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Rural Business-Cooperative Service

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Rural Utilities Service

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7 CFR Parts 4279 and 4287

Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance Program; Final Rule

**DEPARTMENT OF AGRICULTURE****Rural Business-Cooperative Service****Rural Utilities Service****7 CFR Parts 4279 and 4287**

RIN 0570-AA73

**Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance Program**

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

**ACTION:** Interim final rule.

**SUMMARY:** The Rural Business-Cooperative Service (Agency) is publishing this interim final rule for the Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance Program (the Program), formerly the Biorefinery Assistance Program, incorporating changes required in the Agricultural Act of 2014 (2014 Farm Bill) and addressing comments received on the interim final rule published on February 14, 2011 (76 FR 8404). This interim final rule establishes provisions for the loan guarantees available for Biorefineries to support the production of Advanced Biofuels and Renewable Chemicals and for Biobased Product Manufacturing facilities.

**DATES:** This interim rule is effective August 24, 2015. Comments on the rule and the information collection under the Paperwork Reduction Act of 1995 must be received on or before August 24, 2015.

**ADDRESSES:** Submit your comments on 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:**

Todd Hubbell, Energy Branch, Rural Business-Cooperative Service, U.S. Department of Agriculture, 1400 Independence Avenue SW., Stop 3225, Washington, DC 20250-3201; telephone (202) 720-0410.

**SUPPLEMENTARY INFORMATION:****I. Executive Summary**

The Food, Conversation, and Energy Act of 2008 (Pub. L. 110-246), otherwise known as the 2008 Farm Bill, established the Biorefinery Assistance Program (the Program) under Title IX, Section 9003, for making loan guarantees to fund the development, construction, and Retrofitting of Commercial-Scale Biorefineries using Eligible Technology. The 2008 Farm Bill defined Eligible Technologies as: Technology that is being adopted in a viable Commercial-Scale operation of a Biorefinery that produces an Advanced Biofuel; and technology that has been demonstrated to have technical and economic potential for commercial application in a Biorefinery that produces an Advanced Biofuel.

The Program's authority is continued in the Agricultural Act of 2014 (2014 Farm Bill) (Pub. L. 113-79), with several specific changes: (1) Renames the Program as the Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance; (2) Revises the purpose statement for the Program to include Renewable Chemicals and Biobased Product Manufacturing; (3) Expands the Program to include Biobased Product Manufacturing facilities; (4) Adds definitions for "Renewable Chemicals" and "Biobased Product Manufacturing"; and (5) Ensures diversity in the types of Projects approved.

Eligible applicants for the Program are as follows: 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 the foregoing entities.

The 2014 Farm Bill provides the Program with a total budget authority of \$200 million in mandatory funding over three years, with discretionary funding totaling \$375 million over five years (\$75 million per year). This level of funding is less than provided under the 2008 Farm Bill, which had a total budget authority of \$320 in mandatory funding, with discretionary funding totaling \$750 million over five years (\$150 million per year).

*Purpose of the Regulatory Action*

This rule revises 7 CFR part 4279, subpart C and 7 CFR part 4287, subpart D to implement the provisions contained in the 2014 Farm Bill, modifies the Program to incorporate administrative improvements based on Agency experience in implementing the Program, addresses comments received on the interim final rule, published in the **Federal Register** on February 14, 2011, and incorporates the guaranteed loan provisions of the Agency's Business and Industry (B&I) Guaranteed Loan program to make the rule a "stand alone" rule.

*Summary of the Major Changes*

The major changes being implemented by this rulemaking are:

- Revised the purpose and scope section by adding Renewable Chemicals and Biobased Product Manufacturing;
- Adding the ability to fund Biobased Product Manufacturing facilities;
- Removing the requirement that the majority of the Biorefinery production must be an Advanced Biofuel in order to be eligible for Program assistance;
- Supplementing the Program to include a "project-finance framework;"
- Implementing a two-phase application process;
- Overhauling the scoring of applications; and
- Limiting Interest accrual to 90 days, in most instances, to determining what the guarantee will cover and what can be included in a loss claim.

*Costs and Benefits*

The Agency estimates that approximately 95 applicants will submit Phase 1 applications. The burden to these applicants under the new two-phase application process is estimated to be approximately 700 hours per application. The Agency estimates that each applicant who receives a loan guarantee would require an additional 252 hours for reporting and other servicing actions.

The benefits associated with the Program under the subsequent interim rule are, for the most part, the same as those that accrue under the baseline Program. Direct beneficiaries of the Program continue to be those applicants who receive a Section 9003 loan guarantee, but now include owners and operators of Biorefineries whose primary product is a Renewable Chemical and owners and operators of Biobased Product Manufacturing facilities. Indirect beneficiaries of the Program continue to include technology providers of the systems used in advancing these facilities, feedstock

suppliers, producer associations and cooperatives, and Lenders.

Expanding the Program to include Renewable Chemicals and Biobased Product Manufacturing will further potential positive environmental impacts associated with replacing petroleum-based feedstock with renewable biomass feedstock.

The Agency expects the changes (described later in this Notice) to make the Program more attractive to larger, more sophisticated Lenders who are under more regulatory scrutiny than the Lenders that have historically participated in the Agency's guaranteed loan programs. Their participation is necessary due to the size of the Projects funded under the Program. Changes are also made that clarify and streamline Agency application requirements, which will aid Lenders and Borrowers in putting together materials required as part of the application process.

The Agency also expects the changes to the Program to result in a greater diversity of the types of Projects being funded, including Biobased Product Manufacturing facilities and Biorefineries whose primary product is a Renewable Chemical that had not been eligible for funding under the Program as authorized by the 2008 Farm Bill. The Agency further expects these changes to improve the financial feasibility of Biorefineries producing Advanced Biofuels and Renewable Chemicals because Renewable Chemicals typically are of higher value than Advanced Biofuels and have broader market opportunities.

## II. Executive Orders/Acts

### *Executive Order 12866*

This interim final rule has been reviewed under Executive Order (EO) 12866 and has been determined to be "economically significant" by the OMB. 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 EO 12866. In this analysis, the Agency identifies alternatives considered, the distributional effects of the rule changes, the estimated costs of applying for and the potential benefits of receiving Section 9003 funding.

### Alternatives Considered

In the benefit-cost analysis, the Agency considered alternatives associated with three provisions—Renewable Chemicals, Biobased Product Manufacturing, and Project diversity.

*Renewable Chemicals.* Under the baseline Program, a Biorefinery is required to primarily produce Advanced Biofuels in order to participate; that is, the majority of the Biorefinery's production must be an Advanced Biofuel. The 2014 Farm Bill provisions add "Renewable Chemicals" to the Program's title and its purpose statement, but do not address how Renewable Chemical facilities will be assisted. The Agency, therefore, had to consider how a facility producing Renewable Chemicals would be eligible for a Section 9003 loan guarantee.

The Agency considered whether the 2014 Farm Bill would allow providing loan guarantees to facilities that produced Renewable Chemicals, but did not produce any Advanced Biofuel. The Agency also considered Congressional intent as articulated in the 2014 Farm Bill conference report, which would enable the Program to provide loan guarantees to a wide array of facilities.

After consideration of the entire 2014 Farm Bill provisions, the Agency is removing the regulatory requirement that a Biorefinery primarily produce an Advanced Biofuel. In addition, the subsequent interim rule (this rule) requires that the Biorefinery produce at least some Advanced Biofuel, but it does not set a minimum production level of Advanced Biofuel, and does not require the Advanced Biofuel be sold as Biofuel. The primary effect of these changes is to allow a Biorefinery that primarily produces a Renewable Chemical to apply for a Section 9003 loan guarantee.

*Biobased Product Manufacturing.* The 2014 Farm Bill added Biobased Product Manufacturing to the Program's title and purpose statement and provided for up to 15 percent of the mandatory funds for Fiscal Years 2014 and 2015 to be used to support facilities producing Biobased Products for end use. To incorporate Biobased Product Manufacturing facilities into the Program, the Agency considered two approaches—(1) writing separate sections in the rule to address specific Project criteria and

administrative requirements for Biobased Product Manufacturing provisions or (2) revising the rule to broadly apply to all types of projects eligible under the Program.

Under the first approach, the Agency would develop criteria and other specific requirements for applications and write separate sections in the rule to address Biobased Product Manufacturing. This approach would require a large amount of duplication or cross referencing to the general rule. In addition, there is no statutory authorization for Biobased Product Manufacturing projects after 15% of the fiscal years 2014 and 2015 mandatory funding is expended on such projects. Thus, this approach would create provisions that would "sunset" after a short period of time.

Under the second approach, which the Agency is implementing, the Agency would revise the rule to apply as broadly as possible to all types of projects eligible under the Program, such as changing references from "biorefinery" to "facility" and to identify in an annual notice the priority scoring criteria that explicitly apply to Biobased Product Manufacturing facilities.

*Project diversity.* The 2014 Farm Bill provisions require that there be a diversity of technologies, products, and approaches in the types of Projects approved under the Program. The Agency considered two approaches for addressing Project diversity—specific Project criteria and administrative priority points.

Under the first approach, the Agency would identify one or more priority scoring criteria for specific technologies, products, and approaches that are under-represented in the Program portfolio and update the specific technologies, products, and approaches annually. The Agency determined that this approach would be more cumbersome and it could be difficult to identify new and emerging technologies, products, and approaches in advance of drafting and publishing criteria on an annual basis.

Under the second approach, which the Agency is implementing, the Agency would include the authority for the Administrator to award additional discretionary points in the priority scoring and selection process. This approach provides greater flexibility than the first approach and allows the Agency to respond to changes in the applications and the industries as a whole. As implemented, the Administrator, at the Administrator's discretion, may award up to 10 points to ensure as wide a range as possible of

technologies, products, and approaches are assisted in the Program's portfolio.

#### Distributional Effects

The subsequent interim rule affects the distribution of costs and benefits across eligible applicants. The subsequent interim rule increases costs to some of the applicants, but decreases the cost to many applicants (*i.e.*, those applicants who are not invited to submit a Phase 2 application). On balance, the two-phase application process reduces the total cost of the Program to the public.

While the types of benefits occurring as a result of the subsequent interim rule are not different from those that occur under the baseline Program, the benefits occur across a broader range of Projects (Renewable Chemicals and Biobased Product Manufacturing). The Agency also expects these changes to improve the financial feasibility of the Biorefineries supplying Renewable Chemicals and other Biobased Products to manufacturing facilities because Renewable Chemicals typically are of higher value than Advanced Biofuels.

The inclusion of the Renewable Chemical and Biobased Product Manufacturing provisions also means that there may be a shift in the entities receiving the benefits—from Biorefineries that primarily produce Advanced Biofuels to those that produce primarily Renewable Chemicals and to facilities that manufacture Biobased Products into end-user products. The extent that such a shift occurs depends in part on the applications received and their merits.

With regard to the distribution of benefits over time, the Program initially directly benefits those who are receiving loan guarantees for the construction and production of the Advanced Biofuels, Renewable Chemicals, and Biobased Products. The benefits of these products will be enjoyed by future generations to the extent that such Projects are successful in growing these businesses to the point where they become part of the long-term economy. While the subsequent interim rule does not directly change this type of distributional effect, the greater inclusion of Renewable Chemicals and the funding of Biobased Product Manufacturing can help ensure that these types of Projects and their products become part of the long-term economy.

#### Costs

The Agency estimates that the burden to the public of applying for a Section 9003 loan guarantee under the new two-phase application process to be

approximately 700 hours per application. The Agency estimates that each applicant who receives a loan guarantee would require an additional 252 hours for reporting and other servicing actions.

Over the three years following the effective date of the subsequent interim rule, the Agency estimates that there will be approximately 95 applicants submitting Phase 1 applications, of which 34 will be invited to submit a Phase 2 application. The number of applicants is based on (1) an assumption of full funding for the Program over the next three years, (2) the fact that we have received approximately three times more applications than we could fund, and (3) the number of expected applications for the first time from biorefineries whose primary output is a Renewable Chemical and from Biobased Product Manufacturing facilities based on inquiries from these sectors.

#### Benefits

The benefits associated with the Program under the subsequent interim rule are, for the most part, the same as those that accrue under the baseline Program. Direct beneficiaries of the Program are those applicants who receive a Section 9003 loan guarantee, which can be up to \$250 million (not to exceed 80 percent of total Eligible Project Costs). As a result of the 2014 Farm Bill, direct beneficiaries will now include owners and operators of Biorefineries whose primary product is a Renewable Chemical and owners and operators of Biobased Product Manufacturing facilities.

Indirect beneficiaries of the Program include the technology providers of the system used in advancing these Biorefineries and Biobased Product Manufacturing facilities, Agriculture Producers and others who supply the feedstock used in these Biorefineries and facilities, producer associations and cooperatives (to the extent that applicants seek to partner with such entities), and Lenders.

By relying on Renewable Biomass feedstock, these Projects have the ability to have a greater positive impact on the environment than similar products produced from petroleum-based feedstock. Expanding the Program to include Renewable Chemicals and Biobased Product Manufacturing will further these potential positive environmental impacts.

Creating diversity in technologies, products, and approaches helps spread the potential for development of new and emerging technologies products, and approaches as broadly as possible thereby achieving a primary purpose of

the Program—to assist in the development of new and emerging technologies.

#### Funding

The 2014 Farm Bill provides \$100 million of mandatory funding for the Program for Fiscal Year 2014 and \$50 million of mandatory funding for each of Fiscal Years 2015 and 2016. Of the mandatory funding for Fiscal Years 2014 and 2015, the Secretary may use for the cost of loan guarantees not more than 15 percent to promote Biobased Product Manufacturing. The 2014 Farm Bill also enables Congress to approve an additional \$75 million of discretionary funding for Fiscal Years 2014 through 2018.

#### *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 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.

#### *National Environmental Policy Act*

The Program has been operating since 2009, initially under funding notices, but later under an interim final rule published on February 14, 2011. The Program's regulations are found in 7 CFR part 4279, subpart C and 7 CFR part 4287, subpart D. Under this Program, the Agency conducts a National Environmental Policy Act (NEPA) review for each application received. To date, no significant environmental impacts have been reported, and Findings of No Significant Impact (FONSI) have been issued for each approved application. Taken collectively, the applications show no

potential for significant adverse cumulative effects.

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, "Environmental Program." Rural Development has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment, and in accordance with NEPA of 1969, 42 U.S.C. 4321 *et seq.*, an Environmental Impact Statement is not required.

#### *Executive Order 12988, Civil Justice Reform*

This interim final rule has been reviewed under EO 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 to 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 EO 13132, Federalism, that this interim final 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.

Under section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Agency certifies that this rule will not have a significant economic impact on a substantial number of small entities. This interim rule affects entities that utilize the Section 9003 Guaranteed Loan Program and any prospective entities that may

utilize the program in the future. Between fiscal years 2009 and 2014, the Agency received 42 applications. Of these 42 applications, 28 applications were either withdrawn by the applicant/borrower, were determined by the Agency to be ineligible, or have had program funds previously committed, deobligated. Of the remaining 14 applications, the Agency issued 10 Conditional Commitments and 4 applications are pending further review and evaluation. The Agency estimates that most, if not all, of the entities that submitted applications would be considered a small entity, as defined by the Regulatory Flexibility Act, based on using the SBA-established threshold of 1,000 employees for defining a small business for the NAICS code 325199 (which is often used as a default code for many the entities applying for the Section 9003 program). Because of this high percentage, the Agency has determined that this rule will have an impact on a substantial number of small entities.

However, the Agency has determined that the economic impact of this rule on these entities will not be significant. The most significant change in the rule that affects entities applying for this program is the implementation of the two-phase application process, which will have a positive impact on most applicants. Under the two-phase application process, all applicants must submit a Phase I application and then only a smaller subset of these applicants would submit the Phase II application. Under the current interim rule, all applicants have to submit an application that is equivalent to a combined Phase I and Phase II application. The new application process reduces the cost to those applicants who are "unsuccessful"—that is, to those who are not invited to submit a Phase II application. This change reduces the impact of the Section 9003 program by almost 70 percent for the "unsuccessful" applicant. Thus, under the new application process, 67 percent of the applicants between fiscal years 2009 and 2014 would have incurred significantly lower application costs.

Based on the data in the Paperwork Reduction Act (PRA) burden package, the Agency estimates the cost of the rule to be approximately \$31,000 per successful applicant. This is based on determining which of the estimated costs in the PRA burden package would be incurred by the entities applying for and participating in the program. As noted above, most of the entities applying for and participating in the Section 9003 program are likely to be

small businesses. The Agency examined the 10 entities to whom conditional commitments were made and the four entities whose applications are still pending. With the exception of two projects, none of the projects are yet operating. Thus, the Agency does not have actual financial information to use to evaluate the impact of the rule on these entities. Therefore, the Agency elected to look at the financial data (specifically, projected revenue or sales data when the projects reach full production) supplied in the applications and upon which the Agency made its decisions as to which projects to issue conditional commitments. Based on these data, the range of projected annual revenues/sales for these 14 projects is \$4.1 million to \$262 million. A cost of \$31,000 per entity represents approximately 0.75% of the projected revenues for the smallest projected revenue stream down to 0.01% for the largest. Therefore, this rule will not have a significant impact on a substantial number of small entities.

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

The regulatory impact analysis conducted for this interim final rule meets the requirements for EO 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*

This Program is not subject to the provisions of EO 12372, which require intergovernmental consultation with State and local officials.

#### *Executive Order 13175, Consultation and Coordination with Indian Tribes*

This EO imposes requirements on Rural Development in the development of regulatory policies that have tribal implications or preempt tribal laws. Rural Development has determined that this rule does not have a substantial direct effect on one or more Indian Tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and the Indian Tribes. Thus, this notice is not subject to the requirements of EO 13175.

### Programs Affected

The Biorefinery Assistance Program is listed in the Catalog of Federal Domestic Assistance under Number 10.865. This will be updated with the Program's new name, as changed by the 2014 Farm Bill, the "Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance Program."

#### *Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995, the Rural Business-Cooperative Service announces its intention to seek OMB approval of the new reporting and recordkeeping requirements contained in this rule.

The following annual estimates are based on an estimated volume of activity of 32 Phase 1 applications, 11 Phase 2 applications, and 6 new loan guarantees. Phase 1 applications are evaluated by the Agency to determine whether the Borrower is eligible, the proposed loan is for an eligible purpose, there is reasonable assurance of repayment ability, there is sufficient Collateral and equity, and the proposed loan complies with all applicable statutes and regulations. Phase 2 applications are only required for those applicants submitting eligible, high scoring phase I applications.

*Estimate of Burden:* Public reporting burden for the requirements will increase the current collection of information by an estimated total of 6,281 hours. The Agency anticipates the number of respondents to fluctuate based on funding levels. The average burden per respondent under the current interim rule is estimated to be 148 hours, and the average burden under the subsequent interim rule is estimated to be 410 hours, for an estimated increase of 262 hours per respondent.

*Respondents:* Respondents for this data are lending institutions and for profit businesses but also include individuals and corporations, non-profit businesses, Indian Tribes, units of State and Local Governments, farmer and rural electric cooperatives, Associations of Agricultural Producers, Institutions of Higher Education, public power entities, and consortiums of any of the foregoing entities. The annual estimates below are for both subsets associated with this rule.

*Estimated Number of Respondents:* 32.

*Estimated Number of Responses per Respondent:* 23.5.

*Estimated Number of Responses:* 752.

*Estimated Total Annual Burden (hours) on Respondents:* 13,115.

Copies of this information collection can be obtained from Jeanne Jacobs, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave. SW., Washington, DC 20250-0742 or by calling (202) 692-0040.

*Comments:* Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to Jeanne Jacobs, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave. SW., Washington, DC 20250. All responses to this rule will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

#### *E-Government Act Compliance*

Rural Development is committed to complying with the E-Government Act, to 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.

#### *USDA Non-Discrimination Statement*

The U.S. Department of Agriculture (USDA) prohibits discrimination against its customers, employees, and applicants for employment on the bases of race, color, national origin, age, disability, sex, gender identity, religion, reprisal and, where applicable, political beliefs, marital status, familial or parental status, sexual orientation, or all or part of an individual's income is derived from any public assistance program, or protected genetic information in employment or in any program or activity conducted or funded by the Department. (Not all prohibited bases will apply to all programs and/or employment activities.)

If you wish to file an employment complaint, you must contact your agency's EEO Counselor (PDF) within 45 days of the date of the alleged discriminatory act, event, or in the case of a personnel action. Additional information can be found online at [http://www.ascr.usda.gov/complaint\\_filing\\_file.html](http://www.ascr.usda.gov/complaint_filing_file.html)

If you wish to file a Civil Rights program complaint of discrimination, complete the USDA Program Discrimination Complaint Form (PDF), found online at [http://www.ascr.usda.gov/complaint\\_filing\\_cust.html](http://www.ascr.usda.gov/complaint_filing_cust.html), or at any USDA office, or call (866) 632-9992 to request the form. You may also write a letter containing all of the information requested in the form. Send your completed complaint form or letter to us by mail at U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW., Washington, DC 20250-9410, by fax (202) 690-7442 or email at [program.intake@usda.gov](mailto:program.intake@usda.gov).

