

**DEPARTMENT OF AGRICULTURE****Rural Business-Cooperative Service****Notice of Funds Availability (NOFA)  
Inviting Applications for Biorefineries**

**AGENCY:** Rural Business-Cooperative Service, USDA.

**ACTION:** Notice.

**SUMMARY:** This notice announces the funds available for the BioRefinery Assistance Program (the "Program") to provide guaranteed loans for the development and construction of commercial-scale biorefineries or for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. In conjunction with this notice, USDA is publishing elsewhere in this issue an advanced notice of proposed rulemaking (ANPRM) seeking comments for the development of a proposed rule to implement the BioRefinery Assistance guaranteed loan program.

**DATES:** To be considered for funding in the first half of Fiscal Year 2009, applications must be completed and submitted to the USDA Rural Development National Office by December 31, 2008. To be considered for funding in the second half of Fiscal Year 2009, complete applications must be submitted to the USDA Rural Development National Office between March 1, 2009 and April 30, 2009. Comments regarding the information collection requirements under the Paperwork Reduction Act of 1995 must be submitted on or before January 20, 2009.

**ADDRESSES:** Applications and forms may be obtained from:

- U.S. Department of Agriculture, Rural Development, Energy Branch, Attention: BioRefinery Assistance Program, 1400 Independence Avenue, SW., STOP 3225, Washington, DC 20250-3225.

- Agency Web site: <http://www.rurdev.usda.gov>. Follow instructions for obtaining the application and forms.

Submit an original completed application with two copies to USDA's Rural Development National Office: Energy Branch, Attention: BioRefinery Assistance Program, 1400 Independence Avenue, SW., STOP 3225, Washington, DC 20250-3225.

**FOR FURTHER INFORMATION CONTACT:** Energy Branch, Attention: BioRefinery Assistance Program, 1400 Independence Avenue, SW., Mail Stop 3225, Washington, DC 20250-3225. Telephone: 202-720-1400.

**SUPPLEMENTARY INFORMATION:****Programs Affected**

This Program is listed in the Catalog of Federal Domestic Assistance under Number 10.865.

**Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995, Rural Development is requesting emergency approval from OMB of the reporting and a recordkeeping requirement contained in this Notice and hereby opens a 60-day public comment period.

*Title:* BioRefinery Assistance Program Guaranteed Loans.

*OMB Number:* 0570-XXXX.

*Type of Request:* Emergency Approval of a new collection.

*Expiration Date of Approval:* Six months from date of OMB approval.

*Abstract:* The collection of information is vital to Rural Development to make wise decisions regarding the eligibility of projects and borrowers in order to ensure compliance with the regulations and to ensure that the funds obtained from the Government are used appropriately (i.e., being used for the purposes for which the guaranteed loans were awarded). In sum, this collection of information is necessary in order to implement this Program.

Rural Development has established "Instructions for Application for Loan Guarantee in the Application Guide—Section 9003 BioRefinery Assistance Loan Guarantees" that contains Form RD 4279-1 and full details of the application process. Eligible entities are strongly encouraged to consult the instructions guide when preparing applications for submission.

All applicants requesting Federal funding must complete Form RD 4279-1, "Application for Loan Guarantee (Business and Industry and Section 9006 Program)". Completed applications must include a proposal narrative and written evidence to collect needed information required by the Agency for reporting requirements. This includes but not limited to: Forms RD 1980-41, "Guaranteed Loan Status Report"; RD 1980-44, "Guaranteed Loan Borrower Default Status"; RD 400-1, "Equal Opportunity Agreement"; RD 400-4, "Assurance Agreement"; RD 4279-3, "Conditional Commitment"; RD 449-30, "Loan Note Guarantee Report of Loss"; RD 1980-43, "Lender's Guaranteed Loan Payment to USDA"; RD 4279-4 "Lender's Agreement"; RD 1980-19, "Guaranteed Loan Closing Report"; RD 4279-6, "Assignment Guarantee Agreement"; RD 1940-20 "Request for environmental Information"; RD 1940-Q, "Certification

for Contracts, Grants, and Loans" (if loan exceeds \$150,000); SF-LLL, "Disclosure of Lobbying Activities" and AD-1047, "Certification Regarding Debarment, Suspension, and Other Responsibility Matters."

The following estimates are based on the average over the first three years the program is in place.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 4 hours per response.

*Respondents:* Individuals, Indian tribes, units of State or local government, corporations, farm cooperatives, farmer cooperative organizations, associations of agricultural producers, National Laboratories, institutions of higher education, rural electric cooperatives, public power entities, and consortia of any of these entities.

*Estimated Number of Respondents:* 10.

*Estimated Number of Responses per Respondent:* 31.

*Estimated Number of Responses:* 306.

*Estimated Total Annual Burden (hours) on Respondents:* 1,281.

Copies of this information collection may be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250-0742 or by calling (202) 692-0043.

**Comments**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of Rural Development, including whether the information will have practical utility; (b) the accuracy of the new Rural Development estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Cheryl Thompson, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250.

Section 9003 of the Food, Conservation, and Energy Act of 2008

(2008 Farm Bill) and its accompanying Managers Report direct the Secretary to implement this program as soon as possible in fiscal year 2009. As a result, the Agency has requested emergency approval from OMB of the information collection to implement this Notice. The Agency is soliciting comments with respect to this information collection and such comments will be considered and addressed in the final rule and in the information collection submission to OMB for the 3-year approval. All comments will also become a matter of public record.

### E-Government Act Compliance

Rural Development is committed to complying with the E-Government Act, to provide increased opportunities for citizens to access Government information and services electronically.

### I. Background

Section 9003 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) is intended to assist in the development and construction of commercial-scale biorefineries and the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. Consistent with Congressional intent, preference will be given to projects where first-of-a-kind technology will be deployed at the commercial scale. To that end, the program will promote the development of the first commercial scale biorefineries that do not rely on corn kernel starch as the feedstock or standard biodiesel technology.

The Agency will make guarantees available on loans for eligible projects that will provide for the development, construction, and/or retrofitting of commercial biorefineries using eligible technology. Eligible technology is:

(a) Any technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel, and

(b) Any technology not described in paragraph (a) above that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

Over the life of the program, it is likely that guarantees will be awarded to projects that are first-of-a-kind and that may include projects with commercial applications that are expanded to new regions, modified to utilize different feedstocks, or substantially improved such that they represent a significant technological risk.

- The section 9003 program being implemented is similar, but not identical to, the guaranteed loan

program for innovative technologies implemented by the U.S. Department of Energy under title XVII of the Energy Policy Act of 2005 (Pub. L. 109-58). The Agency is implementing the section 9003 as a separate program because the types of projects that would be "good candidates" for guaranteed loans under title XVII of the Energy Policy Act of 2005 would not likely be good candidates for guaranteed loans under section 9003, and vice-versa.

#### A. Guaranteed Loan Funding

The 2008 Farm Bill provides mandatory budget authority for this Program of \$75 million in Fiscal Year 2009 to support loan guarantees based on credit subsidy scoring that is yet to be determined.

The maximum principal amount of a loan guaranteed under this Program is \$250 million; there is no minimum amount. The amount of a loan guaranteed under this Program will be reduced by the amount of other direct Federal funding that the eligible borrower receives for the same project.

The maximum guarantee under this Program is 80 percent of the principal and interest due on a loan guaranteed under this Program if the loan amount is equal to or less than \$80 million. If the loan amount is more than \$80 million and less than \$125 million, the maximum guarantee is 70 percent for the amount in excess of \$80 million. If the loan amount is equal to or more than \$125 million, the maximum guarantee is 60 percent for the entire loan amount.

The amount of a loan guaranteed for a project under this Program will not exceed 80 percent of total eligible project costs. Thus, the amount of guaranteed loan funds that may be made available to an applicant for an eligible project will not exceed 64 percent of the total eligible project costs.

The interest rate for the guaranteed loan will be negotiated between the lender and the applicant and shall be in line with interest rates on other similar government guaranteed loan programs. The interest rate may be either fixed or variable, as long as it is a legal rate, and shall be fully amortizing. The interest rate for both the guaranteed and unguaranteed portions of the loan must be of the same type (i.e., both fixed or both variable). The interest rate charged will be subject to Agency review and approval.

The length of a loan guaranteed under this Program would be for a period of no more than 20 years or 85 percent of the useful life of the project, as determined by the lender and confirmed by the Agency, whichever is less. The length of the loan term would be

required to be the same for both the guaranteed and unguaranteed portion of the loan.

#### B. Eligibility Requirements for Guarantee Assistance

This Notice contains eligibility requirements for borrowers, projects, and lenders, as discussed below.

##### Borrower Eligibility

To be eligible to receive a guaranteed loan under this Program, a borrower must be one of the following:

- Individual,
- Indian tribe,
- Unit of State or local government,
- Corporation,
- Farm cooperative,
- Farmer cooperative organization,
- Association of agricultural producers,
- National Laboratory,
- Institution of higher education,
- Rural electric cooperative,
- Public power entity, or
- Consortium of any of those entities.

##### Project Eligibility

Projects eligible for loan guarantees under this Program must be located in a rural area and be for either:

- The development and construction of commercial-scale biorefineries using eligible technology, or
- The retrofitting of existing facilities, including, but not limited to, wood products facilities and sugar mills, with eligible technology.

Eligible technology is defined as either:

- A technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel; or
- A technology not described in the previous paragraph that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

##### Lender Eligibility

Regulated or supervised lenders that meet the requirements specified in this Notice (see section I) may be eligible to participate in this Program.

#### C. Applications

The lender must submit a separate application for each project for which a loan guarantee is sought under this Program. The contents of the application, including forms, certifications, and agreements, are very similar to what is required for the Business and Industry Guaranteed Loan Program and the Renewable Energy Systems and Energy Efficiency

Improvements Guaranteed Loan Program. It is recommended that applicants refer to the application guide for this program ("Instructions for Application for Loan Guarantee—Section 9003 BioRefinery Assistance Loan Guarantees"), which can be found on the Agency's Web site.

Because of factors of cost and complexity for eligible projects under this Program, the lender must include with the application a project-specific feasibility study, as defined in this Notice. The feasibility study must be prepared by a qualified consultant. The feasibility study must address, in part, both the technical and economic feasibility of the project.

The Agency intends to accept applications twice during Fiscal Year 2009 for consideration for funding under this Program. The first window for submitting applications begins on the publication date of this Notice and closes December 31, 2008. Therefore, it is imperative that applicants submit complete applications to the USDA Rural Development National Office by December 31, 2008, in order to be considered for funding in the first half of FY 2009. Applicants not selected in the first round may reapply during the second application window.

The second window for submitting applications under this Program begins on March 1, 2009. Complete applications must be submitted to the USDA Rural Development National Office between March 1, 2009, and April 30, 2009, to be considered for funding in the second half of FY 2009. Applications received after April 30, 2009, will not be considered for funding in FY 2009.

In administering this program's budgetary authority for FY 2009, the Agency will allocate up to, but no more, than 50 percent of its FY 2009 \$75 million budgetary authority to fund applications received by the end of the first application window. Any funds not obligated to support applications submitted during the first application window will be available to support applications received during the second window. The Agency, therefore, will have a minimum of 50 percent of its FY 2009 budgetary authority for this program available to support applications received during the second application window.

Ineligible or incomplete applications will be returned to the applicant. If an application is determined to be ineligible for any reason, the Agency will inform the lender, in writing, of the reasons and provide any applicable appeal rights. The denial or rejection of

an application under the Program may be appealed as provided in this Notice.

#### *D. Evaluation of Guaranteed Loan Applications*

Submission of an application neither reserves funding nor ensures funding. The Agency will evaluate each application and make a determination as to whether the borrower is eligible, whether the lender is eligible, whether the proposed project is eligible, the credit-worthiness and technical merit of the project, and whether the proposed funding request complies with all applicable statutes and regulations. The evaluation will be based on the information provided by the lender and on other sources of information, such as recognized industry experts in the applicable technology field, as necessary.

The Agency will score each application in order to prioritize each proposed project. The evaluation criteria that the Agency will use to score these projects are:

- Whether the borrower has established a market for the advanced biofuel and the byproducts produced.
- Whether the area in which the borrower proposes to place the biorefinery has other similar advanced biofuel facilities.
- Whether the borrower is proposing to use a feedstock not previously used in the production of advanced biofuels.
- Whether the borrower is proposing to work with producer associations or cooperatives.
- The level of financial participation by the borrower, including support from non-Federal and private sources. Such financial participation may take the form of direct financial support, technical support, and contributions of in-kind resources including such kinds of support from state government. Any direct Federal funding from other sources will reduce the amount of the loan that may be guaranteed under this program.
- Whether the borrower has established that the adoption of the process proposed in the application will have a positive impact on resource conservation, public health, and the environment.
- Whether the borrower can establish that, if adopted, the biofuels production technology proposed in the application will not have any significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks.
- The potential for rural economic development, including the number of local jobs created and inclusion of local

banks or other capital sources in any proposed debt syndication.

- The level of local ownership proposed in the application.
- Whether the project can be replicated.
- The extent to which the project converts cellulosic biomass feedstocks into advanced biofuel.
- Whether the project is a first-of-a-kind technology, system, or process.

Using these evaluation criteria, the Agency expects that existing biodiesel technology is unlikely to score high enough to be selected for a guaranteed loan under this NOFA.

## **II. Provisions for BioRefinery Assistance Loan Guarantees**

All guaranteed loan requests for this Program are subject to the provisions of this Notice as laid out in this section of the Notice.

### *A. Definitions*

The following definitions are applicable to this Notice.

*Advanced biofuel.* Fuel derived from renewable biomass, other than corn kernel starch to include:

- (1) Biofuel derived from cellulose, hemicellulose, or lignin;
- (2) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);
- (3) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;
- (4) Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat;
- (5) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass;
- (6) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass; or
- (7) Other fuel derived from cellulosic biomass.

*Agency.* The Rural Business-Cooperative Service or successor Agency assigned by the Secretary of Agriculture to administer the BioRefinery Assistance Program. References to the National Office, Finance Office, State Office or other Agency offices or officials should be read as prefaced by "Agency" or "Rural Development" as applicable.

*Association of agricultural producers.* An organization that represents independent producers directly engaged in the production of agricultural products, including crops (including farming); livestock (including ranching); forestry products; hydroponics; nursery

stock; or aquaculture, whereby 50 percent or greater of their gross income is derived from the operations; and whose mission includes working on behalf of such producers and the majority of whose membership and board of directors are comprised of agricultural producers.

**Arm's-length transaction.** A transaction between ready, willing, and able disinterested parties who are not affiliated with or related to each other and have no security, monetary, or stockholder interest in each other.

**Assignment Guarantee Agreement.** A signed, Agency-approved agreement between the Agency, the lender, and the holder setting forth the terms and conditions of an assignment of a guaranteed portion of a loan or any part thereof.

