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Part II

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Rural Business-Cooperative Service
Rural Utilities Service

7 CFR Parts 4279 and 4287
Biorefinery Assistance Guaranteed Loans; Final Rule

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Rural Utilities Service

7 CFR Parts 4279 and 4287

RIN 0570–AA73

Biorefinery Assistance Guaranteed Loans

AGENCY: Rural Business-Cooperative Service and Rural Utilities Service, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule establishes a guaranteed loan program for the development and construction of commercial-scale biorefineries and for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels.

DATES: This interim rule is effective March 16, 2011. Comments must be received on or before April 15, 2011.

ADDRESSES: You may submit comments to this rule by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.
- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

All written comments will be available for public inspection during regular work hours at the 300 7th Street, SW., 7th Floor address listed above.

FOR FURTHER INFORMATION CONTACT: Kelley Oehler, Energy Branch, Biorefinery Assistance Program, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 3225, Washington, DC 20250–3201; telephone (202) 720–6819. E-mail: *kelley.oehler@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This interim rule has been reviewed under Executive Order (EO) 12866 and has been determined to be economically significant by the Office of Management and Budget. The EO defines a "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this EO.

The Agency conducted a benefit-cost analysis to fulfill the requirements of Executive Order 12866. In this analysis, the Agency identified potential benefits and costs of the Biorefinery Assistance Guaranteed Loan Program to lenders, borrowers, and the Agency. The analysis contains both quantitative estimates and qualitative descriptions of the expected benefits and costs of the Biorefinery Assistance Guaranteed Loan Program. The environmental and energy impacts associated with the Biorefinery Assistance Guaranteed Loan Program were qualitatively assessed.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, Rural Development generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires Rural Development to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This interim rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Environmental Impact Statement

This renewable energy program under Section 9003 of the Farm Security and Rural Investment Act of 2002 (FSRIA) (as amended by Section 9001 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill)) has been operating on an interim basis through the issuance of a Notice of Funds Availability (NOFA). During this initial round of applications, the Agency conducted National Environmental Policy Act (NEPA) reviews on each individual application for funding. No significant environmental impacts were reported, and Findings of No Significant Impact (FONSI) were issued for each approved application. Taken collectively, the applications show no potential for significant adverse cumulative effects.

The Agency has prepared a programmatic environmental assessment (PEA), pursuant to 7 CFR part 1940, subpart G, analyzing the environmental effects to air, water, and biotic resources; land use; historic and cultural resources; and greenhouse gas emissions affected by the Biorefinery Assistance Guaranteed Loan Program proposed rule. The purpose of the PEA is to assess the overall environmental impacts of the programs related to the Congressional goal of advancing biofuels production for the purposes of energy independence and greenhouse gas emission reductions. The impact analyses are national in scope, but draw upon site-by-site analysis for each application to the program. Site-specific NEPA documents prepared for those facilities funded under Sections 9003 and 9004 of the FSRIA in FY 2008 and/or 2009 were utilized, as well, to forecast likely impacts under the interim rule. The draft PEA was made available to the public for comment on the USDA Rural Business-Cooperative Service's Web site on May 3, 2010. No comments were received on the draft PEA, and the Agency is preparing to publish a Finding of No Significant Impact (FONSI) for the program.

Executive Order 12988, Civil Justice Reform

This interim rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with this rule: (1) All State and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given this rule; and (3) administrative proceedings in accordance with the regulations of the Department of Agriculture's National Appeals Division (7 CFR part 11) must be exhausted before bringing suit in court challenging action taken under this rule unless those regulations specifically allow bringing suit at an earlier time.

Executive Order 13132, Federalism

It has been determined, under Executive Order 13132, Federalism, that this interim rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions contained in the rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have an economically significant impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

In compliance with the RFA, Rural Development has determined that this action will not have an economically significant impact on a substantial number of small entities. The burden for applying for a Biorefinery Assistance Guaranteed Loan Program loan to any one borrower is estimated to be less than 0.1 percent of the estimated cost of the average construction or reconstruction project funded under this program. Further, this regulation only impacts those who choose to participate in the program.

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

The regulatory impact analysis conducted for this interim rule meets the requirements for Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, Executive Order No. 13211, which states that an agency undertaking regulatory actions related to energy supply, distribution, or use is to prepare a Statement of Energy Effects. This analysis finds that this rule will not have any adverse impacts on energy supply, distribution, or use.

Executive Order 12372, Intergovernmental Review of Federal Programs

Rural Development guaranteed loans are subject to the Provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. Rural Development will conduct intergovernmental consultation in the manner delineated in RD Instruction 1940–J, "Intergovernmental Review of Rural Development Programs and Activities," available in any Rural Development office and on the Internet at *http://www.rurdev.usda.gov/regs,* and in 7 CFR part 3015, subpart V.

Executive Order 13175

United States Department of Agriculture (USDA) will undertake, within 6 months after this rule becomes effective, a series of regulation Tribal consultation sessions to gain input by elected Tribal officials or their designees concerning the impact of this rule on Tribal governments, communities, and individuals. These sessions will establish a baseline of consultation for future actions, should any be necessary, regarding this rule. Reports from these sessions for consultation will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule and will provide additional venues, such as webinars and teleconferences, to periodically host collaborative conversations with Tribal leaders and their representatives concerning ways to improve this rule in Indian country.

The policies contained in this rule would not have Tribal implications that preempt Tribal law.

Programs Affected

The Biorefinery Assistance Guaranteed Loan Program is listed in the Catalog of Federal Domestic Assistance Program under Number 10.865.

Paperwork Reduction Act

The information collection requirements contained in the Notice of Funding Availability for the Section 9003 Biorefinery Assistance Guaranteed Loan Program published on November 20, 2008, were approved by the Office of Management and Budget (OMB) under emergency clearance procedures and assigned OMB Control Number 0570–0055. In accordance with the Paperwork Reduction Act of 1995, the Agency is now seeking standard OMB approval of the reporting requirements contained in this interim rule. In the publication of the proposed rule on April 16, 2010, the Agency solicited comments on the estimated burden. The Agency received one comment in response to this solicitation. This information collection requirement will not become effective until approved by OMB. Upon approval of this information collection, the Agency will publish a rule in the **Federal Register**.

Title: Biorefinery Assistance Guaranteed Loan Program.

OMB Number: 0570–NEW.

Type of Request: New collection.

Abstract: The collection of information is vital for 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., are used for the purposes for which the guaranteed loans were awarded). Persons seeking loan guarantees under this program will have to submit applications that include specified information including, but not limited to, the lender's analysis and credit evaluation, financial statements on the borrower, a feasibility study, a business plan, a technical assessment, an economic analysis, and a description of the borrower's bioenergy experience. The information included in applications for loan guarantee will be used to determine applicant and project eligibility and to ensure that funds are used for projects that are likely to be financially sound.

Once a project has been approved and the loan has been guaranteed, lenders must submit certain reports. Some of these reports are associated with the performance of the lender's loan portfolio and include both periodic reports on the status of that portfolio and, when applicable, monthly default reports. Other reports are associated with individual projects and include quarterly construction reports and, once a project has been completed, annual reports through the life of the guaranteed loan. In addition, lenders are required to conduct annual inspections of each completed project.

The estimated information collection burden hours has not changed from the proposed rule, remaining at 2,920 hours.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 4.6 hours per response.

Respondents: Individuals, entities, 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: 23.

Estimated Number of Responses per Respondent: 27.4.

Estimated Number of Responses: 630.

Estimated Total Annual Burden on Respondents: 2,920.

E-Government Act Compliance

Rural Development is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

I. Background

Rural Development administers a multitude of Federal programs for the benefit of rural America, ranging from housing and community facilities to infrastructure and business development. Its mission is to increase economic opportunity and improve the quality of life in rural communities by providing the leadership, infrastructure, venture capital, and technical support that enables rural communities to prosper. To achieve its mission, Rural Development provides financial support (including direct loans, grants, and loan guarantees) and technical assistance to help enhance the quality of life and provide the foundation for economic development in rural areas.

Section 9003 of the Farm Security and Rural Investment Act of 2002 (FSRIA) (as amended by Section 9001 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill)) provides for financial assistance in the form of grants and loan guarantees to assist in the development of new and emerging technologies for the development of advanced biofuels. At this time, Congress has not appropriated any discretionary funding, which would be necessary to fund program grants. Therefore, the interim rule only addresses loan guarantees. If and when funds for grants are appropriated and received by the Agency, it will be necessary for the Agency to promulgate a separate regulation for program grants.

The interim rule establishes the Biorefinery Assistance Guaranteed Loan Program to provide loan guarantees for the development, construction, or retrofitting of commercial biorefineries using eligible technology, where eligible technology is defined as:

(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.

On April 16, 2010 [75 FR 20044], the Agency published a proposed rule for the Biorefinery Assistance Guaranteed Loan Program. Comments were requested on the proposed rule, which are summarized in Section III of this preamble. Most of the proposed rule's provisions have been carried forward into 7 CFR part 4279, subpart C, and 7 CFR part 4287, subpart D, although there have been several significant changes. Changes to the proposed rule are summarized in Section II of this preamble.

Interim rule. USDA Rural Development is issuing this regulation as an interim rule, effective March 16, 2011. All provisions of this regulation are adopted on an interim final basis, are subject to a 60-day comment period, and will remain in effect until the Agency adopts the final rule.

II. Summary of Changes to the Proposed Rule

This section presents changes from the April 16, 2010, proposed rule. Most of the changes were the result of the Agency's consideration of public comments on the proposed rule. Some changes, however, are being made to clarify proposed provisions. Unless otherwise indicated, rule citations refer to those in the interim rule.

A. Highlighted Changes

The following highlight significant changes to the rule:

- Revised the maximum percent guarantee provisions, including adding provisions to allow for a 90 percent guarantee for loan amounts of $125 million or less under certain conditions.
- Added refinancing as an eligible project purpose under certain conditions.
- Removed location in a rural area as a requirement for project eligibility; however, it is included in a scoring criterion in order to receive points for that criterion.
- Removed the citizenship requirement for borrowers.
- Revised the minimum retention requirement to 7.5 percent of total loan amount.

B. Section Specific Changes

1. Definitions

A number of definitions were added, revised, or removed.

The Agency added one definition: "Biobased product" was added in order to further clarify the biorefinery definition.

The Agency revised several definitions as follows:

- *Business plan.* The Agency clarified the wording of this definition.
- *Existing businesses.* The Agency clarified the wording of this definition.
- *Farm cooperative.* The Agency revised the definition to be generally consistent with the definition being used in the value-added producer grant program.
- *Feasibility study.* The Agency replaced "capabilities" with "feasibility" to clarify the definition.
- *Local owner.* The Agency revised the rule to remove the reference to the feedstock supply area and now defines local owner as "an individual who owns any portion of an eligible advanced biofuel biorefinery and whose primary residence is located within a certain distance from the biorefinery as specified by the Agency in a Notice published in the **Federal Register**."
- *Material adverse change.* The Agency revised the definition by replacing "might" with "would likely" jeopardize loan performance.
- *Project.* The Agency corrected the term "biobased byproduct" to "biobased product."
- *Technical and economic potential.* The Agency added to the definition the phrase "successfully completed" when referring to the 12-month operating cycle.

Lastly, the Agency revised several definitions associated with capital ratios to refer to the Federal Deposit Insurance Corporation regulations in general.

The Agency removed several definitions—Agency, byproduct, future recovery, immediate family, regulated or supervised lender, and surety.

- The term "Agency" was removed from the definitions because it is defined in § 4279.2 and does not need to be repeated in the interim rule.
- The term "future recovery" was removed because the term is not used in the interim rule.
- The term "immediate family" was removed because the term was only used for the citizenship requirement, which has been removed. Thus, the term is no longer used in the rule.
- The term "regulated or supervised lender" was removed because of the revision made to identify eligible lenders.

• The specific definition for the term "surety" was removed; the rule now refers to how the term is commonly used in the industry.

2. Lender Eligibility Requirements

The Agency modified § 4279.202(c)(1) to make the definition of eligible lender similar, but not identical, to the definition of traditional lender in the Business and Industry Guaranteed Loan Program. The Agency notes that, under the interim rule, savings and loan associations, mortgage lenders, and other lenders (those that are not regulated lenders) are not eligible to participate in this program.

The Agency modified the rule to require that the lender meet acceptable levels of capital at the time of application and at the time of issuance of loan note guarantee, thereby removing the requirement of maintaining acceptable capital levels at all times.

The Agency also clarified that, if the information to calculate these levels of capital is not identified in the Call Reports or Thrift Financial Reports, the lender will be required to calculate these levels and provide them to the Agency.

Lastly, the Agency added a provision addressing lenders that are under a cease and desist order from a Federal agency. In such instances, the Agency will evaluate the lender's eligibility on a case-by-case basis given the risk of loss posed by the cease and desist order.

3. Independent Credit Risk Analysis

The Agency revised "$100,000" to "$125,000,000."

4. Conditions of Guarantee

The Agency revised the rule to indicate that both the guaranteed and unguaranteed portions of the entire loan must be secured by a first lien and that the Agency may consider a subordinate lien position on inventory and accounts receivable for working capital loans if certain conditions are met.

The Agency also clarified that the lender remains bound by all obligations under the loan note guarantee, Lender's Agreement, and Agency program regulations even if all or a portion of the loan note guarantee has been sold to a holder.

Lastly, the Agency incorporated provisions associated with rights and liabilities specific to this program, rather than relying on the corresponding provisions in the Business and Industry Guaranteed Loan program found at § 4279.72(b), to clarify that having a holder purchase part of the loan note guarantee does not increase the coverage provided to the lender under the loan note guarantee.

5. Sale or Assignment

The Agency revised the sale or assignment provisions to rely solely of the sale or assignment provisions of the Business and Industry Guaranteed Loan program found at § 4279.75.

6. Minimum Retention

The Agency revised the minimum retention provisions to rely on the minimum retention provisions of the Business and Industry Guaranteed Loan program found at § 4279.77, except that the lender is required to hold 7.5 percent (rather than 5 percent) of the total loan amount in its own portfolio.

7. Ineligible Purposes

As proposed, projects in excess of $1 million that would likely result in the transfer of jobs from one area to another and increase direct employment by more than 50 employees and projects in excess of $1 million that would increase direct employment by more than 50 employees, if the project would result in an increase in the production of goods for which there is not sufficient demand, or if the availability of services or facilities is insufficient to meet the needs of the business, would have been ineligible purposes, as they are in the Business and Industry Guaranteed Loan program. The Agency has removed these types of projects as ineligible; that is, such projects would be eligible for a guaranteed loan under this program. The Agency has determined that to continue excluding such projects is unnecessary for this program because the program's primary focus is on the development of renewable energy technologies and not on job creation.

8. Fees

The Agency removed the cross-reference to the Business and Industry Guaranteed Loan program and replaced it with provisions specific to this program. The only substantive change is the elimination of reference to the option to lower the guarantee fee to 1 percent, which was never intended to be part of this program.

The Agency has added provisions that allow it to adjust the guarantee fee and the annual renewal fee through the publication of a **Federal Register** notice.

The Agency has added a 3 percent guarantee fee for loans with a 90 percent guarantee.

9. Borrower Eligibility

The Agency removed the citizenship requirement. In addition, the Agency clarified that the borrower must have or obtain legal authority prior to loan closing.

10. Project Eligibility

Changes made to project eligibility include:

• Replacing the requirement that the project must be located in a rural area with the requirement that the project must be located in a State. Note that the project must be located in a rural area to receive points under the "potential for rural economic development" scoring criterion.

• Clarifying that the project must use an eligible feedstock for the production of advanced biofuels and biobased products (at proposal, only advanced biofuels was identified) to be consistent with the authorizing legislation.

• Revising the proposed requirement that "more than 70 percent of the revenue generated by the biorefinery must be from the sale of advanced biofuel" to now require that the majority of the production generated by the biorefinery must be advanced biofuels. If the biorefinery produces biobased products and, if applicable, byproduct(s) with an established BTU content, majority biofuel production will be based on BTU content of the advanced biofuel, the biobased product, and byproduct. Alternatively, if there is no established BTU value for the biobased product or the byproduct produced, then majority biofuel production would be based on output volume of the advanced biofuel, the biobased product, and, if applicable, the byproduct.

• Adding a provision that the advanced biofuel must be sold as a biofuel unless otherwise approved by the Agency and determined to be in the best financial interests of the government.

• Revising the rule to include any organic matter that is available on a renewable or recurring basis from non-Federal land or eligible tribal land, including municipal solid waste consisting of renewable biomass, biosolids, treated sewage sludge, and byproducts of the pulp and paper industry, as eligible feedstock.

• Clarifying that an advanced biofuel that is converted to another form of energy for sale will still be considered an advanced biofuel.

11. Guaranteed Loan Funding

The Agency has made several changes in this section, including:

• Clarifying that the borrower needs to provide the remaining 20 percent from other non-Federal sources to complete the project.

- Revising the loan guarantee amounts associated with the maximum percent guarantees;
- Allowing a maximum guarantee of 90 percent for loan requests of $125 million or less and identifying the conditions under which the Agency may issue a 90 percent guarantee.
- Adding a provision that loans made with the proceeds of any obligation the interest on which is excludable from income under the Internal Revenue Code are ineligible.

12. Subordination of Lien Position

The Agency moved this provision to the servicing section and corrected the cross-reference (from § 4279.123 to § 4287.123).

13. Interest Rates

In addition to removing the proposed provisions associated with blended rates and the 1 percent interest rate cap from the interim rule, the Agency has significantly revised this section to now rely on the interest provisions found in the Business and Industry Guaranteed Loan program at § 4279.125, with several exceptions:

- The rate on the unguaranteed portion of the loan cannot exceed the rate on the guaranteed portion of the loan by more than 500 basis points;
- Variable rate loans will not provide for negative amortization nor will they give the borrower the ability to choose its payment among various options; and
- Both the guaranteed and unguaranteed portions of the loan must be amortized over the same term.

In addition, the interest rates provisions found in the Business and Industry Guaranteed Loan program at § 4287.112 also apply to this program.

14. Terms of Loan

The maximum repayment period has been revised from "20 years or 85 percent of the useful life of the project, as determined by the Agency, whichever is less" to "20 years or the useful life of the project, as determined by the lender and confirmed by the Agency, whichever is less."

The Agency also removed the cross-reference to § 4279.126(d) and inserted corresponding text specific to this program (see § 4279.232(d)).

15. Credit Evaluation

The Agency made several changes to the provisions for demonstrating the borrower's equity. One change allows equipment and qualified intellectual project (in addition to real property as was proposed) to be used to meet the equity requirement, but clarifying that this provision applies to only existing biorefineries and not to new biorefineries. In addition, the Agency clarified that equity cannot include other direct Federal funding.

The Agency clarified that the project equity must be demonstrated at the time the loan is closed.

With regard to collateral, the Agency added provisions that it may consider, for both existing and new biorefineries, the value of qualified intellectual property, arrived at in accordance with GAAP standards and subject to discounting. The value of intellectual property may not exceed 30 percent of the total value of all collateral.

16. Guarantee Applications

i. *Application submittal, deadlines, and process.* Reference to paper copies has been replaced with reference to the use of the annual Federal Register notice to identify the applicable method(s) of application submittal.

ii. *Lender's analysis and credit analysis.* The Agency added a provision requiring the lender to identify whether the loan note guarantee is requested prior to construction or after completion of the construction of the project; revised the requirement that the required personal credit report be from an "acceptable" credit reporting company to an "Agency-approved" credit reporting company; added a requirement that personal credit reports are required from key employees of the borrower; added a provision to allow the Agency to obtain personal credit reports when the borrower is a corporation listed on a major stock exchange; and deleted the provision that stated credit reports are not required for elected and appointed officials when the borrower is a public body or non-profit corporation.

iii. *Feasibility study.* Several changes were made to the contents of the feasibility study as summarized in the following table. Note that only elements that were changed are shown in the table.

Feasibility area	Change(s)
Economic	• Added feedstock risks. • Revised documentation of woody biomass feedstock to apply only to woody biomass feedstock sourced from National Forest system lands or public lands. • Added "or sold to" when referring to biobased by-products and producer associations and cooperatives.
Market	• Redefined risks to address competitive threats and advantages and specific market risks.
Technical	• Removed "any constraints or limitations in the financial projections and any other facility or design-related factors that might affect the success of the enterprise." • Under Risk Related to: added "Design-related factors that may affect project success."
Financial	• Added reference to "uses of project capital." • Revised the provision of project balance sheets, income and expense statement, and cash flow statements from 3 years to over the useful life of the project.
Management	• Added biofuel production, acquisition of feedstock, and marketing and sale of off-take to the list of areas to be covered when describing the borrower and management's previous experience. • Added risks related to management strengths and weaknesses.

Note: No changes were made to: Executive Summary and Qualifications.

iv. *Economic analysis.* The elements of the economic analysis have been incorporated in the economic feasibility and financial feasibility sections of the feasibility study and proposed § 4279.261(i) has been removed from the rule as a separate provision.

V. *Scoring information.* The Agency added a paragraph requiring that the application must contain information in a format that is responsive to the scoring criteria.

17. Lender Certification

The lender is now required to certify that "the lender concludes that the project has technical merit" rather than certify that "the project is able to demonstrate technical merit."

18. Scoring Criteria

The Agency revised the date it will score each completed application it receives from June 1 to May 1 in the fiscal year in which the application is received.

The Agency also made numerous changes to the criteria it will use to score applications. These changes are summarized in the following table. Note that only criteria that were changed are shown in the table.

Criterion	Change(s)
Borrower has established a market	• Added requirement for the advanced biofuel to meet an applicable renewable fuel standard in order to be awarded points. • Reduced the percent commitment from 60 to 50 percent. • Increased points from 5 to 10.
Location of biorefinery relative other similar biorefineries.	• Revised to read "any other similar advanced biofuel facilities."
Use of feedstock not previously used in the production of advanced biofuels.	• No changes were made to this criterion.
Working with producer associations and cooperatives.	• Corrected example. • Instituted a two-tier system that begins awarding points at a 30 percent threshold. • To be awarded points, must meet one of the three provisions, not all three as proposed. • Replaced "advanced biobased byproducts" with "biobased products".
Level of financial participation by the borrower.	• Reduced points from 20 to 15.
Impacts on resource conservation, public health, and environment.	• Increased maximum points from 5 to 10 and redistributed the points. • Added examples to each of the three impact areas. • Added provision to deduct 5 points if feedstock can be used for human or animal consumption.
Significant negative impacts on existing facilities.	• Increased points from 5 to 10. • Added provision that if the feedstock is wood pellets, no points would be awarded under this criterion.
Rural economic development potential	• Added provision that the project be located in a rural area to be awarded points under this criterion. • Removed reference to the median household wage in the State such that only the County median household wage is used in awarding points. • Increased points from 5 to 10.
Level of local ownership	• Decreased points from 15 to 5.
Project replication	• Increased points from 5 to 10.
Use of feedstock for human or animal consumption deduction.	• Removed as a separate criterion and incorporated provision for deducting points under the "Impact on resource conservation, public health, and environment" criterion.
Use of technology, system, or process not in operation in the fiscal year.	• Decreased points from 15 to 5.
Applications that promote partnerships and other activities that further the purpose of the program as stated in the authorizing legislation.	• Added provision to award Administrator bonus points.

19. Ranking of Applications

The Agency modified when it will rank applications and when applications are due for each of the two rankings. The Agency also modified slightly the process that will be used to rank applications, which includes allowing an application to be competed in two consecutive competitions. This has the effect of allowing applications submitted during the second application period of a fiscal year to be carried over to the next fiscal year. Conforming changes were made in the section addressing ranked applications not funded.

20. Conditions Precedent to Issuance of Loan Note Guarantee

The Agency added to the introductory text that the lender can request the guarantee prior to construction, but must still certify to all conditions in this section. The Agency also added a new requirement that the lender certify that the borrower has provided the equity in the project identified in the conditional commitment.

21. Requirements After Project Construction

The Agency added a requirement to report on the actual amount of biobased product and, if applicable, byproducts produced.

22. Servicing

The Agency is allowing the financial statements to be submitted within 180 days rather than the 120 days required under § 4287.107(d).

The Agency made a conforming change in § 4287.307(d) that, for working capital loans, the Agency may consider a subordinate lien provided it is consistent with the conditional provisions specified in § 4279.202(i)(1).

The Agency determined that the interest rate adjustment provisions of § 4287.112(a)(2) should not apply to this program and has revised the rule to exclude those provisions.

As noted earlier, the Agency moved the provisions concerning subordination of lien position to this section (see § 4287.307(g)).

The Agency revised the transfer and assumption provisions to cross-reference this rule rather than the Business and Industry Guaranteed Loan rule.

The Agency revised the default by borrower provisions by removing the cross-reference to the corresponding Business and Industry Guaranteed Loan program provisions and inserting text specific to this program. This change was made to correct an incorrect cross-reference.

The Agency revised the liquidation provisions to correct an incorrect cross-reference in § 4287.157(d)(13) concerning appraisals.

23. Fiscal Year 2009 and Fiscal Year 2010 Loan Guarantees

Prior to this interim rule, applications were processed and guaranteed loans were serviced according to the provisions in the November 20, 2008 (73 FR 70544), March 12, 2010 (75 FR 11840), or the May 6, 2010 (75 FR

25076) **Federal Register** notice, as applicable. Because of the changes the Agency has made to the servicing of loans guaranteed under the Biorefinery Assistance Guaranteed Loan Program, there may be entities that would prefer to have a guaranteed loan serviced under the provisions of the interim rule rather than under the provisions in the three **Federal Register** notices pursuant to which their guaranteed loans were made. The Agency has determined that such entities should be afforded the opportunity to access the servicing provisions of the interim rule. Therefore, the Agency has added a new provision to this effect in the interim rule.

III. Summary of Comments and Responses

The proposed rule was published in the **Federal Register** on April 16, 2010 (75 FR 20044) with a 60-day comment period that ended June 15, 2010. Comments were received from 42 commenters yielding 352 individual comments on the proposed rule, which have been grouped into categories based on similarity. Commenters included biorefinery owner/operators, community development groups, industry and trade associations, investment banking institutions, Rural Development personnel, and individuals. As a result of some of the comments, the Agency made changes in the rule. The Agency sincerely appreciates the time and effort of all commenters. Responses to the comments on the proposed rule are discussed below.

Requested Comments—
a. Preapplications

Comment: Two commenters state that a preapplication process that serves as a screening process could be very helpful to all parties. One of the commenters states that considerable effort is required to develop an application package that may ultimately not score high enough to meet eligibility requirements. In addition, lenders have to commit to the application process with no reference as to how the Agency will view the project. One option would be to move the feasibility study (§ 4279.261) and the evaluation scoring (§ 4279.265) into a preapplication process. Screening and filtering out ineligible or otherwise low scoring projects would streamline the overall process and improve program efficiencies.

One commenter states that the application requirements, which appear to be rather lengthy and burdensome, contain elements that should be required by any prudent commercial loan committee reviewing the loan itself. The commenter believes a preapplication process for the program will only be of benefit to lenders and borrowers if it includes a sign-off by the Agency as to completeness of the application. The commenter believes it would be a waste of time to review a project for acceptability and then review it again for guarantee issuance; the review of a partial and then complete application would only serve to slow down a process that we are seeking to expedite.

One commenter believes that a preapplication process would only add another step in the program and would not further the intent and effectiveness of the program. Similarly, another commenter states that a preapplication should not be required as it increases the burden of required paperwork.

One commenter recommends that, rather than preapplications, specialists be available to assist in evaluating how a given project application would likely score against the program criteria.

One commenter encourages the Agency to consider a pre-application process similar to the two-phase process employed by the Department of Energy in its current solicitation (DE–FOA–0000140) for Title XVII loan guarantees, the lack of which the commenter identifies as an obstacle for applying for assistance. This process would be beneficial to the extent the "preapplication process" is similar to the two-phase process that the U.S. Department of Energy (DOE) is using in its current solicitation for Title XVII loan guarantees. Requiring less than a "full-blown" application in Phase I so that the Agency can determine eligibility and "invite" those applicants with a reasonable likelihood of success to apply in Phase II would relieve some burdens from applicants. Phase I could include a basic application, a letter commitment from the borrower to pursue Phase II if invited to apply and the applicant (lender) to lend a specified amount to the project if the Agency agrees to guarantee the loan (subject to other customary conditions precedent), along with an overview of the project reflective of the scoring criteria. This would reduce the level of diligence that lenders would have to conduct for Phase I and shift this diligence to Phase II when the success of an application is more likely. This may entice additional qualified lenders to participate and result in the Agency receiving more Phase I applications. A phased application process would also reduce the burden on the borrower, who, prior to issuance of the loan (or a greater likelihood as evidenced by an invitation to submit a Phase II application), may choose not to apply and instead allocate limited personnel resources to other tasks.

Response: The Agency has decided not to implement a preapplication requirement. Because the information that would be required in the preapplication would be similar to that in a formal application, a preapplication would be duplicative and add further burden to the lender and Agency. The Agency can meet with the lender/potential borrower prior to application submission to discuss the scoring criteria and informally review the proposal and application material completed to date.

Comment: One commenter suggests that a qualification form be written and posted on the Agency Web site that would be accessible to all. The commenter recommends that such a form would contain, at a minimum, scoring criteria; equity requirements and detailed examples of allowable equity; eligible borrowers; eligible technologies; eligible uses of loan proceeds; and approval timelines. The commenter also suggests that a blog page be implemented to make available questions and answers, new information, comments, and suggestions on an interactive basis.

Response: The rule provides applicable eligibility criteria and so no changes were made to the rule based on this comment. The Agency is currently revising the USDA Web site and will consider the suggestions offered by the commenter. The Agency will also consider preparing an application guide.

Comment: One commenter recommends implementing a pre-application process that does not require a lender-of-record. The first hurdle for participation in the section 9003 program is convincing a lender to commit resources to a project for due diligence, feasibility studies, term sheet development, and filing of an application. The program requirements are not conducive to lenders, particularly in light of the inherent risks associated with first-of-kind commercial advanced biofuel projects. Applications from several companies are being held back simply because a lender-of-record could not be found to begin the process. The structure that the Agency has created is counter to how private debt transactions are generally arranged. Typically, an investment bank represents the company/project and approaches lenders to underwrite the loans. Then, the lender will conduct extensive due diligence on the project and decide whether or not to lend and on what terms. The proposed structure, however, requires the lender to be identified from the beginning, without any indication from the Agency as to whether or not there will be a guarantee from the Agency.

The commenter recommends phasing in applications in two parts as follows:

Part I (Pre-application)—The investment bank representing the project submits an application (similar to the current application) along with the project company. The Part I application contains the level of due diligence required by the Agency and gives the Agency comfort that an accredited, U.S. Securities and Exchange Commission (SEC)-regulated entity is representing the project and attesting to the project's attributes and risks. The Agency reviews that application and makes a determination, based on its review, whether a project should receive a "Letter of Intent" to proceed to Part II.

Part II—Once a Letter of Intent is issued, the project then seeks a lender for the guaranteed portion of the debt and a lender/investor for the unguaranteed portion of the debt. The latter is going to be the key participant and the one who will conduct a significant amount of due diligence to decide whether or not to take the risk on investing/lending for the unguaranteed portion of the debt. The result of that due diligence and a decision to invest should then be submitted to the Agency as a Part II "application," which is really more of a collection of due diligence findings. The company and the original investment bank could even certify as to its accurateness and then the Agency can review that final deliverable prior to issuing a guarantee and closing the transaction.

The commenter recognizes that a potential Agency concern is that the appropriate level of due diligence would not be conducted unless a lender is on the hook for some portion of the unguaranteed portion of the loan. However, the fact that there is an unguaranteed note means that an investor or lender will do a tremendous amount of due diligence prior to agreeing to lend/invest in the unguaranteed portion, which is a condition precedent for the Agency to issue a final loan guarantee and close a deal. If the Agency's concern is that proper due diligence is being done, the Agency should be confident that it will be done prior to the closing of the transaction and the issuance of a loan guarantee, because there is an unguaranteed portion of the debt that has to be placed. But by requiring the "Lender of Record," as defined to mean the holder of a portion of the unguaranteed debt, to conduct all of that due diligence up front is both unnecessary and unfeasible in this market. To protect the Agency from outstanding conditional commitments, without the ability to close on the guarantee, a 6-month time limit could be placed on submitting a Part II application.

Response: With regard to a pre-application process, for the reasons noted in an earlier response, the Agency is not implementing a pre-application process.

As a matter of practice, the Agency is available to meet with potential borrowers and/or lenders prior to the submittal of an application for a specific project.

The Agency further requires that a formal application be submitted from an eligible lender. From the formal application forward, the eligible lender will be the primary point of contact for the project with the Agency.

Requested Comments—b. Feedstock

Comment: One commenter recommends removing the restriction, "no corn feedstock," from tandem USDA and DOE programs in the instance of biobased chemicals, products, and materials only. The commenter states that corn has long given the U.S. a competitive advantage in the biofuel industry and that it may be our country's only advantage in the clean energy sector. The Agency should not eliminate the advantage of a highly efficient industrial product, engineered specifically for use in industry and not for food consumption. The Agency should, instead, advocate for any advantage in reaching our country's goals to achieve both renewable fuel standards and U.S. government biobased product procurement program goals.

One commenter believes that feedstock currently used for the production of food, other on-site energy production, and in other industries should not be diverted to new energy production, and that the current proposal to exclude cellulosic feedstock and "corn kernel starch" is sound and reasonable, and fits within the Agency's guidelines, purpose, and intent.

Response: The Agency notes that the exclusion of corn kernel starch is a statutory requirement and cannot be changed by this regulation. However, cellulosic feedstock is eligible under this program.

Comment: One commenter believes that all biorefineries using any eligible feedstock should be eligible for the program because the purpose of this program is the creation of advanced biofuel biorefineries and limiting feedstock eligibility would not further the program's purposes.

One commenter recommends allowing byproducts from pulp and paper if they can be upgraded to higher value products compared to power generation, and scoring them equally to other feedstock. Another commenter also recommends that byproducts from the paper and pulp industry be eligible, if the byproducts meet the criteria of not being consumed in a higher value use.

Response: The program allows for a variety of feedstock. The feedstock must be renewable biomass, other than corn kernel starch, as defined in the statute. The statute requires that the materials, pre-commercial thinnings, or invasive species from National Forest System land or public lands cannot be used for higher value products. This "higher value" criterion does not apply to byproducts of the paper and pulp industry.

Comment: Six commenters note that the proposed rule limits the types of feedstock that can be used to produce biofuels under the program. The House Conference Report for the 2008 Farm Bill—House Report 110–627, p. 1048, lines 3–8—specifically provides that: "Examples of lignocellulosic or hemicellulosic matter that is available on a renewable or recurring basis include dedicated energy crops and trees, wood and wood residues, plants, grasses, agricultural residues, fibers, animal wastes and other waste materials, and municipal solid wastes." The commenters believe that the Conference Managers undoubtedly intended that municipal solid waste can be used as a feedstock and state that the Agency has chosen to ignore this letter. Instead, the Agency notes in the proposed rule: "The Agency believes that the statute clearly defines eligible feedstock and no further clarification is needed in the proposed rule."

The commenters believe that the public interest is not served by limiting the number and types of technologies that can be used to build biorefineries, or in limiting the types of feedstock that are available for use and can provide an economic benefit to rural America. The commenters urge the Agency to modify the proposed rule to specifically state that municipal solid waste can be used as a feedstock, in conformity with the express intent of the House Conference Report for the 2008 Farm Bill.

One commenter also recommends stating that municipal solid waste can be used as a feedstock and treating municipal solid waste materials as a homogeneous feedstock eligible to be used in biofuels production, consistent with standard recycling practices.

One commenter recommends including biosolids, or treated sewage sludge and its byproducts, as an eligible feedstock, and that facilities producing advanced biofuels, solid and liquid, from biosolids be allowed to apply for program funds.

One commenter recommends including all biodegradable solid wastes to further expand the types of feedstock that can be utilized.

One commenter recommends expanding the traditional definition of biomass to take advantage of new technologies that convert additional organic matters into energy—such as biosolids. Such an expanded definition of "renewable biomass" would take account of population growth in our rural communities and the environmental impacts of the traditional methods of biosolids disposal on such rural communities. Additionally, the Agency would be encouraging the recycling and reuse of a substantial renewable organic feedstock—biosolids, further expanding our nation's sources of energy. Specifically, the commenter proposes that the definition of "renewable biomass" be expanded as follows to include: "(iii) Renewable waste materials and byproducts resulting from the treatment of sewage, including biosolids, fats, oils, and grease and other byproducts."

Similarly, one commenter recommends expanding the definition of "Advanced biofuel" as follows to include: "(iii) Biofuel (solid or liquid) derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, yard waste, and treated sewage waste, residues and byproducts." According to the commenter, specifically including biosolids in the definition of "renewable biomass" as an eligible feedstock, and qualifying the definition of "advanced biofuels" to include treated human sewage waste materials, will encourage the wide-spread adoption of sewage-to-energy technologies and further efforts by Congress and the Administration to develop all sources of renewable energy and create jobs in green technologies.

One commenter states there should be no restriction on feedstock used and that the definition of feedstock needs to be expanded to include municipal sludge as an acceptable feedstock. The commenter states that, with the current need and demand for biofuels, it is imperative that there should not be a restriction on the type of feedstock used. In addition to producing advanced biofuels in a sustainable, efficient manner, it is imperative that waste materials be used to produce other advanced products and be utilized in the greatest way to achieve energy production and reduce greenhouse gases (GHG).

Response: The Agency partially agrees with the commenters. The Agency has revised the rule to clarify that municipal solid waste is an eligible feedstock, but only to the extent that it meets the statutory definition of renewable biomass. It is unlikely that homogeneous, unsegregated municipal solid waste would meet this definition. The Agency has also revised the rule to include as eligible feedstock any organic matter that is available on a renewable or recurring basis from non-Federal land or eligible tribal land, including biosolids, treated sewage sludge, and byproducts of the pulp and paper industry. The Agency notes that "black liquor," a byproduct of the pulp and paper industry, is not an eligible feedstock, because it includes inorganic material and, therefore, does not meet the definition of renewable biomass.

Comment: One commenter states that their technology is complementary to recycling and will not use paper that is commonly recycled. However, if paper is mixed with municipal solid waste instead of being collected separately, it cannot be recycled and should, thus, be considered a waste material for the production of biofuels. Therefore, the commenter urges the Agency to broadly define waste material, consistent with common recycling practices. Further, the commenter requests that the Agency not establish separate compliance obligations for various component parts of the waste stream, such as paper. The commenter, instead, recommends that the Agency provide additional guidance on the eligibility of paper, so that soiled paper, which is not recyclable, be included in the definition of waste material.

Response: The Agency considers soiled paper mixed with other organic municipal solid waste to be eligible renewable biomass. In § 4279.228(c), the phrase "consisting of renewable biomass" was added after the term "municipal solid waste" in the description of eligible feedstocks.

Comment: One commenter encourages the Agency to refrain from limiting feedstock eligibility for the program unless a particular feedstock is prohibited by Section 9003. The commenter agrees that "the statute clearly defines eligible feedstock and no further clarification is required." The commenter states that both Section 9001(3) and 9001(12) of the 2008 Farm Bill contain lists of feedstock that are included, but that these lists should not be construed as limiting these definitions to those feedstock listed, but rather as examples of the term being defined.

The commenter asserts that any fuel derived from algae, whether blue-green, cyanobacteria, or seaweeds, meets the definition of "advanced biofuel" in all respects, perhaps limited only by Section 9001(12)(B). Algae are not corn starch, and it is explicitly included as an example of "renewable biomass." The commenter would object to any efforts by the Agency or other stakeholders to exclude algae by administrative discretion. This would be contrary to clear Congressional support for the inclusion of algae as "renewable biomass" and, therefore, an eligible feedstock. The commenter believes the Agency views algae as an important feedstock to meeting the mandates imposed by the Renewable Fuel Standard (RFS) as evidenced by the loan guarantee issued to Sapphire Energy in 2009. The commenter applauds the Agency for taking the leading role in supporting the development of the algae industry as a vital sector of the broader agricultural industry poised to play an important role in securing America's energy independence and rural job growth. In sum, the commenter suggests that the Agency resist excluding feedstock as being "eligible" if such feedstock would qualify under section 9003.

Response: The Agency agrees and considers the list provided by statute to be illustrative, but not exclusive. No change was made to the rule in response to this comment.

Comment: Two commenters urge the Agency to exercise caution when considering limitations on feedstock for use in biorefineries. The commenters encourage the Agency to support feedstock that increase the overall potential of the biomass industry through widespread applicability, creation of jobs, and a positive impact on national security, while excluding support for feedstock that compete with food or harm the environment. Outside of these specific areas, however, the commenters encourage the Agency to remain as feedstock neutral as possible in order to allow both the feedstock and biofuels industry to innovate freely. In the notice of proposed rulemaking (NPRM), the Agency notes: "At this stage in the development of the biofuels industry, it is impossible to know what technologies will become the most effective." The same is true of feedstock.

Another commenter also encourages the Agency to remain as feedstock-neutral as possible in order to allow the feedstock and biofuels industry to innovate freely. The commenter believes the Federal government has a dubious track record when it attempts to pick winners and losers in the energy space, and the advanced biofuels sector should be no exception. The commenter warns against excessive limitations on feedstock for use in biorefineries. Concerns over competition with food or harm to the environment are legitimate and should be addressed; however, the Agency should also take into account the overall potential of the biomass industry through widespread applicability, creation of jobs, and a positive impact on national security.

A third commenter states that the regulations need to provide sufficient flexibility so that the refinery can minimize the cost of its biofeedstock. To accomplish this, it is essential that the rules be feedstock-neutral. The commenter understands that there are as many as 3,200 potential biofeedstock and that the economic viability of a given feedstock is likely to vary significantly by region. The commenter believes it is inappropriate at this stage to single out one or more specific feedstock or those with specific characteristics that would disqualify their use in a biorefinery supported by the section 9003 program. That decision should be made in concert with the Agency when an application is being evaluated based on all relevant sustainability issues. The commenter also believes that it will be necessary to provide the ability to utilize alternative feedstock on an opportunistic basis in the event that they are economically advantageous to use.

Response: The Agency agrees with the commenters and is not trying to exclude any eligible feedstock. The Agency notes, however, that it wants to encourage all advanced biofuels, except in very limited specific instances (e.g., feedstock that can be used for human or animal consumption) and that, beyond such instances, it does not want to limit specific feedstock from participation in the program.

Comment: One commenter states that any exclusion to the definition of feedstock should be based solely upon GHG life-cycle emissions. For example, if a specific feedstock is estimated to produce fuel that causes no significant reduction in life-cycle GHGs compared to conventional fuels, or causes more emissions than conventional fuels, the Agency should consider excluding such feedstock from the list on that basis.

One commenter states that conversion technologies, on a life-cycle basis, are among the cleanest methods available for the production of advanced biofuels and green power.

Response: The Agency disagrees with the recommendation to exclude any feedstock based solely on the basis of GHG life-cycle emissions of the resulting advanced biofuel. The feedstock must be renewable biomass, other than corn kernel starch, as defined in the statute. However, to help address such environmental considerations as GHG life-cycle emissions, the Agency has revised the scoring criteria such that an advanced biofuel must meet an applicable renewable fuel standard as identified by the U.S. Environmental Protection Agency (EPA) in order to receive points under the first scoring criterion.

The Agency is currently considering various models related to life-cycle analysis and has not identified an appropriate model at this time. Should a model be selected by the Agency, the rule will be amended accordingly.

Requested Comments—c. Rural Area Requirement

Comment: Four commenters recommend not restricting a biorefinery to a rural area. Restricting the location of a biorefinery to a rural area is, in theory, a logical extension of an already established value-added agriculture industry. At first blush, it serves the purpose of the 2008 Farm Bill to boost the rural economy. However, as the economic crisis continues, more flexibility of site selection, not less, should be installed in these programs. The commenters believe that restricting these vital programs to rural areas is not only impractical and illogical, but fundamentally unfair to urban communities in desperate need of economic revitalization and job creation. The Agency, therefore, should enable biorefineries to develop wherever there is market potential regardless of whether that area is rural.