Individuals who are deaf, hard of hearing, or have speech disabilities and you wish to file either an EEO or program complaint please contact USDA through the Federal Relay Service at (800) 877-8339 or (800) 845-6136 (in Spanish).

Persons with disabilities who wish to file a program complaint, please see information above on how to contact us by mail directly or by email. If you require alternative means of communication for program information (e.g., Braille, large print, audiotope, etc.) please contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

### III. Background

On February 14, 2011, the Agency published an interim final rule for the Biorefinery Assistance Program (the Program) in the **Federal Register** (76 FR 8404). The interim final rule addressed comments that the Agency received on the proposed rule, which was published in the **Federal Register** on April 16, 2010 (75 FR 20044), and to clarify proposed provisions. Changes were made throughout the rule, with many of the changes addressing definitions; Lender, Borrower, and Project eligibility requirements; application requirements and scoring; and various loan guarantee provisions, such as those associated with conditions of guarantee, fee, Interest rates and loan terms, and maximum percent guarantee.

The interim final rule became effective on March 16, 2011, and the Agency provided a 60-day comment period for the public to submit comments on the interim final rule.

Today's action is addressing the public comments received.

On February 7, 2014, the 2014 Farm Bill was signed into law. Section 9003 of the 2014 Farm Bill addresses the Program. The Agency held a listening session on March 13, 2014, to receive input from interested stakeholders on the various energy and bioeconomy provisions of the 2014 Farm Bill. No comments specific to the Program were received.

In addition to renaming the Program the "Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance," Section 9003 affects funding associated with Biobased Product Manufacturing facilities and funding associated with Biorefineries producing Renewable Chemicals. Section 9003 also requires the Secretary of Agriculture to ensure diversity in the types of Projects approved under the Program.

The Agency has been implementing the Program since the 2008 Farm Bill. During this time, the Agency has applied a "commercial lending" framework to the Program. The Agency has determined that the Program can be implemented more effectively by adding the flexibility of using a "project finance-based" framework. In order to add project finance-based framework aspects, it is necessary to revise certain Program provisions, which are discussed later in this preamble.

Lastly, the Agency is restructuring the rule to be a "stand alone" rule. The current interim rule relies heavily on incorporating the guaranteed loan provisions of the Agency's B&I Guaranteed Loan program. The Agency has decided to eliminate the extensive cross-references to the B&I Guaranteed Loan program and in its place create a "self-contained" rule for the Program. In the course of doing this, the Agency is taking the opportunity to clarify and/or modify many of the provisions previously incorporated by reference in order to improve Program administration.

Most of the current interim rule's provisions have been carried forward into the subsequent interim rule, although there have been several significant changes. A summary of major changes to the current interim rule are summarized below in Section IV of this preamble. All of the comments received on the current interim rule and during the listening session are summarized in Section V of this preamble. Section VI presents in brief the substantive changes, if any, made in each section of the rule.

*Interim final rule.* USDA Rural Development is issuing this rule as an

interim final rule, effective July 24, 2015. All provisions of this rule 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.

#### IV. Discussion of Major Changes to the Program

As noted above, the changes being made to the Program are due to: (1) Statutory changes resulting from the 2014 Farm Bill, (2) based on the Agency's experience in operating the Program since it was authorized in 2008, amending the Program to enable flexibility to use a project finance-based framework, (3) the Agency's consideration of public comments on the February 14, 2011, interim final rule, and (4) the Agency's decision to create a "self-contained" rule. The following discussion presents the major changes made in response to these four considerations.

##### A. The 2014 Farm Bill

Section 9003 of the 2014 Farm Bill requires the Agency to modify the current interim rule in order to:

- include Biorefineries that primarily produce Renewable Chemicals;
- include Biobased Product Manufacturing; and
- ensure that there is diversity in the types of Projects approved.

##### 1. Renewable Chemicals

The 2014 Farm Bill provisions add "Renewable Chemicals" to the Program's title and purpose statement, but do not address how the Program will assist Renewable Chemical facilities.

Currently, Biorefineries are required to primarily produce Advanced Biofuels in order to participate. Under the subsequent interim rule, the Agency is removing the regulatory requirement that the majority of production of a Biorefinery be an Advanced Biofuel. By removing this regulatory requirement, a Biorefinery producing Advanced Biofuel and Renewable Chemicals, will be able to participate without having to meet a specific minimum threshold production level of Advanced Biofuel.

When considering the eligibility of Biorefineries that produce Renewable Chemicals, the Agency will include in its consideration reliance on the program purpose and scope and the definitions of "Biorefinery" and "Eligible Technology" as found in 7 U.S.C. 8101 and 8103).

The purpose of the Program is to assist in the development of Advanced Biofuels, Renewable Chemicals, and Biobased Product Manufacturing.

"Biorefinery.—The term 'Biorefinery' means a facility (including equipment and processes) that (A) converts *renewable biomass* into *biofuels* and *biobased products*; and (B) may produce electricity." 7 U.S.C. 8101(7) (emphasis added.) The Agency interprets this definition to mean that the facility must produce Biofuel and may produce Biobased Products (which includes Renewable Chemicals) and may produce electricity.

"Eligible technology.—The term 'Eligible Technology' means, as determined by the Secretary (A) a technology that is being adopted in a viable Commercial-Scale operation of a *Biorefinery that produces an Advanced Biofuel*; and (B) a technology not described in subparagraph (A) that has been demonstrated to have technical and economic potential for commercial application in a *Biorefinery that produces an Advanced Biofuel*." 7 U.S.C. 8103(b)(2) (emphasis added.)

Under the subsequent interim rule, a Biorefinery may convert Renewable Biomass into Renewable Chemicals or Biobased Products and must produce an Advanced Biofuel.

While requiring Biorefineries produce an Advanced Biofuel, the subsequent interim rule does not set a specific minimum production level of Advanced Biofuel and does not require that the Advanced Biofuel be sold as Biofuel. A Biorefinery may sell the Advanced Biofuel that it produces as a Biofuel or for other non-fuel usage. A Biorefinery may further process the Advanced Biofuel into Renewable Chemicals or other Biobased Products or use the Biofuel as a fuel for heat or power in its process or generate electricity.

Food or feed are not eligible Biobased Products (see § 4279.202 for definition of Biobased Products). However, a Renewable Chemical that is food-grade would be eligible.

In summary, the subsequent interim rule requires that at least some amount of Advanced Biofuel is produced, but does not set a specific minimum production level of Advanced Biofuel. The subsequent interim rule does not require that the Advanced Biofuel be sold as Biofuel. The Biorefinery may sell the Advanced Biofuel that it produces as a Biofuel, Renewable Chemical, or for other non-fuel usage. Further, the Biorefinery may process the Advanced Biofuel into Renewable Chemicals or other Biobased Products or use the Biofuel as a fuel for heat or power in its process or generate electricity.

2. Biobased product manufacturing facilities

The primary substantive change related to Biobased Product Manufacturing facilities is that the Program will now be able to provide funding to Biobased Product Manufacturing facilities.

The 2014 Farm Bill provides the definition of “Biobased Product Manufacturing,” which the Agency has incorporated into the subsequent interim rule. See § 4279.202. This definition requires the Biobased Product Manufacturing facility to use Renewable Chemicals and other biobased outputs of Biorefineries as inputs to produce end-user products. The facility must also use Technologically New Commercial-Scale processing and manufacturing equipment.

As being implemented under the subsequent interim rule, these facilities can be either stand-alone facilities or add-ons to existing Biorefineries. The amount of funding that can be used to support these facilities is limited by the 2014 Farm Bill to no more than 15 percent of mandatory funds made available in FY 2014 and FY 2015 to promote Biobased Product Manufacturing. (Note: This excludes any and all FY 2016 mandatory funds and all discretionary funds.)

The Agency is adding a new paragraph to the Project eligibility section to address Biobased Product Manufacturing facilities. The general Program requirements apply to financing of Biobased Product Manufacturing facilities. The Agency will publish, subsequent to the publication of this rule, a notice in the

**Federal Register** soliciting applications for Biobased Product Manufacturing facilities.

3. Project Diversity

The 2014 Farm Bill provisions require that there be diversity in the types of Projects approved under the Program. The relevant provision states “the Secretary shall ensure that, to the extent practicable, there is diversity in the types of Projects approved for loan guarantees to ensure that as wide a range as possible of technologies, products, and approaches are assisted.” 7 U.S.C. 8103(d)(1)(D).

The Agency is implementing this provision by including authority for the Administrator to award discretionary points in the priority scoring and selection process. As implemented under the subsequent interim rule, the Administrator, at the Administrator’s discretion, may award up to 10 points to ensure as wide a range as possible of technologies, products, and approaches are assisted in the Program’s portfolio.

*B. Improvements in program administration*

As has been noted, the Agency is supplementing the commercial lending framework with the flexibility to use a project finance-based framework. A commercial loan is generally made to well-established companies in established industries. Commercial loans are secured by business assets. The evaluation of a commercial loan is generally based on the historical financial performance of the business and its financial performance in comparison to its industry peers.

Project financing is the financing of infrastructure and industrial projects. The evaluation of a project financing loan relies primarily on the development of a project and its cash flow for repayment, with the project’s assets as secondary security or collateral.

Supplementing the Program with a project finance-based framework will align the Program with the Lenders standards and procedures and improve the Agency’s evaluation of loan guarantee applications and credit risks. Significant changes are discussed below.

1. Two-Phase Application Process

The rule currently requires all applicants to submit a complete application including a technical report, environmental analysis, and the Lender’s credit evaluation, as specified in the rule. The subsequent interim rule divides the application process into two phases. Phase 1 applications will provide information to determine Lender, Borrower, and Project eligibility; preliminary economic and technical feasibility; and the priority score of the application. Based on the priority score ranking, the Agency will invite applicants whose Phase 1 applications receive higher priority scores to submit Phase 2 applications. Phase 2 application materials will be submitted as the project planning and engineering is finalized and will include an environmental report, technical report, financial model, and the Lender’s credit evaluation, as specified in the rule.

**PHASE 1 APPLICATION MATERIALS**

[Phase 1 application content must be submitted in an initial complete application package]

1. Project Summary.
2. Application form, Form RD 4279–1.
3. Financial statements—Audited annual statements and current statements.
4. Financial model and supporting assumptions.
5. Feasibility Study.
6. Business Plan.
7. Scoring information.
8. Intergovernmental consultation.
9. DUNS Number.

**PHASE 2 APPLICATION MATERIALS**

[Phase 2 application materials are submitted under the direction of the Agency and may be submitted as the materials are developed or updated]

1. Technical assessment/Technical Report.
2. Environmental Assessment.
3. Updates to application materials, as appropriate.
4. Other information requested by the Agency including contacts and agreements.
5. Lender’s analysis, credit evaluation, and supporting materials.
6. Appraisals.
7. Lender’s proposed Loan Agreement.
8. Estimate timing of loan closing and issuance of the Loan Note Guarantee (pre-construction or post-construction).
9. Credit rating—obtained under the direction of the Agency after loan terms and conditions have been established.



## 2. Credit Evaluation

The current interim rule requires Lenders to include an analysis of the credit factors associated with each guarantee application, including consideration of each of the following five elements:

- (1) Credit worthiness.
- (2) Cash flow.
- (3) Capital.
- (4) Collateral.
- (5) Conditions.

Rather than focusing on a limited listing of elements, the subsequent interim rule requires the Lender to analyze all credit factors associated with each proposed loan and apply its professional judgment to determine that the credit factors, considered in combination, ensure loan repayment. This allows the Lender to apply a commercial lending framework or a project finance framework, as appropriate, on a project-by-project basis.

The Agency has identified in the subsequent interim rule the factors it uses to conduct its credit evaluation of the Project and Borrower. These factors include, but are not limited to, debt structure, revenues, technical feasibility, project equity, and other project funding.

## 3. Collateral Evaluation

Under the current interim rule, the adequacy of the Collateral is based on the value of the Project assets and requires the discounted Collateral value to be at least equal to the loan amount. The current interim rule does not evaluate the Collateral from the perspective of the Project's cash flow for repayment. However, of the Projects financed under this Program, the value of the assets is directly related to the Project's cash flow.

Under the subsequent interim rule, the Agency has the flexibility to determine how Collateral will be evaluated on a case-by-case basis, taking into account the type of project and the types of assets.

## 4. Lender Responsibilities

The subsequent interim rule places more emphasis on the Lender obtaining and relying on certain written materials (including, but not limited to, certifications, evaluations, appraisals, financial statements and other reports) from qualified third parties (including, among others, one or more independent engineers, appraisers, accountants, attorneys, consultants or other experts).

## C. Public Comments on Interim Final Rule

The Agency received four comment letters from the public on the current interim rule (see Section V below.) After reviewing the public comments, the Agency identified a number of changes to improve the Program including:

- Removing the 500 basis point spread requirement between the guaranteed and unguaranteed portions of the loan. (§ 4279.231(a) of the current interim rule)
- Clarifying when a subordinate lien position may be taken on Borrower inventory and accounts receivables. (§ 4279.235(a))
- Adding a provision to allow the Lender to require Borrowers to fund debt service reserve accounts with loan proceeds. (§ 4279.210(c)(7))
- Revising the requirement for a Borrower to obtain an evaluation and either a credit rating or credit assessment for loan requests of \$125 million or greater to requiring the Borrower to obtain an evaluation and rating of the total Project's indebtedness, without consideration for a government guarantee, from a nationally-recognized statistical rating organization (NRSRO), as defined by the U.S. Security and Exchange Commission for all Projects with total Eligible Project Costs of \$25 million or more. An updated rating may be required at the Agency's discretion if changes are subsequently made to the Project including changes to any contracts and agreements or changes to loan terms and conditions. (§ 4279.261(k)(5))

## D. Stand-Alone Rule

As discussed earlier, the Agency is restructuring the rule to be a "stand alone" rule. The current interim rule relies heavily on incorporating the guaranteed loan provisions of the Agency's B&I Guaranteed Loan program. The Agency has decided to eliminate the extensive cross-references to the B&I Guaranteed Loan program and in its place create a "self-contained" rule for the Program. In the course of doing this, the Agency has restructured the rule. While the majority of the current interim rule's provisions have been carried forward, a number of provisions have been relocated. In addition, the Agency took the opportunity to clarify and/or modify many of the provisions previously incorporated by reference in order to improve Program administration.

## V. Summary of Comments and Responses

As noted earlier, the current interim rule was published in the **Federal**

**Register** on February 14, 2011, with a 60-day comment period that ended April 15, 2011. The Agency received comments from four commenters, which included Biorefinery owner/operators, Lenders and investment banking institutions. 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.

## A. Equity Requirements

*Comment:* One commenter encouraged USDA to allow contributions of other real and personal property previously purchased with cash to count towards the Project equity requirement.

Two commenters recommended clarification as to whether or not the Fair Market Value of the Project, based on audited financial statements, can be used in whole or in part to meet equity requirements. One of these two commenters also recommended clarification as to whether or not the value of qualified intellectual property based on audited financial statements may be substituted in whole or in part to meet equity requirements.

One commenter recommended applying the Generally Accepted Accounting Principles (GAAP) utilized in the B&I Guaranteed Loan program such that the equity requirement may be calculated by deducting Federal grants from Eligible Project Costs in arriving at the equity requirement.

One commenter recommended allowing Project assets funded with other Federal grants, as well as other subordinate financing, to qualify as Project equity in arriving at the 20 percent equity requirement. Another commenter also recommended including subordinated financing as Project equity for purposes of satisfying the Program's equity requirements.

*Response:* The subsequent interim rule clarifies that Total Federal participation will not exceed 80 percent of total Eligible Project Costs. The subsequent interim rule states that the total amount of a loan guaranteed for a Project plus other Federal funding in the Project will not exceed 80 percent of total Eligible Project Costs. The remaining 20 percent of total eligible project cost must be funded from non-Federal sources. In addition, the subsequent interim rule revises the equity requirement by removing the balance sheet or financial statement equity test. The subsequent interim rule requires the Borrower and other principals involved in the Project to make a significant equity investment in the Project in the form of cash

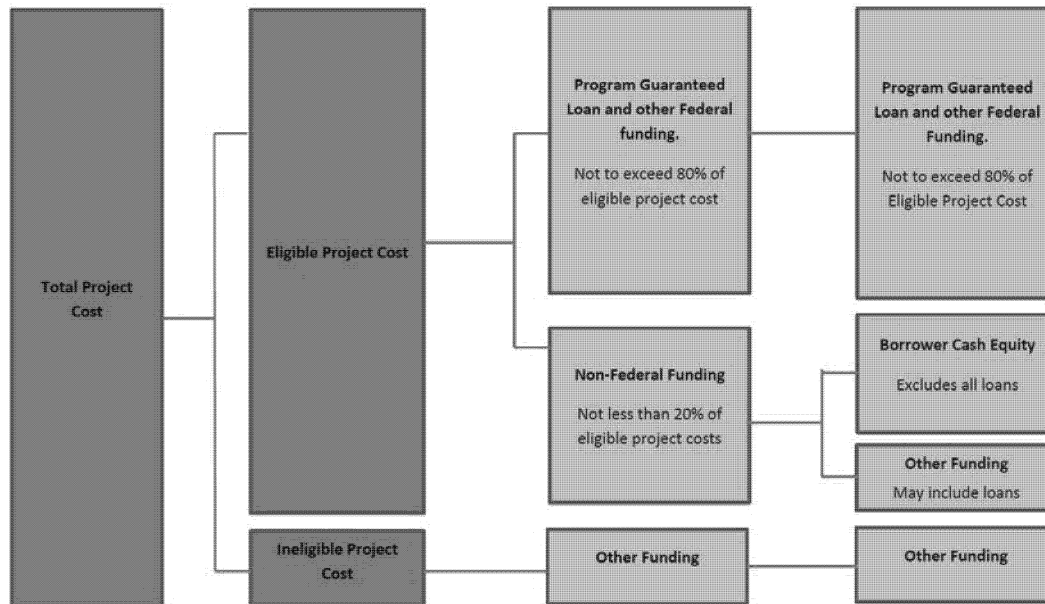
contribution. Equity does not include loans to the Project. The Agency will establish the specific amount of equity

it requires on a project-by-project basis based on its credit evaluation.

The following diagram illustrates the Project funding requirements and

differentiates the cash equity requirement from non-Federal funding requirement:

### Project Funding Requirements



#### B. Financing More Than One Facility

*Comment:* One commenter recommended clarifying whether or not more than one facility can be financed, together in the same loan package in order to be able to cross collateralize and to reduce application costs.

*Response:* There is no provision in the current or subsequent interim rule that excludes Projects that would provide financing for more than one facility in one application. Thus, Projects may be submitted with more than one facility under the same loan application.

#### C. Interest Rates

*Comment:* Two commenters stated that the Interest rate spread on the guaranteed and unguaranteed portions of the loan should not be restricted and should be allowed to follow market rates for similar investments with commensurate risk.

*Response:* The Agency agrees that the Interest rates on the guaranteed and unguaranteed portions of the loan should be set by the market and this change has been incorporated into the subsequent interim rule. The requirement from the current interim rule of a maximum 500 basis point spread between the Interest rates on the guaranteed and unguaranteed portions of the loan has been removed.

#### D. Minimum Retention

*Comment:* One commenter requested that the Agency lower the amount of the unguaranteed portion of the loan that the Lender must hold from 7.5 percent to 5 percent.

*Response:* The subsequent interim rule maintains that the Lender must retain 7.5 percent of the total loan amount. However, it allows for the Agency to reduce the percentage of the specific loan held, on a case by case basis, if the Lender establishes to the Secretary's satisfaction that reduction of the minimum retention percentage is to meet compliance with the Lender's regulatory authority.

#### E. Prototypes

*Comment:* One commenter stated that alternate approaches to prototype testing of complex processes and facilities should be considered to build confidence for the Commercial-Scale readiness. The commenter requests that the Agency allow "Semi-Work" Scale testing combined with predictive modeling to cut the cost of demonstration scale testing.

*Response:* The Agency disagrees with the commenter. The Projects financed in the Program all involve complex processes which are stand-alone but must be integrated with each other for

the facilities to be successful. Integrated demonstration of all necessary processes provides the best way of minimizing risk to both the Lender and the Agency. Under the subsequent interim rule, Projects utilizing a technology that does not have a history of successful utilization in a Commercial-Scale operation of a Biorefinery that produces an Advanced Biofuel will be required to provide evidence supporting technical information and data for 120 days of continuous, steady state production from an integrated demonstration unit facility prior to issuance of the Loan Note Guarantee. The integrated demonstration unit must prove out the Project's ability to utilize Project relevant biomass and produce Advanced Biofuel at a yield and quality consistent with the design basis of the Project.

#### F. Liens

*Comment:* One commenter recommended allowing a senior lien on the Borrower's cash in order to secure a portion of the unguaranteed loan amount retained by the Lender.

*Response:* The Agency disagrees with the commenter's recommendation. It is important the Lender have a financial interest in the success and also in any possible failure of the Project and

requiring that the Lender hold a certain percentage of the unguaranteed portion of the loan, and not allowing additional Collateral solely to secure the unguaranteed portion of the loan, is key to that position. Therefore, the rule does not allow for additional Collateral to be obtained solely for the purpose of securing the amount of the unguaranteed portion of the loan that must be held by the Lender.

