as a Multi-State CDC, it must apply to the SBA district office serving the area where the CDC will headquarter its Multi-State CDC operations in that State. A new CDC may not apply to cover an area as a Multi-State CDC during the first 24 months after SBA

approves it to be a CDC. SBA believes that a CDC should demonstrate that it has actively serviced an Area of Operations within its State of incorporation (including any Local Economic Areas) before it applies to cover an area as a Multi-State CDC. SBA will review a CDC's 504 performance history when it considers an application to serve an area as a Multi-State CDC.

Proposed regulation § 120.837 would be retitled "SBA decision on application for certification or expansion." Current § 120.837 applies only to decisions on requests for expansion. Under the proposed rule, the provisions of § 120.837 would apply to applicants applying to become CDCs and CDCs wishing to expand. In either case, the proposed regulation would require the processing district office to solicit comments from all other district offices serving the CDC's existing and proposed area of operations to determine if the applicant is in compliance with all of SBA's regulations, policies, and performance benchmarks, including pre-approval and annual review of any management or staff contracts, and the timely submission of all annual reports.

The proposed rule further amends § 120.837 to delete the examples of the types of information a district office might consider in reviewing an application for expansion. The amended rule would clarify that the district office, in making its recommendation, and the Associate Administrator for Financial Assistance (AA/FA), in making the decision on the application, may consider any available information regarding the proposed area of operations, the requesting CDC, and the existing CDCs serving the area. Some CDCs and district offices have treated the examples in the current regulation as a prescribed list that could not be supplemented.

The proposed regulations would delete the requirement in § 120.837 that the AA/FA must make his or her final decision within 30 days of receipt of the district office's recommendation. Because of staffing limitations, SBA has not been able to meet this deadline. However, SBA will continue to place a priority on these requests.

The proposed regulation § 120.837(c) also would establish that any unilateral authority that a CDC has in its State of incorporation (such as Accredited Lenders Program (ALP), Premier Certified Lenders Program (PCLP), or Priority CDC) does not carry over into a State in which it is operating as a Multi-State CDC. The CDC must earn any such status in each State based solely on the activity in that State. SBA's grant of any special unilateral authority in an Area of

Operations depends on the quality of a CDC's performance history, relationship with its SBA district office(s), and its processing, closing, servicing, and liquidation abilities in that Area of Operation. There is no guarantee that the quality of a CDC's operations in one State will be duplicated in another State with a separate membership, Board, Loan Committee, management, and staff.

The proposed rule would amend § 120.820 to delete a limited liability company from the types of organizations that may apply to be certified as a CDC. SBA believes that since a limited liability company structure only benefits its members when it is a for-profit entity providing its members certain tax advantages over a C Corporation while still offering its members some of the liability protection enjoyed by C Corporation shareholders, a limited liability company structure would not be appropriate to be used to fulfill the non-profit, local economic development role intended for CDCs. (SBA has never received an application from a limited liability company to become a CDC.) Section 120.822 sets forth a CDC's membership requirements. The proposed rule adds to § 120.822 the requirement that the membership must meet at least annually. It emphasizes that a CDC must meet the membership requirements separately for its State of incorporation and for each State in which it proposes to and is operating as a Multi-State CDC.

Section 120.823 sets forth the requirements regarding a CDC's Board of Directors. The proposed regulation clarifies that a quorum represents at least five Directors authorized to vote. There may be no conflict of interest or self-dealing, or any appearance of a conflict of interest or self-dealing in regards to any action of a CDC Board. Board members often must recuse themselves from voting on a project. The proposed regulation clarifies that it is the number of Board members voting, not present, that determines whether there is a quorum.

A CDC Board must be independent, objective, and composed of qualified representatives of the required community groups with a nexus to the mission and activities of the CDC. For example, an individual is not a qualified representative of the business community merely because he or she works for a business located in the community. A board member must be a responsible official of the represented organization. An example of a responsible official of a business would be the owner of the business. An example of a responsible official of a

bank would be a commercial loan officer.