One commenter further states that the siting of biofuel facilities will be dependent on available feedstock, infrastructure, logistics, and other factors. Undoubtedly, many advanced biofuel facilities will be located in rural areas due to feedstock availability. However, to the extent that qualifying renewable biomass is located in other areas, the Agency should not discourage utilization of these resources by excluding non-rural facilities from eligibility for the payments program. Additionally, the scoring criteria in Section 9003(e)(1)(C) also demonstrate that "the potential for rural economic development" is merely one of ten factors that the Agency is directed to consider. While this scheme indicates that Congress intended that the Agency grant some level of preference to rural development, it does not support an interpretation that would preclude the issuance of loans to facilities in non-rural areas. The commenter states that, as with citizenship requirements, if Congress intended that rural development be a prerequisite, it would have explicitly stated so.

One commenter states that the rural location requirement will unfairly exclude biorefineries that make quality fuels, utilize domestic feedstock, and benefit American farmers and their communities. The commenter believes that any biorefinery constructed in the U.S. that provides jobs for U.S. workers and utilizes domestic agricultural feedstock produced by American farmers should be eligible for a loan guarantee under the program. The commenter believes that this was the intent of Congress, and is consistent with the national renewable energy and energy security goals. The commenter recommends removing the proposed rural location requirement in the final rule for biomass grant, loan, and loan guarantee programs.

One commenter states that, given that feedstock availability and reliability is paramount to success, any location that can support a successful project should be allowed, especially if the site was chosen in order to achieve feedstock availability and reliability. The same could be said for off-take agreements if the chosen feedstock can be brought to the proposed site easily, yet the off-take requirements necessitate a non-rural location. For example, for a project with Fisher-Tropsch output to make economic sense, the biorefinery would need to be co-located with an existing fossil fuel refinery, which may not be in a rural area. As another example, in order to have access to the largest possible geography for off-take, if a project must be located in a port facility that is in a non-rural area, this should be equally allowed.

The commenter also states that the program will only succeed in the event that proposed projects can minimize overall risk as much as possible. Project location can have a huge impact on this issue. Rather than citing "consistency with other programs" as a justification for a proposed rule, the criteria should be tailored to the needs of this specific program. In this case, any location that makes it easier to achieve project financing should be allowed without exception. There should be no restrictions on location for this program. It could make sense for a different program targeted at the scale-up of commercially proven technologies, but in this context adds unnecessary additional burdens to achieving already challenging lender financing criteria.

One commenter opposes the rural area requirement, stating that biorefineries located in nonrural areas should be eligible. Nowhere in the authorizing legislation for this proposed rule did Congress even suggest that the section 9003 program be limited to rural areas. For the Agency to go outside the statute and make such a recommendation is puzzling at the very least, given the difficulty companies already face in opening biorefineries. The commenter states that the Agency should encourage biorefineries to develop wherever there is market potential, regardless of whether that area is rural, in order to meet the Agency's goal for an overall Federal renewable energy strategy designed to foster the development of a strong, expanding, and sustainable group of renewable energy industries in the U.S. to supply an increasing share of the country's energy needs.

One commenter, while recognizing the importance for the Agency to increase economic opportunity and improve the quality of life in rural communities, cautions against defining "rural area" with too much restriction, potentially disqualifying ideal sites for biorefineries that would, in fact, meet the program goals and increase economic opportunity in rural communities, but may be located in areas that do not fit the program definition. Offering eligibility to facilities in non-rural communities is critical to the success of the program goals and the advanced biofuels industry. Restricting the location of these facilities is not necessary to maintain the spirit of enhancing rural development and the geographic diversity of advanced biofuels production. More flexibility of site selection, not less, should be installed in these programs.

The commenter further states that having a consistent, cost-competitive regional supply of feedstock is key to the success of any project. Non-rural plants that use agricultural feedstock will most certainly rely on the surrounding rural communities to produce, harvest, store, and handle feedstock needs. With feedstock cost representing the largest operational cost of a biorefinery this, in turn, means that most of what the plant spends goes to the rural community in paying for that feedstock. This should demonstrate that the biorefinery does not need to be in a rural area to fulfill program goals. Excluding plants that are not in rural areas denies the supporting rural community significant opportunity.

One commenter states that winter barley from the rural community is key to the success of their project. According to the commenter, an independent economic analysis determined that their project will create an additional $100 million in revenue to rural farmers and create 450 farm jobs, clearly demonstrating that the biorefinery does not need to be in a rural area to fulfill program goals. In some circumstances, the decision of where to site a facility will be based on infrastructure often not available in rural areas (power, natural gas, transportation modes). Excluding facilities that are not within a strict definition of a rural area denies the supporting rural community significant opportunity.

One commenter states that their research indicates that biofuel refinery business plans will produce biofuels that cost substantially more than JetA and diesel. The commenter believes it is vital to minimize biofuel costs where airlines are supporting development of biofuel refineries by long-term cost plus purchase contracts. The commenter states that early research suggests that biofuel costs would be reduced by using as much existing infrastructure as possible throughout the entire supply chain (this includes delivery pipelines, refinery facilities, and agricultural infrastructure) and that requiring a biorefinery to be located in a rural area is likely to make it impossible to use some existing infrastructure, most particularly at refineries. The commenter recognizes that the purpose of the program is to support business development in rural areas, and proposes that biorefineries that are not located in rural areas, but obtain more than 75 percent of the dollar value of their raw materials from rural America, should qualify for the program.

One commenter states that, to maximize the rural economic benefits of the section 9003 program in furtherance of the Agency mission, a project's location in a "rural area" be removed as a threshold eligibility requirement and, instead, that a project's rural economic benefits be added as an evaluation criterion to proposed § 4279.265(d). Rural Development's mission to enhance the quality of life and economic foundation of rural communities would be furthered by a more comprehensive evaluation of a project's potential rural economic benefits. A project's rural economic impact is not only determined by the location of the biorefinery, but by the origin of the feedstock as well. Awarding points to projects based on their level of economic impact to a rural community is consistent with the Agency's mission and allows maximum opportunity for the commercialization of domestic advanced biofuels in the U.S. Dedicated energy crops, such as carnelian, are grown in rural areas. Thus, the commenter encourages Rural Development to consider a project's location in a rural area or its feedstock's rural origins as plus factors in the evaluation criteria. Many non-rural advanced biofuel refining projects can yield substantial economic benefits for rural America, in addition to increasing energy independence, decreasing greenhouse gas emissions, and diversifying agricultural markets. Thus, a more inclusive approach would maximize the impact of the section 9003 program.

One commenter believes that, while the definition of a rural area should be included, the definition proposed is too broad. The commenter requests deleting the wording "and the contiguous and adjacent urbanized area" through the remainder of the paragraph ending with the words "otherwise considered not in a rural area under this definition." The use of "not more than 2 census blocks," and "contiguous and adjacent urbanized area" appears intended to make the definition of rural as broad as possible, which is unwarranted and inappropriate. The Agency's scarce funding dollars should focus on truly rural areas particularly those further away from larger cities and more densely populated areas. The benefits of job creation should go to actual rural areas, not simply those areas that are adjacent to rural areas.

One commenter states that, while the proposed rule states that projects that are located in areas determined to be "rural in character" will be eligible, it does not explain how this nebulous determination will be made except to say in the same manner as in the business and industry (B&I) guaranteed loan program. The commenter believes that this terminology is far too broad and should not be allowed for determining rural areas. B&I guaranteed loans are much smaller than those envisioned in this program and the commenter believes the program should truly serve rural areas. Allowing rural areas to be defined in the manner stated is completely arbitrary and could open the program to abuse and unnecessary criticism.

One commenter states that the rural area requirement needs to be amended because many of these facilities have to be located where there are essential infrastructure, land available and specialized jobs, which is usually in the larger communities. Facilities should be allowed to be located in communities larger than 50,000 if they are proposing to obtain a certain percentage (like greater than 25 percent) of their feedstock from rural areas. This will help farmers, rural businesses and rural cities find markets for their feedstock (solid waste, grease, crops, etc). By allowing them to be located in urban areas, it will increase the number of sites available to locate these facilities but at the same time increase feedstock markets for rural residents. Until these types of energy projects are well developed and mature, the commenter believes that all barriers that they may be encountering should be mitigated.

One commenter believes that, for new projects, implementing the rural area requirement will help the Agency fulfill its mission to improve economic conditions of rural America. However, with regard to retrofitting of existing biodiesel facilities, this requirement may not be practical as many existing facilities are no longer in production and are not all located in rural areas and an exception should be considered if the viability of the project is otherwise strong.

One commenter supports the requirement that the program only be used for biorefineries in rural areas. The commenter believes that the program should be targeted to rural economies.

Response: In consideration of all of the associated comments reflected above on rural area, the Agency has, as a matter of policy, reconsidered the proposed rural area requirement. The beneficial impacts of the program will generally be in rural areas even if the biorefinery is located in an area that does not meet the proposed rural area definition, because biomass production is expected to occur largely in rural areas and, thus, rural economies will benefit from the increased use of biomass. The Agency is, therefore, removing the proposed rural area requirement from the rule as an eligibility criterion.

The Agency notes, however, two provisions of the interim rule. First, the project must still be located in a State in order to participate in this program. Therefore, the Agency has modified the location requirement so the project must be located in a State, as defined in § 4279.2. Second, the project must be located in a rural area in order to receive points under the potential for rural economic development criterion (see § 4279.265(d)(8)).

Comment: One commenter recommends redefining the definition of the "location population" classification of eligible and ineligible areas for the purpose of including companies that are located in cities. The commenter states that they would be eliminated solely due to the Agency's classification of location population. Presently, the Agency defines a City to be greater than 50,000 persons. The City of Erie holds approximately 102,036 persons and the Borough of Wesleyville holds approximately 3,617 persons. Therefore, according to the Agency eligibility map, both the City of Erie and the Borough of Wesleyville are deemed ineligible areas.

The commenter requests expanding the boundaries that define the location population to define a city as a populace of over 500,000 to 1,000,000 persons versus 50,000 persons.

Due to the present classification by the Agency, the commenter is not qualified to apply for any Agency funding programs (grants or loans) because the commenter is located in an area that encompasses the City of Erie and its outlying areas, even though they have low population.

The commenter states that their plant has the versatility to run on various feedstock from non-vegetable oils to animal fats to agricultural feedstock such as soy. It is also located on Lake Erie where it has access to shipping, two interconnected railroads (CSX and Norfolk Southern), I–90 and I–79. Thus, it can easily bring in feedstock and ship out finished biodiesel. The commenter states that, if they could be deemed located in an applicable area, then they could apply for Agency funding and build on relationships with local/domestic farm institutions.

Response: As noted in the previous response, the Agency has reconsidered the proposed rural area requirement and has removed it from the rule as an eligibility criterion. Thus, the applicant's facility would be eligible for participation in this program. The Agency notes that the definition of "rural area" is broader than previously used by the Agency and includes provisions for allowing urbanized areas to qualify for being "rural in character."

Requested Comments—d. Foreign Ownership

Comment: Numerous commenters recommend eliminating the 51 percent U.S. citizen ownership requirement in biomass grant, loan, and loan guarantee programs. U.S. government grants, loans, and loan guarantees are a large piece of incentivizing private financing for large-scale commercial projects. This incentive is diminished by requiring at least 51 percent domestic ownership. It presents the green business world with a conundrum. The commenters note that they need government grants, loans, and loan guarantees to attract investors who understand green investment. The investors who understand green investment are often foreign, where the clean tech investment framework is readily understood. Yet, the U.S. loan guarantees put a 49 percent limitation on foreign investment. In the age of a global economy, this citizenship requirement is impractical and ineffective. It inhibits the purpose of the program to incentivize private equity investment in the sector and may lead to job outsourcing. An increase in private equity in this sector is the key to multiple goals of current U.S. domestic policy. Green job creation, reduced dependence on foreign oil and reaching climate change reduction goals all benefit the country and taxpayers irrespective of funding sources.

As a regulatory matter, a 51 percent determination of domestic investors is untenable. An investor's domicile often cannot be discerned as foreign or domestic. A successful, ready to scale biochemical company is usually funded by a number of sources, both foreign and domestic, often made up of venture funds with investment from around the world, funds of funds, and independent investors alike. To discern whether or not the individual owners or investors of a fund, that owns a fund, that is invested in a particular portfolio company has 51 percent U.S. ownership, is not only impractical, it is impossible.

Additionally, the citizenship requirement is hurting rural America. The policy is delaying the administration's ability to reach its economic goals for rural America and energy independence goals for the country. The commenters hope that the Agency will use all of the resources available to help the administration reach its energy independence goals by removing all citizenship requirements. Rural Americans that benefit from the jobs created by these biorefineries do not care about the ownership of the biorefineries. The jobs provide much needed economic stability for local economies. The commenters state that Congress did not include eligibility restrictions as part of the program and the Agency's decision is a significant departure from Congressional intent. Rural Development regulations were implemented when our rural economy looked significantly different from today's rural economy. The commenters believe that the creation of biorefineries should be promoted in rural America, regardless of ownership.

One commenter further states that Congress specifically outlined the definition of "eligible entity" and chose not to include any citizenship requirements. Had Congress intended to do so, it would have done so explicitly.

Another commenter states that to impose such a restriction without being mandated to do so by statute is counterproductive and will delay the development of new technologies and thwart achievement of the section 9003 program's purpose. To the extent the Agency considers citizenship of the borrower, it should be limited to the requirements of section 9003 and consider it only as one of many factors in evaluating and scoring an application.

Two commenters recommend considering foreign ownership in the context of all of the benefits of any given project and make decisions on a case-by-case basis rather than establishing an inflexible limit on the percentage of foreign investment.

One commenter offers this provision: The proposed rulemaking requires that, if the borrower is an entity other than an individual, it must be at least 51 percent owned or controlled by individuals who are either citizens or legally admitted permanent residents residing in the U.S. When an entity owns an interest in the borrower, that entity's citizenship will be determined by the citizenship of the individuals who own an interest in the entity or any subentity based on their ownership interest. Similarly, if the borrower is a subsidiary, the parent entity or the entities that have an ownership interest in that borrower must also be at least 51 percent owned by individuals who are either citizens or nationals or legally admitted permanent residents residing in the U.S.

One commenter recommends that non-U.S. ownership be permitted and that, if points are awarded for local ownership, the Agency consider awarding points based on estimated job creation. On the whole, the commenter supports rational requirements for new technologies that will foster rural development as those industries have a chance to grow.

One commenter recommends that, as long as the ownership of the project has at least 25 percent U.S. citizenship, the project be equally eligible. Given the challenges to achieve funding sources to date, the program should be open to the widest possible sources of funding.

One commenter recommends allowing borrowers that are entities that are other than individuals to be owned or controlled by less than 51 percent of either citizens or legally admitted for permanent residence. The percentage could be 34 percent of U.S. ownership or legally admitted for permanent residence instead of 51 percent. It will allow for additional investment from non-U.S. investors that may have a higher comfort level in investing in these types of energy projects. These types of energy projects are more advanced in other countries, so foreign investors are more familiar with the technology and are willing to invest in these projects. Banks in Europe are also more familiar with financing these types of projects, so they may feel more comfortable to finance a project in the U.S. if one of their existing customers in Europe is investing and developing an energy project in the U.S.

One commenter believes that the foreign ownership requirement should be strengthened to eliminate the automatic presumption that companies traded on U.S. stock exchanges are 51 percent owned by persons who are either citizens or legally admitted permanent residents residing in the U.S.

One commenter states that the proposed rule makes eligibility parameters extremely broad as almost any U.S. citizen or corporation with majority U.S. ownership is eligible. The commenter agrees with the citizenship requirements as one way to partially limit the scope of those eligible for loan funding.

Response: The Agency has determined that it is in the best interests of furthering the Administration's goal of increasing the production of advanced biofuels to broaden the Biorefinery Assistance Guaranteed Loan Program applicability to include making loans to eligible domestic or foreign-owned advanced biofuel refineries.

Requested Comments—e. Program Obstacles

The Agency received numerous comments on program obstacles and ways to improve the program. Please note that for those comments received under this section that are the same or similar to comments made on specific provisions within the rule, the Agency has grouped such comments with those comments made on the specific rule section rather than presenting them below in this section.

Total Loan Guarantee Amount

Comment: Several commenters recommend publishing the total loan guarantee amount, not just the monetary fiscal appropriation. With all USDA loan guarantee programs, there is a multiplier risk calculation that is set by OMB for each annual appropriation, which allows the total of the loan guarantees awarded to be greater than the actual cash appropriation. The commenter state that transparency is needed from USDA and OMB in advance to know what the lending authority is at the beginning of the fiscal year. Without that information, applicants do not want to apply, and lending institutions do not want to take the time to support the application if there is not adequate funding for the programs.

Response: The Agency will provide, by Notice, the available program level funding for a specific fiscal year. No change was made to the rule in response to this comment.

Evaluation and Approval Process

Comment: One commenter believes that the evaluation and approval process may be an obstacle. The evaluation process must be transparent and clearly stated with established timelines for the approval process.

Several commenters state that the evaluation process must be transparent, clearly stated, with established timelines for the approval process. These commenters recommend holding a pre-application and post-application meeting at the state office, at a minimum, to discuss the procedure and the requirements with the applicant and the lending facility. Large projects take intense coordination, management, and incur the up-front expense of permitting, detailed engineering, and other development costs. The financing program must be implemented within the same schedule as the other tasks to properly complete the project on time and under budget.

Response: With regard to establishing timelines for the approval process, the Agency disagrees that this is possible because timing varies dependent on the unique characteristics of applications submitted. With regard to transparency, the Agency is satisfied that the evaluation and approval process is transparent and, for those applications that are denied, the Agency advises the lenders accordingly and provides them appeal rights.

Lastly, with regard to the suggested meetings, as noted in an earlier response, the Agency can meet with the lender/potential borrower prior to application submission to discuss the scoring criteria and informally review the proposal and application material completed to date. Further, Agency personnel are always available to answer questions.

Guarantee During Construction

Comment: Several commenters state that it is imperative that the section 9003 loan guarantee continue to cover the construction period. No other funding mechanism currently exists that could fund during the construction period without the loan guarantee in place.

One commenter states that, to be a complete program, the loan guarantees must include the construction period.

One commenter states that one of the greatest needs in renewable energy financing is construction financing. The commenter recommends setting up the section 9003 program to provide its guarantee at the outset of the project's construction so that the guarantee covers the construction risk. It appears this may be the case based on the reference in § 4279.256(e), but this should be made expressly clear that such coverage is to be available routinely.

Response: The rule allows the Agency to guarantee the project prior to construction or after completion of the construction. The Agency has revised the rule in §§ 4279.261 and 4279.281 to clarify this.

Forms

Comment: Several commenters recommend that the Agency prepare and provide fillable servicing reporting forms for lending institutions to provide the lender with a manageable, easy to use format for fulfilling the section 9003 reporting requirements. One of the main concerns that lenders face is the possibility of losing the Agency guarantee through improper or misunderstood reporting requirements. The Agency should provide actual forms and a section 9003 program reporting guidance document to all lenders, as well as post the documents on the Agency Web site for full review. An Agency primary contact person should also be provided to the lender during the application process as well as throughout the loan servicing process.

Response: The Agency will take this comment into consideration as it develops the forms for the implementation of the regulation. Applicants may always consult the Agency's National Office Energy Division with any questions they may have during the application process and loan servicing process.

Technical Reports

Comment: Several commenters recommend modifying the technical report to include elements of a project management plan that can be used by the applicant, lender, EPC (engineering, procurement, and construction) contractor, and the Agency to properly evaluate, benchmark, and complete the project within the time frames and budgets as proposed. Every major EPC contractor has software programs and policies and procedures in place that would provide this kind of reporting and which has previously been used for government contracting projects. This would also assist in organizing the application to become a living document that could then be utilized to begin the construction process and used throughout the life of the project, thereby saving time and resources.

Response: The Agency does not object to the incorporation of elements of a project management plan in the technical report. However, the Agency is neutral on the use or brand of project management software.

Total Project Guarantee

Comment: One commenter recommends utilizing the program to guarantee the full cost of a project, not just the biofuels portion.

Response: The authorizing legislation does not allow the Agency to guarantee the full cost of a project.

Comment: Several commenters recommend utilizing the loan guarantee to purchase, build, and operate all the collateral necessary to develop the total project, not just the biofuels portion. Because of the nature of biomass-to-biofuel production, there can be, and usually is, a significant portion of waste fiber material that is best utilized by gasifying, burning, or converted in some form that is usually ultimately manufactured into renewable electricity or another power product. Alternatively, the waste material is utilized in the production of animal feed or fertilizer. These products are also vitally important in providing sustainable, long-term profitability and production for the project and can greatly enhance the production capabilities of the region. The loan guarantee should cover all of the expenses of the entire project. Other expenses that are not listed in this rule but should be included are the cost of buildings, engineering fees, utility interconnect studies and infrastructure, vehicles, natural gas and electricity infrastructure costs, road upgrades or construction, and bonding and insurance costs.

Response: The Agency disagrees with the recommendation to cover all of the expenses of the entire project. The Agency anticipates an over-subscription of the program. Therefore, the Agency's intent is to focus the program's limited funding resources on core project costs, which are identified in the interim rule as eligible project costs (see § 4279.229(e)). As the program matures, the Agency may consider whether to expand the list of eligible project costs, which is provided for in the interim rule (see § 4279.229(e)(7)).

Bond Financing

Comment: One commenter advocates the Bond Loan Model as the most efficient financing mechanism for renewable energy projects and states it can be executed in a more cost-effective and timely manner than conventional financing transactions utilizing the Conventional Loan Model, particularly in light of the lack of commercial banks' willingness to commit to loans of 15 to 20 years.

Three commenters recommend financing through the use of corporate bonds. One commenter states that they recently reviewed a proposed corporate bond structure that would allow companies to issue 15 to 25 year non-amortizing bonds that would have the Agency guarantee attached. This would significantly reduce the cost of borrowing and provide a creative alternative to conventional commercial bank financing. The commenter believes using the loan guarantee program in support of this type of structure would provide a very viable financing source for these projects and would help achieve the overall objectives of creating a biorefinery industry.

One commenter states that, because they are recognized as a more freely tradable instrument than loan participations, the interest cost to borrowers (bond issuers) is often lower with bonds than with traditional loans. By not recognizing the predominant method for financing large commercial projects, the section 9003 program will likely not attract the larger producers of advanced biofuels and, equally important, will likely not attract the investment banking firms that are needed to facilitate these complex financings. The commenter suggested language for allowing the use of corporate bonds.

Three commenters recommend allowing borrowers to issue notes or bonds directly to accredited investors by way of capital markets offerings for both the guaranteed and unguaranteed portions. Two of the commenters point out that the proposed rule allows only for the sale of indirect "participations" in the unguaranteed portions, with the original lender retaining title to the notes, and does not contemplate the sale of notes or bonds in the capital markets (except with respect to the sale of the guaranteed portion to accredited investors).

The commenters state that banks are unwilling to fund the unguaranteed portion of the loans. The commenters point out that, in the current market, only institutional investors are able, through capital markets transactions, to assume the perceived level of risk on the unguaranteed portion of the loans. Efficient capital markets transactions, including the sale of bonds, will require the direct sale by the borrower of notes or bonds to investors. As is market practice, a trustee would act on behalf of the bond investors as a class with the original lender performing the role of Collateral, Inter-creditor and Administrative Agent on behalf of all lenders, investors and the Agency. In that role, the original lender will perform all of the servicing duties contemplated under the proposed rule.

One commenter encourages the Agency to consider utilization of bond financing mechanisms in order to expand opportunities for debt finance where traditional credit markets are tight as one way to reduce program obstacles. The commenter believes that the currently proposed requirements dramatically reduce the number of lenders that will be willing to work with the program due to the current bank market and high-risk associated with this new industry. The Agency can address this problem by expanding the definition of eligible lender to enable utilization of the bond market in addition to the bank market. The bond market is favorable at this time because it is largely untapped in comparison with the bank market, it is more flexible than traditional commercial lending, and it eliminates a substantial portion of the risk for the lender. This can be accomplished by permitting a corporate trustee and investment bank to, collectively, function as an "eligible lender" for purposes of taxable corporate bond transactions.

One commenter states that the regulation needs to clearly state if bonds are allowed, what type of bonds should be allowed, who can issue the bonds, who can purchase the bonds, and how they are to be serviced.

Response: The Agency is authorized to guarantee loans, which in certain circumstances may include bonds as described below, under this program. The Agency considers that this requires a lender to make the loan from its resources and then service that loan itself. While the Agency will permit the lender to secure limited servicing responsibilities from third parties, the lender must remain responsible for the servicing.

The Agency considers this as distinct from the typical investment banking scenario, where an investment bank secures the financing from outside investors. After the funding is secured, the investment bank has no further involvement with the transaction. Servicing is handled by a trustee who reports to and is controlled by the investors. The Agency considers that this is an investment instead of a loan and that its current authority is insufficient to guarantee investments.

Recognizing the current difficulties in securing funding, the Agency has been approving certain bond transactions. The Agency considers that, under the limitations contained in this regulation, guaranteeing these bonds is in keeping with its authority. In order to be more transparent of its willingness to guarantee certain bond transactions, the Agency has modified this regulation accordingly.

Specifically, the lender is required to provide the loan proceeds and service the loan. The Agency will allow a trustee to provide limited servicing only if the trustee is fully under the control of the lender. Holders' rights are limited to receiving payments under the note or bond and if those payments are delinquent making demand for payment on the lender and the government as provided in the regulation. In certain cases where the lender and borrower desire to change the loan terms, the holder is also required to consent to any changes. Loans providing holders any other rights are ineligible for guarantee under this program.

Comment: Several commenters recommend including the option to utilize bond financing. The section 9003 program has already established a precedent in funding a project through the use of bonds. The need for lender participation through the section 9003 program can be met through use of an appropriately structured bond program to achieve effective financing in today's capital markets.

The commenters recommend expanding the section 9003 program to (1) permit treatment of large commercial banks or investment banks with substantial corporate trust practices as "eligible lenders" when acting as a bond trustee and (2) find that the "minimum retention" requirements are met if the bank, in its capacity as bond trustee, holds 100 percent of the legal title to the underlying corporation debt obligation and to related mortgage and security interests, even if the beneficial interests are participated out and held by a controlled number of sophisticated, institutional investors.

For purposes of the section 9003 program, the commenters advocate the expansion of the lending criteria to include a structured bond financing approach, which will assure the Agency of safety and soundness in the lending activity it guaranties, including high quality loan servicing, as well as the involvement of knowledgeable, professional investors well-qualified to evaluate and manage risks.

Response: The Agency can only consider bond financing where the lender purchases all bonds and sells and/or participates thereafter. In all scenarios, the lender is responsible and controls the servicing of the loan. In addition, the lender would be required to fully control any trustee related to the bond financing.

Regarding eligible lenders, the rule reflects requirements that are similar to the requirements for a traditional lender under the Business and Industry guaranteed loan program. The Agency has determined that its current authority would not permit using an investment bank bond model. Unlike the authority given to the Department of Energy that permits the guarantee of debt obligations in addition to loans for several of its programs, the authority for this program is limited to guaranteeing loans.

Comment: One commenter states that several banks have noted the limitation on the participation of noncommercial bank lenders. Given the size of the loan required to construct a commercial cellulosic ethanol facility, noncommercial bank participants will likely be critical to any effort in completing financing of a project. The commenter states that they are aware of discussions to use the loan guarantee program to guarantee bonds sold to accredited investors. Given the apparent lack of appetite in the debt markets, expanding the program to cover the bond market will increase potential financing options for cellulosic projects.

One commenter states that they have contacted numerous banks and insurance companies and have been unable to locate a commercial lender to finance the debt portion of a project despite the section 9003 program. Although the financial market conditions of the past 18 months have contributed to some degree to this challenge, the lack of available lenders has less to do with the recent debt crisis and more to do with structural issues with the program. The section 9003 program today is modeled after the B&I guaranteed loan program and requires a commercial lender to apply for the guarantee. This model has worked fine for the B&I guaranteed loan program because the typical loan size is sufficiently small. There are hundreds, if not thousands, of small rural banks that can fund small guaranteed loans. The section 9003 program, targeted at much larger projects with debt components that start at $70 million and go up from there, quickly outstrips the capabilities of rural and even regional banks. The remaining lenders are "too big to fail" sized banks that have little, if any, experience with USDA programs. The only way for Wells Fargo, and even Rabo Bank, to fund one of these loans requires a high level executive decision to create a whole new line of business. So far that has not happened and expectations are that not much progress will be made in this arena.

As a result, the commenter states that they have been working with the Agency, specifically Undersecretary Tonsager and his team, to determine how best to adapt the program to the use of the commercial bond market which is a far better solution for the following reasons:

1. Bond investors provide "patient" capital that provides term lengths that match the project life better than a commercial loan.

2. Bonds do not include "sweep" provisions whereby the commercial bank lender "sweeps" any excess cash generated to reduce the principal of the loan. When this happens, it reduces the returns to equity investors and thereby makes it much more difficult to attract equity capital.

3. The bond market is 10 times larger than the commercial debt market.

4. Higher levels of due diligence are performed than is true with small lenders because a professional investment bank performs the underwriting and the bond investors also does similar due diligence.

5. Loan servicing is performed by a trustee that has a higher level of professionalism and process technology to assure greater compliance and overall loan processing. In the worst case scenario of liquidation, these trustees are far more capable of making debt holders whole than is a small lender.

The commenter proposes the bond market alternative because of the challenges with loans of the size needed for section 9003 projects and the lack of availability of lenders willing to participate. The additional minimum criteria in the proposed rule will make it even more difficult to find lenders willing to participate. The commenter believes that the bond market approach not only meets the criteria of the program as provided by the statute, but provides benefits in terms of lower risk to the Agency and better screening of projects.

Response: For the reasons previously stated, the Agency can only consider bond financing where the lender purchases all bonds and sells and/or participates thereafter. In all scenarios, the lender is responsible and controls the servicing of the loan. In addition, the lender would be required to fully control any trustee related to the bond financing. In addition to other provisions, the Agency has tried to make the program more attractive to commercial lenders by revising the rule to allow either 20 years or useful life of the project (removing the "85 percent" provision associated with useful life), whichever is less, to allow more flexible terms for loans.

Special Program

Comment: Several commenters recommend implementing a special section 9003 advanced biofuels guaranteed loan-bond program for the Gulf Coast and Eastern seaboard region to stimulate the economy ravaged by the recent Gulf oil spill crisis. The Go-Zone Bond funding and other business stimulus programs were vitally instrumental to getting these regions additional financial support that stimulated business creation and the rebuilding of the region. For the advanced biofuels industry, the primary feedstock that is the most reliable to date "woody biomass" is found in this same region in greater volumes than anywhere else in the country.

Response: The Agency understands the commenters' concerns. However, the Agency wants to encourage the geographic distribution of projects throughout the U.S. and its territories and not tailor the program to specific events. The Agency notes that there are other methods to address specific events described by the commenter (*e.g.,* Presidentially-declared disaster areas).

Demonstration Funding for Pilot and Demonstration Scale Projects

Comment: Several commenters recommend implementing the demonstration funding portion of the section 9003 program to include pilot and demonstration scale projects providing grants under the section 9003 program to assist in providing additional financial support, because these types of projects typically do not cash flow on a commercial scale. This intermediate step is a vitally important one in developing these new technologies to the commercial stage, and needs funding to allow deserving, sustainable technologies to move to commercialization.

Response: The statute only allows for demonstration scale projects to be funded with grant funding. At this time, no funding has been appropriated to implement a grant program.

Dairy Industry and Department of Defense Set-Asides

Comment: Several commenters recommend setting aside special funds for USDA partnership efforts with the dairy industry and the Department of Defense (DoD). In recent months, the Agency has entered into a memorandum of understanding (MOU) with the dairy industry with the intent of developing anaerobic digester technology and providing a reduction of greenhouse gas emissions. This technology has not been fully implemented in dairies because of the high cost and low profit margins from currently used technologies. However, advanced integrated biofuels technologies have been developed that dramatically increase efficiencies and provide profitable returns for investor-owners. The Agency can assist in this effort by supporting larger projects that are greater than the $25 million cap in the Rural Energy for America Program. Utilizing a 90 percent loan guarantee for these projects, and low or no fees will also additionally incentivize the growth of these technologies in this market segment.

The Agency also recently entered into a partnership agreement with the Navy to assist in developing advanced biofuels for fleets and vehicles. Five energy targets have been adopted by the Navy to reduce conventional fuel use. This will require an intense effort and coordination by the advanced biofuels industry just to supply the Navy this type of fuel, notwithstanding the RFS requirement and other industry needs. It is vitally important to our national security that the Agency can provide assistance to both the industry and the Navy in this effort through assisting in the development, implementation and financing of these new biofuels projects that must be implemented to meet such a demand.

Response: The Agency is not establishing the set asides referenced in the comment because the Agency has adopted a policy of wanting to have a program that is technologically, geographically, and feedstock neutral. Such a set aside would provide preferences for specific feedstock and technologies inconsistent with this policy. The Agency believes that feedstock, geographic, and technology neutrality are critical to meeting the purposes of the program, which is to encourage broad-based advanced biofuel production practices, technologies, and feedstocks so that the best renewable energy options are supported.

However, the Agency has added a provision to the rule to allow the Administrator to award bonus points to applications for partnerships and other activities that assist in the development of new and emerging technologies for the development of advanced biofuels so as to increase the energy independence of the United States; promote resource conservation, public health, and the environment; diversify markets for agricultural and forestry products and agriculture waste material; and create jobs and enhance the economic development of the rural economy. The Agency will identify these partnerships and other activities in a **Federal Register** notice each fiscal year. Please note that the Agency is specifically seeking comment on this provision (see Section IV, Request for Comments).

New Technology and Commercialization

Comment: One commenter states that there appears to be some confusion as to how to determine whether a new technology is ready for commercialization. This shows up in the requirement that pilot-scale or semi-work facilities will have already been built and operated as a means to build confidence in commercial scale rollout. For some technologies, this is an acceptable approach, but it is not for many others. As a result, the technology development leading up to the proposal, and whether that work provides sufficient confidence to move to commercial scale, should be determined as appropriate, to the technology being proposed. Also, if the financing team and the due diligence performed by them and the third party Technical Reviewer finds the evidence sufficient, that is a good proxy for acceptance. Instead, it can be a requirement of the Technology Assessment to express whether sufficient pre-work has been performed to warrant a commercial scale project. Or when a proposed project for commercial scale operations is of a size that could also be considered a pilot scale project, that such projects are equally qualified and eligible. Although there are many technologies that are well suited to testing with pilot scale facilities as a means to increase confidence in the technology (*e.g.* fermentation), oxygen gasification of biomass is not one of these. The commenter's commercial facility, with a proposed budget of $140 million, is in fact at a scale that would normally be considered "pilot scale." The commenter states they considered developing a quarter-scale facility for this purpose. Unfortunately, the challenges of either generating or trucking sufficient oxygen to a quarter-scale facility drives the cost of such a facility to be comparable (approximately 70 percent) to the full commercial scale design. Also, a quarter-scale facility provides little valuable information in terms of scalability and therefore very little increased confidence for the commercial scale-up. The reason is that the fluid dynamics and chemistry within such a gasifier vary dramatically from one size to another. Operation of a smaller unit does not predict the actual operation of a larger unit. As a result, the design work and subsequent validation within the pilot facility would only prove that the pilot functions properly. The details of the full scale commercial unit will certainly be different and require its own separate validation. Given that the risks are similar and equally low for a quarter-scale versus commercial scale, it is unwise to waste that much money on a useless facility. More importantly, investors are not willing to waste that much investment on a pilot scale that provides little incremental value.

Response: The Agency disagrees with the comment. The application must include documentation that proves the technology as proposed meets the definition of eligible technology. The Agency has consulted with technical experts and has determined that the process needs to be demonstrated to provide reasonable experimental data to support engineering scale-up with acceptable technical risk. That documentation includes that the advanced biofuel technology has at least a 12-month (four seasons) successful operating history at semi-work scale, which demonstrates the ability to operate at a commercial scale. Semi-work scale is defined as "a manufacturing plant operating on a limited commercial scale to provide final tests of a new product or process." The Agency did not receive many comments concerning this issue and the commenter did not provide sufficient reasons for a change in policy at this time.

Interest Caps and Financing Structure

Comment: To achieve the Agency's goal of leveraging Federal government biorefinery assistance loan guarantees and private capital sources to facilitate financing of biorefineries in the U.S., two commenters recommend considering factors not included in the NPRM that affect available financing of renewable energy—in this case biorefinery—projects. Specifically, while Federal loan guarantees provide greater certainty for private lenders, if interest caps on loan guarantees are too low, commercial lenders are just as likely to turn to other stable investments, such as Treasury Bills, rather than the desired renewable energy investments. While some commercial lenders are comfortable operating in the current program structure, the commenters believe that the industry as a whole would benefit from maximum competition and flexibility for lenders to negotiate business structures and terms that provide incentives to finance biorefineries.

Response: The Agency has removed the proposed blended interest rate requirement from the rule. The Agency has revised the interest rate provisions to more closely match the requirements in §§ 4279.125 and 4287.112, while providing lenders with some flexibility in establishing loan type and terms on the unguaranteed portion. The Agency believes that this and other changes to the rule sufficiently address the commenter's concerns.

Grants

Comment: One commenter recommends including grants in the program. According to the commenter, grants could be used as matches for other funding sources and would help reduce the high startup costs associated with the use of new technology, particularly in rural communities.

Another commenter also encourages the Agency to include grants for developing and deploying new and emerging technologies that, at a minimum, emanate from paradigms different from the one built into the proposed rules, and preferably that target transformative innovations in rural America.

Response: The Agency points out that grants for this program are authorized by statute for the development and construction of demonstration-scale biorefineries to demonstrate the commercial viability of one or more processes for converting renewable biomass to advanced biofuels, and are only funded under discretionary funding, which must be appropriated by Congress. At this time, no discretionary funding has been received by the Agency for the program. Therefore, until funds for grants are appropriated, the Agency cannot address grants in the program. Additionally, the authorizing legislation for this program would not authorize program grants being used as a match for another Federal grant program.

Comment: One commenter states that the language in the rules for the grants authorized under Section 9003 are limited to only development and construction of demonstration-scale biorefineries or construction of commercial scale facilities based on a traditional "bricks and mortar" paradigm. ["Grants for the development and construction of demonstration-scale biorefineries to demonstrate the commercial availability of one or more processes for converting renewable biomass to advanced biofuels."] This language precludes the Agency from tapping into truly transformative innovations.

The commenter further states that the Agency needs to include in its rules the ability to fund transformative technologies in the agriculture sector that support and accelerate the sustainable production of advanced biofuels.

The commenter states that ag-interested/savvy venture investors do not truly exist in the agriculture sector. Thus, incremental agricultural improvements have tended to be the norm; paradigms producing transformative innovations in this sector are few and far between. The DOE views its mission in strictly narrow terms as only pertaining to the fuel, even though by definition biofuel includes agriculture. Thus, it has been funding interesting science "fuel only" focused efforts that will likely take many, many years to deploy at commercial scale with competitively priced output. Our urgent national imperative is for a domestic renewable source of liquid fuels. Urgency requires transformational innovation in the agricultural sector. The Agency is the only entity with enough knowledge and experience in this sector, and with a mission to revitalize rural America, to foster the kind of innovation that can enable transformation in the agricultural-related advanced biofuel sector.

The commenter provided the following discussion to support their position regarding grants for innovative technology:

(1) The new paradigm is born of a different way of thinking about how to solve our urgent near-term need for a thriving domestic biofuels industry. The new paradigm recognizes that it is really the yeast that produces the biofuel and thus is at the center of the ethanol ecosystem, and that the current yeast only produces one product—ethanol. The facilities the existing yeast is deployed in, as a consequence are known as "ethanol plants." The commenter utilized off-the-shelf biotechnology to modify the single-product yeast so it would multi-task. When multi-tasking yeast are deployed, producing ethanol and valuable co-products simultaneously, ethanol plants automatically become biorefineries by definition. Furthermore, since yeast do not care where their C6 sugar-food comes from, the biorefineries deploying multi-tasking yeast can use feedstock other than grain feedstock (e.g. stover, sorghum, grasses, etc.) to produce advanced biofuels. Off-the-shelf technology exists today to convert cellulose into C6 sugar-food for the yeast to ferment into ethanol. The problem heretofore has been doing so in an economically sustainable way from just the cellulose alone. However, the valuable co-products that multi-tasking yeast produce enable economically sustainable conversion of only the cellulose portion of cellulosic feedstock, allowing the hemi-cellulose and lignin to be used for heat and energy to run the operation in a carbon neutral manner.

(2) When the yeast element of the biofuel system changes, all the other elements of that system also change. The most important change from switching to multi-tasking yeast is a sustainable advanced biofuel business model. The revenue in this new model is from the sale of ethanol and valuable co-products that are derived solely from the C6 sugars converted from just the cellulose portion. The hemicellulose and lignin used in CHP facilities provide the heat and power to run the operation and generate more revenue through sale of excess electricity to the grid. Private capital will invest in a sustainably profitable business model—the key element that is missing from the biofuel funded efforts to date. Farmers will grow cellulosic crops when a profitable market exists.

The logical sequence of events, therefore, will proceed as follows:

a. The Agency should change the rule pertaining to grants in Section 9003, allowing the Agency to make "grant(s) for the development of processes for converting renewable biomass to [sustainable] advanced biofuels."

b. The revised rule would allow the commenter, for example, to apply for a grant under Section 9003 to complete the optimization of its multi-tasking yeast in order to produce commercially viable levels of co-products in advanced biofuel biorefineries, furthering the fundamental intent of the rules "to assist in the development of new and emerging technologies for the development of advanced biofuels." It would also enable the Agency to successfully advance its agenda to revitalize rural America by creating thousands of new green jobs, and do so at an accelerated pace.

c. The commenter would then deploy multi-tasking yeast first in existing ethanol plants, where just the cellulose from cellulosic feedstock (initially stover because it is already grown) is converted to C6 sugar for the yeast to ferment.

d. Ethanol produced in the biorefinery would be sold through existing channels at market prices as it is today, and the byproduct portion would be sold as a molasses-type material or dried and sold as a powder (market pricing for amino acids is quite stable), which has enabled computation of the $0.70/gallon of revenue.

e. With a proven sustainable business model (by converting an existing ethanol plant to an advanced biofuel biorefinery), private capital will invest in building many new biorefineries (even without guaranteed loans) to expand the industry, and farmers will grow the cellulosic crops to meet the new market for them.

The systemic changes also include:

(1) No need for funding for new pilot plants to demonstrate viability of unproven, complex and costly technologies.

(2) Existing designs for ethanol plants (substituting pulp mills at the front end for existing corn grinders) can be used for new advanced biofuel biorefineries, expediting deployment of these facilities at a lower cost, and accelerating production of advanced biofuel that can meet the RFS2 production levels and timeline.

(3) Accelerated advanced biofuel production (within 24 months post funding) means accelerated construction and operating jobs in rural communities, which will enable the Agency to dramatically demonstrate to rural America and to Congress that it is the Agency that can make the transformative difference to rural America and to our domestic biofuels industry that the President, Congress and the American people voted for.

In conclusion, the commenter advocates rules that allow an Agency-funded transformational innovation to be developed wherever the resources within the United States most readily exist in order to expedite development and deployment, but the resulting technology must be deployed in rural America. If the statutory language requirement in the 2008 Farm Bill will not allow for inclusion of funding for development of agricultural-biofuels related transformative innovations like the one discussed above, then provision for such should be made clear under § 4279.202(b).

Response: The language in the statute (see section 9003(c)(1) of the FSRIA) states: "grants to assist in paying the costs of the development and construction of demonstration-scale biorefineries to demonstrate the commercial viability of 1 or more processes for converting renewable biomass to advanced biofuels." This language precludes the Agency from implementing what the commenter is requesting. Further, to the extent commenter is requesting the Agency to do otherwise, the Agency cannot. It is up to Congress to modify the statutory language in order for the Agency to consider the commenter's suggestions.

Simple Applications

Comment: One commenter recommends developing a simple application for small biorefineries that produce less than 1,500 gallons of biofuels per day.

Response: Because the program deals with new and emerging technologies, the Agency needs the same detailed information on the technology and process regardless of the size of the biorefinery. Therefore, a simplified application is not appropriate for the program.

Small, Mobile Biorefinery Units

Comment: One commenter recommends giving preference to small and particularly mobile biorefinery units that may be better able to serve small rural communities on a multi-county regional basis. The commenter states this will help provide economic security to those communities through job creation and dependable sources of local energy and provide greater feedstock security by having the sources located in many different locations throughout a multi-county area instead of being concentrated near one centralized biorefinery.

Response: Please note the previous response where the Agency stated its position to remain technologically, geographically, and feedstock neutral. While there is no preference given for small biorefinery units, they are not excluded from the program. A mobile system is eligible.

