

# Rules and Regulations

Federal Register

Vol. 74, No. 198

Thursday, October 15, 2009

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## DEPARTMENT OF ENERGY

### Office of Energy Efficiency and Renewable Energy

#### 10 CFR Part 452

RIN 1904-AB73

#### Production Incentives for Cellulosic Biofuels; Reverse Auction Procedures and Standards

**AGENCY:** Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (DOE) today publishes a final rule establishing the procedures and standards for reverse auctions of production incentives for cellulosic biofuels pursuant to section 942 of the Energy Policy Act of 2005 (EPA 2005).

**DATES:** This final rule is effective November 16, 2009.

#### FOR FURTHER INFORMATION CONTACT:

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#### I. Background and Overview

Section 942 of the Energy Policy Act of 2005, Pub. L. 109-58 (August 8, 2005), requires the Secretary of Energy (Secretary), in consultation with the Secretary of Agriculture, the Secretary of Defense, and the Administrator of the Environmental Protection Agency, to establish an incentive program for the production of cellulosic biofuels and to implement that program by means of a "reverse auction." Section 942(a) states that the purposes of the program are to: "(1) Accelerate deployment and commercialization of biofuels; (2) deliver the first one billion gallons of annual cellulosic biofuel production by 2015; (3) ensure biofuels produced after 2015 are cost competitive with gasoline and diesel; and (4) ensure that small feedstock producers and rural small businesses are full participants in the development of the cellulosic biofuels industry." In order to achieve these purposes, the Secretary is to award production incentives on a per gallon basis to eligible entities by means of a reverse auction. Under section 942, the auction is conducted annually until the earlier of the first year that annual production of cellulosic biofuels in the United States reaches one billion gallons or 10 years after enactment of EPA 2005.

In order to implement section 942, DOE is promulgating this final rule establishing procedures for the reverse auction and standards for making production incentive awards. The eligibility standards include both pre-auction requirements which must be met prior to an entity's participation in a reverse auction under section 942 and several post-auction standards which must be met as a condition of receiving an award. The post-auction standards are especially necessary if the nation is to achieve the long-term goals of section 942, including delivery of the first one

billion gallons of annual cellulosic biofuel production by the statutory deadline, and establishment of a biofuels industry that is cost competitive with gasoline and diesel. The post-auction standards are thus intended to ensure that successful bidders make real and meaningful progress toward the production of cellulosic biofuels in commercially significant quantities. DOE believes that as successive auctions yield more and more production of cellulosic biofuels, the nation will move closer to achieving section 942's long-term national goal of a commercially viable production capability after 2015. In addition, by setting forth clear pre-auction and post-auction standards, DOE believes that only the most serious entities will seek to participate in each reverse auction.

#### II. Discussion of Comments and Modifications of Proposed Rule

##### A. Comments of Dupont Danisco Cellulosic Ethanol, LLC

On December 23, 2008, DOE published a Notice of Proposed Rulemaking (NOPR) in the **Federal Register**, 73 FR 78663, proposing the issuance of this rule and inviting public comment on the proposal. In response, DOE received only one set of comments—from Dupont Danisco Cellulosic Ethanol, LLC (Dupont Danisco).

*Dupont Danisco offered the following recommendations:*

- Eligibility Criteria. Tighten the eligibility criteria for bidders, including the addition of requirement that a bidder must have previously demonstrated its refining technology in a pilot plant; that DOE employ a review panel to qualify bidders; and that putative bidders must submit *pro forma* financial statements.

- Bidding Process. Adopt an anonymous iterative, open bidding process and clarify whether bids are to cover one year or multiple years and/or total volume production for a specific site or multiple sites for a single entity. The comments recommend that the rule should permit incentive awards that are site specific and for multiple years and that a bidder also should be able to bid in subsequent years for uncovered production volumes at the same site.

- Bidder Defaults. Where the bidder defaults due to a failure to fulfill annual production obligations, (a) only the

shortfall should be considered to be in default and only the dollar value of the shortfall should be added to the amount of incentives eligible in the next auction round; or, in the alternative, (b) defaulted monies should be allocated to the next lowest<sup>1</sup> non-winning bidder in the auction in which the defaulting bidder won its award.

