

## **DEPARTMENT OF COMMERCE**

### **National Telecommunications and Information Administration**

#### **Notice of Programmatic Waiver**

#### **ACTION: Notice**

#### **SUMMARY:**

The Infrastructure Investment and Jobs Act (Infrastructure Act), enacted in November 2021, includes funding for robust investment in American infrastructure projects. The Infrastructure Act includes the Broadband Equity, Access, and Deployment (BEAD) Program, which provides \$42.45 billion of funding to achieve reliable, affordable, and high-speed Internet coverage throughout the United States. *See* Infrastructure Investment and Jobs Act of 2021, Division F, Title I, Section 60102, Public Law 117-58, 135 Stat. 429 (Nov. 15, 2021). The U.S. Department of Commerce, in keeping with its mission to create the conditions for economic growth and opportunity for all communities, is ready to lead the building of equitable access to universal high-speed Internet coverage in the United States, in partnership with other agencies and Departments.

The National Telecommunications and Information Administration (NTIA), as the agency responsible for administering the BEAD program, provides herein notice of a conditional programmatic waiver of the letter of credit requirements set forth in section IV.D.2.a.ii of the BEAD Program Notice of Funding Opportunity.<sup>1</sup>

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<sup>1</sup> Broadband Equity, Access, and Deployment Program Notice of Funding Opportunity at 72, § IV.D.2.a.ii (BEAD NOFO).

## Table of Contents

<b>1. Background .....</b>	<b>3</b>
<b>2. Conditional Programmatic Waiver .....</b>	<b>3</b>
2.1 Subgrantee Option to Use Credit Unions.....	3
2.2 Subgrantee Option to Use Performance Bonds.....	3
2.3 Reduction of LOC/Performance Bonds Upon Completion of Milestones.....	4
2.4 Subgrantee Option for Alternative Initial LOC or Performance Bond Percentage.....	5

## 1. Background

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The BEAD NOFO requires Eligible Entities to establish a model letter of credit substantially similar to the model letter of credit established by the Commission in connection with the Rural Digital Opportunity Fund.<sup>2</sup> During each Eligible Entity's application process for subgrantees seeking to deploy network facilities, each applicant must submit a letter from a bank meeting eligibility requirements consistent with those set forth in 47 C.F.R. § 54.804(c)(2) committing to issue an irrevocable standby letter of credit, in the required form, to the prospective subgrantee.<sup>3</sup> Prior to entering into any subgrantee agreement, subgrantees must provide the Eligible Entity an irrevocable standby letter of credit in the required form, acceptable in all respects to the Eligible Entity, in a value of no less than 25 percent of the subaward amount.<sup>4</sup> In addition, a subgrantee must provide the Eligible Entity an opinion letter from legal counsel stating that in a proceeding under the Bankruptcy Code the bankruptcy court would not treat the letter of credit as property of the winning subgrantee's bankruptcy estate.<sup>5</sup>

The Assistant Secretary of Commerce for Communications and Information has determined that, for good cause shown, and in the best interest of the Federal Government, a conditional programmatic waiver of the letter of credit obligation should be granted as described herein.

## 2. Conditional Programmatic Waiver

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The LOC Requirement is waived only to the extent to and as described below:

### 2.1 Subgrantee Option to Use Credit Unions

That portion of the LOC Requirement that requires the use of a bank that meets the eligibility requirements of 47 C.F.R. § 54.804(c)(2) is waived where the subgrantee otherwise meets the LOC Requirement using:

Any United States credit union that:

- (a) is insured by the National Credit Union Administration;<sup>6</sup> and
- (b) has a credit union safety rating issued by Weiss of B- or better.<sup>7</sup>

### 2.2 Subgrantee Option to Use Performance Bonds

That the LOC Requirement is waived where:

- (a) During the application process, prospective subgrantees are required to submit a letter from a company holding a certificate of authority as an acceptable surety on federal bonds as identified in the Department of Treasury Circular 570 committing to issue a

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<sup>2</sup> *Rural Digital Opportunity Fund; Connect America Fund*, Report and Order, 35 FCC Rcd 686, 773-33, Appx. C (2020).

<sup>3</sup> BEAD NOFO at 72, § IV.D.2.a.ii.

<sup>4</sup> *Id.* at 72-73.