Unsecured Debt

Comment: One commenter believes that the primary obstacle to this program is the unsecured debt requirement. According to the commenter, lenders are not willing to take risk in the alternative fuels industry given the current state of financial markets. The Agency must be willing to relax this rule. Options include allowing subordinate risk, such as a state or other credible entity, or offering a 100 percent guarantee under conditions when a high ratio of equity investment is secured, where technology risk is limited, and where there is a demonstrated ability to accelerate return on investment. Loan guarantees, like loans, should not be a "one size fits all." Banks adjust loan terms based on conditions specific to the investment the loan supports. The Agency should consider adjustments when the potential investment offers compelling reasons to do so.

Response: The Agency is addressing these concerns by allowing the subordination its lien on accounts receivable and inventory for working capital loans under certain conditions and guaranteeing up to 90 percent of the loan for guaranteed loans of $125 million or less, also under certain conditions. As noted in an earlier response, the rule outlines the criteria the project must meet to obtain a 90 percent guarantee.

Requested Comments—f. Processing Technology Owned by Borrower

Comment: One commenter believes that the majority of biorefineries will be built by entities that are not owners of the processing technology that will be used in the biorefineries. Thus, the commenter believes that the processing technology should not be counted as collateral or equity in the project. In the instance where the process technology owner is the borrower, the market value of the technology should not be counted in the project cost. This will lower the equity requirement of the borrower because the project cost will be lower. Thus, the commenter recommends setting the market value of the technology at zero, and not entering it into the calculation of the equity requirement, if its market value cannot be determined because it is a novel technology and unproven in the production of advanced biofuels.

Response: With regard to process technology, the Agency agrees with the commenter that it should not be counted as collateral or equity in the project.

The Agency agrees that the market value of the technology should not be counted in the project cost, because it is the Agency's intent to focus the program's limited funding resources on implementing the technology rather than developing technology. However, the Agency notes that technology may be considered as part of the collateral based on the value identified on the borrower's audited financial statement prepared in accordance with Generally Accepted Accounting Principles (GAAP) and subject to appropriate discounting as provided for in the rule.

Comment: One commenter suggests using the standard discount rate of 20 percent that is used in the B&I loan guarantee calculation.

Response: The Agency disagrees with the commenter. Prudent lending practices dictate that the Agency use a discount factor, which may vary depending on condition and type of collateral offered. Because of the variability associated with the technologies participating in this program, discounting needs to be performed on a case-by-case basis and a standard, fixed discounting rate would be inappropriate. Where there is an existing market for intellectual property, discounting will be performed in accordance with the lender's standard discounting practice. Where there is not a market for intellectual property, the value of the intellectual property will be no greater than 25 percent, as determined by the Agency.

Comment: One commenter suggests calculating highly skilled labor as a business expense on the income statement and not including it in the equity calculation.

Response: The Agency agrees that highly skilled labor will not be included in equity calculation. However, labor is an eligible business expense, which could be financed with working capital.

Comment: One commenter stated that a broad interpretation of "eligible project costs" will facilitate lending and achievement of the purposes of the program. Because upfront transaction costs on these projects are significant, borrowers should receive credit for their contributions of real and personal property, including, without limitation, laboratory equipment, intellectual property, and reasonable fees paid to critical service providers. These fees can be substantial, up-front costs that are often a barrier to completing a significant application as is required for this program. If there is the opportunity to wrap these into the loan or apply them towards the borrower's equity contributions, additional companies with promising technology may choose to avail of the program as a financing mechanism.

Response: It is the Agency's intent to focus the program's limited funding resources on primary project costs and, therefore, the Agency disagrees with the suggestion for wrapping these fees into the loan because the Agency does not consider these fees to be primary project costs. For existing biorefineries only, qualified intellectual property, equipment, and real property may be considered in meeting the equity requirement, as described in § 4279.234(c)(1). The Agency notes that a loan guaranteed under the program may only finance 80 percent of the eligible project costs. The borrower needs to provide the remaining 20 percent from other non-Federal sources to complete the project.

Comment: Two commenters state that processing technology owned by the borrower should be included as an eligible project cost. Allowing for a means to recoup the processing technology development costs will speed the creation of biorefineries. It will maximize commercial flexibility of technology owners and project developers to negotiate deals that create incentives for innovation (on the part of the technology owner) and commercialization (on the part of the developer). If it is not an eligible cost, the developer will have to compensate the technology owner outside of the project finance structure, which reduces the capital that could be applied to biorefinery deployment/retrofitting. This may significantly reduce the commercialization of advanced biofuels refining technologies necessary to meet the RFS as well as diversifying the country's transportation fuel portfolio.

Another commenter, however, states that, while physical laboratory and equipment costs should be considered eligible project costs if they are listed as assets of the borrower, there is no legitimate value to intellectual property until the industry has emerged into commercial-scale production, and, at that point, commercial values will be changing to meet new supplies and demands. If there is the opportunity to apply a portion of what the borrower perceives as the value of its intellectual property towards the required equity contributions, additional companies with promising technologies may be eligible for assistance under the section 9003 program. Because the documentation required by the Agency is no different than what a prudent lender should require, eligible project costs should not include any item that is not considered a project cost in the borrower/lender transaction being guaranteed.

One commenter explains that, as a startup company with first-of-kind technology, they have and will incur significant cost securing intellectual property, financing arrangements, R&D expenditures, and developing new forms of renewable biomass. The commenter believes these costs should be allowed as eligible project costs and should be applied to the cash equity requirements.

Response: The Agency will not consider processing technology as an eligible project cost, because, as noted in a previous response, it is the Agency's intent to focus the program's limited funding resources on core project costs. However, the Agency acknowledges that the processing technology has collateral value and can consider the value of such technologies, with certain restrictions, in addressing the program's collateral and equity requirements.

Comment: One commenter states that eligible costs should include all costs that make up a sound project including production of byproducts, co-products, and electricity co-generation. If a facility generates excess heat or other forms of energy that can be harnessed to co-generate power, it should be encouraged to do so because this activity is in keeping with the energy goals of the Agency and the program. Also, as long as there are investment tax credits available for power co-generation, these "funds" can have a profound positive impact on the financability of the project. Hence, these should all be included in eligible costs so that the best possible financing package may be brought to bear. If professional service fees include the legal fees and other fees are required to complete the financing, including the fees to the bank or investment bank, these should be allowed if they are to be incurred after the guarantee application has been submitted. These are bona fide costs of the project and should therefore be included.

Response: The Agency agrees with the commenter to the extent that the costs associated with byproducts, co-products, and electricity generation are eligible project costs as provided in § 4279.229(e). The items listed in paragraphs (e)(1) through (e)(7) of § 4279.229 are eligible project costs as long as they are integral and necessary parts of the total project. With regard to professional fees, the Agency anticipates an over-subscription of the program, so the Agency's intent is to focus the program's limited funding resources on core project costs, which are identified in the interim rule as eligible project costs (see § 4279.229(e)).

Requested Comments—g. Percent Revenue From Sale of Advanced Biofuel

Comment: Two commenters believe that the mandate that 70 percent of the revenue generated by a biorefinery must be from the sale of advanced biofuel will create a disincentive and turn companies away from the program goals. An integrated biorefinery, as described by the DOE, is similar to a petrochemical refinery where crude oil is processed into a variety of fuels and chemicals. To achieve this integrated biorefinery model, biofuel companies will have to go into production of biochemicals themselves (incurring enormous capital expenditure costs), or enter into a joint venture with existing biochemical companies that have ready-to-scale technology.

Under the section 9003 program, a chemical production facility included as part of a biorefinery can have no more than 30 percent of the revenue generated at the biorefinery, yet the revenue generation of chemicals compared to fuels is traditionally disproportionately higher. This revenue restriction inhibits the creation of joint ventures by putting a cap on the future revenue of the potential biorefinery partner, limits the growth potential due to market demand or other external factors that affect the partners, and limits the ability of biofuel companies to enter into a revenue generating joint venture in efforts to become economically viable and self-sufficient in the long-term.

The most powerful aspect of the biorefinery as a business model is the ability to produce multiple products, so that the plant can weather prices drops, fluctuations in demand and volatile feedstock prices by arbitraging between the various products produced and privileging those that are the most profitable at any given time. If this cap exists and biofuels are not economically viable or require large subsidies to be viable, then limiting the amount of higher value-added products that can be produced will condemn the biorefinery to failure.

In addition, as a practical matter, the Agency will be required to regulate the 70 percent revenue generation requirement on an ongoing basis. From the bioproduct and biochemical perspective, this is a revenue limitation of 30 percent. Limiting revenue generation of one component of a business within a free enterprise is questionable policy. The Agency does not have a rational basis for this limitation grounded in sound economics, nor does it serve the broader policy purposes of the program. Biofuels and bioproduct companies should not be limited in revenue for any reason. The U.S. economy and its taxpayers will only reap the benefits of biorefineries if they are profitable ventures. They should be free to innovate new business models in order to achieve sustainable success.

One commenter agrees that the intent of the program is to create biorefineries that produce advanced biofuels, but believes that the 70 percent requirement is too high. The commenter believes that as long as 35 percent or more of the revenue is from the sale of advanced biofuels, then the project should be eligible for the program.

One commenter states that the advanced biofuels industry is an emerging market and, as such, many configurations for profitability and risk mitigation include the sale of byproducts and renewable electricity as major components of the profit and product streams. There should be no set standards for the production of the advanced biofuels, and to require that 70 percent of the revenues are from the sale of advanced biofuels adds a further artificial barrier on sound, sustainable projects. The requirement should be lowered to 50 percent and be a combination of all forms of energy, including renewable electricity.

One commenter states that it is important that new fuel production methods pass through the financing "Valley of Death" so that they can be replicated in the market without government financial assistance. Hence, whether a first of a kind project under section 9003 sells much, if any, advanced biofuel should be irrelevant as long as the proposed business plan is financeable and there is sufficient evidence that there is a market (or emerging market) for the proposed fuel. Thus, more new technologies will be financed and more new advanced biofuels will ultimately come to market. Because even the small number of section 9003 eventual winners will have a negligible total impact on U.S. fuel consumption, it is more important to set the stage for future growth rather than saddle these early stage projects with excessive hurdles to overcome to create a successful business plan for a first commercial project. As long as the borrower can explain cogently how future plants will produce and deliver advanced biofuels and bioproducts that mitigate imported fuel or energy intensive products, these should be equally rewarded in this program.

One commenter agrees that the program should be focused on projects that primarily produce advanced biofuels, and encouraged the Agency to make a determination of the nature of the project on a site-specific basis and not promulgate a bright-line threshold. BTL (benzene, toluene, and xylenes) facilities can be configured to produce various combinations of fuels, co-products, and electricity. Thus, it may be that an optimized plant on an efficiency basis would be configured for something marginally less than 70 percent revenue from advanced biofuel. While a plant could be configured to meet a 70 percent requirement, the commenter asks that the Agency provide flexibility to allow for the most efficient plant configurations, which would be consistent with the proposal to consider life-cycle GHG emissions and other performance criteria.

Two commenters state that, while the Agency has proposed to require a certain percentage of biofuels be produced at the facility receiving an Agency loan guarantee, other product streams from the same feedstock can enhance the economic viability of biofuel projects. Market forces will affect revenues based on ever-shifting price points. Thus, a requirement for a percentage of revenue would make financial and operational planning very difficult for a biorefinery that receives a loan guarantee. An energy content or biomass usage metric is more effective, allowing developers to plan their facility/project at the outset to ensure that a certain percentage of the energy or biomass is used for biofuels. The commenters recommend basing any required percentage related to biofuel production on energy content or biomass usage, not revenue. The commenters also urge the Agency to promulgate flexible guidelines to implement this approach at this stage of development and uncertainty in the biofuels market.

Response: The Agency agrees with commenters' suggestion to remove the 70 percent revenue threshold. The rule has been modified to require that a majority of the biorefinery production is an advanced biofuel. When the biobased product and any byproduct produced have an established BTU content from a recognized Federal source, majority biofuel production will be based on BTU content of the advanced biofuel, the biobased product, and any byproduct. When the biobased product or any byproduct produced does not have an established BTU content, then majority biofuel production will be based on output volume, using parameters announced by the Agency in periodic Notices in the Federal Register, of the advanced biofuel, the biobased product, and any byproduct.

The Agency has determined that measuring the output is a better metric than the energy content of the biomass input in determining project eligibility, because the energy value of biomass input is not necessarily equivalent to the energy product outputs. The primary purpose of the program is for the development of advanced biofuels. For these reasons, the Agency is focusing on production of advanced biofuels rather than consumption of feedstock.

Comment: One commenter recommends changing the facility's percentage of "revenue" that must come from advanced biofuels to a percentage of "volume" in order to enable a company to maximize the economic viability of its operations. The commenter believes basing the percentage requirement on revenue, and not volume, significantly inhibits a company from pursuing its maximum economic potential as the prices of many byproducts are greater than fuels. The commenter believes that changing this requirement to 70 percent of volume will still enable the Agency to pursue its goal of promoting advanced biofuels without unduly restricting companies from pursuing the most economically advantageous means of supporting their facilities.

Private financing entities will judge whether "facilities are worth financing" solely based on the economic potential of that facility to earn sufficient profits to be able to pay back the loan to the financing entity as well as pay returns to its equity holders. Therefore, any regulations should be structured such that they will facilitate the manufacturing plant achieving maximum profits and enhancing its economic viability. The Agency itself recognizes the value of multiple revenue streams that exist in a biorefinery operation. For example, the Agency states that "byproducts are an important revenue source for many biorefineries."

To provide an example: The commenter's process inherently produces byproducts at a certain level. Monetizing these byproducts significantly enhances the financial viability of a biorefinery facility. As an example, one of the byproducts is an organic acid that sells for more than $2,000/ton, significantly more than the value of ethanol. Under a revenue-based eligibility requirement, the commenter states they would be significantly restricted from monetizing this byproduct, which is currently made exclusively from fossil fuels. Since this acid sells for more than 3 times the value of ethanol, the commenter states they would only be able to sell very small amounts in a revenue-based scenario, losing not only the revenue and societal benefit of replacing a fossil fuel derived material, but also incurring a cost to dispose of the material. In a volume-based scenario, the commenter states they would still focus on producing advanced biofuels as the primary purpose of the facility, but also would be able to enhance the economics of the facility by realizing the value inherent in its processes' byproducts.

Response: As noted in the response to the previous comment, the Agency is replacing revenue as the standard of measurement and instead will determine the majority biofuel production based on BTU content of the advanced biofuel, biobased product, and any byproduct. However, if the biobased product or any byproduct does not have an established BTU value, the Agency will determine majority biofuel production based on output volume of the advanced biofuel, the biobased product, and any byproduct.

Comment: One commenter states that the 70 percent requirement is not contained in Section 9003 and may cause significant problems, both in terms of deterring companies from using the section 9003 program and then increasing the chance of default if a loan guarantee is issued. The commenter recognizes that the primary purpose of Title IX is "Energy"; however, Title IX also recognizes that, like petroleum, co-products provide essential revenue streams. Liquid transportation fuel has been the "holy grail" of the algae industry since its inception, but many companies are shifting their business plans away from a fuel-dominant approach in the short term and dedicating more efforts to developing higher-value co-products such as chemicals, agricultural soil remediation and fertilization, and plastics. This has been driven primarily by high production costs for lipids and having to compete with low-cost crude oil. One of the primary reasons for the high production costs of algal-based fuels is the lack of commercial-scale (and even demonstration-scale) projects that provide opportunities to optimize and de-risk technologies and reduce costs with scale. The algae industry views the section 9003 program as a much-needed financing tool to develop projects and bring down costs and risks. As the Agency notes, "byproducts are an important revenue source for many biorefineries." They will be even more important for the long-term success of the algae industry and the ability of the industry and its technologies to mature to the point where algal-based liquid transportation fuels are price competitive with petroleum gasoline, diesel or jet fuel.

For this reason, the commenter strongly encourages the Agency to interpret the purposes of Section 9003 broadly and in a way that will most likely accelerate the ultimate development and production of advanced biofuels. Imposing a 70 percent revenue requirement defeats this purpose.

First, it is unclear what the ramifications would be to the applicant if, in practice, this 70 percent threshold was violated. Would this constitute a default under the credit facility or security agreement? If so, this injects an artificial limit into the operation of projects that may, at points, obligate the applicant to run the project in a commercially unreasonable or imprudent way by producing products that fail to provide sufficient revenue to meet debt service.

Second, and related to the first, it is much more difficult to control price for a product (unless long-term off-take contracts are in place) than volume produced. Price fluctuations may inadvertently cause a breach of any loan agreement or security document.

Third, there is a significant pricing differential for feed, nutraceuticals, bioplastics, and biochemicals compared to fuel. This pricing differential could distort financial models and disqualify early algae projects that will rely on co-product sales to make the fuels portion of the project "pencil out." Borrowers should not be penalized for capitalizing on multiple value streams. If any limit on product mix is imposed, this should be volumetric rather than revenue-based.

Fourth, Section 9003 imposes no such specific threshold for purposes of a biorefinery's eligibility for the section 9003 program. Section 9003 provides that "eligible technology" for purposes of qualifying for a loan guarantee is "technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel" as well as "technology * * * that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel." Nothing in this sentence requires anything more than a biorefinery to produce some quantity of advanced biofuel, and it certainly doesn't base a requirement on a percentage of revenue. Further, a "biorefinery" is defined as a "facility (including equipment and processes) that "(A) converts renewable biomass into biofuels and biobased products; and (B) may produce electricity". On the face of the statute, Congress did not require a project's eligibility to be based on production and sale of a specific product mix or revenue mix, and biobased products and electricity are specifically anticipated to be key attributes of any biorefinery. The Agency's exercise of administrative discretion on this issue goes too far and jeopardizes the success of a much-needed program.

This limit on the revenue mix from products produced by the project is counterproductive to the purpose of the section 9003 program. Imposing an arbitrary limit on the product and revenue mix unsupported by Section 9003 will negatively affect borrower's ability to make prudent business choices and maximize revenues based on market demand for certain products at any given time during the loan term. This is not in the lender's best interest, it is not in the borrower's best interest, and it is not in the taxpayer's best interest when the borrower defaults.

The commenter recommends considering the merits of (most desirable to least desirable):
(i) Completely eliminating this requirement for project eligibility in favor of a certification by the borrower that the primary purpose of the project over the term of the loan is the production of advanced biofuels;
(ii) imposing a volumetric requirement rather than a revenue requirement with the volumetric requirement being a "majority" rather than 70 percent;
(iii) reducing the 70 percent revenue threshold to a "majority"; (iv) providing a waiver process to avoid default; and (v) permitting the carry-forward and carry-backward of surpluses and deficits so that the 70 percent revenue requirement is imposed over multiple years.

In any event, the commenter encourages the Agency to clarify its intent here and the ramifications for failing to meet such a requirement, and recommends either discarding the 70 percent revenue-from-fuels requirement or completely restructuring this requirement.

Response: For program integrity the Agency cannot rely just on certifications. As has been noted in the responses to the two previous comments, the Agency is replacing revenue as the standard of measurement and instead will determine the majority biofuel production based on BTU content of the advanced biofuel, biobased product, and any byproduct. However, if the biobased product or any byproduct does not have an established BTU value, majority biofuel production will be determined based on output volume of the advanced biofuel, biobased product, and any byproduct. The Agency has also removed the 70 percent threshold and replaced it with a majority threshold. Based on the changes, the Agency has determined that a waiver process and the carry of revenue surpluses and deficits are not required. The Agency reserves the right to take any legal action to address default when the borrower is not operating as originally proposed.

Comment: One commenter believes that biobased chemicals and biobased products must be included in grant, loan, and loan guarantee programs under the section 9003 program to enable stand-alone commercial scale facilities. Currently, most, if not all, large funding advantages in the DOE and USDA biomass program are available to biofuels production projects only (with one exception). Expanding funding programs to include production of biobased chemicals and products will enable shovel ready projects that are the cornerstones of new biobased industries to immediately take hold. The 2008 Farm Bill states clear objectives for our nation yet these programs exclude loans, loan guarantees and grants for biochemical and biobased material production that would immediately enable these goals. The commenter believes the U.S. cannot afford to miss an economic and environmental opportunity for ready to scale green technology that falls well within the parameters of 2008 Farm Bill concerns.

Response: The Agency disagrees with commenter. The purpose of the program, as provided in the statute, is to assist in the development of new and emerging technologies for the development of advanced biofuels. Pursuant to the statute, all biorefineries financed under the program must produce advanced biofuels.

Requested Comments—h. Value of Feedstock Supplied by Producer Association and Coops

60 Percent Threshold

Comment: One commenter strongly opposes the proposed 60 percent threshold. The advanced biofuel feedstock markets, particularly for algae and cellulosic ethanol, are immature and have not developed to date using the agricultural cooperative model. Given transportation costs and other logistical issues, algal feedstock will likely be grown by the same companies that harvest the lipids/triaclglycerides and convert the same to advanced biofuels or other biobased products at the same or an adjacent site.

While the commenter encourages and supports the premise that "algae is agriculture," the commenter urges the Agency to avoid making the same mistakes that Congress and other agencies have made in the past when crafting legislation or policy with traditional agricultural food crops in mind. The Agency should not impose an existing model on a new industry at this point in its development, despite the fact that cooperatives and producer associations have served the terrestrial agricultural industry well. To do so in terms of awarding points when scoring applications would severely disadvantage biorefineries seeking to use algal feedstock (and other feedstock) vis-à-vis other projects that would, for example, use corn stover, cobs, straw, sugar, or other cellulosic feedstock.

The commenter recognizes the requirements in Section 9003(e)(1)(C) and the critical importance of producer associations to the development of the agriculture industry in the U.S.; however, the commenter urges the Agency to avoid imposing existing models on new industries. Disproportionate benefits should not be afforded to certain business structures that may be inapplicable to certain sectors of the bioenergy industry. The commenter states that the Agency should minimize such benefits.

One commenter states that, because most producer associations and coops are not yet involved with nor have a track record in feedstock procurement and supply, a lender will generally consider such contracts to be unreliable and likely unfinancable. This proposed criterion should be dropped in its entirety so as to allow projects to procure reliable feedstock wherever possible so that pre-commercial technologies can be built and validated. Do not add this level of complexity. It will almost certainly render most projects ineligible and would be a travesty for the program.

Three commenters state that the Agency should not place limits on feedstock suppliers in order to qualify for this program. Feedstock availability and price basically determine the success of the plant and maximum flexibility should be awarded in order to maximize the opportunity for success.

Several commenters state that a 60 percent threshold is unrealistic and, at this time, presents an artificial restriction for good, bankable projects. The commenters state that woody biomass is currently the lowest cost, most dependable, and most accessible feedstock for large-scale commercial advanced biorefineries, and is not traditionally owned, managed, or harvested by producer associations and/or cooperatives. The commenters support the activities of producer associations and cooperatives in developing advanced biofuels facilities and/or supplying biomass to these facilities, but state that the current costs and lack of infrastructure to economically and sustainably supply the facility with crops, such as miscanthus or energy cane, at a price comparable to woody biomass restricts the project from providing the necessary base level of feedstock pricing support that makes this type of business model bankable in the near term.

Response: The Agency appreciates the commenters' concerns. However, the statute requires the Agency to consider whether the borrower is proposing to work with producer associations or cooperatives. The Agency has modified this criterion to award points if the project can document working with cooperative and producer associations under one of the three criteria rather than all three. In addition, this scoring criterion has been revised by incorporating a two-tiered system that begins awarding points at a 30 percent threshold.

Algae Exception

One commenter states that they reviewed several proposals from potential algae producers to build out 10 to 100 acre algae production facilities that could provide a minimum of approximately 10,000 gallons (235 barrels) per acre/year, and over a million gallons of biomass per acre/year on a totally renewable basis without having to address growing seasons, rainfall and other factors that crop farmers must consider. Due to these considerations and the land use requirements of other feedstock, this would be practical, but due to the de minimus land requirement for algae production, the commenter does not believe that this is a practical restriction and requests that an exception be granted for algae production.

Response: The Agency disagrees. The Agency has adopted a policy to have a program that is technologically, geographically, and feedstock neutral. As noted in the response to the previous comment, the Agency points out that the rule has been revised to award points if the project can document working with cooperative and producer associations under one of the three criteria rather than all three. In addition, this scoring criterion has been revised by incorporating a two-tiered system that begins awarding points at a 30 percent threshold.

Requested Comments—i. Measuring Potential for Rural Economic Development

Comment: One commenter believes that the scoring system is flawed in regard to rural economic development. In large states, such as Texas, the requirement that the average wage created by the project be above the county and state median household wage will greatly affect project scoring compared to a small state since the Texas median state wage may be significantly higher than the county median wage. If a project's average wage is above the median household wage in the county and contiguous rural counties, then the project should receive the points for this criterion. Rural counties would be defined in this instance to be all nonmetropolitan counties, as defined by ERS, with a rural-urban continuum code of 4 through 9. The commenter believes, however, that this criterion should be worth 15 points and not the 5 points in the proposed rule.

Response: The Agency has considered the comment and revised the criterion to reflect the location of the project (must be in a rural area in order to be awarded points) and County median household wage only. The Agency agrees that the points for this criterion should be increased, and has increased the points from 5 to 10, which the Agency has determined is appropriate relative to the other scoring criteria.

Comment: One commenter states that standard economic impact analysis software is easily obtained through several private organizations and universities, and has often been used to judge the economic impact of a new business in a community. The key components that can be compared are number of direct and indirect jobs created, the area multiplier effect, and the impact of purchases of local goods and services, including feedstock.

One commenter states that when measuring the potential impacts on rural economic development, the easiest things to measure are:

1. Construction Phase

a. Amount of construction funds that will be spent in the local area and immediate region for equipment, supplies, labor and other support services.

b. Downstream effects of construction job spending on the local economy, which is generally a multiple of the primary spending (velocity of money).

2. Operations Phase

a. Number of new jobs and salaries to be paid plus the downstream effects that these employees will have on spending in the local economy.

b. Feedstock purchases. Determine who gets paid and how much in the feedstock supply chain in the local area. In some cases these will be estimates, but given that the feedstock supply chain must be fairly transparent to meet lender requirements, these estimates can be quite accurate.

Response: The Agency does not agree with changing the economic impact analysis at this time. The Agency has not identified the appropriate models to determine the economic impact in the manner suggested by the commenter. If the Agency identifies an appropriate model, it will amend the regulation accordingly and notify the public.

Requested Comments—j. Measuring Positive Impacts

Comment: One commenter believes that the production of advanced biofuels will have positive impacts on resource conservation, public health, and the environment. The commenter believes the Agency should rely on the definition of advanced biofuels as defined in the 2008 Farm Bill and believes EPA is using unproven combinations of models to calculate the GHG reduction for biofuels. Also, EPA's delay in qualifying existing and new feedstock and process pathways will not allow for quick implementation of the program. There could be instances where a feedstock could be under review until 2012 by EPA—the expiration of the current Agency program.

Dependence by the Agency on the RFS2 definitions and delineations is premature. Once the science behind GHG emissions is more fully understood and defined, then the Agency may want to look at including some tiered system to determine the environmental positive impact. The commenter suggests that this could be a much more appropriate discussion as the 2012 Farm Bill takes shape.

The commenter states that a tiered scoring system based on GHG reductions would not further the intent of the program and not help rural economies through the creation of advanced biorefineries. However, the commenter believes that a project should show a reduction in GHG emissions as verified through a life-cycle analysis in the published literature or completed by a university or a private third party that specializes in such analysis.

Response: The Agency agrees with the commenter, and requires that the project produce an advanced biofuel as defined in the statute. The Agency has decided not to require compliance with the Renewable Fuel Standard, because to do so would narrow the range of feedstocks eligible under this Program. Furthermore, the renewable fuel standards only apply to liquid transportation fuels, while this Program applies to a broader range of advanced biofuels. However, the Agency has modified the scoring criteria such that in order to receive points under the first scoring criterion an advanced biofuel must meet an applicable renewable fuel standard as identified by the EPA and clarified the scoring criterion associated with demonstrating positive effects that compliance with the renewable fuel standard is one way that a positive effect on the environment can be demonstrated.

With respect to the commenter's concern about GHGs, the Agency encourages applicants to provide any and all information that supports a positive effect on resource conservation, public health, and the environment. The Agency considers a reduction in life-cycle GHGs to be a positive effect on the environment. Thus, if the borrower demonstrates a reduction in life-cycle GHGs, the borrower will receive points under § 4279.265(d)(6). However, a borrower will also receive points under this criterion if they demonstrate a positive effect on resource conservation, public health, or the environment in another manner. Finally, to help address GHG life-cycle emissions, the Agency has revised, as noted above, the scoring criterion such that an advanced biofuel must meet an applicable renewable fuel standard as identified by the EPA in order to receive points under the first scoring criterion.

Comment: One commenter states that eligible projects should provide a reduction in GHG reductions, as verified through a GREET Analysis or other university or private, third party analysis. The project should also meet or exceed the EPA standards for permitting. Extra points should be given for projects that provide additional clean, potable water for human use and/or irrigation.

Response: Applications will be accepted for biorefineries that produce an advanced biofuel. The Agency is considering the impacts of the EPA requirements on the program and has not made a final determination to date. As noted in the response to previous comments, to help address GHG life-cycle emissions, the Agency has revised the first scoring criterion such that an advanced biofuel must meet an applicable renewable fuel standard as identified by the EPA in order to receive points under the first scoring criterion.

With regard to the comment on potable water, the Agency encourages applicants to provide any and all information that supports a positive effect on resource conservation, public health, and the environment. The Agency may consider potable water under this criterion, for example resource conservation. Thus, if the borrower demonstrates positive impact GHGs or potable water, the borrower may receive points under § 4279.265(d)(6) and, as noted above, the advanced biofuel must meet an applicable renewable fuel standard as identified by the EPA to receive points under the first scoring criterion. However, the Agency has chosen to provide applicants more options in demonstrating a positive effect on resource conservation, public health, or the environment.

Comment: One commenter agrees that biofuels and bioproducts that significantly reduce greenhouse gas emissions are more desirable than those that do not. Such criteria also ensure that the net energy balance of the proposed fuels or products is higher, which in turn reduces imported energy products to a higher degree. Hence, such a measurement is consistent with the overarching goals of the program. Fuels and products that can be produced with low overall water consumption should also score higher. Given that most fossil fuels require water for production and to date most biofuels require dramatically higher uses of water, which is unsustainable, low water consumption should be considered to be one of the highest and most important criteria.

One commenter recommends structuring the loan guarantee program to promote the best-performing biofuels to the maximum extent possible and "pay for performance." As one of the purposes of the program is to "promote resource conservation, public health and the environment," the commenter encourages the Agency to link the loan guarantee application scoring criteria to the entire performance profile of the advanced biofuel proposed to be produced.

The commenter believes that, while the assessment of the GHG performance of fuels, as well performance relating to air quality, water quality, and water quantity are all important aspects of the performance profile of a fuel, the Agency should assess other important factors, such as the compatibility of fuels with existing infrastructure and equipment and the total thermal efficiency of the facility, among other relevant factors. Linking payments to the achievement of GHG reduction thresholds under EPA's RFS2 program, as suggested in the proposal, would certainly help to achieve the goal of reducing GHG emissions.

While supporting consideration of life-cycle GHG reductions, the commenter encourages the Agency to fill existing policy gaps and maximize GHG reductions from biofuels by scoring proposed projects on the full life-cycle reductions actually anticipated based on a site specific life-cycle analysis, not merely on the basis of achieving minimum thresholds. The existing RFS2 program only requires that biofuels meet specific thresholds (such as a 60 percent reduction for cellulosic biofuels), but the program offers no incentives for producers to exceed those thresholds. Conversely, low-carbon fuel standards being developed by California and the Northeastern states encourage maximum reductions by fully crediting the reductions achieved. Under such an approach, a facility producing a fuel with a 90 percent GHG reduction benefit would score comparatively higher than a facility producing a fuel that merely meets RFS2 thresholds. The commenter encourages the Agency to adopt a similar approach that would best help the Agency achieve incremental GHG reductions and support the Administration's goal of reducing GHGs.

One commenter states it is important to remember that the industry must fulfill the advanced biofuel requirement of the RFS. The commenter believes that, if the Agency decides to award points towards an overall score that will then be used to evaluate and compare applications for facilities that produce biofuels that significantly reduce life-cycle GHG emissions compared to conventional fuels, the regulations should be kept simple to encourage streamlined administration of the program. While the commenter does not believe that the indirect land use change calculations included in the RFS regulation are mature or have been adequately vetted in the scientific community, if the Agency does include life-cycle GHG emission reduction benchmarks as a way to reward lower emitting fuels with additional points, the commenter recommends: (1) Relying on already established regulations instead of creating a new set of regulations for those calculations (*i.e.,* EPA RFS), and (2) Not complicating the program with multiple threshold levels that the Agency will need to create and monitor, but simply create one value (5 points) for advanced biofuels that meet the RFS life-cycle GHG emission reduction requirements.

Response: In addition to the reasons already provided, the Agency also notes that it agrees with simple implementation of this scoring criterion and encourages applicants to provide information that supports a positive effect on resource conservation, public health, and the environment. The applicant can consider a recognized and published source of information to document the impacts noted above. The Agency has increased the amount of points under this scoring criterion and added provisions to deduct points if the feedstock can be used for human or animal consumption.

Comment: Regarding suggested metrics for the other proposed performance criteria, in assessing air quality, one commenter recommends looking at conventional pollutant emissions of a fuel as compared to a baseline represented by the fuel it replaces. For water quantity, fuels could be scored on water use in production per BTU of energy produced. Fuels could be scored on the basis of the fertilizer use and runoff related to their feedstock.

Despite requesting comment on many performance criteria, the Agency has proposed to reduce the points allocated to these criteria in its ranking scheme. Rather than reducing the points, the commenter believes it would be appropriate for the Agency to substantially tailor the scoring system around such criteria.

Response: The Agency agrees that the metrics identified by the commenter can be used to demonstrate the impacts of a biorefinery. However, the Agency disagrees that it is necessary to identify these metrics specifically in the rule. This criterion is written broadly to allow applicants to provide whatever information the applicant believes will demonstrate the positive impacts of their proposed projects. Thus, the Agency encourages applicants to provide any and all information that supports a positive effect on resource conservation, public health, and the environment. The applicant can consider a recognized and published source of information to document the impacts noted above. As noted in the response to the previous comment, the Agency has increased the amount of points under this scoring criterion and added provisions to deduct points if the feedstock can be used for human or animal consumption.

Comment: Two commenters encourage the Agency to coordinate with the DoD to ensure that any requirement regarding the reduction of life-cycle GHGs does not inhibit DoD's goal of increasing the amount of domestically-produced jet fuel. The Agency should ensure that facilities that could provide such fuel are not ineligible for the program based on how GHGs are calculated on a life-cycle basis. The commenters support program incentives that reduce life-cycle GHGs as technologies advance, but recommends that national security benefits be considered for the eligibility of biofuel programs.

Response: Although the statute does not require the Agency to consider national security as an eligibility requirement, the Agency recognizes the importance of biofuels to national security and has signed a MOU with the Navy. The MOU encourages the development of advanced biofuels in order to secure the strategic energy future of the United States and will be supported by the Agency to the extent possible. Further, as noted in a response to a previous comment, the Agency has included in the rule a provision, for which it is seeking comment, to allow the Administrator to award bonus points to applications that promote partnerships and other activities that assist in the development of new and emerging technologies for the development of advanced biofuels that further the purpose of this Program, as stated in the authorizing legislation. The Agency will identify these partnerships and other activities in a **Federal Register** notice each fiscal year. Therefore, the Agency has determined that it is unnecessary to add the suggested scoring criterion to the rule.

Comment: One commenter urges the Agency to ensure that the program is flexible so that a producer can reapply in order to meet the higher criteria for the same project as it evolves. Liquid biofuels are the only advanced biofuels that currently have a regulatory framework in place for measuring GHG emission reductions compared to their counterparts. If the definition of advanced biofuels in the final rule applies to solid, liquid, or gaseous fuels, the Agency would need to determine how they will quantify gaseous and solid advanced biofuels emission reductions when compared to their counterparts. In addition, it should be assumed that producers of advanced liquid biofuels would not produce fuels that do not meet the RFS qualifications, therefore, including life-cycle GHG emission reduction requirements in this program for liquid transportation fuels would be redundant and the commenter cautions against adding any unnecessary regulations to this program that could slow or complicate the process of awarding guarantees and therefore retard commercialization and production.

One commenter supports the approach the Agency is considering that would award more points to facilities that produce biofuels that significantly reduce life-cycle GHGs compared to conventional fuels. Drafting language to incorporate the EPA's renewable fuels standard and ongoing biofuels life-cycle analysis (in partner with the National Academy of Sciences) would structure the rules effectively. Given the need to address climate change, awarding points is a practical step in fostering development of emission-reducing feedstock production.

One commenter supports basing scoring criteria on life-cycle assessments and encourages the Agency to employ established methods being utilized by other agencies (e.g., the U.S. EPA). If the section 9003 program is a means to achieve the ends required by the RFS Program, then requirements imposed on borrowers as producers of renewable fuel for sale to obligated parties should be synchronous.

Response: The purpose of the program, as provided in the statute, is to assist in the development of new and emerging technologies for the development of advanced biofuels. The Agency is currently considering various models related to life-cycle analysis and has not identified a model at this time. When the Agency determines the appropriate model, it will amend the rule accordingly. As stated above, the Agency encourages applicants to provide any and all information that supports a positive effect on resource conservation, public health, and the environment and, to help address such environmental considerations as GHG life-cycle emissions, the Agency has revised the scoring criteria such that an advanced biofuel must meet an applicable renewable fuel standard as identified by the EPA in order to receive points under the first scoring criterion.

Requested Comments—k. Definition of Agricultural Producer

Comment: Two commenters recommend keeping the definition of agricultural producer as proposed. According to the commenters, there is no advantage increasing this guideline, which will put another artificial barrier or restriction in place to qualifying producers. The definition should be consistent across all areas of Agency funding programs.

Response: The Agency thanks the commenter for their comments and the Agency has decided not to change the definition.

Requested Comments—l. Local Ownership

Distance

Comment: Two commenters recommend increasing the mileage allowance to 200 miles. The project must be economically and financially sustainable, and could require feedstock procured and obtained from a larger area. The most economically advantageous site may be located away from the owner's business or home location. This is another artificial barrier that must be removed from the process.

Two commenters recommend that, if the Agency insists on providing a benefit to locally owned companies, this should be increased to 200 miles from 20 miles. This required scoring criteria, like the producer association scoring criteria, benefits certain sectors of the bioenergy industry and not others and actually serves as a way for producer associations to get "double points" for the same thing. Owners of companies developing large-scale algae growth and cultivation biorefineries, unlike their counterparts using corn stover or wheat straw, will likely be located far from these production facilities due to the fact that these facilities are best located in areas where terrestrial agriculture activities requiring fresh water would be impossible.

To reduce possible double benefits for producer associations in the scoring criteria and to more realistically account for project finance-type investment by funds with urban domiciles into these $100+ million facilities, the commenter recommends basing "local ownership" on owners living either within the state in which the project is located or 200 miles.

One commenter states that the 20 mile limitation for local ownership is too restrictive. Many of these facilities will have to be located in larger communities that have essential infrastructure to service them, which could easily be more than 20 miles from the source of the feedstock. Also, many of these facilities will be utilizing specialized feedstock that may have to be obtained from further distances. The commenter recommends that 100 miles be used to determine local ownership.

Response: In the definition of local ownership, the Agency has replaced the feedstock supply area provision with the distance an owner's primary residence is from the location of the biorefinery, with the distance to be specified by the Agency in a **Federal Register** notice. The Agency is seeking comment on this provision (see Section IV, Request for Comments). It is the Agency's intent to implement in the final rule for this Program a specific criterion, or set of criteria, to establish such distance or distances for defining a local owner. The Agency plans on using the input provided in response to the requested comment in finalizing this definition for the final rule.

Comment: One commenter agrees with the local owner definition requiring a local residence in proximity to the feedstock area. The commenter, however, recommends strengthening the phrasing "an individual who owns any portion" to say an individual who owns a specific minimum dollar amount or percentage. Otherwise, the provision could be open to abuse.

Response: The Agency disagrees with the recommendation, and wants to clarify that local ownership will be determined based on the percentage of ownership of the biorefinery rather than on the number of owners. The Agency would like to be as inclusive as possible and consider all local ownership interests instead of setting a minimum dollar or percentage threshold.

Scoring

Comment: One commenter believes there should not be more than 5 points allotted for local ownership.

Another commenter states that local ownership is important, but not as important as the jobs created in the rural economy where the biorefinery will be placed. The commenter does not support the scoring system in regards to this criterion. The commenter proposes the following criterion with a maximum of 10 points:

1. If more than 20 but less than or equal to 50 percent of the biorefinery's owners are local owners, 6 points will be awarded.
2. If more than 50 percent of the biorefinery's owners are local owners, 10 points will be awarded.
3. A biorefinery that has as its majority owner a publicly traded entity shall not be eligible for any points under this criterion.

Two commenters suggest that the Agency reconsider its proposal to award increased points to loan applicants that have a higher percentage of owners whose primary residences are within 20 miles of the area supplying feedstock to the biorefinery. While it is reasonable to expect that biomass production sites will be near a biorefining facility, requiring local ownership of the project and establishing a strict 20-mile proximity requirement for scoring is not necessarily the only manner in which to achieve this goal. The commenters urge the Agency to be flexible in its scoring on this matter and to ensure that comparable points are awarded for projects that use other means to encourage nearness of feedstock to biorefinery.

Response: The Agency disagrees with the commenters in that this criterion is not intended to encourage nearness of the feedstock to the biorefinery, but to encourage local ownership of the biorefinery, which is a specified criterion in the statute. The Agency notes that it has revised the points associated with this criterion, from 15 to 5.

Delete the Criterion

Comment: One commenter states that the local ownership requirement should be removed to be in keeping with the goals of financing pre-commercial projects. Although in the past we have seen much local ownership in ethanol and biodiesel plants, this was not true with the first commercial scale facilities. It was only after a track record had been established that rural residents became comfortable with these investments. Requiring local investment is yet another hurdle not needed for a pre-commercial support program.

One commenter states that the Agency should not require local ownership of a biorefinery to qualify for this program. Local ownership requirements place additional investment challenges on projects that otherwise could have a significant impact on rural development. Lack of investment financing is the biggest impediment and this requirement handicaps projects even further.

Response: The Agency points out that local ownership is not an eligibility criterion, as the commenters seem to think, but is one of the criteria that the Agency will use to score applications. Further, because the statute identifies local ownership as a scoring criterion, the Agency must include it in the rule.

Scope

Comment: One commenter states that the aviation industry welcomes "local" investors in an alternative aviation fuel biorefinery, but believes that these investors should be allowed to live within the geographic region where the feedstock is grown. In addition, the commenter proposes that the regulations allow refineries that invite "local" investors into a project after it has been structured to score local ownership points.

The commenter further states they have seen a number of aviation fuel biorefinery proposals for 100 million gallons per year refineries that plan to use camelina, one of the most promising non-food feedstock. Each proposal indicates that, until camelina becomes a generally accepted crop by farmers, it is likely that a refinery would have to purchase camelina from farmers in several states and, as a result, the definition of "local" would need to be changed.

Response: The Agency has revised the rule to remove the reference to the feedstock supply area and now defines local owner as "an individual who owns any portion of an eligible advanced biofuel biorefinery and whose primary residence is located within a certain distance from biorefinery as specified by the Agency in a Notice published in the Federal Register." As has been noted previously, the Agency is seeking comment on the most suitable mechanism for defining a local owner. The Agency disagrees with the comment on inviting "local investors into a project after it has been structured." To be considered under this score criterion, local investors need to be identified in the application. The Agency can consider local owners from more than one state as long as the owners are within a certain distance from the advanced biofuel biorefinery. The Agency notes that the scoring criteria give preference; they do not determine eligibility. As to gaming the local ownership provision, the Agency has addressed this by clarifying that it will examine the percentage of local ownership versus number of owners.

Purpose and Scope (§ 4279.201)

Comment: One commenter supports the continued development of a loan guarantee program for biorefineries in order to encourage the development and construction of commercial scale biorefineries and for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. The commenter supports the goal of the program and believes that the Agency is being prudent by remaining open to all feasible technologies at this stage in the development of the biofuels industry. In addition, the commenter supports the Agency's proposal to conduct the program on a rolling application acceptance basis that allows the Agency to make decisions regarding proposed deals in a relatively short period of time.