○ Force Majeure. DOE should provide a reasonable time extension for performance by the successful bidder where there has been a delay due to a force majeure event.

○ Transfer of Awards. Awards should be site specific but transferable to entities producing at that site.

DOE agrees with the commenter that, as a condition of eligibility for participation in reverse auctions under the rule, bidders should have to demonstrate that the technologies which they employ have been first demonstrated as effective processes for biofuels refining, and the final rule incorporates this recommendation in the definition of “eligible cellulosic biofuels production facility” in section 452.2. Likewise, DOE agrees that bidders must submit audited or *pro forma* financial statements as a condition of eligibility, as reflected in section 452.4(a)(2). These two modifications of the NOPR should help to ensure that only capable and financially fit entities participate in the reverse auctions. On the other hand, the rule does not adopt the commenter’s recommendation for the establishment of a review panel. The review of bidders’ qualifications is a governmental function. While DOE may employ a panel to assist it in this review, in the manner suggested by the commenter, DOE is not convinced of the need for it in this situation.

DOE appreciates the commenter’s recommendation for the adoption of an anonymous, iterative bidding process. However, it is not clear at this time that an iterative bidding process would improve the bidding process or the quality of the bids received. It warrants noting that DOE had specifically solicited public comment on the question of potential benefits from use of such an open iterative bidding process but, other than the single recommendation described above, received none. Accordingly, DOE will carefully monitor the procedures adopted in this final rule. Over time, DOE may reconsider whether an open iterative bidding scheme would be helpful.

With respect to whether a bid is site specific and/or entity specific, or whether a bid is to cover only a single year or multiple years, DOE intends that each bid should identify a projected level of production on a per gallon, site, entity, and year specific basis for a six year production period. Bids thus must contain projections of anticipated production volumes for each of the six years covered by the bid. The final rule provides clarification of these matters in section 452.5(b). Additionally, DOE intends that a bidder should be able to bid for additional incentives for uncovered production volumes in subsequent years at the same site where an award has already been made. Also see, section 452.5(b).

DOE has revised section 452.6 to address the question of force majeure events. Section 452.6(b) contains language that would allow a reasonable extension of time to be granted at DOE’s discretion to winning bidders to fulfill their obligations under their production agreements with DOE.

Absent a force majeure event, however, the final rule provides, in section 452.6(c) that a winning bidder must produce at least 50 percent of its annual obligation under the production agreement in order to avoid a default and the revocation of its award. Assuming that at least 50 percent of its annual obligation is produced in any calendar year covered by the production agreement, any shortfall will be added to the production obligation for the following year.

The final rule, however, adopts the commenter’s alternate recommendation as regards defaults, i.e., if there is still a shortfall at the end of the last calendar year covered by the production agreement, the shortfall will be allocated to the next best (lowest) bidder in the auction round won by the bidder that is party to the production agreement. If, however, the next best bidder fails to enter into a production agreement with DOE within 30 days after being notified of its award, the shortfall will be allocated instead to the next reverse auction. See, section 452.5(d).

As proposed in the NOPR, DOE also agrees with the commenter that awards should be site specific but transferable to eligible entities that succeed to ownership of the site. Section 452.5(g) has been revised to clarify this intent.

#### *B. Energy Independence and Security Act of 2007*

Title II of the Energy Independence and Security Act of 2007, Pub. L. 110–140 (December 19, 2007) (EISA), directs the Administrator of the Environmental

Protection Agency (EPA) to revise that agency’s regulations implementing section 211(o)(1) of the Clean Air Act, 42 U.S.C. 7545(o), to ensure, *inter alia*, that transportation fuel sold or introduced into commerce in the United States on an annual average basis, contains at least a specified minimum volume of renewable fuel, advanced biofuel, cellulosic biofuel, or biomass-based diesel. Pursuant to EISA section 202, the minimum volume requirement for cellulosic biofuel, as defined in EISA, is 1 billion gallons by the year 2013. The term “cellulosic biofuel” is defined in section 201 of EISA as “renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the Administrator, that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions.”

