

Chapter XVI. Excelsior Linked Deposit Program

Part 160. Administration, Application, and Evaluation

Section 160.1. Purpose and general description

The Excelsior Linked Deposit Program authorizes the Comptroller to deposit State funds and the Commissioner of Taxation and Finance to deposit funds of public authorities and public benefit corporations with participating banks, thrifts, [and] farm credit system institutions, and the New York Business Development Corporation at a reduced rate of return when such banks, thrifts, [(which includes savings banks and savings and loan associations) and] farm credit system institutions, and the New York Business Development Corporation make lower cost loans, on the basis of such linked deposits, to qualifying businesses to improve productivity, competitiveness, access to new markets, and exporting capabilities. The Commissioner of Economic Development is charged with administering the program. The purpose of these regulations is to set forth the eligibility requirements and application procedures for participation by businesses and banks and thrifts in the program.

Section 160.2. Definitions

(a) *Agricultural business* means a business that produces products defined in subdivision two of section 301 of the agriculture and markets law.

([a]b) *Authorized depositor* means the Comptroller with respect to linked deposits made by the Comptroller and the Commissioner of Taxation and Finance with respect to linked deposits made by the Commissioner of Taxation and Finance.

([b]c) *Census* means the decennial census performed by the Bureau of the Census of the United States Department of Commerce.

[(c)d] *Census bureau* means the Bureau of the Census of the United States Department of Commerce.

[(d)e] *Certified business* means a business located in an [economic development] empire zone created pursuant to article 18-B of the General Municipal Law and, at the time of application to the program, certified pursuant to such article as eligible for the benefits referred to in section 966 of such article.

[(e)f] *Certified minority- or women-owned business* means any minority-or women-owned business enterprise, as defined in section 310 of the Executive Law, and, at the time of application to the program, certified pursuant to section 314 of the Executive Law.

[(f)g] *Commissioner* means the Commissioner of Economic Development.

[(g)h] *Comptroller* means the Comptroller of the State of New York.

[(h)i] *Defense industry manufacturer* means a manufacturing firm as defined in subdivision [(s)t] of this section, 25 percent or more of the gross revenues of which derive, either directly as a prime contractor or indirectly as a subcontractor of a prime contractor, from Department of Defense or other military contracts.

[(i)j] *Department* means the Department of Economic Development.

[(j)k] *Department of Defense* means the United States Department of Defense.

[(k) *Economic development region* means a region established by the department pursuant to section 232 of the Economic Development Law.]

(l) [*Economic development*] Empire zone means an [economic development] empire zone created pursuant to article 18-B of the General Municipal Law.

(m) *Eligible business* means:

- (1) a manufacturing firm or agricultural business that has its principal place of

business in New York State and that employs 500 or fewer employees within New York State on a full-time basis;

- (2) a certified business with a facility located in an [economic development] empire zone, which business has its principal place of business in New York State and which employs 100 or fewer employees within New York State on a full-time basis;
- (3) any firm seeking financing through the program for an export project, which firm has its principal place of business in New York State and employs 100 or fewer employees within New York State on a full-time basis; [or]
- (4) any business located in a highly distressed area, as defined herein, which business is not a retail business, has its principal place of business in New York State, and employs 100 or fewer employees within New York State on a full-time basis; provided, however, that a retail business located in a highly distressed area may be considered an eligible business, if the commissioner determines that:
 - i. the financing provided through the program will retain permanent, full-time jobs in the highly distressed area; or
 - ii. the financing provided through the program will increase the overall number of retail jobs in the local retail market within which the business is located; [or]
- (5) any certified minority- or women-owned business that has its principal place of business in New York State and is seeking financing necessary to carry out a specific procurement contract with an agency or public authority or other entity of the New York State or Federal governments, provided that a minority- or women-

owned business which does not seek financing necessary to carry out such a procurement contract shall not be precluded from qualifying as an eligible business for any other purpose enumerated herein; [or]

(6) any service business that:

- i. is not dominant in its field within New York State during the preceding 10 years;
- ii. has its principal place of business in New York State and employs 100 or fewer employees within New York State on a full-time basis;
- iii. is seeking financing for a project that will result in the retention or creation of permanent, full-time, private-sector jobs within New York State; [and]
- iv. does not sell a service rendered at a facility personally by an individual for another individual, directly, without the intervention of a third party, or professional services such as health, legal, accounting, engineering, or architectural services; and