Response: The Agency appreciates the commenter's support.

Definitions (§ 4279.202(a))

Comment: One commenter recommends reviewing the definitions within the October 7, 2009 DOE solicitation to determine if some of these definitions can be utilized for this regulation so there are some common definitions between the DOE and the Agency loan guarantee programs.

Response: While both Agencies have similar terms, specific definitions have to vary in response to different statutory provisions and Departmental policies.

Affiliate

Comment: One commenter recommends adding a definition of "affiliate," to read: "Affiliate. This term has the meaning set forth in Section 2(k) of the Bank Holding Company Act (12 U.S.C. Section 1841(k))." The commenter points out that commercial banks and thrifts administer their CDFI Fund approved New Markets Tax Credit Program (NMTC) Program through controlled affiliates. This addition would enable CDFI Fund approved NMTC Program lenders that are under the control of a bank or thrift to become eligible for the section 9003 program and provide the benefits of the NMTC Program to projects financed using guaranteed loans under the section 9003 Program.

Similarly, another commenter states that they have discussed with many prospective biorefinery applicants the advantage of combining Federal NMTC Program available to certain commercial banks with a loan guarantee under the section 9003 program. The NMTC Program is administered by the Community Development Financial Institution Fund (CDFI Fund) within the Department of Treasury and provides tax credit equity to certain approved lenders. The program has the effect of "de-leveraging" a project by passing through the tax credit equity to the borrower as an additional source of funds for a project. The commenter states that in order to accommodate the use of the NMTC Program by affiliates of commercial banks and thrifts who have been approved by the CDFI Fund and the section 9003 program, § 4279.202(c)(2) must be revised to read as follows:

"The lender must maintain at all times the minimum acceptable levels of capital specified in paragraphs (c)(2)(i) through (iii) of this section. If the regulated or supervised lender is a commercial bank or thrift, or an Affiliate of a commercial bank or thrift, these levels will be based upon those reflected in the Call Reports and Thrift Financial Reports of that commercial bank or thrift."

Response: The Agency disagrees with commenters that a definition of affiliate is needed as it relates to a lender. Lenders must independently qualify regardless of whether they are affiliated with another eligible lender.

Association of Agricultural Producers

Comment: One commenter urges the Agency to ensure that state and national trade associations are not included in this definition because it would be improper for such groups to receive Agency loan funds. Because money is fungible, it would be difficult for the Agency to track the actual usage of the funds. Funds should go for those activities strictly associated with building and operating advanced biorefineries.

Response: The Agency disagrees with the commenter. The statutory language is broad enough to include these entities. The Agency does not want to limit the pool of eligible applicants as suggested. However, it should be noted that most associations would not have the ability to own, operate, and incur debt for such a project. Further, the Agency would rely upon the lender to ensure that funds were spent as proposed.

Biofuel/Advanced Biofuel

Comment: One commenter recommends expanding the definition of biofuel to include heat and power derived from renewable biomass. The commenter states that the production of renewable heat and power from renewable biomass is just as advantageous to national security and energy independence as transportation fuel.

Response: The Agency disagrees with the recommendation. Per the authorizing legislation, heat and power are not considered biofuel. The applicant would first need to demonstrate they are producing an advanced biofuel, which could then be used for combined heat and power systems.

Comment: Regarding the definition of advanced biofuel, one commenter states that EPA now requires that diesel engines used in transportation must emit extremely low levels of nitrogen oxides (NO_X). The most common way to mitigate NO_X emissions is to use urea to react with the fuel exhaust in a catalytic converter. Given that it will soon be illegal to drive a diesel vehicle without such capabilities, that the engine exhaust is an integral part of the fuel system, and that such exhaust must be treated, it can be argued that any additive that reduces such emission is part of the overall fuel system. When produced from renewable biomass, these would be considered advanced biofuels. Also, given that urea and all such other nitrogen products are being imported as foreign produced energy intensive products, production of these advanced biofuels in a biorefinery meet and achieve the overarching goals of the program and should qualify equally for the program.

Response: Applications will be accepted for biorefineries that produce an advanced biofuel. At the present time, urea is not considered an advanced biofuel. However, urea is considered a biobased product. The rule has been modified to require that a majority of the biorefinery production is advanced biofuels. The definition of biorefinery requires the production of biobased products in addition to biofuel.

Comment: One commenter is concerned that the Agency has misconstrued congressional intent with regard to the definition of "advanced biofuel" when the Agency states in the preamble that it "understands the definition to apply to solid, liquid, or gaseous fuels that are final products." The Agency's Commodity Credit Corporation made a similar statement regarding solid advanced biofuels in its Biomass Crop Assistance Program (BCAP) proposal, where it stated that a biomass conversion facility includes a facility that proposes to convert renewable biomass into heat, power, biobased products, advanced biodiesel, or advanced biofuels, such as wood pellets, grass pellets, wood chips, or briquettes.

The commenter does not believe that any solid fuel qualifies as an advanced biofuel under the 2008 Farm Bill. The Farm Bill definition closely tracks the definition in the 2007 Energy Independence and Security Act (EISA). Like the definition in EISA, the 2008 Farm Bill Section 9001 definition of advanced biofuel includes seven qualifying types of fuel. These fuels are listed in the exact same order, except that the 2008 Farm Bill definition replaces references to "ethanol" with references to "biofuel." Congress also replaced the reference to "biomass-based diesel" in EISA to "diesel equivalent fuel."

The commenter states these changes did not evidence an intent to broaden the definition to include solid fuels, but rather indicated Congress' growing understanding that there were numerous kinds of advanced biofuels other than ethanol, including cellulosic diesel (e.g., BTL). Thus, it is clear that the 2008 Farm Bill definition builds and improves upon the EISA definition, but that in both cases Congress intended to include only liquid fuels and biogas. While the EISA definition specifically focuses on transportation fuels and the 2008 Farm Bill definition does not, there is no indication that Congress ever intended to include products such as wood pellets, grass pellets, wood chips, or briquettes within the definition in either definition. Rather, under the 2008 Farm Bill, these types of products are either a "biobased product" or simply renewable biomass. The mere act of chipping, pelletizing, or compressing renewable biomass does not convert it into an advanced biofuel. The commenter encourages the Agency to clarify that advanced biofuels are liquid fuels (and biogas) as defined in the 2008 Farm Bill.

Response: The Agency disagrees and is satisfied that the statute does not provide an exclusive list of eligible advanced biofuels and does permit solid fuels. However, the Agency has added a provision to the scoring criterion addressing a proposed project's impact on existing manufacturing plants and other facilities that use similar feedstock that if the facility proposes to use wood pellets as its feedstock, no points would be awarded under this scoring criterion.

Comment: One commenter states that the definition of advanced biofuels in the 2008 Farm Bill is ambiguous in regards to the inclusion of biofuels derived from sugar and starch. The commenter believes the Agency needs to clarify that advanced biofuels other than ethanol, for example fuels with a different molecular structure such as biobutanol, or other hydrocarbons with 4 or more carbons, produced from a corn starch feedstock, qualify for this program under the definition of advanced biofuel. The proposed rule for this program states that "to be eligible for payments, advanced biofuels must be produced from renewable biomass, excluding corn kernel starch, in a biorefinery located in the United States." The inclusions section of the advanced biofuel definition in the legislation specifically includes "(ii) biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch)" and "(vi) butanol or other alcohols produced through the conversion of organic matter from renewable biomass." The commenter believes that this legislative ambiguity requires the Agency to clarify in the final rule that the only fuel produced from corn kernel starch excluded from this program is ethanol, per the legislation.

Response: The Agency disagrees with the commenter. The statute defines advanced biofuels as fuels derived from renewable biomass other than corn kernel starch. Therefore, any advanced biofuel produced from corn kernel starch is excluded.

Comment: Several commenters recommend broadening the definition of advanced biofuels to include bioproducts. There are many new technologies that are being developed in the pursuit of advanced biofuels that can significantly contribute to rural economic development through the use of biobased feedstock and/or biobased products that are more environmentally desirable as well as more cost effective. Many of these new technologies also require plants to be built to an economy of scale that would require a loan guarantee in the $100 to $250 million range. These projects can also provide needed jobs in rural areas and bring enhanced economic development to the region.

Response: The definition of "advanced biofuel" is provided in the statute and, thus, cannot be changed by the Agency. The statute also defines "biorefinery" to include the production of both biofuels and biobased products. However, the potential borrower must demonstrate that the majority of the production is advanced biofuels.

Biorefinery

Comment: One commenter states that the language "and may produce electricity" seems to be at odds with § 4279.228(d). The commenter asks if this means a facility that produces electricity from an advanced biofuel is not an eligible project, unless the revenue generated from the sale of electricity is less than 30 percent of the total revenue generated by the biorefinery. The commenter believes that a facility that makes an advanced biofuel and biobased products (such as biogas) and then produces electricity from the advanced biofuel or biobased products should be deemed to be both a "biorefinery" within the meaning of § 4279.202(a) and an eligible project within the meaning of § 4279.228. In any event, clarity is needed in these two sections.

Response: As long as the electricity is derived from advanced biofuels produced in the facility, the Agency agrees and has included clarifying language in the project eligibility section of the rule.

Byproduct

Comment: One commenter suggests that the definition of byproduct include the primary product being produced whenever the primary product has more than one marketable use beyond as an advanced biofuel. For example, anhydrous ammonia is an excellent fuel in its own right, is the best way to transport, store, and recover hydrogen, and can also be used as fertilizer. There should be no penalties for a biorefinery that sells all of its product to established markets, whether as an advanced biofuel or as a byproduct, as long as the project can be financed.

Response: As noted earlier, the Agency has removed the requirement that 70 percent of the revenue must be from the sale of advanced biofuel. To be eligible, the project needs to produce an advanced biofuel and biobased product and the majority of the production is advanced biofuels.

Eligible Technology

Comment: One commenter states that, in conversations with Agency staff that oversees this program, there appears to be an "institutional bias" in favor of technologies that follow a specific technology development pathway. There appears to be an expectation that all technologies should have completed a "pilot facility" as a precursor to commercial viability. However, not all technologies neatly fit into a reasonably priced "pilot project" pathway. Not all technologies can, nor should be required to, follow one common pathway to commercialization. For example, oxygen gasification of biomass to produce syngas to then produce fuels does not neatly fit into a reasonably priced, pilot scale technology development pathway. Specifically, the commenter states that their technology, when produced at commercial scale, will perform at a level that would normally be considered a pilot scale.

Because of the type of technology involved, there are less expensive and better ways than a "pilot project" to design, optimize, and achieve high confidence in a commercial scale design. For example, to produce a quarter-scale implementation, the cost would be 70 percent of the commercial project and would not yield much valuable data for predicting the success at full scale. The physics and fluid dynamics differences between different scales of the same gasifier technology means that data gathered in one scale are only marginally useful in another scale. As a result, different techniques have been developed to design and scale such gasifiers. These techniques lead to an equal level of confidence in the proposed design and implementation as is often garnered from other technologies that are better suited to pilot scale projects. Therefore, the commenter maintains that requiring the advanced biofuel technology "has at least a 12-month (four seasons) operating cycle at semi-work scale" is unwarranted and unacceptable. This criterion assumes that there are no alternative, less expensive, or even better approaches to achieving confidence that the new technology is ready for first-time commercial deployment. In fact, there are such alternative approaches for many technologies. The program evaluation criteria must be flexible enough to provide the acceptance of technologies that do not neatly fit into the "standard" scale-up model that appears to be expected in this proposed rule.

Response: The Agency disagrees with the recommendations. Because of the operational risks associated with these new and emerging technologies, it is necessary for the semi-work scale facility to operate for a sufficiently long period to determine if there is any seasonal variation in the production process. To determine if there is any seasonal variation, at least 12 months of operation is required. The technology must demonstrate technical and commercial viability at semi-work scale to qualify for the program. The technical assessment criterion is not specific to any one technology.

Comment: Two commenters state that the definition of technical and economic potential is inconsistent with prevailing industry practice and requirements of other Federal programs. Standard industry practice is to operate a demonstration plant for a sufficient enough time to generate steady state operating data that validates key unit operations and the integrated biorefinery process. For example, the DOE requires six months of operation and 1,000 to 2,000 hours of operating data at the demonstration scale level. The commenters recommend adopting a 1,000 hour operating data requirement to define "technical and economic potential" instead of the 12-month requirement in the proposed rule.

Another commenter states that, although it is generous to add a provision for "semi-work scale," it is restrictive to include the 12-month (four season) operating history in all cases. To prove the viability of the technologies being used, the commenter suggests that the requirement be changed to require that, with regard to algae projects, the growing, harvesting, and extraction systems be benchmarked by three independent third parties rather than requiring a specific length of operating history without a 'proven results' requirement.

Response: The Agency disagrees with the recommendation. Because of the operational risks associated with these new and emerging technologies, it is necessary for the demonstration plant to operate for a sufficiently long period to determine if there is any seasonal variation in the production process. To determine if there is any seasonal variation, at least 12 months of operation is required. Thus, requiring only 1,000 hours, as suggested, would not allow this determination of potential seasonal variation. Therefore, the Agency has not revised the rule as requested.

Farm Cooperative

Comment: One commenter believes this definition would unintentionally exclude long-standing cooperatives from eligibility for the program. Cooperatives are not required to be formed under a cooperative incorporation statute in order to qualify as a cooperative for purposes of the IRS Code or other Federal statutes. A cooperative may be organized, instead, under a state's general business corporation statute and have its cooperative characteristics established in its articles and bylaws. The commenter is aware of many farmer cooperatives incorporated in this manner.

The commenter recommends using the definition as put forth in the recently published proposed rule regarding the VAPG Program, 7 CFR parts 1951 and 4284, RIN 0570–AA79. In the proposed rule, "farmer or rancher cooperative" is defined as: "A business owned and controlled by agricultural producers that is incorporated, or otherwise identified by the state in which it operates, as a cooperatively operated business."

This definition would include farmer cooperatives that are incorporated under general business corporation statutes and yet operate in a cooperative manner and are recognized as farmer cooperatives for purposes of Federal and state taxation and other statutes.

One commenter agrees with the Agency's definition as being a business incorporated as a cooperative that is solely owned and controlled by agricultural producers. However, operational aspects should also be included, consistent with the requirements of the Capper-Volstead Act. This will help prevent the abuse of the term farmer cooperative.

Response: In considering these comments, the Agency has determined that it is appropriate to revise the definition in the rule to be generally consistent with the definition being used in the value-added producer grant program. The revised definition requires the business to be "cooperatively operated," which addresses the one commenter's request concerning operational aspects.

Participation

Comment: One commenter recommends adding a definition for "participation." The commenter suggests the following:

Loan Participations

Structure: Generally, participations are loans where the "lead lender" (Lead) sells a participation in a loan to one or more participating lenders (Participant(s)). The sale may be expressed in terms of a dollar amount or a percentage of the loan. The Lead then continues to manage the loan on behalf of itself and the Participants. The relationship among the lenders is typically formalized by a participation agreement, which states in writing that the Participant receives an undivided interest in the loan. The sale of the participation generally occurs after the Lead and the borrower have executed the loan documentation. The Participant is thus dependent upon the Lead for protection of its interests in the loan—the Participant and the borrower do not have privity of contract and thus have no rights or obligations to one another.

Response: The Agency has determined that the definition of participation found in § 4279.2, which is incorporated by reference in this rule, is sufficient. Thus, the Agency has not included the definition of participation suggested by the commenter.

Regulated or Supervised Lender

Comment: One commenter states that, in order for the implementation of their recommended Bond Loan Model to be successful, the definition of Lender needs to be modified to add to the end thereof:

"* * * and may include a regulated or supervised lender, acting through its corporate trust department, that otherwise meets the lender eligibility requirements in § 4279.202(c). A lender that otherwise meets the lender eligibility requirements of § 4279.202(c), where the guaranteed and/or unguaranteed portions of the loan are to be funded through bonds, may join with a broker or dealer that is regulated by the Securities Industry and Financial Markets Association and is otherwise a registered broker or dealer within the meaning of the Securities Exchange Act of 1934, in submitting the application required by § 4279.260 and be a party to such application for purposes of assisting the lender in assuring compliance with § 4279.261."

Response: The Agency disagrees with the commenter's suggested revision to the definition of lender. The Agency is authorized to guarantee loans, which in certain circumstances may include bonds as described below, under this program. The Agency considers that this requires a lender to make the loan from its resources and then service that loan itself. While the Agency will permit the lender to secure limited servicing responsibilities from third parties, the lender must remain responsible for the servicing. The rule clarifies the definition of eligible lenders, which is similar to that used in the Business and Industry Guaranteed Loan Program. As noted earlier, savings and loan associations, mortgage companies, and other lenders (those that are not regulated) are not eligible to participate in this program.

The Agency considers this as distinct from the typical investment banking scenario where an investment bank secures the financing from outside investors. After the funding is secured, the investment bank has no further involvement with the transaction. Servicing is handled by a trustee who reports to and is controlled by the investors. The Agency considers that this is an investment instead of a loan and that its current authority is insufficient to guarantee investments.

Renewable Biomass

Comment: One commenter states that they are aware of the numerous definitions of biomass in Federal statutes and understand that the Agency is compelled to administer the loan guarantee program based upon the definition in Section 9001 of the 2008 Farm Bill. The commenter hopes that Congress will consider reconciling these definitions in the near future, and asks that the Agency, in coordination with the Biofuels Interagency Working Group, provide recommendations on a definition of biomass that is consistent with sustainability principles while also providing adequate supplies of biomass. The commenter believes that the 2008 Farm Bill definition meets these criteria.

Response: The Agency acknowledges the comment.

Syndication of Loans

Comment: One commenter recommends adding a definition of "syndication of loans." The commenter suggests the following:

Syndication Structure: A loan participation is similar to a loan syndication in that a group of lenders provides funds to a borrower. In a syndication, however, each lender signs the loan agreement with the borrower and thus has a direct legal relationship with the borrower. One of the lenders will be designated as the agent-lender (Agent) for the other syndicate members. The Agent is typically the lender owning the largest percentage of the loan or the lender with enough prestige to form a syndicate of lenders. The Agent may also be the lender with an established relationship with the borrower. It is responsible for structuring the intended credit facility, pricing the loan, developing information pertaining to the borrower, and negotiating and closing the transaction. Thus, all formal communications among the lenders, as a group, and the borrower are conducted through the Agent and all funds are disbursed through and received by the Agent.

Response: The Agency does not agree that the rule needs to include provisions directed at syndication. The Agency has made three significant changes to the rule that mitigate and minimize the concerns expressed by this and other commenters for syndication in order to mitigate lead lender risk. Specifically, the three changes are:

- Revising the minimum retention requirement from 50 percent of the unguaranteed portion to 7.5 percent of the total loan amount;
- Enabling the interest rate of the unguaranteed portion of the loan to increase by 500 basis points rather than 1 percent as proposed; and
- Allowing loan guarantees up to 90 percent for guaranteed loans of $125 million or less.

Lender Eligibility Requirements (§ 4279.202(c))

Comment: One commenter states that the early preamble comments to the regulation indicate that lender eligibility will be restricted to regulated, supervised lenders. Given the highly specialized nature of biorefinery lending, the restriction on eligible lenders should not be driven by regulatory controls, but rather by experience and sophistication in financing biorefinery projects. The parameters for eligible lender instead should be broader than those outlined in 4279–A and should include experienced investment bank consortiums with an emphasis on experience and capitalization. The commenter states he did not actually find the lender eligibility criteria anywhere in the proposed rule.

One commenter recommends expanding the definition of eligible lender to make it clear that lenders other than commercial banks are allowed. The definition could be: "Any person or legal entity for the purpose of, or engaged in the business of, lending money, including, but not limited to, commercial banks, insurance companies, credit unions, mutual funds, factoring companies, investment banks, institutional investors, venture capital investment companies, trusts, or other entities designated as trustee or agents acting on behalf of bondholders or other lenders."

Another commenter is concerned that allowing only commercial banks to participate in the loan guarantee program limits the pool of potential investors and rules out investors such as insurance companies, pension funds, mutual funds, and college endowments. The commenter believes it makes sense to allow the borrower to fund debt from any accredited investor in order to maximize the potential investor base and lower the overall cost of borrowing for biofuel projects.

Response: The Agency disagrees with the commenters regarding eligible lenders, and the rule reflects requirements that are similar to those for a traditional lender under the Business and Industry guaranteed loan program. The Agency requires a lender to make the loan from its resources and then service that loan itself. While the Agency will permit the lender to secure limited servicing responsibilities from third parties, the lender must remain responsible for the servicing.

Comment: One commenter believes that allowing biorefinery applicants to use the Federal Financing Bank as the sponsor lender, similar to the DOE loan guarantee program, would provide projects with another option to secure debt financing.

Response: The Agency cannot consider the Federal Financing Bank as an eligible lender because it requires a 100 percent guarantee, which the Agency is prohibited from offering by statute.

Comment: One commenter recommends allowing a "lead lender/arranger" to submit an application for a loan guarantee by the NOFA deadline, stating the level of their funding commitment along with a funding plan on how the remaining portion of the loan will be financed by other lenders. The other lenders may not be identified until after the "lead lender" receives the Conditional Commitment, but will be identified and subject to the Conditional Commitment prior to issuance of the Loan Note Guarantee.

Response: The comment presumes that the rule would allow syndication. However, for the reasons presented in response to an earlier comment, the interim rule does not contain provisions specific to syndication. Therefore, no changes have been made to the rule in response to this comment.

Comment: One commenter recommends allowing the "lead lender/arranger" to perform the servicing activities of the syndication, and deal directly with the borrower instead of requiring all the lenders of the syndication perform duplicate routine servicing activities. Each original lender will hold its own promissory note and the collateral is held by the arranger as agent for each of the members of the syndicate. As to any matters of significance, a vote or approval of 51 percent of the lenders is required to take any action (e.g., waive or modify covenants, release collateral, agree to forbearance, declare default and liquidate collateral, etc.). Each of the original lenders in the syndication would be responsible for servicing, but there would only be one original lead lender performing most of the servicing activities.

Response: Absent syndication, the Agency agrees with the concept of a lead lender in the context of participation. As noted in a previous response, while the interim rule does not contain provisions specific to syndication, the rule does provide other ways lenders can manage risk, which address the concerns raised by the commenter.

Comment: One commenter recommends allowing lenders to "participate the loans," which is different than "syndication of lenders" with other lenders by Participation Agreements.

Response: Participations are not excluded under the rule. The Agency has determined that the definition of participation found in § 4279.2, which is incorporated by reference in this rule, is sufficient for allowing participations.

Comment: One commenter recommends clearly allowing a "syndication of lenders" to finance a single project. The process could be structured similar to the Solicitation Notice DE–FOA–0000166 issued by the DOE on October 7, 2009. This is the traditional way large loans of this type are financed by lenders.

Response: For the reasons previously provided in response to other comments on syndication, the interim rule does not contain provisions specific to syndication. As noted in a previous response, while the interim rule does not contain provisions specific to syndication, the rule does provide other ways lenders can manage risk, which address the concern raised by the commenter.

Lender Eligibility Requirements (§ 4279.202(c)(1))

Comment: One commenter recommends allowing SEC-regulated investment banks, as well as commercial banks, to act as the applicant "lender-of-record." According to the commenter, commercial banks are not the best equipped entities to perform due diligence and debt structuring and placement on first-of-kind biorefinery projects. Because a "lender-of-record" serves as the applicant for the program, this restrictive definition of eligible "lenders-of-record" fundamentally restricts the potential applicant pool.

Response: The Agency's current statutory authority does not permit investment banks to be eligible lenders. The rule reflects requirements that are similar to those for a traditional lender under the Business and Industry guaranteed loan program. The Agency requires a lender to make the loan from its resources and then service that loan itself. While the Agency will permit the lender to secure limited servicing responsibilities from third parties, the lender must remain responsible for the servicing.

Comment: One commenter states that the "supervised or regulated" lender terms are unclear and further definition or guidance needs to be provided so potential lenders know if they meet the criteria prior to applying for a loan guarantee. The commenter recommends loosely defining the term "supervised or regulated" in order to allow as many different types of lenders as possible to qualify, but still have an adequate amount of oversight by a state or Federal agency. If a lender is not "supervised or regulated," then provisions should be stated as to what other criteria they can meet so they can become an eligible lender. This could be patterned after the "non-traditional" lender requirements that the B&I guaranteed loan program utilizes.

Response: The Agency agrees with the commenter that the term "supervised and regulated" was unclear and has modified the rule to define eligible lenders similar to the Business and Industry Guaranteed Loan Program. However, the Agency disagrees with the commenter to make the requirements similar to the non-traditional lender language under the Business and Industry Guaranteed Loan program. Due to the amount of risk associated with these projects, the Agency has determined, based on the its experience in managing lender risk in other guaranteed loan programs, that traditional lenders offer stronger capital base and loan and servicing experience.

Lender Eligibility Requirements (§ 4279.202(c)(2))

Comment: One commenter asks how the requirement that the lender must maintain at all time the minimum acceptable levels of capital specified in § 4279.202(c)(2)(i) through (iii) will be enforced. The commenter also asks: What is the purpose of this requirement? What happens if the lender fails to meet the requirements? The commenter recommends that this requirement be removed from the proposed regulation.

Response: The Agency has modified the rule to require that the lender must meet acceptable levels of capital at the time of application and issuance of loan note guarantee, thereby removing the requirement of maintaining acceptable capital levels at all times, which addresses the enforcement concern noted by the commenter.

Comment: One commenter requests clarification as to whether there are any minimum total risk based capital ratios or leverage capital ratio requirements if the lender is not a commercial bank or thrift.

Response: Lenders other than commercial banks or thrifts must also demonstrate that they meet the same criteria identified in § 4279.202(c)(2).

Debarment/Suspension (§ 4279.202(c)(3))

Comment: In pointing out that one of the lender eligibility requirements is that the lender must not be otherwise debarred or suspended by the Federal government, one commenter states that he assumes this language does not disallow lenders that may have a cease and desist order or other directive requesting corrective actions from FDIC from obtaining a loan guarantee. The commenter recommends that lenders be able to obtain a loan guarantee even if they have a cease and desist or other directive from FDIC requesting corrective actions. The B&I guaranteed loan program allows lenders to continue to obtain loan guarantees.

Response: Because of the maximum program loan amount for this program (i.e., $250 million) and the associated risk under this program, the Agency is concerned that allowing a lender with a cease-and-desist order to continue to obtain a loan guarantee may not be in the government's best interests. Therefore, the Agency will evaluate such instances on a case-by-case basis.

Lender Experience (§ 4279.202(c)(5))

Comment: One commenter states that the Agency is contemplating approving loan guarantees only for lenders with adequate experience (as determined by the Agency) with similar projects and the expertise to make, secure, service, and collect loans approved under the section 9003 program. The Agency believes this provision is necessary to further limit Agency risk, and the Agency is proposing the issuance of loan guarantees to regulated or supervised lenders, which precludes bond financing monies from being guaranteed under this program. In a better economy, other forms of financing, such as bond financing, might become available. Although the underwriting requirements are not necessarily as stringent as bank loans, and given the results of the state guarantees of debt for biorefineries, the commenter suggests that, in order for bond financing to qualify for Agency guarantees, the same guidelines and requirements be implemented as for more traditional lenders.

The commenter proposes that the Agency, the lenders, and the borrowers all remember that the Agency is offering to issue loan guarantees, and that the guidelines not interfere with the traditional asset-based lending process, but supplement it by offering lenders inducements to make the loans necessary to develop commercial-scale projects.

Response: The Agency is authorized to guarantee loans, which in certain circumstances may include bonds as described below, under this program. The Agency considers that this requires a lender to make the loan from its resources and then service that loan itself. While the Agency will permit the lender to secure limited servicing responsibilities from third parties, the lender must remain responsible for the servicing.

Recognizing the current difficulties in securing funding, the Agency has been approving certain bond transactions. The Agency considers that, under the limitations contained in this regulation, guaranteeing these bonds is in keeping with its authority. In order to be more transparent of its willingness to guarantee certain bond transactions, the Agency has modified this regulation accordingly.

Specifically, the lender is required to provide the loan proceeds and service the loan. The Agency will allow a trustee to provide limited servicing only if the trustee is fully under the control of the lender. Holders' rights are limited to receiving payments under the note or bond and if those payments are delinquent making demand for payment on the lender and the government as provided in the regulation. In certain cases where the lender and borrower desire to change the loan terms, the holder is also required to consent to any changes. Loans providing holders any other rights are ineligible for guarantee under this program.

Independent Credit Risk Analysis (§ 4279.202(d))

Comment: One commenter states that the requirement for an independent risk analysis mentioned in § 4279.202(d) refers to a $100,000 threshold, and recommends a threshold of $100 million.

Response: The Agency agrees that the $100,000 amount was in error. The error has been corrected in the rule to $125 million.

Environmental Responsibilities (§ 4279.202(e))

Comment: One commenter recommends basing the environmental review requirements of § 4279.202(e) on 7 CFR part 1794 rather than 7 CFR part 1940, subpart G. The commenter points out that 7 CFR part 1940, subpart G, relies heavily on agency personnel to conduct the environmental analysis, whereas 7 CFR part 1794 places the burden for preparation on professional consultants whose work is then subject to agency review. This latter approach is appropriate given the complexities of biorefinery environmental impacts. The commenter believes that Agency personnel will typically lack the expertise for a project of this nature.

Response: The Agency disagrees with the commenter. The program is consistent with the Business and Industry Guaranteed Loan Program, 7 CFR part 4279, subparts A and B, which references 7 CFR part 1940, subpart G. The rule requires the applicant to complete Exhibit H of 7 CFR part 1940, subpart G, which is an environmental report, similar to the Rural Utilities Service 7 CFR part 1794 process. Neither this program nor the Business and Industry Guaranteed Loan Program precludes third parties from performing the environmental analysis necessary for the Agency to conduct its National Environmental Policy Act evaluation as long as the submitted material is sufficient for the Agency purposes.

Conditions of Guarantee (§ 4279.202(i))

Comment: Several commenters state that, as proposed, the guarantee would protect only 60 percent of the bank's position. The commenters recommend that, if the Agency wants to insist on a first lien position, a guarantee of up to the 90 percent level allowed by statute is certainly warranted for loans on first-of-a-kind technologies. If the Agency does not increase the guarantee level to 90 percent, some of the commenters recommend that the lien positions of the Agency and the holders of unguaranteed debt have equal priority.

Response: The Agency is allowing a guarantee of 90 percent for guaranteed loans of $125 million or less under certain conditions. To clarify for the commenter, the Agency requires that the lender acquire the first lien position on the collateral. The Agency does not file a lien against the collateral. The Agency notes that the guaranteed and the unguaranteed portions of the loan have the same lien priority.

Comment: One commenter states that a working capital lender is vital to the success of any biorefinery, and that, under commercial lending practices for project finance transactions, a working capital lender will require a first lien on raw goods, works in progress and finished goods inventory, as well as proceeds thereof (in the form of accounts receivable), including any insurance proceeds. Therefore, the commenter recommends modifying § 4279.202(i) to provide that a working capital lender may have a first lien on raw goods, work in process and finished goods inventory, as well as proceeds thereof (in the form of account receivable), including any insurance proceeds.

Response: The Agency is agreeable to allowing working capital loans, not guaranteed by the Agency, which are secured by the inventory and accounts receivable. The Agency may consider a subordinate lien position on inventory and accounts receivable for working capital loans under certain conditions (see § 4279.202(i)(1)). The Agency disagrees with the comment regarding inclusion of insurance proceeds. The borrower should be able to obtain a working capital loan without the inclusion of insurance proceeds.

Comment: One commenter believes that the requirement of § 4279.202(i) for a first lien on all collateral is too inflexible. The commenter recommends that a section 9003 loan be fully secured, and any improvements or property financed with section 9003 funds be pledged under a first lien. Beyond this, the collateral should be negotiable. The commenter believes it may be necessary to allow other lenders to have a first lien on assets they finance, and this is certainly the case with any lender providing working capital.

Response: The Agency partially agrees with the commenter. The Agency is agreeable to allowing working capital loans, not guaranteed by the Agency, which are secured by the inventory and accounts receivable. The Agency may consider a subordinate lien position on inventory and accounts receivable for working capital loans under certain conditions. However, the Agency disagrees with rest of the comment due to the risk to the government.

Comment: Two commenters state that the proposed rule appears to conflict with the 9003 NOFA in that it would put the unguaranteed lenders in a junior position to the Agency, whereas the 9003 NOFA states: "The entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan."

Response: There is no conflict. Within the rule at § 4279.224, a cross reference is made to the provisions found in §§ 4279.107 through 4279.187, which includes § 4279.131(e) stating "the entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan." As noted above for clarification purposes, the Agency requires that the lender acquire the first lien position on the collateral. The Agency does not file a lien against the collateral.

Comment: One commenter states that the Agency should clarify that the guaranteed and unguaranteed lenders will rank pari passu with respect to the first lien on project collateral as specified in the 2008 Notice of Funding Announcement (NOFA). The commenter believes the Agency added the first lien requirement in the proposed rule due to the size of the guaranteed loans under this program. This requirement puts lenders in a secondary position behind the Federal government. The lender's position is protected by the loan guarantee—but only up to the percentage amount of the guarantee. In case of default on a $125 to $250 million loan, the guarantee would protect only 60 percent of the lender's position, according to the proposed rule's current structure.

The commenter recommends that, if the Agency includes the first lien position as specified in the proposed rulemaking in the final rule, a guarantee of up to the 90 percent level, as allowed by statute, be provided for loan guarantees on first-of-a-kind technologies.

Response: As noted above for clarification purposes, the Agency requires that the lender acquire the first lien position on the collateral. The Agency does not file a lien against the collateral. As previously referenced, the entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan.

Comment: One commenter states that the requirement for the guarantee to be secured by a first lien on all collateral to run the project in the event of a borrower's default, along with a bank lender being required to hold 50 percent of the unguaranteed portion, has the effect of being an unguaranteed loan equal to 10 percent of the project loan for the bank. The commenter recommends some form of lien with pari passu repayment formula in order to provide sufficient incentive for lenders to participate.

Response: Within the rule at § 4279.224, a cross reference is made to the provisions found in §§ 4279.107 through 4279.187, which includes § 4279.131(e) stating "the entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan." Therefore, the guaranteed and unguaranteed portions of the loan enjoy the same lien position.

Comment: One commenter states that the proposal requiring that the guarantee be secured by a first lien on all collateral is unreasonable from a commercial lending standpoint. In order to comply with basic asset based lending guidelines and prudent commercial lending guidelines, the lender must have a first lien position on all assets of the borrower. The commenter further states that, because the terms of the guarantee documentation will address when the guarantee comes into play, which would be after an uncured event of default by the borrower under the lender's loan documents, an assignment by the lender to the Agency of its lien position, should the lender pursue the guarantee, is a standard and customary term.

Response: As noted above, the Agency requires that the lender acquire the first lien position on the collateral. The Agency does not file a lien against the collateral. As previously referenced, the entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan.

Comment: Several commenters state that the Agency should not hold the first lien on all collateral necessary to run the project in the event of a borrower's default. Lenders would, therefore, be subordinate to the government. In the event of default, the lender's position is only protected up to the percentage of the B&I guaranteed. The commenters also state that this also contradicts the current B&I guaranteed loan requirements, which have worked well for the Agency in the past.

Response: As noted above, the Agency requires that the lender acquire the first lien position on the collateral. The Agency does not file a lien against the collateral. As previously referenced, the entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan.

Comment: One commenter states that authorizing guarantees of a revolving credit facility for future working capital and allowing the replacement of the non-guaranteed portion of the loan with equity would provide cellulosic biofuel companies necessary flexibility to better finance commercial projects.

Response: The Agency does not agree with authorizing guarantees of a revolving credit facility for future working capital. Working capital is an eligible purpose for the guaranteed loan but, at this time, the Agency feels that lenders can administer revolving credit facilities more efficiently. Therefore, the Agency is agreeable to allowing working capital loans, not guaranteed by the Agency, which are secured by the inventory and accounts receivable. The Agency also does not agree with allowing the replacement of the non-guaranteed portion of the loan with equity. The non-guaranteed portion of the loan cannot be converted because the Agency wants the lender to maintain a lending interest in the loan.

Sale or Assignment of Guaranteed Loan (§ 4279.202(j))

Comment: Based upon the state of the commercial banking industry, one commenter recommends applying the language regarding the transferability of the loan to any accredited investor to both the guaranteed and unguaranteed portions of the loan.

Response: To allow the transfer of the unguaranteed portion of the loan beyond the minimum retention requirement would minimize the lender's financial interest in the project. Therefore the Agency disagrees with the recommendation. The Agency notes that the unguaranteed portion of the loan in excess of the minimum retention requirement may be sold to third party holders.

Comment: One commenter states that the Agency should explain why it will not guarantee a loan funded with the net proceeds of a bond described in section 142(a) of the Internal Revenue Code of 1986.

Another commenter believes what the Agency intended to say in the second part of § 4279.202(j) is that the guaranteed portion of the loan may not be funded with the net proceeds of bonds described in section 142(a) of the Internal Revenue Code of 1986, as a result of the prohibition thereof contained in Section 149(b). The commenter suggests revising § 4279.202(j) to read as follows:

"In addition to complying with the provisions of § 4279.75, and subject to the limitation imposed on the original lender by § 4279.202(k), the guaranteed and unguaranteed portions of the loan shall be fully transferable to any accredited investor and the Agency may not guarantee any portion of the loan funded with the net proceeds of the bond described in section 142(a) of the Internal Revenue Code of 1986. The unguaranteed portion of the loan may be funded with the net proceeds of a bond described in section 142(a) of the Internal Revenue Code of 1986."

A third commenter states that borrowers should be permitted to access the tax-exempt capital markets for the unguaranteed portion of debt. Tax-exempt project debt appears permitted, but should be explicitly allowed for the unguaranteed portion of the debt. Projects should be afforded every opportunity to lower interest costs, especially by way of Federal, state and local programs designed to meet regional and national priorities such as the Recovery Zone bond programs. The commenter recommends that borrowers should be permitted in all cases to access the tax exempt capital markets, including when necessary through state authority issuance vehicles.

Response: The Agency disagrees with the request to modify proposed § 4279.202(j). To support consistency between this program and the B&I guaranteed loan program and to eliminate any duplicative Federal assistance that would be provided by the subsidy for the loan note guarantee and the tax exemption, the Agency has determined that it would be inappropriate to distinguish between guaranteed and unguaranteed portions of the loan when applying this provision.

Minimum Retention (§ 4279.202(k))

Comment: Seven commenters state that the proposed level of unguaranteed loan retention by the original lender is not possible given today's market conditions. The commenters state that banks remain extremely cautious to make loans to first-of-a-kind technologies. One commenter states that the risks associated with holding a large unguaranteed portion of a loan is akin to making an equity investment in the enterprise being financed, something most lenders are unable to do because of regulatory constraints, or are unwilling to do because of the high degree of risk involved. These commenters, therefore, recommend eliminating this provision.

Six commenters recommend using the same requirement for minimum retention that is allowed for the guaranteed Business and Industry loan guarantee program where the lender is to retain 5 percent of the loan amount.

One commenter believes, for a multitude of reasons, that this section of the proposed rule is unworkable and relies upon assumptions that are incorrect. The commenter disagrees with the size of the minimum retention requirement and the assumption on which it was based for the following reasons:

(1) The Agency did not do adequate diligence or inquiry of the commercial banking industry when it proposed the 50 percent minimum retention requirement in the Section 9003 NOFA as is evidenced by its recent outreach to commercial banks to determine why they have been unwilling to act as a sponsor/lender of a section 9003 program guaranteed application;

(2) the Agency incorrectly assumed that a commercial bank originating a loan guarantee under the section 9003 program would be less interested in or attentive to the servicing of a loan where the potential loss to the lender in a liquidation scenario would be $12,500,000 (assuming application of the B&I Program's 5 percent minimum retention requirement) versus $50,000,000 (assuming application of the section 9003 program's 50 percent of the unguaranteed portion minimum retention requirement). The commenter asserts that there is not a commercial bank in the U.S. that would devote less attention to a $12,500,000 potential loss than a $50,000,000 potential loss, as either loss is material;

(3) the Agency did not do adequate diligence in setting the minimum retention requirement in the Section 9003 NOFA, because, if it had, it would have understood that for a $250,000,000 loan guarantee, there are likely less than 5 commercial banks in the U.S. that have the capacity to originate such a loan where they were required to retain 50 percent of the unguaranteed portion thereof; and

(4) the Agency failed to do appropriate diligence when it issued the Section 9003 NOFA because there are no commercial banks in the U.S. that are either willing or able to approve through their respective loan committees a $50,000,000 unguaranteed loan for a nonrecourse financing of a first-of-a-kind technology which loan cannot be syndicated or participated.

The commenter suggests that the language should incorporate either "syndication" or "participation," such that a lender can syndicate and/or participate a portion of the lender's risk position. The commenter also suggests that the language which provides that lenders may syndicate a portion of its risk position to other eligible lenders be revised to provide syndication and/or participation to any accredited investor in order to make § 4297.202(k) consistent with § 4279.202(j).

The commenter states that, in the context of the Bond Loan Model, a bond trustee holds title to and is the owner of 100 percent of the Bond Loan Note and the Collateral Documents securing the guaranteed and unguaranteed portions of the loan for the entire term of the loan. Additionally, a corporate trustee is the agent of and fiduciary for the bondholders, and the commenter states that the minimum retention requirements of § 4279.202(k) should be deemed satisfied as a direct result of the corporate trustee reporting to and being controlled by the underlying bondholders in a way which permits and requires bondholders, subject to Agency retained rights, to exercise their rights as at-risk investors through the trustee. The commenter states that the notion that institutional bondholders working together with a corporate trustee are somehow less accountable to the Agency than an AgBank or other lending institution is simply unfounded. As evidenced by the one trillion dollar annual bond market, which utilizes the Bond Loan Model, there is a demonstrated confidence in and success rate for project finance utilizing the Bond Loan Model. Consequently, the commenter requests that the Agency deem the minimum retention requirement of the section 9003 program to be satisfied by a trustee acting on behalf of the bondholders when a financing is accomplished utilizing the Bond Loan Model.

Based on the above, the commenter recommends revising § 4279.202(k) to read as follows: "The provisions of § 4279.77 apply to this subpart. Lenders may syndicate and/or participate a portion of their risk position to other eligible lenders or accredited investors provided that at no time during the life of the guarantee may the original lender hold an amount of the loan less than the amount required by § 4279.77. The requirements of this section and § 4279.77 will always be deemed satisfied by a trustee where bonds are used to fund a guaranteed loan."

Response: The Agency recognizes the concerns raised by the commenters regarding the impact of a minimum retention requirement. Based on the Agency's lengthy experience, it believes that it is necessary for participating lenders to always retain a portion of the risk to ensure that the loans are properly serviced. The Agency also recognizes that the minimum retention requirement in the proposed rule did not strike a proper balance with respect to these concerns. As a result, the Agency has revised the minimum retention requirement to be similar to that found in the Business and Industry Guaranteed Loan program. The Agency notes that, given the size and complexity of projects under the Biorefinery Assistance Program, the minimum retention was increased from 5 percent to 7.5 percent.

As previously stated, it is the Agency's position that its current authority does not permit a trustee, whether that trustee is an eligible lender or not, to just hold a beneficial interest for other lenders.

Guarantee Fee (§ 4279.226(a))

Fee Structure

Comment: Several commenters believe that the current Agency fee structure is onerous for larger projects, and should be set at one flat fee as in the other Agency loan guarantee programs. These fees need to be affordable for these types of projects. The Agency should not receive a fee based on the amount of equity that is contributed as long as the loan follows the minimum guidelines. The fees should be capped at the same amount, and because these are large projects, it should be no more than 0.5 percent. Having a fee in the 2 percent range adds tremendous pressure on debt financing that is already higher than usual because of the risk profile. Annual renewal fees should also be capped at 0.25 percent.

Response: The Agency disagrees with commenter. The Agency has structured the fees to address the risk and cost to the government.

Comment: One commenter recommends that the guarantee fee set forth in § 4279.226 be left subject to change in each **Federal Register** notice that announces the availability of funds. The actual subsidy rate cost of running this program may change as more information about the risks associated with it become clear, and because the projects that will be submitted are already controlled by a NOFA process, the Agency should retain the right to set a new fee structure with each NOFA. The commenter believes the Agency should not lock itself in to fees in the regulation.