The Board is responsible for hiring and providing oversight of the CDC's management and staff, which in turn is responsible for the day-to-day marketing, processing, closing, and servicing of the loans. In order to maintain the appearance of objectivity on the part of the Board, the proposed regulation prohibits any member of a CDC's staff or management from being a voting member of the Board. If a member of a CDC's staff or management is present as a non-voting member of the Board, his or her presence does not count toward a quorum.

Many CDC Boards designate a Loan Committee to review and decide on loan approvals and servicing actions on an interim basis between Board meetings. SBA's current regulations do not address Loan Committees. The proposed regulation clarifies that a Board may establish a Loan Committee. The Loan Committee must meet the same organizational requirements as the full Board. It must be independent and objective, providing objective analysis of the actions recommended by the CDC management and staff. It must represent at least three of the four membership groups; and include at least one person with commercial lending experience acceptable to SBA. Like the Board, the Loan Committee must have at least five voting members to establish a quorum and the Loan Committee must not include any CDC staff or management as a voting member. Members must be responsible members of the represented organizations with a nexus to the missions and activities of the CDC. All members must live or work in the Area of Operations of the State in which the 504 project on which they are voting is located, unless the project qualifies under one of the exceptions in § 120.839, Case-by-case Extensions. For example, a representative Loan Committee might include three bankers (lenders), a CPA (business), a commercial real estate agent (business), a representative of the local economic development authority (government), and a member of the Board of Directors who represents the community (community). If there is a Loan Committee, the Board must still meet at least quarterly and ratify the actions of the Loan Committee.

The proposed rule makes it clear that a CDC must meet the Board and Loan Committee requirements for its State of incorporation and for each State in which it proposes to and is operating as a Multi-State CDC. Also, there can be no conflict of interest or self-dealing, or any appearance of a conflict of interest or

self-dealing, on the part of any Board or Loan Committee member in regard to any action of the Board or Loan Committee. If there is a potential for an appearance of a conflict of interest, the Board or Loan Committee member must recuse him or herself from voting on the action. For example, if a Loan Committee member is an officer of the bank that will have the first mortgage on the 504 project being reviewed for approval, he or she should not vote on the project. At least one other member of the Loan Committee with commercial lending experience will have to be present to vote on the project. Also, the language allowing an alternative, approved by SBA, to a voting Board member with lending experience has been deleted because SBA believes that a CDC should have several Board or Loan Committee members with commercial lending experience available to vote on loans, rather than needing an exception to the requirement because its member is unavailable.

In § 120.824, the proposed rule clarifies under what circumstances a CDC may contract out its management and staffing. Section 503(e) of the Small Business Investment Act of 1958 states that a qualified State or local development company must have: (1) A full-time professional staff; and (2) professional management ability (including adequate accounting, legal, and business-servicing abilities). Public Law 100-590, approved November 3, 1988, permitted an exception to these requirements for a CDC in a rural area. It states that the rural CDC "shall be deemed to have satisfied the requirements of a full-time professional staff and professional management ability if it contracts with another certified development company which has such staff and management ability and which is located in the same general area to provide such services." The Congressional Record dated October 3, 1988, states that this would allow "a certified development company in a rural area to contract out for professional staff and professional management ability rather than hiring the employees in-house. This will help development companies in rural areas which do not do a sufficient loan volume to justify a full time staff." (Congressional Record—H9279). This is the only exception Congress made to the requirement that a CDC must have in-house full-time professional management and staff.

In recent years, many CDCs have entered into contracts with outside parties for CDC staffing and management. Questions have arisen

regarding the extent and propriety of such contracts.

In § 120.824, the proposed rule requires a CDC to have a full-time professional, including an Executive Director (or the equivalent) managing daily operations. At a minimum, this means a CDC must have at least one full-time salaried professional employee that is employed directly to manage the CDC. A CDC may petition the AA/FA to waive this requirement in only two circumstances: (1) When the management of a rural CDC with insufficient loan volume to justify its own management employee is to be contributed by another CDC located in the same general area; or (2) when the management of a CDC is to be contributed by a non-profit affiliate of the CDC that is financially subsidizing the CDC's operation and has the economic development of the CDC's Area of Operations as one of its principal activities. In the latter case, the management contributed by the affiliate may work on and operate other economic development programs of the affiliate, but must be available to 504 customers during regular business hours. The first exception is authorized by statute. SBA proposes to permit the second exception because it considers the CDC and the affiliate to be sufficiently related to have the same or similar mission and objectives for the Area of Operations.