*Comment:* One commenter requested that the Agency clarify whether or not a Working Capital Lender may secure a senior lien position on inventory and accounts receivables and also have senior payment rights with respect to the proceeds of the sale of that Collateral.

*Response:* The subsequent interim rule allows a Working Capital Lender to take a senior lien position on inventory and accounts receivables. The financial structure of the Project is under the discretion of the Lender and submitted to the Agency for review. If the Lender chooses to allow another banking institution to secure a lien on inventory and accounts receivables in exchange for Working Capital, it is permissible, provided that all Collateral requirements for the Agency guaranteed loan are met.

#### G. Tax Exempt Financing

*Comment:* One commenter recommended allowing tax exempt financing to fund the unguaranteed portion of the loan.

*Response:* OMB Circular A-129, Policies for Federal Credit Programs and Non-Tax Receivables, precludes adopting the commenter's suggestion.

#### H. Sale or Assignment

*Comment:* One commenter recommended allowing the sale or assignment of a portion of the guarantee to subsidiaries or Affiliates under certain conditions.

*Response:* It is the Agency's position that allowing the sale or assignment of a portion of the guarantee to subsidiaries or Affiliates constitutes a Conflict of Interest. In some servicing actions, such as changing loan terms and Interest rate reductions, the Holder of portions of the guaranteed loan would have to approve the modification. The Agency's concern is that allowing subsidiaries or Affiliates to have control over loan modifications that they have a direct benefit in constitutes a Conflict of Interest. To avoid any appearance of a Conflict of Interest, the subsequent interim rule prohibits the sale or assignment of any portion of the guaranteed loan to the Borrower or its parent, subsidiary or

Affiliate or to officers, directors, stockholders, other owners, or members of their Immediate Families.

#### I. Bonds

*Comment:* One commenter stated that any Agency required debt service reserve funds should not be viewed as Collateral for Bonds but rather as an accommodation to the bond market and that the proceeds of the sale of the Bonds should be permitted to be used to fund the debt service reserve funds thus making them Eligible Project Costs.

*Response:* The Agency agrees with the commenter. The subsequent interim rule allows for the use of guaranteed loan or Bond proceeds to be used to fund a debt service reserve account, if the Lender deems it necessary. The Agency reserves the right to require a debt service reserve on all Projects.

#### J. Collateral

*Comment:* One commenter stated that USDA should include assets acquired with other Federal funds on which the Lender is required to have first lien in the definition of Collateral in determining the value of Collateral, including loan-to-value calculations and net worth covenants.

*Response:* The Agency agrees with the commenter and has modified the rule accordingly. The subsequent interim rule does not require that assets acquired with Federal funds be excluded from the total value of Collateral. Under the Program, the onus is on the Lender to obtain and maintain proper and adequate Collateral to protect the interest of the Lender, the Holder, and the Agency.

#### K. Eligible Project Costs

*Comment:* One commenter requested a clarification whether or not the following are considered Eligible Project Costs: capitalized Interest, cost of financing, overhead expenditures of the Borrower related directly to a Project, development fees, license fees, third party engineering costs and other expenses such as rail lines, roads, and electric power lines.

*Response:* All of the expenses listed by the commenter, except for development fees, would be considered Eligible Project Costs.

#### L. Credit Assessment

*Comment:* One commenter recommended requiring a credit assessment on loans larger than \$125 million rather than requiring a credit rating, which has significantly higher costs.

*Response:* The Agency has removed the requirement for a credit rating from

all applicants for loans of \$125 million and more and will require an evaluation and rating only for applicants selected for Phase 2 applications. The Agency is requiring an evaluation and rating of the total Project's indebtedness, without consideration for a government guarantee, from a nationally-recognized statistical rating organization (NRSRO), as defined by the U.S. Security and Exchange Commission, for all Projects with total Eligible Project Costs of \$25 million submitting phase 2 applications. An updated rating may be required at the Agency's discretion if changes are subsequently made to the Project including changes to any contracts and agreements or changes to loan terms and conditions.

#### M. Surety

*Comment:* One commenter recommended removing the requirement that surety be secured on work to be completed.

*Response:* The Agency disagrees with the commenter. The commenter claims that the types of Projects in the Program will not be able to meet that requirement because these Projects are first-of-a-kind technology Projects where contractors will not accept the risk of a lump sum fixed price contract. Based on the Projects submitted to the Agency for review thus far, the majority have fixed price engineering, procurement and construction contracts, and many have wraps on the individual processes that constitute the Project. The rule specifies that Surety, as the term is commonly used in the industry, will be required. The Borrower must have either 100 percent performance/payment bonds on the contractors or a guarantee from a creditworthy parent entity or an alternative acceptable to the Lender and the Agency and must be secured. The bonding agent must be listed on Treasury Circular 570.

## VI. Section-By-Section Discussion

This section presents, in brief, substantive changes and notable clarifications to the rule on a section-by-section basis. In developing the stand-alone rule, many existing provisions have been relocated to different places in the rule. Such relocations are not identified in the following discussion because the requirement itself has not changed.

### A. 7 CFR Part 4279, Subpart C

#### Purpose and scope (§ 4279.201)

The Agency modified this section to reflect expansion of the Program as a result of the 2014 Farm Bill provisions to address Renewable Chemicals and

Biobased Product Manufacturing and to reflect more directly the authorizing language establishing the Program.

#### Definitions and abbreviations (§ 4279.202)

The Agency deleted terms that are no longer used within the rule. The Agency also added terms to, in part, incorporate changes in response to the 2014 Farm Bill and make improvements to the administration of the Program. Added terms include, but are not limited to:

- Annual Renewal Fee
- Biobased Product Manufacturing
- Bond
- Commercial-Scale
- Conflict of Interest
- Delinquency
- Good cause
- Grossly Negligent Loan Origination
- Grossly Negligent Loan Servicing
- In-house Expenses
- Interest termination date
- Liquidation Expenses
- Loan Packager
- Loan Service Provider
- Local Government
- Person
- Public Body
- Renewable Chemical
- Technologically New
- Well Capitalized

#### Exception authority (§ 4279.203)

The Agency did not make any substantive changes to this section.

#### Appeals (§ 4279.204)

The Agency provided additional examples and clarifications to this section, including reference to “adverse” decisions, but did not make any other substantive changes.

#### Prohibition under Agency programs (§ 4279.205)

The Agency did not make any substantive changes to this section. The Agency removed the prohibition of assistance to Government employees and active military personnel who are directors or officers or have an ownership interest of 20 percent or more in the business from being eligible applicants. While this change has the potential to increase the pool of applicants, the Agency expects the actual impact to be minimal.

#### Agency representation (§ 4279.206)

The Agency added this new section to ensure that in any litigation case in which the Agency is named a party the Agency has the right to be represented by the U.S. Department of Justice.

#### Lender eligibility requirements (§ 4279.208)

The Agency replaced the specific Lender capital requirements with a

cross-reference to FDIC’s definition of “Well Capitalized.” This modification, however, does not change the actual capital requirements.

The Agency also supplemented when Lenders must notify the Agency when under a “cease-and-desist order” with “or other similar constraint, from a Federal agency” to cover instances where different terminology is used.

In addition, insurance companies regulated by a State or National insurance regulatory agency are no longer eligible for the Program.

#### Borrower eligibility requirements (§ 4279.209)

The Agency did not make any changes to this section.

#### Project eligibility requirements (§ 4279.210)

The Agency made a number of changes to this section including:

- Requiring that the Borrower and other principals involved in the Project make a significant equity investment in the Project in the form of cash contribution, with the specific amount of equity required determined by the Agency on a project-by-project basis based on its credit evaluation;
- Incorporating requirements associated with the 2014 Farm Bill provisions for Renewable Chemicals and Biobased Product manufacturing.
- Removing the provisions associated with the requirement that the majority of the Biorefinery production must be an Advanced Biofuel.
- Removing the paragraph addressing eligible feedstock. Feedstock is addressed in the definitions of “Advanced Biofuel”, “Biorefinery”, and “Renewable Biomass.”
- Clarifying Eligible Project Costs include an integrated demonstration unit under certain circumstances, professional services, necessary insurance and bonds, financing fees and costs, and cash reserve accounts.
- Incorporating ineligible project costs into this section. Changes include reducing/simplifying the identified ineligible purposes to only those costs that are most applicable to the Program; clarifying processing of corn kernel starch into biofuel is ineligible; and payments in excess of actual costs incurred by the contractor are ineligible under certain conditions. The absence of other ineligible loan purposes or project costs that are incorporated by reference under the current interim rule does not mean that they are now eligible.

#### General functions and responsibilities (§ 4279.214)

The Agency made three substantive changes in this section:

- Clarifying the Lender’s responsibility when contracting with third parties and when relying on information from qualified third parties.
- Prohibiting agents and Persons from acting as both Loan Packager and Loan Service Provider on the same guaranteed loan. This implements a best practice.
- Requiring the keeping of a Collateral inventory by the Lender. This implements a best practice that a reasonable Lender should be doing as part of its normal business practice.

#### Credit evaluation (§ 4279.215)

The Agency revised this section based on experience administering the Program (as discussed earlier in Section III, Background.)

#### Environmental responsibilities (§ 4279.216)

The Agency changed the role of the Lender from helping the Borrower complete Form RD 1940–20, “Request for Environmental Information,” to ensuring that the Borrower has provided the environmental assessment.

#### Oversight and monitoring (§ 4279.217)

The Agency did not make any substantive changes to this section.

#### General conditions of guarantee (§ 4279.220)

The Agency made two primary modifications to this section. First, the Lender may request a change in the standard from “negligent” to “grossly negligent” for Loan Origination and Loan Servicing. The Agency will make this change on a case-by-case basis and only when the Lender can demonstrate to the Agency’s satisfaction that changing to a “gross negligence” standard will not materially impair the Agency’s interests, determined solely at the Agency’s discretion. The subsequent interim rule identifies several additional conditions that must be met for the Agency to grant such a request.

Second, the Agency instituted a limitation on the period of time over which accrued Interest would be covered by the Loan Note Guarantee. If the Lender owns all or a portion of the guaranteed interest in the guaranteed loan or make a Protective Advance, the Loan Note Guarantee will not cover interest to the Lender accruing after 90 days from the most recent Delinquency effect date as reported by the Lender. If the guaranteed loan has one or more Holders, the Loan Note Guarantee will

not cover interest to the Holder(s) accruing after the greater of 90 days from the most recent Delinquency effect date as reported by the Lender or 30 days from the date the Lender or the Agency sends an interest termination letter to the Holder(s). These conditions are found in the definition of Interest Termination Date.

#### Rights and liabilities (§ 4279.221)

The Agency did not make any substantive changes to this section.

#### Payments (§ 4279.222)

The Agency did not make any substantive changes to this section.

#### Sale or assignment of guaranteed loan (§ 4279.223)

The Agency made a number of clarifications to this section to ensure Lenders know how the process works.

The Agency modified provisions associated with the multi-note option. The Agency removed limits on the number of notes that can be issued under the multi-note option. The Agency also removed the provision that allowed the Lender to issue a new series of notes when a loan is closed using the multi-note option and additional notes are desired at a later date.

#### Minimum retention (§ 4279.224)

The Agency did not make any substantive changes to this section.

#### Repurchase from Holder (§ 4279.225)

The Agency replaced the current provisions associated with the accrued Interest that the guarantee will cover with the provisions described above under § 4279.220 and the Interest Termination Date definition and now addresses these provisions in paragraphs (b)(3) through (5) of the section.

The Agency clarified that if the Agency repurchases 100 percent of the guaranteed portion of the loan, the Agency will not continue collection of the Annual Renewal Fee from the Lender.

The Agency also made a number of clarifications to ensure Holders know how the repurchase process works.

#### Replacement of document (§ 4279.226)

The Agency did not make any substantive changes to this section.

#### Equal Credit Opportunity Act (§ 4279.227)

The Agency did not make any substantive changes to this section.

#### Fees (§ 4279.231)

The Agency changed the basis for calculating the guarantee fee and

Annual Renewal Fee from “Total Project Costs” to “total Eligible Project Costs.”

#### Guaranteed loan funding (§ 4279.232)

The Agency simplified and clarified the text describing the maximum amount of loan a Project is eligible for and changed reference from “equity” to “non-Federal sources.”

In cases requesting 90 percent guarantee rate, the Agency restated the requirement for “equity of 40 percent” to “total Federal participation . . . not be greater than 60 percent of total Eligible Project Costs.” The Agency also replaced the requirement of the Collateral coverage ratio with a provision limiting tax credits, carbon credits and other subsidies to 10 percent of the Project’s total revenue on an annual basis in the Borrower’s base case of financial projections.

#### Interest rates (§ 4279.233)

The Agency removed the requirement that the Interest 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.

The Agency also modified the section to remove redundancies.

#### Terms of Loan (§ 4279.234)

The Agency did not make any substantive changes to this section.

#### Collateral (§ 4279.235)

The Agency restated the Collateral requirement to reflect the revised standards resulting from the Agency’s experience administering the Program.

#### Insurance (§ 4279.243)

The Agency did not make any substantive changes to this section.

#### Appraisals (§ 4279.244)

The Agency made several changes and clarifications to this section, including:

- A clarification removed reference to a complete self-contained appraisal and now requiring the appraisal must be reported in a manner that summarizes all of the information necessary for the intended users to understand the report and contain all information pertinent to the appraiser’s opinions and conclusions.

- Clarifying that documentation is included showing that the appraiser has the necessary experience and competency to appraise the property in question.

- Adding a requirement that appraisals not be more than 1 year old and that a more recent appraisal may be required by the Agency in order to reflect more current market conditions.

- For loan servicing purposes, updating to an appraisal may be acceptable in lieu of a completely new appraisal when the original appraisal is between one and two years old.

- Clarifying the requirements on what appraisals need to conform to.

- Adding a requirement for Lender to submit its technical review of the appraisal.

- For construction Projects, requiring the use of the “as completed” Market Value of the real estate to determine the value of the real estate.

#### Personal and corporate guarantees (§ 4279.245)

The Agency revised the conditions under which owners may be exempted, in part or in full, from providing guarantees.

#### Construction planning and performing development (§ 4279.256)

The Agency is clarifying a number of provisions associated with this section including:

- Lenders may contract for services and may rely on certain written materials and other reports provided by independent engineers or other qualified third parties;

- Borrowers must have either 100 percent performance/payment bonds on the contractors or a guarantee from a creditworthy parent entity or an alternative acceptable to the Lender and the Agency and must be secured;

- Lender requirements prior to the disbursement of construction funds (e.g., having on file major drawings and a detailed timetable for the Project, requiring the Borrower to have contingencies in place for handling unforeseen cost overruns);

- The contents of monthly construction reports and quarterly progress reports submitted by the Lender to the Agency; and

- Once construction is completed, final permits and accounting of project funds.

The Agency is requiring Lenders to expeditiously report any problems in Project development to the Agency and to provide the Agency with a copy of the Notice of Completion when construction has been completed.

#### Borrower responsibilities (§ 4279.259)

The Agency did not make any substantive changes to this section.

#### Guarantee applications—general (§ 4279.260)

The Agency added a requirement that the Lender or Borrower must submit to the Agency a non-binding letter of intent to apply for loan guarantee not

less than 30 calendar days prior to the application deadline.

The Agency revised the application deadlines from November 1 and May 1 to October 1 and April 1, respectively.

The Agency clarified how application revisions submitted after the application deadline may impact the processing of the application and added "ownership structure" as a type of revision the Lender must report to the Agency.

Application for loan guarantee content (§ 4279.261)

The Agency revised the application process to a two-phase application (see Section IV.B.1). The Agency will use Phase 1 application information to determine Lender, Borrower, Project eligibility, economic and technical feasibility, and application priority score. Phase 2 application materials will be submitted as the Project planning and engineering develops and is finalized.

As noted earlier, the Agency is revising the requirement for a Borrower to obtain an evaluation and either a credit rating or credit assessment for loan requests of \$125 million or greater to requiring only Phase 2 applicants to obtain an evaluation and rating for Projects with total Eligible Project Costs of \$25 million or greater. In addition to the evaluation and rating from a nationally recognized statistical rating organization, the Agency is also using its own credit evaluation (see § 4279.215(b)) to conduct its "assessment of the credit-worthiness of a security or money market instrument." The Agency has determined that these provisions are not in conflict with section 939A(b) of Pub. L. 111-203 (Dodd Frank).

The Agency also expanded the application requirements from submittal of the required environmental information to include submittal of an environmental analysis that meets the policies and requirements of the National Environmental Policy Act and the Agency. In addition, the Agency added to the resource assessment content a requirement to address methods and systems to prevent the spread of invasive species.

Guarantee application processing (§ 4279.265)

The Agency made several changes and clarifications to this section, including:

- Making conforming changes to remove reference to the financial metric criteria that are no longer part of the rule.
- Replacing reference to "technical merit" with "technical and economic

feasibility" to align with the authorizing statute.

- Adding that the economic feasibility of the Project will be based on the Agency's analysis of the Feasibility Study, the Lender's credit evaluation, and other application materials.

- Deleting the three financial metric criteria for the Borrower and replaced with consideration of the Project's economic feasibility.

- For those Projects utilizing a technology that does not have a history of successful utilization in a Commercial-Scale operation of a Biorefinery that produces an Advanced Biofuel, requiring the evaluation of technical feasibility to include evidence demonstrating 120 days of continuous, steady state production from an integrated demonstration unit.

Guarantee application scoring (§ 4279.266)

The Agency made numerous changes and clarifications to this section, including:

- Revising the scoring criterion whether the Borrower has established a market for the Biofuel and Byproducts to evaluate the degree of commitment of Off-Take Agreements, duration of the Off-Take Agreements, financial strength of the off-take counterparty and dependency on subsidies. Total maximum points are increased from 10 to 20.

- Revising the scoring criterion whether the Borrower is proposing to use a feedstock not previously used in the production of Advanced Biofuels by reducing the total maximum points from 15 to 10.

- Revising the scoring criterion regarding working with cooperatives to simplify distribution of points.

- Revising the scoring criteria regarding the level of financial participation by the Borrower by changing the metric from debt-to-tangible net worth ratio to Federal participation as a percentage of total Eligible Project Costs. Total maximum points are increased from 15 to 20.

- Revising the scoring criteria 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 by reducing the total maximum points from 10 to 5 points.

- Revising the scoring criterion regarding the potential for Rural economic development by adding points if the majority of feedstock to be utilized by the Project, on an annual

basis, is harvested from the land and by increasing total maximum points from 10 to 20 points.

- Adding Administrator discretionary points to ensure, to the extent practical, there is diversity in the types of Projects approved for loan guarantees to ensure as wide a range as possible of technologies, products, and approaches are assisted in the Program's portfolio.

- Clarifying that the Agency will award points on the basis of its review and analysis of all application materials.

Selecting guarantee applications (§ 4279.267)

The Agency added text to explain that procedures for selecting Biobased Product Manufacturing Projects will be identified in a **Federal Register** notice.

With the change in the application deadlines and with the implementation of the two-phase application process (see § 4279.260 above), the Agency revised the dates by which the Agency expects to rank applications each year.

The Agency also made conforming changes to accommodate the two-phase application process.

Loan approval and obligating funds (§ 4279.278)

The Agency clarified the procedures on how the Agency will handle Conditional Commitments and any changes thereto, including that changes must be for Good Cause. The Agency is also making clear that the Borrower must comply with all Federal requirements then in effect for receiving Federal assistance.

Transfer of Lenders (§ 4279.279)

The Agency clarified the specifics on how the Agency will handle the transfer of Lenders, which reflects current policy.

Changes in Borrowers (§ 4279.280)

The Agency did not make any changes to this section.

Conditions precedent to issuance of Loan Note Guarantee (§ 4279.281)

The Agency made explicit all of the forms and documents needed at or immediately after loan closing to include the following:

- Copy of the executed Promissory Note(s);
- Copy of the executed Loan Agreement;
- Copy of the executed settlement statement and updated source and use statement including all Project funding;
- Original, executed "Unconditional Guarantee" forms, as appropriate;
- Borrower's loan closing balance sheet; and

- Any other documents required to comply with applicable law or required by the Conditional Commitment or the Agency.

The Agency reduced the number of certifications required and removed redundancy in the certifications being required.

In the certification regarding the Borrower or its officers, directors, stockholders, or other owners having an ownership interest in the Lender, the Agency replaced “substantial financial interest” with “more than a 5 percent ownership interest in the Lender.”

Refusal to execute Loan Note Guarantee (§ 4279.283)

The Agency did not make any substantive changes to this section.

Requirements after Project construction (§ 4279.290)

The Agency made conforming changes to accommodate the inclusion of Renewable Chemicals and Biobased Product Manufacturing.

#### *B. 7 CFR Part 4287, Subpart D*

Introduction (§ 4287.301)

The Agency clarified that all loan servicing actions under this subpart, except for certain specific actions, are subject to Agency concurrence and that, whenever Agency approval is required, the servicing action must be for Good Cause.

Definitions (§ 4287.302)

As discussed above, the definitions in § 4279.202 apply for terms applicable to this subpart.

Exception authority (§ 4287.303)

The Agency did not make any changes to this section.

Appeals (§ 4287.306)

The Agency made edits to clarify what is appealable versus reviewable. In addition, the Agency expanded the provisions to reflect current practice.