Another commenter believes the fee structure is reasonable in terms of requiring lower fees for lower dollar projects. The commenter suggested periodically reviewing whether the two percent fee for larger projects is warranted to ascertain its appropriateness as projects are funded.

Response: The Agency generally agrees with commenters. The intent of establishing a specific guarantee fee in the rule is to provide a stated fee in the rule. However, the Agency does acknowledge there may be a time when a different guarantee fee may be required. Therefore, the Agency has revised the rule to allow it the option of adjusting the guarantee fee through the publication of a **Federal Register** notice.

Borrower Eligibility (§ 4279.227)

Comment: One commenter states that the distinction between the proposed rule and the May 6, 2010 NOFA is the addition of the term "persons" and the deletion of the term "individuals." The proposed rule does not define the term "persons"; however, the Section 9003 NOFA and the May 6, 2010 NOFA define "person" to mean "Any individual, corporation, company." With the term "person" now defined to include "corporations" that are "citizens," then a "borrower" for purposes of the section 9003 program seemingly can be owned by corporate or other types of entity shareholders at the first ownership level above the borrower, as corporations or other entities incorporated, organized or otherwise established in the U.S. have traditionally been held by our laws and courts to be U.S. citizens. This interpretation would then require no further "look-up" the ownership chain, as U.S. citizenship will have been legally established at the first ownership level above the borrower. However, the commenter states that in the May 6, 2010 NOFA the Agency unnecessarily goes a step further (this further step is also contained in the proposed rule) by adding a sentence stating: "When an entity owns an interest in the borrower, its citizenship will be determined by the citizenship of the individuals who own an interest in the entity or any sub-entity based on their ownership interest."

According to the commenter, notwithstanding that the term "person" includes a corporation that is a U.S. citizen, the Agency will continue to look-up the chain of ownership to determine the ultimate individual owners of such entity and the total percentage U.S. citizenship among them, ignoring that the corporate entity is a U.S. citizen. The commenter states that the Agency seemingly went out of its way to complicate and confuse the otherwise clear meaning of the term "person" to require that a further test of U.S. ownership be undertaken by adding a seemingly endless upstream ownership analysis notwithstanding that these entities may be legally incorporated, organized or otherwise established entities of the U.S., which are legitimate U.S. citizens under long-established laws.

The commenter states that this U.S. ownership restriction has no bearing on the creditworthiness of any borrower under the section 9003 program. Rather, in the current adverse economic climate of diminishing numbers of available investors, and in light of President Obama's expressly stated dual intentions to (1) create 5 million new jobs from the renewable energy industries and (2) double the percentage of renewable energy in each of the three years between January 1, 2009 and January 1, 2012, these restrictions fly in the face of the Administration's clearly stated goals.

The commenter, therefore, recommends that § 4279.227(a)(2) either be deleted or revised to read as follows: (ii) 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." The commenter noted that comparable Department of Energy and Department of the Treasury loan guarantee and/or grant programs do not contain similar citizenship restrictions.

Response: As noted in a previous response, the Agency has reconsidered the citizenship requirement and has decided to eliminate this requirement from the final rule. Because we have removed this requirement, no action is required to address the commenter's concern.

Comment: One commenter states that the proposed program does not include 501(c)(3) nonprofit organizations as an eligible applicant for the program and believes nonprofit organizations, because of their role in communities as being there for the good of all, can help showcase the biorefinery technology, support small local businesses through their purchasing power, and even encourage the startup of privately owned biorefineries.

Response: Nonprofits can apply provided they meet the eligibility requirements.

Revenue From Sale of Advanced Biofuel Requirement (§ 4279.228(d))

Comment: One commenter states that there are numerous scenarios whereby the only way to achieve financing for a new renewable fuel product is to make it and sell it into an alternative market because this approach achieves the lower risk level required by the investors and lenders. The commenter states that one example would be to convert biomass into methanol. Methanol is a promising and emerging fuel for a large class of fuel cells than can be used for stationary electricity generation, or as a means of recharging a battery in an electric car when a plug is not easily accessible. Or, for electric delivery vehicles that stop regularly, such fuel cells would be providing near-real-time battery recharge. This would not be a typical gasoline replacement fuel scenario but achieves the same goals. While that market is emerging, the production volume that would make the biorefinery sufficiently efficient and therefore economically viable could likely exceed the near term need as fuel. In that case, the financing group could require that the biorefinery sell the methanol to biodiesel plants or as a replacement denaturant for ethanol production. Very few of these uses looks like a standard "fuel" business yet in all cases meets the intended overarching goals of the program which is the reduction of the imports of foreign energy (especially given that the U.S. imports 100 percent of the methanol used in the U.S.). The commenter states that, as a result, this criterion should be dropped in its entirety and replaced with criteria that cover whether the product proposed replaces an existing fuel or energy intensive product and whether the replacement substitutes for an equivalent imported energy product. Examples of products where substitutes would meet this requirement are: oil (and refined products like gasoline, jet fuel, diesel), methanol, anhydrous ammonia (or other nitrogen derivatives such as urea), LPG/LNG. Any product that replaces any of these energy or energy intensive products should be equally allowed.

Response: The Agency allows the sale of biobased products and byproducts. However, the project must demonstrate that the majority of the production is advanced biofuels, which corresponds with the intent of the authorizing legislation. Unless otherwise approved by the Agency, and determined to be in the best financial interest of the government, the advanced biofuel must be sold as a biofuel.

Comment: One commenter states that, although the purpose and intent of this funding is for alternate fuel feedstock, the nature of algae as a feedstock puts producers in an unusual position: Algae produces many different biomass co-products and biocrude oil, both of which have marketability, whereas most feedstock sources result in one or two products. The commenter states that, while the 70 percent restriction is certainly appropriate for non-algae producers, it reduces the ability of algae producers to develop additional revenues from which it can pay down its loan (and consequently reduce the amount of funds being guaranteed). The commenter proposes that algae producers be excluded from the requirement that 70 percent of its revenue must be from the sale of advanced biofuels. If that is not possible, a suitable compromise would be that at least 50 percent of what algae producers produce be dedicated to the sale of advanced biofuels and that the proceeds (gross vs. net could be determined based on percentage) of the sale of all co-products must be used to pay down the debt being guaranteed. The loan covenants and business plans would have to address the pricing differentials and percentage ratios in entering into the required off-take contracts.

The commenter believes that this solution more specifically mirrors the original intent, as stated in the definition of 'biorefinery' in the 2008 Farm Bill.

Response: The Agency disagrees with the commenter to develop a separate threshold for algae producers. As noted above, the Agency has removed revenue as the standard of measurement, and the rule has been modified to require that a majority of the biorefinery production is advanced biofuels. When the biobased product and any byproduct have an established BTU content from a recognized Federal source, majority biofuel production will be based on BTU content of the advanced biofuel, biobased product, and any byproduct. When the biobased product or any byproduct does not have an established BTU content, majority biofuel production will be based on output volume, using parameters announced by the Agency in periodic Notices in the **Federal Register**, of the advanced biofuel, biobased product, and any byproduct.

Cash Equity Requirement (§ 4279.228(e))

Equity Sources

Comment: Several commenters recommend allowing all sources of equity available to the project when calculating the equity percentage for the project. These projects have large equity requirements, and should be allowed to utilize advanced carbon credit sales, subordinated debt, preferred stock or loans from investor-owners, New Markets Tax Credits, sale of accelerated depreciation, and other means of securing the large amount of capital that is needed to provide the equity component. There is currently a bill in Congress to provide the 30 percent grant by Treasury for biofuels production in lieu of the ITC/PTC credits. As a part of implementing that program, the requirements for application and approval of that program need to be changed to allow Treasury to supply a letter of pre-approval for the project that can be used as a financeable instrument in this process. Currently, this grant is applied for and paid 60 days after the project is commissioned. To be able to properly use this incentive, it is imperative that the legislation and approval process be changed to provide a financeable instrument that can be recognized as collateral by the financing community at the beginning of the project.

Response: The Agency will consider a wide variety of assets as equity. However, in order to control risk, an asset used as equity, for the purpose of this regulation, must be available at the time of closing.

Comment: One commenter states that the 20 percent proposed minimum cash equity requirement is acceptable and appropriate. The commenter states that, given the size of the projects, there are no investors that are truly able to invest in such projects with the expectation of losing funds. Twenty percent of $100 million project ($20 million) is a real and meaningful commitment by an investor or investor group. A higher amount of investment does not actually achieve any higher level of commitment since the amount is already so high. These amounts are also too large for a venture investor given that the project returns do not meet their high return requirements (usually 40 percent) and so these applications will only see project equity investors whose $20 million represents a very real commitment. Hence, by requiring only 20 percent equity and not offering more points for a larger percentage, the Agency can rest assured that sufficient project due diligence will have been performed. When calculating total equity in the project, technology contributions and in-kind services should be counted for any amount above the 20 percent minimum cash equity requirement.

Response: The Agency does score projects based on the level of financial participation by the borrower. In addition, the Agency will consider, for existing biorefineries only, the value of intellectual property based on the value identified on its audited financial statement, prepared in accordance with GAAP. Given the potential size and complexity of these projects, the risks inherent in projects attempting to commercialize new and emerging technologies make in-kind contributions unsuitable for inclusion in the equity calculation.

Comment: One commenter states that, as with cost-sharing in the grants context, consideration should be given to a borrower's contributions of land, personal property, intellectual property, and other assets. The Agency could use the type of "equity" composing the 20 percent (or the borrower's contribution in general) as part of the scoring criteria, but contributions of assets other than cash should not operate to disqualify a project for failing to meet eligibility criteria.

Two other commenters recommend considering existing equipment, building, and land at appraisal value when calculating the equity requirements of the borrower.

Response: The Agency agrees with the commenters to the extent that, for existing biorefineries, qualified intellectual property, equipment, and real property can be considered in meeting the equity requirement, as described in § 4279.234(c)(1). The Agency will consider the value of qualified intellectual property based on the value identified on its audited financial statement, prepared in accordance with GAAP. The Agency notes that a loan guaranteed under the program may only finance 80 percent of the eligible project costs. The borrower needs to provide the remaining 20 percent from other non-Federal sources to complete the project.

Comment: Two commenters state that the requirement for a 20 percent cash infusion will impose a significant burden that may render many otherwise well-qualified projects unable to secure financing. Any applicant that brings a project to the stage where it is able to achieve financial closing will, by virtue of the selection criteria, have incurred significant pre-closing costs that will not take the form of real property that can be collateralized. This is especially likely to be the case with projects that make use of new technology or new feedstock, endeavors that are especially likely to require up-front commitments of capital. The commenters state that it would be appropriate, in the scoring of applications, to grant extra points to those applicants that commit to provide cash equity at closing, thereby enhancing the competitive position of their proposals; however, the posting of this equity commitment should not be an absolute threshold requirement for participation, as this would have the effect of removing many otherwise-worthy projects from consideration.

The commenters recommend eliminating the requirement for 20 percent cash equity and allowing applicants to include preconstruction costs as contributed equity.

One commenter believes that the requirement that the project must have cash equity of not less than 20 percent of eligible project costs should be changed to allow for non-cash equity, and that "eligible project costs" should not include goodwill or non-proven or non-benchmarked technologies. The commenter states that the latter could be included as a portion of the required equity, but that they believe that the demise of the dotcom industry lay in the fact that values were attributed to unproven ideas and that they are not interested in allowing history to repeat itself, especially with something as important as energy security.

Response: The Agency disagrees with removing the 20 percent cash equity requirement. The Agency may consider, for existing biorefineries only, qualified intellectual property, equipment, and real property in meeting the equity requirement, as described in § 4279.234(c)(1). The Agency notes that, by statute, a loan guaranteed under the program may only finance 80 percent of the eligible project costs. The borrower needs to provide the remaining 20 percent from other non-Federal sources to complete the project.

Guaranteed Loan Funding (§ 4279.229)

Comment: One commenter recommends that borrowers be permitted in all cases to access the tax exempt capital markets, including when necessary through state authority issuance vehicles. The commenter states that tax-exempt project debt appears permitted, but should be explicitly allowed for both the guaranteed and unguaranteed portions. According to the commenter, projects should be afforded every opportunity to lower interest costs, especially by way of Federal, state and local programs designed to meet regional and national priorities such as the Gulf Opportunity Zone bond programs.

Response: Tax-exempt debt cannot be part of the guaranteed loan, which includes the unguaranteed portion of the loan. To support consistency between this program and the B&I guaranteed loan program and to eliminate any duplicative Federal assistance, the Agency has determined that it would be inappropriate to distinguish between guaranteed and unguaranteed portions of the loan when applying this provision.

Guaranteed Loan Funding (§ 4279.229(a))

Comment: One commenter recommends not limiting the availability of funds as set forth in § 4279.229(a). Once a NOFA is issued, all funds should be available rather than have half of the funds reserved. If the idea is to get viable advanced biorefinery projects financed, the commenter believes they should be financed as they are submitted rather than potentially be required to wait for a second funding period.

Response: The authorizing legislation states: "Of the funds made available for loan guarantees for a fiscal year under subsection (h), 50 percent of the funds shall be reserved for obligation during the second half of the fiscal year." Therefore, the Agency cannot accommodate the commenter's request.

Comment: One commenter points out that the program has statutory minimum funding requirements and an ability to add discretionary funds and, in order to maximize the benefits of the program, recommends that the Agency authorize the maximum funding (statutory and discretionary) in each fiscal year.

Response: The Agency points out that it is Congress, not the Agency, who is authorized by statute to provide discretionary program funds. It is the Agency's intent to maximize funding on this program based on Congress's appropriations.

Comment: One commenter recommends that the Agency provide a Web page for the program that shows a running tally of funds expended and funds remaining available on any given day. This should be represented as the actual dollars authorized (and remaining) and the total amount of loan guarantee these dollars represent as authorized (and remaining) because these numbers are different. The available loan guarantee amount is the one that is of most relevance and interest for proposed project sponsors and lenders.

Response: Projects funded are announced by the Agency on its Web site. At this time, the Agency does not have the administrative resources to assume the burden associated with maintaining and verifying the accuracy associated with the suggested Web page. As this request would not require a rule change, none has been made.

Guaranteed Loan Funding (§ 4279.229(b))

Comment: Six commenters recommend offering guarantees of 90 percent of the total loan amount. Each commenter points to the authorizing legislation, which authorizes the Agency to offer loan guarantees up to 90 percent. Concerns identified by the commenters include:

1. The level of guarantees in the proposed rule may be appropriate for existing, commercially available technologies. But they do not provide sufficient risk reduction for new, emerging technologies. That is why the authors of the statute specified in Section 9003, paragraph (e)(2)(B)(iii) that "The Secretary may guarantee up to 90 percent of the principal and interest due on a loan guaranteed under [this] subsection."

2. Low guarantee amounts, such as those proposed by the Agency, limit the number of lenders who will be willing to assume the risks associated with the high capital costs of building and operating a facility that employs a new, first-of-a-kind technology that has not been commercially proven. This makes capital harder to get, and means fewer projects will be funded. As a result, new technologies will be deployed much more slowly. The public interest is not served by this approach.

3. Guarantee amounts less than 100 percent create an additional burden for first-of-a-kind technology projects by requiring the nearly impossible task of placing unguaranteed debt in the market. While commenters believe that funding these unguaranteed portions of debt might be possible in the taxable and tax exempt bond markets, it is not at all clear that the very tight credit market will in fact be receptive to unproven technology risk. There is, therefore, a real risk that projects could succeed in obtaining an Agency loan guarantee, yet end up failing to fund the unguaranteed debt in any market and fail to secure financing.

4. Without a 90 percent guarantee, it is unlikely that first-of-a-kind technology projects will secure financing.

5. At a 90 percent level, the amount of unguaranteed debt could be more easily placed in the market and should keep lenders with some "skin" in the deal. One commenter points out that the Senate version of this program provided for a 100 percent guarantee. The guarantee was reduced to 90 percent in conference committee due to pressure from House negotiators who felt that not only project developers, but banks as well, should have "some skin in the game."

6. The decision to limit the guaranteed percentage to 60 to 80 percent with a maximum of 60 percent for loans greater than $125 million leaves a significant amount of unguaranteed debt that banks are not willing to accept.

One commenter suggests as an alternative, loan guarantee percentages could be adjusted higher depending upon the specific circumstances of a project. For example, a maximum guarantee could be offered under conditions when a high ratio of equity investment is secured, where the use of proven technology removes technology risk, and where there is a demonstrated ability to accelerate return on investment.

Two commenters believe that with the oil spill in the Gulf, prices at the pump creeping up in preparation for the summer travel season, two wars in the Middle East, and a U.S. Department of Energy loan guarantee program that has to date proven unworkable for financing biorefineries, the U.S. can no longer delay efforts to commercialize promising technologies that can lessen our impact on the environment and increase our energy security.

One commenter recommends that the loan guarantee percentage be a maximum of 90 percent per the statute. The commenter states that they make this recommendation based on their experience seeking debt financing for their project. The commenter states that they have been told by most lenders that 80 percent is insufficient, given that the lender must hold no less than 50 percent of the unguaranteed portion of the loan. At an 80 percent guarantee, that represents 10 percent of the total loan. Unlike venture capital, banks are in the business of lending without the expectation of a loss of capital. When combined with the Agency first lien proposal, the guarantee is not perceived as much of a guarantee by the bank holding the unguaranteed portion. Given the perceived technology risk, the bank perceives that they are taking a 10 percent capital risk in such a deal. As a result, the program requirements are not in alignment with the banking industry requirements for lending. In addition, the maximum percentage should not decrease with the size of the loan. As it has been implemented in the NOFAs, projects larger than a certain size, will only achieve a lower percentage guarantee. Given the conflicts noted above with standard banking criteria, these larger projects cannot be financed. Too much would be at risk for the bank and hence they cannot do the deal. At the same time, equity investors cannot make up the difference because doing so will increase the require IRR to a level that is not achievable. Hence, the guarantee percent should be 90 percent no matter whether it is a $40 million loan or a $250 million loan.

Response: The Agency has revised the rule to allow a guarantee of 90 percent for guaranteed loans of $125 million or less. The rule also outlines the criteria the project must meet to obtain a 90 percent guarantee, as well as the guarantee fee for loans obtaining a 90 percent guarantee. In the Agency experience there is greater loss exposure with larger loans; therefore, if the loan does not meet the requirement to issue a 90 percent guarantee, the percent of guarantee will be based on loan size. In addition, with regard to this comment, the Agency continues to support consistency between this program and the Business and Industry guaranteed loan program.

Comment: Several commenters state that the guarantee fees should be consistent at 90 percent, as set by the 2008 Farm Bill. There is no provision for the lesser guarantees. To raise the 20 percent or more equity that is required and to find lending institutions to fund the remaining debt, it is imperative that the guarantee be raised to the 90 percent level that was legislated by Congress. Recent success with the additional B&I Loan Guarantee appropriation in the ARRA (which had up to a 90 percent guarantee, and reduced or no fee structure) resulted in the program being totally subscribed ahead of the September 30, 2010 deadline for use of these funds. This shows that the lending community will utilize these types of programs with this higher level of credit enhancement.

Response: The Agency has revised the rule to allow a guarantee of 90 percent for guaranteed loans of $125 million or less. The rule also outlines the criteria the project must meet to obtain a 90 percent guarantee, as well as the guarantee fee for loans obtaining a 90 percent guarantee. In the Agency experience there is greater loss exposure with larger loans; therefore, if the loan does not meet the requirement to issue a 90 percent guarantee, the percent of guarantee will be based on loan size. In addition, with regard to this comment, the Agency continues to support consistency between this program and the Business and Industry guaranteed loan program.

Guaranteed Loan Funding (§ 4279.229(c))

Comment: One commenter states that, rather than define a maximum amount of $250 million to a given borrower under the program in any given fiscal year, it should only be an initial threshold. In the event that there are budget funds remaining after all other eligible projects have been reviewed, and a borrower has already borrowed $250 million, that borrower should be allowed to borrow additional guaranteed funds in that same fiscal year. This flexibility will allow equal access to the program and yet allow the best borrowers who have more than one excellent project to participate at a higher level. This will also allow the program to achieve its maximum potential in the shortest possible time. Under this same provision, the commenter recommends that more than one similar project be eligible for the extended funds. The commenter states that, for example, their core technology is based on oxygen gasification of biomass to produce syngas. There are three fuels that their analysis indicates are viable in the marketplace: anhydrous ammonia, methanol and dimethyl ether. Although they would each leverage the same core gasification technology, they would each address different fuel market opportunities and each should be allowed simultaneously under the program until they have been proven at commercial scale.

Response: During these early program years, the Agency believes that it is prudent to diversify its risk, to allow more entities to participate, to assist a more diverse group of applicants, and to provide assistance to geographically separate areas. To this end, the Agency prefers to carry over funds, if available, to the next fiscal year rather than to give an already funded entity more money in that fiscal year. Therefore, the Agency has not revised the rule in response to this comment.

Guaranteed Loan Funding (§ 4279.229(d))

Comment: One commenter states that the proposed rule limits the guaranteed percentage to 60 percent for loans greater than $125 million, even though Congress authorized the Agency to provide guarantees of up to 90 percent for the entire loan amount. Given that commercial-scale cellulosic projects will exceed this $125 million threshold and because these are first-of-kind projects, limiting the guaranteed percentage to 60 percent creates a higher level of risk for many lenders, and could result in projects not being able to secure the non-guaranteed portion from the marketplace. This is compounded by additional restrictions on lenders discussed elsewhere. The commenter, therefore, urges the Agency to implement the program to the fullest extent authorized by law and allow a 90 percent guarantee on the full loan amount regardless of size.

One commenter states that section 9003 permits guarantees of up to 90 percent of the principal and interest, but noted that § 4279.229 provides for guarantees of a lower amount. The level of guarantees may be appropriate for existing, commercially available technologies; however, these levels fall significantly short of providing sufficient risk reduction for new, emerging technologies, and will not incentivize private institutions to lend. Low guarantee amounts limit the number of lenders who will be willing to assume the risks of capital-intensive, first-of-their-kind projects. As a result, entire fledgling industries may disappear and technologies will be deployed slowly and perhaps not at all.

The commenter states that the rule should provide for the full 90 percent guarantee for the principal and interest up to $250 million and, at a minimum, should provide for a 90 percent guarantee of up to $125 million and 80 percent guarantee of principal and interest up to $250 million. The commenter states that it is important to note that the Senate version of the program provided for a 100 percent guarantee. The guarantee was reduced to 90 percent in conference due to House negotiators wanting project developers and lenders to have some "skin in the game." This is not objectionable, but the intent of Congress was clear that the guarantee of a significant amount of the loan is necessary for lenders to finance new technologies.

Two commenters state that insufficient or too low loan guarantee amounts create a major hurdle for first-of-kind technology projects by requiring the placement of significant amounts of unguaranteed debt in very challenging markets. The commenters believe that funding unguaranteed portions might be possible in the taxable and tax exempt bond markets, but that it is not at all clear that these volatile markets will in fact be receptive to unproven technology project risk. There is, therefore, a very real risk that projects that succeed in obtaining a partial Agency loan guarantee nevertheless end up failing to fund the unguaranteed portion in any market. Furthermore, the tiered structure of the guarantee levels is based solely on the size of the loan amount, without regard to overall capital structure. This can create a situation where the Agency guarantee is exposed to a disproportionate share of project risk relative to private capital. For example, on a $200 million project, with a capital structure of 75 percent debt and 25 percent equity, the Agency guarantee covers 60 percent of the loan amount, or $90 million. This reflects nearly double the investment of equity providers. However, if the guarantee percentage were based on the capital structure, with the guarantee percentage growing to 80 percent on projects that have a minimum of 40 percent equity, the Agency's exposure on the project is the same, at $90 million, and yet less than the exposure of equity providers.

The commenters recommend adhering to the statutory language to provide maximum flexibility for project finance and suggest adopting a tiered guarantee coverage based on the overall capital structure, for example:

Minimum equity percentage	USDA guarantee level (percent)
50	90
40	80
30	70
20	60

This structure would allow the Agency to more fully employ its statutory ability to covering up to 90 percent of a loan for strong projects with a significant equity, where private capital contributions are strong. For large projects, as most commercial scale advanced biorefinery projects will be, it still affords a sizeable unguaranteed exposure to lenders. This will ensure adequate risk sharing and, therefore, due diligence by private capital sources whether in the form of unguaranteed loans or equity participation.

One commenter states that the percentage of the loan guarantee should not be limited beyond what the statute sets forth by amount or otherwise. Lowering the percentage for larger loans would unfairly penalize new technology and feedstock that, by the nature of being new, require larger initial funding. In an already difficult lending environment, the proposed limitations would have a deleterious effect on economic-growth oriented innovation. The rural credit crunch has made it imperative for the Agency to guarantee a very high percentage of project costs or offer significant grants in conjunction with those guarantees. The construction of large biofuels facilities should be encouraged.

One commenter believes that the purpose of the loan guarantee program should be to bring alternative energy technologies on line as quickly as possible. Regrettably, current loan guarantee guidelines, while perhaps appropriate for existing, commercially available technologies, do not provide sufficient risk reduction where they are needed most—in the commercial demonstration of new advanced biofuel technologies. That is why the authors of the statute specified that the secretary may guarantee up to 90 percent of the principal and interest due on the a loan guaranteed under this subsection (Sec. 9003(e)(2)(B)). Therefore, the rule should be modified to allow for guarantees up to the maximum amount allowed by statute: 90 percent of all loans up to $250 million. If the Agency wishes to require a first lien position, then a guarantee of up to the 90 percent level is certainly warranted for loans intended to assist these emerging technologies at the pilot or commercial demonstration stage.

One commenter questions whether the guarantee amounts are too low based on size of the project (*e.g.* 70 percent on loans over $80 million; 60 percent over $125 million). Because these may be larger dollar projects, they may easily top $125 million in project costs. A 60 percent loan requirement seems too low to attract private funding given the unproven aspects of commercializing the new technologies. The commenter suggests that a portion of Agency funds should be reserved to provide a higher guarantee percentage on at least a couple of larger projects if projects cannot be funded with lower guarantee amounts.

One commenter states that the Agency should consider applying the 20 percent non-guaranteed requirement across the board, and not decrease the percentage guaranteed as the amount of the debt increases, as currently proposed in § 4279.229. By decreasing the amount guaranteed by the Agency as the principal amount of the loan increases (as currently proposed), borrowers will be less likely to find an eligible lender that is willing to retain the un-guaranteed debt. At the maximum level of $250,000,000 (resulting in a 60 percent guaranty), a lender would be required to retain at least $50,000,000 of the loan (50 percent of the non-guaranteed portion), assuming the lender is able to find participants for the other 50 percent of the non-guaranteed debt, and possibly the full $100,000,000 if no participants are found. The commenter states that the likelihood of finding eligible lenders that are willing to participate at these levels is extremely unlikely.

Response: The Agency has revised the rule to allow a guarantee of 90 percent for guaranteed loans of $125 million or less. The rule also outlines the criteria the project must meet to obtain a 90 percent guarantee, as well as the guarantee fee for loans obtaining a 90 percent guarantee. In the Agency experience there is greater loss exposure with larger loans; therefore, if the loan does not meet the requirement to issue a 90 percent guarantee, the percent of guarantee will be based on loan size. In addition, with regard to this comment, the Agency continues to support consistency between this program and the Business and Industry guaranteed loan program.

Eligible Project Costs (§ 4279.229(e))

Comment: One commenter recommends expanding the eligible loan purposes listed in § 4279.229(e) to allow debt refinancing on existing advanced biorefineries. Any assistance this program can bring to this emerging sector should be authorized, and debt refinancing on existing projects that may need workout assistance should not be excluded.

Response: While the program is meant for first-of-a-kind technology, the Agency agrees that there may be some refinancing projects that may be suitable for potential funding. Therefore, the Agency will consider refinancing as an eligible project purpose under two situations (see § 4279.228(g)). The first situation is where permanent financing is used to refinance interim construction financing of the proposed project only if the application for the guaranteed loan under this subpart was approved prior to closing the interim loan for the construction of the facility. The second situation is where refinancing is not more than 20 percent of the loan for which the Agency is guaranteeing and the purpose of the refinance is to enable the Agency to establish a first lien position with respect to pre-existing collateral subject to a pre-existing lien and the refinancing would be in the best financial interests of the Federal Government.

Guaranteed Loan Funding (§ 4279.229(e)(6))

Comment: One commenter recommends including the section 9003 guarantee fee as an eligible loan purpose, contrary to what is stated in § 4279.229(e)(6). The commenter believes there is no reason to exclude this purpose, which is offered in the B&I program and other Agency guaranteed programs.

Response: The Agency disagrees with commenter. As noted in previous responses, the Agency is focusing the program's limited funding resources on core project costs, such as construction costs, in order to fund more projects.

Interest Rates (§ 4279.231)

Comment: One commenter states that the rules on interest rates in § 4279.231 are too elaborate and complex. The commenter asks why not simply stick with the proven, viable regulations found in 7 CFR part 4279, subpart B? According to the commenter, consistency between guaranteed loan programs should be maintained for simplicity and consistency's sake unless something about a program absolutely requires deviation. The commenter believes there is no reason to believe advanced biorefinery interest rate protocols are different than other business loan pricing.

Response: The Agency has revised the interest rate provisions to more closely match the requirements in §§ 4279.125 and 4287.112, while providing lenders with some flexibility in establishing loan type and terms on the unguaranteed portion.

Interest Rates (§ 4279.231(a)(1))

Comment: One commenter recommends modifying the amortization requirements for commercial loans for first-of-kind technology to allow a 5- to 10-year non-amortizing period with annual amortization after the non-amortizing period.

Response: The Agency disagrees with the comment. In accordance with § 4279.126(b), interest only payments are allowed for up to three years. Interest only payments for up to ten years substantially increases Agency risk in the event of default by not reducing the principal balance and the commensurate decline in collateral value.

Interest Rates (§ 4279.231(a)(2))

Comment: Three commenters state that bank project financing is most efficiently provided on a floating rate basis during the construction period, given the difficulty of setting a fixed rate on future loan disbursements over a long construction period. Bond investors, however, typically require fixed rate issuance. The commenters recommend allowing the interest rates on the guaranteed and unguaranteed portions to be fixed or floating without requiring both portions to be on the same basis. An appropriate (and conventional) additional requirement to minimize interest rate exposure for a given project would be to the extent the project company borrows on a floating rate basis for all or a portion of the loans, it will enter into interest rate management agreements that reduce interest rate risk during the life of the project.

One commenter states that, under the Commercial Loan Model, it is likely that any portion of a loan purchased or funded by a commercial bank will bear interest at a variable rate such as the Prime Rate or the LIBOR, while any portion of the loan funded or purchased by an institutional investor will likely bear interest at a fixed rate. Accordingly, the commenter recommends amending § 4279.231 to provide as follows:

(2) The interest rate for both the guaranteed and unguaranteed portions of the loan must be the same type (*i.e.,* both fixed and variable). For this purpose, a variable interest rate loan may be converted to a fixed rate through the use of an interest rate hedge or cap so long as such hedge or cap is for maturity of the obligation.

Response: The Agency has revised the interest rate provisions to more closely match the requirements in §§ 4279.125 and 4287.112, while providing lenders with some flexibility in establishing loan type and terms on the unguaranteed portion. The rule identifies a cap by requiring that the rate on unguaranteed portion of the loan not exceed the rate on the guaranteed portion of the loan by more than 500 basis points.

Interest Rates (§ 4279.231(a)(3))

Comment: Several commenters recommend allowing the guaranteed and unguaranteed portions of the loan to have different interest rates, determined by the market and what is currently available to the borrower and the lender, not an arbitrary blended rate of 1 percent. There is tremendous risk associated with the unguaranteed portion of the loan, and the borrower must be allowed to work with the lender to provide an acceptable solution for all parties without artificial constraints by the section 9003 regulations, including the ability to further enhance the unguaranteed portion by the use of additional equity, letters of credit, personal or corporate guarantees, warrants, or any and all other credit enhancements.

Another commenter also recommends allowing different rates for the guaranteed versus unguaranteed portions of the loan and allowing the market to make the determination, given that the perceived risk for guaranteed versus unguaranteed risk is a purely market-based phenomenon, and changes from time to time. In the Loan Guarantee Conditional Commitment agreement, a maximum percentage could be specified and tolerated, with that percentage being determined by the maximum rate that still allows the project to be financially successful based on the submitted pro formas. The determination of this figure could be a requirement of the application process to be determined by the lender as part of the normal due diligence and sensitivity analysis.

Response: As noted in a previous response, the Agency has removed the proposed blended interest rate requirement from the rule. By changing the minimum retention requirement and by allowing for a 90 percent guarantee for guaranteed loans of $125 million or less, the Agency has eliminated the need for the other credit enhancements for the unguaranteed portion of the loan.

Comment: One commenter notes that, as proposed, interest rates charged must be in line with other similar guaranteed loans and blended rates on the entire guaranteed loan cannot exceed the rate on the guaranteed portion of the loan by more than 1 percent. The commenter questions these stipulations and believes the question of what rates to charge should be left to the marketplace, particularly given the lower guarantee percentage envisioned of 60 percent for larger loans, the high level of borrower equity required of 20 percent and the riskiness of commercializing unproven technologies. The Agency should remove interest rate requirements because the Agency will be able to review the interest rate levels and make a determination down the road if certain interest rates are too far out of line. Viable projects will have strong competition among lenders, which will keep interest rates as low as possible to cover the lender's costs and ensure adequate returns.

Response: The Agency has revised the interest rate provisions to more closely match the requirements in §§ 4279.125 and 4287.112, while providing lenders with some flexibility in establishing loan type and terms on the unguaranteed portion.

Comment: One commenter states that market-based interest rate differentials on the guaranteed and unguaranteed portions of debt will be significant, especially for the first-of-a-kind projects this program seeks to promote (this differential reflecting the difference between a AAA-rated, full faith and credit guarantee of the United States on one hand and sub-investment grade-rated technology project debt on the other). Any limitation on this spread will prevent the market from properly pricing the unguaranteed portion of the debt and may make placement impossible. The commenter believes the Agency should eliminate the proposed 1 percent limitation on the interest rate differential between the guaranteed debt and overall blended debt, since it fails to reflect the wide difference in credit risk to the holders of the guaranteed and unguaranteed portions.

One commenter notes that, over the 10-year period from May 2000 through May 2010, the spread between the AAA and B indices has been approximately 532 basis points and the spread between the AAA and BB indices has been approximately 335 basis points. The underlying credit rating of a biorefinery is reflective of the lack of investment grade off-takes or related purchase contracts that might otherwise elevate the underlying credit level of the biorefinery to investment grade (that is, BBB or greater). Consequently, the commenter suggests it would be a rare occurrence that the blended rate on the entire guaranteed loan would not exceed the rate on the guaranteed portion of the loan by more than 1 percent. The commenter states that without over-collateralizing the unguaranteed portion of the loan, it is not likely that the spread differential on the guaranteed and unguaranteed portions of the loan will ever be within 1 percent. Therefore, the commenter recommends deleting § 4279.231(a)(3).

Several other commenters recommend eliminating the current proposed 1 percent rate differential between guaranteed and non-guaranteed portions of the debt.

One commenter states that banks have told them that the provisions limiting the delta between the interest rate on the guaranteed portion of the loan and the weighted average interest rate of the full loan amount to 1 percent gives them significant pause in moving forward. Lenders would like to be able to set the interest rate for the non-guaranteed portion at market rates.

One commenter states that, because the guaranteed portion is secured by the United States, it is unrealistic to expect market rates for the guaranteed and non-guaranteed portions to be within 1 percent of each other.

One commenter states market-based interest rate differentials on the guaranteed and unguaranteed portions will be significant, reflecting the difference between a AAA-rated, full faith and credit guarantee of the United States on the one hand and sub-investment grade rated technology project debt on the other. (Current market differentials are estimated to be greater than 6.0 percent.)

One commenter states that the blended rate method also gives a disadvantage for the larger loans; since the percentage of guarantee is less, the difference in the interest rates between guarantee and unguaranteed must be less than for the smaller loans with a higher percentage of guarantee. The interest rate on the unguaranteed portion will be influenced by many factors; lenders will have to price it on a case by case basis; and it could vary substantially depending on the financial strength, type of technology, size of loan, type of lender, etc., so the government should let the market determine what that interest rate difference should be on the unguaranteed portion.

Response: The Agency has revised the interest rate provisions to more closely match the requirements in §§ 4279.125 and 4287.112, while providing lenders with some flexibility in establishing loan type and terms on the unguaranteed portion. The rule now states that the rate on unguaranteed portion of the loan shall not exceed the rate on the guaranteed portion of the loan by more than 500 basis points.

Terms of Loan (§ 4279.232(a))

Comment: One commenter recommends that the maximum term be the useful life of the project, not 20 years or 85 percent of its life as set forth in § 4279.232(a). The 9003 program should promote financing, and setting shorter terms does not do this. A lender may elect to use a more conservative term, but the program should at least be willing and able to go to the limit of the project's useful life.

Response: Due to the risk associated with these new and emerging technologies, the Agency disagrees with using useful life solely. The Agency considers 20 years an appropriate maximum term for loans under this program. However, the Agency has revised the rule to allow either 20 years or useful life of the project (removing the "85 percent" provision associated with useful life), whichever is less.

Credit Evaluation (Proposed § 4279.233)

Comment: Three commenters state that commodity projects, especially fuels facilities, are typically able to obtain low cost, highly efficient working capital loans from specialist lenders secured by inventory and receivables. Two of the commenters also note that, as proposed, a borrower is required to receive a first priority pledge of collateral including, potentially, working capital. These loan/debt facilities are usually entered into just prior to, or just after, commencement of operations. The proposed rule making does not contemplate the use of traditional working capital loans separately secured by inventory or receivables. The commenter recommends allowing collateral carve outs for inventory and receivables pledged to working capital lenders.

Response: The Agency is agreeable to allowing working capital loans, not guaranteed by the Agency, which are secured by the inventory and accounts receivable. The Agency may consider a subordinate lien position on inventory and accounts receivable for working capital loans under certain conditions.

Comment: Two commenters recommend making the maintenance of adequate working capital levels a post-completion requirement. In other words, allow time during the construction period for complete analysis and funding of the project's working capital requirements, including negotiation of working capital loans from specialist lenders.

Response: The Agency disagrees with making maintenance of adequate working capital levels a post-completion requirement. To minimize risk, the Agency requires that all applicants are adequately capitalized at the time of application. Subsequently, borrowers are free to seek additional working capital sources post-application.

Construction Planning and Performing Development (§ 4279.256)

Comment: One commenter states that the traditional commercial lending process for construction projects is different than that providing either development or working capital funds, in that construction lenders traditionally require a commitment for "take-out" or permanent financing upon completion of the construction. The commenter recommends amending the requirements for construction projects to require "take-out" financing commitments for all construction projects.

Response: The Agency agrees that a requirement for take-out financing is needed, and has added a provision addressing permanent financing as described in the interim rule at § 4279.228(g)(1) in the context of a refinance of interim construction financing under certain conditions. Therefore, the Agency has revised the rule in response to this comment.

Onsite Inspectors (§ 4279.256(b))

Comment: One commenter recommends that, instead of requiring lenders to provide an onsite project inspector, the borrower provide an onsite inspector, paid for if necessary from the loan proceeds with verification that such a person is in place by the lender.

Response: The Agency disagrees with the commenter's recommendation. In order to ensure proper oversight, the inspector needs to be a "disinterested" third party. Having the borrower provide the onsite inspector does not ensure that an appropriate third party will be used to conduct onsite inspections. Furthermore, the guarantee is affixed to the lender's loan and having the lender provide the onsite inspector is one way of managing project risk. Lastly, the Agency's relationship is with the lender and the requirement for the lender to provide an onsite inspector is one of the lender's servicing responsibilities. Therefore, the lender needs to be responsible for providing the onsite inspector.

Changes and Cost Overruns (§ 4279.256(c))

Comment: One commenter states that the requirement that no subsequent loans for cost overruns will be made, found in § 4279.256(c), is overly strict. The Agency should be open to such requests, while obviously retaining the right to approve them or not. To simply say this will not be done may create loan servicing problems if promising projects do end up needing additional financing. The commenter believes that prudence dictates the Agency never say never on this.

One commenter states that, in the event that construction cost increases or changes in the proposed project design are required for successful commercial operations, rather than not allowing any restructuring of the loan and guarantee, as long as a revised budget and financial plan meets the required criteria and would have qualified for the loan and guarantee as adjusted if it were a new application, such changes and restructuring should be allowed.

Response: The Agency agrees with the commenters that the proposed rule was potentially too stringent. Therefore, the Agency has revised the rule so that the Agency may consider modifying the current guaranteed loan or a subsequent guaranteed loan after all other financing options have been exhausted by the lender and borrower.

Comment: One commenter states that Change or Cost Overruns should be handled by the lender pursuant to the terms of traditional construction loan documents and restricted per the guarantee and other agreements between the lender and the Agency. The commenter states that all construction agreements should be standard AIA Fixed Cost contracts, and that the lender should be responsible for administration of draw requests. The Agency would, of course, have the option to not guarantee the loan if it does not believe that the construction documents provide adequate protection, and the documentation supporting the loan guarantee should address situations such as this.

Response: The Agency does not agree that this suggestion needs to be provided for in the rule, but rather will consider such matters on a case-by-case basis and, where appropriate, add to the Conditional Commitment. In other words, while this approach may be useful in some cases, it does not need to be universally applied to all Biorefinery Assistance Guaranteed Loan Program loans. Therefore, the Agency has not revised the rule in response to this comment.

New Draw Certifications (§ 4279.256(d))

Comment: One commenter questions why the lender is required to "certify" the borrower is complying with the Davis-Bacon Act as this was not required in Section 9003 NOFA and is an added burden. This should be done by the Agency, not required of the lender.

Response: The Agency disagrees with the commenter. While omitted from the NOFA, this requirement has been placed in each Conditional Commitment under the NOFA and is required by the authorizing legislation. Because our relationship is with the lender and not the borrower and the lender has access to the requisite documentation, the

Agency believes this requirement needs to be completed by the lender.

Surety (§ 4279.256(e))

Comment: One commenter states that it may not be possible to achieve surety from the construction contractor given that no contractor will guarantee the performance of new technology unless they own it (generally not the case). However, it is standard practice that the contractor will guarantee that the work is performed according to specifications. It will generally be necessary to pay the contractor as work is completed and should be anticipated when the guarantee is in place during construction.

Response: The Agency believes that the commenter is misinterpreting surety. The intent of surety for construction projects is to guarantee the completion of the project as designed for the intended purpose. Surety cannot guarantee performance or prevent design failure. To avoid such misinterpretation, the Agency has removed the definition of surety and will rely on the use of the term as it is commonly used by the industry.

Guarantee Applications—General (4279.260)

Comment: One commenter agrees with the position that financing arrangements do not necessarily fit within prescribed application windows and that the applications should be submitted upon individual completion. However, the commenter believes there are some references in the proposal to "application deadlines" which could be confusing or misleading.

Response: The intent of the program is to accept applications year round. The rule identifies two application deadlines. The applications received under each deadline will be competed against each other to determine funding priority. While the rule is clear, to the extent that confusion arises, the Agency will take other action to address the confusion such as supplementing its Web site.

Comment: Several commenters suggest that the section 9003 program have an open year-round application process, similar in scope to the B&I guaranteed loan program. The application process is arduous and time consuming, and cannot be completed in 30 to 60 days. This will encourage applications year-round, and will also ensure that applicants will not have to wait a year or more to apply. It is extremely important to not hinder the growth of this industry at this time through the use of short windows and year-long waits to release appropriated funds for each fiscal year. The experience and "on-the-ground" support of the Agency state offices should be used to administer the program to provide a greater level of service. An experienced regional staff should be appointed to assist the state offices in administering this program and work intra-state to develop regional solutions and approaches for advanced biofuels.

Response: The Agency has an open application cycle, but competes applications twice per year. This competition is necessary in order to pick the best proposals. The Agency will assign adequate staff to review applications and administer this program.

Application Submittal (§ 4279.260(a))

Comment: One commenter recommends that applications be submitted electronically and that paper copies not be required at all. According to the commenter, it is an anachronistic burden and environmentally unsound to require paper copies.

Response: The Agency acknowledges the desirability of electronic applications versus paper applications. The proposed rule required paper copies because, at this time, the Agency is not able to accept electronic copies. However, the Agency is working on having a system to accept electronic applications, although when such a system will be in place is unknown. To accommodate the future acceptability of electronic applications, the Agency has revised the rule to remove reference to paper copies and insert reference to the use of the annual **Federal Register** notice to identify the applicable method of application submittal.