[iv]v. is independently owned and operated. For purposes of this paragraph, *independently owned and operated* means that the business is not a subsidiary or affiliate of another operating company and is not operated under a franchise or similar agreement[.]; and

(7) a qualifying technology or innovation business which business employs one hundred or fewer employees within the state on a full-time basis and engages in

- i. biotechnologies, which shall be defined as technologies involving the scientific manipulation of living organisms, especially at the molecular

and/or the submolecular genetic level, to produce products conducive to improving the lives and health of plants, animals, and humans; and the associated scientific research, pharmacological, mechanical, and computational applications and services connected with these improvements;

- ii. information and communication technologies, equipment, and systems that involve advanced computer software and hardware, visualization technologies, and human interface technologies;
- iii. advanced materials and processing technologies that involve the development, modification, or improvement of one or more materials or methods to produce devices and structures with improved performance characteristics or special functional attributes, or to activate, speed up, or otherwise alter chemical, biochemical, or medical processes;
- iv. electronic and photonic devices and components for use in producing electronic, optoelectronic, mechanical equipment and products of electronic distribution with interactive media content;
- v. energy efficiency, renewable energy and environmental technologies, products, devices, and services; or
- vi. small-scale systems integration and packaging.

(n) *Eligible projects* means:

- (1) export projects designed to increase a firm's export activities; or
- (2) for eligible manufacturing, technology or innovation, agricultural, and service firms, projects that involve one or more of the following:

- i. the preparation of strategic plans for improving productivity and competitiveness;
- ii. the introduction of modern equipment and/or the expansion of facilities as part of a business modernization plan;
- iii. the introduction of advanced technologies to improve productivity and quality;
- iv. improvements in production processes and operations, including agricultural operations;
- v. introduction of computerized information, reporting and control systems;
- vi. reorganization or improvement of work place systems and the introduction to total quality and employee participation programs;
- vii. development and introduction of new products;
- viii. identification and development of new markets, including entry into foreign markets;
- ix. financial restructuring for purposes of enabling specific modernization activities, however, refinancing of existing debt solely to obtain a lower interest rate shall be ineligible;
- x. buyouts of viable companies by employees or buyouts of viable companies by local owners residing in New York State;
- xi. provision of working capital for other business modernization activities that will improve the competitiveness and productivity of a firm and result in the creation or retention of permanent, full-time jobs; or

(3) for certified businesses located in [economic development] empire zones, and for

eligible retail businesses located in highly distressed areas, projects that will create or retain full-time, permanent jobs within the [economic development] empire zone or highly distressed area, as the case may be;

- (4) for defense industry manufacturers, projects designed to reduce dependence on Department of Defense and other military contracts and to change or diversify production in order to take advantage of any market other than that serving the Department of Defense or other military procurers; or
- (5) for certified minority- and women-owned businesses, projects to provide financing necessary to carry out a specific procurement contract with an agency or public authority or other entity of the New York State or Federal governments. For purposes of this paragraph, procurement contract shall include construction contracts.

(o) *Highly distressed area* means:

- (1) a census tract or tracts or block numbering area or areas or such census tract or block numbering area contiguous thereto which, according to the most recent census data available, has:
 - i. a poverty rate of at least 20 percent for the year to which the data relates or at least 20 percent of the households receiving public assistance; and
 - ii. an unemployment rate of at least one and twenty-five one hundredths times the statewide unemployment rate for the year to which the data relates; or
- (2) a city, town, village or county within a city with a population of one million or more for which:

- i. the ratio of the full value property wealth, as determined by the comptroller for the year 1990, per resident to the statewide average full value property wealth per resident; and
 - ii. the ratio of the income per resident, as shown in the 1990 census, to the statewide average income per resident; are each 55 percent or less of the statewide average;
- (3) an [economic development] empire zone shall not be considered a highly distressed area for purposes of this subdivision.