To date, the Administrator of the EPA has not issued the regulations required under section 202 of EISA. Nonetheless, DOE is mindful that the EPA regulations, once promulgated, could affect reverse auctions established by this final rule. In particular, if the renewable fuel standard for “cellulosic biofuel” under EISA is achieved, the last reverse auction required under section 942 of EPAct 2005 may occur in 2013, rather than 2015, the target provided under EPAct for refining 1 billion gallons of cellulosic biofuels on an annual basis. However, this presupposes that the “cellulosic biofuel” used to meet the renewable fuel standard under EISA also qualifies as “cellulosic biofuels” for purposes of this final rule.

That may not be the case, however. The definition of “cellulosic biofuel” in section 201 of EISA is different from the definition used in EPAct and this final rule. The final rule defines “*cellulosic biofuel*” as “any liquid fuel produced from cellulosic feedstocks” and “*cellulosic feedstock* means any lignocellulosic feedstock as defined by EPAct, section 932(a)(2).” Thus the final rule attempts to be consistent with the definition used elsewhere in EPAct. In the absence of final regulations implementing the renewable fuel standard of EISA, the definitions established in the later-enacted legislation cannot be imported to this final rule without the possibility that the EPA regulations may further refine the statutory definitions.

Nevertheless, DOE retains discretion to later modify the definition used in this final rule in order to make it consistent with the regulations implementing EISA, if sound public

<sup>1</sup> The commenter uses the term “next highest bid” but, given the context of a reverse auction, we understand him to mean “next lowest bid.”

policy considerations support such a modification within the parameters established by EPA. After EPA promulgates its regulations implementing section 202 of EISA, DOE will review this final rule to determine whether it is feasible and appropriate to reconcile the terms and definitions of both rules.

#### C. Heating Value

In an effort to treat all potential biofuels equally, section 452.5 of this final rule modifies the proposed rule by requiring bidders to set forth their calculation of the fuel selected for their bids on a gasoline equivalent volumetric basis using the lower heating Btu value (LHV) of the fuel compared to the LHV of gasoline. Awards similarly shall be issued on a gasoline equivalent volumetric basis. The gasoline equivalent volumes are to be calculated by multiplying the gallons of biofuels times the LHV of the fuel divided by 116,090 Btu per gallon (the LHV of gasoline). An example, in the case of ethanol, would be 1 gallon of ethanol times 76,330 Btu per gallon (the LHV of ethanol) divided by 116,090 (the LHV of gasoline). Consequently, 1 gallon of ethanol would be 0.6575 gasoline equivalent gallons. A table with most common fuels heating values can be found at: [http://cta.ornl.gov/bedb/appendix\\_a/Lower\\_Higher\\_Heating\\_Values\\_for\\_Various\\_Fuels.xls](http://cta.ornl.gov/bedb/appendix_a/Lower_Higher_Heating_Values_for_Various_Fuels.xls).

#### D. Commercial Suitability

This final rule modifies section 452.4(a)(2) of the proposed rule by clarifying that bidders must demonstrate in their pre-auction eligibility submissions that, in addition to other requirements set forth in section 452.4, they will produce a cellulosic biofuel which either currently is suitable for widespread general use as a transportation fuel or, alternatively, that the cellulosic biofuel will be suitable for such use in a timeframe and in sufficient volumes to significantly contribute to the goal of 1 billion gallons of refined cellulosic biofuel by the statutory deadline. Those pre-auction eligibility submissions proposing fuels that are not currently widely accepted and available as a transportation fuel also must describe a clear path to achieving the status of an acceptable liquid transportation cellulosic biofuel. This description may include, but is not limited to the following:

- Obtaining vehicle manufacturer(s) approval;
- Obtaining EPA fuel registration(s);
- Establishing standards for use, production, storage, transportation, and retail dispensing; and,

- Establishing a distribution/dispensing infrastructure.
- Additionally, the pre-auction eligibility submissions must estimate the costs and discuss the activities required for eventually commercializing the proposed cellulosic biofuel.