**Assurance agreement.** A signed, Agency-approved agreement between the Agency and the lender that assures the Agency that the lender is in compliance with and will continue to be in compliance with Title VI of the Civil Rights Act of 1964, 7 CFR part 15, and Agency regulations promulgated thereunder.

**Biofuel.** A fuel derived from renewable biomass.

**Biogas.** Biomass converted to gaseous fuels.

**Biorefinery.** A facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products and may produce electricity.

**Borrower.** The person that borrows, or seeks to borrow, money from the lender, including any party or parties liable for the guaranteed loan.

**Business plan.** A comprehensive document that:

- (1) Describes clearly the borrower's ownership structure and management, including experience and succession planning;
- (2) Discusses, if applicable, the borrower's parent, affiliates, and subsidiaries, including their names and a description of the relationship;
- (3) Discusses how the borrower will operate the proposed project, including, at a minimum, a description of:
  - (i) The business and its strategy;
  - (ii) Possible vendors and models of major system components;
  - (iii) The products and services to be provided;
  - (iv) The availability of the resources (e.g., labor, raw materials, supplies) necessary to provide those products and services;
  - (v) Site location and its relation to product distribution (e.g., rail lines or highways) and any land use or other permits necessary to operate the facility; and

(vi) The market for the product and its competition, including any and all competitive threats and advantages;

(4) Presents pro forma financial statements, including:

(i) Balance sheet and income and expense for a period of not less than 3 years of stabilized operation, and

(ii) Cash flows for the life of the project; and

(5) Describes the proposed use of funds.

**Collateral.** The asset(s) pledged by the borrower in support of the loan.

**Conditional Commitment.** An Agency-approved form provided to the lender indicating the loan guarantee it has requested has been approved subject to the completion of all conditions and requirements contained therein.

**Deficiency balance.** The balance remaining on a loan after all collateral has been liquidated.

**Deficiency judgment.** A monetary judgment rendered by a court of competent jurisdiction after foreclosure and liquidation of all collateral securing the loan.

**Eligible borrower.** An individual, Indian tribe, or unit of State or local government, including a corporation, farm cooperative, farmer cooperative organization, association of agricultural producers, National Laboratory, institution of higher education, rural electric cooperative, public power entity, or consortium of any of those entities.

**Eligible project costs.** Those expenses approved by the Agency for the project as identified in paragraphs (g)(3)(i) through (ix) of Section Q of this NOFA.

**Eligible technology.**

(1) A technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel; or

(2) A technology not described in paragraph (1) of this definition that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

**Fair market value.** The price that could reasonably be expected for an asset in an arm's-length transaction under ordinary economic and business conditions.

**Farm cooperative.** A farmer or rancher owned and controlled business from which benefits are derived and distributed equitably on the basis of use by each of the farmer or rancher owners.

**Farmer Cooperative Organization.** A cooperative organization is a cooperative or an entity, not chartered as a cooperative, that operates as a cooperative in that it is owned and operated for the benefit of its members,

including the manner in which it distributes its dividends and assets.

**Feasibility study.** An analysis by a qualified consultant of the economic, market, technical, financial, and management capabilities of a proposed project or business in terms of its expectation for success.

**Finance Office.** The office which maintains the Agency financial accounting records located in St. Louis, Missouri.

**Future recovery.** Any funds collected by lender associated with a defaulted project, after final loss claim has been paid by USDA.

**Guaranteed loan.** A loan made and serviced by a lender for which the Agency has issued a Loan Note Guarantee.

**Holder.** A person or entity, other than the lender, who owns all or part of the guaranteed portion of the loan with no servicing responsibilities. When the single note option is used and the lender assigns a part of the guaranteed note to an assignee, the assignee becomes a holder only when the Agency receives notice and the transaction is completed through use of Form RD 4279-6, "Assignment Guarantee Agreement," or predecessor form.

**Immediate family.** Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.

**Indian tribe.** This term has the meaning given it in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

**Institution of higher education.** This term has the meaning given it in section 102(a) of the Higher Education Act of 1965 (20 U.S.C. 1002(a)).

**Intellectual property.** Any and all intangible assets that consists of human knowledge and ideas including, without limitation, patents, copyrights, trademarks, service marks, and trade secrets.

**Lender.** A regulated or supervised lender that meets the criteria specified in Section I of this NOFA.

**Lender's Agreement.** The Agency approved signed form between the Agency and the lender setting forth the lender's loan responsibilities under an issued Loan Note Guarantee.

**Lender's analysis.** The analysis and evaluation of the credit factors associated with each guarantee application to ensure loan repayment through the use of credit document procedures and an underwriting process that is consistent with industry

standards and the lender's written policy and procedures.

**Liquidation value.** A monetary value given to property that is sold or exchanges hands under forced or limiting conditions, such as bankruptcy.

**Loan agreement.** The Agency approved agreement between the borrower and lender containing the terms and conditions of the loan and the responsibilities of the borrower and lender.

**Loan Note Guarantee.** The Agency approved form containing the terms and conditions of the guarantee of an identified loan.

**Loan-to-cost.** The ratio of the dollar amount of a loan to the dollar value of the actual eligible project cost adjusted for other debt, project obligations, or other factors as determined by USDA.

**Loan-to-value.** The ratio of the dollar amount of a loan to the dollar value of the collateral pledged as security for the loan.

**Market value.** The amount for which property would sell for its highest and best use in an arm's length transaction.

**Negligent loan servicing.**

(1) The failure of a lender to perform those services that a reasonably prudent lender would perform in originating, servicing, and liquidating its own portfolio of unguaranteed loans; or

(2) The failure of the lender to perform its origination and servicing responsibilities in accordance with its origination and servicing policies and procedures in use by the lender at the time the loan is made.

(3) The term includes the concepts of failure to act, not acting in a timely manner, or acting in a manner contrary to the manner in which a reasonably prudent lender would act.

**Offtake agreement.** The terms and conditions governing the sale and transportation of biofuels, biobased products, and electricity produced by the borrower to another party.

**Parity.** A lien position whereby two or more lenders share a security interest of equal priority in collateral. In the event of default, each lender will be affected on a *pro rata* basis.

**Participation.** Sale of an interest in a loan by the lender wherein the lender retains the note, collateral securing the note, and all responsibility for loan servicing and liquidation.

**Person.** Any individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, public body, or State or local government.

**Promissory Note.** A legal instrument that a borrower signs promising to pay a specific amount of money at a stated

time. "Note" or "Promissory Note" shall also be construed to include "Bond" or other evidence of debt where appropriate.

**Protective advances.** Advances made by the lender for the purpose of preserving and protecting the collateral where the debtor has failed to, and will not or can not, meet obligations to protect or preserve collateral.

**Qualified consultant.** An independent, third-party possessing the knowledge, expertise, and experience to perform in an efficient, effective, and authoritative manner the specific task required.

**Qualified Intellectual Property.** Any intellectual property included on current (within one year) audited balance sheets for which an audit opinion has been received that states the financial reports fairly represent the values therein and the reported value has been arrived at in accordance with Generally Accepted Accounting Principles (GAAP) standards for valuing intellectual property. The supporting work papers must be satisfactory to the Administrator.

**Regulated or supervised lender.** A lender that is subject to examination or supervision by an appropriate agency of the United States or a State that supervises or regulates credit institutions.

**Renewable biomass.**

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(i) Are byproducts of preventive treatments that are removed to reduce hazardous fuels; to reduce or contain disease or insect infestation; or to restore ecosystem health;

(ii) Would not otherwise be used for higher-value products; and

(iii) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of paragraphs (2), (3), and (4) of subsection (e) of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention of subsection (f) of that section; or

(2) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(i) Renewable plant material, including feed grains; other agricultural

commodities; other plants and trees; and algae; and

(ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

**Renewable biomass agreement.** The terms and conditions governing the sale and transportation of the renewable biomass to the borrower by another party.

**Retrofitting.** The modification of a building or equipment to incorporate functions not included in the original design that allow for the production of advanced biofuels.

**Rural or rural area.** Any area of a State not in a city or town that has a population of more than 50,000 inhabitants, according to the latest decennial census of the United States, and the contiguous and adjacent urbanized area. In determining which census blocks in an urbanized area are not in a rural area, the Agency shall exclude any cluster of census blocks that would otherwise be considered not in a rural area only because the cluster is adjacent to not more than 2 census blocks that are otherwise considered not in a rural area under this definition. For the purposes of this definition, cities and towns are incorporated population centers with definite boundaries, local self government, and legal powers set forth in a charter granted by the State. For Puerto Rico, Census Designated Place, as defined by the U.S. Census Bureau, will be used as the equivalent to city or town. For the purpose of defining a rural area in the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, the Agency shall determine what constitutes rural and rural area based on available population data.

**State.** Any of the 50 States of the United States, the Commonwealth of Puerto Rico, the District of Columbia, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

**Subordination.** An agreement between the lender and borrower whereby lien priorities on certain assets pledged to secure payment of the guaranteed loan will be reduced to a position junior to, or on parity with, the lien position of another loan (see paragraph (h)(1) in section O).

**Technical and economic potential.** A technology not described in paragraph

(1) of the definition of “eligible technology” is considered to have demonstrated “technical and economic potential” for commercial application in a biorefinery that produces an advanced biofuel if each of the following conditions is met:

(1) The advanced biofuel biorefinery’s likely financial and production success is evidenced in a thorough evaluation including, but not limited to:

- (i) Feedstocks;
- (ii) Process engineering;
- (iii) Siting;
- (iv) Technology;
- (v) Energy production; and
- (vi) Financial and sensitivity review

using a banking industry software analysis program with appropriate industry standards.

(2) The evaluation in paragraph (1) of this definition is completed by an independent third-party expert in a feasibility study, technical report, or other analysis, each of which must be satisfactory to the Agency, that demonstrates the success of the project.

(3) The advanced biofuel technology has at least a 12 month (four season) operating cycle at semi-work scale.

*Total project cost.* The sum of all costs (including eligible and ineligible project costs) associated with a completed project.

*Transfer and assumption.* The conveyance by a debtor to an assuming party of the assets, collateral, and liabilities of the loan in return for the assuming party’s binding promise to pay the outstanding debt.

*Viable commercial-scale.* An operation is considered to a viable commercial scale operation if it meets each of the following conditions:

(1) Evidence that a proposed project’s revenue will be sufficient to recover the full cost of the project over the term of the guaranteed loan, service debt, and result in an anticipated annual rate of return sufficient to encourage investors or lenders to provide funding for the project.

(2) Such proposed project will be able to operate profitably without public and private sector subsidies upon completion of construction (volumetric excise tax is not included as a subsidy).

(3) Contracts for feedstocks are adequate to address proposed off-take from the biorefinery.

(4) The proposed project demonstrates the ability to achieve market entry, suitable infrastructure to transport the advanced biofuel to its market is available, and general market competitiveness of the advanced biofuel technology and related products.

(5) The project must demonstrate that it can be easily replicated and that

replications can be sited at multiple facilities across a wide geographic area based on the proposed deployment plan.

(6) The advanced biofuel technology has at least a 12 months (four seasons) operating history at semi-work scale, which demonstrates the ability to operate at a commercial scale.

#### *B. Exception Authority*

Except as specified in paragraphs (a) through (d) of this section, the Administrator may, on a case-by-case basis, make exceptions to any requirement or provision of this Notice only when such an exception is in the best financial interests of the Federal Government and is otherwise not in conflict with applicable law.

(a) *Lender and borrower eligibility.* No exception to lender or borrower eligibility can be made.

(b) *Project eligibility.* No exception to project eligibility can be made.

(c) *Term length.* No exception to the maximum length of the loan term can be made with respect to loan originations.

(d) *Rural area definition.* No exception to the definition of rural area, as defined in this Notice, can be made.

#### *C. Review or Appeals*

A person has review or appeal rights in accordance with 7 CFR part 11.

#### *D. Conflicts of Interest*

No conflict of interest or appearance of conflict of interest will be allowed. For purposes of this Notice, conflict of interest includes, but is not limited to, distribution or payment of guaranteed loan funds or award of project contracts to an individual owner, partner, stockholder, or beneficiary of the lender or borrower or an immediate family member of such an individual.

#### *E. Oversight and Monitoring*

(a) *General.* The lender will cooperate fully with Agency oversight and monitoring of all lenders involved in any manner with any guarantee under this Program to ensure compliance with the provisions in this Notice. Such oversight and monitoring will include, but is not limited to, reviewing lender records and meeting with lenders.

(b) *Reports and notifications.* The Agency will require lenders to submit to the Agency reports and notifications to facilitate the Agency’s oversight and monitoring. These reports and notifications include, but are not necessarily limited to:

(1) During construction, the lender will submit quarterly construction progress reports to the Agency. These reports will contain, at a minimum,

construction milestone attainment, loan advances, and personnel hiring, training, and retention.

(2) Periodic reports, to be submitted quarterly unless otherwise specified in the Conditional Commitment, regarding the condition of its Agency guaranteed loan portfolio (including borrower status and loan classification) and any material change in the general financial condition of the borrower since the last periodic report was submitted.

(3) Monthly default reports, including borrower payment history, for each loan in monetary default using a form approved by the Agency.

(4) Notification within 15 days of:

(i) Any loan agreement violation by any borrower, including when a borrower is 30 days past due or is otherwise in default;

(ii) Any permanent or temporary reduction in interest rate; and

(iii) Any change in the loan classification of any loan made under this Notice.

(5) If a lender receives a final loss payment, an annual report on its collection activities for each unsatisfied account for 3 years following payment of the final loss claim.

#### *F. Forms, Regulations, and Instructions*

Copies of all forms, regulations, and instructions referenced in this Notice may be obtained through the Agency.

#### *Basic Eligibility Requirements*

##### *G. Borrower Eligibility*

To be eligible for a guaranteed loan under this Program, a borrower: must meet each of the conditions specified in the following paragraphs, as applicable.

(a) The borrower must be one of the following:

- (1) An individual;
- (2) An Indian tribe;
- (3) A unit of State or local government;
- (4) A corporation;
- (5) A farm cooperative;
- (6) A farmer cooperative organization;
- (7) An association of agricultural producers;
- (8) A National Laboratory;
- (9) An institution of higher education;
- (10) A rural electric cooperative;
- (11) A public power entity; or
- (12) A consortium of any of the above entities.

(b) Individual borrowers must either:

(1) Be citizens of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or

(2) Reside in the U.S. after legal admittance for permanent residence.

(c) Entities other than individuals must be at least 51 percent owned by persons who are either citizens as identified above or legally admitted permanent residents residing in the U.S.

(d) Each borrower must have, or obtain, the legal authority necessary to construct, operate, and maintain the proposed facility and services and to obtain, give security for, and repay the proposed loan.