Application Deadline (§ 4279.260(b))

Comment: One commenter states that the June 1 application deadline specified in § 4279.260(b) is too specific. The commenter believes it should be left to the **Federal Register** process and Agency administrative decisions and processes to establish the NOFA date.

Response: The Agency disagrees with the commenter. As discussed above, the Agency intends to accept applications year round, but plans to compete those applications on hand as of the two specific dates stated in the rule (May 1 and November 1). Thus, May 1 would be considered an "application deadline" only to the extent that applications received after May 1 will be included in the evaluation cycle that begins on the following November 1 rather than being evaluated when received. The intent of establishing a specific application deadline in the rule is to provide a default date, which provides the public with a consistent and known date as to when to submit applications. Because unforeseen events may cause a different application date to be preferable, the rule allows the Agency to adjust the application date through the publication of a **Federal Register** notice.

Comment: One commenter recommends that, rather than requiring a deadline for consideration within a given fiscal year, the Agency commit to a short time response, such as two weeks from the date of submittal. It should not matter when the application was submitted as long as it is submitted within the fiscal year to qualify for that year's allocation of funds as long as there are funds remaining in the budget. It would be acceptable to have a response to an application delivered in the next fiscal year when such application was delivered near the end of the prior fiscal year. Also, rather than having two competitions, applications should be considered and awarded as they are received. Because the Agency has discretionary authority to expand the funding for the program beyond the statutory minimum, in such a case when the Agency were to receive many qualified projects throughout the year, funding could be expanded to match the qualified projects. Hence, there is no need for a two phase competition. The commenter further states that, unlike with the NOFAs there should be no specific windows. The program should be available at any time throughout the fiscal year until no more funds are available, with applications accepted, evaluated and loan guarantees authorized on a rolling basis. The Agency needs to commit to respond, and preferably complete its review within two (2) weeks of receiving an application.

Response: The Agency does not have the authority to expand funding for the program beyond the amount appropriated by Congress. Because the amount of funding is limited, the Agency may not be able to award funds to all eligible projects. Therefore, applications need to be competed in order to award the available funds to the highest scoring projects. If the Agency were to award funds to projects on the basis of when applications are received, the best projects may not be funded. Thus, the Agency cannot make awards throughout the year as applications are received. If a lender wishes to know the status of an application, the lender can contact the Agency at any time for updates on application review.

With regard to the commenter's suggestion that the Agency commit to responding to and completing its review within 2 weeks of receiving an application, the Agency cannot make such a commitment because of the time needed to conduct the technical review (which is performed by parties outside of the Agency) and such uncertainties as the number of applications received at any one time and the availability of Agency resources.

Feasibility Study (§ 4279.261(f))

Comment: Several commenters state that the feasibility study should be modified to include or re-arrange its elements as follows:

Feasibility Study

Economic Feasibility—remove the requirement to document that all woody biomass feedstock cannot be used as a higher value wood-based product. Add a section on "feedstock risks."

Market Feasibility—redefine the risk section to specific market risks, including competitive threats and advantages.

Technical Feasibility—Delete "any constraints or limitations in the financial projections" and move to the Financial Feasibility section. Add a category on "design-related risks." Add a section on permits required and other environmental or ecological constraints.

Financial Feasibility—add a section on "sources and uses of funds" and "matching funds." Add a section on "borrower's business strategy." Redefine the risk section to include only "baseline production outputs, borrower financing plan, tax issues, government regulations, and borrower as a company."

Management Feasibility—further define the three levels of management: Ownership, management, and provide an organizational chart showing all staff required to manage and operate the biorefinery with a spreadsheet showing annual wage rates for each employee category. Change the management risk category to include: Changes in management, strengths and weaknesses of the management team, changes in ownership of the company, conflicts of interest.

Business Plan—Eliminate the Business Plan requirement as all elements are present in the Feasibility Study.

Economic Analysis—This criterion should be eliminated, and all elements moved to the financial feasibility section of the feasibility study.

Response: The Agency agrees with some of the commenters' suggestions and disagrees with others as follows:

1. Economic Feasibility (Section B of Table 1). With regard to the recommendation to remove the requirement to document that all woody biomass feedstock cannot be used as a higher value wood-based product, the Agency disagrees, but instead has revised the rule to clarify that the "higher value product" only applies to woody biomass feedstock from National Forest system lands or public lands.

With regard to the recommendation to add a section on "feedstock risks," the Agency agrees that these risks need to be addressed and has revised the feasibility study accordingly.

2. Market Feasibility (Section C of Table 1). With regard to the recommendation to redefine the risk section to specific market risks, including competitive threats and advantages, the Agency agrees with the comment and has revised the feasibility study accordingly.

3. Technical Feasibility (Section D of Table 1). With regard to the recommendation to delete "any constraints or limitations in the financial projections" from this section and move it to the Financial Feasibility section, the Agency agrees with the comment and has revised technical feasibility accordingly. The Agency notes that the remainder of this element (and any other facility or design-related factors that might affect the success of the enterprise) has been removed, but its intent is covered by the addition of design-related risks as discussed in the following paragraph.

With regard to the recommendation to add a category on "design-related risks," the Agency agrees with the comment. The Agency has revised technical feasibility by adding "risks related to design-related factors that may affect project success" and moving the remaining segment of the fourth section under Section (D) of Table 1 ("Any constraints or limitations in the financial projections") to the Financial Feasibility section.

With regard to the recommendation to add a section on permits required and other environmental or ecological constraints, the Agency does not agree with commenter. The rule requires the lender to submit Exhibit H of 7 CFR part 1940, subpart G, to address environmental issues and permits. Section B of the feasibility study requires the identification of project impacts on the environment.

4. Financial Feasibility (Section E of Table 1). With regard to the recommendation to add a section on "sources and uses of funds" and "matching funds," the Agency agrees with the suggestions to add reference to the "uses of project capital" and has revised the rule accordingly. However, the Agency disagrees with the suggestion to add a section on matching funds because matching funds are already addressed in Section E of Table 1.

With regard to the recommendation to add a section on "borrower's business strategy," the Agency disagrees because the borrower's business strategy is sufficiently covered as part of the borrower's business plan.

With regard to the recommendation to redefine the risk section to include only "baseline production outputs, borrower financing plan, tax issues, government regulations, and borrower as a company," the Agency disagrees with the commenter. The Agency requires the risk categories identified to assist with the evaluation of the feasibility of the project and technology.

5. Management Feasibility (Section F of Table 1). With regard to the recommendation to further define the three levels of management, the Agency is satisfied that sufficient disclosure of management and ownership structures is provided for in the feasibility study and the lender's written credit analysis.

With regard to the recommendation to change the management risk category to include changes in management, strengths and weaknesses of the management team, changes in ownership of the company, and conflicts of interest, the Agency will add management's strengths and weaknesses but disagrees with commenter's other suggestions. The Agency notes that "Conflicts of Interest" was already included in the proposed rule and remains in this interim final rule.

6. Business Plan (proposed § 4279.261(g)). With regard to the recommendation to eliminate the Business Plan requirement as all elements are present in the Feasibility Study, the Agency disagrees with the commenter's suggestion. The business plan is prepared by the borrower, while the feasibility study is prepared by a third-party expert and is an evaluation of the project and the company. The Agency notes that the rule allows a business plan to omit any information that is included in the feasibility study.

7. Economic Analysis (proposed § 4279.261(i)). With regard to the recommendation that this section be eliminated and all elements moved to the financial feasibility section of the feasibility study, the Agency agrees with the commenter and has revised the rule to incorporate the economic analysis into the feasibility study.

Comment: One commenter states that the Agency proposes to require that applicants submit documentation in their feasibility study that all woody biomass feedstock proposed to be utilized could not be used as a higher value wood-based product. The commenter states that a similar restriction in the BCAP proposal was inconsistent with the Farm Bill definition of "renewable biomass." Under Section 9001 of the Farm Bill, an advanced biofuel need only be derived from "renewable biomass other than corn kernel starch." Thus, a fuel is an advanced biofuel so long as it is produced from materials meeting the definition of renewable biomass and it falls within one of the seven types of listed advanced biofuel categories. Looking to the definition of renewable biomass in the Farm Bill, the only restriction relating to higher-value products can be found in Section 9001(12)(A)(ii), relating to Federal land. There, Congress included the higher-value product limitation with regard to "materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands * * *" Section 9001(12)(B), governing the definition of renewable biomass as it relates to biomass derived from non-Federal land, contains no such value-added restriction. Indeed, this section refers to "any organic matter that is available on a renewable or recurring basis from non-Federal land." However, the definition contains no such restriction as it relates to non-Federal land, nor does it leave room for statutory interpretation.

The commenter does not believe that the Agency has the statutory authority to require that applicants document that their woody biomass could not have been used in a higher-value product. The Farm Bill definition makes clear that such a restriction could only apply to applicants seeking payment for advanced biofuels derived from woody biomass sourced from Federal land. The commenter urges the Agency not to finalize a provision so clearly contrary to express statutory language.

Statutory authority aside, if the Agency chooses to finalize such a scheme, the commenter suggests that it not categorically exclude biomass that could be used in higher-value products. The commenter believes that there is some woody biomass that, while it could be used as a higher-value wood based product, will not be for numerous reasons, including market access. The rule should allow for loans for advanced biofuel facilities using renewable biomass that could be used as inputs for higher-value products, but that have not been previously utilized on a facility-specific or regional basis.

Response: The Agency agrees with commenter's interpretation of the statute with regard to higher-value products from wood sources from Federal lands. The Agency has clarified the rule to reflect that the "higher-value product" documentation requirement only applies to wood sourced from National Forest System lands or other public lands, as specified in the authorizing statute.

Technical Assessment (§ 4279.261(h))

Comment: One commenter suggests that the Agency drop its technology review from the application process. The commenter states that, given that the Agency is open to all technologies, an in-depth technical review will have already been completed by the investor group and so the Agency will not need to do so.

Response: The Agency disagrees with commenter's suggestion. The technology review allows the Agency to determine the commercial viability and technical merit of the proposed project and provides verification that the project has reached semi-work scale. Therefore, the Agency has not revised the rule in response to this comment.

Lender Certifications (§ 4279.261(k))

Comment: One commenter states that the proposed rule requires lenders to "certify" that the project is able to demonstrate technical merit but then states that the Agency will determine the project's technical merit. Lenders should not be required to determine the technical merit of these projects particularly since these projects may or will incorporate first-of-a-kind technology—technology never before utilized. Such a requirement is unnecessary given that the Agency will actually make this determination. Lenders should only be required to verify that the borrower has provided a technology assessment as part of the application.

Response: The purpose of the certification required under this paragraph is neither to replace nor to duplicate the Agency's determination of technical merit. The purpose of this certification is to ensure that the lender performs its due diligence. To make this clear, the Agency has recast the second sentence of this paragraph such that the lender will now certify that, as a result of its due diligence, the lender concludes that the project has technical merit.

Scoring Applications (§ 4279.265(d))

General

A number of commenters characterized the scoring criteria as unrealistic, presenting obstacles or being contrary to the program's goals, etc. Some of these commenters illustrated their concerns by discussing specific scoring criteria. In such instances, such discussions are included in the specific scoring criteria. Commenters also suggested numerous additions to the scoring criteria. The general comments and proposed additions are addressed first, followed by comments associated with the specific scoring criteria.

Comment: Several commenters state that the scoring criteria are unrealistic in several areas and must be reconstructed to recognize the economic, environmental, technical, managerial, and financial strength of the project as the first qualifying criteria. The points in the current proposed rule do not correlate to the risks and rewards involved in the development and successful implementation of a long-term, sustainable project. The scoring criteria should be modified to properly define the risk and reward of a project, including a review of the technology, the financial strength of the project including equity contribution, the strength of the management team, and then include the required criteria with a point value of no more than 30 percent of the total score. The funds must go to the projects that have the best chance of sustainability and implementation in the long run. This will properly provide a springboard for the industry for financing and long-term implementation and success.

Response: The statute identifies the criteria the Secretary will consider when scoring a project and the Agency incorporated the criteria into the rule. In addition, in consideration of language contained in the Managers Report, an additional criterion was incorporated to give preference to projects that are first-of-a-kind. As is true for all of the comments to this rule regarding how many points the Agency assigned to the various scoring criteria, the points for each of these criteria were assigned in a way that the Agency has determined best meets the goal of supporting the advanced biofuel industry and Congressional intent while minimizing the risk to public funds.

Comment: One commenter states that one obstacle that is difficult to overcome is inherent "institutional biases" that lead to specific emphases in point scoring. For example, with respect to Financial Participation, the text states: "Regarding the fifth criterion, level of financial participation, the proposed rule requires borrowers to provide at least 20 percent cash equity into the project. It is the Agency's intent to score applications higher that can demonstrate more than this 20 percent minimum (30 percent or more).

Borrowers who meet the minimum 20 percent cash equity are still eligible, but will not receive points under this criterion. Further, of all the criteria used to score applications, the Agency continues to believe that this criterion is the most important because it represents the best commitment of the borrower to the project. Therefore, the Agency continues to assign the highest potential points to this criterion."

The commenter disagrees that a higher equity percentage indicates a higher and better commitment to the project. Given that the equity investors in such projects do not invest with the expectation to lose their investment, since these are not venture investors, a $100 million project that requires $20 million in cash equity for example, is a major commitment. A $30 million equity participation does not indicate any more commitment. However, it does substantially increase the IRR requirement from the cash investor and that can provide undue financial burden on the project and make it financially unfundable for no real benefit. A higher percentage for a much smaller project could represent a more sincere commitment, but that is not true in this case.

Response: Cash equity is the metric used to show the commitment level. The 20 percent requirement is the minimum level to be eligible and is required by statute. The points awarded are intended to reflect those who contribute more to the project, and not to reflect whether one borrower is more committed than another.

Comment: One commenter refers to the proposed increase in the scoring for novel feedstock as another obstacle presented by the scoring criteria. According to the commenter, the requirement in § 4279.265(d)(3) is in direct opposition to the needs of financing a pre-commercial technology. Despite the Agency's extensive experience with loan guarantee programs, it has yet to administer a program for such large projects or for pre-commercial technologies. Although some of the prior regulations and approaches can conveniently be adopted from B&I and REAP, the section 9003 program is fundamentally different from these commercially proven technology programs. There appears to be a lack of awareness (possibly based on a lack of experience) within the Agency to recognize the roadblocks that some of the proposed rules and scoring criteria create for good projects where pre-commercial technology is being deployed. The fact that we are engaging in pre-commercial technologies is a game changer when it comes to what criteria matter and the support that such projects need.

Response: The Agency recognizes the concern raised by the commenter. However, the statute identifies this criterion. Therefore, the Agency must include this criterion. The Agency notes that the scoring criteria give preference; they do not determine eligibility.

Comment: One commenter states that, to maximize the rural economic benefits of the Section 9003 Guaranteed Loan Program in furtherance of the Rural Development's mission, a project's rural economic benefits be added as an evaluation criterion to proposed § 4279.265(d). Rural Development's mission to enhance the quality of life and economic foundation of rural communities would be furthered by a more comprehensive evaluation of a project's potential rural economic benefits. A project's rural economic impact is not only determined by the location of the biorefinery, but by the origin of the feedstock as well. Awarding points to projects based on their level of economic impact to a rural community is consistent with the Agency's mission and allows maximum opportunity for the commercialization of domestic advanced biofuels in the U.S. Dedicated energy crops, such as carnelian, are grown in rural areas. Thus, the commenter encourages the Agency to consider a project's location in a rural area or its feedstock's rural origins as plus factors in the evaluation criteria. Many non-rural advanced biofuel refining projects can yield substantial economic benefits for rural America, in addition to increasing energy independence, decreasing greenhouse gas emissions, and diversifying agricultural markets. Thus, a more inclusive approach would maximize the impact of the section 9003 program.

Response: The Agency agrees that potential rural economic development is an important metric for evaluating applications. Consistent with one of the commenter's suggestions, the Agency has added a rural location requirement for the project to this criterion to accompany potential rural jobs to measure this metric, as found in § 4279.265(d)(8). To include other aspects suggested by the commenter would make the scoring overly complicated and burdensome with questionable benefit. Therefore, except for adding the rural location requirement for the project, the Agency has not otherwise revised the rule in response to this comment.

Comment: One commenter encourages the Agency to revise the stipulation that "specific feedstock should not receive preference over other feedstock when evaluating applications." The commenter believes that biorefinery feedstock should be evaluated according to a comprehensive life-cycle analysis that accounts for all greenhouse gas emissions, including those associated with indirect land use changes. Additionally, the commenter believes that extra points should be given for projects that provide clean, potable water for human use and/or irrigation.

Response: The scoring criterion in § 4279.265(d)(6) addresses the positive impact of the project on resource conservation, public health, and the environment. This can include each of the elements identified by the commenter, including life-cycle analysis, water impacts, and irrigation. The Agency encourages applicants to submit data, analyses, etc. to support this criterion, including any life-cycle analyses. As noted in previous responses, this scoring criterion now contains a deduction when the feedstock can be used for human or animal consumption. This provision further advances the positive impact under this scoring criterion.

Established Market Criterion

Comment: One commenter agrees that it is appropriate to demonstrate that there is a market for the product from the facility, but believes that the Agency should apply this requirement flexibly in view of two facts. First, unlike electricity which is typically contracted over a multi-year time horizon, liquid fuels are traded almost entirely through short-term spot markets. Second, it was due in part to recognition of this basic structural feature of fuels markets that Congress enacted, in 2005, and expanded, in 2007, an RFS that codifies a purchase mandate in Federal law. The RFS establishes targeted levels for purchases of cellulosic biofuel, as well as default pricing mechanisms for credits when available quantities of that fuel are insufficient to meet the needs of an obligated party under the law. The existence of this mandate provides strong assurance that a market will exist for cellulosic biofuels production, at a price up to the cost that an obligated party under the RFS would incur to purchase alternative supplies plus credits to fulfill its obligation.

To illustrate potential issues with the rule as proposed, the biofuels industry has experienced significant road blocks when navigating the Department of Energy loan guarantee program application process in this regard. Therefore, the commenter is asking for the following inclusion in The

Innovative Technology Loan Guarantee Program (Title XVII of EPAct):

"Loan guarantee applications for emerging technologies, such as advanced biofuels, should not be evaluated against more mature technologies, such as wind or solar. The liquid fuels marketplace does not operate within a framework that lends itself to long-term, fixed-price forward contracting mechanisms; therefore, DOE should not require these contracts as evidence of 'reasonable prospect of repayment' for biofuels projects. The Committee recommends that this program also be expanded to include eligibility for renewable chemicals and biobased products in addition to biofuels."

Another commenter encourages the Agency to consider the appropriateness of off-take agreements in the fuels market. The commenter states that their experience has indicated that such requirements are much more challenging for renewable fuels than with renewable electricity, which has been financed largely through long-term power purchase agreements. The commenter urges the Agency to broaden the scope of what it considers a demonstration of an established market for a fuel. Off-take agreements are clearly one way that such a market can be established. The commenter believes that EPA's large RFS2 mandates represent "legislated demand" that should sufficiently demonstrate that a market exists. RFS2 relies upon a fungible, liquid market for renewable fuels that is fundamentally inconsistent with a requirement that obligated parties actually purchase the fuel and take delivery. Rather, obligated parties demonstrate compliance through submission of "RIN" credits, which renewable fuel producers generate when they produce qualifying fuels. Demand for these RIN credits functions in the same way as an off-take agreement, as both serve as a market outlet for the fuel. Given forecasts on meeting RFS2 targets through 2022, it does not appear that advanced biofuel production will exceed mandates. Thus, every gallon of advanced biofuel produced up to the mandates will have a guaranteed market outlet. Even absent the RFS2 (as well as low carbon fuel standards in California and the northeastern states), the Agency should consider drop-in fungible fuels to have an established market (equivalent to a dedicated off-take agreement) at no less than the value of the fossil-fuel which they replace. Indeed, since synthetic hydrocarbons like BTL offer superior performance characteristics, including lower conventional pollutant emissions than conventional fuels, a market premium would be justified. While non-fungible fuels such as ethanol that can only be blended up to certain levels with conventional fuels have a demand ceiling (absent dedicated infrastructure, such as that needed for E–85), fungible fuels such as BTL that are fully compatible with existing fuels and infrastructure will have access to existing fossil fuel markets. While the commenter recognizes that future fossil fuel prices alone may not sufficiently demonstrate the financial feasibility of a project, the commenter urges the Agency to recognize this market "floor" in its scoring criteria for demonstrating an established market for an advanced biofuel project.

Response: With regard to the commenter's concern about spot market, the Agency points out that the rule does not specify a timeframe associated with the commitments. Therefore, this concern should not be an issue.

With regard to the comments made concerning the Renewable Fuel Standard program, the Agency acknowledges that the Renewable Fuel Standard program may establish a commodity market for renewable fuel standard biofuels as a whole. However, for the purposes of the Biorefinery Assistance Guaranteed Loan Program, the Agency is looking at whether the borrower has established a market for its biofuel and byproducts; that is, the Agency is looking for the establishment of an individual market for the borrower's biofuel and byproducts. The commodity market created by the Renewable Fuel Standard program does not ensure there will be revenue generated for the specific project in the application. On the other hand, the Agency seeks to further the renewable fuel provisions of the Section 9003 program by, as has been noted previously, requiring the advanced biofuel to meet an applicable renewable fuel standard as identified by the EPA in order to receive points under this scoring criterion.

The Agency notes that it does not have the authority to modify the Department of Energy's Innovative Technology Loan Guarantee Program as requested by one commenter.

Comment: One commenter believes that this is a misinterpretation in the proposed rule of the intent of Congress in the 2008 Farm Bill. To "establish markets" for the advanced biofuel and byproducts would only apply for a new type of advanced biofuel. Ethanol and biodiesel are traded as commodities and already have an "established market." The same is true of distiller's grain from current ethanol biorefineries. The commenter proposes that newer types of alcohol, such as butanol or propanol, meet the requirement of establishing a market with a signed off-take agreement. The same is true of the biobased byproducts from new processes. Due to changing farm economics as well as changes in farm policy, a feedstock agreement of more than 3 years is very difficult to obtain. The commenter proposes the following criterion with a maximum of 5 points:

1. If the application has a commitment for at least 40 percent of the biofuel produced from the project; a commitment for at least 40 percent of the biobased byproduct produced from the project; and a commitment for at least 60 percent of the feedstock to be used in the project, then the application will be awarded 5 points.
2. All commitments must be for at least 3 years.
3. Notwithstanding other qualifications of this criterion, ethanol, biodiesel, and distiller's grains shall be exempt from any purchase commitment.

Response: With regard to the recommendation for how points will be awarded, the Agency is revising the rule to require a 50 percent commitment for each and, as noted previously, requiring the advanced biofuel to meet an applicable renewable fuel standard as identified by the EPA in order to receive points under this scoring criterion. The Agency is also increasing the points for this scoring criterion from 5 to 10.

The Agency disagrees with the recommendation for including a requirement that all commitments must be for at least three years, because it could discourage the introduction of advanced biofuels produced from new feedstock.

As noted in the previous response, the borrower needs to demonstrate that the borrower has established a market for the borrower's advanced biofuel and byproducts produced. Furthermore, the selection criteria in the statute refer to "the advanced biofuel and the byproducts produced" without distinguishing between new and established biofuel. Therefore, the Agency disagrees with the commenter's recommendation for providing an exemption from the purchase commitments.

Comment: One commenter states that requiring feedstock supply commitments in demonstrating establishment of a market favors existing feedstock markets and, thus, does not encourage new solutions/feedstock usage/technologies.

Response: All applicants must establish a market for the advanced biofuel and byproducts produced per the statute. While the Agency recognizes that it may be easier for a borrower to obtain feedstock supply commitments in existing feedstock markets, the Agency has reduced the requirement from 60 percent to 50 percent. Further, the Agency is not requiring a time commitment for these commitments. Lastly, the scoring criteria at § 4279.265(d)(3) and (d)(11) are specifically designed to encourage new feedstock usage and technologies.

Comment: One commenter recommends eliminating this scoring criterion for supply and off-take agreements. The commenter states that liquid fuels are a very fungible product and the industry practice is to not have long term off-take agreements.

Response: As noted in the previous response, all applicants must establish a market for the advanced biofuel and byproducts produced per the statute. The Agency is satisfied that requiring demonstration of such agreements is reasonable. Further, the Agency is not requiring borrowers to demonstrate long-term off-take agreements.

Comment: One commenter states that the proposed scoring system and the manner in which points are awarded in a number of categories seems to contradict the purposes of the program. As a result, there is a significant likelihood that the projects most likely to succeed (and the best deal for the taxpaying public) will be outscored by niche projects that will have limited impact on rural development or of filling advanced biofuel voids. One commenter disagrees with awarding zero points if 60 percent or less on feedstock commitments or finished product marketing agreements. The commenter explains that a commercial scale biorefinery is going to take two years to construct and require significant volumes of feedstock. It is unrealistic to expect a company to be able to contract over two years in advance for what could be millions of dollars of feedstock. Forward pricing would be so speculative and price risk would make a supply contracts unaffordable. Points will only go to small producers of niche products with feedstock sources that have no scalable impact on the rural community. An alternative would be to score based on Ag Census statistics on the agricultural capacity to grow the feedstock within a specified radius of the project.

Response: The Agency disagrees that this scoring criterion will provide a preference to smaller producers. First, not all projects require a multi-year construction period. Second, even for projects that require a multi-year construction period, it is the Agency's experience that borrowers can reasonably obtain commitments in advance. Further, the Agency notes that it has reduced the required percentage of these commitments from 60 to 50 percent.

Presence of Other Biorefineries Criterion

Comment: One commenter believes this criterion should be changed to 10 points maximum. The commenter also suggests that the language be changed, as follows, to clarify that it is based on the exclusivity of a biorefinery using a particular feedstock:

1. If the area that will supply the feedstock to the proposed biorefinery does not have any other advanced biofuel biorefineries using the same or similar feedstock, award 10 points.

2. If there are other advanced biofuel biorefineries using the same or similar feedstock located within the area that will supply the feedstock to the proposed biorefinery, award 0 points.

Response: The Agency is satisfied that the weight provided for this criterion is reasonable. With regard to adding to the scoring criterion "using the same or similar feedstock," the Agency is clarifying the language to read "any other similar advanced biofuel biorefineries." The similarity is intended to refer to the facility and not to the feedstock.

Feedstock Not Previously Used Criterion

Comment: One commenter states that financiers seek to reduce risk as much as possible and, in general, wherever possible, the scoring criteria to qualify for the program should be as flexible as possible so as to allow proposed projects to reduce all non-technology risk as much as possible. For example, the scoring criterion that awards more points for "novel feedstock" is in direct opposition to what is required to attract investors, both equity and debt. This might be a reasonable hurdle for an alternative program that seeks to help finance existing and commercially established technologies. For first-of-a-kind projects, requiring novelty in feedstock supply will likely render most proposed projects unfinancable because lenders will not take that type of risk even when the technology is proven. Despite the value of the loan guarantee, such a guarantee is insufficient in its own right to be able to mitigate sufficient risk for lender, especially given the requirement that the lender put itself at significant risk by holding 10 percent of the unguaranteed portion. The loan guarantee will only help those projects that have reduced risk to the greatest degree possible other than the technology risk.

Response: As stated previously in response to a similar comment, the Agency recognizes the concern raised by the commenter. However, the statute identifies this criterion. The Agency notes that the scoring criteria give preference; they do not determine eligibility.

Comment: One commenter believes that the proposed rule weights this criterion too heavily. The intent of the program is to increase the production of advanced biofuels in rural America, which can be carried out by not limiting the awarding of such a large number of points to the first biorefinery to use a particular feedstock. Many groups want to be the "second" biorefinery to learn from the mistakes of the "first." The proposed rule should not carry such a hefty penalty for not being first. The commenter proposes that this criterion be a maximum of 5 points.

Several commenters state that the points awarded to this criterion should be changed or given 3 to 5 points. Different technologies that utilize the same biomass should not be excluded because another applicant used it first.

Another commenter recommends revising the language to include some threshold level instead of simply a "first mover" requirement. The intent is to establish multiple energy crops on a commercial scale and as written the first user of a new feedstock would qualify regardless of the size of their biorefinery and second user would not. The commenter states that, in addition, you want to encourage the further expansion on the feedstock, preferably with even new and better processes that make even more efficient use of the feedstock.

Response: As noted in the response to the previous comment, because this criterion is identified in the statute, the Agency must include this criterion.

Comment: One commenter agrees that no specific feedstock should be preferred. The commenter states that there should also be no additional points awarded for novelty. The commenter states that, under the NOFAs and propose rule, more scoring points are to be awarded for "novel feedstock." The commenter states that if a prior project has been approved for the program with a type of feedstock, any future applications would not achieve maximum points because the proposed feedstock would no longer be "novel." The commenter believes this scoring criterion is antithetical to the main goals of the program, which is to assist commercially viable technologies to pass through the "valley of death" in terms of financing and should be removed as a scoring criterion, and to the goals of the financiers and especially the lenders and therefore the program. The most important criterion for lenders is the reliability of the availability of the feedstock and the reliability of the supplier(s). Lenders always look for a track record and performance history. Hence, any feedstock that can be procured to meet the needs of the project financiers should be rewarded equally. The commenter states that it is unwise to increase the number of points for this criterion given that doing so makes projects less financeable and more risky.

Response: As noted in the previous response, the Agency must include this criterion, because it is identified in the statute.

Comment: One commenter states that the proposed manner in which points are awarded in a number of categories seems to contradict the purposes of the program. The commenter states that, as a result, there is a significant likelihood that the projects most likely to succeed (and the best deal for the taxpaying public) will be outscored by niche projects that will have limited impact on rural development or of filling advanced biofuel voids. The commenter states that awarding zero points for using a feedstock previously used in commercial production places the lowest risk projects at the biggest disadvantage. The commenter recommends that the Agency remain feedstock neutral and score projects based on their outcomes (rural revitalization), not inputs (type of feedstock).

Response: Except to the extent the scoring criteria required by the statute result in favoring one feedstock over another, the Agency agrees with the commenter in that the Agency wants to encourage all advanced biofuels, except in very limited specific instances (*e.g.,* feedstock that can be used for human or animal consumption). Beyond such instances, the Agency does not want to limit specific feedstock from participation in the program.

Working With Cooperatives and Producer Associations Criterion

Comment: One commenter believes the calculations representing the 60 percent level are incorrect and represent a 50 percent commitment.

Response: The Agency agrees that the example was incorrect, and the example has been corrected.

Comment: While one commenter agrees with the percentage requirements of the dollar value of feedstock being supplied by and byproducts being produced and sold to local producers to ensure strong local involvement, all other commenters express concern with this criterion, as follows:

One commenter is concerned that the concept of providing points to projects that purchase 60 percent or more of their feedstock from producer associations or cooperatives and sell 60 percent or more of the products precludes benefits associated with purchasing feedstock from independent producers, farmers, etc., who stand to benefit significantly from such purchases. It is also not practical to require 60 percent of revenue generated to be from selling products to producer associations or cooperatives. Typical biorefinery products are sold to obligated parties to generate maximum revenue. In general, this criterion may favor projects that do not bring as much benefit to local farmers and producers and may have higher risk through lower product revenue.

One commenter suggests that this scoring criterion for supply and off-take agreements through cooperatives be eliminated. Because of the capital intensity of the first commercial projects, the entire entrepreneurial community needs to be engaged. Also, because these refineries utilize commodity inputs and are producing liquid fuel that fluctuates daily in price, it is very difficult to get supply and off-take agreements at fixed prices.

One commenter states that, given the challenges of achieving financing for projects, it is unwise to limit scoring to projects that are so heavily weighted to such transactions with producer associations and cooperatives. It is more important to assist the commercialization of new technologies and make the projects attractive to investors. In many cases, biomass feedstock is not yet available by way of producer associations and cooperatives. Hence, such a procurement plan would be considered unduly risky to financiers. At the same time, there is no guarantee that producer associations and cooperatives will provide the best outlet market for products to be sold. It is more important to make sure that these projects have the best possible chance of succeeding financially so that they can be financed. Having the most flexible sources of feedstock suppliers and off-take partners is the smartest way to get projects off the ground. The proposed constraints might make sense for a different program designed to support already commercialized technologies where the quid pro quo for Agency assistance would be to support such supply and off-take entities. The commenter states that it is unwise to try to achieve too many Agency goals in one program when the financing challenges are already very high.

One commenter believes this criterion unfairly limits the sale of biofuels and biofuel byproducts. The commenter believes that both products should be able to be sold to individual farmers, community residents, small local businesses, power generation facilities, hospitals, educational institutions, municipalities, traditional oil refineries, etc. Selling the biofuel to a larger and more diversified number of users will help encourage faster acceptance and adoption of biofuels by the public and industry thereby increasing demand for even more locally produced biofuels.

This same commenter also states that the provision for 60 percent of the dollar value of the feedstock will be supplied by producer associations and cooperatives unfairly and unnecessarily limits it to mainly producer associations and cooperatives. Small independent family farms and landowners should be able to equally provide feedstock to a biorefinery funded through this program. The number of small farms in the United States, particularly in the East, is growing. Being able to sell feedstock to the biorefinery would provide small farmers and landowners an additional source of potential income. It would also help keep land actively farmed in some communities.

One commenter states that waste material, as a feedstock, does not lend itself to contracts with producer associations or cooperatives in the same way that biomass from crop or plant residues do. The commenter urges the Agency to adopt an alternative metric for feedstock that do not ordinarily have a nexus with producer associations and cooperatives, so that the investment in rural communities that the Agency seeks to encourage can come from the broadest possible sources.

Response: The statute requires the Agency to consider whether the borrower is proposing to work with producer associations or cooperatives and, therefore, the Agency must include this as one of the scoring criteria. In recognition of the concerns raised by the commenters, the Agency has modified this criterion to award points if the project can document working with cooperatives and producer associations under one of the three criteria rather than all three. In addition, the Agency has revised this scoring criterion with a two-tiered system that begins awarding points at a 30 percent threshold. The Agency considers the revised scoring methodology more workable, allowing greater participation by independent producers, farmers, etc.

Comment: While working with producer associations and cooperatives is important, one commenter believes that the requirements in the proposed rule are not workable, especially regarding the purchase of the biofuel by the producer association or cooperative. The commenter proposes modification as follows with a maximum of 10 points that can be awarded:

1. Award 2 points for an application with at least two support letters from producer associations or cooperatives.
2. Award 4 points for an application with at least 20 percent of the dollar value of the feedstock purchased from a producer association or cooperative.
3. Award 4 points for an application with at least 20 percent of the dollar value of the biobased byproducts sold to a producer association or cooperative.
4. Notwithstanding other qualifications of this criterion, if the applicant is a producer association or cooperative, award 10 points.

Response: The Agency disagrees with the specific recommendation. However, as stated in the response to the previous comment, the Agency has modified the criteria to award points if the project can document working with cooperative and producer associations under one of the three criteria rather than all three. In addition, the Agency has revised this scoring criterion with a two-tiered system that begins awarding points at a 30 percent threshold. The Agency considers the revised scoring methodology more workable.

With regard to the request to award points based solely on the borrower being a producer association or cooperative, the Agency disagrees because the change in the rule to allow the borrower to meet one of the three criteria allows such a borrower to be awarded points under this criterion by working with another producer association or cooperative.

With regard to the suggestion to increase the points awarded from 5 to 10, the Agency considers the points associated with this criterion appropriate relative to the other scoring criteria and has not changed the points awarded under this criterion.

Comment: Several commenters recommend giving a total score of 5 points for projects that incorporate any contract or business relationship with producer associations and cooperatives, whether it consists of feedstock purchases or product and byproduct sales and should include any renewable electricity sold to a rural electric cooperative, or electricity purchased from a rural electric cooperative.

Response: The Agency agrees with the commenters and has revised the rule to modify the scoring criteria to award points if any one of the three criteria are met. With regard to the suggestions that this criterion should include electricity sold to a rural electric cooperative, the Agency agrees. Sale of an advanced biofuel converted to electricity would qualify for points under § 4279.265(d)(4)(i)(B) or (d)(4)(ii)(B). The Agency does not agree with commenter to award points for purchasing electricity from an electric cooperative. The Agency has determined that to make the criteria meaningful, the Agency must limit the points awarded under this criterion such that not all applicants score under this criterion.

Financial Participation Criterion

Comment: One commenter, while agreeing that this criterion should remain the most important, recommends increasing the maximum points to 25 points. The commenter supports the exclusion of other direct Federal funding in calculating the borrower's cash equity participation. However, the commenter does not support the deduction of 10 points for the use of other Federal direct funding in the project. The commenter proposes the following:

1. If the borrower's cash equity injection plus other resources results in a debt-to-tangible net worth ratio equal to or less than 3.00 to 1, but greater than 2.75 to 1, award 11 points.
2. If the borrower's cash equity injection plus other resources results in a debt-to-tangible net worth ratio equal to or less than 2.75 to 1, but greater than 2.50 to 1, award 18 points.
3. If the borrower's cash equity injection plus other resources results in a debt-to-tangible net worth ratio equal to or less than 2.50 to 1, award 25 points.

Response: With regard to the suggestion to increase points awarded under this criterion from 20 to 25, the Agency disagrees and has reduced the points from 20 to 15, which the Agency considers appropriate relative to the other scoring criteria and changes in points made to other criteria.

With regard to the suggestion to delete the deduction of 10 points for the use of other Federal direct funding, the Agency wants to encourage participation from non-Federal sources and to diversify risk to Federal funds. Therefore, the Agency disagrees with the suggestion to delete this deduction.

With regard to adding an additional level (*i.e.,* 2.5 to 2.75 to 1) for awarding points, the Agency disagrees this level of distinction is necessary at this time because the scoring gradations are sufficient to distinguish the priority of the projects. As the program matures, the Agency may revise this criterion along the lines suggested by the commenter in order to provide further distinction between competing applications.

Comment: One commenter states that projects that have exceptional economics and that can withstand higher percentages of debt should not be penalized by an arbitrary bias in favor of lower debt percentages. There should be no points specifically associated with this issue. Either a project meets the financing criteria or it does not. Not all projects can sustain low percent debt levels. Each project should be evaluated on its own merits, but percent of equity versus debt should not be a competitive decision making criterion. It is a false assumption that lower debt percent is generally preferable. Some products and markets may require high debt percent levels in order to be competitive and should not be penalized for it. Because the goal is to help projects prove commercial viability, projects that propose a financing plan that matches the most likely replicable future commercial financing scenario should be favored. It will be these projects that not only prove that the technology is commercially viable, but that the means of finance is also commercially viable.

Response: The Agency disagrees with the commenter. The statute identifies financial participation of the borrower as a scoring criterion. Therefore, the Agency has retained this scoring criterion. The Agency notes that a loan guaranteed under the program may only finance 80 percent of the eligible project costs. In addition, the Agency's default and loss claim experience is that lower debt percentage is generally preferable because those projects tend to be more successful.

Comment: One commenter states that this scoring criterion unfairly handicaps "advanced technology biorefineries" because they have the highest capital funding requirements. While understanding the need to get some biorefineries in production, the commenter believes the key is to advance future biorefinery technology so that we have a large scale commercial industry in the future.

Response: As stated in the response to the previous comment, the statute requires the Agency to consider the level of financial participation of the borrower as part of scoring applications, and the Agency notes that a loan guaranteed under the program may only finance 80 percent of the eligible project costs.

Comment: Two commenters recommend, given the complexity and variety of negotiation and business structures between the lender and equity source, greater flexibility in the scoring requirement for projects that demonstrate more than 20 percent cash equity in order to foster increased use of the loan guarantee program.

Response: To the extent that the commenter is requesting "more levels" for awarding points under this criterion, the Agency disagrees that additional levels of distinction are necessary at this time. As the program matures, the Agency may revise this criterion to provide further distinction between competing applications.

Positive Effect on Resource Conservation, Public Health, and the Environment Criterion

Comment: One commenter suggests increasing the points awarded for this criterion from 5 to 10 and modifying how points are awarded as follows:

1. If the production of advanced biofuels from the approval of the application would have a positive impact in one of the three impact areas (resource conservation, public health, and environment), award 2 points.

2. If the production of advanced biofuels from the approval of the application would have a positive impact in two of the three impact areas, award 6 points.

3. If the production of advanced biofuels from the approval of the application would have a positive impact in all three of the impact areas, award 10 points.

Response: The Agency has modified the rule to increase points and distribute the points as recommended, except that 3 points will be awarded if there is a positive impact on one of the three impact areas. However, the Agency disagrees with the proposed rewording to use "production of advanced biofuels from the approval of the application" in place of "process adoption" because "process adoption" reflects the statutory language of the "adoption of the process proposed in the application."

In addition, the Agency has added a provision to deduct 5 points if the feedstock for the proposed project can be used for human or animal consumption. The Agency is adding this provision because such feedstocks are considered to have significant enough negative impacts that the Agency seeks to discourage their use.

No Significant Negative Economic Impacts on Existing Facilities Criterion

Comment: One commenter proposes no change to this criterion and would award a maximum 5 points.

Response: The Agency disagrees, and, in the broader context of all the scoring criteria, has revised the points awarded under this criterion from 5 to 10, which the Agency has determined is reasonable relative to the other criterion.

Comment: One commenter recommends that, as for local competition for feedstock, the local area for procurement be considered to be not more than 50 miles from the proposed project site. Given that biomass is generally uneconomical to transport more than 50 miles from source to site, using an area that is more than 50 miles will provide undue protection to some existing projects and limit the scope and possibility of many good projects. The commenter suggests that, alternatively, total available supply of feedstock within the competitive area be considered and whether there is sufficient availability for the incumbents as well as the proposed project. In general, by the time a project has been proposed to the Agency, this issue will have been reviewed to the satisfaction of the financers and will never be an issue. As a result, this review item can probably be dropped in its entirety, other than asking whether such an analysis was performed.

Response: The statute requires the Agency to consider whether the proposed project will have any significant negative impacts on existing facilities. As such, the Agency must include this criterion in the rule. In order to determine if there will be any significant negative impacts, the Agency needs sufficient evidence to make an evaluation—simply asking whether such an analysis was performed is insufficient. Therefore, the Agency has not revised the rule in response to this comment.

However, the Agency has added a provision to this criterion that would result in no points being awarded if the feedstock to be used is wood pellets. While the Agency acknowledges the eligibility of wood pellets, the emphasis of this program is new and emerging technologies. The Agency further notes that wood pellets can be considered under other programs.

Potential for Rural Economic Development Criterion

Comment: One commenter suggests increasing the points awarded for this criterion from 5 to 15 and modifying how points are awarded as follows:

1. If a project's average wage is above the median household wage in the county and contiguous rural counties, award 15 points.

2. If a project's average wage is equal to or below the median household wage in the county and contiguous rural counties, award 0 points.

Response: The Agency has reconsidered the points associated with this criterion and increased them from 5 to 10, which is appropriate relative to the other scoring criteria. Further, the Agency has added the provision that the project must be located in a rural area in order to be awarded points under this scoring criterion. As noted elsewhere in this preamble, this provision replaces the proposed eligibility requirement for a rural area location.

With the respect to commenter's suggestion to use the median household wage in the county, the Agency agrees with the commenter that it is appropriate to look at the median household wage for the county, and not to include the median household wage for the state, because the county median household wage is more reflective of local economic conditions. The Agency has revised the rule accordingly.

With respect to the commenter's suggestion to include contiguous rural counties, the Agency disagrees with the commenter because economic conditions in the contiguous counties may differ significantly from the project county. Thus, the Agency has not revised the rule with respect to this specific comment.

Local Ownership Criterion

Comment: One commenter suggests decreasing the points awarded for this criterion from 15 to 10 and modifying how points are awarded as follows:

1. If more than 20 but less than or equal to 50 percent of the biorefinery's owners are local owners, award 6 points.

2. If more than 50 percent of the biorefinery's owners are local owners, award 10 points.

3. A biorefinery that has as its majority owner a publicly traded entity would be awarded no points.

Response: Considering the points proposed for this criterion relative to the other criteria, the Agency agrees with the recommendation to reduce the points for this criterion, but has reduced them from 15 to 5, in part because of the changes to the rural economic development potential scoring criterion, which now incorporates a rural area location requirement for the project to be awarded points and the increase in points under that criterion from 5 to 10. However, the Agency does not specifically exclude majority ownership by publicly traded entities so long as the entity can demonstrate local ownership. The Agency has not made the recommended change regarding publicly traded owners because it does not want to discriminate against applicants with publicly traded owners. The Agency also notes that the calculations are based on ownership interest, not the number of owners.