### III. Regulatory Review

#### A. Executive Order 12866

Today's rule has been determined to be a significant regulatory action under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

Section 942 of EPAct 2005 provides that awards under the program shall be limited to not more than \$100 million in any one year. 42 U.S.C. 16251(d)(4). The possibility of awards at the \$100 million level makes this rulemaking economically significant under the Executive Order. However, the level of funding provided by Congress for this program, thus far, suggests it is unlikely DOE will award \$100 million in any one year. In fiscal year 2008, Congress appropriated \$5.0 million to initiate the program. The President has requested no funding for this program in his Fiscal Year 2010 budget.

The incentives awarded for the production of cellulosic biofuels under this program constitute transfer payments. In this case, the payments are from the Government to private entities, and they do not affect total resources available to society. These transfers do not involve costs and benefits, and thus no assessment of costs and benefits is required by Executive Order 12866. See OMB Circular A-4, at 38 and 46. DOE expects the first auction will be held in late 2009 or 2010 and the last auction no later than 2015. As discussed in section II. B. of this notice, the Renewable Fuel Standard administered by EPA was amended by EISA to call for the production of 1 billion gallons of cellulosic biofuel by the year 2013. If that goal is met, then the last auction would occur in 2013.

The EPAct 2005 program for conducting reverse auctions to provide incentives for production of cellulosic biofuels is one of several actions Congress has taken to encourage the production of cellulosic biofuels. As discussed, Congress has amended the Renewable Fuel Standard to set specific targets for the production of cellulosic biofuel, including 1 billion gallons by 2013. Congress also in EPAct 2005 and

EISA authorized funding for research and development of advanced biofuels and cellulosic biofuel. Current research and development efforts, in combination with various methodologies that could be funded using the procedures established in this regulation, have the potential to realize alternatives that DOE believes can achieve the production goals set in section 942 of EPAct 2005 and EISA.

#### B. National Environmental Policy Act

DOE has determined that this rule is covered under the Categorical Exclusion found in the DOE's National Environmental Policy Act (NEPA) regulations at paragraph A6 of Appendix A to Subpart D, 10 CFR part 1021, which applies to rulemakings that are strictly procedural. DOE notes that the procedures proposed in this rule do not afford DOE discretion to determine whether or how a facility will be constructed or operated. DOE's prescribed role under section 942, that is, awarding production incentives to the lowest bidder in a reverse auction, is strictly procedural. Accordingly, neither an environmental assessment nor an environmental impact statement is required for the rule or for an award that DOE gives or proposes to give to a successful bidder. If DOE subsequently proposes to take any additional actions with respect to successful bidders, separate from the award of funds under section 942 of EPAct 2005, DOE will separately evaluate the need for NEPA review of those new proposed actions.

#### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's Web site: <http://www.gc.doe.gov>.

DOE has reviewed today's rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The rule will only affect biofuels

producers if they choose to participate in the reverse auction. Moreover, the rule will provide an economic benefit without imposing any regulatory requirements on producers of cellulosic biofuels. On the basis of the foregoing, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. This certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

#### D. Paperwork Reduction Act

Section 452.4(a) provides that entities that intend to participate in a reverse auction must file a pre-auction eligibility submission. The pre-auction eligibility submission must contain certain information, including an implementation plan, as described above. This information will be used by DOE to determine if an entity that files a pre-auction eligibility submission will be accepted to participate in the reverse auction.

In addition, section 452.4(c) provides that a bidder must submit a progress report. The progress report must contain the additional information described above. DOE will use this information to evaluate the bidder's progress in the production of cellulosic biofuels. DOE has submitted this collection of information to the Office of Management and Budget for approval pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and the procedures implementing that Act, 5 CFR 1320.1 *et seq.*

DOE estimates that the annual reporting and recordkeeping burden for this collection of information will be 30 hours per year (10 bidders × 3 hours) at a total annual cost of \$2250 (10 bidders × \$225 per auction). Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

#### E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of title I of that law

defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of \$100 million or more in any one year (adjusted annually for inflation). 2 U.S.C. 1532(a) and (b). Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments. 2 U.S.C. 1534.