<sup>5</sup> *Id.*

<sup>6</sup> NCUA is the "independent federal agency that insures deposits at federally insured credit unions, protects the members who own credit unions, and charters and regulates federal credit unions." <https://ncua.gov/about>. The National Credit Union Administration is to credit unions as the Federal Deposit Insurance Company is to banks.

<sup>7</sup> <https://weissratings.com/en/credit-unions>

performance bond to the prospective subgrantee.<sup>8</sup> The letter shall at a minimum provide the dollar amount of the performance bond.

- (b) Within 60 days of entering into any subgrantee agreement, each prospective subgrantee obtains a performance bond, acceptable in all respects to the Eligible Entity and in a value of no less than 100 percent of the subaward amount.<sup>9</sup> If a performance bond has not been obtained prior to entering a subgrant agreement, the Eligible Entity must include a clause in the agreement that allows for termination should the subgrantee fail to obtain the performance bond within 60 days.

Where a subgrantee chooses to exercise the option to obtain a performance bond under this waiver, the requirement that the subgrantee “provide with its letter of credit an opinion letter from legal counsel clearly stating, subject only to customary assumptions, limitations, and qualifications, that in a proceeding under Title 11 of the United States Code, 11 U.S.C. § 101 et seq. (the “Bankruptcy Code”), the bankruptcy court would not treat the letter of credit or proceeds of the letter of credit as property of the winning subgrantee’s bankruptcy estate under Section 541 of the Bankruptcy Code” is waived.

### *2.3 Reduction of LOC/Performance Bonds Upon Completion of Milestones*

The requirement that “In no event, however, shall the letter of credit have a value of less than 25 percent of the subaward amount” is waived, conditioned on the requirement that the subgrantee obtain a new a letter of credit in a reduced amount upon achievement of specific deployment milestones that are publicly specified by the Eligible Entity and applicable to all subgrantees subject to the LOC Requirement. Where a subgrantee chooses to utilize a performance bond in lieu of a letter of credit under section 2.2 above, Eligible Entities shall also have the option to reduce the amount of the performance bond by a commensurate amount as subgrantees meet the same service milestones.

By way of example, an Eligible Entity could specify that a subgrantee may obtain a new letter of credit or renew its existing letter of credit to reduce its value in accordance with the following limitations:

- Upon demonstrating to the satisfaction of the Eligible Entity that it has completed the buildout of 40 percent of locations to be served by the project, a subgrantee may obtain a new letter of credit or renew its existing letter of credit so that it is valued at no less than 20 percent of the award amount.
- Upon demonstrating to the satisfaction of the Eligible Entity that it has completed the buildout of 60 percent of locations to be served by the project, a subgrantee may obtain a new letter of credit or renew its existing letter of credit so that it is valued at no less than 15 percent of the award amount.
- Upon demonstrating to the satisfaction of the Eligible Entity that it has completed the buildout of 80 percent of locations to be served by the project, a subgrantee may obtain a new letter of credit or renew its existing letter of credit so that it is valued at no less than 10 percent of the award amount.
- Upon demonstrating to the satisfaction of the Eligible Entity that it has completed the buildout of 100 percent of locations to be served by the project, a subgrantee may terminate its letter of credit under the terms set forth therein.

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<sup>8</sup> See <https://www.fiscal.treasury.gov/surety-bonds/list-certified-companies.html>

<sup>9</sup> For the sake of clarity, Eligible Entities are not required to prepare a model performance bond.

#### 2.4 *Subgrantee Option for Alternative Initial LOC or Performance Bond Percentage*

The requirement that the initial letter of credit be for 25% of the subaward amount, or in the case where a subgrantee chooses to utilize a performance bond consistent with section 2.2 above, allow the initial amount of the performance bond to be lower than 100% of the subaward amount, where:

- (a) The Eligible Entity issues funding on a reimbursable basis consistent with Section IV.C.1.b of the NOFO;
- (b) Reimbursement is for periods of no more than six months; and
- (c) The subgrantee commits to maintain a letter of credit or performance bond in the amount of 10% of the subaward until it has demonstrated to satisfaction of the Eligible Entity that it has completed the buildout of 100 percent of locations to be served by the project or until the period of performance of the subaward has ended, whichever occurs first.<sup>10</sup>

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<sup>10</sup> For the sake of clarity, the option to reduce the amount of the performance bond by a commensurate amount as subgrantees meet the same service milestones described in section 2.3 may not be applied to a letter of credit or performance bond obtained under this section 2.4.