Servicing (§ 4287.307)

The Agency made several changes and clarifications to this section, including:

- Clarifying that while the Lender may contract with third parties and rely on information from qualified third parties that the Lender is solely responsible for servicing the loan.
- Adding additional examples of servicing responsibilities.
- Requiring Lenders to submit monthly Default reports.
- Revising the timeframes for submitting financial statements.
- Requiring the written summary provided by the Lender to include any

violations of loan covenants and covenant waivers proposed by the Lender and any routine servicing actions performed.

- Updating the audit requirements to conform to 2 CFR part 200, subpart F and including Indian Tribes as being subject to the audit requirements.

- Clarifying, as a conforming change, that the guarantee is unenforceable under either negligent loan servicing or grossly negligent loan servicing as established in the Loan Note Guarantee.

Interest rate changes (§ 4287.312)

All increases in interest rates must be for Good Cause. The Agency did not make any other substantive changes to this section.

Release of Collateral (§ 4287.313)

The Agency made several changes and clarifications to this section, including:

- Clarifying that working assets can be released for routine business purposes without prior concurrence of the Agency when the loan is in good standing.

- Summarizing appraisal requirements.

- Requiring justifications and conditions for release of Collateral to include: applying the Collateral sold to Borrower debt, using net proceeds to purchase other Collateral of equal or greater value, and applying the proceeds to the business operations. Assurance that the release of Collateral is essential for the success of the business must be provided by the Lender.

Subordination of Lien Position (§ 4287.323)

The Agency made several changes to this section, including:

- Removing the limitation concerning the Subordination to a revolving line of credit cannot exceed one year.

- Replacing the requirement for adequate consideration for the Subordination with the requirement that the Subordination must be in the best financial interest of the Agency.

- Removing the provision prohibiting a Subordination from extending beyond the term of the guaranteed loan because a Subordination deals solely with the lien position on joint Collateral and does not address the term of the guaranteed loan.

- Requiring the Lender's Subordination proposal to include a financial analysis of the servicing action and be fully supported by current financial statements.

- Allowing a Subordination on accounts receivables and inventory to a line of credit.

- Providing the Agency the discretion to require an appraisal of Collateral assuring proper Collateral coverage.

- Providing the Agency the ability to deny Subordinations of the Lender's lien position for good cause.

Alterations of Loan Instruments (§ 4287.324)

The Agency did not make any changes to this section.

Transfer and Assumption (§ 4287.334)

The Agency made several changes and clarifications to this section, including:

- Clarifying that a Transfer and Assumption of the Borrower's operation can take place either before or after the loan goes into liquidation.

- Prohibiting a Transfer and Assumption if Borrower Collateral has been purchased through foreclosure or the Borrower has conveyed title to the Lender.

- Providing Agency discretion as to when personal or corporate guarantees are required and whether the guarantees will be full or partial.

- Requiring that any new loan terms must also be for Good Cause.

- Adding a provision that the Agency will not approve any change in terms that results in an increase in the cost of the loan guarantee, except for good cause and only if the change otherwise conforms to applicable regulations.

- As one of the conditions for a release of liability, requiring that all of the loan Collateral is transferred to the transferee if the transferee is assuming the full amount of loan.

- If the proposed Transfer and Assumption is for less than the full amount of the Agency guaranteed loan, requiring an appraisal and limiting the appraised value of the Collateral to not less than the amount of the assumption.

- Requiring a legal opinion to accompany each request for a Transfer and Assumption.

- Prohibiting the issuance of new Promissory Notes to the transferee.

- Requiring a legal opinion that, upon its execution, the Transfer and Assumption is completed, valid, and enforceable and a certification that the Transfer and Assumption is consistent with the Agency's approved conditions for the transfer.

- Adding a requirement that, when the transfer and transferee are Affiliates or related parties, the Transfer and Assumption must be to an eligible Borrower and must continue the Project for eligible purposes as well as be for the full amount of the guaranteed loan indebtedness.

- Providing a description of the calculation of the transfer fee.

• Removing, with regard to change in control of the Borrower, reference to “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.”

#### Substitution of Lender (§ 4287.335)

The Agency made several changes and clarifications to this section, including:

- Requiring the Lender to transfer the original Promissory Note and loan security documents to the new Lender, who must agree to the current loan terms.
- Adding additional procedures to be followed when there is a substitution of Lender.
- Requiring the request for a substitute Lender to be from the Borrower, the proposed substitute, and the original Lender if still in existence.
- Clarifying that where a Lender has been merged with or acquired by another Lender, the new Lender must execute a new Lender’s Agreement unless the new Lender already has a valid Lender’s Agreement with the Agency.

#### Lender Failure (§ 4287.336)

The Agency added this new section to address procedures when a Lender fails.

The acquiring Lender must take such action that a reasonable Lender would take if it did not have a Loan Note Guarantee.

#### Default by Borrower (§ 4287.345)

The Agency made several changes and clarifications to this section, including:

- Clarifying Lender duties in the event of a loss, including acting reasonably, working with the Borrower to cure the Default, and minimizing potential loss in the case of liquidation.
- Requiring monthly (rather than every other month) reports while the loan is still in Default.
- Removing reference to subsequent loan guarantees as a servicing option.
- Prohibiting capitalization of accrued Interest.
- Allowing balloon payments as a servicing option under certain conditions.
- Prohibiting the Lender from claiming Default or penalty Interest, late payment fees, and Interest-on-Interest when there is a loss or repurchase.
- Prohibiting debt write-down by the Lender where the Lender will continue with the Project loan, except as directed or ordered by a final court order.
- In instances of a loss, not allowing the guarantee to cover any accrued

Interest in accordance with the Interest Termination Date as discussed earlier under § 4279.220.

#### Protective Advances (§ 4287.356)

The Agency made several changes and clarifications to this section, including:

- Clarifying that Protective Advance claims are paid only at the time of the final loss payment.
- Not allowing the guarantee to cover Interest on the Protective Advance accruing after the Interest Termination Date as discussed earlier under § 4279.220.
- Revising the cumulative total of Protective Advances for which Agency authorization is required from “\$100,000” to “\$200,000 or 10 percent of the outstanding principal, whichever is less.”

#### Liquidation (§ 4287.357)

The Agency made a number of changes and clarifications to this section, including:

- Clarifying that when the decision to liquidate is made, if any portion of the loan has been sold or assigned, provisions will be made for repurchase.
- Explaining more clearly how the Agency will handle the Lender’s liquidation plan, including its approval and the resolution of any Agency concerns.
- Requiring the Lender to take such actions that a reasonable Lender would take without a guarantee and to keep the Agency informed of such actions.
- Allowing a liquidation plan to be submitted with an estimate of Collateral value with Agency approval subject to the results of the final liquidation appraisal.
- Requiring the Lender to notify the Agency of any changes and updates (*e.g.*, change in value based on the liquidation appraisal) in the liquidation plan.
- Clarifying provisions regarding protective bids.
- Explaining when Agency approval is or is not required for acceleration.
- Limiting the accrual of Interest in accordance with the Interest Termination Date as discussed earlier under § 4279.220.
- Explaining more clearly the process for compromise settlements.
- Spelling out the responsibilities of the Lender during litigation proceedings.

#### Determination of Loss and Payment (§ 4287.358)

The Agency made a number of changes and clarifications to this section, including:

• Prohibiting the estimated loss payment from being used to reduce the unpaid balance owed by the Borrower.

• Revising the time period that the Agency will not guarantee accrued Interest in accordance with the Interest Termination Date as discussed earlier under § 4279.220.

• Allowing the Agency to consider a compromise settlement of Federal Debt after it has processed a final “Guaranteed Loan Report of Loss” and issued a 60 day due process letter.

• Prohibiting the sharing of any funds collected on Federal Debt with the Lender.

• Expanding the provision for the consideration of Liquidation Expenses to include:

- Prohibiting the Lender from claiming any Liquidation Expenses in excess of liquidation proceeds.
- Requiring Agency approval of any changes to the Liquidation Expenses that exceed 10 percent of the amount proposed in the liquidation plan.
- Sharing equally between the Lender and Agency reasonable attorney/legal expense.
- Prohibiting the guarantee fee and annual renewal fee as an authorized Liquidation Expense.

#### Future Recovery (§ 4287.369)

The Agency revised this section to require the Lender, after the final loss claim has been paid, to use reasonable efforts to attempt collection from any party still liable on the guaranteed loan. Any net proceeds from that effort must be split Pro Rata between the Lender and the Agency based on the original amount of the loan guarantee.

#### Bankruptcy (§ 4287.370)

The Agency made a number of changes and clarifications to this section, including:

• Requiring Lenders to monitor bankruptcy plans to determine Borrower compliance and, if the Borrower fails to comply, pursue appropriate relief.

• Requiring Lenders to submit a Default status report within 15 days after the date the Borrower Defaults and every 30 days thereafter until the Default is resolved or a final loss claim is paid by the Agency. The Default status report will be used to inform the Agency of the bankruptcy filing, the plan confirmation date, when the plan is complete, and when the Borrower is not in compliance with the plan.

• Requiring the Lender to request a bankruptcy loss payment of the guaranteed portion of the accrued Interest and principal discharged by the court for all bankruptcies when all or a portion of the debt has been discharged.



- Allowing only one bankruptcy loss payment during the bankruptcy proceeding unless the Bankruptcy Court approves a subsequent change to the bankruptcy plan.

- Requiring the Lender to use the Guaranteed Loan Report of Loss form to request a bankruptcy loss payment or to revise any bankruptcy loss payments.

- Revising when Protective Advances can be payable under the guarantee in the final loss claim and what kinds of expenses can be considered Liquidation Expenses.

- Expanding the types of expenses incurred during bankruptcy proceedings beyond just legal expenses and how those expenses will be treated.

Termination of Guarantee (§ 4287.380)

The Agency did not make any substantive changes to this section.

## VII. Invitation To Comment

RD encourages interested persons and organizations to submit written comments, which may include data, suggestions, or opinions. Commenters should include their name, address, and other appropriate contact information. If persons with disabilities (*e.g.*, deaf, hard of hearing, or have speech difficulties) require an alternative means of receiving this notice (*e.g.*, Braille, large print, audiotape) in order to submit comments, please contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

Comments may be submitted by any of the means identified in the **ADDRESSES** section. If comments are submitted by mail or hand delivery, they should be submitted in an unbound format, no larger than letter-size, suitable for copying and electronic filing. If confirmation of receipt is requested, a stamped, self-addressed, postcard or envelope should be enclosed. RD will consider all comments received during the comment period and will address comments in the preamble to the final rule.

### List of Subjects for 7 CFR Parts 4279 and 4287

Loan programs—Business and industry, Loan programs—Rural development assistance, Economic development, Energy, Direct loan programs, Grant programs, Guaranteed loan programs, Renewable energy systems, Energy efficiency improvements, Rural areas.

For the reasons set forth in the preamble, parts 4279 and 4287 of title 7 of the Code of Federal Regulations are amended as follows:

## PART 4279—GUARANTEED LOANMAKING

■ 1. The authority citation for part 4279 is revised to read as follows:

**Authority:** 5 U.S.C. 301; and 7 U.S.C. 1989.

■ 2. Revise subpart C to read as follows:

### Subpart C—Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance Loans

#### General

##### Sec.

- 4279.201 Purpose and scope.
- 4279.202 Definitions and abbreviations.
- 4279.203 Exception authority.
- 4279.204 Appeals.
- 4279.205 Prohibition under Agency programs.
- 4279.206 Agency representation.
- 4279.207 [Reserved]

#### Eligibility Requirements

- 4279.208 Lender eligibility requirements.
- 4279.209 Borrower eligibility requirements.
- 4279.210 Project eligibility requirements.
- 4279.211–4279.213 [Reserved]

#### Lender Functions and Responsibilities

- 4279.214 General functions and responsibilities.
- 4279.215 Credit evaluation.
- 4279.216 Environmental responsibilities.
- 4279.217 Oversight and monitoring.
- 4279.218–4279.219 [Reserved]

#### Conditions of Guarantee

- 4279.220 General conditions of guarantee.
- 4279.221 Rights and liabilities.
- 4279.222 Payments.
- 4279.223 Sale or assignment of guaranteed loan.
- 4279.224 Minimum retention.
- 4279.225 Repurchase from Holder.
- 4279.226 Replacement of document.
- 4279.227 Equal Credit Opportunity Act.
- 4279.228–4279.230 [Reserved]

#### Loan Processing

- 4279.231 Fees.
- 4279.232 Guaranteed loan funding.
- 4279.233 Interest rates.
- 4279.234 Terms of loan.
- 4279.235 Collateral.
- 4279.236–4279.242 [Reserved]
- 4279.243 Insurance.
- 4279.244 Appraisals.
- 4279.245 Personal and corporate guarantees.
- 4279.246–4279.255 [Reserved]
- 4279.256 Construction planning and performing development.
- 4279.257–4279.258 [Reserved]
- 4279.259 Borrower responsibilities.

#### Applications

- 4279.260 Guarantee applications—general.
- 4279.261 Application for loan guarantee content.
- 4279.262–4279.264 [Reserved]
- 4279.265 Guarantee application processing.
- 4279.266 Guarantee application scoring.

- 4279.267 Selecting guarantee applications.
- 4279.268–4279.277 [Reserved]
- 4279.278 Loan approval and obligating funds.

- 4279.279 Transfer of Lenders.

- 4279.280 Changes in Borrowers.

- 4279.281 Conditions precedent to issuance of Loan Note Guarantee.

- 4279.282 [Reserved]

- 4279.283 Refusal to execute Loan Note Guarantee.

- 4279.284–4279.289 [Reserved]

- 4279.290 Requirements after Project construction.

- 4279.291–4279.299 [Reserved]

- 4279.300 OMB control number.

### Subpart C—Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance Loans

#### General

##### § 4279.201 Purpose and scope.

The purpose of the Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Program is to assist in the development of new and emerging technologies for the development of Advanced Biofuels, Renewable Chemicals, and Biobased Product Manufacturing. This is achieved through guarantees for loans made to fund the development, construction, and Retrofitting of Commercial-Scale Biorefineries using Eligible Technology and of Biobased Product Manufacturing facilities that use Technologically New Commercial-Scale processing and manufacturing equipment and required facilities to convert Renewable Chemicals and other biobased outputs of Biorefineries into end-user products on a Commercial Scale.

(a) This subpart and subpart D of part 4287 of this chapter contain the regulations for this Program.

(b) The Lender is responsible for ascertaining that all requirements for making, securing, servicing, and collecting the loan are complied with.

(c) Whether specifically stated or not, whenever Agency approval is required, it must be in writing.

(d) Copies of all forms, regulations, and instructions referenced in this subpart are available in any Agency office and from the USDA Rural Development Web site at <http://www.rd.usda.gov/programs-services/biorefinery-assistance-program>. Whenever a form is designated in this subpart, it is initially capitalized and its reference includes predecessor and successor forms, if applicable.

##### § 4279.202 Definitions and abbreviations.

Terms used in this subpart are defined in this section. Terms used in this subpart that have the same meaning

as the terms defined in this section have been capitalized in this subpart.

**Administrator.** The Administrator of Rural Business-Cooperative Service within the Rural Development mission area of the U.S. Department of Agriculture.

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

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

**Affiliate.** An entity that is related to another entity by owning shares or having an interest in the entity, by common ownership, or by any means of control.

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

**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.

**Annual renewal fee.** A fee that is paid once a year by the Lender and is required to maintain the enforceability of the Loan Note Guarantee.

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

**Assignment Guarantee Agreement.** Form RD 4279-6, "Assignment Guarantee Agreement," is the signed agreement between the Agency, the Lender, and the Holder containing the

terms and conditions of an assignment of a guaranteed portion of a loan, using the single Promissory Note system.

**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.

**BAP.** Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Assistance Program.

**Biobased product.** A product determined by the Secretary to be a commercial or industrial product (other than food or feed) that is either:

- (1) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or
- (2) An intermediate ingredient or feedstock.

**Biobased product manufacturing.** The use of Technologically New Commercial-Scale processing and manufacturing equipment and required facilities to convert Renewable Chemicals and other biobased outputs of Biorefineries into end-user products on a Commercial Scale.

**Biofuel.** A fuel derived from Renewable Biomass.

**Biogas.** Renewable Biomass converted to gaseous fuel.

**Biorefinery.** A facility (including equipment and processes) that converts Renewable Biomass into Biofuels and Biobased Products and may produce electricity.

**Bond.** A form of debt security in which the authorized issuer (Borrower) owes the Bond holder (Lender) a debt and is obligated to repay the principal and Interest (coupon) at a later date(s) (maturity). An explanation of the type of Bond and other Bond stipulations must be attached to the Bond issuance.

**Borrower.** The Person that borrows, or seeks to borrow, money from the Lender, including any party liable for the loan except for guarantors.

**Byproduct.** An incidental or secondary product generated under normal operations of the proposed Project that can be reasonably measured and monitored other than: Advanced Biofuel, Program-eligible Biobased Products including Renewable Chemicals, and Program-eligible end-user products produced by Biobased Product Manufacturing facilities. Byproducts may or may not have a readily identifiable commercial use or value.

**Calendar quarter.** Four three-month periods in each calendar year as follows:

(1) Quarter 1 begins on January 1 and ends on March 31;

(2) Quarter 2 begins on April 1 and ends on June 30;

(3) Quarter 3 begins on July 1 and ends on September 30; and

(4) Quarter 4 begins on October 1 and ends on December 31.

**Collateral.** The asset(s) pledged by the Borrower to secure the loan.

**Commercial-scale (commercial scale).**

An operation is considered to be a Commercial-Scale operation if it demonstrates that its sole or chief emphasis is on salability and profit and:

(1) Its revenue will be sufficient to recover the full cost of the Project over its expected life and result in an anticipated annual rate of return sufficient to encourage investors or Lenders to provide funding for the Project;

(2) 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);

(3) Contracts for feedstock are adequate to address proposed off-take; and

(4) It has the ability to achieve market entry, suitable infrastructure to transport product to its market is available, and the technology and related products are generally competitive in the market.

**Conditional Commitment.** Form RD 4279-3, "Conditional Commitment," is the Agency's notice to the Lender that the loan guarantee it has requested is approved subject to the completion of all conditions and requirements set forth by the Agency and outlined in the attachment to the Conditional Commitment.

**Conflict of interest.** A situation in which a Person has competing personal, professional, or financial interests that prevents the Person from acting impartially.

**Default.** The condition that exists when a Borrower is not in compliance with the Promissory Note, the Loan Agreement, security documents, or other documents evidencing the loan. Default could be a monetary or non-monetary Default.

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

**Delinquency.** A loan for which a scheduled loan payment is more than 30 days past due and cannot be cured within 30 days.

**Eligible project costs.** Those expenses approved by the Agency for the Project as set forth in § 4279.210(d) and do not

include the costs set forth in § 4279.210(e).

*Eligible technology.* The term “Eligible technology” means, as determined by the Secretary:

(1) A technology that is being adopted in a viable Commercial-Scale operation of a Biorefinery that produces an Advanced Biofuel; or

(2) A technology not described in paragraph (1) of this definition that has been demonstrated to have Technical and Economic Potential for commercial application in a Biorefinery that produces an Advanced Biofuel.

*Fair market value.* The price that could reasonably be expected for an asset in an Arm’s-Length Transaction between a willing buyer and a willing seller under ordinary economic and business conditions.

*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 or consultants of the economic, market, technical, financial, and management feasibility of a proposed Project or business in terms of its expectation for success.

*Federal debt.* Debt owed to the Federal government that is subject to collection under the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701 *et seq.* Once the Agency determines a debt is Federal Debt and provides notice to the Lender, that Federal Debt is excluded from Future Recovery.

*Future recovery.* Funds anticipated to be collected by the Lender after a final loss claim is processed.

*Good cause.* A justification representing a reasonable approach given:

(1) The reasonably available alternatives;

(2) All known relevant factors;

(3) Program requirements; and

(4) The best interests of the

government. Good cause must be approved by the Agency. Without prior approval by the Agency, alternatives that require the Agency to increase its guarantee, in either the Conditional Commitment or Loan Note Guarantee (including an increase of its subsidy costs under the Credit Reform Act of 1990), or provide additional assistance, will not be considered reasonable available alternatives under paragraph (1) of this definition or in the best

interests of the government under paragraph (4) of this definition.

*Grossly negligent loan origination.* A serious carelessness in originating the loan which is so great as to appear to be conscious. The term includes not only the concept of a failure to act, but also not acting in a timely manner.

*Grossly negligent loan servicing.* A serious carelessness in servicing the loan which is so great as to appear to be conscious. The term includes not only the concept of a failure to act, but also not acting in a timely manner.

*Guaranteed Loan Report of Loss.* Form RD 449–30, “Guaranteed Loan Report of Loss,” used by Lenders when reporting a financial loss under an Agency guarantee.

*Holder.* A Person, other than the Lender, who owns all or part of the guaranteed portion of the loan with no servicing responsibilities.

*Immediate family(ies).* Individuals who live in the same household or who are closely related by blood, marriage, or adoption, such as a spouse, domestic partner, parent, child, sibling, aunt, uncle, grandparent, grandchild, niece, nephew, or cousin.

*Indian tribe.* This term has the meaning as defined in 25 U.S.C. 450b.