A CDC must possess a full-time professional staff that is capable of packaging, processing, closing, and servicing loans. The staff capacity of the CDC may be procured from salaried employees or, under certain circumstances, on a contractual basis that is acceptable to SBA, as long as at least one full-time professional manager in charge of the day-to-day operations of the CDC is a salaried employee of the CDC. The purpose of permitting a CDC to contract for staff functions, in certain cases, is to allow those CDCs that do not have sufficient 503/504 project-related income to provide the cash flow to support a full-time staff for each of the functions to be able to contract for a qualified individual on a part-time basis. If a CDC contracts for some of the staff functions, the services must be billed at rates that are reasonable and customary for the service and the geographic area.

The proposed regulation eliminates the reference in the current § 120.824 to Lender Service Providers, as defined in 13 CFR 103.1. This reference has been confusing to CDCs, and SBA believes it is not necessary. The proposed rule clarifies that the contractors must either

live or work in the CDC's Area of Operations.

In contracting out for management and staff services, there must be no evidence of a conflict of interest or self-dealing, or any appearance of a conflict of interest or self-dealing on the part of the CDC's Board, management, or staff that could result in increased costs to a small business borrower or the CDC, or which would adversely affect the financial condition of the CDC including its ability to become self-sustaining. Any contracted staff must be qualified for the function that he or she is providing and live or do business in the CDC's Area of Operations.

SBA believes that Congress intended a CDC to sustain its operations continuously with reliable sources of funds, including income from services rendered from the Development Company Loan Program. A CDC's Board is not acting in the best interests of the CDC, SBA, or small business borrowers if it is permitting fee income generated from the Development Company Loan Program to be diverted to another organization through a contractual relationship rather than retained in the CDC to support its operations and economic development mission. The reason for the present clarification to the regulations is to ensure that the congressional intent is followed and that CDCs are not doing indirectly what they are not permitted to do directly, such as becoming effectively a shell for a for-profit organization through a contractual relationship. This would be in direct conflict with the intent of the Development Company Loan Program. Except for a few for-profit CDCs certified before January 1, 1987, and grandfathered in 1986, when the eligibility requirements for a CDC were changed, a CDC must be non-profit. The preamble to the 1986 regulations stated that "The purpose of a 503 company shall be to foster economic development in its area of operations; any benefit flowing to shareholders, members or other related parties shall be merely incidental to such purpose." The preamble went on to say that the reason for the change was "the desire to emphasize the *pro bono* public character of the industry over the profit incentive. The nature of the 503 company is to be a catalyst in fostering economic development, and not a profit center for owners or members \* \* \*" (64 FR 20765).

Conflict of interest and self dealing, or any appearance of a conflict of interest or self dealing by related parties (which includes the CDC's professional management, staff, and Board of Directors) to the detriment of a small

business borrower, the CDC, or SBA is prohibited.

If a CDC Board proposes to contract for staff rather than hire that staff directly, SBA must preapprove and annually review each contract to ensure that the contracts are reasonable and customary for the area and that there is no self-dealing or conflict of interest, or any appearance of self-dealing or conflict of interest. If the CDC's Board believes that it is in the best interest of the CDC to contract for a function, the CDC's Board must justify to SBA why SBA should favorably consider the contract for the services. SBA-approved contractors must not be compensated directly from the small business and must be compensated only by the CDC from the eligible 504 project-related fees that the CDC receives. No contractor or Associate of a contractor may be a voting or non-voting member of the CDC's Board or Loan Committee.

Finally, the proposed rule amends § 120.825 to clarify and emphasize that any funds generated from 503 and 504 loan activity by a CDC remaining after the payment of staff and overhead expenses must be retained in the CDC as a reserve for future operations or to be invested in other local economic activity in its Area of Operations. One of the primary missions of the CDC's Board must be to ensure that the CDC is, or is becoming, self-sufficient through the fee income generated while maintaining its local economic focus. If the CDC's Board approves a contract that benefits the contractor at the expense of the CDC, then the CDC's Board is failing its mission.