(e) A borrower will be considered ineligible for a guarantee under this Program if either the borrower or any owner with more than 20 percent ownership interest in the borrower:

(i) Has an outstanding judgment obtained by the U.S. in a Federal Court (other than U.S. Tax Court),

(ii) Is delinquent on the payment of Federal income taxes,

(iii) Is delinquent on Federal debt, or

(iv) Is debarred or suspended from receiving Federal assistance.

#### H. Project Eligibility

Projects eligible for loan guarantees under this Program must meet the criteria specified in this section.

(a) The project must be located in a rural area.

(b) The project must be for either:

(1) The development and construction of commercial-scale biorefineries using eligible technology or

(2) The retrofitting of existing facilities, including, but not limited to, wood products facilities and sugar mills, with eligible technology.

(c) The project must meet the financial metric criteria specified in paragraphs (c)(1) through (c)(3) of this section. These financial metric criteria shall be calculated from the realistic information in the pro forma statements or borrower financial statements of a typical operating year after the project is completed and stabilized.

(1) A debt coverage ratio of 1.0 or higher;

(2) A debt-to-tangible net worth ratio of 4:1 or lower for start-up businesses and of 9:1 or lower for existing businesses.

(3) A loan-to-value ratio of no more than 1.0.

#### I. Lender Eligibility

To be eligible to participate in this Program under this Notice, a lender must be a regulated or supervised lender and must maintain at all times the following minimum acceptable levels of capital:

- Total Risk-Based Capital ratio of 10 percent or higher;
- Tier 1 Risk-Based Capital ratio of 6 percent or higher; and
- Tier 1 Leverage Capital ratio of 5 percent or higher.

If the regulated or supervised lender is a commercial bank or thrift, these levels would be based on those reflected in Call Reports and Thrift Financial Reports.

Further, the Agency will approve loan guarantees only for lenders with adequate experience with similar projects and the expertise to make, secure, service, and collect loans approved under this Notice. Lenders debarred from other Federal credit programs will not be eligible under this program.

#### Basic Application Provisions

##### J. Loan Applications

Applications for loan guarantees, which are to be filed with the USDA Rural Development National Office's Energy Branch as shown under **ADDRESSES**, must contain the items identified in the paragraphs (b)(1) through (18), organized pursuant to a Table of Contents in a chapter format.

(a) *Table of Contents*.

(b) *Project Summary*. Provide a concise summary of the proposed project and application information, project purpose and need, and project goals, including the following:

(1) *Title*. Provide a descriptive title of the project.

(2) *Borrower eligibility*. Describe how the borrower meets the eligibility criteria identified in Section II.G of this Notice.

(3) *Project eligibility*. Describe how the project meets the eligibility criteria identified in Section II.H of this Notice. This description is to provide the reader with a frame of reference for reviewing the rest of the application. Clearly state whether the application is for the construction and development of a biorefinery or for the retrofitting of an existing facility and provide a brief description of the project. Provide results from demonstration or pilot facilities that prove the technology proposed to be used meets the definition of eligible technology. Additional project description information will be needed later in the application.

(4) *Matching funds*. Submit a spreadsheet identifying sources, amounts, and status of matching funds. The spreadsheet must also include a directory of matching funds source contact information. Attach any applications, correspondence, or other written communication between applicant and matching fund source.

(5) *Application for Loan Guarantee*. Completed Form RD 4279-1, "Application for Loan Guarantee" (or successor form).

(6) *Environmental information*. Form RD 1940-20, "Request for Environmental Information"; omit the attachments specified in the instructions to the form; and attach an environmental information document completed pursuant to 7 CFR part 1940, subpart G, Exhibit H.

(i) *Civil Rights Impact Analysis*. The Agency is responsible for ensuring that all requirements of RD Instruction 2006-P, "Civil Rights Impact Analysis," with the addition of Executive Order 12898, Environmental Justice, are met and will complete the appropriate level of review in accordance with that instruction. When guaranteed loans are proposed, Agency employees will conduct a Civil Rights Impact Analysis (CRIA) with regard to environmental justice. The CRIA must be conducted and the analysis documented utilizing Form RD 2006-38, "Civil Rights Impact Analysis Certification." This must be done prior to loan approval, obligation of funds, or other commitments of agency resources, including issuance of a Conditional Commitment, whichever occurs first.

(ii) *Intergovernmental consultation*. Intergovernmental consultation comments in accordance with RD Instruction 1940-J and 7 CFR, part 3015, subpart V.

(7) *Credit reports*.

(i) A personal credit report from an acceptable credit reporting company for a proprietor (owner), each partner, officer, director, key employee, and stockholder owning 20 percent or more interest in the applicant, except for those corporations listed on a major stock exchange. Credit reports are not required for elected and appointed officials when the applicant is a public body.

(ii) Commercial credit reports obtained by the lender on the borrower and any parent, affiliate, and subsidiary firms.

(8) *Appraisals*. Appraisals, accompanied by a copy of a Phase I Environmental Site Assessment (ESA) in accordance with ASTM standards. If the appraisal has not been completed when the application is filed, an estimated appraisal must be submitted with the application. In all cases, a completed appraisal consistent with paragraph (c) in section N must be submitted prior to the loan being closed.

(9) *Financial information*. For all businesses, a current (not more than 90 days old) balance sheet; a *pro forma* balance sheet at startup; projected balance sheets and income and expense statements for a period of not less than 3 years of stabilized operation; and cash flow statements for the life of the

project. Projections should be supported by a list of assumptions showing the basis for the projections.

(10) *Credit rating.* For loans of \$125 million or more, an evaluation and credit rating of the total project's indebtedness, without consideration for a government guarantee, from a nationally recognized rating agency.

(11) *Lender's analysis.* Lender's complete written analysis of the project, including:

- (i) A summary of the technology to be used in the project;
- (ii) The viability of such technology for the particular project application;
- (iii) Whether the project is retrofit or Greenfield;
- (iv) Borrower's management;
- (v) Repayment ability (including a cash-flow analysis);
- (vi) Sponsor's history of debt repayment;
- (vii) Necessity of any debt refinancing;
- (viii) The credit reports of the borrower, its principals, and any parent, affiliate, or subsidiary; and

(ix) The credit analysis specified in Section II.N of this Notice.

(12) *Loan Agreement.* A proposed loan agreement or a sample loan agreement with an attached list of the proposed loan agreement provisions. The loan agreement must be executed by the lender and borrower before the Agency issues a Loan Note Guarantee. The following requirements must be addressed in the loan agreement:

- (i) Prohibition against assuming liabilities or obligations of others;
- (ii) Restriction on dividend payments;
- (iii) Limitation on the purchase or sale of equipment and fixed assets;
- (iv) Limitation on compensation of officers and owners;
- (v) Financial covenants regarding working capital or current ratio requirement, and maximum debt-to-net worth ratio;
- (vi) Borrower change of control;
- (vii) Repayment and amortization of the loan;
- (viii) List of collateral and lien priority for the loan;

(ix) Type and frequency of financial statements to be required for the duration of the loan;

(x) A section for the later insertion of any additional requirements imposed by the Agency in its Conditional Commitment; and

(xi) A section for the later insertion of any necessary mitigation measures by the borrower to avoid or reduce adverse environmental impacts from this proposal's construction or operation.

(13) *Business plan.* Submit a business plan. Any or all of the requirements in the business plan may be omitted if the information is included in the feasibility study.

(14) *Feasibility study.* Submit a feasibility study on the proposed project. Elements in an acceptable feasibility study include, but are not limited to, the elements outlined in Table 1. In addition, as part of the feasibility study, both a technical assessment and economic analysis of the project are required. These two assessments are discussed in detail in paragraphs (d) and (e) of this section.

TABLE 1—FEASIBILITY STUDY COMPONENTS

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**(A) Executive Summary**

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Introduction/Project Overview (Brief general overview of project location, size, etc.)  
 Economic feasibility determination.  
 Technical feasibility determination.  
 Market feasibility determination.  
 Financial feasibility determination.  
 Management feasibility determination.  
 Recommendations for implementation.

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**(B) Economic Feasibility**

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Information regarding project site;  
 Availability of trained or trainable labor;  
 Availability of infrastructure, including utilities, and rail, air and road service to the site.  
 Feedstock:  
     Feedstock source management.  
     Estimates of feedstock volumes and costs.  
     Collection, Pre-Treatment, Transportation, and Storage.  
 Impacts on existing manufacturing plants or other facilities that use similar feedstock if the applicant's proposed biofuel production technology is adopted.  
 Project impact on resource conservation, public health, and the environment.  
 Overall economic impact of the project including any additional markets created for agricultural and forestry products and agricultural waste material and potential for rural economic development.  
 Feasibility/plans of project to work with producer associations or cooperatives including estimated amount of annual feedstock and biofuel and byproduct dollars from producer associations and cooperatives.

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**(C) Market Feasibility**

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Information on the sales organization and management;  
 Nature and extent of market and market area;  
 Marketing plans for sale of projected output—principal products and by-products;  
 Extent of competition including other similar facilities in the market area;  
 Commitments from customers or brokers—principal products and by-products.  
 Risks Related to the Advanced Biofuel Industry, including industry status.

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**(D) Technical Feasibility**

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Suitability of the selected site for the intended use including the information documents Form RD 1940–20 and required narrative in the 7 CFR part 1940, subpart G Exhibit H format.

TABLE 1—FEASIBILITY STUDY COMPONENTS—Continued

Report shall be based upon verifiable data and contain sufficient information and analysis so that a determination may be made on the technical feasibility of achieving the levels of income or production that are projected in the financial statements. Describe the scale of development for which the process technology has been proven, i.e., lab (or bench), pilot, or demonstration scale; and the specific volume of the process (expressed either as volume of feedstock processed—tons per unit of time, or as product—gallons per unit of time).

Report shall also identify any constraints or limitations in these financial projections and any other facility or design-related factors which might affect the success of the enterprise.

Report shall also identify and estimate project operation and development costs and specify the level of accuracy of these estimates and the assumptions on which these estimates have been based.

The Project engineer or architect is considered an independent party provided neither the principals of the firm nor any individual of the firm who participates in the technical feasibility report has a financial interest in the project if no other individual or firm with the expertise necessary to make such a determination is reasonably available to perform the function, an individual or firm that is not independent may be used.

Ability of the proposed system to be Commercially Replicated.

Supports the Renewable Fuel Standard established in the Energy Independence and Security Act of 2007.

Risks Related to:

Construction of the Advanced Biofuel Plant.

Advanced Biofuel Production.

Regulation and Governmental Action.

#### (E) Financial Feasibility

Reliability of the financial projections and assumptions on which the financial statements are based including all sources of project capital, both private and public, such as Federal funds. Three years (minimum) projected Balance Sheets and Income Statements. Cash Flow projections for the life of the project.

Ability of the business to achieve the projected income and cash flow.

Assessment of the cost accounting system.

Availability of short-term credit or other means to meet reasonable business costs;

Adequacy of raw materials and supplies.

Sensitivity Analysis—including feedstock and energy costs, product/co-product prices.

Risks Related to:

The Project.

Applicant Financing Plan.

The operational units.

Tax Issues.

#### (F) Management Feasibility

Continuity and adequacy of management.

Projected total supply from members and non-members.

Projected competitive demand for raw materials.

Procurement plan and projected procurement costs.

Form of commitment of raw materials (marketing agreements, etc.).

Identify applicant and/or management's previous experience concerning the receipt of federal financial assistance, including amount of funding, date received, purpose, and outcome.

Risks Related to:

Applicant as a Company (i.e. Development-Stage) Conflicts of Interest.

#### (G) Qualifications

A résumé or statement of qualifications of the author of the feasibility study, including prior experience, should be submitted.

##### (15) Lender certifications.

(i) A certification by the lender stating that it has completed a comprehensive analysis of the proposal, the borrower is eligible, the loan is for an eligible project, and there is reasonable assurance of repayment ability based on the borrower's history, projections and equity, and the collateral to be obtained.

(ii) A certification by the lender that the proposed project will be in compliance with all applicable State and Federal environmental laws and regulations.

(16) *DUNS Number*. A Dun and Bradstreet Universal Numbering System (DUNS) number.

(17) *Bioenergy experience*. Identify applicant, including principals, prior

experience in bioenergy projects and the receipt of Federal financial assistance, including amount of funding, date received, purpose, and outcome, for such projects.

(18) *Other*. Any additional information required by the Agency.

(c) *Form modifications*. The BioRefinery Assistance Program will be using the same forms as the Business and Industry and Section 9006 programs with the understanding that:

(1) All references in those forms to the Business and Industry program or the Section 9006 program in whatever manner, and whether referenced singularly or jointly, shall be deemed to be references to the BioRefinery

Assistance Program described in this Notice, and

(2) All references to the Business and Industry or Section 9006 regulations in those forms in whatever manner, whether general or specific, whether singularly or jointly, and whether or not specific Code of Federal Regulation citations are used, shall be deemed to be a reference to the requirements of the BioRefinery Assistance Program described in this Notice. In addition, the following modifications are to be used for this Program.

(i) Application for Loan Guarantee (Form RD 4279-1) is modified as described below.

(A) Part A, Block 10, Type of Borrower, do not fill out if your entity is not listed.

(B) Part A, Block 11. Instead of the SIC Code, fill in your NAICS.

(C) Part A, Block 22 is not applicable.

(D) Part A, Block 29, Financial Statements. Comply with the financial statement requirements in this Notice rather than in Block 29.

(E) Part A, Block 30, which deals with guarantors, is not applicable.

(F) Part A, Block 33, Technical Report. Replace Technical Report with Feasibility Study, which will include a technical assessment of the project.

(G) Part B, Block 17, which addresses equity. Do not fill in this block, but instead provide similar information according to the equity requirements contained in this Notice.

(H) Part B, Block 22, which addresses the lender's analysis. Attach the lender's analysis as described in this Notice.

(3) Lender's Agreement (Form RD 4279-4), Section I, Item B, is applicable with the addition that negligent servicing includes any instance where a lender fails to ensure that all environmental laws are being complied with by any person receiving guaranteed loan funds under this Program.

(4) Loan Note Guarantee (Form RD 4279-5), Section 3, Full Faith and Credit, under Conditions of Guarantee is applicable with the addition that negligent servicing includes any instance where a lender fails to ensure that all environmental laws are being complied with by a person receiving guaranteed loan funds under this Program.

(d) *Technical Assessment.* As part of the feasibility study, a detailed technical assessment is required for each project. The technical assessment must demonstrate that the project design, procurement, installation, startup, operation and maintenance of the project will operate or perform as specified over its useful life in a reliable and a cost effective manner, and must identify what the useful life of the project is. The technical assessment must also identify all necessary project agreements, demonstrate that those agreements will be in place on or before the time of loan closing, and demonstrate that necessary project equipment and services will be available over the useful life. All technical information provided must follow the format specified in paragraphs (d)(1) through (9) below. Supporting information may be submitted in other formats. Design drawings and process flow charts are encouraged as exhibits. A discussion of each topic identified in paragraphs

(d)(1) through (9) is not necessary if the topic is not applicable to the specific project. Questions identified in the Agency's technical review of the project must be answered to the Agency's satisfaction before the application will be approved. All projects require the services of a professional engineer (PE).