Comment: Four commenters suggest eliminating this scoring criterion. One commenter believes that local ownership will be difficult to obtain for these first-of-a-kind technologies that are perceived to be risky because of the general conservative nature of rural investors. This commenter believes that this criterion would be acceptable for projects based on commercially proven technology as a quid pro quo for Agency financial assistance, but is incompatible with early stage pre-commercial technology projects. It is unwise to increase the number of points for this criterion as a result.

One commenter states that, in many cases, these projects require significant capital to complete and eliminating good projects because they do not have local ownership does not seem to support the objectives of creating a biorefinery industry.

One commenter states that these projects need to be able to take full advantage of the entire range of investment opportunity. According to the commenter, this criterion places limitations on where supporting investment comes from. As a result, the commenter believes that there is a significant likelihood that projects most likely to succeed (and the best deal to the taxpaying public) will be outscored by niche projects that will have limited impact on rural development or of filling advanced biofuel voids. Such an outcome seems to contradict the purposes of the program.

Response: The statute requires the Agency to consider local ownership. As such, the Agency must include this criterion in the rule. The Agency notes that the scoring criteria give preference; they do not determine eligibility. Thus, local ownership is not an eligibility criterion.

With regard to reducing the number of points awarded for this criterion, the Agency has considered the points proposed for this criterion relative to the other criteria and, as discussed in the response to the previous comment, has reduced the points for this criterion.

Project Replication Criterion

Comment: One commenter proposes no change in this criterion and would award a maximum of 5 points.

Response: The Agency disagrees and has increased the points awarded under this criterion from 5 to 10. The Agency, in considering all of the scoring criterion and the relative points associated with each, has determined that the ability of a project to be replicated, especially first-of-a-kind technologies, is an important quality that the Agency wishes to encourage. Thus, the Agency has increased the points associated with this criterion.

Technology Not Currently Operating in Advanced Biofuel Market Criterion

Comment: One commenter recommends eliminating this criterion because it is not explicitly stated in the 2008 Farm Bill. As stated earlier, the commenter believes that the second biorefinery is important as it learns from the first one. This criterion should not be needed to encourage the production of advanced biofuels.

Response: The purpose of the program, as provided in the statute, is to assist in the development of new and emerging technologies for the development of advanced biofuels. This criterion gives priority to such technologies. Therefore, the Agency is retaining this criterion. However, in considering the points for this criterion relative to the other criterion, the Agency has reduced the points from 15 to 5.

Comment: Several commenters state that points for a “first-of-a-kind technology” should be changed to “first commercial application of the applicant’s technology.”

Response: The Agency notes that the commenters are referring to language (“first-of-a-kind technology”) that was used in a notice of funding availability. The rule does not use that phrase, but instead refers to “a particular technology, system, or process that is not currently operating in the advanced biofuel market as of October 1 of the fiscal year for which funding is available.” This is very similar to the intent of the commenter’s suggested “first commercial application of the applicant’s technology,” and the Agency has retained the phrasing used in the proposed rule for the interim rule.

Comment: Two commenters state that the points available for “first of a kind technology” category should be at least as high as “feedstock not previously used” in order to continue to encourage innovation.

Response: As proposed, both criteria had the same maximum number of points (15). However, the Agency is concerned that many new technologies are also likely to use new feedstocks and that the resulting 30 points was too high relative to the other criteria the Agency must consider for making awards under this program. Therefore, the Agency reduced the points under this criterion to 5, which would still provide 20 points for new technologies using new feedstocks.

Comment: One commenter believes awarding points for unproven technologies is counter-intuitive to the program mission. The commenter states that technology risk is viewed by lenders and investors as one of the biggest barriers to participating in a project. Loans and loan guarantees should reflect preference towards projects with a declining risk and points should be awarded to projects that overcome technology risk.

Response: The purpose of the program, as provided in the statute, is to assist in the development of new and emerging technologies for the development of advanced biofuels. This criterion gives priority to such technologies. Therefore, the Agency is retaining this criterion.

Comment: One commenter believes this scoring criterion provides many opportunities for unclear scoring. For example, in the commenter’s case, there may be other biomass gasification technologies being used, or under construction, for the production of advanced biofuels. However, all gasification systems are not alike and, in the commenter’s case, the commenter is using oxygen vs. air plus a syngas yield enhancement stage using a catalytic autothermal reformer vs. a cleanup stage. This combination is considered a different and unique technology within the field. Hence, unless a proposed project and its technology are substantially identical to other technologies in deployment, at the very detailed level, the commenter suggests that any proposed project should be eligible and achieve the maximum possible points.

Response: The Agency recognizes the concerns raised by the commenter. However, the Agency wants to continue to include this criterion in order to encourage the development of truly different and unique technologies. Thus, the Agency encourages the borrower to submit detailed information to establish that the technology is unique for the Agency to consider when scoring the project. As the program matures, the Agency may revisit this criterion to determine if any changes should be made.

Feedstock That Can Be Used for Human or Animal Consumption Criterion

Comment: One commenter recommends eliminating this criterion because almost all feedstock "can" be used for human or animal consumption under some circumstance. Further, this criterion was not explicitly listed in the 2008 Farm Bill and will not further the intent of increasing advanced biofuel production in rural America.

Response: While the Agency generally agrees with the commenter and has removed this as a separate scoring criterion from the rule, the Agency continues to believe that such feedstock should not be encouraged. To that end, the Agency, as noted elsewhere in this preamble, has incorporated a provision in the "impacts on resource conservation, public health, and environment" criterion a deduction of 5 points if the feedstock can be used for human or animal consumption.

Comment: One commenter believes that the Agency should remain feedstock neutral and award points based on the feedstock's ability to create new food and fuel opportunities. According to the commenter, just because feedstock could be used for food does not mean they would be if they otherwise would not have been grown.

Response: As explained in the previous response, the Agency has removed this as a separate scoring criterion from the rule and incorporates it as a 5-point deduction under the "impacts on resource conservation, public health, and environment" criterion.

Alternatives

Comment: One commenter recommends scoring feedstock based on their ability to be easily integrated into current agricultural practices.

Response: The Agency agrees that it would be desirable to use feedstock that can be easily integrated into current agricultural practices. However, the Agency has determined that it would be difficult to measure such integration. Furthermore, the Agency does not want to include in the rule specific feedstock criteria, except in very limited specific instances (e.g., feedstock that can be used for human or animal consumption) that could limit the Agency's implementation of the program and is concerned about establishing a lengthy inflexible permanent list of specific scoring criteria not based directly on the authorizing legislation. Therefore, for these reasons, the Agency has not included the recommendation in the rule.

Comment: One commenter recommends that scoring should be weighted towards avoidance of environmental consequences, ability to offer the agricultural industry a compelling reason to produce (value-add to what is already being done), and likelihood of leading to high capacity volumes. The commenter states that systems that integrate winter crops are an excellent example of this.

Response: With regard to the avoidance of environmental consequences, the Agency is satisfied that this is sufficiently addressed in § 4279.265(d)(6), especially with the addition of the provision to deduct points if the feedstock can be used for human or animal consumption.

With regard to the ability to offer the agricultural industry a compelling reason to produce feedstock, the Agency has determined that it is not appropriate for this program to address this proposed criterion because USDA has other programs that address this area.

With regard to including a criterion specific to the likelihood of leading to high capacity volumes, the Agency is satisfied that this is sufficiently addressed in § 4279.265(d)(10). The ability of a project to be replicated will increase the likelihood that future facilities will be able to have high capacity volume.

Comment: One commenter states that rural development is the ultimate goal, yet program rules, structure, and scoring system place considerable limits on the opportunities. The commenter recommends including the following metrics:

1. Demand for new feedstock. To what extent will the project drive the development of new agricultural-related energy crops?
2. Revenue opportunity. What are the volume needs and expected value of those crops in the vicinity of the project?
3. Job creation. How many additional rural jobs will result from the project?
4. Ease of adoption. How fungible are the new crops with respect to existing agricultural practices (use of existing equipment, storage and handling, planting and cultivating, nutrient and moisture requirements, etc.)?
5. Sustainability. To what extent is the plant and feedstock system a longer term proposition? This includes carbon intensity, use of marginal lands/double crop systems/use of waste or residue, and market outlook for products.

The commenter also states that the scoring system could be a program obstacle and recommends a more basic structure. The commenter states that DOE seems content with promoting the high risk emerging technology and niche application projects and that the Agency should measure projects based upon the mission of revitalization of the rural economy and promote projects with the greatest chance of success. The commenter recommends a scoring system based on the following:

1. Ability to deploy unutilized crop options or create new energy crops that offer new opportunities for rural America.
2. Ability to be scaled and replicated with limited technology risk.
3. Ability to provide environmental benefits and avoid environmental and social consequences.
4. Ability to be accepted into the farming community and be easily integrated into current agricultural practices.
5. Ability for the finished products to be fungible in the current marketplace, while also adding significant volumes to the market.
6. Ability to attract high ratios of equity or other investment.
7. Ability to generate attractive returns and to offer compelling reasons for financing market participation.

Response: The Agency agrees that potential rural economic development is an important metric for evaluating applications. In the rule, the Agency is using both the location of the project in a rural area and potential rural jobs to measure this metric, as found in § 4279.265(d)(8). To include the other aspects suggested by the commenter would make the scoring overly complicated and burdensome. The scoring criteria identified in the rule are either statutory and or in the Managers Report on the authorizing legislation. Statutory provisions cannot be eliminated. Therefore, the Agency has not revised the rule in response to this comment.

Comment: One commenter agrees that there should be strong requirements and incentives for local ownership and local participation, but believes that rural job growth is not given adequate weight in the proposed scoring. The commenter recommends creating a scoring criterion that would award 10 points if a certain level of new job creation is projected. In addition, the commenter suggests that the Agency consider lowering the annual or other fees if the projected job creation level is exceeded by the project.

Response: As noted in a response to a previous comment, the Agency reconsidered the points awarded for potential economic development and increased them from 5 to 10, which the Agency considers appropriate relative to the other scoring criteria.

With respect to the comment on the fees, the Agency disagrees with the suggestion to lower annual or other fees if projected job creation levels are exceeded. The fee structure is independent of the number of jobs created and is based on the cost of implementing the program. Any change in fees would have an impact on the subsidy rate for the program, which determines dollars available. Further, if fees were tied to number of jobs created exceeding projected jobs, applicants would have an incentive to project fewer jobs being created.

Comment: One commenter suggests awarding points to proposed biorefinery projects that intend to produce aviation fuels. According to the commenter, unlike automobiles, power plants, and other energy users who can turn to alternative energy sources for power, aviation does not have alternatives to petroleum-based fuels other than biofuels. Thus, to lower its carbon footprint beyond efficiency measures, aviation must have access to a supply of biofuels. Given these unique technological circumstances, the commenter believes that points should be awarded for proposed biorefinery projects that intend to produce aviation fuels. The commenter believes that declining to do so is risky—should aviation be unable to secure a significant supply of biofuels, the industry and Federal government's goal of carbon reduction will not be achievable.

Response: The Agency wants to encourage all advanced biofuels rather than giving preference to any one biofuel. Therefore, no points have been awarded for production for any one area. It is expected that increased production, in general, will increase the supply for all areas.

Comment: Two commenters suggest modifying the scoring system to award points to projects that benefit the national security needs of the U.S. For example, a biorefinery producing jet fuel used in military aircraft or aircraft used in homeland security-related missions achieves dual goals of developing the biorefinery industry in the United States and providing the Departments of Defense and Homeland Security with a domestically-produced renewable critical resource.

Response: The Agency recognizes the importance of biofuels to national security and has signed a MOU with the Navy. The MOU encourages the development of advanced biofuels in order to secure the strategic energy future of the United States. However, the purpose of the program, as provided in the statute, is to assist in the development of new and emerging technologies for the development of advanced biofuels. Further, the Agency is concerned about establishing a lengthy inflexible permanent list of specific scoring criteria not based directly on the authorizing legislation. Instead, the Agency has included in the rule a provision, for which it is seeking comment, to allow the Administrator to award bonus points to applications that promote partnerships and other activities that assist in the development of new and emerging technologies for the development of advanced biofuels that further the purpose of this Program, as stated in the authorizing legislation. The Agency will identify these partnerships and other activities in a **Federal Register** notice each fiscal year. Therefore, the Agency has determined that it is unnecessary to add the suggested scoring criterion to the rule.

Comment: Two commenters recommend awarding points for improved feedstock, where "improved" is defined as having better per-acre metrics, lower resource requirements, or otherwise great potential for being adopted on a sustainable and viable widespread basis on U.S. soil.

Response: The Agency disagrees with the comment, because it would be difficult to quantify across all current and potential feedstocks. Further, if all of these metrics are improved, the feedstock should prove more appealing to the biorefineries that use the feedstock.

Comment: One commenter encourages the Agency to retain the use of cellulosic feedstock as a scoring criterion. The commenter notes that the EISA requires that 21 billion gallons of advanced biofuel (under the EISA definition) be produced by 2022, and that 16 billion of those gallons must be must be "cellulosic biofuel." Thus, consistent with the President's directive that executive departments and agencies work together through the Biofuels Interagency Working Group to meet the Administration's advanced biofuels goals, the commenter believes that it would be appropriate for the Agency to steer loan guarantee program funds to facilities that will help to meet the large cellulosic biofuel mandate under EISA. If the Agency is concerned that algae and other feedstock do not meet the definition of cellulosic, the commenter suggests that the Agency utilize its scoring discretion to include those feedstock as well.

On the other hand, one commenter agrees with the removal of cellulosic feedstock as a scoring criterion. According to this commenter, all advanced biofuels should compete on a "level playing field," and cellulosic ethanol has already received substantially greater government investment when compared to other advanced biofuels that could serve as "drop-in" replacements for existing petroleum fuels.

One commenter points out that cellulosic biomass is the most abundantly available renewable energy source in rural America and should be favored in the scoring system.

Response: The Agency has decided not to reinsert the cellulosic feedstock criterion. The Agency wants to encourage all advanced biofuels, except in very limited specific instances (*e.g.,* feedstock that can be used for human or animal consumption). Beyond such instances, the Agency does not want to limit specific feedstock from participation in the program.

Selection of Applications for Funding (§ 4279.265(f))

Comment: While a scoring model such as the one proposed may be helpful, one commenter questions whether the model alone is an appropriate determiner of loan quality. The commenter suggests the Agency consider additional flexibility in the loan approval process based on the quality of the loan.

Response: The Agency considers factors other than the scoring criteria in determining loan quality, such as various technical, financial, and environmental factors. Identification of weaknesses during the Agency's review of these additional factors may result in a loan not being approved or they may be addressed in specific conditions in the Conditional Commitment.

Comment: One commenter, who proposes a scoring system that allows for a maximum of 100 points, believes that a score of 55 should be necessary to move forward with an application.

Response: The Agency notes that the maximum score is 100 points, and that a minimum score of 55 points is required in order to be considered for guarantee.

Comment: One commenter recommends that, given that 50 percent of the program budget must be reserved for each half of the fiscal year, in the event that all budget for a given half has been allocated, eligible applications that are received in such a half be held over to the other half and funded in the order received, and not in a new batch competition. The commenter further recommends that any budget unused in any given fiscal year should be re-allocated in the following fiscal year and applications already received should be funded in the order they were received from the prior fiscal year. According to the commenter, this will reduce the burden and risk of applying for the program and will encourage the maximum number of qualified applications to be submitted as early as possible.

Response: As noted in the response to the following comment, the Agency intends to consider an application for funding for two funding competitions, which will result in some applications carrying over to the subsequent fiscal year. This is reflected in the rule in § 4279.265(e)(1). However, the Agency disagrees with the commenter's suggestion that applications that are carried over should not be re-competed. The Agency has determined that all applications that are carried over will be re-competed in order to fund the highest scoring/best qualified applications. To the extent allowed, the Agency may carry over mandatory funding into the next fiscal year.

Ranked Application Not Funded (§ 4279.265(g))

Comment: One commenter is concerned that there could be situations where Agency budgetary authority for a given fiscal year is insufficient to fully fund strong, highly ranked projects. Given the size of advanced biorefinery projects, it is possible that only one or two projects could constitute the entirety of the Agency's budgetary authority in any given year. Such projects could be stronger than any future projects that are submitted in applications in subsequent fiscal years and should not be competitively disadvantaged versus subsequent submissions.

The commenter, therefore, recommends allowing ranked applications that are not fully funded due to budgetary authority limitations to roll over into subsequent fiscal year budget cycles, without requiring a reapplication. Such applications could be re-ranked against new applications to ensure they are still highly ranked, and that the process remains competitive. They should not, however, be competitively disadvantaged and forced to re-apply to subsequent application periods.

Response: The Agency acknowledges that funding in certain years may not be sufficient to make awards to strong projects and that the proposed rule was unnecessarily restrictive in limiting considerations of an application to the fiscal year in which it was submitted. Therefore, the Agency has revised the rule to allow an application to be competed in two consecutive competitions, which would allow applications submitted during the second application period of a fiscal year to be carried over to the next fiscal year. However, if an application is not funded after its second competition, the Agency will not consider the application any further (the applicant would have to submit a new application). The Agency has revised the rule (see § 4279.265(e)(1) and (g)) to make this process clear.

Comment: Several commenters recommend that applicants not have to re-apply from one funding cycle to the next, but, instead, that the program operate in the same way as the B&I guaranteed loan program in this regard.

Response: The Agency generally agrees and will consider an application for one additional funding cycle. If an application still has not been selected after a second funding cycle, the application will not be considered further by the Agency because the information in the application will no longer be current. Thus, the applicant would need to submit a new application for the project.

Conditions Precedent to Issuance of Loan Note Guarantee (§ 4279.281(a))

Comment: One commenter questions why a lender needs to "certify" compliance with the Anti-Lobby Act because such information on these activities may not be available to the lender. The commenter recommends disclosing these activities in the application.

Response: The Agency disagrees. The lender is the applicant to the Agency, and the Agency is requiring this from the lender to ensure that the lender is sufficiently informed regarding the use of project fund, which would be determined by the lender as part of its due diligence.

Introduction (§ 4287.301(b))

Comment: One commenter recommends modifying § 4287.301(b) to allow non-project related collateral to be pledged to secure the non-guaranteed portion of the debt. Such segregated collateral or security could be in the form of a letter of credit, a parent company collateralized guaranty, or investment securities (or a combination). Restrictions could be placed on the ability to access such security so that it not be available unless and until payment is made on the USDA Guaranty to the holders of the guaranteed debt. In addition, the lender-of-record would not be allowed to access the security until it has completed the foreclosure process on the project and has met the requirements to collect on the USDA Guaranty on any debt held by it that is so guaranteed. This will provide assurance that the lender-of-record will meet its servicing responsibilities throughout the collateral liquidation process.

Response: The Agency does not allow separate collateral for the unguaranteed portion of the loan because the Agency wants the lender to maintain a certain level of risk in connection with the project. This makes the lender more likely to service the loan properly and take an active interest in the success of the project. The Agency has structured the program to ensure that project risk is being shared on a pro rata basis commensurate with the percentage of the loan that is guaranteed versus unguaranteed. Therefore, the Agency has not revised the rule as suggested by the commenter.

Comment: One commenter states that the timing of project equity funding under the proposed rule is under-addressed. The commenter recommends pro rata funding of project equity with loan disbursements, provided the underlying equity commitments are on a firm basis from creditworthy entities (defined as investment grade or otherwise deemed creditworthy by the lender). If the equity commitments are not from creditworthy entities, then upfront equity funding from less than creditworthy sponsors shall be required as a condition of closing.

Response: At closing, the lender must demonstrate the equity is available. At project completion, the lender must certify funds were disbursed in accordance with the Conditional Commitment. Between closing and completion, there are no rule requirements regarding the order in which equity funds and loan funds are disbursed. However, the Agency agrees with the commenter's characterization that the timing of project equity funding is under-addressed in rule. Therefore, the Agency has clarified the rule (see § 4279.234(c)(1)) that the equity requirement must be demonstrated at the time the loan is closed.

Exception Authority (§ 4287.303)

Comment: One commenter recommends providing the Administrator with the widest possible authority for every criterion except for those specifically limited in the statute.

Response: The Agency disagrees that the exception authority needs to be "the widest possible authority for every criterion." The exception authority provided is adequate, and the Agency only exercises this authority when it is not inconsistent with applicable law and when not making an exception adversely affects the Federal Government's interest.

Other—Working Capital Loans

Comment: One commenter recommends that a portion of the funds dedicated to loan guarantees be converted to working capital and equipment loans for startup businesses. The commenter states that, although several projects are prime for the commercialization of algae as an alternate fuel, traditional funding sources are non-existent in the current economy. If lenders are not making loans, there are no loans to guarantee. The basics of the lending could mirror the guarantee program with certain exceptions:

Commercial lending in the U.S. is virtually non-existent due to the current economic conditions. The inability to obtain working capital and construction funds has significantly slowed the progress of development of alternate fuels. Funds have become available in terms of grants for research and development (as opposed to the commercial applications), and the current financing opportunities are based on grants with milestone payments but no repayment obligation and has primarily supported the academic community and government laboratories. The commenter states that: (a) The technologies that have been created have no value until there is a viable market for them, and (b) laboratories and universities have not, to date, shown the ability to commercialize the algae industry. Their purpose is restricted to research. The commenter believes that a portion of the funds allocated for loan guarantees should be converted to direct loans to individuals and companies who plan to build products in the U.S. and employ U.S. workers. The guidelines for required documentation have already been stated; the only difference is that the Agency would be taking on the role of the lender, subject to servicing arrangements which would probably be handled by a third party service provider on behalf of the Agency. The risk would be greater than with a loan guarantee, but the rewards would include the ability to negotiate loans with shorter terms, requiring the borrowers to generate revenue and loan repayment history so that, when the economy strengthens, they are 'bankable' or investment-grade companies. The commenter believes that this program will further support the concept that private companies and investors will be attracted to invest in these companies once they have proven themselves to be credit-worthy.

Response: The statute authorizing this program does not provide the Agency with the authority to provide direct funding.

Other—Algae Related Projects

Comment: One commenter requests exemptions for algae-related projects involving off-take contracts covering a significant percentage of the biocrude with the two biggest users, the U.S. airlines and the U.S. military, because of the urgent need to develop alternative fuel sources and the lack of traditional lending sources. The governments of many other countries are beginning to invest in commercialization, following the commenter's belief that additional research will be needed after actual commercial-scale production has begun, and the funds need to be made available for construction of commercial production facilities. The commenter states that sites could be built out for production at an approximate cost of $1 million to $2 million per acre and that, although the Agency is not a regulated or supervised lender, it could oversee financing of loans structured with (a) first lien positions, (b) fixed-cost contracts and take-out commitments, (c) required off-take contracts from either the U.S. military or U.S. airlines, (d) interest and repayment terms, and (e) all of the other components of traditional short-term commercial loans.

Response: To the extent the commenter is asking for direct loan financing, the statute authorizing this program does not provide the Agency with the authority to provide direct funding. To the extent the commenter is seeking preferential treatment for algae-related projects, the Agency has adopted a policy of wanting to have a program that is, in part, technologically neutral. Such preferential treatment for algae-related projects would provide preferences for technologies inconsistent with this policy. The Agency believes that technology neutrality, along with feedstock and geographic neutrality, is critical to meeting the purposes of the program, which is to encourage broad-based advanced biofuel production practices, technologies, and feedstock.

Other—Disbursement of Guaranteed and Unguaranteed Portions

Comment: Three commenters believe that requiring the simultaneous disbursement of the guaranteed and unguaranteed portions will unduly burden projects using bonds with excess "negative carry" costs (the difference between the interest rate on the loans and money market reinvestment rates earned while funds are held pending disbursement). Construction periods for capital intensive projects of the type envisioned under the program are generally very long. Most project financings with long construction periods rely on bank lenders to disburse funds over a construction loan period and thereby avoid negative carry costs. However, when bonds are one of the funding sources, bond market convention requires simultaneous closing and funding of bond proceeds. In cases when bonds and bank loans are used together for a project financing, bonds are generally placed first with proceeds held in a disbursement account pending construction draws. Once the bond proceeds have been used, the bank lender then funds its share of the loans over the remainder of the construction period.

The commenters recommend allowing the guaranteed and unguaranteed portions, whether capital markets offerings or bank loans, to be funded disproportionally in order to reduce construction period interest costs for the projects. To address the potential mismatch in exposure based on differing funding schedules, the Intercreditor Agreement will require that upon a default the under-funded lender (likely to be the guaranteed bank lender) fund its pro rata share of the loans (or purchase pro rata participations from the over-funded lender). As is typical for project financings, a requirement that satisfactory debt and equity commitments for the full funding of the project budget are entered into at closing should also be added to the list of program requirements.

Response: The Agency is not adopting this comment. The lender is required to proportionally disburse the guaranteed and unguaranteed funding to reduce Agency risk and maintains the lender's financial stake in the project.

IV. Request for Comments

The Agency is interested in receiving comments on all aspects of the interim rule. The area in which the Agency is seeking specific comments is identified below. All comments should be submitted as indicated in the **ADDRESSES** section of this preamble.

1. *Local owner definition.* The Agency is seeking comments on the best mechanism for defining a local owner. Should it reflect a uniform distance? If not, should we define differently for different regions? Should we reflect different distances based on the type of technology? Are there any other factors the Agency should consider? Should this be established by notice or by

regulation? Please be sure to include your rationale for your suggestions.

2. *Administrator bonus points.* The Agency is seeking comment on whether this is an appropriate use of Administrator bonus points. The Agency is also seeking comment on whether there is a mechanism more suitable than Administrator bonus points to adopt this program to the dynamic nature of the biorefinery industry. Please be sure to include your rationale for your suggestions.

List of Subjects in 7 CFR Parts 4279 and 4287

Biorefinery assistance, Loan programs—Business and industry, Rural development assistance, Rural areas.

For the reasons set forth in the preamble, title 7, chapter XLII of the Code of Federal Regulations, is amended as follows:

CHAPTER XLII—RURAL BUSINESS–COOPERATIVE SERVICE AND RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE

PART 4279—GUARANTEED LOANMAKING

■ 1. The authority citation for part 4279 is amended to read as follows:

Authority: 5 U.S.C. 301; and 7 U.S.C. 1989.

■ 2. Part 4279 is amended by adding a new subpart C to read as follows:

Subpart C—Biorefinery Assistance Loans

Sec.

Subpart C—Biorefinery Assistance Loans

§ 4279.201 Purpose and scope.

The purpose and scope of this subpart is to provide financial assistance 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.

§ 4279.202 Compliance with §§ 4279.1 through 4279.84.

Except as specified in paragraphs (a) through (l) of this section, all loans guaranteed under this subpart shall comply with the provisions found in §§ 4279.1 through 4279.84 of this title.

(a) *Definitions.* The terms used in this subpart are defined in either § 4279.2 or in this paragraph. If a term is defined in both § 4279.2 and this paragraph, it will have, for purposes of this subpart only, the meaning given in this section.

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

(i) Biofuel derived from cellulose, hemicellulose, or lignin;

(ii) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);

(iii) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;

(iv) Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat;

(v) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass;

(vi) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass; and

(vii) Other fuel derived from cellulosic biomass.

Agricultural producer. An individual or entity 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.

Association of agricultural producers. An organization that represents agricultural producers and whose mission includes working on behalf of such producers and the majority of whose membership and board of directors is comprised of agricultural producers.

Biobased product. A product determined by the Secretary to be a commercial or industrial product (other than food or feed) that is either:

(i) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or

(ii) An intermediate ingredient or feedstock.

Biofuel. A fuel derived from renewable biomass.

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

Borrower. Any party that borrows or seeks to borrow money from the lender, including any party or parties liable for the guaranteed loan except guarantors.

Business plan. A comprehensive document that includes a clear description of the borrower's ownership structure and management experience, including, if applicable, discussion of a parent, affiliates, and subsidiaries, and a discussion of how the borrower will operate the proposed project, including, at a minimum, a description of the business and project; the products and services to be provided; the availability of the resources necessary to provide those products and services; and pro forma financial statements for a period of 2 years, including balance sheet, income and expense, and cash flows.

Byproduct. Any and all biobased products generated under normal operations of the proposed project that can be reasonably measured and monitored. Byproducts may or may not have a readily identifiable commercial use or value.

Default. The condition that exists when a borrower is not in compliance with the promissory note, the loan agreement, or other related documents evidencing the loan.

Eligible project costs. Those expenses approved by the Agency for the project.

Eligible technology. Eligible technology is defined as either:

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

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

Existing business. A business that has been in operation for at least one full year. Businesses that have undergone mergers, changes in the business name, changes in the legal type of entity, or expansions of product lines are considered to be existing businesses as long as there is not a significant change in operations.

Farm cooperative. A business owned and controlled by agricultural producers that is incorporated, or otherwise recognized by the state in which it operates, as a cooperatively operated business.

Farmer Cooperative Organization. An organization whose membership is composed of farm cooperatives.

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

Indian tribe. This term has the meaning as defined in 25 U.S.C. 450b.

Institution of higher education. This term has the meaning as defined in 20 U.S.C. 1002(a).

Loan classification. The assigned score or metric reflecting the lender's analysis of the degree of potential loss in the event of default.

Local owner. An individual who owns any portion of an eligible advanced biofuel biorefinery and whose primary residence is located within in a certain distance from the biorefinery as specified by the Agency in a Notice published in the **Federal Register**.

Market value. The amount for which a property will sell for its highest and best use at a voluntary sale in an arm's length transaction.

Material adverse change. Any change in the purpose of the loan, the financial condition of the borrower, or the collateral that would likely jeopardize loan performance.

Negligent loan origination. The failure of a lender to perform those services that a reasonably prudent lender would perform in originating its own portfolio of unguaranteed loans. 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.

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

Project. The facility or portion of a facility producing eligible advanced biofuels and any eligible biobased product receiving funding under this subpart.

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 cannot, meet its obligations to protect or preserve collateral.

Renewable biomass.

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

(A) 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;

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

(C) 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

(ii) 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:

(A) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(B) 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.

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, or in the urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants, and any area that has been determined to be "rural in character" by the Under Secretary for Rural Development, or as otherwise identified in this definition.

(1) An area that is attached to the urbanized area of a city or town with more than 50,000 inhabitants by a contiguous area of urbanized census blocks that is not more than 2 census blocks wide. Applicants from such an area should work with their Rural Development State Office to request a determination of whether their project is located in a rural area under this provision.

(2) 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.

(3) For the Commonwealth of Puerto Rico, the island is considered rural and eligible for Business Programs assistance, except for the San Juan Census Designated Place (CDP) and any other CDP with greater than 50,000 inhabitants. CDPs with greater than 50,000 inhabitants, other than the San Juan CDP, may be determined to be eligible if they are "not urban in character."

(4) For the State of Hawaii, all areas within the State are considered rural and eligible for Business Programs assistance, except for the Honolulu CDP within the County of Honolulu.

(5) 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.

(6) The determination that an area is "rural in character" will be made by the Under Secretary of Rural Development. The process to request a determination under this provision is outlined in paragraph (6)(ii) of this definition.

(i) The determination that an area is "rural in character" under this definition will apply to areas that are within:

(A) An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town that has a population of greater than 150,000 inhabitants or the urbanized area of such a city or town; or

(B) An urbanized area contiguous and adjacent to a city or town of greater than 50,000 inhabitants that is within one-quarter mile of a rural area.

(ii) Units of local government may petition the Under Secretary of Rural Development for a "rural in character" designation by submitting a petition to both the appropriate Rural Development State Director and the Administrator on behalf of the Under Secretary. The petition shall document how the area meets the requirements of paragraph

(6)(i)(A) or (B) above and discuss why the petitioner believes the area is "rural in character," including, but not limited to, the area's population density, demographics, and topography and how the local economy is tied to a rural economic base. Upon receiving a petition, the Under Secretary will consult with the applicable Governor or leader in a similar position and request comments to be submitted within 5 business days, unless such comments were submitted with the petition. The Under Secretary will release to the public a notice of a petition filed by a unit of local government not later than 30 days after receipt of the petition by way of publication in a local newspaper and posting on the Agency's Web site, and the Under Secretary will make a determination not less than 15 days, but no more than 60 days, after the release of the notice. Upon a negative determination, the Under Secretary will provide to the petitioner an opportunity to appeal a determination to the Under Secretary, and the petitioner will have 10 business days to appeal the determination and provide further information for consideration.

Semi-work scale. A manufacturing plant operating on a limited commercial scale to provide final tests of a new product or process.

Startup business. A business that has been in operation for less than one full year. Startup businesses include newly formed entities leasing space or constructing facilities in a new market area, even if the owners of the startup business own affiliated businesses doing the same kind of business. Newly formed entities that are buying existing businesses or facilities will be considered an existing business as long as the business or facility being bought remains in operation and there is no significant change in operations.

Tangible net worth. Tangible assets minus liabilities.

Technical and economic potential. A technology not described in paragraph (i) 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:

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

(A) Feedstocks;

(B) Process engineering;

(C) Siting;

(D) Technology;

(E) Energy production; and

(F) Financial and sensitivity review using a banking industry software analysis program with appropriate industry standards.

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

(iii) The advanced biofuel technology has successfully completed at least a 12 -month (four seasons) operating cycle at semi-work scale.

Tier 1 capital. This term has the meaning given it under applicable Federal Deposit Insurance Corporation regulations.

Tier 2 capital. This term has the meaning given it under applicable Federal Deposit Insurance Corporation regulations.

Tier 1 leverage capital ratio. This term has the meaning given it under applicable Federal Deposit Insurance Corporation regulations.

Tier 1 risk-based capital ratio. This term has the meaning given it under applicable Federal Deposit Insurance Corporation regulations.

Total project costs. The sum of all costs associated with a completed project.

Total qualifying capital. This term has the meaning given to it under applicable Federal Deposit Insurance Corporation regulations.

Total risk-based capital ratio. This term has the meaning given it under applicable Federal Deposit Insurance Corporation regulations.

Viable commercial-scale operation. An operation is considered to be a viable commercial-scale operation if it demonstrates that:

(i) Its revenue will be sufficient to recover the full cost of the project over the term of the loan and result in an anticipated annual rate of return sufficient to encourage investors or lenders to provide funding for the project;

(ii) It 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);

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

(iv) It has the ability to achieve market entry, suitable infrastructure to transport the advanced biofuel to its market is available, and the advanced biofuel technology and related products are generally competitive in the market;

(v) 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; and

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

Working capital. Current assets available to support a business's operations and growth. Working capital is calculated as current assets less current liabilities.

(b) *Exception authority.* The exception authority provisions of this paragraph apply to this subpart instead of those in § 4279.15. The Administrator may, with the concurrence of the Secretary of Agriculture, make an exception, on a case-by-case basis, to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the Federal government's interest.

(c) *Lender eligibility requirements.* The requirements specified in § 4279.29 do not apply to this subpart. Instead, a lender must meet the requirements specified in paragraphs (c)(1) through (c)(5) of this section in order to be approved for participation in this program.

(1) An eligible lender is any Federal or State chartered bank, Farm Credit Bank, other Farm Credit System institution with direct lending authority, and Bank for Cooperatives. These entities must be subject to credit examination and supervision by either an agency of the United States or a State. Credit unions subject to credit examination and supervision by either the National Credit Union Administration or a State agency, and insurance companies regulated by a State or National insurance regulatory agency are also eligible lenders. The National Rural Utilities Cooperative Finance Corporation is also an eligible lender. Savings and loan associations, mortgage companies, and other lenders as identified in 7 CFR 4279.29(b) are not eligible.

(2) The lender must demonstrate the minimum acceptable levels of capital specified in paragraphs (c)(2)(i) through (c)(2)(iii) of this section at the time of application and at time of issuance of the loan note guarantee. This information may be identified in Call Reports and Thrift Financial Reports. If the information is not identified in the Call Reports or Thrift Financial Reports, the lender will be required to calculate

its levels and provide them to the Agency.

(i) Total Risk-Based Capital ratio of 10 percent or higher;

(ii) Tier 1 Risk-Based Capital ratio of 6 percent or higher; and

(iii) Tier 1 Leverage Capital ratio of 5 percent or higher.

(3) The lender must not be debarred or suspended by the Federal government.

(4) If the lender is under a cease and desist order from a Federal agency, the lender must inform the Agency. The Agency will evaluate the lender's eligibility on a case-by-case basis given the risk of loss posed by the cease and desist order.

(5) The Agency, in its sole determination, will approve applications for loan guarantees only from lenders with adequate experience and expertise, from similar projects, to make, secure, service, and collect loans approved under this subpart.

(d) *Independent credit risk analysis.* The Agency will require an evaluation and credit rating of the total project's indebtedness, without consideration for a government guarantee, from a nationally-recognized rating agency for loans of $125,000,000 or more.

(e) *Environmental responsibilities.* The provisions of this paragraph shall be used instead of the provisions specified in § 4279.30(c) for determining a lender's environmental responsibilities under this subpart. Lenders have a responsibility to become familiar with Federal environmental requirements; to consider at the earliest planning stages, in consultation with the prospective borrower, the potential environmental impacts of their proposals; and to develop proposals that minimize the potential to adversely impact the environment.

(1) Lenders must alert the Agency to any controversial environmental issues related to a proposed project or items that may require extensive environmental review.

(2) Lenders must help the borrower prepare Form RD 1940–20, "Request for Environmental Information," (when required by 7 CFR part 1940, subpart G, or successor regulations); 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.

(3) Lenders must ensure that the borrower has:

(i) Provided the necessary environmental information to enable the Agency to undertake its environmental review process in accordance with 7 CFR part 1940, subpart G, or successor regulations, including the provision of all required Federal, State, and local permits;

(ii) Complied with any mitigation measures required by the Agency; and

(iii) Not taken any actions or incurred any obligations with respect to the proposed project that will either limit the range of alternatives to be considered during the Agency's environmental review process or which will have an adverse effect on the environment.

(f) *Additional lender functions and responsibilities.* In addition to the requirements in § 4279.30, the requirements specified in paragraphs (f)(1) through (f)(3) apply.

(1) Any action or inaction on the part of the Agency does not relieve the lender of its responsibilities to originate and service the loan guaranteed under this subpart.

(2) The lender must compile a complete application for each guaranteed loan and maintain such application in its files for at least 3 years after the final loss has been paid.

(3) The lender must report to the Agency all conflicts of interest and appearances of conflicts of interest.

(g) *Certified lender program.* Section 4279.43 does not apply to this subpart.

(h) *Oversight and monitoring.* In addition to complying with requirements specified in § 4279.44, the lender will cooperate fully with Agency oversight and monitoring of all lenders involved in any manner with any guarantee under the Biorefinery Assistance program to ensure compliance with this subpart. Such oversight and monitoring will include, but is not limited to, reviewing lender records and meeting with lenders (in accordance with § 4287.107(c)).

(i) *Conditions of guarantee.* All loan guarantees under this subpart are subject to the provisions of § 4279.72, except for § 4279.72(b), and the provisions specified in paragraphs (i)(1) through (i)(5) of this section.

(1) The entire loan, the guaranteed and unguaranteed portions, must be secured by a first lien on all collateral necessary to run the project. The Agency may consider a subordinate lien position on inventory and accounts receivable for working capital loans provided: The Agency determines the working capital is necessary for the operation; with the subordination, the Agency remains adequately secured; and the subordination is in the best interests of the Government.

(2) The holder of a guaranteed portion shall have all rights of payment, as defined in the loan note guarantee, to the extent of the portion purchased. Even if all or a portion of the loan note guarantee has been sold to a holder, the lender will remain bound by all obligations under the loan note guarantee, Lender's Agreement, and Agency program regulations.

(3) The lender must 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 off-take agreements, as may be applicable.

(4) If a lender does not satisfactorily comply with the provision found in § 4279.256(c) and such failure leads to losses, then such losses may not be recoverable under the guarantee.

(5) When a guaranteed portion of a 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 had actual knowledge at the time it became the holder or in which the holder participates or condones. The lender will reimburse the Agency for any payments the Agency makes to a holder of lender's guaranteed loan that, under the Loan Note Guarantee, would not have been paid to the lender had the lender retained the entire interest in the guaranteed loan and not conveyed an interest to a holder.

(j) *Sale or assignment of guaranteed loan.* The provisions of § 4279.75 apply to this subpart.

(k) *Minimum retention.* The provisions of § 4279.77 apply to this subpart, except that the lender is required to hold in its own portfolio a minimum of 7.5 percent of the total loan amount.

(l) *Replacement of document.* Documents must be replaced in accordance with § 4279.84, except, in § 4279.84(b)(1)(v), a full statement of the circumstances of any defacement or mutilation of the Loan Note Guarantee or Assignment Guarantee Agreement would also need to be provided.

§§ 4279.203–4279.223 [Reserved]

§ 4279.224 Loan processing.

Processing of Biorefinery Assistance Guaranteed loans under this subpart shall comply with the provisions found in §§ 4279.107 through 4279.187 of this chapter, except as provided in the following sections.

§ 4279.225 Ineligible loan purposes.

For the purposes of this subpart, the ineligible purposes identified in § 4279.114(b), (c), and (p) do not apply to this subpart.

§ 4279.226 Fees.

Fees will be determined according to the provisions of this section in lieu of § 4279.107.

(a) *Guarantee fee.* The guarantee fee will be paid to the Agency by the lender and is nonrefundable. The fee may be passed on to the borrower. Issuance of the Loan Note Guarantee is conditioned on payment of the guarantee fee by closing. The guarantee fee will be the percentage specified in paragraphs (a)(1) or (a)(2) of this section, as applicable, unless otherwise specified by the Agency in a notice published in the **Federal Register**, multiplied by the principal loan amount multiplied by the percent of guarantee and will be paid one time only at the time the Loan Note Guarantee is issued.

(1) For loans receiving a 90 percent guarantee, the guarantee fee is three percent.

(2) For loans receiving less than a 90 percent guarantee, the guarantee fee is:

(i) Two percent for guarantees on loans greater than 75 percent of total project costs.

(ii) 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 costs.

(iii) One percent for guarantees on loans of 65 percent or less of total project costs.

(b) *Annual renewal fee.* The annual renewal fee, which may be passed on to the borrower, will be paid to the Agency for as long as the guaranteed loan is outstanding and is payable during the construction period. Unless otherwise specified by the Agency in a notice published in the **Federal Register**, the annual renewal fee shall be as follows:

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

(2) 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.

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

§ 4279.227 Borrower eligibility.

Borrower eligibility will be determined according to the provisions of this section in lieu of § 4279.108.

(a) *Eligible entities.* To be eligible, a borrower must meet the requirements specified in paragraphs (a)(1) and (a)(2) of this section, as applicable.

(1) *Type of borrower.* The borrower must be one of the following:

(i) An individual;

(ii) An entity;

(iii) An Indian tribe;

(iv) A unit of State or local government;

(v) A corporation;

(vi) A farm cooperative;

(vii) A farmer cooperative organization;

(viii) An association of agricultural producers;

(ix) A National Laboratory;

(x) An institution of higher education;

(xi) A rural electric cooperative;

(xii) A public power entity; or

(xiii) A consortium of any of the above entities.

(2) *Legal authority and responsibility.* Each borrower must have, or obtain before loan closing, 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.

(b) *Ineligible entities.* A borrower will be considered ineligible for a guarantee if the borrower, any owner with more than 20 percent ownership interest in the borrower, or any owner with more than 3 percent ownership interest in the borrower if there is no owner with more than 20 percent ownership interest in the borrower:

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

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

(3) Is delinquent on a Federal debt, or

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

§ 4279.228 Project eligibility.

In lieu of the requirements specified in § 4279.113, to be eligible for a guaranteed loan under this subpart, at a minimum, a borrower and project, as applicable, must meet each of the requirements specified in paragraphs (a) through (g) of this section.

(a) The project must be located in a State, as defined in § 4279.2.

(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 use an eligible feedstock for the production of advanced biofuels and biobased products. Eligible feedstocks include, but are not limited to, renewable biomass, including municipal solid waste consisting of renewable biomass, biosolids, treated sewage sludge, and byproducts of the pulp and paper industry. For the purposes of this subpart, recycled paper is not an eligible feedstock.

(d) The majority of the biorefinery production must be an advanced biofuel. Unless otherwise approved by the Agency, and determined to be in the best financial interest of the government, the advanced biofuel must be sold as a biofuel. The following will be considered in determining what constitutes the majority of production:

(1) When the biorefinery produces a biobased product and, if applicable, byproduct that has an established BTU content from a recognized Federal source, majority biofuel production will be based on BTU content of the advanced biofuel, the biobased product, and, if applicable, the byproduct, or

(2) When the biorefinery produces a biobased product or, if applicable, byproduct that does not have an established BTU content, then majority biofuel production will be based on output volume, using parameters announced by the Agency in periodic Notices in the **Federal Register**, of the advanced biofuel, the biobased product, and, if applicable, the byproduct.