SBA invites comment on all aspects of this proposed rule, including the underlying policies. SBA may rely on its own expertise in promulgating the final rule. Submitted comments will be available to any person or entity upon request.

**Compliance With Executive Orders 13132, 12988, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601, et seq.), and the Paperwork Reduction Act (44 U.S.C., Ch. 35)**

For the purposes of Executive Order 13132, SBA certifies that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

This proposed rule does not constitute a significant rule within the meaning of Executive Order 12866, since it is not likely to have an annual effect on the economy of \$100 million or more, result in a major increase in costs or prices, or have a significant adverse effect on competition or the U.S. economy.

SBA certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612. Currently, out of approximately 24 million small businesses in the United States, about 4000 receive 504 loans annually. As described in the preamble, through this regulation, SBA hopes to increase the number of loans made to small businesses. Even if SBA were to assume a generous result of a 20 percent increase in loans, it would only result in an annual increase of 800 loans per year. SBA does not consider this a significant economic impact on a substantial number of small entities. Other aspects of this rule clarify management and structural requirements for CDCs. These aspects would have no economic impact on small entities, as they merely alter CDC requirements.

SBA certifies that this proposed rule does not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., chapter 35.

For purposes of Executive Order 12988, SBA certifies that this proposed rule is drafted, to the extent practicable, to accord with the standards set forth in paragraph 3 of that Order.

#### List of Subjects in 13 CFR Part 120

Loan programs—business, Small business.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR part 120 as follows:

#### PART 120—BUSINESS LOANS

1. The authority citation for part 120 continues to read as follows:

**Authority:** 15 U.S.C. 634(b)(6) and 636(a) and (h).

2. Amend § 120.802, to revise the definition of “Area of Operations” and add definitions of *Local Economic Area* and *Multi-State CDC* in alphabetical order to read as follows:

*Area of Operations* is the geographic area where SBA has approved a CDC’s request to provide 504 program services to small businesses on a permanent basis.

\* \* \* \* \*

*Local Economic Area* is an area, as determined by SBA, that is in a State other than the State in which an existing CDC (or an applicant applying to become a CDC) is incorporated, shares a border with the CDC’s existing Area of Operations (or applicant’s proposed Area of Operations) in its State of incorporation, and is a part of a local

trade area that is contiguous to the CDC’s Area of Operations (or applicant’s proposed Area of Operations) within its State of incorporation. Examples would be a city that is bi-sected by a State line or a metropolitan statistical area that is bi-sected by a State line.

*Multi-State CDC* is a CDC that is incorporated in one State and is authorized by SBA to operate as a CDC in another State beyond any contiguous Local Economic Areas.

\* \* \* \* \*

3. Revise § 120.810 to read as follows:

#### § 120.810 Applications for certification as a CDC.

Applicants for certification as a CDC must apply to the SBA District Office serving the area in which the applicant proposes to locate its headquarters.

(a) An SBA District Office may accept an application for a county only if:

(1) The county is part of the Area of Operations of only one CDC that is incorporated in the State where the county is located; the county has a population of 100,000 or more; the county has not become part of an Area of Operations within the last 24 months of a CDC that is incorporated in the State where the county is located; and the applicant is incorporated in the State where the county is located.

(2) For all counties other than those that qualify under paragraph (a)(1) of this section:

(i) There is no CDC that includes the county in its Area of Operations; or

(ii) The CDCs that include the county in their Areas of Operations have not averaged together at least one 504 loan approval per 100,000 population per year averaged over the previous 24 months prior to SBA receiving a complete application from the applicant (loans that are approved by SBA for a Multi-State CDC outside of its State of incorporation are not to be used in the calculation if the applicant is incorporated in the State); and the county has not become part of an Area of Operations within the last 24 months of a CDC that is incorporated in the State where the county is located.

(b) An applicant whose application has been accepted must demonstrate that it satisfies the certification and operating criteria in §§ 120.820 through 120.829 and the need for 504 services in the Area of Operations (if there is already a CDC in the Area of Operations, the applicant must justify the need for another and present a plan to avoid duplication or overlap). Applications must also include an operating budget approved by the applicant’s Board of Directors, and a plan to meet CDC operating requirements (without

specializing in a particular industry). An applicant’s proposed Area of Operations may include Local Economic Areas. An applicant may not apply to cover an area as a Multi-State CDC. The AA/FA shall make the certification decision.