(1) *Qualifications of project team.* The project team will vary according to the complexity and scale of the project. The project team must have demonstrated expertise in similar advanced biofuel technology development, engineering, installation, and maintenance. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services for the development, construction, and retrofitting, as applicable, of technology for producing advanced biofuels must be provided. In addition, authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the biorefinery to operate over its useful life must be provided. The application must:

(i) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the borrower's risk, and a design build method, often referred to as turnkey, where the borrower establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(ii) Discuss the advanced biofuels technology equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(iii) Discuss the project team members' qualifications for engineering, designing, and installing advanced biofuels refineries including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available; and

(iv) Describe the advanced biofuels refinery operator's qualifications and experience for servicing, operating, and maintaining such equipment or projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available.

(2) *Agreements and permits.* All necessary agreements and permits required for the project and the status

and schedule for securing those agreements and permits, including the items specified in paragraphs (2)(i) through (vi), must be identified in the application.

(i) Advanced biofuels refineries must be installed in accordance with applicable local, State, and national codes and regulations. Identify zoning and code issues, and required permits and the schedule for meeting those requirements and securing those permits.

(ii) Identify licenses where required and the schedule for obtaining those licenses.

(iii) Identify land use agreements required for the project and the schedule for securing the agreements and the term of those agreements.

(iv) Identify any permits or agreements required for solid, liquid, and gaseous emissions or effluents and the schedule for securing those permits and agreements.

(v) Identify available component warranties for the specific project location and size.

(vi) Identify all environmental issues, including environmental compliance issues, associated with the project.

(3) *Resource assessment.* Adequate and appropriate evidence of the availability of the feedstocks required for the advanced biofuels refinery to operate as designed must be provided in the application. Indicate the type and quantity of the feedstock including storage, where applicable. Indicate shipping or receiving method and required infrastructure for shipping, and other appropriate transportation mechanisms. For proposed projects with an established resource, provide a summary of the resource.

(4) *Design and engineering.* Authoritative evidence that the advanced biofuels refinery will be designed and engineered so as to meet its intended purposes, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards must be provided in the application. Projects shall be engineered by a qualified entity. Biorefineries must be engineered as a complete, integrated facility. The engineering must be comprehensive including site selection, systems and component selection, and systems monitoring equipment. Biorefineries must be constructed by a qualified entity.

(i) The application must include a concise but complete description of the project including location of the project; resource characteristics, including the kind and amount of feedstocks; biorefinery specifications; kind, amount,

and quality of the output; and monitoring equipment. Address performance on a monthly and annual basis. Describe the uses of or the market for the advanced biofuels produced by the biorefinery. Discuss the impact of reduced or interrupted feedstock availability on the biorefinery's operations.

(ii) The application must include a description of the project site and address issues such as site access, foundations, backup equipment when applicable, and the environmental information documents Form RD 1940-20 and required narrative in the 7 CFR part 1940, subpart G, Exhibit H format. Identify any unique construction and installation issues.

(iii) Sites must be controlled by the eligible borrower for at least the proposed project life or for the financing term of any associated federal loans or loan guarantees.

(5) *Project development schedule.* Each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown must be provided in the application. Provide a detailed description of the project timeline including resource assessment, project and site design, permits and agreements, equipment procurement, and project construction from excavation through startup and shakedown.

(6) *Equipment procurement.* A demonstration that equipment required by the biorefinery is available and can be procured and delivered within the proposed project development schedule must be provided in the application. Biorefineries may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory.

(7) *Equipment installation.* A full description of the management of and plan for site development and systems installation, details regarding the scheduling of major installation equipment needed for project construction, and a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the biorefinery as a whole must be provided in the application.

(8) *Operations and maintenance.* The operations and maintenance requirements of the biorefinery necessary for the biorefinery to operate

as designed over the useful life must be provided in the application. The application must also include:

(i) Information regarding available biorefinery and component warranties and availability of spare parts;

(ii) A description of the routine operations and maintenance requirements of the proposed biorefinery, including maintenance schedule for the mechanical, piping, and electrical systems and system monitoring and control requirements, as well as provision of information that supports expected useful life of the biorefinery and timing of major component replacement or rebuilds;

(iii) A discussion of the costs and labor associated with operations and maintenance of the biorefinery and plans for in-sourcing or outsourcing. A description of the opportunities for technology transfer for long term project operations and maintenance by a local entity or owner/operator; and

(iv) Provision and discussion of the risk management plan for handling large, unanticipated failures of major components.

(9) *Decommissioning.* When uninstalling or removing the project, a description of the decommissioning process. A description of any issues, requirements, and costs for removal and disposal of the biorefinery.

(e) *Economic Analysis.* The feasibility study must also contain a detailed economic analysis of the project. The economic analysis must describe the costs and revenues of the proposed project to demonstrate the financial performance of the project by:

(1) Providing a detailed analysis and description of project costs including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, systems installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs;

(2) Providing a detailed analysis and description of annual project revenues and expenses over the useful life of the project;

(3) Providing a detailed description of applicable investment incentives, productivity incentives, loans, and grants; and

(4) Identifying any other project authorities and subsidies that affect the project.

#### *K. Evaluation of Guaranteed Loan Applications*

(a) *General review.* The Agency will utilize a panel of reviewers, including Rural Development field staff and U.S.

Department of Energy staff, to review each application. Each application will be evaluated to confirm that both the borrower and project are eligible, the project has technical merit, there is reasonable assurance of repayment, there is sufficient collateral and equity, and the proposed project complies with all applicable statutes and regulations. If the Agency determines it is unable to guarantee the loan, the lender will be informed in writing. Such notification will include the reasons for denial of the guarantee.

(b) *Ineligible applications.* If the borrower, lender, or the project is determined to be ineligible for any reason, the Agency will inform the lender, in writing, of the reasons and provide any applicable appeal rights. No further evaluation of the application will occur.

(c) *Incomplete applications.* If the application is incomplete, the Agency will identify those parts of the application that are incomplete and return it, with a written explanation, to the lender for possible future resubmission. Upon receipt of a complete application, if submitted within the proper deadlines noted in this NOFA, the Agency will complete its evaluation.

(d) *Technical merit determination.* The Agency's determination of a project's technical merit will be based on the information in the application. The Agency may engage the services of other government agencies or recognized industry experts in the applicable technology field, at its discretion, to evaluate and rate the application. The Agency may use this evaluation and rating to determine the level of technical merit of the proposed project. Projects determined by the Agency to be without technical merit will not be selected for funding.

(e) *Evaluation criteria.* The Agency will score each eligible application that meets the minimum requirements for financial and technical feasibility, based on the evaluation criteria identified below. A minimum score of 40 points is required in order to be considered for a guarantee. The Agency will give priority to those applications with the highest scores above the minimum threshold. A maximum of 100 points is possible.

(1) Whether the borrower has established a market for the advanced biofuel and the byproducts produced. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the business has less than or equal to a 50 percent commitment for feedstocks, marketing agreements for the

advanced biofuel, and the byproducts produced, 0 points will be awarded.

(ii) If the business has a greater than 50 percent commitment for feedstocks, marketing agreements for the advanced biofuel and the byproducts produced, 5 points will be awarded.

(2) Whether the area in which the borrower proposes to place the biorefinery has other similar advanced biofuel facilities. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the biorefinery will be located in a trade area that has other advanced biofuel facilities, with area defined as "within the area supplying the feedstock," 0 points will be awarded.

(ii) If the biorefinery will be located in a trade area that does not have other advanced biofuel facilities, with area defined as "within the area supplying the feedstock," 5 points will be awarded.

(3) Whether the borrower is proposing to use a feedstock not previously used in the production of advanced biofuels. A maximum of 14 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower proposes to use a feedstock previously used in the production of advanced biofuels in a commercial facility, 0 points will be awarded.

(ii) If the borrower proposes to use a feedstock not previously used in production of advanced biofuels in a commercial facility, 14 points will be awarded.

(4) Whether the borrower is proposing to work with producer associations or cooperatives. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower procurement or marketing agreements amount to less than or equal to 50 percent of annual feedstock and biofuel and byproduct dollars with producer associations or cooperatives, 0 points will be awarded.

(ii) If the borrower procurement or marketing agreements amount to more than 50 percent of annual feedstock and biofuel and byproduct dollars with producer associations or cooperatives, 5 points will be awarded.

(5) The level of financial participation by the borrower, including support from non-Federal and private sources. Such financial participation may take the form of direct financial support, technical support, and contributions of in-kind resources including financial or other support from state or local government. A maximum of 20 points can be awarded. Other Direct Federal funding will not be considered as part of the borrower's cash equity

participation. Points to be awarded will be determined as follows:

(i) If the borrower's cash equity injection plus other sources is equal to or greater than 30 percent, but less than 40 percent, tangible balance sheet equity, 10 points will be awarded.

(ii) If the borrower's cash equity injection plus other sources is equal to or greater than 40 percent tangible balance sheet equity, 20 points will be awarded.

(iii) If a project uses other Federal direct funding, 10 points will be deducted.

(6) Whether the borrower has established that the adoption of the process proposed in the application will have a positive impact on resource conservation, public health, and the environment. A maximum of 9 points can be awarded. Points to be awarded will be determined as follows:

(i) If process adoption will have a positive impact on resource conservation, 3 points will be awarded.

(ii) If process adoption will have a positive impact on public health, 3 points will be awarded.

(iii) If process adoption will have a positive impact on environment, 3 points will be awarded.

(7) Whether the borrower can establish that, if adopted, the biofuels production technology proposed in the application will not have any significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower has not established, through an independent third party, that the biofuels production technology proposed in the application, if adopted, will not have any significant negative impacts on existing manufacturing plants or other facilities that use similar feed stocks, 0 points will be awarded.

(ii) Applicant has established, through an independent third party, that the biofuels production technology proposed in the application, if adopted, will not have any significant negative impacts on existing manufacturing plants or other facilities that use similar feed stocks, 5 points will be awarded.

(8) The potential for rural economic development. If the business creates jobs with an average wage that exceeds both the State and County median household wages, 3 points will be awarded.

(9) The level of local ownership proposed in the application. A maximum of 13 points can be awarded. Points to be awarded will be determined as follows:

(i) If local ownership is greater than 20 percent, with area defined as "within the area supplying the feedstock," up to 6 points will be awarded.

(ii) If local ownership is greater than 50 percent, with area defined as "within the area supplying the feedstock," 13 points will be awarded.

(10) Whether the project can be replicated. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the project can be commercially replicated regionally (e.g., Northeast, Southwest, etc.), 2 points will be awarded.

(ii) If the project can be commercially replicated nationally, up to 5 points will be awarded.

(11) The extent to which the project converts cellulosic biomass feedstocks into advanced biofuels. A maximum of 6 points can be awarded.

(i) If 50% or less of the amount of advanced biofuels produced by the project is derived from cellulosic renewable biomass feedstocks, then 0 points will be awarded.

(ii) If more than 50% of the amount of advanced biofuels produced by the project is from cellulosic renewable biomass feedstocks, then 6 points will be awarded.

(12) If the project is a first-of-a-kind technology, system, or process, 10 points will be awarded.

#### *L. Loan Approval and Obligor Funds*

(a) *Environmental review.* The Agency has reviewed the types of applicant proposals that may qualify for assistance under this section and has determined, in accordance with 7 CFR Part 1940-G, that all proposals shall be reviewed as a Class II Environmental Assessment (EA) as the development of new and emerging technologies would not meet the classification of a Categorical Exclusion (CE) in accordance with 7 CFR Part 1940.310 or a Class I EA in accordance with 7 CFR Part 1940.311. Furthermore, if after Agency review of proposals the Agency has determined that the proposal could result in significant environmental impacts on the quality of the human environment, an Environmental Impact Statement may be required pursuant to 7 CFR Part 1940.313.

(b) *Conditional Commitment.* Upon approval of a loan guarantee, the Agency will issue a Conditional Commitment to the lender containing conditions, including all applicable regulatory, statutory, and other requirements, under which a Loan Note Guarantee will be issued. One of the conditions shall be that the project receiving guaranteed loan funds under

this Program will be in compliance with all applicable State and Federal environmental laws and regulations. The Conditional Commitment is a binding obligation by the Agency. However, if the terms of the Conditional Commitment are not satisfied, the Commitment is no longer binding on the Agency.

(c) *Alternate conditions.* If certain conditions of the Conditional Commitment cannot be met, the lender and applicant may propose alternate conditions. Within the requirements of the applicable regulations and instructions and prudent lending practices, the Agency may negotiate with the lender and the applicant regarding any proposed changes to the Conditional Commitment.

(d) *Wage rates.* As a condition of receiving a loan guaranteed under this Program, each borrower shall ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with Guaranteed Loan Funds under this Notice shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 through 3144, 3146, and 3147 of title 40, U.S.C. Awards under this Notice are further subject to the relevant regulations contained in title 29 of the Code of Federal Regulations.

#### *M. Lender's Functions and Responsibilities—General*

All lenders requesting or obtaining a loan guarantee under this Notice are responsible for:

- (a) Processing applications for guaranteed loans;
- (b) Developing and maintaining adequately documented loan files;
- (c) Recommending only loan proposals that are eligible and financially feasible;
- (d) Obtaining valid evidence of debt and collateral in accordance with sound lending practices;
- (e) Supervising construction;
- (f) Distribution of loan funds;
- (g) Servicing guaranteed loans in a prudent manner, including liquidation if necessary;
- (h) Following Agency regulations; and
- (i) Obtaining Agency approvals or concurrence as required.

#### *N. Lender's Functions and Responsibilities—Origination*

(a) *Credit evaluation.* The lender must determine credit quality of the borrower, including the following:

- (1) The lender must address all of the elements of credit quality in a written

credit analysis, including cash flow, collateral, and adequacy of equity.

(i) *Cash flow.* All efforts will be made to structure debt so that the business has adequate debt coverage and the ability to accommodate expansion.

(ii) *Collateral.* Collateral must have documented value sufficient to protect the interest of the lender and the Agency, as determined by the Agency.

(iii) *Equity.* Borrowers shall demonstrate evidence of cash equity injection in the project of not less than 20 percent of eligible project costs. The fair market value of equity in real property that is to be pledged as collateral for the loan may be substituted in whole or in part to meet the cash equity requirement. However, the appraisal completed to establish the fair market value of the real property must not be more than 1 year old and must meet Agency appraisal standards. Otherwise, cash equity injection must be in the form of cash.