(p) *Lender* means:

- (1) any commercial bank that is or shall become an approved depository of State funds by meeting such qualifications and executing such documents as required by an authorized depositor and that agrees to participate in the program as evidenced by executing a linked deposit agreement, provided for in section 160.3 of this Part, with an authorized depositor; [or]
- (2) any thrift which an authorized depositor determines is eligible to accept linked deposits based upon criteria applied by the authorized depositor in making determinations under section 105 of the State Finance Law, and which agrees to participate in the program as evidenced by executing a linked deposit agreement with an authorized depositor, provided that any linked deposit in such thrift shall be secured in the same manner as moneys deposited pursuant to section 105 of the State Finance Law and such thrifts shall pledge assets or furnish other security satisfactory in form and amount to the authorized depositor for the repayment of moneys[.];

(3) any farm credit system institution which an authorized depositor determines is eligible to accept linked deposits based upon criteria applied by the authorized depositor in making determinations under section 105 of the State Finance Law, and which agrees to participate in the program as evidenced by executing a linked deposit agreement with an authorized depositor, provided that any linked deposit in such farm credit system institution shall be secured in the same manner as moneys deposited pursuant to section 105 of the State Finance Law and such farm credit system institutions shall pledge assets or furnish other security satisfactory in form and amount to the authorized depositor for repayment of moneys[.]; or

(4) The New York Business Development Corporation.

(q) *Linked deposit* means a deposit, or for farm credit system institutions an investment eligible to be held by such institution, placed with a lender by the Comptroller or the Commissioner of Taxation and Finance for a period of [two] four years at a fixed linked deposit interest rate, provided the lender agrees to:

- (1) lend the equivalent value of such deposit to an eligible business at the fixed interest rate provided in [this subdivision] section 218 of the state finance law;
and
- (2) permit the deposit to be comprised of a series of 90-day, six-month or one-year deposits each bearing an interest rate equal to the linked deposit interest rate fixed at the time the original deposit is placed.

(r) *Linked deposit interest rate* means:

- (1) for a linked deposit made in connection with a linked loan to a certified business in an economic development zone or to an eligible business located in an highly

distressed area or to a qualifying technology or innovation business as defined in paragraph (m)(7) of this section or to a certified minority- or women-owned business enterprise for an eligible project defined in paragraph ([m]n)(5) of this section or to a defense industry manufacturer for a project defined in paragraph ([m]n)(4) of this section, a fixed rate of interest which is 300 basis points below the lender's posted [two] four year certificate of deposit rate or, if the lender does not offer a [two] four year certificate of deposit or publicly post its [two]four year certificate of deposit rate, is 300 basis points below the average statewide rate for [two] four year certificates of deposit as determined by the Commissioner[of Economic Development];

(2) for linked deposit made in connection with any linked loan other than those specified in paragraph (1) of this subdivision, a fixed rate of interest which is 200 basis points below the lender's posted [two] four year certificate of deposit rate, or, if the lender does not offer a [two] four year certificate of deposit or publicly post its [two] four year certificate of deposit rate, is 200 basis points below the average statewide rate for [two] four year certificates of deposit as determined by the Commissioner[of Economic Development].

(3) In no event shall the linked deposit interest rate be less than zero.

(s) *Linked loan* means a loan for purposes of an eligible project, in an amount not to exceed \$[1]2,000,000, bearing interest for the first [two]four years at the interest rate provided in [subdivision q of this] section 218 of the state finance law, and linked to a deposit by an authorized depositor of equal value. Upon notice to authorized depositors and lenders, the commissioner may establish a lower maximum amount of a linked loan to ensure fulfillment

of program purposes.

(t) *Manufacturing firm* means a firm involved with extracting, smelting, recovering, developing, preparing, compounding, converting, assembling or producing in any manner, minerals, raw materials, products or substances of any kind or nature, and shall include facilities related thereto for storage, warehousing or distribution, for research and development or for the discovery of new, and the refinement of known, substances, processes, and products.

(u) *Program* means the Excelsior Linked Deposit Program.

(v) *Retail business* means a business that:

(1) sells merchandise to the general public for personal or household use or sells merchandise both to the general public for personal or household use and to businesses;

(2) buys and receives, as well as sells, merchandise;

(3) has an identified place of business and engages in activities to attract the general public to buy merchandise; and

(4) to the extent it renders services, does so incidental to the sale of merchandise.