4. Revise § 120.820 to read as follows:

#### § 120.820 CDC non-profit status.

A CDC must be a non-profit corporation in good standing. (For-profit CDCs certified by SBA prior to January 1, 1987, may retain their certifications.) An SBIC may not be a CDC.

5. Revise § 120.822 as follows:

#### § 120.822 CDC membership.

(a) A CDC must have at least 25 members (or stockholders for for-profit CDCs approved prior to January 1, 1987). The CDC membership must meet annually. No person or entity may own or control more than 10 percent of the CDC’s voting membership (or stock). Members must be representative of and provide evidence of active support in the Area of Operations. Members must be from each of the following groups:

(1) Government organization responsible for economic development in the Area of Operations and acceptable to SBA;

(2) Financial institutions that provide commercial long-term fixed asset financing in the Area of Operations;

(3) Community organizations dedicated to economic development in the Area of Operations such as chambers of commerce, foundations, trade associations, colleges, or universities; and

(4) Business in the Area of Operations.

(b) A CDC that is incorporated in one State and is operating as a Multi-State CDC in another State must meet the membership requirements for each State.

6. Revise § 120.823 to read as follows:

#### § 120.823 CDC Board of Directors and Loan Committee.

The CDC must have a Board of Directors chosen from the membership by the members, and representing at least three of the four membership groups. No single group shall control. The Board members must be responsible officials of the organizations they represent, and at least one must possess commercial lending experience. The Board must meet at least quarterly and shall be responsible for CDC staff decisions and actions. A quorum shall require at least five Directors authorized to vote. No person who is a member of a CDC’s staff or management may be a voting member of the Board. When the Board votes on loan approval or

servicing actions, at least one Board member with commercial lending experience acceptable to SBA must be present and vote. There must be no appearance of a conflict of interest with respect to any actions of the Board.

(a) The Board may establish a Loan Committee that reports to the Board. The Loan Committee members must represent at least three of the four membership groups including at least one member with commercial lending experience acceptable to SBA. All members must live or work in the Area of Operations of the State where the 504 project they are voting on is located unless the project falls under one of the exceptions listed in § 120.839, Case-by-case extensions. No CDC staff or management is permitted to be a voting member of any Loan Committee. A quorum shall require at least five voting members. The CDC's Board must ratify the actions of any Loan Committee on at least a quarterly basis. There must be no appearance of a conflict of interest with respect to any actions of the Loan Committee.

(b) If the CDC is incorporated in one State and is approved as a Multi-State CDC to operate in another State, the CDC must meet the Board and Loan Committee requirements for each State.

7. Revise § 120.824 to read as follows:

**§ 120.824 Professional management and staff.**

A CDC must have full-time professional management, including an Executive Director (or the equivalent), managing daily operations. It must also have a full-time professional staff qualified by training and experience to market the 504 Program, package and process 504 loan applications, close 504 loans, service, and, if authorized by SBA, liquidate the loan portfolio, and sustain a sufficient level of service and activity in the Area of Operations. CDCs may obtain, under written contract, marketing, packaging, processing, closing, or liquidation services provided by qualified individuals and entities who live or do business in the CDC's Area of Operations under the following circumstances:

(a) The CDC has at least one salaried professional employee that is employed directly (not contracted) full-time to manage the CDC. A CDC may petition SBA to waive the requirement of at least one full-time manager if the CDC is rural and has insufficient loan volume to justify its own management, and another CDC located in the same general area will provide the management; or the management of a CDC is to be contributed by a non-profit affiliate of the CDC that is financially subsidizing

the CDC's operations and has the economic development of the CDC's Area of Operations as one of its principal activities. In the latter case, the management contributed by the affiliate may work on and operate other economic development programs of the affiliate, but must be available to 504 customers during regular business hours.

(b) SBA must pre-approve all contracts. (CDCs may contract for legal and accounting services without SBA approval.)