(2) The credit analysis must also include spreadsheets of the balance sheets and income statements of the borrower for the 3 previous years (for existing businesses), pro forma balance sheets at startup, and projected yearend balance sheets and income statements for a period of not less than 3 years of stabilized operation, with appropriate ratios and comparisons with industrial standards (such as Dun & Bradstreet or Robert Morris Associates) to the extent available.

(3) All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales.

(b) *Lien priorities.* The entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan. The unguaranteed portion of the loan will neither be paid first nor given any preference or priority over the guaranteed portion. The guarantee will be secured by a first lien on all collateral necessary to run the project in the event of the borrower's default including, without limitation, all real property, contracts and permits, and all furnishings, fixtures, and equipment of the project. In addition, the lender and the Agency should be shown as an additional insured on insurance policies (or other risk sharing instruments) that benefit the project and must be able to assume any contracts that are material to running the project including any feedstock or offtake agreements.

(c) *Appraisals.* Lenders are required to provide real property and chattel collateral appraisals conducted by an

independent qualified appraiser in accordance with the Uniform Standards of Professional Appraisal Practices or successor standards.

(1) All appraisals used to establish the fair market value of the real property must not be more than 1 year old.

(2) All appraisals will include consideration of the potential effects from a release of hazardous substances or petroleum products or other environmental hazards on the market value of the collateral.

(3) A complete self-contained appraisal must be conducted.

(4) Lenders must complete, for all applications, a Phase I Environmental Site Assessment (ESA) in accordance with ASTM standards, which should be provided to the appraiser for completion of the self-contained appraisal. Lenders shall use specialized appraisers.

(d) *Construction planning and performing development.*

(1) *Design Policy.* The lender must ensure that all project facilities will be designed utilizing accepted architectural and engineering practices and must conform to applicable Federal, state, and local codes and requirements. The lender will also ensure that the project will be completed using the available funds and, once completed, will be used for its intended purpose and produce products in the quality and quantity proposed in the completed application approved by the Agency.

(2) *Project Control.* The lender will monitor the progress of construction and undertake the reviews and inspections necessary to ensure that construction conforms to applicable Federal, state, and local code requirements; proceeds are used in accordance with the approved plans, specifications, and contract documents; and that funds are used for eligible project costs. The lender will provide a resident inspector.

(3) *Changes or cost overruns.* The borrower shall be responsible for any changes or cost overruns. If any such change or cost overrun occurs, then any change order must be expressly approved by the Agency which approval shall not be unreasonably withheld, and neither the lender nor borrower will divert funds from purposes identified in the guaranteed loan application to pay for any such change or cost overrun without the express written approval of the Agency. In no event will the current loan be modified or a subsequent guaranteed loan be approved to cover any such changes or costs. Failure to comply with the terms of this paragraph will be considered a material adverse change in the borrower's financial condition, and the lender must address

this matter, in writing, to the Agency's satisfaction. In the event any of the aforementioned increases in costs and/or expenses are incurred by the borrower, the borrower must provide for such increases in a manner that there is no diminution of the borrower's operating capital.

(4) *New draws.* The following two certifications are required for each new draw:

(i) Certification by the project engineer to the lender that the work referred to in the draw has been successfully completed; and

(ii) Certification from the lender that all debts have been paid and all mechanics' liens have been waived.

(e) *Laws that contain other compliance requirements.* Each lender and borrower must comply with:

(1) *Equal Credit Opportunity Act.* In accordance with title V of Public Law 93-495, the Equal Credit Opportunity Act, with respect to any aspect of a credit transaction, neither the lender nor the Agency will discriminate against any applicant on the basis of race, color, religion, national origin, sex, marital status or age (providing the applicant has the capacity to contract), or because all or part of the applicant's income derives from a public assistance program, or because the applicant has, in good faith, exercised any right under the Consumer Protection Act. The lender will comply with the requirements of the Equal Credit Opportunity Act as contained in the Federal Reserve Board's Regulation implementing that Act (see 12 CFR part 202). Such compliance will be accomplished prior to loan closing.

(2) *Equal opportunity.* For all construction contracts in excess of \$10,000, the contractor must comply with Executive Order 11246, "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented by applicable Department of Labor regulations (41 CFR part 60). The borrower and lender are responsible for ensuring that the contractor complies with these requirements.

(3) *Americans with Disabilities Act (ADA).* Guaranteed loans that involve the construction of or addition to facilities that accommodate the public and commercial facilities, as defined by the ADA, must comply with the ADA. The lender and borrower are responsible for compliance.

(4) *Environmental analysis.* Each lender and borrower must comply with the environmental analysis identified in 7 CFR part 1940, subpart G, which outlines environmental procedures and requirements for this Notice. Each proposal will be evaluated to determine

the proper level of National Environmental Policy Act (NEPA) review on a case-by-case basis by the Agency's environmental staff. The lender's borrower will cooperate with the Agency in the preparation of the environmental review. Prospective borrowers are advised to contact the Agency to determine environmental requirements as soon as practicable after they decide to pursue any form of financial assistance directly or indirectly available through the Agency.

(i) Any required environmental review must be completed by the Agency prior to the Agency obligating any funds.

(ii) The borrower will be notified of all specific compliance requirements, including, but not limited to, the publication of public notices, and consultation with State Historic Preservation Offices and the U.S. Fish and Wildlife Service.

(iii) A site visit by the Agency may be scheduled, if necessary, to determine the scope of the review.

(iv) A borrower taking any actions or incurring any obligations prior to or during application review and processing that would either limit the range of alternatives to be considered or that would have an adverse effect on the environment, such as the initiation of construction, may result in project ineligibility.

(f) *Environmental responsibilities.* Lenders have a responsibility to become familiar with Federal environmental requirements; to consider, in consultation with the prospective borrower, the potential environmental impacts of their proposals at the earliest planning stages; and to develop proposals that minimize the potential to adversely impact the environment. Lenders must alert the Agency to any controversial environmental issues related to a proposed project or items that may require extensive environmental review at the time of the application as well as after the loan closes if unforeseen events take place. Lenders must ensure that their borrowers complete Form RD 1940-20; omit the attachments specified in the instructions to the form; and attach an environmental information document completed pursuant to 7 CFR part 1940, subpart G, Exhibit H; assist in the collection of additional data when the Agency needs such data to complete its environmental review of the proposal; and assist in the resolution of environmental problems.

(g) *Loan closing.* The lender or its designated representative is responsible for loan closings. At the closing, the lender will ensure that all the

conditions in the Agency's Conditional Commitment have been met.

#### *O. Lender's Functions and Responsibilities—Servicing General*

(a) *Routine servicing.* The lender is responsible for servicing the entire loan and for taking all servicing actions that a prudent lender would perform in servicing its own portfolio of loans that are not guaranteed.

(1) The lender must service the entire loan and must remain mortgagee and secured party of record notwithstanding the fact that another party may hold a portion of the loan.

(2) The Loan Note Guarantee is unenforceable by the lender to the extent any loss is occasioned by violation of usury laws, use of loan funds for unauthorized purposes, negligent servicing, or failure to obtain the required security interest regardless of the time at which the Agency acquires knowledge of the foregoing. This responsibility includes, but is not limited to, the collection of payments, obtaining compliance with the covenants and provisions in the loan agreement, obtaining and analyzing financial statements, checking on payment of taxes and insurance premiums, and maintaining liens on collateral.

(b) *Loan classification.* Within 90 days of receipt of the Loan Note Guarantee, the lender must notify the Agency of the loan's classification or rating under its regulatory standards. Should the classification be changed at a future time, the Agency must be notified within 15 days.

(c) *Insurance requirements.* The lender must ensure that the borrower has obtained, and will maintain for the life of the guaranteed loan, all necessary insurance coverage appropriate to the proposed project, in accordance with the lender's loan origination policies and procedures or what a reasonably prudent lender requires, whichever is more stringent.

(d) *Financial reports.* The lender must obtain and forward to the Agency the financial statements required by the loan agreement or the Conditional Commitment.

(1) The lender must submit to the Agency:

(i) Quarterly financial statements within 45 days of the end of each quarter and

(ii) Annual audited financial statements within 120 days of the end of the borrower's fiscal year.

(2) The lender must analyze the financial statements and provide the Agency with a written summary of the lender's analysis and conclusions,

including trends, strengths, weaknesses, extraordinary transactions, and other indications of the financial condition of the borrower. Spreadsheets of the new financial statements must be included.

(e) *Requirements after construction.*

(1) *Reports.* In addition to complying with the requirements for loan servicing, once the project has been constructed, the lender must provide the Agency periodic reports from the borrower commencing the first full calendar year following the year in which project construction was completed and continuing for the life of the guaranteed loan. The borrower's reports will include, but not be limited to, the information specified in the following paragraphs, as applicable.

(i) The actual amount of advanced biofuels produced to assess whether project goals are being met.

(ii) If applicable, documentation that identified health and/or sanitation problem has been solved.

(iii) A summary of the cost of operating and maintaining the facility.

(iv) Description of any maintenance or operational problems associated with the facility.

(v) Demonstration that the project is and has been in compliance with all applicable State and Federal environmental laws and regulations.

(vi) The number of jobs created.

(vii) A description on the status of the project's feedstock including, but not limited to, the feedstock being used, outstanding feedstock contracts, feedstock changes and interruptions, and quality of the feedstock.

(2) *Inspections.* The lender shall conduct annual inspections of the project for the life of the guaranteed loan.

(f) *Release of collateral.*

(1) All releases of collateral with a value exceeding \$100,000 must be supported by a current appraisal on the collateral released. The appraisal will be at the expense of the borrower and must meet the appraisal requirements contained in this Notice. The remaining collateral must be sufficient to provide for repayment of the Agency's guaranteed loan. The Agency may, at its discretion, require an appraisal of the remaining collateral in cases where it is determined that the Agency may be adversely affected by the release of collateral. Sale or release of collateral must be based on an arm's-length transaction.

(2) Within the parameters of the paragraph (f)(1):

(i) Lenders may, over the life of the guaranteed loan, release collateral with a cumulative value of up to 20 percent of the original loan amount without

Agency concurrence if the proceeds generated are used to reduce the guaranteed loan or to buy replacement collateral.

(ii) Release of collateral with a cumulative value in excess of 20 percent of the original loan or when the proceeds will not be used to reduce the guaranteed loan or to buy replacement collateral, must be requested, in writing, by the lender and concurred by the Agency, in writing, in advance of the release. A written evaluation will be completed by the lender to justify the release.

(g) *Loan transfer and assumption.*

(1) Subject to approval by the lender and the Agency and the payment to the Agency of a one percent fee, loans are assumable. Assumption shall be deemed to occur in the event of a change in the control of the borrower. For purposes of the loan, change of control means the merger, sale of all or substantially all of the assets of the borrower, or the sale of more than 25 percent of the stock or other equity interest of either the borrower or its corporate parent.

(2) All loan transfers and assumptions must comply with the following:

(i) *Documentation of request.* All transfers and assumptions must be approved, in writing, by the Agency and must be to eligible borrowers.

(ii) *Terms.* Loan terms must not be changed unless the change is approved, in writing, by the Agency with the concurrence of any holder and the transferor, if they have not been or will not be released from liability. Any new loan terms must be within the terms authorized by this Notice. The Agency cannot approve deals unless all statutory, regulatory, and budgetary requirements are met. The lender's request for approval of new loan terms will be supported by an explanation of the reasons for the proposed change in loan terms. The Agency will not approve any change in terms that results in an increase in the cost of the loan guarantee, unless the Agency can secure any additional budget authority that would be required.

(iii) *Release of liability.* The transferor may be released from liability only with prior Agency written concurrence and only when the value of the collateral being transferred is at least equal to the amount of the loan being assumed and is supported by a current appraisal and a current financial statement. The Agency will not pay for the appraisal. If the transfer is for less than the debt, the lender must demonstrate to the Agency that the transferor has no reasonable debt-paying ability considering their assets and income in the foreseeable future.

(iv) *Proceeds.* Any proceeds received from the sale of collateral before a transfer and assumption will be credited to the transferor's guaranteed loan debt in inverse order of maturity before the transfer and assumption are closed.

(v) *Additional loans.* Loans to provide additional funds in connection with a transfer and assumption must be considered as a new loan application under the provisions of this Notice.

(vi) *Credit quality.* The lender must make a complete credit analysis of the proposed borrower and the project which is subject to Agency review and approval.

(vii) *Documents.* Prior to Agency approval, the lender must advise the Agency, in writing, that the transaction can be properly and legally transferred, and the conveyance instruments will be filed, registered, or recorded as appropriate.

(A) The assumption will be done on the lender's form of assumption agreement and will contain the Agency case number of the transferor and transferee. The lender will provide the Agency with a copy of the transfer and assumption agreement. The lender must ensure that all transfers and assumptions are noted on all original Loan Note Guarantees.

(B) The lender will provide to the Agency a written certification that the transfer and assumption is valid, enforceable, and complies with all Agency regulations.

(viii) *Loss resulting from transfer.* If a loss should occur upon consummation of a complete transfer and assumption for less than the full amount of the debt and the transferor is released from liability, the lender, if it holds the guaranteed portion, may file Form RD 449-30, "Loan Note Guaranteed Report of Loss," to recover its pro rata share of the actual loss. If a holder owns any of the guaranteed portion, such portion must be repurchased by the lender or the Agency in accordance with the provisions of this Notice. In completing the report of loss the amount of the debt assumed will be entered as net collateral (recovery). Approved protective advances and accrued interest thereon made during the arrangement of a transfer and assumption will be included in the calculations.

(ix) *Related party.* If the transferor and transferee are affiliated or related parties, any transfer and assumption must be for the full amount of the debt.

(x) *Cash downpayment.* When the transferee will be making a cash downpayment as part of the transfer and assumption:

(A) The lender must have an appropriate appraiser, acceptable to

both the transferee and transferor and currently authorized to perform appraisals, determine the value of the collateral securing the loan. The appraisal fee and any other costs will not be paid by the Agency.

(B) The market value of the collateral, plus any additional property the transferee proposes to offer as collateral, must be adequate to secure the balance of the guaranteed loans, as determined by the Agency.

(C) Cash downpayments may be paid directly to the transferor provided:

(1) The lender recommends that the cash be released, and the Agency concurs prior to the transaction being completed. The lender may wish to require that an amount be retained for a defined period of time as a reserve against future defaults. Interest on such account may be paid periodically to the transferor or transferee as agreed;

(2) The lender determines that the transferee has the repayment ability to meet the obligations of the assumed guaranteed loan as well as any other indebtedness;

(3) Any payments by the transferee to the transferor will not suspend the transferee's obligations to continue to meet the guaranteed loan payments as they come due under the terms of the assumption; and

(4) The transferor agrees not to take any action against the transferee in connection with the assumption without prior written approval of the lender and the Agency.