*In-house expenses.* Expenses associated with activities that are routinely the responsibility of a Lender’s internal staff or its agents. In-house expenses include, but are not limited to, employees’ salaries, staff lawyers, travel, and overhead.

*Institution of higher education.* This term has the meaning as defined in 20 U.S.C. 1002(a).

*Interest.* A fee paid by a Borrower to a Lender as a form of compensation for the use of money. When money is borrowed, Interest is typically paid as a fee over a certain period of time (typically months or years) to the Lender as percentage of the principal amount owed. The term Interest does not include Default or penalty Interest or late payment fees or charges.

*Interest Termination Date.* The date on which no further interest will be payable under the Loan Note Guarantee.

(1) If the Lender owns all or a portion of the guaranteed interest in the guaranteed loan or makes a Protective Advance, then the Loan Note Guarantee will not cover Interest to the Lender accruing after 90 days from the most recent Delinquency effective date as reported by the Lender.

(2) If the guaranteed loan has a Holder(s), the Lender, or the Agency, at its sole discretion, will issue an interest termination letter to the Holder(s) establishing the termination date for Interest accrual. The Loan Note

Guarantee will not cover Interest to the Holder(s) accruing after the greater of:

(i) 90 days from the date of the most recent Delinquency effective date as reported by the Lender or

(ii) 30 days from the date of the interest termination letter.

*Lender.* The entity approved, or seeking to be approved, by the Agency to make, service, and collect the Agency guaranteed loan that is subject to this subpart.

*Lender’s Agreement.* Form RD 4279–4, “Lender’s Agreement,” or predecessor form, between the Agency and the Lender setting forth the Lender’s loan responsibilities.

*Liquidation expenses.* Costs directly associated with the liquidation of Collateral, including preparing Collateral for sale (*e.g.*, repairs and transport) and conducting the sale (*e.g.*, advertising, public notices, auctioneer expenses, and foreclosure fees). Liquidation Expenses do not include In-House Expenses. Legal/attorney fees are considered Liquidation Expenses provided that the fees are reasonable, as determined by the Agency, and cover legal issues pertaining to the liquidation that could not be properly handled by the Lender and its in-house counsel.

*Loan agreement.* The agreement between the Borrower and Lender containing the terms and conditions of the loan and the responsibilities of the Borrower and Lender.

*Loan classification.* The process by which loans are examined and categorized by degree of potential loss in the event of Default.

*Loan Note Guarantee.* Form RD 4279–5, “Loan Note Guarantee,” or predecessor form, issued and executed by the Agency containing the terms and conditions of the guarantee.

*Loan packager.* A Person, other than the applicant Borrower or Lender, that prepares a loan application package.

*Loan service provider.* A Person, other than the Lender of record, that provides loan servicing activities to the Lender.

*Local government.* A county, municipality, town, township, village, or other unit of general government below the State level, or Indian Tribe governments.

*Local owner.* An individual who owns any portion of an eligible 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**.

*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 circumstance associated with a guaranteed loan, including the Borrower's financial condition or Collateral that could be reasonably expected to jeopardize loan performance.

**NAD.** National Appeals Division, or successor agency, in the United States Department of Agriculture.

**Negligent Loan Origination.** The failure to perform those actions which a reasonably prudent lender would perform in originating its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act but also acting in a manner contrary to the manner in which a reasonably prudent lender would act.

**Negligent Loan Servicing.** The failure to perform those services which a reasonably prudent lender would perform in servicing (including liquidation of) its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act, but also 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 including Renewable Chemicals, Biobased Product Manufacturing end-user products, and electricity produced by the Borrower to another party.

**Parity.** A lien position whereby two or more Lenders share a security interest of equal priority in Collateral.

**Participate.** Sale of an interest in a loan by the lead Lender to one or more Lenders wherein the lead Lender retains the Promissory Note, Collateral securing the Promissory Note, and all responsibility for managing and servicing the loan. Participants are dependent upon the lead Lender for protection of their interests in the loan.

**Person.** An individual or entity.

**Program.** Biorefinery Renewable Chemical, and Biobased Product Manufacturing Assistance Program often abbreviated as BAP.

**Project.** The facility or portion of a facility receiving funding under this subpart.

**Pro rata.** On a proportional basis.

**Promissory note.** Evidence of debt with stipulated repayment terms. "Note" or "Promissory Note" shall also be construed to include "Bond" or other evidence of debt, where appropriate.

**Protective advance.** An advance made by the Lender for the purpose of preserving and protecting the Collateral where the Borrower has failed to, and will not or cannot, meet its obligations

to protect or preserve Collateral. Protective advances include, but are not limited to, advances affecting the Collateral made for property taxes, rent, hazard and flood insurance premiums, and annual assessments. Legal/attorney fees are not a Protective Advance. Holders do not have an interest in Protective Advances.

**Public body.** A municipality, county, or other political subdivision of a State; a special purpose district; or an Indian Tribe on a Federal or State reservation or other Federally-recognized Indian Tribe; or an organization controlled by any of the above. A Local Government would also be a Public Body.

**Renewable biomass.** (1) 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:

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

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

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

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

(i) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

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

**Renewable chemical.** A monomer, polymer, plastic, formulated product, or chemical substance produced from Renewable Biomass.

**Retrofitting.** The modification of a building or equipment to incorporate functions not included in the original design.

**Rural Development.** The mission area of USDA that is comprised of the Rural Business-Cooperative Service, Rural Housing Service, and Rural Utilities Service and is under the policy direction and operational oversight of the Under Secretary for Rural Development.

**Rural or rural area.** See 7 U.S.C. 1991(a)(13)(A) and (D) *et seq.*

**Secretary.** The Secretary of the Department of the Agriculture.

**Semi-work scale.** A facility operating on a limited scale to provide final tests of a product or process.

**Spreadsheet.** A table containing data from a series of financial statements of a business over a period of time. Financial statement analysis normally contains Spreadsheets for balance sheet and income statement items and includes a cash flow analysis and commonly used ratios. The Spreadsheets enable a reviewer to easily scan the data, spot trends, and make comparisons.

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

**Subordination.** The reduction of the Lender's lien priority on certain assets pledged to secure payment of the guaranteed loan to a position junior to, or on Parity with, the lien position of another loan in order for the Borrower to obtain additional financing, not guaranteed by the Agency, from the Lender or a third party.

**Technologically New.** New or significantly improved equipment, process or production method to deliver a product, or adoption of equipment, process or production method to deliver a new or significantly improved product, of which the first Commercial-Scale use in the United States is within the last five years and is used in not more than three Commercial-Scale facilities in the United States.

**Total project costs.** The sum of all costs associated with a completed Project.

**Transfer and assumption.** The conveyance by a Borrower to an assuming Borrower of the assets, Collateral, and liabilities of the loan in return for the assuming Borrower's binding promise to pay the outstanding loan debt approved by the Agency.

**USDA Lender Interactive Network Connection (LINC).** The portal Web site currently at <https://usdalinc.sc.egov.usda.gov/> used by Lenders to update loan data in the

Agency's Guaranteed Loan System. Current capabilities include loan closing and status reporting.

*Well capitalized.* Federal Deposit Insurance Corporation (FDIC) requirements used to determine if a lending institution has enough capital on hand to withstand negative effects in the market, and which the Agency uses to determine Lender eligibility. The criteria are specified in the Federal Deposit Insurance Act, and are currently at 12 CFR 325.103, or subsequent regulation.

*Working capital.* Current assets available to support a business's operations. Working Capital is calculated as current assets less current liabilities.

#### **§ 4279.203 Exception authority.**

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.

#### **§ 4279.204 Appeals.**

Borrowers, Lenders, and Holders have appeal or review rights for adverse Agency decisions made under this subpart. Adverse programmatic decisions based on clear and objective statutory or regulatory requirements are not appealable; however, such decisions are reviewable for appealability by the National Appeals Division (NAD). The Borrower, Lender, and Holder can appeal any Agency decision that directly and adversely impacts them. For an adverse decision that impacts the Borrower, the Lender and Borrower must jointly execute a written request for appeal for an alleged adverse decision made by the Agency. An adverse decision that only impacts the Lender may be appealed by the Lender only. An adverse decision that only impacts the Holder may be appealed by the Holder only. A decision by a Lender adverse to the interest of the Borrower is not a decision by the Agency, whether or not concurred in by the Agency. Appeals will be conducted by NAD and will be handled in accordance with 7 CFR part 11.

#### **§ 4279.205 Prohibition under Agency programs.**

(a) No loan guaranteed by the Agency under this subpart will be conditioned on any requirement that the recipient(s) of such assistance accept or receive

electric service from any particular utility, supplier, or cooperative.

(b) No loan guaranteed by the Agency may be made with the proceeds of any obligation the Interest on which is excludable from income under 26 U.S.C. 103 or a successor statute. Funds generated through the issuance of tax-exempt obligations may neither be used to purchase the guaranteed portion of any Agency guaranteed loan nor may an Agency guaranteed loan serve as Collateral for a tax-exempt issue. The Agency may guarantee a loan for a Project which involves tax-exempt financing only when the guaranteed loan funds are used to finance a part of the Project that is separate and distinct from the part which is financed by the tax-exempt obligation, and the guaranteed loan has at least a Parity security position with the tax-exempt obligation.

(c) The Agency may not issue a guarantee for a loan where there may be, directly or indirectly, a Conflict of Interest or an appearance of a Conflict of Interest involving any action by the Agency.

(d) The Agency may not guarantee lease payments.

(e) The Agency may not guarantee loans made by other Federal agencies.

#### **§ 4279.206 Agency representation.**

Notwithstanding any other provision of this subpart and 7 CFR part 4287, subpart D, the Agency reserves the right to be represented by the U.S. Department of Justice in any litigation where the Agency is named as a party.

#### **§ 4279.207 [Reserved]**

#### **Eligibility Requirements**

#### **§ 4279.208 Lender eligibility requirements.**

(a) 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 are eligible Lenders. The National Rural Utilities Cooperative Finance Corporation is also an eligible Lender. Savings and loan associations, mortgage companies, insurance companies, and other lenders not meeting the above criteria are not eligible.

(b) The Lender must demonstrate that it meets the FDIC definition of Well Capitalized at the time of application and at time of issuance of the Loan Note

Guarantee. This information may be identified in FDIC 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.

(c) The Lender must not be debarred or suspended by the Federal government.

(d) If the Lender is under a cease-and-desist order, or similar constraint, from a Federal or State 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 or similar constraint, as applicable.

(e) The Agency will only approve loan guarantees for Lenders with adequate experience and expertise, from similar projects, to make, secure, service, and collect loans approved under this subpart.

#### **§ 4279.209 Borrower eligibility requirements.**

(a) *Eligible entities.* To be eligible, a Borrower must meet the requirements specified in paragraphs (a)(1) and (2) of this section.

(1) *Type of Borrower.* A Borrower must be an individual; an entity; an Indian Tribe; or a unit of State or Local Government, including a corporation; a Farm Cooperative; a Farmer Cooperative Organization; an Association of Agricultural Producers; a National Laboratory; an Institution of Higher Education; a rural electric cooperative; a public power entity; or 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 Project 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.

#### **§ 4279.210 Project eligibility requirements.**

(a) The Project must be located in a State.

(b) The Project must be for either:

(1) The development, construction, and Retrofitting of Technologically New Commercial-Scale processing and manufacturing equipment and required facilities that will be used to convert Renewable Chemicals and other biobased outputs of Biorefineries into end-user products on a Commercial Scale; or

(2) The development, construction, or Retrofitting of a Commercial-Scale Biorefinery using Eligible Technology.

(c) The Borrower and other principals involved in the Project must make a significant equity investment in the Project in the form of cash contribution. Equity does not include loans to the Project. The Agency will evaluate the adequacy of equity in its credit evaluation in accordance with § 4279.215(b).

(d) Eligible Project Costs are only those costs associated with the items listed in paragraphs (d)(1) through (9) of this section, as long as the items are assets owned by the Borrower or expenses incurred by the Borrower and the items are an integral and necessary part of the Project, as determined by the Agency. A Project may consist of multiple facilities or components located at multiple locations.

(1) Purchase and installation of equipment (new, refurbished, or remanufactured), including an integrated demonstration unit if the integrated demonstration unit will be used by the Borrower in the Project after the Project is developed and in operation.

(2) New construction or Retrofitting of existing facilities including reasonable contingency reserves, land acquisition, site improvements and development, and associated costs such as surveys, title insurance, title fees, and recording or transfer fees.

(3) Permit and license fees and fees and charges for professional services. Professional services are those rendered by entities generally licensed or certified by States or accreditation associations, such as architects, engineers, accountants, attorneys, or appraisers, and those rendered by Loan Packagers (excluding finders fees). The Borrower may pay fees for professional services needed for planning and developing a Project provided that the amounts are reasonable and customary in the area. Professional fees may be included as an eligible use of loan proceeds.

(4) Working Capital.

(5) Cost of necessary insurance and bonds.

(6) Cost of financing, including capitalized Interest during construction

period, legal fees, transaction costs, and customary fees charged by the lender, excluding the guaranteed loan fee and annual renewal fees.

(7) Cash reserve accounts required by the Lender or Agency, such as a debt service reserve account.

(8) Any other item identified by the Agency in a notice published in the **Federal Register**.

(9) The Agency will consider refinancing only under either of the two conditions specified in paragraphs (d)(9)(i) and (ii) of this section.

(i) 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 Project.

(ii) 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.

(e) Ineligible Project costs include:

(1) Distribution or payment to an individual owner, partner, stockholder, or beneficiary of the Borrower or a close relative of such an individual when such individual will retain any portion of the ownership of the Borrower;

(2) Any line of credit;

(3) Any equipment, processes, and related costs of such equipment used for processing corn kernel starch into biofuel, including as an incidental or secondary product; and

(4) Payment in excess of actual costs (such as profit, overhead, and indirect costs) incurred by the contractor or other service provider on a contract or agreement that has been entered into at less than an Arm's Length Transaction or with an appearance of or a potential for Conflict of Interest.

#### §§ 4279.211–4279.213 [Reserved]

### Lender Functions and Responsibilities

#### § 4279.214 General functions and responsibilities.

(a) The Lender has the primary responsibility for loan origination and servicing. 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. The Lender may contract for services and may rely on certain written materials (including, but not limited to, certifications, evaluations, appraisals, financial statements and other reports) to be provided by the

Borrower or other qualified third parties (including, among others, one or more independent engineers, appraisers, accountants, consultants or other experts.) The Lender is ultimately responsible for underwriting, loan origination, loan servicing, and compliance with all Agency regulations.

(b) Agents and Persons are prohibited from acting as both Loan Packager and Loan Service Provider on the same guaranteed loan.

(c) All Lenders obtaining or requesting a Program loan guarantee are responsible for:

(1) Processing applications for guaranteed loans. The Lender is responsible for submitting a complete application for each guaranteed loan requested;

(2) Developing and maintaining adequately documented loan files, which must be maintained for at least 3 years after the final loss has been paid;

(3) Recommending only loan proposals that are eligible and financially feasible;

(4) Properly closing the loan and obtaining valid evidence of debt and Collateral in accordance with sound lending practices prior to disbursing loan proceeds;

(5) Keeping an inventory accounting of all Collateral items and reconciling the inventory of all Collateral sold during loan servicing, including liquidation;

(6) Supervising construction;

(7) Distributing loan funds;

(8) Servicing guaranteed loans in a reasonable manner, including liquidation if necessary;

(9) Following Agency regulations and agreements;

(10) Obtaining Agency approvals or concurrence as required; and

(11) Reporting all Conflicts of Interest, or appearances thereof, to the Agency.

#### § 4279.215 Credit evaluation.

(a) Lenders must analyze all credit factors associated with each proposed loan and apply its professional judgment to determine that the credit factors, considered in combination, to ensure loan repayment. The Lender must have an adequate underwriting process to ensure that loans are reviewed by someone other than the originating officer. The Agency will only guarantee loans that are financially sound and feasible with reasonable assurance of repayment.

(b) In its credit evaluation, the Agency will consider the following factors:

(1) The feasibility of the Project and Borrower and likelihood that the Project and Borrower will produce sufficient revenues to service the Project's debt

obligations over the life of the loan guarantee and result in sufficient returns to investors;

(2) Project and Borrower debt structure and characteristics and debt repayment ability;

(3) Revenues of the Project and Borrower, strength and duration of off-take contracts and counterparty agreements, market demand and competitive position;

(4) Technical feasibility, demonstrated performance of the technology and readiness to commercialize the technology;

(5) Ownership structure of the Project and Borrower, strength of ownership and sponsors, commitment and amount of equity investment from ownership, sponsors and other equity investors;

(6) Operational management and experience;

(7) Complexity of construction/ completion, terms of construction contracts, experience and financial strength of the construction contractor or engineering, procurement, and construction (EPC) contractor;

(8) Availability and depth of resource/ feedstock market, strength and duration of purchase agreements, and availability of substitutes;

(9) Contracts and intellectual property rights, and state and local regulations;

(10) Energy, infrastructure and environmental considerations;

(11) The extent to which Project Costs are funded by the guaranteed loan or other Federal and non-Federal governmental assistance such as grants, tax credits, or other loan guarantees;

(12) Economic safeguards of the Project including contingency reserve funds and protections and safeguards provided to the Agency and Lender in the event of default through loan collateral and ownership and sponsorship guarantors, and;

(13) Other criteria that the Agency deems relevant.

#### **§ 4279.216 Environmental responsibilities.**

Lenders are responsible for becoming familiar with Federal environmental requirements; considering, in consultation with the prospective Borrower, the potential environmental impacts of their proposals at the earliest planning stages; and developing proposals that minimize the potential to adversely impact the environment.

(a) Lenders must alert the Agency to any environmental issues related to a proposed Project or items that may require extensive environmental review.

(b) Lenders must ensure that the Borrower has:

(1) 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, and has completed Form RD 1940–20, “Request for Environmental Information,” and Exhibit H “Environmental Assessment for Class II Actions” (when required by 7 CFR part 1940, subpart G);

(2) Complied with any mitigation measures required by the Agency; and

(3) 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.

(c) Lenders must 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 issues.

#### **§ 4279.217 Oversight and monitoring.**

The Lender must permit representatives of the Agency (or other agencies of the United States) to inspect and make copies of any records of the Lender pertaining to Program guaranteed loans during regular office hours of the Lender or at any other time upon agreement between the Lender and the Agency. In addition, the Lender must cooperate fully with Agency oversight and monitoring of all Lenders involved in any manner with any loan guarantee under this 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 § 4287.307(d) of this chapter).

#### **§§ 4279.218–4279.219 [Reserved]**

#### **Conditions of Guarantee**

#### **§ 4279.220 General conditions of guarantee.**

A loan guarantee under this part will be evidenced by a Loan Note Guarantee issued by the Agency. Each Lender will execute a Lender’s Agreement. If a valid Lender’s Agreement already exists, it is not necessary to execute a new Lender’s Agreement with each loan guarantee. The provisions of this part and 7 CFR part 4287, subpart D will apply to all outstanding guarantees. In the event of a conflict between the guaranteed loan documents and these regulations as they exist at the time the documents are executed, the regulations will control.

(a) *Full faith and credit.* (1) A guarantee under this subpart constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which a Lender or Holder has actual knowledge at the time it becomes such Lender or Holder or which a Lender or Holder participates in or condones.

(2) The guarantee will be unenforceable to the extent that any loss is occasioned by:

(i) A provision for Interest on Interest, Default or penalty Interest, or late payment fees;

(ii) The violation of usury laws;

(iii) Use of loan proceeds for unauthorized purposes or to the extent that loan funds are used for purposes other than those specifically approved by the Agency in its Conditional Commitment;

(iv) Failure to obtain or maintain the required security regardless of the time at which the Agency acquires knowledge thereof; and

(v) Negligent Loan Origination or Negligent Loan Servicing unless otherwise determined under paragraph (d) of this section.

(3) The Agency will guarantee payment as follows:

(i) To any Holder, 100 percent of any loss sustained by the Holder on the guaranteed portion of the loan it owns and Interest through the Interest Termination Date due on such portion.

(ii) To the Lender, subject to the provisions of this part and subpart D of part 4287 of this chapter, the lesser of:

(A) Any loss sustained by the Lender on the guaranteed portion, including principal and Interest, through the Interest Termination Date, evidenced by the notes or assumption agreements and secured advances for protection and preservation of Collateral made with the Agency’s authorization; or

(B) The guaranteed principal advanced to or assumed by the Borrower and any Interest due thereon through the Interest Termination Date.

(b) *Credit quality of Borrower.* The Agency will provide guarantees 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) *Quality of loan.* All loans guaranteed under this subpart must be financially sound and feasible, with reasonable assurance of repayment.

(d) *Gross negligence.* Upon written request of the Lender, the Agency will consider changing the negligence standard to Grossly Negligent Loan Origination and Grossly Negligent Loan

Servicing on a case-by-case basis. The Lender must establish to the Agency's satisfaction that changing to the gross negligence standard does not materially impair the Agency's interests, solely at the Agency's discretion, subject to:

(1) The lender has demonstrated capacity and experience in making and servicing loans of similar amounts and for transactions of comparable complexity;

(2) The Agency's review of the Lender's underwriting, loan approval and loan servicing policies and procedures, and;

(3) The Agency's review of the Lender's loan servicing plan.