(c) If a CDC's Board believes that it is in the best interest of the CDC to contract for a marketing, packaging, processing, closing, servicing or liquidation function, the CDC's Board must justify to SBA why SBA should favorably consider the contract for the services. The CDC's Board must demonstrate to SBA that compensation under the contract is only from the CDC, is reasonable and customary for similar services in the Area of Operations, is only for actual services performed, and does not evidence any conflict of interest or self-dealing, or an appearance of conflict of interest or self-dealing, on the part of any of the CDC's officers, management, and staff, including members of the Board and any Loan Committee.

(d) Contracts must be for a period not to exceed 2 years (including options to renew) and must clearly identify procedures satisfactory to SBA that permit the CDC to terminate the contract prior to its expiration date. SBA must review all 2-year contracts after the first year to ensure that there is no conflict of interest or self-dealing, or an appearance of conflict of interest or self-dealing.

(e) No contractor (under this section) or Associate of a contractor may be a voting member of the CDC's Board or Loan Committee.

8. In § 120.825 add the following two sentences to the end of the section as follows:

**§ 120.825 Financial ability to operate.**

\* \* \* Any funds generated from 503 and 504 loan activity by a CDC remaining after payment of staff and overhead expenses must be retained in the CDC as a reserve for future operations or to be invested in other local economic development activity in its Area of Operations. If a CDC is operating as a Multi-State CDC, it must maintain separate accounting for each State of all 504 fee income and expenses and provide, upon SBA's request, evidence that the funds resulting from its Multi-State CDC operations are being invested in economic development

activities in each State in which it was generated.

9. Revise § 120.835 to read as follows:

**§ 120.835 Application to expand a CDC's Area of Operations.**

An existing, active CDC applying to expand its Area of Operations must be operating in conformance with all existing SBA regulations, policies, and performance benchmarks and be well-qualified to serve the proposed area. A CDC seeking to expand its Area of Operations must apply in writing to the SBA District Office where the CDC is headquartered, unless it is applying as a Multi-State CDC. In that case, the CDC must apply to the SBA District Office that services the area where the Multi-State CDC is locating its principal office in that State.

(a) An SBA District Office may accept a CDC's application to expand its Area of Operations into a county within its State of incorporation, in a Local Economic Area or in another State beyond a Local Economic Area that it would service as a Multi-State CDC only if:

(1) The county is part of the Area of Operations of only one CDC that is incorporated in the State where the county is located; the county has a population of 100,000 or more; the county has not become part of an Area of Operations within the last 24 months of a CDC that is incorporated in the State where the county is located; and the applicant CDC is incorporated in the State where the county is located.

(2) For all counties other than those that qualify under paragraph (a)(1) of this section:

(i) There is no CDC that includes the county in its Area of Operations; or (ii) The CDCs that include the county in their Areas of Operations have not averaged together at least one 504 loan approval per 100,000 population per year averaged over the previous 24 months prior to SBA receiving a complete application from the applicant CDC (loans that are approved by SBA for a Multi-State CDC outside of its State of incorporation are not to be used in the calculation if the requesting CDC is incorporated in the State); and the county has not become part of an Area of Operations within the last 24 months of a CDC that is incorporated in that State.

(b) An applicant whose application for expansion has been accepted must demonstrate to the satisfaction of SBA that it satisfies all of the certification and operating criteria in §§ 120.820 through 120.829. It must demonstrate that it has the ability to provide full service to small businesses in the



requested area including processing, closing, servicing, and, if authorized, liquidating 504 loans. It must also demonstrate the need for 504 services in the Area of Operations and present a plan for servicing the area. If there is already one or more CDCs in the requested Area of Operations, the applicant must justify the need for another. In addition, an applicant to service an area as a Multi-State CDC must show that:

(1) The requirements in § 120.822, Membership, are met separately for the Area of Operation within the CDC's State of incorporation and for each additional State in which it operates or seeks to operate as a Multi-State CDC;

(2) The requirements regarding Boards of Directors in § 120.823, CDC Board of Directors and Loan Committees, are met separately for the State of incorporation and for each additional State in which it operates or seeks to operate as a Multi-State CDC;

(3) The CDC Board of Directors must have the same number of members residing or working in the CDC's State of incorporation and each other State in which it operates or seeks to operate as a Multi-State CDC; and

(4) The CDC must have separate Loan Committees in its State of incorporation and in each State in which the CDC operates or seeks to operate as a Multi-State CDC, comprised of members residing or working in that State.