(h) *Subordination of lien position.* A subordination of the lender's lien position must be requested, in writing, by the lender and concurred, in writing, by the Agency in advance of the subordination. Agency concurrence requires that:

(1) The subordination be in the best financial interests of the Federal government;

(2) The lien to which the guaranteed loan is subordinated is for a fixed dollar limit;

(3) Lien priorities remain for the portion of the loan that was not subordinated; and

(4) The subordination does not extend the term of the guaranteed loan, and in no event exceeds more than 3 years.

(i) *Repurchase from holder.*

(1) *Repurchase by lender.* A lender has the option to repurchase the unpaid guaranteed portion of the loan from a holder within 30 days of written demand by the holder when the borrower is in default not less than 60 days on principal or interest due on the loan; or the lender has failed to remit to the holder its pro rata share of any payment made by the borrower within

30 days of the lender's receipt thereof. The repurchase by the lender will be for an amount equal to the unpaid guaranteed portion of principal and accrued interest less the lender's servicing fee. The holder must concurrently send a copy of the demand letter to the Agency. The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the demand letter to the lender requesting the repurchase. The lender will accept an assignment without recourse from the holder upon repurchase. The lender is encouraged to repurchase the loan to facilitate the accounting of funds, resolve the problem, and prevent default, where and when reasonable. The lender will notify the holder and the Agency of its decision.

(2) *Agency purchase.*

(i) If the lender does not repurchase the unpaid guaranteed portion of the loan as provided in paragraph (1) of this section, the Agency will purchase from the holder the unpaid principal balance of the guaranteed portion together with accrued interest to the date of repurchase, less the lender's servicing fee, within 30 days after written demand to the Agency from the holder. (This is in addition to the copy of the written demand on the lender.) The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the original demand letter of the holder to the lender requesting the repurchase.

(ii) The holder's demand to the Agency must include a copy of the written demand made upon the lender. The holder must also include evidence of its right to require payment from the Agency. Such evidence will consist of either the original of the Loan Note Guarantee properly endorsed to the Agency or the original of the Assignment Guarantee Agreement properly assigned to the Agency without recourse including all rights, title, and interest in the loan. The holder must include in its demand the amount due including unpaid principal, unpaid interest to date of demand, and interest subsequently accruing from date of demand to proposed payment date. The Agency will be subrogated to all rights of the holder.

(iii) The Agency will notify the lender of its receipt of the holder's demand for payment. The lender must promptly provide the Agency with the information necessary for the Agency to determine the appropriate amount due the holder. Upon request by the Agency, the lender will furnish a current statement certified by an appropriate authorized officer of the lender of the

unpaid principal and interest then owed by the borrower on the loan and the amount then owed to any holder. Any discrepancy between the amount claimed by the holder and the information submitted by the lender must be resolved between the lender and the holder before payment will be approved. Such conflict will suspend the running of the 30 day payment requirement.

(iv) Purchase by the Agency neither changes, alters, nor modifies any of the lender's obligations to the Agency arising from the loan or guarantee nor does it waive any of Agency's rights against the lender. The Agency will have the right to set-off against the lender all rights inuring to the Agency as the holder of the instrument against the Agency's obligation to the lender under the guarantee.

(3) *Repurchase for servicing.* If, in the opinion of the lender, repurchase of the guaranteed portion of the loan is necessary to adequately service the loan, the holder must sell the guaranteed portion of the loan to the lender for an amount equal to the unpaid principal and interest on such portion less the lender's servicing fee. The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the demand letter of the lender or the Agency to the holder requesting the holder to tender its guaranteed portion. The lender must not repurchase from the holder for arbitrage or other purposes to further its own financial gain. Any repurchase must only be made after the lender obtains the Agency's written approval. If the lender does not repurchase the portion from the holder, the Agency may, at its option, purchase such guaranteed portion for servicing purposes.

(j) *Additional loans.* The lender may make additional expenditures or new loans to a borrower with an outstanding loan guaranteed under this Notice only with prior written Agency approval. The Agency will only approve additional expenditures or new loans to the extent such actions where the expenditure or loan will not violate one or more of the loan covenants of the borrower's loan agreement. In all instances, the lender must notify the Agency when they make any additional expenditures or new loans. In all cases, any additional expenditure or loan made by the lender must be junior in priority to the loan guaranteed hereunder.

(k) *Default by borrower.*

(1) The lender must notify the Agency when a borrower is 30 days past due on a payment or is otherwise in default of the loan agreement. Form RD 1980-44,

“Guaranteed Loan Borrower Default Status,” will be used and the lender will continue to submit this form bimonthly until such time as the loan is no longer in default. If a monetary default exceeds 60 days, the lender will arrange a meeting with the Agency and the borrower to resolve the problem.

(2) In considering options, the prospect for providing a permanent cure without adversely affecting the risk to the Agency and the lender is the paramount objective.

(i) Curative actions include but are not limited to:

(A) Deferment of principal (subject to rights of any holder);

(B) An additional unguaranteed loan by the lender to bring the account current;

(C) Reamortization of or rescheduling the payments on the loan (subject to rights of any holder);

(D) Transfer and assumption of the loan in accordance with the provisions in this Notice;

(E) Reorganization;

(F) Liquidation;

(G) Subsequent loan guarantees; and

(H) Changes in interest rates with the Agency's, the lender's, and holder's approval, provided that the interest rate is adjusted proportionately between the guaranteed and unguaranteed portion of the loan.

(ii) In the event a deferment, rescheduling, reamortization, or moratorium is accomplished, it will be limited to the remaining life of the collateral or remaining limits as contained in the loan term provisions in this Notice, whichever is less.

(1) *Protective advances.* Protective advances are advances made by the lender for the purpose of preserving and protecting the collateral where the debtor has failed to, will not, or cannot meet its obligations. Sound judgment must be exercised in determining that the protective advance preserves collateral and recovery is actually enhanced by making the advance. Protective advances will not be made in lieu of additional loans.

(1) The maximum loss to be paid by the Agency will never exceed the original principal plus accrued interest regardless of any protective advances made.

(2) Protective advances and interest thereon at the note rate will be guaranteed at the same percentage of loss as provided in the Loan Note Guarantee.

(3) Protective advances must constitute an indebtedness of the borrower to the lender and be secured by the security instruments. Agency written authorization is required when

cumulative protective advances exceed \$200,000.

(m) *Liquidation.* In the event of one or more incidents of default or third-party actions that the borrower cannot or will not cure or eliminate within a reasonable period of time, liquidation may be considered. If the lender concludes that liquidation is necessary, it must request the Agency's concurrence. The lender will liquidate the loan unless the Agency, at its option, carries out liquidation. When the decision to liquidate is made, if the loan has not already been repurchased, provisions will be made for repurchase in accordance with the repurchase from holder provisions in this Notice.

(1) *Decision to liquidate.* A decision to liquidate shall be made when it is determined that the default cannot be cured through actions identified in this Notice or it has been determined that it is in the best financial interest of the Federal government and the lender to liquidate. The decision to liquidate or continue with the borrower must be made as soon as possible when any of the following exist:

(i) A loan has been delinquent 90 days and the lender and borrower have not been able to cure the delinquency through one of the actions identified in this Notice.

(ii) It has been determined that delaying liquidation will jeopardize full recovery on the loan.

(iii) The borrower or lender has been uncooperative in resolving the problem and the Agency or the lender has reason to believe the borrower is not acting in good faith, and it would enhance the position of the guarantee to liquidate immediately.

(2) *Liquidation by the Agency.* The Agency may require the lender to assign the security instruments to the Agency if the Agency, at its option, decides to liquidate the loan. When the Agency liquidates, reasonable liquidation expenses will be assessed against the proceeds derived from the sale of the collateral. Form RD 1980-45, “Notice of Liquidation Responsibility,” will be forwarded to the Finance Office when the Agency liquidates the loan.

(3) *Submission of liquidation plan.* The lender will, within 30 days after a decision to liquidate, submit to the Agency, in writing, its proposed detailed method of liquidation. Upon approval by the Agency of the liquidation plan, the lender will commence liquidation.

(4) *Lender's liquidation plan.* The liquidation plan must include, but is not limited to, the following:

(i) Such proof as the Agency requires to establish the lender's ownership of

the guaranteed loan promissory note and related security instruments and a copy of the payment ledger if available which reflects the current loan balance and accrued interest to date and the method of computing the interest.

(ii) A full and complete list of all collateral.

(iii) The recommended liquidation methods for making the maximum collection possible on the indebtedness and the justification for such methods, including recommended action for acquiring and disposing of all collateral.

(iv) Necessary steps for preservation of the collateral.

(v) Copies of the borrower's latest available financial statements.

(vi) An itemized list of estimated liquidation expenses expected to be incurred along with justification for each expense.

(vii) A schedule to periodically report to the Agency on the progress of liquidation.

(viii) Estimated protective advance amounts with justification.

(ix) Proposed protective bid amounts on collateral to be sold at auction and a breakdown to show how the amounts were determined.

(x) If a voluntary conveyance is considered, the proposed amount to be credited to the guaranteed debt.

(xi) Legal opinions, if needed.

(xii) The lender will obtain an independent appraisal report meeting the requirements of appraisal requirements in this Notice on all collateral securing the loan which will reflect the fair market value and potential liquidation value. In order to formulate a liquidation plan which maximizes recovery, collateral must be evaluated for the release of hazardous substances, petroleum products, or other environmental hazards which may adversely impact the market value of the collateral. Both the estimate and the appraisal shall consider this aspect. The independent appraiser's fee, including the cost of a Phase I Environmental Site Assessment (ESA) in accordance with ASTM standards, will be shared equally by the Agency and the lender.

(5) *Approval of liquidation plan.* The Agency will inform the lender, in writing, whether it concurs in the lender's liquidation plan. Should the Agency and the lender not agree on the liquidation plan, negotiations will take place between the Agency and the lender to resolve the disagreement. When the liquidation plan is approved by the Agency, the lender will proceed expeditiously with liquidation.

(i) A transfer and assumption of the borrower's operation can be accomplished before or after the loan

goes into liquidation. However, if the collateral has been purchased through foreclosure or the borrower has conveyed title to the lender, no transfer and assumption is permitted.

(ii) A protective bid may be made by the lender, with prior Agency written approval, at a foreclosure sale to protect the lender's and the Agency's interest. The protective bid will not exceed the amount of the loan, including expenses of foreclosure, and should be based on the liquidation value considering estimated expenses for holding and reselling the property. These expenses include, but are not limited to, expenses for resale, interest accrual, length of time necessary for resale, maintenance, guard service, weatherization, and prior liens.

(iii) Under no circumstances will the Agency pay more than 90 days of additional accrued interest once the liquidation plan is approved.

(6) *Acceleration.* The lender, or the Agency if it liquidates, will proceed to accelerate the indebtedness as expeditiously as possible when acceleration is necessary including giving any notices and taking any other legal actions required. A copy of the acceleration notice or other acceleration document will be sent to the Agency (or lender if the Agency liquidates). The guaranteed loan will be considered in liquidation once the loan has been accelerated and a demand for payment has been made upon the borrower.

(7) *Filing an estimated loss claim.* When the lender is conducting the liquidation and owns any or all of the guaranteed portion of the loan, the lender will file an estimated loss claim once a decision has been made to liquidate if the liquidation will exceed 90 days. The estimated loss payment will be based on the liquidation value of the collateral. For the purpose of reporting and loss claim computation, the lender will discontinue interest accrual on the defaulted loan in accordance with Agency procedures, and the loss claim will be promptly processed in accordance with applicable Agency regulations.

(8) *Accounting and reports.* When the lender conducts liquidation, it will account for funds during the period of liquidation and will provide the Agency with reports at least quarterly on the progress of liquidation including disposition of collateral, resulting costs, and additional procedures necessary for successful completion of the liquidation.

(9) *Transmitting payments and proceeds to the Agency.* When the Agency is the holder of a portion of the guaranteed loan, the lender will

transmit to the Agency its pro rata share of any payments received from the borrower; liquidation; or other proceeds using Form RD 1980-43, "Lender's Guaranteed Loan Payment to USDA."

(10) *Abandonment of collateral.* There may be instances when the cost of liquidation would exceed the potential recovery value of the collection. The lender, with proper documentation and concurrence of the Agency, may abandon the collateral in lieu of liquidation. A proposed abandonment will be considered a servicing action requiring the appropriate environmental review by the Agency in accordance with subpart G of part 1940 of this title. Examples where abandonment may be considered include, but are not limited to:

(i) The cost of liquidation is increased or the value of the collateral is decreased by environmental issues;

(ii) The collateral is functionally or economically obsolete;

(iii) The collateral has deteriorated; or

(iv) The collateral is specialized and there is little or no demand for it.

(11) *Recovery and deficiency judgments.* The lender should take action to maximize recovery from all collateral. The lender will seek a deficiency judgment when there is a reasonable chance of future collection of the judgment. The lender must make a decision whether or not to seek a deficiency judgment when:

(i) A borrower voluntarily liquidates the collateral, but the sale fails to pay the guaranteed indebtedness;

(ii) The collateral is voluntarily conveyed to the lender; or

(iii) A liquidation plan is being developed for forced liquidation.

(12) *Compromise settlement.* A compromise settlement may be considered at any time.

(i) The lender and the Agency must receive complete financial information on all parties obligated for the loan and must be satisfied that the statements reflect the true and correct financial position of the debtor including all assets. Adequate consideration must be received before a release from liability is issued. Adequate consideration includes money, additional security, or other benefit to the goals and objectives of the Agency.

(ii) Once the Agency and the lender agree on a reasonable amount that is fair and adequate, the lender can proceed to effect the compromise settlement.

(iii) A compromise will only be accepted if it is in the best financial interest of the Federal government.

(n) *Determination of loss and payment.* In all liquidation cases, final settlement will be made with the lender

after the collateral is liquidated, unless otherwise designated as a future recovery or after settlement and compromise of all parties has been completed. The Agency will have the right to recover losses paid under the guarantee from any party which may be liable.

(1) *Report of loss form.* Form RD 449-30 will be used for calculations of all estimated and final loss determinations. Estimated loss payments may only be approved by the Agency after the Agency has approved a liquidation plan.

(2) *Estimated loss.* In accordance with the requirements of 7 CFR part 4287, an estimated loss claim based on liquidation appraisal value will be prepared and submitted by the lender.

(i) The estimated loss payment shall be applied as of the date of such payment. The total amount of the loss payment remitted by the Agency will be applied by the lender on the guaranteed portion of the loan debt. Such application does not release the borrower from liability.

(ii) An estimated loss will be applied first to reduce the principal balance on the guaranteed loan and the balance, if any, to accrued interest. Interest accrual on the defaulted loan will be discontinued.

(iii) A protective advance claim will be paid only at the time of the final report of loss payment, except in certain transfer and assumption situations as specified in 7 CFR part 4287.