(e) An advanced biofuel that is converted to another form of energy for sale will still be considered an advanced biofuel.

(f) The project must provide funds (*e.g.,* cash, subordinate financing, non-federal grant) of not less than 20 percent of eligible project costs. All projects must meet the equity requirements specified in § 4279.234(c)(1).

(g) The Agency will consider refinancing only under either of the two conditions specified in paragraphs (g)(1) and (g)(2) of this section.

(1) Permanent financing used to refinance interim construction financing of the proposed project only if the application for the guaranteed loan under this subpart was approved prior to closing the interim loan for the construction of the facility.

(2) Refinancing that is no more than 20 percent of the loan for which the Agency is guaranteeing and the purpose of the refinance is to enable the Agency to establish a first lien position with respect to pre-existing collateral subject to a pre-existing lien and the refinancing would be in the best financial interests of the Federal Government.

§ 4279.229 Guaranteed loan funding.

Instead of the provisions found in § 4279.119, the provisions of this section apply to loans guaranteed under this subpart.

(a) In administering this program's budgetary authority each fiscal year, the Agency will allocate up to, but no more, than 50 percent of its budgetary authority to fund applications received by the end of the first application window, including those carried over from the previous application period. Any funds not obligated to support applications submitted by the end of the first application window will be available to support applications received by the end of the second window, including those carried over from the previous application period. The Agency, therefore, will have a minimum of 50 percent of each fiscal year's budgetary authority for this program available to support applications received by the end of the second application window.

(b) The amount of a loan guaranteed for a project under this subpart will not exceed 80 percent of total eligible project costs. Total Federal participation will not exceed 80 percent of total eligible project costs. The borrower needs to provide the remaining 20 percent from other non-Federal sources to complete the project. Eligible project costs are specified in paragraph (e) of this section.

(c) The maximum principal amount of a loan guaranteed under this subpart is $250 million to one borrower; there is no minimum amount. If an eligible borrower receives other direct Federal funding (*i.e.,* direct loans and grants) for a project, the amount of the loan that the Agency will guarantee under this subpart must be reduced by the same amount of the other direct Federal funding that the eligible borrower received for the project. For example, an eligible borrower is applying for a loan guarantee on a $1 million project. The borrower provides the minimum matching requirement of 20 percent, or $200,000. This leaves $800,000 in other funding needed to implement the project. If the borrower receives no other direct Federal funding for this project and requests a guarantee for the $800,000, the Agency will consider a guarantee on the $800,000. However, if this borrower receives $100,000 in other direct Federal funding for this project, the Agency will only consider a guarantee on $700,000.

(d) The maximum guarantee on the principal and interest due on a loan guaranteed under this subpart will be determined as specified in paragraphs (d)(1) through (d)(4) of this section.

(1) If the loan amount is equal to or less than $125 million, 80 percent for the entire loan amount unless all of the conditions specified in paragraphs (d)(1)(i) through (d)(1)(iii) of this section are met, in which case 90 percent for the entire loan amount.

(i) Equity of 40 percent, excluding qualified intellectual property;

(ii) Feedstock and off-take contracts of at least 1 year in duration; and

(iii) Collateral coverage ratio, total discounted collateral value divided by total loan request, exceeding 1.5 to 1.

(2) If the loan amount is more than $125 million and less than $150 million, 80 percent for the entire loan amount.

(3) If the loan amount is equal to or more than $150 million but less than $200 million, 70 percent on the entire loan amount.

(4) If the loan amount is $200 million up to and including $250 million, 60 percent on the entire loan amount.

(e) Eligible project costs are only those costs associated with the items listed in paragraphs (e)(1) through (e)(7) of this section, as long as the items are an integral and necessary part of the total project, as determined by the Agency.

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

(2) Construction or retrofitting.

(3) Permit and license fees.

(4) Working capital.

(5) Land acquisition.

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

(7) Any other item identified by the Agency in a notice published in the **Federal Register**.

(f) Loans made with the proceeds of any obligation the interest on which is excludable from income under the Internal Revenue Code are ineligible. Funds generated through the issuance of tax-exempt obligations cannot be used to purchase the guaranteed portion of any Agency guaranteed loan and an Agency guaranteed loan cannot serve as collateral for a tax-exempt issue. The Agency may guarantee a loan with respect to a project at a facility that has received, or will receive, tax-exempt financing only when the guaranteed loan funds are used to finance a project that is separate and distinct from the activities at the facility that have been or will be financed by the tax-exempt obligation, and the guaranteed loan has at least a parity security position with the tax-exempt obligation.

§ 4279.230 [Reserved]

§ 4279.231 Interest rates.

The provisions found in § 4279.125 apply to loans guaranteed under this subpart, except as provided in paragraphs (a) through (c) of this section. Lenders are encouraged to pass interest-rate savings realized through the secondary market on to the borrower.

(a) The rate on the unguaranteed portion of the loan shall not exceed the rate on the guaranteed portion of the loan by more than 500 basis points;

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

(c) Both the guaranteed and unguaranteed portions of the loan must be amortized over the same term, as provided in § 4279.232(a).

§ 4279.232 Terms of loan.

Instead of the provisions found in § 4279.126, the provisions of this section apply to loans guaranteed under this subpart, except as provided in § 4279.232(e).

(a) The repayment term for a loan under this subpart will be for a maximum period of 20 years or 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 portions of the loan.

(b) Guarantees shall 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.

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

(d) A loan's maturity will take into consideration the use of proceeds, the useful life of assets being financed, and the borrower's ability to repay the loan.

(e) Repayment of the loan shall be in accordance with § 4279.125(a) and § 4279.126(b) and (c).

§ 4279.233 [Reserved]

§ 4279.234 Credit evaluation.

Instead of the provisions found in § 4279.131, the provisions of this section apply to loans guaranteed under this subpart. For all applications for guarantee, the lender must prepare a credit evaluation. An acceptable credit evaluation must:

(a) Use credit documentation procedures and an underwriting process that are consistent with generally accepted commercial lending practices, and

(b) Include an analysis of the credit factors associated with each guarantee application, including consideration of each of the following five elements.

(1) *Credit worthiness.* Those financial qualities that generally make the borrower more likely to meet its obligations as demonstrated by its credit history.

(2) *Cash flow.* A borrower's ability to produce sufficient cash to repay the loan as agreed.

(3) *Capital.* The financial resources that the borrower currently has and those it is likely to have when payments are due. The borrower must be adequately capitalized.

(4) *Collateral.* The assets pledged by the borrower in support of the loan, including processing technology owned by the borrower and excluding assets acquired with other Federal funds. Collateral must have documented value sufficient to protect the interest of the lender and the Agency, and the discounted collateral value must be at least equal to the loan amount. Lenders will discount collateral consistent with sound loan-to-value policy. The Agency may consider the value of qualified intellectual property, as defined in § 4279.2, arrived at in accordance with GAAP standards. The value of the intellectual property may not exceed 30 percent of the total value of all collateral.

(i) If there is an established market for the intellectual property, the value of the intellectual property will be valued according to the lender's standard discounting practice for intellectual property for determining adequacy of collateral.

(ii) If there is no established market for the intellectual property, the value of the intellectual property will be valued not greater than 25 percent, as determined by the Agency, for determining adequacy of collateral.

(5) *Conditions.* The general business environment and status of the borrower's industry.

(c) When determining the credit quality of the borrower, the lender must include the following in its analysis:

(1) The borrower shall demonstrate that it will be able to provide equity in the project of not less than 20 percent of eligible project costs at the time the loan is closed. For existing biorefineries, the fair market value of project equity (including the guaranteed loan being applied for) in real property and equipment and the value of qualified intellectual property based on the audited financial statements in accordance with Generally Accepted Accounting Principles may be substituted in whole or in part to meet the equity requirement. However, the appraisal completed to establish the fair market value of the real property and equipment must not be more than 1 year old. The Agency may require the lender to provide a more recent appraisal in order to reflect current market conditions. The appraisal used to establish fair market value of the real property and equipment must conform to the requirements of § 4279.244. Otherwise, equity must be in the form of cash and cannot include other direct Federal funding (*i.e.,* loans and grants).

(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 industrial standards are 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.

§§ 4279.235–4279.236 [Reserved]

§ 4279.237 Financial statements.

The provisions of § 4279.137 do not apply to this subpart. Instead, the submittal of financial statements with the loan guarantee application must meet the requirements specified in § 4279.261(c).

§§ 4279.238–4279.243 [Reserved]

§ 4279.244 Appraisals.

All appraisals must be in accordance with § 4279.144 and each appraisal must be a complete, self-contained appraisal. Lenders must complete at least a Transaction Screen Questionnaire for any undeveloped sites and a Phase I Environmental Site Assessment on existing business sites in accordance with ASTM International Standards, which should be provided to the appraiser for completion of the self-contained appraisal. Specialized appraisers will be required to complete appraisals under this section. The Agency may approve a waiver of this requirement only if a specialized appraiser does not exist in a specific industry or hiring one will cause an undue financial burden to the borrower.

§§ 4279.245–4279.249 [Reserved]

§ 4279.250 Feasibility studies.

The provisions of § 4279.150 do not apply to this subpart. Instead, feasibility studies must meet the requirements specified in § 4279.261(f).

§§ 4279.251–4279.254 [Reserved]

§ 4279.255 Loan priorities.

The provisions of § 4279.155 do not apply to this subpart.

§ 4279.256 Construction planning and performing development.

The lender must comply with § 4279.156(a) through (c), except as otherwise provided in paragraphs (a) through (f) of this section.

(a) *Architectural and engineering practices.* Under paragraph § 4279.156(a), the lender must also ensure that all project facilities are designed utilizing accepted architectural and engineering practices that conform to the requirements of this subpart.

(b) *Onsite inspector.* The lender must provide an onsite project inspector.

(c) *Changes and 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 approved by the Agency 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. In the event of any of the aforementioned increases in cost or expenses, the borrower must provide for such increases in a manner that does not diminish the borrower's operating capital. 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.

(d) *New draw certifications.* The following three certifications are required for each new draw:

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

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

(3) Certification from the lender that the borrower is complying with the Davis-Bacon Act.

(e) *Surety.* Surety, as the term is commonly used in the industry, will be required in cases when the guarantee will be issued prior to completion of construction unless the contractor will receive a lump sum payment at the end of work. Surety will be made a part of the contract if the borrower requests it or if the contractor requests partial payments for construction work. In such cases where no surety is provided and the project involves pre-commercial technology, technology that is first of its type in the U.S., or new designs without sufficient operating hours to prove their merit, a latent defects bond may be required by the Agency to cover the work.

(f) *Reporting during construction.* During the construction of the project, lenders shall submit quarterly construction progress reports to the Agency. These reports must contain, at a minimum, planned and completed construction milestones, loan advances, and personnel hiring, training, and retention. This requirement applies to both the development and construction of commercial-scale biorefineries and to the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. The lender must expeditiously report any problems in project development to the Agency.

§§ 4279.257–4279.258 [Reserved]

§ 4279.259 Borrower responsibilities.

(a) *Federal, State, and local regulations.* Borrowers must comply with all Federal, State, and local laws and rules that are in existence and that affect the project including, but not limited to:

(1) Land use zoning;

(2) Health, safety, and sanitation standards as well as design and installation standards; and

(3) Protection of the environment and consumer affairs.

(b) *Permits, agreements, and licenses.* Borrowers must obtain all permits, agreements, and licenses that are applicable to the project.

(c) *Insurance.* The borrower is responsible for maintaining all hazard, flood, liability, worker compensation, and personal life insurance, when required, on the project.

(d) *Access to borrower's records.* Except as provided by law, upon request by the Agency, the borrower will permit representatives of the Agency (or other Federal agencies as authorized by the Agency) to inspect and make copies of any of the records of the borrower pertaining to any Agency-guaranteed loan. Such inspection and copying may be made during regular office hours of the borrower or at any other time agreed upon between the borrower and the Agency.

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

§ 4279.260 Guarantee applications—general.

Unless otherwise noted, the provisions of § 4279.161 do not apply to this subpart. Instead, the application provisions of this section and § 4279.261 apply to the preparation of Biorefinery Assistance Guaranteed loan applications.

(a) *Application submittal.* For each guarantee request, the lender must submit to the Agency an application that is in conformance with § 4279.261. The methods of application submittal will be specified in the annual **Federal Register** notice.

(b) *Application deadline.* Unless otherwise specified by the Agency in a notice published in the Federal Register, complete applications must be received by the Agency on or before May 1 of each year to be considered for funding for that fiscal year. If the application deadline falls on a weekend or a Federally observed holiday, the deadline will be the next Federal business day.

(c) *Incomplete applications.* Incomplete applications will be rejected. Lenders will be informed of the elements that made the application incomplete. If a resubmitted application is received by the applicable application deadline, the Agency will reconsider the application.

(d) *Application withdrawal.* During the period between the submission of an application and the execution of documents, the lender must notify the Agency, in writing, if the project is no longer viable or the borrower is no longer requesting financial assistance for the project. When the lender so notifies the Agency, the selection will be rescinded or the application withdrawn.

§ 4279.261 Application for loan guarantee content.

Approved lenders must submit an Agency-approved application form for each loan guarantee sought under this subpart. Loan guarantee applications from approved lenders must contain the information specified in paragraphs (a) through (n) of this section, organized pursuant to a table of contents in a chapter format, and in paragraph (o) of this section as applicable.

(a) *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 § 4279.227.

(3) *Project eligibility.* Describe how the project meets the eligibility criteria identified in paragraph (c) of this section. Clearly state whether the application is for the construction and development of a biorefinery or for the retrofitting of an existing facility. Provide results from demonstration or pilot facilities that prove that the technology proposed to be used meets the definition of eligible technology. Additional project description information will be needed later in the application process.

(4) *Matching funds.* Submit a spreadsheet identifying sources, amounts, and availability 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 borrower and matching fund source.

(b) *Lender's analysis and credit evaluation.* This analysis shall conform to § 4279.232(b) and shall include:

(1) A summary of the technology to be used in the project;

(2) The viability of such technology for the particular project application;

(3) The development type (e.g., installation, construction, retrofit);

(4) The credit reports of the borrower, its principals, and any parent, affiliate, or subsidiary as follows:

(i) A personal credit report from an Agency-approved credit reporting company for individuals who are key employees of the borrower, as determined by the Agency, and for individuals owning 20 percent or more interest in the borrower or any owner with more than 10 percent ownership interest in the borrower if there is no owner with more than 20 percent ownership interest in the borrower, except for when the borrower is a corporation listed on a major stock exchange unless otherwise determined by the Agency; and

(ii) Commercial credit reports on the borrower and any parent, affiliate, and subsidiary firms;

(5) The credit analysis specified in § 4279.232(b);

(6) 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; and

(7) Whether the loan note guarantee is requested prior to construction or after completion of construction of the project.

(c) *Financial statements.* Financial statements as follows:

(1) For businesses that have been in existence for one or more years,

(i) The most recent audited financial statements of the borrower if the guaranteed loan is $3 million or more, unless alternative financial statements are authorized by the Agency; or

(ii) The most recent audited or Agency-acceptable financial statements of the borrower if the guaranteed loan is less than $3 million.

(2) For businesses that have been in existence for less than one year, the most recent Agency-authorized financial statements of the borrower regardless of the amount of the guaranteed loan request.

(3) For all businesses, a current (not more than 90 days old) balance sheet; a *pro forma* balance sheet at startup; and projected balance sheets, income and expense statements, and cash flow statements for a period of not less than 3 years of stabilized operation. Projections should be supported by a list of assumptions showing the basis for the projections.

(4) Depending on the complexity of the project and the financial condition of the borrower, the Agency may request additional financial statements and additional related information.

(d) *Environmental information.* Environmental information required by the Agency to conduct its environmental reviews (as specified in Exhibit H of 7 CFR part 1940, subpart G).

(e) *Appraisals.* An appraisal conducted as specified under § 4279.244.

(f) *Feasibility study.* 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, a technical assessment of the project is required, as specified in paragraph (h) of this section.

TABLE 1—FEASIBILITY STUDY COMPONENTS

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

(B) Economic Feasibility:
- 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; and
  - Feedstock risks.
- Documentation that woody biomass feedstock from National Forest system lands or public lands cannot be used for a higher-value product.
- Impacts on existing manufacturing plants or other facilities that use similar feedstock if the borrower's proposed biofuel production technology is adopted.
- Projected impact on resource conservation, public health, and the environment.
- Detailed analysis of project costs including:
  - Project management and professional services;
  - Resource assessment;
  - Project design and permitting;
  - Land agreements and site preparation;
  - Equipment requirements and system installation;
  - Startup and shakedown; and
  - Warranties, insurance, financing, and operation and maintenance costs.
- Overall economic impact of the project, including any additional markets created for agricultural and forestry products and agricultural waste material and the potential for rural economic development.
- Feasibility/plans of project to work with producer associations or cooperatives, including estimated amount of annual feedstock, biofuel, and byproduct purchased from or sold to producer associations and cooperatives.

(C) Market Feasibility:
- 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 byproducts;
- Extent of competition, including other similar facilities in the market area;
- Commitments from customers or brokers—principal products and byproducts.
- Risks related to the Advanced Biofuel industry, including
  - Industry status;
  - Specific market risks; and
  - Competitive threats and advantages.

(D) Technical Feasibility:
- Suitability of the selected site for the intended use.
- Scale of development for which the process technology has been proven (i.e., lab or bench, pilot, demonstration, or semi-work scale).
- 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]).
- Identification and estimation of project operation and development costs. Specify the level of accuracy of these estimates and the assumptions on which these estimates have been based.

TABLE 1—FEASIBILITY STUDY COMPONENTS—Continued

- Ability of the proposed system to be commercially replicated.
- Risks related to:
  - Construction of the Biorefinery;
  - Advanced Biofuel production;
  - Regulation and governmental action; and
  - Design-related factors that may affect project success.

(E) Financial Feasibility:

- Reliability of the financial projections and the assumptions on which the financial statements are based, including all sources and uses of project capital, private or public, such as Federal funds. Provide detailed analysis and description of projected balance sheets, income and expense statements, and cash flow statements over the useful life of the project.
- A detailed description of:
  - Investment incentives;
  - Productivity incentives;
  - Loans and grants; and
  - Other project authorities and subsidies that affect the project.
- Any constraints or limitations in the financial projections.
- 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 seasonal business costs.
- Adequacy of raw materials and supplies.
- Sensitivity analysis, including feedstock and energy costs and product and byproduct prices.
- Risks related to:
  - The project;
  - Borrower financing plan;
  - The operational units; and
  - Tax issues.

(F) Management Feasibility:

- Borrower and/or management's previous experience concerning:
  - Biofuel production;
  - Acquisition of feedstock;
  - Marketing and sale of off-take; and
  - The receipt of Federal financial assistance, including amount of funding, date received, purpose, and outcome.
- Management plan for procurement of feedstock and labor, marketing of the off-take, and management succession.
- Risks related to:
  - Borrower as a company (e.g., development-stage);
  - Conflicts of interest; and
  - Management strengths and weaknesses.

(G) Qualifications:

- A resume or statement of qualifications of the author of the feasibility study, including prior experience, must be submitted.

(g) *Business plan.* The lender must submit a business plan that includes the information specified in paragraphs (g)(1) through (g)(10) of this section. Any or all of this information may be omitted if it is included in the feasibility study specified in paragraph (f) of this section.

(1) The borrower's experience;

(2) The borrower's succession planning, addressing both ownership and management;

(3) The names and a description of the relationship of the borrower's parent, affiliates, and subsidiaries;

(4) The borrower's business strategy;

(5) Possible vendors and models of major system components;

(6) The availability of the resources (*e.g.,* labor, raw materials, supplies) necessary to provide the planned products and services;

(7) 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;

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

(9) Projected balance sheets, income and expense statements, and cash flow statements for a period of not less than 3 years of stabilized operation; and

(10) A description of the proposed use of funds.

(h) *Technical Assessment.* As part of the feasibility study required under paragraph (f) of this section, a detailed technical assessment is required for each project. The technical assessment must demonstrate that the design, procurement, installation, startup, operation and maintenance of the project will permit it to 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 at or before the time of loan closing, and demonstrate that necessary project equipment and services will be available over the useful life of the project. The technical assessment must be based upon verifiable data and contain sufficient information and analysis so that a determination can be made on the technical feasibility of achieving the levels of income or production that are projected in the financial statements. All technical information provided must follow the format specified in paragraphs (h)(1) through (h)(9) of this section. Supporting information may be submitted in other formats. Design drawings and process flow charts are required as exhibits. A discussion of a topic identified in paragraphs (h)(1) through (h)(9) of this section 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 an independent, third-party professional engineer.

(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 method, 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 manufacturers of major components of advanced biofuels technology equipment 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, 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, with references if available.

(2) *Agreements and permits.* The application must identify 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 (h)(2)(i) through (h)(2)(vi) of this section.

(i) Advanced biofuels refineries must be installed in accordance with applicable local, State, and national codes and applicable local, State, and Federal regulations. Identify zoning and code requirements and necessary 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, the schedule for securing those 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.* The application must provide adequate and appropriate evidence of the availability of the feedstocks required for the advanced biofuels refinery to operate as designed. Indicate the type and quantity of the feedstock, and discuss storage of the feedstock, where applicable, and competing uses for the feedstock. Indicate shipping or receiving methods 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.* The application must provide 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. Projects shall be engineered by a qualified entity. Each biorefinery 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) A description of the project site that addresses issues such as site access, foundations, and backup equipment when applicable;

(B) A completed Form RD 1940–20 and an environmental assessment prepared in accordance with Exhibit H of 7 CFR part 1940, subpart G; and

(C) Identification of any unique construction and installation issues.

(iii) Sites must be controlled by the eligible borrower for at least the financing term of the loan note guarantee.

(5) *Project development schedule.* The application must describe each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown. 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.* The application must demonstrate that equipment required by the biorefinery is available and can be procured and delivered within the proposed project development schedule. 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.* The application must provide 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.

(8) *Operations and maintenance.* The application must provide the operations and maintenance requirements of the biorefinery necessary for the biorefinery to operate as designed over its useful life. 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 schedules 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 operating and maintaining 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.* A description of the decommissioning process, when the project must be uninstalled or removed. A description of any issues, requirements, and costs for removal and disposal of the biorefinery.

(i) *Scoring information.* The application must contain information in a format that is responsive to the scoring criteria specified in § 4279.265(d).

(j) *Loan Agreement.* A proposed loan agreement or a sample loan agreement with an attached list of the proposed loan agreement provisions as specified in § 4279.161(b)(11).

(k) *Lender certifications.* The lender must provide certification in accordance with § 4279.161(b)(16). In addition, the lender must certify that the lender concludes that the project has technical merit.

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

(m) *DUNS Number.* For borrowers other than individuals, a Dun and Bradstreet Universal Numbering System (DUNS) number, which can be obtained online at *http://fedgov.dnb.com/webform.*

(n) *Bioenergy experience.* Identify borrower's, including its principals', prior experience in bioenergy projects and the receipt of Federal financial assistance, including the amount of funding, date received, purpose, and outcome, for such projects.

(o) *Other information.* Any other information determined by the Agency to be necessary to evaluate the application.

§§ 4279.262–4279.264 [Reserved]

§ 4279.265 Guarantee application evaluation.

Instead of evaluating applications using the provisions of § 4279.165, the Agency will evaluate and award applications according to the provisions specified in paragraphs (a) through (h) of this section.

(a) *Application processing.* Upon receipt of a complete application, the Agency will conduct a review to determine if the borrower, lender, and project are eligible; if the project has technical merit as determined under paragraph (b) of this section; and if the minimum financial metric criteria under paragraph (c) of this section are met.

(1) 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. No further evaluation of the application will occur.

(2) 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) *Technical merit determination.* The Agency's determination of a project's technical merit will be based on the information in the application. Projects determined by the Agency to be without technical merit will not be selected for funding.

(c) *Financial metric criteria.* The borrower 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, submitted in accordance with § 4279.261(c), 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 startup businesses and of 9:1 or lower for existing businesses.

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

(d) *Scoring applications.* The Agency will score each complete and eligible application it receives on or before May 1 in the fiscal year in which it was received. The Agency will score each eligible application that meets the minimum requirements for financial and technical feasibility using the evaluation criteria identified below. A maximum of 100 points is possible.

(1) Whether the borrower has established a market for the advanced biofuel and the byproducts produced and whether the advanced biofuel meets an applicable renewable fuel standard. A maximum of 10 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 each of the following: feedstocks, marketing agreements for the advanced biofuel, and the byproducts produced or if the project does not produce an advanced biofuel that meets an applicable renewable fuel standard, 0 points will be awarded.

(ii) If the business has a greater than 50 percent commitment for any one or two of the following: feedstocks, marketing agreements for the advanced biofuel, and the byproducts produced and if the project produces an advanced biofuel that meets an applicable renewable fuel standard, 5 points will be awarded.

(iii) If the business has a greater than 50 percent commitment for each of the following: Feedstocks, marketing agreements for the advanced biofuel, and the byproducts produced and if the project produces an advanced biofuel that meets an applicable renewable fuel standard, 10 points will be awarded.

(2) Whether the area in which the borrower proposes to place the biorefinery, defined as the area that will supply the feedstock to the proposed biorefinery, has any 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 area that will supply the feedstock to the proposed biorefinery does not have any other similar advanced biofuel biorefineries, 5 points will be awarded.

(ii) If there are other similar advanced biofuel biorefineries located within the area that will supply the feedstock to the proposed biorefinery, 0 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 15 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, 15 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) Five (5) points will be awarded if any one of the three conditions specified in paragraphs (d)(4)(i)(A) through (d)(4)(i)(C) of this section is met.

(A) At least 60 percent of the dollar value of feedstock to be used by the proposed biorefinery will be supplied by producer associations and cooperatives;

(B) At least 60 percent of the dollar value of the advanced biofuel to be produced by the proposed biorefinery will be sold to producer associations and cooperatives; or

(C) At least 60 percent of the dollar value of the biobased products to be produced by the proposed biorefinery will be sold to producer associations and cooperatives.

(ii) Three (3) points will be awarded if any one of the three conditions specified in paragraphs (d)(4)(ii)(A) through (d)(4)(ii)(C) of this section is met.

(A) At least 30 percent of the dollar value of feedstock to be used by the proposed biorefinery will be supplied by producer associations and cooperatives;

(B) At least 30 percent of the dollar value of the advanced biofuel, or an advanced biofuel converted to electricity, to be produced by the proposed biorefinery will be sold to producer associations and cooperatives; or

(C) At least 30 percent of the dollar value of the biobased products to be produced by the proposed biorefinery will be sold to producer associations and cooperatives.

For example, consider a proposed biorefinery that will purchase $1,000,000 of feedstock and produce $5,000,000 worth of biofuel and $2,000,000 worth of biobased products. In order to receive the 5 points under this criterion, at least $600,000 worth of feedstock purchases must be from producer associations or cooperatives, at least $3,000,000 worth of biofuel must be sold to producer associations or cooperatives, or at least $1,200,000 worth of biobased products must be sold to producer associations or cooperatives.

(5) The level of financial participation by the borrower, including support from non-Federal government sources and private sources. Other direct Federal funding (*i.e.,* direct loans and grants) will not be considered as part of the borrower's equity participation. A maximum of 15 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower's equity plus other resources results in a debt-to-tangible net worth ratio equal to or less than 3 to 1, but greater than 2.5 to 1, 8 points will be awarded.

(ii) If the borrower's equity plus other resources results in a debt-to-tangible net worth ratio equal to or less than 2.5 to 1, 15 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 effect on three impact areas: resource conservation (*e.g.,* water, soil, forest), public health (*e.g.,* potable water, air quality), and the environment (*e.g.,* compliance with an applicable renewable fuel standard, greenhouse gases, emissions, particulate matter). A maximum of 10 points can be awarded. Based on what the borrower has provided in either the application or the feasibility study, points to be awarded will be determined as follows:

(i) If process adoption will have a positive impact on any one of the three impact areas (resource conservation, public health, or the environment), 3 points will be awarded.

(ii) If process adoption will have a positive impact on two of the three impact areas, 6 points will be awarded.

(iii) If process adoption will have a positive impact on all three impact areas, 10 points will be awarded.

(iv) If the project proposes to use a feedstock that can be used for human or animal consumption as a feedstock, 5 points will be deducted from the score.

(7) Whether the borrower can establish that, if adopted, the biofuels production technology proposed in the application will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks. A maximum of 10 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 feasibility study, that the biofuels production technology proposed in the application, if adopted, will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, 0 points will be awarded.

(ii) If the borrower has established, through an independent third party feasibility study, that the biofuels production technology proposed in the application, if adopted, will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, 10 points will be awarded.

(iii) If the feedstock is wood pellets, no points will be awarded under this criterion.

(8) The potential for rural economic development. If the project is located in a rural area and the business creates jobs with an average wage that exceeds the County median household wages where the biorefinery will be located, 10 points will be awarded.

(9) The level of local ownership of the biorefinery proposed in the application. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If local owners have an ownership interest in the biorefinery of more than 20 percent but less than or equal to 50 percent, 3 points will be awarded.

(ii) If local owners have an ownership interest in the biorefinery of more than 50 percent, 5 points will be awarded.

(10) Whether the project can be replicated. A maximum of 10 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.), 5 points will be awarded.

(ii) If the project can be commercially replicated nationally, 10 points will be awarded.

(11) If the project uses a particular technology, system, or process that is not currently operating in the advanced biofuel market as of October 1 of the fiscal year for which the funding is available, 5 points will be awarded.

(12) The Administrator can award up to a maximum of 10 bonus points to applications that promote partnerships and other activities that assist in the development of new and emerging technologies for the development of advanced biofuels so as to increase the energy independence of the United States; promote resource conservation, public health, and the environment; diversify markets for agricultural and forestry products and agriculture waste material; and create jobs and enhance the economic development of the rural economy. These partnerships and other activities will be identified in a **Federal Register** notice each fiscal year. However, the Administrator's bonus points may not raise an applicant's score to more than 100 points.

(e) *Ranking of applications.* The Agency will rank all scored applications to create a priority list of scored applications for the program. Unless otherwise specified in a notice published in the **Federal Register**, the Agency will rank applications by approximately January 31 for complete and eligible applications received on or before November 1 and by approximately July 31 for complete and eligible applications received on or before May 1.

(1) All applications received on or before November 1 and May 1 will be ranked by the Agency and will be

competed against the other applications received on or before such date. All applications that are ranked will be considered for selection for funding for that application cycle.

(2) When an application scored in first set of applications is carried forward into the second set of applications, it will be competed against all of the applications in the second set using its score from the first set of applications.

(f) *Selection of applications for funding.* Using the priority list created under paragraph (e) of this section, the Agency will select applications for funding based on the criteria specified in paragraphs (f)(1) through (f)(3) of this section. The Agency will notify, in writing, lenders whose applications have been selected for funding.

(1) *Ranking.* The Agency will consider the score an application has received compared to the scores of other applications in the priority list, with higher scoring applications receiving first consideration for funding. A minimum score of 55 points is required in order to be considered for a guarantee.

(2) *Availability of budgetary authority.* The Agency will consider the size of the request relative to the budgetary authority that remains available to the program during the fiscal year.

(i) If there is insufficient budgetary authority during a particular funding period to select a higher scoring application, the Agency may elect to select the next highest scoring application for further processing. Before this occurs, the Agency will provide the borrower of the higher scoring application the opportunity to reduce the amount of its request to the amount of budgetary authority available. If the borrower agrees to lower its request, it must certify that the purposes of the project can be met, and the Agency must determine the project is financially feasible at the lower amount.

(ii) If the amount of funding required is greater than 25 percent of the program's outstanding budgetary authority, the Agency may elect to select the next highest scoring application for further processing, provided the higher scoring borrower is notified of this action and given an opportunity to revise their application and resubmit it for an amount less than or equal to 25 percent of the program's outstanding budgetary authority.

(3) *Availability of other funding sources.* If other financial assistance is needed for the project, the Agency will consider the availability of other funding sources. If the lender cannot demonstrate that funds from these sources are available at the time of selecting applications for funding or potential funding, the Agency may instead select the next highest scoring application for further processing ahead of the higher scoring application.

(g) *Ranked applications not funded.* A ranked application that is not funded in the application cycle in which it was submitted will be carried forward one additional application cycle, which may be in the next fiscal year. The Agency will notify the lender in writing. If an application has been selected for funding, but has not been funded because additional information is needed, the Agency will notify the lender of what information is needed, including a timeframe for the lender to provide the information. If the lender does not provide the information within the specified timeframe, the Agency will remove the application from further consideration and will so notify the lender.

(h) *Wage rates.* As a condition of receiving a loan guaranteed under this subpart, 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 subpart 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 subpart are further subject to the relevant regulations contained in title 29 of the Code of Federal Regulations.

§§ 4279.266–4279.278 [Reserved]

§ 4279.279 Domestic lamb industry adjustment assistance program.

The provisions of § 4279.175 do not apply to this subpart.

§ 4279.280 Changes in borrowers.

All changes in borrowers must be in accordance with § 4279.180, but the eligibility requirements of this program apply.

§ 4279.281 Conditions precedent to issuance of loan note guarantee.

The loan note guarantee will not be issued until the lender certifies to the conditions identified in § 4279.181(a) through (o) of subpart B of this part and paragraphs (a) through (h) of this section. If the lender is unable to provide any of the certifications required under this section, the lender must provide an explanation satisfactory to the Agency as to why the lender is unable to provide the certification. The lender can request the guarantee prior to construction, but must still certify to all conditions in this section.

(a) For loans exceeding $150,000, the lender has certified its compliance with the Anti-Lobby Act (18 U.S.C. 1913). Also, if any funds have been, or will be, paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to guarantee a loan, the lender shall completely disclose such lobbying activities in accordance with 31 U.S.C. 1352.

(b) Where applicable, the lender must certify that the borrower has obtained:

(1) A legal opinion relative to the title to rights-of-way and easements. Lenders are responsible for ensuring that borrowers have obtained valid, continuous, and adequate rights-of-way and easements needed for the construction, operation and maintenance of a facility.

(2) A title opinion or title insurance showing ownership of the land and all mortgages or other lien defects, restrictions, or encumbrances, if any. It is the responsibility of the lender to ensure that the borrower has obtained and recorded such releases, consents, or subordinations to such property rights from holders of outstanding liens or other instruments as may be necessary for the construction, operation and maintenance of the facility and to provide the required security. For example, when a site is for major structures for utility-type facilities (such as a gas distribution system) and the lender and borrower are able to obtain only a right-of-way or easement on such site rather than a fee simple title, such a title opinion must be provided.

(c) The minimum financial criteria, including those financial criteria contained in the Conditional Commitment, have been maintained through the issuance of the loan note guarantee. Failure to maintain these financial criteria shall result in an ineligible application.

(d) Each borrower shall certify to the lender 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 subpart 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 subpart are further subject to the relevant regulations contained in title 29 of the Code of Federal Regulations.

(e) The lender certifies that it has reviewed all contract documents and verified compliance with Sections 3141 through 3144, 3146, and 3147 of title 40 U.S.C., and title 29 of the Code of Federal Regulations. The lender will certify that the same process will be completed for all future contracts and any changes to existing contracts.

(f) The lender certifies that the proposed facility complies with all Federal, State, and local laws and regulatory rules that are in existence and that affect the project, the borrower, or lender activities.

(g) The lender will notify the Agency in writing whenever there has been a change in the classification of a loan within 15 calendar days of such change.

(h) The lender certifies that the borrower has provided the equity in the project identified in the Conditional Commitment.

§§ 4279.282–4279.289 [Reserved]

§ 4279.290 Requirements after project construction.

Once the project has been constructed, the lender must:

(a) Provide the Agency annual 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.

(1) The actual amount of advanced biofuels, biobased products, and, if applicable, byproducts produced in order to assess whether project goals related to majority production are being met;

(2) If applicable, documentation that identified health and/or sanitation problems have been solved;

(3) A summary of the cost of operating and maintaining the facility;

(4) A description of any maintenance or operational problems associated with the facility;

(5) Certification that the project is and has been in compliance with all applicable State and Federal environmental laws and regulations;

(6) The number of jobs created;

(7) A description of 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;

(8) The results of the annual inspections conducted under paragraph (b) of this section; and

(b) For the life of the guaranteed loan, conduct annual inspections.

§§ 4279.291–4279.300 [Reserved]

PART 4287—SERVICING

■ 3. The authority citation for part 4287 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1989.

■ 4. Part 4287 is amended by adding a new subpart D to read as follows:

Subpart D—Servicing Biorefinery Assistance Guaranteed Loans

Sec.

Subpart D—Servicing Biorefinery Assistance Guaranteed Loans

§ 4287.301 Introduction.

(a) This subpart supplements 7 CFR part 4279, subparts A and C, by providing additional requirements and instructions for servicing and liquidating all Biorefinery Assistance Guaranteed Loans.

(b) The lender will be responsible for servicing the entire loan and will remain mortgagee and secured party of record notwithstanding the fact that another party may hold a portion of the loan. 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 a loan will neither be paid first nor given any preference or priority over the guaranteed portion of the loan.

(c) Copies of all forms, regulations, and Instructions referenced in this subpart are available in any Agency office. Whenever a form is designated in this subpart, that designation includes predecessor and successor forms, if applicable, as specified by the field or National Office.

§ 4287.302 Definitions.

The definitions and abbreviations contained in § 4279.2 of subpart A and in § 4279.202 of subpart C of part 4279 of this chapter apply to this subpart.

§ 4287.303 Exception authority.

The exception authority provisions of this paragraph apply to this subpart instead of those in § 4279.15 of subpart A of part 4279 of this chapter. The Administrator may, with the concurrence of the Secretary of Agriculture, make an exception, on a case-by-case basis, to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the Federal government's interest.

§§ 4287.304–4287.305 [Reserved]

§ 4287.306 Appeals.

Section 4279.16 of subpart A of part 4279 of this chapter applies to this subpart.

§ 4287.307 Servicing.

Except as specified in paragraphs (a) through (m) of this section, all loans guaranteed under this subpart shall comply with the provisions found in §§ 4287.101 through 4287.180 of this chapter. If the Agency determines that the lender is not in compliance with its servicing responsibilities, the Agency reserves the right to take any action the Agency determines necessary to protect the Agency's interests with respect to the loan. If the Agency exercises this right, the lender must cooperate with the Agency. Any cost to the Agency associated with such action will be assessed against the lender.

(a) *Periodic reports.* Each lender shall submit quarterly reports, unless more frequent ones are needed as determined by the Agency to meet the financial interests of the United States, regarding the condition of its Agency guaranteed loan portfolio (including borrower status and loan classification) and any material adverse change in the general financial condition of the borrower since the last report was submitted.

(b) *Default reports.* Lenders shall submit monthly default reports, including borrower payment history, for each loan in monetary default using a form approved by the Agency.

(c) *Financial reports.* The financial report requirements specified in § 4287.107(d) apply except as follows:

(1) The financial reports required under § 4287.107(d) may be specified in either the loan agreement or the Conditional Commitment;

(2) The lender must submit to the Agency quarterly financial statements within 45 days of the end of each quarter; and

(3) The annual financial statements required under § 4287.107(d) must be audited financial statements and must be submitted within 180 days.

(d) *Additional loans.* Instead of complying with the additional expenditures provisions specified in § 4287.107(e), the lender may make additional expenditures or new loans to a borrower with an outstanding loan guaranteed only with prior written Agency approval. The Agency will only approve additional expenditures or new loans 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. Any additional expenditure or loan made by the lender must be junior in priority to the loan guaranteed under 7 CFR part 4279 except for working capital loans for which the Agency may consider a subordinate lien provided it is consistent with the conditional provisions specified in § 4279.202(i)(1).

(e) *Interest rate adjustments.* The provisions of § 4287.112 apply, except for § 4287.112(a)(2).

(f) *Collateral inspection and release.* In lieu of complying with § 4287.113, lenders must comply with the provisions of this paragraph. The lender must inspect the collateral as often as necessary to properly service the loan. The Agency must give prior approval for the release of collateral, except as specified in paragraph (f)(1) of this section or where the release of collateral is made under the abundance of collateral provision of the applicable security agreement, subject to the provisions of paragraph (f)(3) of this section. Appraisals on the collateral being released are required on all transactions exceeding $250,000 and will be at the expense of the borrower. The appraisal must meet the requirements of § 4279.244. The sale or release of collateral must be based on an arm's length transaction, unless otherwise approved by the Agency in writing.

(1) 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 (subject to the provisions of paragraph (f)(3) of this section) if the proceeds generated are used to pay down secured debt in order of lien priority or to buy replacement collateral.

(2) 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 pay down secured debt in order of lien priority 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.

(3) Lenders may not release collateral with a value of more than 10 percent of the original loan amount at any one time and within any one calendar year without Agency concurrence.

(4) Any release of collateral must not adversely affect the project's operation or financial condition.

(g) *Subordination of lien position.* In addition to complying with the provisions found in § 4287.123, a subordination must not extend the term of the guaranteed loan.

(h) *Transfers and assumptions.* Transfers and assumptions shall comply with § 4287.134, except as specified in paragraphs (h)(1) through (h)(3) of this section, and with paragraphs (h)(4) and (h)(5) of this section.

(1) In complying with § 4287.134(a), eligible applicants shall be determined in accordance with subpart C of part 4279 of this chapter instead of subpart B of part 4279.

(2) Any new loan terms under § 4287.134(b) must be within the terms authorized by § 4279.232 of subpart C of part 4279 of this chapter instead of § 4279.126 of subpart B of part 4279.

(3) Additional loans under § 4287.134(e) will be considered as a new loan application under subpart C of part 4279 of this chapter instead of subpart B of part 4279.

(4) The Agency may charge the lender a nonrefundable transfer fee at the time of a transfer application. The Agency will set the amount of the transfer fee in an annual notice of funds availability published in the **Federal Register**.

(5) 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 of the borrower, 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.

(6) 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 and the change otherwise conforms with applicable regulations.

(i) *Substitution of lender after issuance of the Loan Note Guarantee.* All substitutions of lenders must comply with § 4287.135 except that, instead of approving a new lender as a substitute lender using the provisions of § 4287.135(a), the Agency may approve the substitution of a new lender if the proposed substitute lender:

(1) Is an eligible lender in accordance with § 4279.202(b);

(2) Is able to service the loan in accordance with the original loan documents; and

(3) Acquires title to the unguaranteed portion of the loan held by the original lender and assumes all original loan requirements, including liabilities and servicing responsibilities.

(j) *Default by borrower.* The provisions of § 4287.145 apply to this subpart, except that:

(1) Instead of complying with § 4287.145(b)(2), 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 § 4279.232(a) of part 4279 of this chapter; and

(2) If a loan goes into default, the lender must provide the notification required under § 4287.145(a) to the Agency within 15 calendar days of when a borrower is 30 days past due on a payment or is otherwise in default of the Loan Agreement.

(k) *Protective advances.* All protective advances made by the lender must comply with § 4287.156 and the provisions of paragraphs (k)(1) and (k)(2) of this section.

(1) Instead of the $5,000 specified in § 4287.156(c), the Agency's written authorization is required when cumulative protective advances exceed $100,000, unless otherwise specified by the Agency at a lesser amount.

(2) The lender must obtain written Agency approval for any protective advance that will singularly or cumulatively amount to more than $100,000 or 10 percent of the guaranteed loan, whichever is less.

(l) *Liquidation.* Liquidations shall comply with § 4287.157, except that, in complying with § 4287.157(d)(13), lenders are to obtain an independent appraisal report meeting the requirements of § 4279.244, instead of § 4279.144, when the outstanding balance of principal and accrued interest is $200,000 or more.

(m) *Determination of loss and payment.* In addition to complying with § 4287.158, if a lender receives a final loss payment, the lender must submit to the Agency an annual report on its collection activities for each unsatisfied account for 3 years following payment of the final loss claim.

§ 4287.308 Fiscal Year 2009 and Fiscal Year 2010 loan guarantees.

Any loan guarantee application that has been submitted to the Agency under this program prior to March 16, 2011 may submit to the Agency a written request for an irrevocable election to have the guaranteed loan serviced in accordance with this subpart. Such an election must be made by October 1, 2011.

§§ 4287.309–4287.400 [Reserved]

Dated: January 31, 2011.

Dallas Tonsager,

Under Secretary, Rural Development.

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