10. Revise § 120.837 to read as follows:

**§ 120.837 SBA decision on applications for a new CDC or for an existing CDC to expand Area of Operations.**

(a) The processing District Office must solicit the comments of any other District Office in which the CDC operates or proposes to operate. The processing District Office must determine that the CDC is in compliance with SBA's regulations, policies, and performance benchmarks, including pre-approval and annual review by SBA of any management or staff contracts, and the timely submission of all annual reports. In making its recommendation on the application, the District Office may consider any information presented to it regarding the requesting CDC, the existing CDC, or CDCs that may be affected by the application, and the proposed area of operation.

(b) The District Office will submit the application, recommendation, and supporting materials within 60 days of receipt of a complete application from the CDC to the AA/FA, who will make the final decision. The AA/FA may consider any available information.

(c) If a CDC is approved to operate as a Multi-State CDC, any unilateral authority that a CDC has in its State of incorporation under any SBA program (such as the Accredited Lenders Program (ALP), Premier Certified Lenders Program (PCLP), or Expedited Closing Process (Priority CDC)) does not carry over into a State in which it is operating or is approved to operate as a Multi-State CDC. The CDC must earn the status in each State based solely on its activity in that State.

Dated: September 23, 1999.

**Aida Alvarez,**  
*Administrator.*

[FR Doc. 99-29090 Filed 11-5-99; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 95-NM-182-AD]

RIN 2120-AA64

#### **Airworthiness Directives; Dornier Model 328-100 Series Airplanes**

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** This action withdraws a notice of proposed rulemaking (NPRM) that proposed a new airworthiness directive (AD), applicable to all Dornier Model 328-100 series airplanes. That action would have required replacement of the Anti-Skid Control Unit (ASCU) of the aircraft braking system with an improved unit. Since the issuance of the NPRM, the manufacturer has advised the Federal Aviation Administration (FAA) that the entire Model 328-100 fleet has been retrofitted with the improved ASCU, and all ASCU spares have been modified or otherwise removed from service. Accordingly, the proposed rule is withdrawn.

**FOR FURTHER INFORMATION CONTACT:** Norman B. Martenson, Manager, International Branch, ANM-116, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98055-4056; telephone (425) 227-2196; fax (425) 227-1320.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add a new airworthiness directive (AD), applicable to all Dornier Model 328-100 series airplanes, was published in the **Federal Register** as a Notice of Proposed Rulemaking (NPRM) on September 22,

1997 (62 FR 49457). The proposed rule would have required replacement of the Anti-Skid Control Unit (ASCU) of the aircraft braking system with an improved unit. That action was prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The proposed actions were intended to prevent disconnect of the ASCU and reversion to manual braking efficiency during operation on runways contaminated by standing water, slush, or wet snow, which could result in reduced braking efficiency.

#### **Actions That Occurred Since the NPRM Was Issued**

Since the issuance of that NPRM, the manufacturer has provided the FAA with confirmation that the entire fleet of Dornier Model 328-100 series airplanes has been retrofitted with the improved ASCU, and all ASCU spares have been modified or otherwise removed from service.

#### **FAA's Conclusions**

Upon further consideration, the FAA has determined that the proposed actions of the NPRM (Rules Docket 95-NM-182-AD) are unnecessary since the unsafe condition that those actions were intended to address no longer exists. Accordingly, the proposed rule is hereby withdrawn.

Withdrawal of this notice of proposed rulemaking constitutes only such action, and does not preclude the agency from issuing another notice in the future, nor does it commit the agency to any course of action in the future.

#### **Regulatory Impact**

Since this action only withdraws a notice of proposed rulemaking, it is neither a proposed rule nor a final rule and therefore is not covered under Executive Order 12866, the Regulatory Flexibility Act, or DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979).

#### **List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

#### **The Withdrawal**

Accordingly, the notice of proposed rulemaking, Docket 95-NM-182-AD, published in the **Federal Register** on September 22, 1997 (62 FR 49457), is withdrawn.