This rule will not impose a Federal mandate on State, local, or tribal governments or on the private sector. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

#### F. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well being. The rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### G. Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it would not preempt State law and would not have a substantial direct effect on the

States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

#### H. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the rule meets the relevant standards of Executive Order 12988.

#### I. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*J. Executive Order 13211*

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that:

- (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and
- (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or
- (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

*K. Consultation*

Pursuant to section 942(c)(1) of EPA Act 2005, DOE has consulted with the Secretary of Agriculture, the Secretary of Defense, and the Administrator of the Environmental Protection Agency prior to issuing today's rule.

*L. Congressional Notification.*

As required by 5 U.S.C. 801, DOE will report to Congress promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2). DOE will submit the supporting analysis to the Comptroller General in the U.S. Government Accountability Office and make it available to each House of Congress.

**IV. Approval of the Office of the Secretary**

The issuance of this rule has been approved by the Office of the Secretary.

**List of Subjects in 10 CFR Part 452**

Fuel, Grant programs, Recordkeeping and reporting requirements, Renewable energy.

Issued in Washington, DC, on September 11, 2009.

**Cathy Zoi,**

*Assistant Secretary, Energy Efficiency and Renewable Energy.*

■ For the reasons stated in the preamble, DOE is amending chapter II of title 10 of the Code of Federal Regulations by adding a new part 452 as set forth below:

**PART 452—PRODUCTION INCENTIVES FOR CELLULOSIC BIOFUELS**

Sec.

- 452.1 Purpose and scope.
- 452.2 Definitions.
- 452.3 Solicitations.
- 452.4 Eligibility requirements.
- 452.5 Bidding procedures.
- 452.6 Incentive award terms and limitations.

**Authority:** 42 U.S.C. 7101 *et seq.*; 42 U.S.C. 16251.

**§ 452.1 Purpose and scope.**

(a) This part sets forth the standards, policies, and procedures that the Department of Energy uses for receiving, evaluating, and awarding bids in reverse auctions of production incentive payments for cellulosic biofuels under section 942 of the Energy Policy Act of 2005 (42 U.S.C. 16251).

(b) Part 1024 of chapter X of title 10 of the Code of Federal Regulations shall not apply to actions taken under this part.

**§ 452.2 Definitions.**

As used in this part:

*Cellulosic biofuel* means any liquid fuel produced from cellulosic feedstocks.

*Cellulosic feedstock* means any lignocellulosic feedstock as defined by EPA Act, section 932(a)(2).

*Commercially significant quantity* means 10 million gallons or more of cellulosic biofuels produced in one year.

*DOE* means the U.S. Department of Energy.

*Eligible biofuels producer* means a business association, including but not limited to a sole proprietorship, partnership, joint venture, corporation, or other business entity that owns and operates, or plans to own and operate, an eligible cellulosic biofuels production facility and that meets all other eligibility requirements that are conditions on the receipt of production incentives under this part.

*Eligible cellulosic biofuels production facility* means a facility—

(1) Located in the United States (including U.S. territories and possessions);

(2) Which meets all applicable Federal and State permitting requirements;

(3) Employs a demonstrated refining technology; and

(4) Meets any relevant financial criteria established by the Secretary.

*EPA Act 2005* means the Energy Policy Act of 2005, Public Law 109–58 (August 8, 2005).

*Open window* means the period during each reverse auction, as specified in an associated solicitation, during which DOE accepts bids for production incentives under this part.

*Secretary* means the Secretary of Energy.

**§ 452.3 Solicitations.**

The reverse auction process commences with the issuance of a solicitation by DOE. DOE will publish a solicitation in the **Federal Register** and shall post the solicitation on its website at [www.eere.energy.gov](http://www.eere.energy.gov) no later than 60 days before the bidding in a reverse auction under this part commences. The solicitation shall:

(a) Invite interested persons and businesses to submit pre-qualification statements;

(b) Set forth the terms on which bids will be accepted;

(c) Specify the open window for bidding; and

(d) Specify the date by which successful bidders will be required to file pre-auction eligibility submissions.