(w) *Service business* means a business that engages in activities that add value without producing a product and creates intangible outputs rather than tangible goods. For purposes of this subdivision, *service business* shall not include:

(1) a business that sells a service rendered at a facility personally by an individual for another individual, directly and without the intervention of a third party, such as, but not limited to, brokerage of real estate, securities, or insurance; or

(2) professional services rendered by licensed individuals, such as, but not limited to, health, legal, accounting, engineering or architectural services.

(x) *Thrift* means any savings bank or savings and loan association, Federal savings bank or Federal savings and loan association.

Section 160.3. Lender participation in program

(a) The commissioner shall, with the assistance of the Superintendent of [Banks] Financial Services, market the program to lenders and solicit the participation of lenders in the program. In order to participate in the program, a lender shall:

(1) be authorized to accept linked deposits as follows:

- i. if a commercial bank, be an authorized depository of State funds, or become an authorized depository of State funds by executing such undertakings and collateral agreements as are required by each authorized depositor; or
- ii. if a thrift [or], farm credit system institution, or the New York State Business Development Corporation:

- (a) be determined by an authorized depositor as eligible to accept linked deposits based upon criteria applied by the authorized depositor in making determinations under section 105 of the State Finance Law;
- (b) agree to participate in the program;
- (c) secure any linked deposit in the same manner as moneys deposited pursuant to section 105 of the State Finance Law; and
- (d) pledge assets or furnish other security satisfactory in form and amount to the authorized depositor for the repayment of moneys; and

(2) execute a linked deposit agreement with each authorized depositor. Such agreement shall be in such form as required by the authorized depositors and shall govern linked deposits made by the authorized depositors in connection with the

participating lender's linked loans. Upon making a linked loan, the participating lender shall file with the authorized depositor a written linked loan designation, in such form as shall be required by the authorized depositor, which shall serve to identify the linked deposit relating to such loan as a deposit governed by the linked deposit agreement. In no event shall any defect in a linked deposit agreement be asserted as a defense by a borrower on a linked loan.

(b) Lenders participating in the program shall not, for any loan made pursuant to the program, charge any discount, points, origination fees, handling fees, service charges, refinancing fees or penalties or any charge other than those normally charged and in such amounts normally charged by the lender, for loans of the type being made, without regard to the program.

Section 160.4. Application procedure

(a) Eligible businesses seeking a linked loan for an eligible project shall first make a loan application to a lender in the manner customarily required by such lender. The lender shall make its credit decision with respect to such loan application in accordance with its customary standards. Upon approval of such loan, the lender shall submit to the department, a linked deposit application.

(b) The linked deposit application shall require such information as the commissioner shall deem necessary and shall be in as simple a form as possible. It shall elicit, but not be limited to, the following:

- (1) the principal amount and interest rate of the loan;
- (2) identifying information for the lender and the borrower, including the borrower's principal place of business;

- (3) a description of the borrower's business;
 - (4) a description of the project for which the loan has been sought;
 - (5) information on the importance of the project to the competitive position and profitability of the borrower;
 - (6) information relating to the number jobs to be retained or created in connection with the project; and
 - (7) a request by the borrower, if applicable, to treat information about its business as confidential pursuant to section 87(2)(d) of the Public Officers Law.
- (c) The application shall contain the following certifications:
- (1) a lender's certification to the effect that:
 - i. the linked deposit interest rate was calculated based upon the current interest rate that would be charged for the loan in the absence of the program, and the linked deposit interest rate will be a fixed interest rate charged during the term of the linked deposit applicable to the loan, even if the rate is determined upon variable rate conditions;
 - ii. no fees other than those normally charged in such amounts normally charged will be charged by the lender in connection with the loan;
 - iii. the lender agrees to give prompt notice to the authorized depositor of any increase in interest rate of the linked loan as a consequence of default on or renegotiation of the linked loan or the linked loan is charged off, prepayment of all or part of a linked loan, or sale or assignment of all or part of a linked loan; and
 - iv. the information provided by the lender in the application is, to the best of

lender's knowledge after due inquiry, true and correct;

(2) a borrower's certification to the effect that:

- i. the borrower is not currently participating in the program;
- ii. inability to obtain the reduced rate of interest provided by the program would impede the ability of the borrower to undertake the project. For this purpose, *impede* shall mean that the borrower would consider delaying or reducing the scale of the project for which the loan has been sought or would experience other difficulties in proceeding with the project; and
- iii. the information contained in the application is, to the best of the borrower's knowledge, true and correct.