**§ 4279.221 Rights and liabilities.**

When a guaranteed portion of a loan is sold to a Holder, the Holder will succeed to all rights of the Lender under the Loan Note Guarantee to the extent of the portion purchased.

(a) The Lender will remain bound to all obligations under the Loan Note Guarantee, Lender's Agreement, and the Agency Program regulations.

(b) 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.

(c) The Lender must 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.

**§ 4279.222 Payments.**

A Lender will receive all payments of principal and Interest on account of the entire loan and must promptly remit to the Holder its Pro Rata share of any payment within 30 days of the Lender's receipt thereof from the Borrower, determined according to its respective interest in the loan, less only the Lender's servicing fee.

**§ 4279.223 Sale or assignment of guaranteed loan.**

The Lender may Participate or sell all or part of the guaranteed portion of the loan or retain the entire loan. The Lender must fully disburse and properly close a loan prior to sale of any portion of the Promissory Note(s). The Lender cannot Participate or sell any amount of the guaranteed or unguaranteed portion

of the loan to the Borrower or its parent, subsidiary or Affiliate or to officers, directors, stockholders, other owners, or members of their Immediate Families.

The Lender cannot share any premium received from the sale of a guaranteed loan in the secondary market with a Loan Packager or other Loan Service Provider. The participating Lenders and Holders and the Borrower can have no rights or obligations to one another. If the Lender desires to market all or part of the guaranteed portion of the loan at or subsequent to loan closing, such loan must not be in Default. Lenders may use either the single Promissory Note or multi-note system as outlined in paragraphs (a) and (b) of this section.

(a) *Single note system.* The entire loan is evidenced by one Promissory Note, and one Loan Note Guarantee is issued. When the loan is evidenced by one Promissory Note, the Lender may not at a later date cause any additional notes to be issued.

(1) The Lender may assign all or part of the guaranteed portion of the loan to one or more Holders by using the Assignment Guarantee Agreement. The Lender must retain title to the Promissory Note. The Lender must complete and execute the Assignment Guarantee Agreement and return it to the Agency for execution prior to Holder execution.

(2) A Holder, upon written notice to the Lender and the Agency, may reassign the unpaid guaranteed portion of the loan, in full, sold under the Assignment Guarantee Agreement. Holders may only reassign the guaranteed portion in the complete block they have received and cannot subdivide or further split the guaranteed portion of a loan or retain an Interest strip.

(3) Upon notification and completion of the assignment through the use of the Assignment Guarantee Agreement, the assignee shall succeed to all rights and obligations of the Holder thereunder. Subsequent assignments require notice to the Lender and Agency using any format, including that used by the Bond Market Association, together with the transfer of the original Assignment Guarantee Agreement.

(4) The Agency will neither execute a new Assignment Guarantee Agreement to effect a subsequent reassignment nor reissue a duplicate Assignment Guarantee Agreement unless:

(i) The original was lost, stolen, destroyed, mutilated, or defaced; and  
(ii) The reissue is in accordance with § 4279.226.

(5) The Assignment Guarantee Agreement clearly states the percentage and corresponding amount of the

guaranteed portion it represents and the Lender's servicing fee. A servicing fee may be charged by the Lender to a Holder and is calculated as a percentage per annum of the unpaid balance of the guaranteed portion of the loan assigned by the Assignment Guarantee Agreement. The Agency is not and will not be a party to any contract between the Lender and another party where the Lender sells its servicing fee in an Arm's Length Transaction. The Agency will not acknowledge, approve, or have any liability to any of the parties of such contract.

(b) *Multi-note system.* Under this option, the Lender may provide multiple Promissory Notes for the unguaranteed and the guaranteed portions of the loan. All Promissory Notes must reflect the same payment terms. When the Lender selects this option, the Holder will receive one of the Borrower's executed notes and a Loan Note Guarantee. The Agency will issue a Loan Note Guarantee for each Promissory Note, including the unguaranteed Promissory Note(s), to be attached to the Promissory Note(s). An Assignment Guarantee Agreement will not be used when the multi-note option is utilized.

**§ 4279.224 Minimum retention.**

The Lender is required to hold a minimum of 7.5 percent of the total loan amount. The amount required to be held must be of the unguaranteed portion of the loan and cannot be Participated to another Person. The Agency may reduce the minimum retention below 7.5 percent on a case by case basis when the Lender establishes to the Secretary's satisfaction that reduction of the minimum retention percentage is to meet compliance with the Lender's regulatory authority. The Lender must retain interest in the Collateral, and retain the servicing responsibilities for the guaranteed loan.

**§ 4279.225 Repurchase from Holder.**

(a) *Repurchase by Lender.* A Lender has the option to repurchase the unpaid guaranteed portion of the loan from a Holder within 30 days of written demand by the Holder when the Borrower is in Default not less than 60 days on principal or Interest due on the loan; or when the Lender has failed to remit to the Holder its Pro Rata share of any payment within 30 days of the Lender's receipt thereof from the Borrower. The repurchase by the Lender will be for an amount equal to the unpaid guaranteed portion of principal and accrued Interest less the Lender's servicing fee. The Holder must concurrently send a copy of the demand



letter to the Agency. The Lender must accept an assignment without recourse from the Holder upon repurchase. The Lender is encouraged to repurchase the loan, upon written demand from the Holder, to facilitate the accounting of funds, resolve any loan problem, and resolve the Default, where and when reasonable. The benefit to the Lender is that it may re-sell the guaranteed portion of the loan in order to continue collection of its servicing fee if the Default is cured. The Lender must notify, in writing, the Holder and the Agency of its decision.

(b) *Agency repurchase.* (1) The Lender's servicing fee will stop on the date that Interest was last paid by the Borrower when the Agency purchases the guaranteed portion of the loan from a Holder. The Lender cannot charge such servicing fee to the Agency and must apply all loan payments and Collateral proceeds received to the guaranteed and unguaranteed portions of the loan on a Pro Rata basis.

(2) If the Agency repurchases 100 percent of the guaranteed portion of the loan, the Agency will not continue collection of the Annual Renewal Fee from the Lender.

(3) If the Lender does not repurchase the unpaid guaranteed portion of the loan as provided in paragraph (a) of this section, the Agency will purchase from the Holder the unpaid principal balance of the guaranteed portion together with accrued Interest to date of repurchase or the Interest Termination Date, whichever is sooner, less the Lender's servicing fee, within 30 days after written demand to the Agency from the Holder.

(4) When Lender has accelerated the account, and subject to the expiration of any forbearance or workout agreement, the Lender, or the Agency at its sole discretion, must issue a letter to the Holder(s) establishing the Interest Termination Date. Accrued Interest to be paid to the Holder(s) will be calculated from the date Interest was last paid on the loan with a termination date not to exceed the Interest Termination Date.

(5) When the Lender has accelerated the account and the Lender holds all or a portion of the guaranteed loan, an estimated loss claim (loan in the liquidation process) must be filed by the Lender with the Agency within 60 days. Accrued Interest paid to the Lender will be calculated from the date Interest was last paid on the loan to the Interest Termination Date.

(6) The Holder's demand to the Agency must include a copy of the written demand made upon the Lender. The Holder must also include evidence

of its right to require payment from the Agency. Such evidence must consist of either the original of the Loan Note Guarantee properly endorsed to the Agency or the original of the Assignment Guarantee Agreement properly assigned to the Agency without recourse including all rights, title, and interest in the loan. When the single-note system is utilized and the initial Holder has sold its interest, the current Holder must present the original Assignment Guarantee Agreement and an original of each Agency approved reassignment document in the chain of ownership, with the latest reassignment being assigned to the Agency without recourse, including all rights, title, and interest in the guarantee. The Holder must include in its demand the amount due including unpaid principal, unpaid Interest to date of demand, and Interest subsequently accruing from date of demand to proposed payment date. The Agency will be subrogated to all rights of the Holder.

(7) Upon request by the Agency, the Lender must furnish within 30 days of such request a current statement certified by an appropriate authorized officer of the Lender of the unpaid principal and Interest then owed by the Borrower on the loan and the amount then owed to any Holder, along with the information necessary for the Agency to determine the appropriate amount due the Holder. Any discrepancy between the amount claimed by the Holder and the information submitted by the Lender must be resolved between the Lender and the Holder before payment will be approved. Such conflict will suspend the running of the 30 day payment requirement.

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

(c) *Repurchase for servicing.* If the Lender, Borrower, and Holder are unable to agree to restructuring of loan repayment, Interest rate, or loan terms to resolve any loan problem or resolve the Default and repurchase of the guaranteed portion of the loan is necessary to adequately service the loan, the Holder must sell the guaranteed portion of the loan to the Lender for an amount equal to the unpaid principal and Interest on such portion less the Lender's servicing fee. The Lender must not repurchase from the Holder for

arbitrage or other purposes to further its own financial gain. Any repurchase must only be made after the Lender obtains the Agency's written approval. If the Lender does not repurchase the guaranteed portion from the Holder, the Agency may, at its option, purchase such guaranteed portion for servicing purposes.

#### **§ 4279.226 Replacement of document.**

(a) The Agency may issue a replacement Loan Note Guarantee or Assignment Guarantee Agreement which was lost, stolen, destroyed, mutilated, or defaced to the Lender or Holder upon receipt of an acceptable certificate of loss and an indemnity bond.

(b) When a Loan Note Guarantee or Assignment Guarantee Agreement is lost, stolen, destroyed, mutilated, or defaced while in the custody of the Lender or Holder, the Lender must coordinate the activities of the party who seeks the replacement documents and must submit the required documents to the Agency for processing. The requirements for replacement are as follows:

(1) A certificate of loss, notarized and containing a jurat, which includes:

- (i) Name and address of owner;
- (ii) Name and address of the Lender of record;
- (iii) Capacity of Person certifying;
- (iv) Full identification of the Loan Note Guarantee or Assignment Guarantee Agreement including the name of the Borrower, the Agency's case number, date of the Loan Note Guarantee or Assignment Guarantee Agreement, face amount of the evidence of debt purchased, date of evidence of debt, present balance of the loan, percentage of guarantee, and, if an Assignment Guarantee Agreement, the original named Holder and the percentage of the guaranteed portion of the loan assigned to that Holder. Any existing parts of the document to be replaced must be attached to the certificate;

(v) A full statement of circumstances of the loss, theft, destruction, defacement, or mutilation of the Loan Note Guarantee or Assignment Guarantee Agreement; and

(vi) For the Holder, evidence demonstrating current ownership of the Loan Note Guarantee and Promissory Note or the Assignment Guarantee Agreement. If the present Holder is not the same as the original Holder, a copy of the endorsement of each successive Holder in the chain of transfer from the initial Holder to present Holder must be included. If copies of the endorsement cannot be obtained, best available

records of transfer must be submitted to the Agency (e.g., order confirmation, canceled checks, etc.).

(2) An indemnity bond acceptable to the Agency must accompany the request for replacement except when the Holder is the United States, a Federal Reserve Bank, a Federal corporation, a State or territory, or the District of Columbia. The indemnity bond must be with surety except when the outstanding principal balance and accrued Interest due the present Holder is less than \$1 million verified by the Lender in writing in a letter of certification of balance due. The surety must be a qualified surety company holding a certificate of authority from the Secretary of the Treasury and listed in Treasury Department Circular 570.

(3) All indemnity bonds must be issued and payable to the United States of America acting through the Agency. The bond must be in an amount not less than the unpaid principal and Interest. The bond must hold the Agency harmless against any claim or demand that might arise or against any damage, loss, costs, or expenses that might be sustained or incurred by reasons of the loss or replacement of the instruments.

(4) In those cases where the guaranteed loan was closed under the provision of the multi-note system, the Agency will not attempt to obtain, or participate in the obtaining of, replacement Promissory Notes from the Borrower. The Holder is responsible for bearing the costs of Promissory Note replacement if the Borrower agrees to issue a replacement instrument. Should such Promissory Note be replaced, the terms of the Promissory Note cannot be changed. If the evidence of debt has been lost, stolen, destroyed, mutilated or defaced, such evidence of debt must be replaced before the Agency will replace any instruments.

#### § 4279.227 Equal Credit Opportunity Act.

In accordance with the Equal Credit Opportunity Act (15 U.S.C. 1691, *et seq.*), with respect to any aspect of a credit transaction, neither the Lender nor the Agency will discriminate against any applicant on the basis of race, color, religion, national origin, sex, marital status or age (providing the applicant has the capacity to contract), or because all or part of the applicant's income derives from a public assistance program, or because the applicant has, in good faith, exercised any right under the Consumer Protection Act. The Lender must comply with the requirements of the Equal Credit Opportunity Act as contained in the Federal Reserve Board's Regulation

implementing that Act (see 12 CFR part 202) prior to loan closing.

#### §§ 4279.228—4279.230 [Reserved]

#### Loan Processing

##### § 4279.231 Fees.

(a) *Guarantee fee.* The guarantee fee is 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 (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 Eligible 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 Eligible Project Costs.

(iii) One percent for guarantees on loans of 65 percent or less of total Eligible Project Costs.

(b) *Annual Renewal Fee.* The Annual Renewal Fee, which may be passed on to the Borrower, is paid by the Lender to the Agency for as long as the guarantee is outstanding and is payable during the construction period.

(1) The amount of the annual renewal fee is calculated by the outstanding principal loan balance as of December 31 of each year multiplied by the Annual Renewal Fee rate, multiplied by the percent of guarantee. The rate is the rate in effect at the time the loan is obligated, and will remain in effect for the life of the loan.

(2) The Annual Renewal Fee is paid once a year and is required to maintain the enforceability of the guarantee as to the lender. Annual Renewal Fees are due on January 31. Payments not received by April 1 are considered delinquent and, at the Agency's discretion, may result in cancellation of the guarantee to the lender. Holders' rights will continue in effect as specified in the Loan Note Guarantee and Assignment Guarantee Agreement. Any delinquent Annual Renewal Fees will bear interest at the note rate and will be deducted from any loss payment due the lender. For loans where the

Loan Note Guarantee is issued between October 1 and December 31, the first Annual Renewal Fee payment will be due January 31 of the second year following the date the Loan Note Guarantee was issued.

(3) When the Agency repurchases 100 percent of the guaranteed portion of the loan, the Agency will not continue collection of the Annual Renewal Fee.

(4) Unless otherwise specified by the Agency in a notice published in the **Federal Register**, the Annual Renewal Fee rate will be as follows:

(i) One hundred basis points (1 percent) for guarantees on loans that were originally greater than 75 percent of total Eligible Project Costs.

(ii) 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 Eligible Project Costs.

(iii) Fifty basis points (0.50 percent) for guarantees on loans that were originally for 65 percent or less of Total Eligible Project Costs.

(c) *Routine Lender fees.* The Lender may establish charges and fees for the loan provided they are similar to those normally charged other applicants for the same type of loan in the ordinary course of business, and these fees are an eligible use of loan proceeds. The Lender must document such routine fees on Form RD 4279-1, "Application for Loan Guarantee." The Lender may charge prepayment penalties and late payment fees that are stipulated in the loan documents, as long as they are reasonable and customary; however, the Loan Note Guarantee will not cover either prepayment penalties or late payment fees.

#### § 4279.232 Guaranteed loan funding.

(a) 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 non-Federal sources to complete the Project. Eligible Project Costs are specified in § 4279.210(d). If an eligible Borrower receives other direct Federal funding (*i.e.*, direct loans or grants) for a Project, the maximum 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 \$100,000,000 Project. If the Borrower receives no other direct Federal funding for this Project and

requests an \$80,000,000 guaranteed loan, the Agency will consider a guarantee on the \$80,000,000. However, if this Borrower receives \$10,000,000 in other direct Federal funding for this Project, the Agency will only consider a guarantee on \$70,000,000.

(b) The maximum principal amount of a loan guaranteed under this subpart is \$250 million to one Borrower; there is no minimum amount.

(c) The maximum guarantee on the principal and Interest due on a loan guaranteed under this subpart will be determined as specified in paragraphs (c)(1) through (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 (c)(1)(i) through (iii) of this section are met, in which case 90 percent for the entire loan amount.

(i) Total Federal participation, sum of the amount of the loan requested and other direct Federal funding, must not be greater than 60 percent of total Eligible Project Costs;

(ii) Feedstock and Off-Take Agreements of at least 1 year in duration; and

(iii) Total of revenues from tax credits, carbon credits, or other Federal or State subsidies cannot be greater than 10 percent of the Project's total revenues on an annual basis, in the Borrower's base case of financial projections.

(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.

#### § 4279.233 Interest rates.

The Interest rate for the guaranteed loan will be negotiated between the Lender and the Borrower and may be either fixed or variable, or a combination thereof, as long as it is a legal rate. Interest rates will not be more than those rates the Lender customarily charges Borrowers for non-guaranteed loans in similar circumstances in the ordinary course of business and are subject to Agency review and approval. Lenders are encouraged to utilize the secondary market and pass Interest-rate savings on to the Borrower.

(a) A variable Interest rate must be a rate that is tied to a published base rate. The variable Interest rate must be specified in the Promissory Note and may be adjusted at specified intervals during the term of the loan, but the

adjustments may not be more often than once each Calendar Quarter. The Lender must incorporate, within the variable rate Promissory Note at loan closing, the provision for adjustment of payment installments. The Lender must properly amortize the outstanding principal balance within the prescribed loan maturity in order to eliminate the possibility of a balloon payment at the end of the loan.

(b) Any change in the base rate or fixed Interest rate between issuance of the Conditional Commitment and the issuance of the Loan Note Guarantee must be approved by the Agency. Approval of such a change must be shown as an amendment to the Conditional Commitment and must be reflected on the Guaranteed Loan Closing Report.

(c) It is permissible to have different Interest rates on the guaranteed and unguaranteed portions of the loan.

#### § 4279.234 Terms of loan.

The loan terms, other than Interest, must be the same for both the guaranteed and unguaranteed portions of the loan.

(a) The repayment term for a loan under this subpart will be no greater than the lesser of 20 years from the date of loan closing or the useful life of the Project, as determined by the Lender and confirmed by the Agency. Both the guaranteed and unguaranteed portions of the loan must be amortized over the same term.

(b) 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.

(c) The first installment of principal and Interest will, if possible, be scheduled for payment after the Project is operational and has begun to generate income. However, the first full installment must be due and payable within three years from the date of the Promissory Note and be paid at least annually thereafter. In cases where there is an Interest-only period, Interest will be paid at least annually from the date of the Promissory Note.

(d) Only loans that require a periodic payment schedule that will retire the debt over the term of the loan without a balloon payment will be guaranteed except the final payment may be the funds held in the debt service reserve account.

#### § 4279.235 Collateral.

The Lender is responsible for obtaining and maintaining proper and adequate Collateral to protect the interest of the Lender, the Holder, and the Agency. Collateral must be of such

a nature that repayment of the loan is reasonably ensured when considered with the integrity and ability of Project management, soundness of the Project, and the Borrower's prospective earnings. The Collateral may include, but is not limited to, the following: Revenue, land, easements, rights-of-way, buildings, machinery, equipment, inventory, accounts receivable, contracts, cash, or other accounts, licenses and assignments of leases or leasehold interest.

(a) The entire loan, the guaranteed and unguaranteed portions, must be secured by a first lien on all assets of the Project including all assets in the Project budget. The Agency may consider a subordinate lien position on inventory and accounts receivable to Working Capital loans including revolving lines of credit provided the Agency determines the Working Capital is necessary for the operation and with the Subordination, the loan remains adequately secured.

(b) The entire loan must be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan. The unguaranteed portion of the loan will neither be paid first nor given any preference or priority over the guaranteed portion.

#### §§ 4279.236–4279.242 [Reserved]

#### § 4279.243 Insurance.

The Lender is responsible for ensuring that required insurance is maintained by the Borrower. 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 the Project, including any feedstock or Off-Take Agreements, as may be applicable.

(a) *Hazard.* Hazard insurance with a standard clause naming the Lender as mortgagee or loss payee, as applicable, is required for the life of the guaranteed loan. The amount must be at least equal to the replacement value of the Collateral or the outstanding balance of the loan, whichever is the greater amount.

(b) *Life.* The Lender may require as Collateral an assignment of life insurance to insure against the risk of death of persons critical to the success of the business. When required, coverage must be in amounts necessary to provide for management succession or to protect the business. The Agency may require life insurance on key individuals for loans where the Lender has not otherwise proposed such coverage. The cost of insurance and its

effect on the applicant's Working Capital must be considered as well as the amount of existing insurance that could be assigned without requiring additional expense.

(c) *Worker compensation.* Worker compensation insurance is required in accordance with State law.

(d) *Flood.* National flood insurance is required in accordance with applicable law.

(e) *Other.* The Lender must consider whether public liability, business interruption, malpractice, and other insurance is appropriate to the Borrower's particular business and must require the Borrower to obtain such insurance as is necessary to protect the interests of the Borrower, the Lender, or the Agency.

#### § 4279.244 Appraisals.

(a) Lenders must obtain appraisals for real estate when the value of the Collateral exceeds \$250,000. Each appraisal must be reported in a manner that summarizes all of the information necessary for the intended users to understand the report and contain all information pertinent to the appraiser's opinions and conclusions.

(1) Appraisals must not be more than one year old, and a more recent appraisal may be requested by the Agency in order to reflect more current market conditions. For loan servicing purposes, an appraisal may be updated in lieu of a complete new appraisal when the original appraisal is more than one year old, but less than two years old.