**§ 452.4 Eligibility requirements.**

(a) *Pre-auction eligibility submissions.*  
(1) Entities that intend to participate in a reverse auction, within the time period stated in the relevant solicitation, must file a pre-auction eligibility submission that provides all information requested in the applicable solicitation to which it is responding, including an implementation plan.

(2) Each pre-auction eligibility submission's implementation plan must, at a minimum:

(i) Demonstrate that the filing party owns and operates or plans to own and operate an eligible cellulosic biofuels production facility;

(ii) Identify the site or proposed site for the filing party's eligible cellulosic biofuels production facility;

(iii) Demonstrate that the cellulosic biofuel to be produced for purposes of receiving an award either currently is suitable for widespread general use as a transportation fuel or will be suitable for such use in a timeframe and in sufficient volumes to significantly contribute to the goal of 1 billion gallons of refined cellulosic biofuel by August 2015.

(iv) Provide audited or *pro forma* financial statements for the latest 12 month period; and

(v) Identify one or more proposed sources of financing for the construction or expansion of the filing party's eligible cellulosic biofuels production facility.

(b) *Notification of pre-auction eligibility status.* DOE shall notify each entity that files a pre-auction eligibility submission of its acceptance or rejection no later than 15 days before the reverse auction for which the submission was made. A DOE decision constitutes final agency action and is conclusive.

(c) *Progress reports.* Within one year after the reverse auction in which a bidder successfully competed, the bidder must submit a progress report that includes all additional information required by the solicitation in which the bidder submitted a successful bid and which demonstrates that the bidder has:

(1) Acquired the site where its proposed eligible cellulosic biofuels production facility is or will be located;

(2) Obtained secure financing commitments for the plant or expansion thereof, as necessary to produce cellulosic biofuels; and

(3) Entered into a written engineering, procurement, and construction (EPC) contract for design and construction of the eligible cellulosic biofuels production facility; such EPC contract must provide for completion of construction of the eligible cellulosic biofuels production facility such that operations at the plant or plant expansion will commence within three years of the reverse auction in which the bidder successfully competed.

(d) *Production agreement.* Within 90 days after submission of its progress report under paragraph (c) of this section, the successful bidder must enter into an agreement with DOE which requires the bidder to begin production of commercially significant quantities of cellulosic biofuels, at the eligible cellulosic biofuels production facility that was the subject of the relevant bid, not later than three years from the date of the acceptance of the successful bid.

(e) *Confirmation of continuing eligibility.* After receiving the progress report described in the paragraph (e) of the section and upon confirmation by DOE that the successful bidder has entered into a production agreement with DOE, as described in paragraph (d) of this section, DOE will confirm to the bidder that it continues to meet the eligibility requirements of this part.

(f) *Contractual condition on eligibility.* (1) As a condition of the receipt of an award under this part, a successful bidder in a reverse auction under this

part must demonstrate that it has fulfilled the terms of its production agreement entered into with DOE pursuant to paragraph (d) of this section.

(2) As a condition of continuing to receive production incentive payments under this part, a bidder that has entered into a production agreement with DOE must annually submit to DOE, by a commercially reasonable date specified by DOE, verification of the bidder's production volumes for the prior calendar year. Within 90 days of the submission of such verification, DOE shall notify the successful bidder whether the bidder has fulfilled the terms of the production agreement and shall make payment of any production incentive awards then outstanding for the one year period covered by the verified data submission.

#### § 452.5 Bidding procedures.

DOE shall conduct an electronic reverse auction through a limited duration single bid per producer auction process open only to pre-auction eligible cellulosic biofuels producers. The following procedures shall be used:

(a) DOE shall accept only electronic bids received from pre-auction eligible cellulosic biofuels producers during the open window established in the solicitation. The open window shall consist of a single continuous period of at least four hours for each auction.

(b) Bids shall identify an estimated annual production amount from an eligible cellulosic biofuels production facility on a per gallon, site, entity, and year specific basis for a consecutive six year production period. A bid also may be submitted for additional incentives for uncovered production volumes at a site where an award was made in an earlier auction round.