(d) The commissioner shall approve or reject an application within 28 days after receipt of a fully complete application, and shall notify the lender in writing. Notification may be made, alternatively, by facsimile transmission followed by a confirmation hard copy.

Section 160.5. Evaluation criteria

The commissioner shall evaluate all linked deposit applications based upon the following:

- (a) the eligibility of the borrower for the program;
- (b) the eligibility of the project for which the loan has been sought for the program;
- (c) the significance of the eligible project for improving the competitive position and profitability of the eligible business;
- (d) the importance of a reduced cost of borrowing through a linked loan to the ability of the eligible business to undertake the eligible project; and
- (e) the number of jobs likely to be created or retained, or other substantial economic benefits

likely to be achieved as a result of the eligible project.

Section 160.6. Liability; early repayment; withdrawal; sale or assignment

- (a) No liability shall be imposed on the State or any of its departments or employees for payment or delays in payment of the principal of or interest on a linked loan.
- (b) Any delay in payment or default on a linked loan shall in no way affect the linked deposit agreement between the lender and the authorized depositor.
- (c) In the event the interest rate of the linked loan is increased as a consequence of default on or renegotiation of the linked loan or the linked loan is charged off, the lender shall give the authorized depositor prompt notice of such event, and the authorized depositor shall thereafter withdraw, without penalty for early withdrawal, the linked deposit on not less than seven days prior written notice to the lender.
- (d) Upon prepayment of all or part of a linked loan, the lender shall within 30 days give the authorized depositor notice of such payment, and the authorized depositor shall thereafter withdraw, without penalty for early withdrawal, all or a pro rata part, as the case may be, of the linked deposit upon not less than seven days' prior written notice to the lender. In such event, the interest rate payable on the linked deposit or the portion thereof being withdrawn, from the date of prepayment of the linked loan to the date of withdrawal shall be the interest rate upon which the linked deposit interest rate was calculated without regard to the applicable basis point reduction.
- (e) Upon sale or assignment of all or part of a linked loan, the lender shall within 30 days give the authorized depositor notice of such sale or assignment, and the authorized depositor shall thereafter withdraw, without penalty for early withdrawal, all or pro rata part, as the case may be, of the linked deposit upon not less than seven days prior written notice to the

lender. In such event, the interest rate payable on the linked deposit or the portion thereof being withdrawn, from the date of sale or of assignment of the linked loan to the date of withdrawal shall be the interest rate upon which the linked deposit interest rate was calculated without regard to the applicable basis point reduction.

Section 160.7. Monitoring

The commissioner shall monitor the program activities of lenders and businesses that participate in the program. The commissioner may require periodic reports or request other information from participating lenders and businesses relating to the status of linked loans and projects financed by such loans.

Section 160.8. Renewal of Linked Deposit

A lender may, on behalf of a borrower, apply to the Commissioner to request a renewal of the linked deposit for an additional four-year period to correspond with a second four-year period of a borrower's linked loan. The Commissioner may grant such application if the Commissioner determines that the borrower, during the second four-year period of the linked loan, will create additional industrial modernization benefits or additional export trade benefits or additional jobs. If the Commissioner grants such application, the Commissioner shall notify the authorized depositor who made the linked deposit that the Commissioner has determined that the application satisfies the requirements of this Part and shall request the authorized depositor to continue the linked deposit with the lender for an additional four-year period in accordance with section 98-a of the state finance law and with the authorized depositor's established procedures. Such linked deposit shall continue to be secured in accordance with the provisions of section 105 of the state finance law. The fixed interest rate on the continued linked deposit shall be the linked

deposit interest rate in effect on the first day of the continuation of the linked deposit. The authorized depositor and the lender shall enter into a written deposit agreement governing the continuation of the linked deposit. The interest rate payable on the linked loan for the second four year period shall be, in the case of a certified business in an Empire Zone or an eligible business located in an highly distressed area or a minority or women-owned business enterprise, three percentage points below the interest rate the lender would have charged for the loan in effect on the first day of the continuation of the linked deposit; or in the case of a business not located in an Empire Zone or highly distressed area or which is not a minority or women-owned business enterprise, two percentage points below the interest rate the lender would have charged for the loan in the absence of a linked deposit in effect on the first day of the continuation of the linked deposit.