

is imperative to have the type of catchall provision embodied by § 120.854(f) in order to have effective management tools available in the event that a program participant is engaging in "a pattern of uncooperative behavior" or has taken other action that warrants some enforcement action, but which does not squarely fit within the specific grounds identified in a regulation as a basis for enforcement.

Although SBA retained these provisions, the Agency is sensitive to those comments that CDCs would not be on notice of what behavior was expected by these regulations. SBA believes that the appropriate resolution of these concerns is to provide additional procedural protection to CDCs. Therefore, SBA has added language to § 120.854(f) that would ensure that SBA could only propose enforcement action based on § 120.854(f) after the Agency had: (1) Provided written notice to the CDC explaining why the CDC's actions were uncooperative, not good conduct, or undermined SBA's management of the program and that the CDC's actions could give rise to an enforcement action; and (2) providing the CDC with a reasonable time to cure the deficiency. This change reasonably addresses all of the comments that objected to these provisions.

Several comments objected to the enforcement actions authorized under § 120.855. Thus, concerns were expressed about the language in § 120.855(a) that the AA/FA or his or her delegate's decision to undertake enforcement actions "in SBA's sole discretion" would result in enforcement actions that were subjective or selective. SBA disagrees with the suggestion to delete this language because each enforcement case is different and the Agency believes that effective program administration requires maximum flexibility to determine the appropriate enforcement action appropriate for each particular action. SBA also believes that the due process rights that are provided by the regulations, including the review by the SBA OHA (which is discussed further below regarding § 120.856) protects CDCs from arbitrary enforcement actions.

Several comments objected to § 120.855(a)(3) which authorizes SBA to direct a CDC to transfer some or all of its portfolio to another entity. The comments asserted that SBA should provide the CDC with a right to cure any deficiency prior to such a transfer. Directing a CDC to transfer some or all of its portfolio to another entity is an extreme action that would generally only be considered in egregious

circumstances. Typically, SBA would provide a CDC with an opportunity to cure a deficiency before the initiation of such an action. SBA, however, disagrees with the proposals to mandate a cure before initiating such an enforcement action because there may be circumstances where the opportunity to cure would not be possible, and SBA's administration of the program would be unnecessarily restricted by a mandatory cure opportunity prior to enforcement. For example, if a CDC was terminated from the program due to regulatory violations, a cure of these violations may not be possible. In such a case, SBA needs the authority to be able to direct the transfer of that CDC's portfolio to another entity without the requirement of providing the CDC with a cure opportunity.

SBA also disagrees with the comments which objected to the Agency's authority to direct the transfer of 504 loans to entities other than SBA or a CDC on the ground that transfer to banks and other for-profit entities was contrary to the public or program's interest. Although it would be SBA's clear preference that 504 loans be transferred to a CDC, there may be occasions where no other responsible CDC exists for such a transfer. SBA requires the flexibility to direct a portfolio transfer in the manner that the Agency believes is in the best interests of the program. Generally, however, it is anticipated that a transfer to an entity other than a CDC would be temporary until another responsible CDC was available.

Many comments objected to § 120.855(a)(4), which allows SBA to direct the Central Servicing Agent (CSA) to suspend payment of fees to a CDC and to direct the CSA to submit those fees to SBA to pay for any financial loss resulting from a CDC's imprudence, commercial unreasonableness or failure to comply with an SBA requirement. SBA has agreed to eliminate the provisions allowing for payment of the fees to the Agency to compensate for financial loss because it would like to study this issue further. SBA, however, has retained in the final rule the language allowing the suspension of fee payments to the CDC as an enforcement tool in the absence of any significant comments on this proposal.

A number of concerns were raised regarding § 120.856, which sets forth procedures for proposing and undertaking enforcement actions, and the affected CDC's due process and appellate rights. As discussed below, SBA has revised this section to address several of the comments the Agency received. These changes have also

necessitated a renumbering of the subsections in § 120.856.

Several comments contended that § 120.856(a) should require SBA to provide details of the reasons behind a proposed enforcement action. SBA agrees with this proposal and has added language to make clear that the underlying facts and reasons for the proposed action should be reasonably detailed.

SBA received a number of comments regarding § 120.856(c) [now renumbered as § 120.856(b)], which sets forth the CDC's right to respond to a notice of proposed enforcement action or to a notice of immediate suspension. Several comments requested that the provision should specify that the period for the CDC to respond to a notice should be fixed at 30 days; others felt that the CDC should be given 60 days to respond. SBA disagrees with these comments because the Agency believes that 30 days is a sufficient amount of time, and that the Agency must retain the flexibility to permit a greater or lesser amount of time for a response to accommodate the unique circumstances of each enforcement action. SBA has, however, added language that a CDC may request additional time if it can show that there are compelling reasons why it is not able to respond within the 30-day timeframe.

SBA does, however, agree with those comments that urged that a CDC's 30-day response period should begin to run when a CDC receives the notice of proposed action or immediate suspension. For purposes of determining whether a CDC has timely responded to a notice of a proposed action or immediate suspension, the regulations will make clear that it is presumed that the notice has been received within 5 days of the date of the notice, absent compelling evidence from the CDC to the contrary.

Several comments contended that the regulations should make some or all of the following discovery procedures available to a CDC that receives a notice of a proposed action or immediate suspension: (1) The ability to undertake discovery; (2) the ability to review SBA's complete file; (3) the ability to request and review additional documents; (4) the ability to question SBA's employees; (5) the ability to obtain copies of any documentation that SBA has obtained during the course of its investigation before or after the CDC files its objection; and (6) the ability to obtain information from third parties. Absent these discovery procedures, the comments contended, the CDC would be deprived of the ability to respond meaningfully to the notice. In addition,