(2) 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. The Agency will require documentation that the appraiser has the necessary experience and competency to appraise the property in question.

(3) All real property appraisals associated with Agency guaranteed loan origination and servicing transactions must meet the requirements contained in the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989 and the appropriate guidelines contained in Standards 1 and 2 of the Uniform Standards of Professional Appraisal Practices (USPAP) and be performed by a State Certified General Appraiser. Notwithstanding any exemption that may exist for transactions guaranteed by a Federal Government agency, all appraisals obtained by the Lender for origination and servicing must conform to the Interagency Appraisal and

Evaluations Guidelines established by the Lender's primary Federal or State regulator.

(4) All appraisals must include consideration of the potential effects from a release of hazardous substances or petroleum products or other environmental hazards on the Market Value of the Collateral. The Lender must complete and submit its technical review of the appraisal. For construction Projects, the Lender must use the "as-completed" Market Value of the real estate to determine value of the real estate property. For all proposals, Lenders must obtain a Phase I Environmental Site Assessment in accordance with ASTM International Standards, which should be provided to the appraiser for completion of the appraisal. For additional guidance and information refer to "Phase I Environmental Site Assessment," published by the American Society of Testing and Materials.

(b) Chattels must be evaluated in accordance with normal banking practices and generally accepted methods of determining value. Chattel appraisals must reflect the age, condition, and remaining useful life of the equipment. If the appraisal is completed by a State licensed/certified appraiser, the appraisal report must comply with USPAP Standards 7 and 8.

#### § 4279.245 Personal and corporate guarantees.

(a) Unconditional personal and corporate guarantees are required for the full term of the loan from Persons owning 20 percent or greater interest in the borrower.

(b) When warranted by an Agency assessment and its credit evaluation, guarantees may also be required of parent, subsidiaries, affiliated companies, Persons owning less than a 20 percent interest in the borrower, or Persons whose ownership interest in the Borrower is held indirectly through intermediate entities.

(c) The Agency may require the guarantees to be secured.

(d) Partial guarantees and exemptions to the requirement for guarantees may be requested by the Lender and are subject to concurrence by the Agency approval official on a case-by-case basis when warranted by an Agency assessment and its credit evaluation in accordance with § 4279.215(b). If partial guarantees are required, the partial guarantee will be at least equal to each owner's percentage of interest in the Borrower multiplied by the loan amount.

(e) All personal and corporate guarantors must execute Form RD 4279-

14, "Unconditional Guarantee," and any guarantee form required by the Lender. The Agency will retain the original, executed Form RD 4279-14.

(1) Any amounts paid by the Agency on behalf of an Agency Borrower will constitute a Federal Debt owed to the Agency by the Borrower.

(2) Any amounts paid by the Agency pursuant to a claim by a Lender will constitute a Federal Debt owed to the Agency by a guarantor of the loan, to the extent of the amount of the guarantor's guarantee.

(3) In all instances under paragraphs (c)(1) and (2) of this section, Interest charges will be assessed at the Promissory Note Interest rate on the date a loss claim is paid.

#### §§ 4279.246-4279.255 [Reserved]

#### § 4279.256 Construction planning and performing development.

The Lender and Borrower must comply with paragraphs (a) through (i) of this section. The Lender may contract for services and may rely on certain written materials and other reports to be provided by an independent engineer and other qualified third parties.

(a) *Design policy.* The Lender must monitor and require the Borrower ensure that all facilities constructed with Program funds are designed, and costs estimated, by an independent professional utilizing accepted architectural, engineering, and design practices and conform to applicable Federal, State, and local codes and requirements.

(b) *Project control.* (1) The Lender must monitor the progress of construction and confirm the reviews and inspections necessary to ensure that construction conforms to applicable Federal, State, and local code requirements have been performed; proceeds are used in accordance with the approved plans, specifications, and contract documents; and that loan funds are used for Eligible Project Costs in accordance with the purposes approved by the Agency in its Conditional Commitment. The Lender must expeditiously report any problems in Project development to the Agency.

(2) The Lender must ensure an onsite Project inspector or independent engineer monitors the Project.

(3) The Lender must monitor the Project to confirm that the Project will be completed with available funds and, once completed, will be used for its intended purpose and produce products in the quality and quantity proposed in the completed application approved by the Agency. Once construction is completed, the Lender must provide the

Agency with a copy of the notice of completion.

(4) Prior to the disbursement of construction funds, the Lender shall:

(i) Have on file the major drawings issued for construction and major equipment specifications issued for procurement;

(ii) Have a detailed timetable for the Project with a corresponding budget of costs, setting forth the parties responsible for payment;

(iii) Ensure that the independent engineer confirms that the budget is adequate for the Project;

(iv) Require the Borrower to have a firm fixed-price engineering, procurement and construction (EPC) contract in place which includes performance guarantees customary and reasonable for a project of this nature or engineering, construction, and procurement contracts in place with vendors and construction contractors for the construction of the Project, each on customary terms and conditions;

(v) Require provisions for change order approvals, a retainage percentage, and a disbursement schedule;

(vi) Require the Borrower to have contingencies in place to handle unforeseeable cost overruns without seeking additional Agency assistance. These contingencies must be agreed to by the Agency.

(c) *Changes and cost overruns.* The Borrower is 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 (c) 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 that all debts have been paid and all mechanics' liens have been waived; and

(3) Certification that the Borrower is complying with the Davis-Bacon Act (see paragraph (h) of this section).

(e) *Surety.* Surety, as the term is commonly used in the industry, will be required. The Borrower must have either 100 percent performance/ payment bonds on the contractors or a guarantee from a creditworthy parent entity or an alternative acceptable to the Lender and the Agency and must be secured. The bonding agent must be listed on Treasury Circular 570.

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

(g) *Americans with Disabilities Act (ADA).* Construction of or addition to facilities that accommodate the public or commercial facilities, as defined by the ADA, must comply with the ADA.

(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 29 CFR part 5.

(i) *Reporting during construction.* Lenders must submit monthly construction and quarterly progress reports to the Agency, as specified in paragraphs (i)(1) and (2), respectively, of this section and the Borrower information specified in paragraph (i)(3) of this section.

(1) Monthly construction reports documenting the use of the Project funding until construction is completed. The reports must include the following:

(i) Certifications for each draw request:

(A) Certification by the independent engineer to the Lender that the work

referred to in the draw has been successfully completed;

(B) Certification from the Borrower and independent engineer or that the proceeds of the prior draw have been applied to Eligible Project Costs in accordance with the draw request and that the contractors have delivered mechanics' lien waivers in connection with such draw; and

(C) Certification from the Borrower as to its compliance with the Davis-Bacon Act confirmed by the independent engineer;

(ii) List of invoices;

(iii) Detail of equity and Guaranteed Loan funds paid to date;

(iv) Status of construction and inspection reports; and

(v) Concerns, potential problems, cost overruns, etc.

(2) Quarterly progress reports by the end of each Calendar Quarter, unless more frequent ones are needed as determined by the Agency, through the time when the facility is producing at its designed capacity at a steady state. These reports must contain, at a minimum, planned and completed construction milestones, loan advances, and personnel hiring, training, and retention and commissioning and ramp-up milestones and performance reports. 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 and Biobased Products including Renewable Chemicals. The Lender must expeditiously report any problems in Project development to the Agency.

(3) Once construction is completed, the Lender must provide the Agency with:

(i) A copy of all required material building permits, with sign-offs;

(ii) Notice of Completion or an Agency approved equivalent; and

(iii) Final accounting of sources and uses of all Project funds.

#### §§ 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, for 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's Project. 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.

## Applications

### § 4279.260 Guarantee applications—general.

(a) *Application submittal.* (1) For each guarantee request, the Lender or the Borrower must submit to the Agency a non-binding letter of intent to apply for loan guarantee not less than 30 calendar days prior to the application deadline as provided in paragraph (b) of this section. The letter must identify the Borrower, the Lender and Project sponsors; describe the Project and Project location; describe the proposed feedstock, primary technologies of the facility and primary products produced; estimate the Total Project Cost and amount of loan requested; and any additional information specified in the annual **Federal Register** notice, if any. Applications that do not submit a letter of intent may be accepted by the Agency at the Agency's discretion.

(2) 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**, application deadlines are October 1 and April 1 of each year. Complete applications must be received by the Agency on or before April 1 of each year to be considered for funding for that fiscal year. If the application deadline falls on a weekend or an observed holiday, the deadline will be the next Federal business day. The

deadlines in this paragraph (b) relate to Phase 1 applications in accordance with § 4279.261.

(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 closing, 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 Agency will rescind the selection or withdraw the application.

(e) *Application revisions and updates.* During the period between the submission of an application and closing, the Lender must notify the Agency, in writing, of revisions to the Project including but not limited to revisions to technology utilized in the Project, feedstock, Off-Take Agreements, ownership structure, and Project financing. The Agency may require submittal of updated application and supporting materials. The Agency will complete the application priority scoring in accordance with § 4279.266 based on the application materials received by the Agency prior to the application deadline. Subsequent changes to an application that result in a lower priority score could result in the Agency discontinuing processing of the application.

### § 4279.261 Application for loan guarantee content.

Lenders must submit a complete application for each loan guarantee sought under this subpart. Components of an application are submitted in two phases. Phase I applications, which are the initial application submissions, must contain the information specified in paragraphs (a) through (j) of this section, organized pursuant to a table of contents in a chapter format. Phase 2 application components may be submitted after the Agency invites the Lender and Borrower to make the phase 2 submittal and must contain the information specified in paragraph (k) of this section.

(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 § 4279.209.

(3) *Project eligibility.* Describe how the Project meets the eligibility criteria identified in § 4279.210. Clearly state whether the application is for the construction and development of a Biorefinery or for the Retrofitting of an existing facility. Additional Project description information will be needed later in the application process.

(4) *Project funds.* Submit a Spreadsheet identifying sources, amounts, and availability of funds. The Spreadsheet must also include a directory of funds source contact information. Attach any applications, correspondence, or other written communication between Borrower and fund source.

(5) *Project timeline.* A projected timeline detailing the timeline commencing with the loan application phase 1, including the loan application phase 2, final Project planning and engineering, obtaining required permits, loan closing, plant construction, commissioning and ramp up through stabilized state of operation.

(b) *Application form.* Form RD 4279-1 or other Agency-approved application form if specified in a **Federal Register** notice.

(c) *Financial statements.* (1) The most recent audited financial statements of the Borrower, unless alternative financial statements are authorized by the Agency; and

(2) A current (not more than 90 days old) balance sheet and a pro forma balance sheet at startup.

(d) *Financial model.* Submit a financial model for the Project in the form of a financial modeling software program in an active electronic format which includes, but is not limited to, a projected Project budget and projected balance sheets, income and expense statements, cash flow statements, and Working Capital and capital expense projections for not less than the term of the loan. The projections must be displayed in a monthly format for a period of three years after stabilized operation and annually thereafter. Projections should be supported by a list of assumptions showing the basis for the projections. Depending on the complexity of the Project and the financial condition of the Borrower, the Agency may require additional financial statements and additional related information.

(e) *Feasibility Study.* The Feasibility Study should be prepared by a qualified, independent third party using information gathered from other qualified parties and documents such

as: independent engineer reports, marketing studies, feedstock studies, business plans and financial statements prepared by a certified public

accountant. Any information used to prepare the Feasibility Study should be submitted as attachments. Elements in an acceptable Feasibility Study include,

but are not limited to, the elements outlined in Table 1 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**

Description of feedstock and confirmation that the feedstock is not used elsewhere in the production of Advanced Biofuels or Biobased Products including Renewable Chemicals.

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 any other similar Biorefineries in the area in which the Borrower proposes to place the Project, defined as the area that will supply the feedstock to the proposed Project, if any.

Impacts on existing manufacturing plants or other facilities that use similar feedstock if the Borrower's proposed production technology is adopted.

Projected impact on resource conservation, public health, and the environment.

Information regarding Project site.

Availability of trained or trainable labor.

Availability of infrastructure, including utilities, and rail, air and road service to the site.

Overall economic impact of the Project, including direct jobs, indirect jobs, 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 and the estimated amount of annual feedstock 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 purchasers of off-take—principal products and secondary products, degree of commitment, duration or terms of Off-Take Agreements, and financial strength of counterparties.

Risks related to the 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.*, pilot, demonstration, or Semi-Work Scale Facility). Provide results from pilot, demonstration, or Semi-Work Scale Facilities that prove that the technology proposed to be used is feasible and stands a good chance of being successful. The proposed technology must meet the definition of Eligible technology.

The degree of integration of all processes should be detailed and a summary of any integrated demonstration unit test results should be submitted.

Specific volume produced from the technology 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. 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.

A projected timeline detailing Borrower plans from the time of loan application through plant construction, commissioning and ramp up should be included.

Ability of the proposed system to be commercially replicated.

Risks related to:

Construction of the Biorefinery;  
Production of the Advanced Biofuel and Biobased Product including Renewable Chemical;  
Regulation and governmental action;  
Design-related factors that may affect Project success; and  
Technology scale up risk.

**(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 Federal and non-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 and the degree financial feasibility is dependent on:

TABLE 1—FEASIBILITY STUDY COMPONENTS—Continued

<p>Investment incentives; Productivity incentives; Loans and grants; and Other Project authorities RINs value, tax credits, other credits, 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.</p>		
<p><b>(F) Management Feasibility</b> Borrower and/or management's previous experience concerning: Production of Advanced Biofuel, and Biobased Product including Renewable Chemicals, as applicable; 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.</p>		
<p><b>(G) Qualifications</b> A resume or statement of qualifications of the author and contributors of the Feasibility Study, including prior experience, must be submitted.</p>		
<p>(f) <i>Business Plan.</i> The Lender must submit the Borrower's business plan that includes the information specified in paragraphs (f)(1) through (10) of this section. Any or all of this information may be omitted if it is included in the Feasibility Study specified in paragraph (e) of this section.</p> <p>(1) Describe or provide an organizational chart of the Borrower's ownership structure and affiliation with other entities, if any. The names and a description of the relationship of the Borrower's parent, Affiliates, and subsidiaries. Identify local ownership.</p> <p>(2) The Borrower's succession planning, addressing both ownership and management.</p> <p>(3) The Borrower's experience and management experience.</p> <p>(4) The products and services to be provided and the Borrower's business strategy.</p> <p>(5) Possible vendors and models of major system components.</p> <p>(6) The availability of the resources (e.g., labor, raw materials, supplies) necessary to provide the planned products and services.</p> <p>(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.</p> <p>(8) The market for the product and its competition, including any and all competitive threats and advantages.</p> <p>(9) Projected balance sheets, income and expense statements, and cash flow</p>	<p>statements for a period of not less than three years of stabilized operation.</p> <p>(10) A description of the proposed use of funds.</p> <p>(g) <i>Scoring information.</i> The application must contain information in a format that is responsive to the scoring criteria specified in § 4279.266.</p> <p>(h) <i>Intergovernmental consultation.</i> Intergovernmental consultation comments in accordance with 2 CFR part 415, subpart C or successor regulation.</p> <p>(i) <i>DUNS Number.</i> For Borrowers other than individuals, a Dun and Bradstreet Universal Numbering System (DUNS) number, which can be obtained online at <a href="http://fedgov.dnb.com/webform">http://fedgov.dnb.com/webform</a>.</p> <p>(j) <i>Other information.</i> Any other information determined by the Agency to be necessary to evaluate the application.</p> <p>(k) <i>Phase 2 application contents.</i> (1) Updates, as appropriate, to contents of application materials submitted in application phase 1. (2) An appraisal conducted as specified under § 4279.244. (3) A proposed Loan Agreement or a sample Loan Agreement with an attached list of the proposed Loan Agreement provisions as specified in paragraphs (k)(3)(i) through (ix) of this section. (i) Prohibition against assuming liabilities or obligations of others. (ii) Restriction on dividend payments.</p>	<p>(iii) Limitation on the purchase or sale of equipment and fixed assets. (iv) Limitation on compensation of officers and owners. (v) Minimum Working Capital or current ratio requirement. (vi) Maximum debt-to-net worth ratio. (vii) Restrictions concerning consolidations, mergers, or other circumstances. (viii) Limitations on selling the business without the concurrence of the Lender. (ix) Repayment and amortization of the loan. (4) Environmental Assessment must meet the policies and requirements of the National Environmental Policy Act and the Agency (as specified in Exhibit H of 7 CFR part 1940, subpart G.) Guidelines for preparing the Environmental Assessment are available from the Agency and published in the annual <b>Federal Register</b> notice. (5) Under the direction of the Agency, an evaluation and rating of the total Project's indebtedness, without consideration for a government guarantee, from a nationally-recognized statistical rating organization (NRSRO), as defined by the U.S. Security and Exchange Commission, for all Projects with total Eligible Project Costs of \$25 million or more unless as otherwise specified by the Agency in a notice published in the <b>Federal Register</b>. The evaluation and rating must be in the form of an indicative private rating,</p>



private credit analysis, or comparable analysis report and include a rating in accordance with the NRSRO's credit rating scales and include a recovery analysis. An updated rating may be required at the Agency's discretion if changes are subsequently made to the Project including changes to any contracts and agreements or changes to loan terms and conditions.

(6) Lender's analysis and credit evaluation that conforms to § 4279.215 and must include the information specified in paragraphs (k)(6)(i) and (ii) of this section.

(i) The credit reports of the Borrower, its principals, and any parent, Affiliate, or subsidiary as follows:

(A) Unless otherwise determined by the Agency, 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; and

(B) Commercial credit reports on the Borrower and any parent, Affiliate, and subsidiary firms.

(ii) Financial and sensitivity review using a financial modeling software program or a banking industry software analysis program with industry standards, when appropriate.

(7) Whether the Loan Note Guarantee is requested prior to construction or after completion of construction of the Project.

(8) The technical assessment must be completed by a qualified independent engineer and 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 (k)(8)(i) through (ix) 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 (k)(8)(i) through (ix) 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.

(i) *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 and Biobased Product including Renewable Chemical, as applicable, technology development, engineering, installation, and maintenance. 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.

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 and Biobased Products including Renewable Chemicals, if applicable, must be provided. In addition, authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the facility to operate over its useful life must be provided. The application must:

(A) 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;

(B) Discuss the manufacturers of major components of Advanced Biofuels and Biobased Product including Renewable Chemical 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;

(C) Discuss the Project team members' qualifications for engineering, designing, and installing similar projects, 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

(D) Describe the facility 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.

(ii) *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 (k)(8)(ii)(A) through (F) of this section.

(A) All facilities funded under this subpart 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.

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

(C) Identify land use agreements required for the Project, the schedule for securing those agreements, and the term of those agreements.

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

(E) Identify available component warranties for the specific Project location and size.

(F) Identify all environmental issues, including environmental compliance issues, associated with the Project.

(iii) *Resource assessment.* The application must provide adequate and appropriate evidence of the availability of the feedstocks required for the facility 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 including methods and systems to prevent the spread of invasive species. For proposed

Projects with an established resource, provide a summary of the resource.

(iv) *Design and engineering.* The application must provide authoritative evidence that the facility 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 facility must be engineered as a complete, integrated facility. The engineering must be comprehensive, including site selection, systems and component selection, and systems monitoring equipment. All Projects funded under this subpart must be constructed by a qualified entity.

(A) 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; facility 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 and Biobased Product including Renewable Chemical produced by the facility. Discuss the impact of reduced or interrupted feedstock availability on the facility's operations.

(B) The application must include:

(1) A description of the Project site that addresses issues such as site access, foundations, and backup equipment when applicable;

(2) A completed Form RD 1940–20 and an environmental assessment prepared in accordance with Exhibit H of 7 CFR part 1940, subpart G; and

(3) Identification of any unique construction and installation issues.

(C) Sites must be controlled by the eligible Borrower for at least the financing term of the Loan Note Guarantee.

(v) *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.

(vi) *Equipment procurement.* The application must demonstrate that equipment required by the facility is available and can be procured and delivered within the proposed Project development schedule. Projects funded

under this subpart 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.

(vii) *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 facility as a whole.

(viii) *Operations and maintenance.* The application must provide the operations and maintenance requirements of the facility necessary for the facility to operate as designed over its useful life. The application must also include:

(A) Information regarding available facility and component warranties and availability of spare parts;

(B) A description of the routine operations and maintenance requirements of the proposed facility, 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 facility and timing of major component replacement or rebuilds;

(C) A discussion of the costs and labor associated with operating and maintaining the facility and plans for insourcing 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

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

(ix) *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 facility.

#### **§§ 4279.262–4279.264 [Reserved]**

#### **§ 4279.265 Guarantee application processing.**

(a) *Eligibility determination.* Upon receipt of a complete Phase 1 application, the Agency will determine

if the Borrower, Lender, and Project are eligible and if the Project is technically and economically feasible, as provided under paragraph (b) of this section.

(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 Agency will inform the Lender in writing. Such notification will include the reasons for denial of the guarantee.

(b) *Technical and economic feasibility.* (1) The Agency's determination of a Project's technical and economic feasibility will be based on:

(i) The Agency's analysis of the technical report and Feasibility Study submitted in the application conducted by qualified independent third parties;

(ii) The Lenders credit evaluation; and

(iii) Other application materials.