(3) *Final loss.* Within 30 days after liquidation of all collateral is completed, a final report of loss must be prepared and submitted by the lender to the Agency. The Agency will not guarantee interest beyond this 30-day period other than for the period of time it takes the Agency to process the loss claim. Before approval by the Agency of any final loss report, the lender must account for all funds during the period of liquidation, disposition of the collateral, all costs incurred, and any other information necessary for the successful completion of liquidation. Upon receipt of the final accounting and report of loss, the Agency may audit all applicable documentation to determine the final loss. The lender will make its records available and otherwise assist the Agency in making any investigation. The documentation accompanying the report of loss must support the amounts shown on Form RD 449-30.

(i) The lender must document that all of the collateral has been accounted for and properly liquidated and that liquidation proceeds have been properly accounted for and applied correctly to the loan.

(ii) The lender will show a breakdown of any protective advance amount as to the payee, purpose of the expenditure, date paid, and evidence that the amount expended was proper and that payment was actually made.

(iii) The lender will show a breakdown of liquidation expenses as to the payee, purpose of the expenditure, date paid, and evidence that the amount expended was proper and that payment was actually made. Liquidation expenses are recoverable only from collateral proceeds. Attorney fees may be approved as liquidation expenses provided the fees are reasonable and cover legal issues pertaining to the liquidation that could not be properly handled by the lender and its in-house counsel.

(iv) Accrued interest will be supported by documentation as to how the amount was accrued. If the interest rate was a variable rate, the lender will include documentation of changes in both the selected base rate and the loan rate.

(v) Loss payments will be paid by the Agency within 60 days after the review of the final loss report and accounting of the collateral.

(4) *Loss limit.* The amount payable by the Agency to the lender cannot exceed the limits set forth in the Loan Note Guarantee.

(5) *Rent.* Any net rental or other income that has been received by the lender from the collateral will be applied on the guaranteed loan debt.

(6) *Liquidation costs.* Liquidation costs will be deducted from the proceeds of the disposition of collateral. If changed circumstances after submission of the liquidation plan require a substantial revision of liquidation costs, the lender will procure the Agency's written concurrence prior to proceeding with the proposed changes. No in-house expenses of the lender will be allowed. In-house expenses include, but are not limited to, employee's salaries, staff lawyers, travel, and overhead.

(7) *Payment.* When the Agency finds the final report of loss to be proper in all respects, it will approve Form RD 449-30 and proceed as follows:

(i) If the loss is greater than any estimated loss payment, the Agency will pay the additional amount owed by the Agency to the lender.

(ii) If the loss is less than the estimated loss payment, the lender will reimburse the Agency for the overpayment plus interest at the note rate from the date of payment.

(iii) If the Agency has conducted the liquidation, it will pay the lender in

accordance with the Loan Note Guarantee.

(o) *Future recovery.* After a loan has been liquidated and a final loss has been paid by the Agency, any future funds which may be recovered by the lender will be pro rated between the Agency and the lender based on the original percentage of guarantee.

(p) *Bankruptcy.* The lender is responsible for protecting the guaranteed loan and all collateral securing the loan in bankruptcy proceedings.

(1) *Lender's responsibilities.* It is the lender's responsibility to protect the guaranteed loan debt and all of the collateral securing it in bankruptcy proceedings. These responsibilities include, but are not limited to, the following:

(i) The lender will file a proof of claim where necessary and all the necessary papers and pleadings concerning the case.

(ii) The lender will attend and, where necessary, participate in meetings of the creditors and all court proceedings.

(iii) When permitted by the Bankruptcy Code, the lender will request modification of any plan of reorganization whenever it appears that additional recoveries are likely.

(iv) The Agency will be kept adequately and regularly informed, in writing, of all aspects of the proceedings.

(v) In a Chapter 11 reorganization, if an independent appraisal of collateral is necessary in the Agency's opinion, the Agency and the lender will share such appraisal fee equally.

(2) *Reports of loss during bankruptcy.* When the loan is involved in reorganization proceedings, payment of loss claims may be made as provided in this section. For a liquidation proceeding, only paragraphs (p)(2)(iii) and (v) of this section are applicable.

(i) *Estimated loss payments.*

(A) If a borrower has filed for protection under Chapter 11 of the United States Code for a reorganization (but not Chapter 13) and all or a portion of the debt has been discharged, the lender will request an estimated loss payment of the guaranteed portion of the accrued interest and principal discharged by the court. Only one estimated loss payment is allowed during the reorganization. All subsequent claims of the lender during reorganization will be considered revisions to the initial estimated loss. A revised estimated loss payment may be processed by the Agency, at its option, in accordance with any court-approved changes in the reorganization plan.

Once the reorganization plan has been

completed, the lender is responsible for submitting the documentation necessary for the Agency to review and adjust the estimated loss claim to reflect any actual discharge of principal and interest and to reimburse the lender for any court-ordered interest-rate reduction under the terms of the reorganization plan.

(B) The lender will use Form RD 449-30 to request an estimated loss payment and to revise any estimated loss payments during the course of the reorganization plan. The estimated loss claim, as well as any revisions to this claim, will be accompanied by documentation to support the claim.

(C) Upon completion of a reorganization plan, the lender will complete a Form RD 1980-44 and forward this form to the Finance Office.

(ii) *Interest loss payments.*

(A) Interest losses sustained during the period of the reorganization plan will be processed in accordance with paragraph (p)(2)(i) of this section.

(B) Interest losses sustained after the reorganization plan is completed will be processed annually when the lender sustains a loss as a result of a permanent interest rate reduction which extends beyond the period of the reorganization plan.

(C) If an estimated loss claim is paid during the operation of the Chapter 11 reorganization plan and the borrower repays in full the remaining balance without an additional loss sustained by the lender, a final report of loss is not necessary.

(iii) *Final loss payments.* Final loss payments will be processed when the loan is liquidated.

(iv) *Payment application.* The lender must apply estimated loss payments first to the unsecured principal of the guaranteed portion of the debt and then to the unsecured interest of the guaranteed portion of the debt. In the event a bankruptcy court attempts to direct the payments to be applied in a different manner, the lender will immediately notify the Agency servicing office.

(v) *Overpayments.* Upon completion of the reorganization plan, the lender will provide the Agency with the documentation necessary to determine whether the estimated loss paid equals the actual loss sustained. If the actual loss sustained as a result of the reorganization is less than the estimated loss, the lender will reimburse the Agency for the overpayment plus interest at the note rate from the date of payment of the estimated loss. If the actual loss is greater than the estimated loss payment, the lender will submit a revised estimated loss in order to obtain

payment of the additional amount owed by the Agency to the lender.

(vi) *Protective advances.* If approved protective advances were made prior to the borrower having filed bankruptcy, these protective advances and accrued interest will be considered in the loss calculations.

(3) *Legal expenses during bankruptcy proceedings.*

(i) When a bankruptcy proceeding results in a liquidation of the borrower by a trustee, legal expenses will be handled as directed by the court.

(ii) Chapter 11 pertains to a reorganization of a business contemplating an ongoing business rather than a termination and dissolution of the business where legal protection is afforded to the business as defined under Chapter 11 of the Bankruptcy Code. Consequently, expenses incurred by the lender in a Chapter 11 reorganization can never be liquidation expenses unless the proceeding becomes a Chapter 11 liquidation. If the proceeding should become a Liquidating 11, reasonable and customary liquidation expenses may be deducted from proceeds of collateral as provided in the Lender's Agreement. Chapter 7 pertains to a liquidation of the borrower's assets. If, and when, liquidation of the borrower's assets under Chapter 7 is conducted by the bankruptcy trustee, then the lender cannot claim expenses.

#### *P. Basic Borrower Provisions*

(a) The borrower must allow the Agency access to the project and its performance information until the loan is repaid in full and permit periodic inspection of the project by a representative of the Agency.

(b) The borrower must permit representatives of the Agency (or other agencies of the U.S.) to inspect and make copies of any records pertaining to any Agency guaranteed loan during regular office hours of the borrower or at any other time upon agreement between the borrower and the Agency, as appropriate.

#### *Q. Basic Guarantee and Loan Provisions*

(a) *Conditions of guarantee.* A loan guarantee under this Notice will be evidenced by a Loan Note Guarantee issued by the Agency. Each lender will execute a Lender's Agreement. If a valid Lender's Agreement already exists, it is not necessary to execute a new Lender's Agreement with each loan guarantee. The provisions of this Notice will apply to all outstanding guarantees. In the event of a conflict between the guarantee documents and this Notice as they exist at the time the documents are

executed, the Notice will control. To the extent that the Agency publishes a regulation whose provisions are inconsistent with the terms of this Notice, the terms of this Notice shall control for loan guarantees entered into pursuant to this Notice.

(b) *Full faith and credit.* A guarantee under this Notice constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which a lender or holder has actual knowledge at the time it becomes such lender or holder or which a lender or holder participates in or condones. The guarantee will be unenforceable to the extent that any loss is occasioned by a provision for interest on interest. In addition, the guarantee will be unenforceable by the lender to the extent any loss is occasioned by the violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which the Agency acquires knowledge thereof. Any losses occasioned will be unenforceable to the extent that loan funds are used for purposes other than those specifically approved by the Agency in its Conditional Commitment. The Agency will guarantee payment as follows:

(1) To any holder, 100 percent of any loss sustained by the holder on the guaranteed portion of the loan and on interest due on such portion.

(2) To the lender, the lesser of:

(i) Any loss sustained by the lender on the guaranteed portion, including principal and interest evidenced by the notes or assumption agreements and secured advances for protection and preservation of collateral made with the Agency's authorization; or

(ii) The guaranteed principal advanced to or assumed by the borrower and any interest due thereon.

(c) *Soundness of guarantee.* All loans guaranteed under this Notice must be financially sound and feasible, with reasonable assurance of repayment.

(d) *Rights and liabilities.* When a portion of the guaranteed loan is sold to a holder, the holder shall succeed to all rights of the lender under the Loan Note Guarantee to the extent of the portion purchased. The lender will remain bound to all obligations under the Loan Note Guarantee, Lender's Agreement, and the Agency program regulations. A guarantee and right to require purchase will be directly enforceable by a holder notwithstanding any fraud or misrepresentation by the lender or any unenforceability of the guarantee by the lender, except for fraud or misrepresentation of which the holder has actual knowledge at the time it

becomes the holder or in which the holder participates or condones.

(1) In the event of material fraud, negligence or misrepresentation by the lender or the lender's participation in or condoning of such material fraud, negligence or misrepresentation, the lender will be liable for payments made by the Agency to any holder.

(2) A lender will receive all payments of principal and interest on account of the entire loan and will promptly remit to the holder its pro rata share thereof, determined according to its respective interest in the loan, less only the lender's servicing fee.

(e) *Interest rates.*

(1) *General.* The interest rate for the guaranteed loan will be negotiated between the lender and the applicant. The interest rate charged must be in line with interest rates on other similar government guaranteed loan programs, and is subject to Agency review and approval.

(i) The interest rate may be either fixed or variable, as long as it is a legal rate, and shall be fully amortizing.

(ii) The interest rate for both the guaranteed and unguaranteed portions of the loan must be of the same type (i.e., both fixed or both variable).

(iii) The guaranteed and unguaranteed portions of the loan can bear interest at different rates, provided that the blended rate on the entire guaranteed loan shall not exceed the rate on the guaranteed portion of the loan by more than one (1) percent.

(iv) Both portions of the loan must amortize at the same rate.

(2) *Variable rates.* A variable interest rate agreed to by the lender and borrower must be based on published indices, such as the Prime Rate, applicable Treasury rate, or the London Inter Bank Offering Rate (LIBOR), and agreed to by the lender and the Agency. Variable rates should have either an internal or external interest rate cap.

(i) The variable interest rate may be adjusted at different intervals during the term of the loan, but the adjustments may not be more often than quarterly and no less than yearly to prevent negative amortization, and must be specified in the loan agreement.

(ii) Variable rate loans will not provide for negative amortization nor will they give the borrower the ability to choose its payment among various options.

(iii) The lender must incorporate, within the variable rate Promissory Note at loan closing, the provision for adjustment of payment installments coincident with an interest-rate adjustment.

(iv) The lender will ensure that the outstanding principal balance is properly amortized within the prescribed loan maturity to eliminate the possibility of a balloon payment at the end of the loan.

(3) *Interest changes.* Any change in the interest rate between the date of issuance of the Conditional Commitment and before the issuance of the Loan Note Guarantee must be approved, in writing, by the Agency approval official. Approval of such a change will be shown as an amendment to the Conditional Commitment. Such changes are subject to the restrictions set forth in the following paragraphs.

(i) *Reductions.* The borrower, lender, and holder (if any) may collectively initiate a permanent or temporary reduction in the interest rate of the guaranteed loan at any time during the life of the loan upon written agreement among these parties. The Agency must be notified by the lender, in writing, within 15 days of the change. If any of the guaranteed portion has been purchased by the Agency, then the Agency will affirm or reject interest rate change proposals in writing. The Agency will concur in such interest-rate changes only when it is demonstrated to the Agency that the change is a more viable alternative than initiating or proceeding with liquidation of the loan or continuing with the loan in its present state.

(A) Fixed rates can be changed to variable rates to reduce the borrower's interest rate only when the variable rate has a ceiling for the life of the guaranteed loan that is less than or equal to the original fixed rate.

(B) The interest rates, after adjustments, must comply with the requirements for interest rates on new loans as established under this Notice.

(C) The lender is responsible for the legal documentation of interest-rate changes by an endorsement or any other legally effective amendment to the promissory note; however, no new notes may be issued. Copies of all legal documents must be provided to the Agency.

(ii) *Increases.* Increases in interest rates are not permitted beyond what is provided in the loan documents. Increases from a variable interest rate to a higher interest rate that is a fixed rate are allowed, subject to concurrence by the Agency.

(f) *Term length, schedule, and repayment.*

(1) The repayment term for a loan under this Notice will be for a maximum period of 20 years or 85 percent of the useful life of the project, as determined by the lender and

confirmed by the Agency, whichever is less. The length of the loan term shall be the same for both the guaranteed and unguaranteed portion of the loan.

(2) The first installment of principal may be scheduled for payment after the project is operational and has begun to generate income. However, the first full installment of principal must be due and payable within 3 years from the date of the Promissory Note and be paid at least annually thereafter. Interest payments will be paid at least annually from the date of the note.

(3) Only loans that require a periodic payment schedule that will retire the debt over the term of the loan without a balloon payment will be guaranteed (i.e., the loan will fully amortize over its life without any balloon payment due at maturity).

(4) The maturity of a loan will be based on the use of proceeds, the useful life of the assets being financed, and the borrower's ability to repay. The lender may apply the maximum guidelines specified above only when the loan cannot be repaid over a shorter term.

(5) Guarantees must be provided only after consideration is given to the borrower's overall credit quality and to the terms and conditions of any applicable subsidies, tax credits, and other such incentives.