(c) All bids must set forth the methodology used to derive the estimates of annual production volumes covered by the bid and the bid shall be calculated on a gasoline equivalent volumetric basis using the lower heating Btu value of the fuel compared to the lower heating Btu value of gasoline.

(d) All bids will be confidential until 45 days after the close of the window for submission of bids for the reverse auction.

(e) Bid evaluation and incentive awards selection procedures include the following:

(1) After DOE evaluates the bids received during the open window, it shall, within 45 days following the close of the open window for submission of bids for the reverse auction, announce on DOE's website and by direct mail the

names of the successful bidders and the terms of their bids.

(2) DOE shall issue awards for the bid production amounts beginning with the bidder that submitted the bid for the lowest level of production incentive on a per gallon basis.

(3) In the event of a tie among the lowest bids, preference will be given to the lowest tied bidder based on DOE's evaluation of the extent to which the tied bids meet the following criteria:

(i) Demonstrates outstanding potential for local and regional economic development;

(ii) Includes agricultural producers or cooperatives of agricultural producers as equity partners in the ventures; and

(iii) Has a strategic agreement in place to fairly reward feedstock suppliers.

(4) In the event more than one lowest tied bid equally meets the standards in paragraph (c)(3) of this section, the award will be distributed equally on a per capita basis among those lowest tied bidders meeting the standards.

#### § 452.6 Incentive award terms and limitations.

(a) *Amount of incentive.* Subject to the availability of appropriated funds and the limitations in paragraph (c) of this section, an eligible cellulosic biofuels producer selected to receive an award shall receive the amount of the production incentive on the per gallon basis requested in the auction solicitation for each gallon produced and sold by the entity during the first six years of operation of its eligible cellulosic biofuels production facility.

(b) *Failure to commence production.* Except in the circumstance of a force majeure event, as solely determined by DOE, failure by an eligible cellulosic biofuels producer that made a successful bid to commence production of cellulosic biofuels, at the eligible cellulosic biofuels production facility that was the subject of the successful bid, by the end of the third year after the close of submission of the open window of bids for the reverse auction in which it submitted a successful bid, shall result in immediate revocation of DOE's award to that producer.

(c) *Failure of the successful bidder to meet annual production obligations.* Except in the circumstance of a force majeure event, as solely determined by DOE, a successful bidder's failure to produce at least 50 percent of the volumes specified in its production agreement by December 31 of any year covered by the bid shall result in immediate revocation of DOE's award; if the successful bidder produces 50 percent or more of the volumes set forth in the production agreement on an

annual basis by December 31 of any year covered by the agreement, any production shortfall will be carried forward and added to the successful bidder's production obligations for next year covered by the agreement.

(d) *Shortfalls remaining at the end of the production period.* If, for any reason, by December 31 of the last year of the production agreement, the bidder has failed to produce the total production volumes for all years covered by the agreement, any such remaining shortfall shall be awarded to the bidder with the next lowest bid in the auction round for which the award was made. If, however, the next best bidder is unable to enter into a production agreement with DOE within 30 days after being notified of its award, the shortfall shall be allocated instead to the next reverse auction.

(e) *Incentive award limitations.* The following limits shall apply to awards of cellulosic biofuels production incentives under this part:

(1) During the first four years after the commencement of the program, the incentive shall be limited to \$1.00 per gallon. For purposes of this limitation, the program shall be deemed to have commenced on the date that the first solicitation for a reverse auction is issued;

(2) A per gallon cap over the remaining lifetime of the program of \$.95 per gallon provided that—

(i) This cap shall be lowered by \$.05 each year commencing the first year after annual cellulosic biofuels production in the United States exceeds 1 billion gallons;

(ii) Not more than 25 percent of the funds committed within each reverse auction shall be awarded to any single project;

(iii) Not more than \$100 million in production incentives shall be awarded in any one calendar year; and

(iv) Not more than \$1 billion in production incentives shall be awarded over the lifetime of the program.

