

the comments urged, a CDC that avails itself of one or more of these discovery procedures should have additional time to respond to the notice of proposed enforcement action or immediate suspension or be able to make additional submissions to SBA beyond the initial objection in opposition to the enforcement action.

The SBA does not believe that these discovery procedures are necessary to provide the CDC with meaningful review or appropriate for the enforcement action set forth in §§ 120.854–120.857. The existing procedures already provide for a meaningful review, in that the CDC will receive a written notice setting forth the proposed enforcement action or immediate suspension and a reasonably detailed description of the underlying facts and reasons for SBA's proposed action or immediate suspension, and will have the opportunity to submit its objections and opposition to that notice. A second review is then undertaken by the Agency prior to the final decision, and the CDC has further relief in seeking review from the OHA and ultimately the courts. The requested discovery procedures will likely serve to delay and frustrate SBA efforts to undertake enforcement necessary for effective program management, and result in considerable additional burden on limited Agency resources in responding to the requested discovery. Indeed, it has been the Agency's experience in attempting enforcement actions in the past that certain CDCs have attempted to repeatedly delay those efforts.

Further, it is SBA's experience that enforcement actions are typically based on documentation and information that is already available or known to the CDC, *e.g.*, loan documentation, the CDC's annual report, or correspondence between the CDC and SBA. Thus, the requested discovery procedures are generally not necessary. Nevertheless, SBA does recognize that if an enforcement action is based on information derived from a third party, *i.e.* a party other than SBA or a CDC, such as a borrower, principles of fairness suggest that the CDC should be provided with a copy of the relevant documentation or name of the third party in the event the information was oral. SBA recognizes also, however, that there may be occasions where there may be compelling reasons for not disclosing the identity of the third party or copies of the actual documentation, such as privilege or significant impairment of SBA's ability to manage the 504 Program. Therefore, SBA has added a new section § 120.856(g) providing that if an enforcement action

is based upon information derived from a third party, SBA'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 SBA determines that there are compelling reasons not to provide such information. If compelling reasons exist, SBA will provide a summary of the information it received to the CDC. Finally, SBA disagrees that a regulation is required to allow the CDC to obtain information from these or other third parties because the CDC can pursue such information without the need for a regulation.

Several comments asserted that § 120.856(c) [now renumbered as § 120.856(b)] should provide that a CDC which has received a notice of a proposed action or immediate suspension has the right to request a more definite statement if SBA's reasons for the proposed action were unclear. Inasmuch as SBA would, as a matter of course, respond to any legitimate request for clarification, SBA agrees to amend the regulation to make clear that a CDC may request clarification of a notice. SBA does not, however, agree with those comments that suggested that the regulation should be revised so that such a request for clarification would automatically delay the time for a CDC to respond to the notice. Allowing a CDC the right to postpone its response time based on an alleged inability to understand a notice could allow the CDC to improperly delay the enforcement action by seeking clarification where none was actually needed (and potentially filing repeated requests for clarification), and by waiting until the last possible moment to respond before seeking clarification. In addition, imposing an automatic delay of the CDC's response time would add considerable confusion to the enforcement procedures by creating uncertainty as to the deadline for the CDC's response. Thus, SBA has added language that the Agency "may" consider delaying the period for the CDC's response in the event the CDC legitimately seeks clarification or has a compelling basis for needing additional time to respond. The new language would likely preclude a CDC from delaying a request for clarification or additional time or improperly making such requests. If SBA disregarded a legitimate request for clarification or an extension of time and proceeded with a termination action, the CDC would have a right to appeal that decision before the OHA or a federal court.

Several comments requested that section 120.856(d) [now renumbered as

§ 120.856(c)] should include a deadline for SBA to issue a final decision on a proposed termination action. The offered rationale for this request was that without a deadline, the CDC would be "in limbo" for an indefinite period of time and could not pursue its rights before the OHA and the courts. SBA disagrees with these comments, for the most part. If SBA proposes an enforcement action, the CDC would not lose any right or authority until a final decision is made, and, therefore, would not experience any prejudice in the event that SBA did not immediately issue a final decision. Similarly, there is nothing for a CDC to appeal to OHA or the courts until a final decision is rendered. In the case of an immediate suspension under § 120.855(b) [now renumbered as § 120.856(a)(2)], however, the CDC's rights and authority would be affected. Therefore, for those actions, SBA agrees that a deadline should be imposed on the issuance of a final decision to avoid any undue prejudice to the CDC. Therefore, SBA has revised § 120.856(c) to require the Agency to issue a final decision on an immediate suspension within 90 days of receiving the CDC's objection. Procedures have also been added to address this deadline in the event a CDC seeks clarification or additional time. In addition, SBA has clarified that Agency decisions must be in writing in § 120.856(c).

Although SBA did not receive any comments pertaining to § 120.856(e) [now renumbered as § 120.856(d)], the Agency has determined through its own initiative that there is a conflict between this section and § 120.856(f) [now renumbered as § 120.856(e)]. Although proposed § 120.856(e) provided that a decision under that section constitutes the final agency decision, which signifies that there is no further appeal within the agency, proposed § 120.856(f) allowed for an appeal from that section to the OHA. To address this inconsistency, § 120.856(e) has been revised to clarify that it only sets forth a right of appeal and appellate procedures for an appeal from § 120.856(c).

SBA also received a comment from the SBA OHA regarding § 120.856(f) [now renumbered as § 120.856(e)] requiring the OHA review of the appeal of an enforcement action to be consistent with legal precedent developed under the arbitrary or capricious standard of 5 U.S.C. 706 because under OHA regulations this could be construed as requiring that only the SBA Administrative Law Judge would hear such appeals. The Agency intends that Administrative Judges and