(6) A principal plus interest repayment schedule is permissible.

(7) The lender will determine the particular prepayment provisions to offer, subject to concurrence by the Agency.

(g) *Guaranteed Loan Funding*

(1) *Maximum amount.* The maximum principal amount of a loan guaranteed under this Program is \$250 million. There is no minimum amount. The amount of a loan guaranteed under this Program will be reduced by the amount of other direct Federal funding that the eligible borrower receives for the same project.

(2) *Maximum guarantee.* The maximum guarantee on the principal and interest due on a loan guaranteed under this Program is as follows:

(i) If the loan amount is equal to or less than \$80 million, 80%;

(ii) If the loan amount is more than \$80 million and less than \$125 million, 80% on the first \$80 million and 70% on the loan amount that is greater than \$80 million; and

(iii) If the loan amount is equal to or more than \$125 million, 60%.

(3) *Percentage of total project cost.*

The amount of a loan guaranteed for a project under this Program will not exceed 80 percent of total eligible project costs. Eligible project costs are only those costs associated with the

items listed in paragraphs (g)(3)(i) through (ix) below, as long as the items are an integral and necessary part of the total project.

(i) Purchase and installation of equipment (new, refurbished, or remanufactured), except agricultural tillage equipment, used equipment, and vehicles.

(ii) Construction or retrofitting, except residential.

(iii) Permit and license fees;

(iv) Professional service fees, except for application preparation;

(v) Feasibility studies;

(vi) Business plans;

(vii) Working capital;

(viii) Land acquisition; and

(ix) Cost of financing, excluding guarantee and renewal fees.

(h) *Guarantee and other fees*

(1) *Guarantee fee.* For any loan, the guarantee fee will be paid to the Agency by the lender at the time the Loan Note Guarantee is requested, and is nonrefundable.

(i) The guarantee fee will be calculated by multiplying the outstanding principal balance by the percentage of the loan that is guaranteed under this program by the guarantee fee rate shown below. The guarantee fee rate shall be determined as follows:

(A) Two percent for guarantees on loans greater than 75 percent of total project cost.

(B) One and one-half percent for guarantees on loans of greater than 65 percent but less than or equal to 75 percent of total project cost.

(C) One percent for guarantees on loans of 65 percent or less of total project cost.

(ii) The guarantee fee may be passed on to the borrower.

(2) *Annual renewal fee.* The annual renewal fee will be calculated on the unpaid principal balance as of close of business on December 31 of each year. Annual renewable fees are due on January 31. For loans where the Loan Note Guarantee is issued between October 1 and December 31, the first annual renewal fee payment will not be due until the January 31st immediately following the first anniversary of the date the Loan Note Guarantee was issued.

(i) Payments not received by April 1 are considered delinquent and, at the Agency's discretion, may result in cancellation of the guarantee to the lender. Holders' rights will continue in effect as specified in the Loan Note Guarantee and Assignment Guarantee Agreement. Any delinquent annual renewal fees will bear interest at the note rate and will be deducted from any loss payment due the lender.

(ii) The annual renewal fee will be calculated by multiplying the outstanding principal balance by the percentage of the loan that is guaranteed under this program by the annual renewal fee rate shown below. The renewal fee rate shall be as follows:

(A) One hundred basis points (1 percent) for guarantees on loans that were originally greater than 75 percent of total project costs.

(B) Seventy five basis points (0.75 percent) for guarantees on loans that were originally greater than 65 percent but less than or equal to 75 percent of total project costs.

(C) Fifty basis points (0.50 percent) for guarantees on loans that were originally for 65 percent or less of total project costs.

(iii) The annual renewal fee will be paid to the Agency for as long as the guaranteed loan is outstanding and is payable during the construction period.

(3) *Lender fees.* The lender may charge the borrower reasonable fees as approved by the Agency.

(i) *Conditions precedent to issuance of Loan Note Guarantee.* All applicable regulatory, statutory, and other requirements must be met to issue the Loan Note Guarantee. The Secretary has the discretion to cancel a Conditional Commitment at any time. Further, the Loan Note Guarantee will not be issued until the lender certifies to the following conditions:

(1) No major changes have been made in the lender's loan conditions and requirements since the issuance of the Conditional Commitment, unless such changes have been approved by the Agency.

(2) All planned property acquisition has been or will be completed, all development has been or will be substantially completed in accordance with plans and specifications, and conforms with applicable Federal, state, and local codes.

(3) Required hazard, flood, liability, worker compensation, and personal life insurance, when required, are in effect.

(4) Truth-in-lending requirements have been met.

(5) All equal credit opportunity requirements have been met.

(6) The loan has been properly closed, and the required security instruments have been obtained or will be obtained on any acquired property that cannot be covered initially under State law.

(7) The borrower has marketable title to the collateral then owned by the borrower, subject to the instrument securing the loan to be guaranteed and to any other exceptions approved, in writing, by the Agency.

(8) When required, the entire amount of funds for working capital has been disbursed except in cases where the Agency has approved disbursement over an extended period of time.

(9) All other requirements of the Conditional Commitment have been met.

(10) Lien priorities are consistent with the requirements of the Conditional Commitment. No claims or liens of laborers, subcontractors, suppliers of machinery and equipment, or other parties have been or will be filed against the collateral and no suits are pending or threatened that would adversely affect the collateral when the security instruments are filed.

(11) The loan proceeds will be disbursed for purposes and in amounts consistent with the Conditional Commitment and Form RD 4279-1. A copy of the detailed loan settlement of the lender must be attached to support this certification.

(12) There has been neither any material adverse change in the borrower's financial condition nor any other material adverse change in the borrower, for any reason, during the period of time from the Agency's issuance of the Conditional Commitment to issuance of the Loan Note Guarantee regardless of the cause or causes of the change and whether or not the change or causes of the change were within the lender's or borrower's control. The lender must address any assumptions or reservations in the requirement and must address all adverse changes of the borrower, and any parent, affiliate, or subsidiary of the borrower.

(13) None of the lender's officers, directors, stockholders, or other owners (except stockholders in an institution that has normal stockshare requirements for participation) has a substantial financial interest in the borrower and neither the borrower nor its officers, directors, stockholders, or other owners has a substantial financial interest in the lender. If the borrower is a member of the board of directors or an officer of a Farm Credit System (FCS) institution that is the lender, the lender will certify that an FCS institution on the next highest level will independently process the loan request and act as the lender's agent in servicing the account.

(14) The loan agreement includes all mitigation measures identified in the Agency's environmental impact analysis for this proposal (measures with which the borrower must comply) for the purpose of avoiding or reducing adverse environmental impacts of the proposal's construction or operation.

(j) *Issuance of the guarantee.*

(1) When loan closing plans are established, the lender must notify the Agency in writing. At the same time, or immediately after loan closing, the lender must provide the following to the Agency

(i) Lender's certifications as required by Conditions Precedent to Issuance of Loan Note Guarantee in this Notice;

(ii) An executed Form RD 4279-4; and

(iii) An executed Form RD 1980-19, "Guaranteed Loan Closing Report," and appropriate guarantee fee.

(2) When the Agency is satisfied that all conditions for the guarantee have been met, the Loan Note Guarantee and the following documents, as appropriate, will be issued:

(i) *Assignment Guarantee Agreement.*

If the lender assigns the guaranteed portion of the loan to a holder, the lender, holder, and the Agency must execute the Assignment Guarantee Agreement;

(ii) *Certificate of Incumbency.* If requested by the lender, the Agency will provide the lender with a copy of Form RD 4279-7, "Certificate of Incumbency and Signature," with the signature and title of the Agency official responsible for signing the Loan Note Guarantee, Lender's Agreement, and Assignment Guarantee Agreement; and

(iii) *Legal documents.* Copies of legal loan documents.

(k) *Refusal to execute Loan Note Guarantee.* If the Agency determines that it cannot execute the Loan Note Guarantee, the Agency will promptly inform the lender of the reasons and give the lender a reasonable period within which to satisfy the objections. If the lender requests, in writing, additional time and within the period allowed, the Agency may grant the request. If the lender satisfies the objections within the time allowed, the guarantee will be issued.

(l) *Replacement of document.* If the Loan Note Guarantee or Assignment Guarantee Agreement has been lost, stolen, destroyed, mutilated, or defaced, the Agency may issue a replacement to the lender or holder upon receipt from the lender of a notarized certificate of loss and an indemnity bond acceptable to the Agency. If the holder is the United States, a Federal Reserve Bank, a Federal Government corporation, a State or Territory, or the District of Columbia, an indemnity bond is not required.

(m) *Alterations of loan instruments.* Under no circumstances shall the lender alter or approve any alterations of any loan instrument without the prior written approval of the Agency.

(n) *Reorganizations.*

(1) *Changes in borrower.* Any changes in borrower ownership or organization prior to the issuance of the Loan Note Guarantee must meet the eligibility requirements of the Program and be approved by the Agency prior to the issuance of the Conditional Commitment. Once the Conditional Commitment is issued, no substitution of borrower(s) or change in the form of legal entity will be approved, unless Agency approval, in writing, is obtained.

(2) *Transfer of lenders.* The Agency may approve the substitution of a new lender in place of a former lender who holds an outstanding Conditional Commitment when the Loan Note Guarantee has not yet been issued provided, that there are no changes in the borrower's ownership or control, loan purposes, or scope of project and loan conditions in the Conditional Commitment and the loan agreement remain the same.

The new lender's servicing capability, eligibility, and experience will be analyzed by the Agency prior to approval of the substitution. The original lender will provide the Agency with a letter stating the reasons it no longer desires to be a lender for the project. The substituted lender must execute a new part B of Form RD 4279-1.

(3) *Substitution of lender.* After the issuance of a Loan Note Guarantee, the lender shall not sell or transfer the entire loan without the prior written approval of the Agency. The Agency will not pay any loss or share in any costs (i.e., appraisal fees, environmental studies, or other costs associated with servicing or liquidating the loan) with a new lender unless a relationship is established through a substitution of lender in accordance with paragraph (b) of this section. This includes cases where the lender has failed and been taken over by a regulatory agency such as the Federal Deposit Insurance Corporation (FDIC) and the loan is subsequently sold to another lender.

(i) The Agency may approve the substitution of a new lender if:

- (A) The proposed substitute lender:
- (1) Is an eligible lender in accordance with this Notice;
  - (2) Is able to service the loan in accordance with the original loan documents; and
  - (3) Acquires/Agrees, in writing, to acquire title to the unguaranteed portion of the loan held by the original lender and assumes all original loan requirements, including liabilities and servicing responsibilities.

(B) The substitution of the lender is requested, in writing, by the borrower,

the proposed substitute lender, and the original lender if still in existence.

(ii) Where the lender has failed and been taken over by FDIC and the guaranteed loan is liquidated by FDIC rather than being sold to another lender, the Agency will pay losses and share in costs as if FDIC were an approved substitute lender.

(o) *Sale or Assignment of Guaranteed Loan.* The lender may sell all or part of the guaranteed portion of the loan on the secondary market or retain the entire loan. The guaranteed portion of the loan shall be fully transferable to any accredited investor. However, the lender shall not sell or participate any amount of the guaranteed or unguaranteed portion of the loan to the borrower or members of the borrower's immediate families, officers, directors, stockholders, other owners, or a parent, subsidiary or affiliate. If the lender desires to market all or part of the guaranteed portion of the loan at or subsequent to loan closing, such loan must not be in default. Loans made with the proceeds of any obligation the interest on which is excludable from income under 26 U.S.C. 103 (interest on State and local banks) or any successor section will not be guaranteed. The Secretary may not guarantee a loan funded with the net proceeds of a bond described in section 142(a) of the Internal Revenue Code of 1986.

(1) *Single note system.* The entire loan is evidenced by one note, and one Loan Note Guarantee is issued. The lender may assign all or part of the guaranteed portion of the loan to one or more holders by using the Agency's Assignment Guarantee Agreement. The holder, upon written notice to the lender and the Agency, may reassign the unpaid guaranteed portion of the loan sold under the Assignment Guarantee Agreement. Upon notification and completion of the assignment through the use of Form RD 4279-6, the assignee shall succeed to all rights and obligations of the holder thereunder. If this option is selected, the lender may not at a later date cause any additional notes to be issued.

(2) *Multi-note system.* Under this option the lender may provide one note for the unguaranteed portion of the loan and no more than 10 notes for the guaranteed portion. When this option is selected by the lender, the holder will receive one of the borrower's executed notes and a Loan Note Guarantee. The Agency will issue a Loan Note Guarantee for each guaranteed note to be attached to the note. An Assignment Guarantee Agreement will not be used when the multi-note option is utilized.

(3) *After loan closing.* If a loan is closed using the multinote option and at a later date additional notes are desired, the lender may cause a series of new notes, so that the total number of notes issued does not exceed the total number provided for in paragraph (b) of this section, to be issued as replacement for previously issued guaranteed notes, provided:

(i) Written approval of the Agency is obtained;

(ii) The borrower agrees and executes the new notes;

(iii) The interest rate terms remain the same as those in effect when the loan was closed;

(iv) The maturity date of the loan is not changed;

(v) The Agency will not bear or guarantee any expenses that may be incurred in reference to such reissuance of notes;

(vi) There is adequate collateral securing the notes;

(vii) No intervening liens have arisen or have been perfected and the secured lien priority is better or remains the same; and

(viii) All holders agree.

(p) *Termination of lender servicing fee.* The lender's servicing fee will stop when the Agency purchases the guaranteed portion of the loan from the secondary market. No such servicing fee may be charged to the Agency and all loan payments and collateral proceeds received will be applied first to the guaranteed loan and, when applied to the guaranteed loan, will be applied on a pro rata basis.

(q) *Participation.* The lender may sell participations in the loan under its normal operating procedures; however, the lender must retain title to the notes if any of them are unguaranteed and retain the lender's interest in the collateral.

(r) *Minimum retention.* Lenders may syndicate a portion of its risk position to other eligible lenders provided that at no time during the life of the guarantee may the original lender hold less than 50 percent of their original unguaranteed position in the loan.

(s) *Termination of guarantee.* A guarantee issued under this Notice will terminate automatically upon:

(1) Full payment of the guaranteed loan;

(2) Full payment of any loss obligation or negotiated loss settlement except for future recovery provisions and payments made as a result of the Debt Collection Improvement Act of 1996. After final payment of claims to lenders and/or holders, the Agency will retain all funds received as the result of

the Debt Collection Improvement Act of 1996; or

(3) Written request from the lender to the Agency that the guarantee will terminate 30 days after the date of the request, provided that the lender holds all of the guaranteed portion, and the original Loan Note Guarantee is returned to the Agency to be canceled.

#### **Nondiscrimination Statement**

“The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on this basis of race, color, national origin, age,

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Dated: November 7, 2008.

**Ben Anderson,**

*Administrator, Rural Business-Cooperative Service.*

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