(f) *Participation in subsequent auctions.* A successful bidder in a reverse auction under this part may participate in subsequent reverse auctions if the incentives sought will assist the addition of plant production capacity for the eligible cellulosic biofuels production facility associated with its previously successful bid.

(g) *Transferability of awards.* A production incentive award under this part may be transferred to a successor entity at the same production facility for which the award was made, provided that the successor entity meets all eligibility requirements of this part, including execution of an agreement

with DOE to commence production of cellulosic biofuels in commercially significant quantities not later than three years of the date that bidding closes on the reverse auction in which the predecessor entity submitted a successful bid.

[FR Doc. E9-24778 Filed 10-14-09; 8:45 am]

BILLING CODE 6450-01-P

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 204

[Regulation D; Docket No. R-1373]

#### Reserve Requirements of Depository Institutions

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule.

**SUMMARY:** The Board is amending Regulation D, Reserve Requirements of Depository Institutions, to reflect the annual indexing of the reserve requirement exemption amount and the low reserve tranche for 2010. The Regulation D amendments set the amount of total reservable liabilities of each depository institution that is subject to a zero percent reserve requirement in 2010 at \$10.7 million, up from \$10.3 million in 2009. This amount is known as the reserve requirement exemption amount. The Regulation D amendments also set the amount of net transaction accounts at each depository institution that is subject to a three percent reserve requirement in 2010 at \$55.2 million, up from \$44.4 million in 2009. This amount is known as the low reserve tranche. The adjustments to both of these amounts are derived using statutory formulas specified in the Federal Reserve Act. The Board is also announcing changes in two other amounts, the nonexempt deposit cutoff level and the reduced reporting limit, that are used to determine the frequency at which depository institutions must submit deposit reports.

**DATES:** *Effective Date:* November 16, 2009.

*Compliance Dates:* For depository institutions that report deposit data weekly, the new low reserve tranche and reserve requirement exemption amount will apply to the fourteen-day reserve computation period that begins Tuesday, December 1, 2009, and the corresponding fourteen-day reserve maintenance period that begins Thursday, December 31, 2009. For depository institutions that report deposit data quarterly, the new low

reserve tranche and reserve requirement exemption amount will apply to the seven-day reserve computation period that begins Tuesday, December 15, 2009, and the corresponding seven-day reserve maintenance period that begins Thursday, January 14, 2010. For all depository institutions, these new values of the nonexempt deposit cutoff level, the reserve requirement exemption amount, and the reduced reporting limit will be used to determine the frequency at which a depository institution submits deposit reports effective in either June or September 2010.

**FOR FURTHER INFORMATION CONTACT:** Sophia Allison, Senior Counsel (202/452-3565), Legal Division, or Mary-Frances Styczynski, Financial Analyst (202/452-3303), Division of Monetary Affairs; for users of Telecommunications Device for the Deaf (TDD) only, contact (202/263-4869); Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

**SUPPLEMENTARY INFORMATION:** Section 19(b)(2) of the Federal Reserve Act (12 U.S.C. 461(b)(2)) requires each depository institution to maintain reserves against its transaction accounts and nonpersonal time deposits, as prescribed by Board regulations, for the purpose of implementing monetary policy. Section 11(a)(2) of the Federal Reserve Act (12 U.S.C. 248(a)(2)) authorizes the Board to require reports of liabilities and assets from depository institutions to enable the Board to conduct monetary policy. The Board's actions with respect to each of these provisions are discussed in turn below.

#### 1. Reserve Requirements

Pursuant to section 19(b) of the Federal Reserve Act (Act), transaction account balances maintained at each depository institution are subject to reserve requirement ratios of zero, three, or ten percent. Section 19(b)(11)(A) of the Act (12 U.S.C. 461(b)(11)(A)) provides that a zero percent reserve requirement shall apply at each depository institution to total reservable liabilities that do not exceed a certain amount, known as the reserve requirement exemption amount. Section 19(b)(11)(B) provides that, before December 31 of each year, the Board shall issue a regulation adjusting the reserve requirement exemption amount for the next calendar year if total reservable liabilities held at all depository institutions increase from one year to the next. No adjustment is made to the reserve requirement exemption amount if total reservable