(2) The Agency's determination of a Project's technical feasibility will be based on the technical report. In addition, prior to loan closing of a Project utilizing technology that does not have a history of successful utilization in a Commercial-Scale operation of a Biorefinery that produces an Advanced Biofuel, evidence demonstrating 120 days of continuous, steady state production from an integrated demonstration unit must be provided by the Borrower to the Lender and the Agency for review and determination of technical feasibility. Authoritative demonstration campaign results must be provided in 30-day intervals. The integrated demonstration unit must prove out the Project's ability to utilize Project-relevant biomass and produce Advanced Biofuel at a yield and quality consistent with the design basis of the Project. The Borrower must provide to the Agency, for review and approval, sufficient information on the integrated campaign design so as to ensure operation duration, quality, and quantity specifications are met and incorporated into the final design criteria for the commercial facility.

(3) Projects determined by the Agency to be without technical or economic feasibility will not be selected for funding.

#### **§ 4279.266 Guarantee application scoring.**

Using the evaluation criteria identified in this section, the Agency will score each eligible Biorefinery application that meets the minimum requirements for technical and economic feasibility. A maximum of 125 points is possible. The Agency will

award points based on its review and analysis of all application materials. Clarifications for the scoring on Biobased Product Manufacturing applications will be made available by a notice published in the **Federal Register**.

(a) Whether the Borrower has established a market for the Advanced Biofuel and the Biobased Products including Renewable Chemicals, as applicable. A maximum of 20 points can be awarded. Points to be awarded will be determined as follows:

(1) *Degree of commitment of Off-Take Agreements*. A maximum of 6 points will be awarded.

(i) If the Borrower has signed Off-Take Agreements for purchase for greater than 50 percent of the dollar value of off-take, 6 points will be awarded.

(ii) If the Borrower has signed letters of intent to enter into Off-Take Agreements, or comparable documentation, for the purchase for greater than 50 percent of the dollar value of off-take, or combination of signed contracts or agreements and letters of intent or comparable documentation, 4 points will be awarded.

(iii) If the Borrower has signed letters of interest to enter into Off-Take Agreements, or comparable documentation, for the purchase for greater than 50 percent of the dollar value of off-take, or combination of signed Off-Take Agreements, letters of intent, letters of intent or comparable documentation, 2 points will be awarded.

(2) *Duration of Off-Take Agreements*. A maximum of 6 points will be awarded.

(i) If the Borrower commits to enter into Off-Take Agreements prior to loan closing for purchase for greater than or equal to 50 percent of the dollar value of off-take for the period not less than the loan term, 6 points will be awarded.

(ii) If the Borrower commits to enter into Off-Take Agreements prior to loan closing for purchase for greater than or equal to 50 percent of the dollar value of off-take for the period not less than five years but less than the term of the loan, 4 points will be awarded.

(iii) If the Borrower commits to enter into Off-Take Agreements prior to loan closing for purchase for greater than or equal to 50 percent of the dollar value of off-take for the period not less than one year but less than five years, 2 points will be awarded.

(3) *Financial strength of the off-take counterparty*. A maximum of 4 points will be awarded.

(i) If the Borrower commits to enter into Off-Take Agreements prior to loan

closing for purchase for greater than or equal to 50 percent of the dollar value of off-take with an off-take counterparty with a corporate credit rating not less than AA, Aa2, or equivalent, 4 points will be awarded.

(ii) If the Borrower commits to enter into Off-Take Agreements prior to loan closing for purchase for greater than or equal to 50 percent of the dollar value of off-take with an off-take counterparty with a corporate credit rating less than AA, Aa2, or equivalent, but not less than A-, or A3, or equivalent, 2 points will be awarded.

(iii) If the Borrower commits to enter into Off-Take Agreements prior to loan closing for purchase for greater than or equal to 50 percent of the dollar value of off-take with an off-take counterparty with a corporate credit rating less than A-, or A3, or equivalent, but not less than BBB-, or Baa3, or equivalent, 1 point will be awarded.

(4) *Revenue dependency on tax credits, carbon credits, or other Federal or State subsidies*. A maximum of 4 points will be awarded.

(i) If total of revenues from tax credits, carbon credits, or other Federal or State subsidies is less than or equal to 10 percent of the Project's total revenues on an annual basis, in the Borrower's base case of financial projections, 4 points will be awarded.

(ii) If total of revenues from tax credits, carbon credits, or other Federal or State subsidies is greater than 10 percent but less than or equal to 20 percent of the Project's total revenues on an annual basis, in the Borrower's base case of financial projections, 2 points will be awarded.

(iii) If total of revenues from tax credits, carbon credits, or other Federal or State subsidies is greater than 20 percent but less than or equal to 30 percent of the Project's total revenues on an annual basis, in the Borrower's base case of financial projections, 1 point will be awarded.

(b) Whether the area in which the Borrower proposes to place the Project, defined as the area that will supply the feedstock to the proposed Project, has any other similar facilities. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(1) If the area that will supply the feedstock to the proposed Project does not have any other similar facilities, 5 points will be awarded.

(2) If there are other similar facilities located within the area that will supply the feedstock to the proposed Project, 0 points will be awarded.

(c) Whether the Borrower is proposing to use a feedstock or biobased output of Biorefineries not previously used in the

production of Advanced Biofuels or Biobased Products including Renewable Chemicals. A maximum of 10 points can be awarded. Points to be awarded will be determined as follows:

(1) If the Borrower proposes to use a feedstock previously used in the production of Advanced Biofuels and Biobased Product including Renewable Chemicals in a commercial facility, 0 points will be awarded.

(2) If the Borrower proposes to use a feedstock not previously used in production of Advanced Biofuels and Biobased Product including Renewable Chemicals in a commercial facility, 10 points will be awarded.

(d) 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:

(1) If at least 50 percent of the dollar value of feedstock to be used by the proposed Project will be supplied by producer associations and cooperatives, 5 points will be awarded.

(2) If at least 30 percent of the dollar value of feedstock to be used by the proposed Project will be supplied by producer associations and cooperatives, 3 points will be awarded.

(e) The level of financial participation by the Borrower, including support from non-Federal government sources and private sources. A maximum of 20 points can be awarded. Points to be awarded will be determined as follows:

(1) If the sum of the loan amount requested and other direct Federal funding is less than or equal to 50 percent of total Eligible Project Cost, 20 points will be awarded.

(2) If the sum of the loan amount requested and other direct Federal funding is greater than 50 percent but less than or equal to 55 percent of total Eligible Project Cost, 16 points will be awarded.

(3) If the sum of the loan amount requested and other direct Federal funding is greater than 55 percent but less than or equal to 60 percent of total Eligible Project Cost, 12 points will be awarded.

(4) If the sum of the loan amount and other direct Federal funding is greater than 60 percent but less than or equal to 65 percent of total Eligible Project Cost, 8 points will be awarded.

(5) If the sum of the loan amount and other direct Federal funding is greater than 65 percent but less than or equal to 70 percent of total Eligible Project Cost, 4 points will be awarded.

(f) 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. Points to be awarded will be determined as follows:

(1) 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.

(2) If process adoption will have a positive impact on two of the three impact areas, 6 points will be awarded.

(3) If process adoption will have a positive impact on all three impact areas, 10 points will be awarded.

(4) If the Project proposes to use a feedstock that can be used for human or animal consumption, 5 points will be deducted from the score.

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

(1) If the Borrower has failed to establish, through an independent third-party Feasibility Study, that the 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.

(2) If the Borrower has established, through an independent third-party Feasibility Study, that the 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, 5 points will be awarded.

(3) If the feedstock is wood pellets, no points will be awarded under this criterion.

(h) The potential for Rural economic development. A maximum of 20 points will be awarded. Points to be awarded will be determined as follows:

(1) If the Project is located in a Rural Area, 5 points will be awarded.

(2) If the Project creates jobs through direct employment with an average wage that exceeds the County median household wages where the Project will be located, 5 points will be awarded.

(3) If the majority of feedstock to be utilized by the Project, on an annual

basis, is harvested from the land, 10 points will be awarded.

(i) The level of local ownership of the facility proposed in the application. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(1) If Local Owners have an ownership interest in the facility of more than 20 percent but less than or equal to 50 percent, 3 points will be awarded.

(2) If Local Owners have an ownership interest in the facility of more than 50 percent, 5 points will be awarded.

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

(1) If the Project can be commercially replicated regionally (*e.g.*, Northeast, Southwest, etc.), 5 points will be awarded.

(2) If the Project can be commercially replicated nationally, 10 points will be awarded.

(k) If the Project uses a particular technology, system, or process that is not currently operating at Commercial Scale as of October 1 of the fiscal year for which the funding is available, 5 points will be awarded.

(l) The Administrator can award up to a maximum of 10 bonus points:

(1) To ensure, to the extent practical, there is diversity in the types of Projects approved for loan guarantees to ensure as wide a range as possible technologies, products, and approaches are assisted in the Program portfolio; and

(2) To applications that promote partnerships and other activities that assist in the development of new and emerging technologies for the development of Advanced Biofuels and Biobased Products including Renewable Chemicals, so as to, as applicable, increase the energy independence of the United States or reduce our dependence on petroleum-based chemicals and products; 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.

#### **§ 4279.267 Selecting guarantee applications.**

(a) *Allocation of budget authority.* 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,

excluding funding for Biobased Product Manufacturing Projects, 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. Administrative procedures for the funding of Biobased Product Manufacturing Projects will be made available by a Notice published in the **Federal Register**.

(b) *Ranking of applications.* The Agency will rank all complete eligible applications to create a priority list of scored Phase 1 applications for the Program. Unless otherwise specified in a notice published in the **Federal Register**, the Agency will rank applications by approximately October 31 for complete and eligible applications received on or before October 1 and by approximately April 30 for complete and eligible applications received on or before April 1. All Phase 1 applications received on or before October 1 and April 1 will be ranked by the Agency and will be competed against the other applications received on or before such date.

(c) *Selection of applications for funding.* The Agency will invite applicants to submit Phase 2 applications based on the criteria specified in paragraphs (c)(1) through (3) of this section. The Agency will notify, in writing, Lenders whose applications have been selected.

(1) *Ranking.* The Agency will consider the score an application has received compared to the scores of other applications in the priority list created under paragraph (b) of this section, with highest scoring applications receiving first consideration for invitation to the phase 2 submittal. 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.

(d) *Ranked applications not selected for phase 2.* A ranked application that is not invited to submit phase 2 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.

#### §§ 4279.268–4279.277 [Reserved]

#### § 4279.278 Loan approval and obligating funds.

(a) Applications for loan guarantees may be approved as their Phase 2 applications are completed and approved. If an application has been selected for phase 2, but has not been approved because additional information is needed, the Agency will notify, in writing, 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 in writing.

(b) Upon approval of a loan guarantee application, the Agency will issue a Conditional Commitment to the Lender containing conditions under which a Loan Note Guarantee will be issued. The

Agency will not issue a Conditional Commitment until the Agency has satisfactorily completed a Civil Rights Impact Analysis. The Conditional Commitment becomes null and void unless the conditions are accepted by the Lender and Borrower within 60 days from the date of issuance by USDA. If the conditions are not met or the Loan Note Guarantee is not issued by the Conditional Commitment expiration date, the Agency may extend the Conditional Commitment expiration date when requested by the Lender and only if there has been no Material Adverse Change in the Borrower's or Borrowers' financial condition since issuance of the Conditional Commitment.

(c) The Lender and Borrower may request changes to the Conditional Commitment. The Agency may negotiate with the Lender and the Borrower regarding any proposed changes to the Conditional Commitment. Any changes to the Conditional Commitment must be documented by written amendment to the Conditional Commitment. The changes must be for Good Cause and the Agency may deny, solely at its discretion, changes to the Conditional Commitment even if the change is otherwise in compliance with this subpart.

(d) The Borrower must comply with all Federal requirements then in effect for receiving Federal assistance.

#### § 4279.279 Transfer of Lenders.

(a) The Agency may approve the substitution of a new eligible Lender in place of a former Lender who has been issued an outstanding Conditional Commitment when the Loan Note Guarantee has not yet been issued provided that there are no changes in the:

- (1) Borrower's ownership or control, loan purposes, or scope of Project;
- (2) Loan terms and conditions in the Conditional Commitment; and
- (3) Loan Agreement.

(b) The Agency must determine that the new Lender is eligible in accordance with § 4279.208 prior to approving the substitution. The original Lender must provide the Agency with a letter stating the reasons it no longer desires to be a Lender for the Project. The substituted Lender must execute a new part B of Form 4279–1 and Lender's Agreement (unless a valid Lender's Agreement with the Agency already exists), and must complete a new Lender's analysis in accordance with § 4279.215. The new Lender may also be required to provide other updated application items outlined in § 4279.261(k).

#### § 4279.280 Changes in Borrowers.

Any changes in Borrower ownership or organization prior to the issuance of the Loan Note Guarantee must meet the eligibility requirements of the Program and be approved by the Agency.

#### § 4279.281 Conditions precedent to issuance of Loan Note Guarantee.

The Lender must not close the loan until all conditions of the Conditional Commitment are met or can be met. When loan closing plans are established, the Lender must notify the Agency in writing.

(a) Coincident with, or immediately after loan closing, the Lender must provide the following forms and documents to the Agency:

- (1) An executed Lender's Agreement;
- (2) Form RD 1980–19, "Guaranteed Loan Closing Report," and appropriate guarantee fee;
- (3) Copy of the executed Promissory Note(s);
- (4) Copy of the executed Loan Agreement;
- (5) Copy of the executed settlement statement and updated source and use statement including all Project funding;
- (6) Original, executed Forms RD 4279–14, as appropriate;
- (7) Borrower's loan closing balance sheet; and
- (8) Any other documents required to comply with applicable law or required by the Conditional Commitment or the Agency.

(b) The Lender must provide their certification to each condition specified in paragraphs (b)(1) through (16) of this section. The Lender may rely on certain written materials (including but not limited to certifications, evaluations, appraisals, financial statements and other reports) to be provided by the Borrower or other qualified third parties (including, among others, one or more independent engineers, appraisers, accountants, attorneys, consultants or other experts.) 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 paragraphs (b)(1) through (16) of this section.

(1) If required, hazard, flood, liability, worker compensation, and life insurance are in effect.

(2) All truth-in-lending and equal credit opportunity requirements have been met.

(3) The loan has been properly closed, and the required security instruments

have been properly executed, or will be promptly obtained on any property that cannot be immediately secured under State law.

(4) The Borrower has or will have marketable title to the Collateral, subject to the guaranteed loan and to any other exceptions approved in writing by the Agency.

(5) The loan proceeds have been or will be disbursed for purposes and in amounts consistent with the Conditional Commitment and the application submitted to the Agency.

(6) When required, personal or corporate guarantees have been obtained in accordance with § 4279.245.

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

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

(9) There has been neither any Material Adverse Change in the Borrower's financial condition nor any other Material Adverse Change in the Borrower, for any reason, during the period of time from the Agency's issuance of the Conditional Commitment to issuance of the Loan Note Guarantee regardless of the cause or causes of the change and whether or not the change or causes of the change were within the Lender's or Borrower's control. The Lender must address any assumptions or reservations in this certification and must address all Material Adverse Changes of the Borrower, any parent, Affiliate, or subsidiary of the Borrower, and guarantors.

(10) Neither the Lender nor any of the Lender's officers has an ownership interest in the Borrower or is an officer or director of the Borrower, and neither the Borrower nor its officers, directors, stockholders, or other owners have more than a 5 percent ownership interest in the Lender.

(11) The Loan Agreement includes all Borrower compliance measures identified in the Agency's environmental review process for avoiding or reducing adverse environmental impacts of the Project's construction or operation.

(12) 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 must completely disclose such lobbying activities in accordance with 31 U.S.C. 1352.

(13) Where applicable, the Lender must certify that the Borrower has obtained:

(i) 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; and

(ii) 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 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.

(14) 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 40 U.S.C. 3141 through 3144, 3146, and 3147. Awards under this subpart are further subject to the relevant regulations contained in Title 29 of the CFR.

(15) The Lender certifies that it has reviewed all contract documents and verified compliance with 40 U.S.C. 3141 through 3144, 3146, and 3147 and Title 29 of the CFR. The Lender will certify that the same process will be completed for all future contracts and any changes to existing contracts.

(16) 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.

(c) The Agency may, at its discretion, request copies of loan documents for its file.

(d) When the Agency is satisfied that all conditions for the guarantee have been met, the Agency will issue the Loan Note Guarantee(s) and the documents identified in paragraphs (d)(1) and (2) of this section, as appropriate.

(1) *Assignment Guarantee Agreement.* In the event the Lender uses the single Promissory Note option and assigns the guaranteed portion of the loan to a Holder, the Lender, Holder, and the Agency will execute the Assignment Guarantee Agreement.

(2) *Certificate of Incumbency.* If requested by the Lender, the Agency will provide the Lender with a certification on Form 4279-7, "Certificate of Incumbency and Signature," of the signature and title of the Agency official who signs the Loan Note Guarantee, Lender's Agreement, and Assignment Guarantee Agreement.

#### **§ 4279.282 [Reserved]**

#### **§ 4279.283 Refusal to execute Loan Note Guarantee.**

If the Agency determines that it cannot execute the Loan Note Guarantee, the Agency will inform the Lender, in writing, of the reasons and give the Lender a reasonable period within which to satisfy the objections. If the Lender satisfies the objections within the time allowed, the Agency will issue the Loan Note Guarantee. If the Lender requests additional time in writing and within the period allowed, the Agency may grant the request.

#### **§§ 4279.284–4279.289 [Reserved]**

#### **§ 4279.290 Requirements after Project construction.**

Once the Project has been constructed, the Lender must meet the requirements specified in paragraphs (a) and (b) of this section.

(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 paragraphs (a)(1) through (8), as applicable, of this section.

(1) The actual amount of Advanced Biofuels, Biobased Products including Renewable Chemicals, and Byproducts produced.

(2) If applicable, documentation that identified health 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.

(b) For the life of the guaranteed loan, conduct annual inspections.

#### §§ 4279.291–4279.299 [Reserved]

#### § 4279.300 OMB control number.

In accordance with the Paperwork Reduction Act of 1995, the information collection requirements contained in the subsequent interim rule have been submitted to the Office of Management and Budget (OMB) under OMB control number 0570–0065 for approval. A person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

### PART 4287—SERVICING

■ 3. The authority citation for part 4287 is revised to read as follows:

**Authority:** 5 U.S.C. 301; and 7 U.S.C. 1989.

■ 4. Revise Subpart D to read as follows:

#### Subpart D—Servicing Biorefinery, Renewable Chemical, and Biobased Manufacturing Assistance Guaranteed Loans

Sec.

4287.301 Introduction.

4287.302 Definitions.

4287.303 Exception authority.

4287.304–4287.305 [Reserved]

4287.306 Appeals.

4287.307 Routine servicing.

4287.308–4287.311 [Reserved]

4287.312 Interest rate changes.

4287.313 Release of Collateral.

4287.314–4287.322 [Reserved]

4287.323 Subordination of lien position.

4287.324 Alterations of loan instruments.

4287.325–4287.333 [Reserved]

4287.334 Transfer and Assumption.

4287.335 Substitution of Lender.

4287.336 Lender failure.

4287.337–4287.344 [Reserved]

4287.345 Default by Borrower.

4287.346–4287.355 [Reserved]

4287.356 Protective Advances.

4287.357 Liquidation.

4287.358 Determination of loss and payment.

4287.359–4287.368 [Reserved]

4287.369 Future recovery.

4287.370 Bankruptcy.

4287.371–4287.379 [Reserved]

4287.380 Termination of guarantee.

4287.381–4287.399 [Reserved]

4287.400 OMB control number.

#### Subpart D—Servicing Biorefinery, Renewable Chemical, and Biobased Manufacturing Assistance Guaranteed Loans

##### § 4287.301 Introduction.

(a) This subpart supplements 7 CFR part 4279, subpart C by providing additional requirements and instructions for servicing and liquidating all loans guaranteed under 7 CFR part 4279, subpart C.

(b) The Lender is 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 must continue to 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) All loan servicing actions under this subpart, except for those identified in § 4287.307(a) through (g), are subject to Agency concurrence. Whether specifically stated or not, whenever Agency approval is required, it must be in writing. Whenever Agency approval is required, such servicing action must be for Good Cause.

(d) Copies of all forms, regulations, and Instructions referenced in this subpart may be obtained from any Agency office and from the USDA Rural Development Web site at <http://www.rd.usda.gov/programs-services/biorefinery-assistance-program>. Whenever a form is designated in this subpart, that designation includes predecessor and successor forms, if applicable, as specified by the Agency.

##### § 4287.302 Definitions.

The definitions and abbreviations contained in § 4279.202 of this chapter apply to this subpart.

##### § 4287.303 Exception authority.

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.

Borrowers, Lenders, and Holders have appeal or review rights for Agency decisions made under this subpart. Programmatic decisions based on clear and objective statutory or regulatory requirements are not appealable; however, such decisions are reviewable for appealability by the National Appeals Division (NAD). The Borrower, Lender, and Holder can appeal any Agency decision that directly and adversely impacts them. For an adverse decision that impacts the Borrower, the Lender and Borrower must jointly execute a written request for appeal for an alleged adverse decision made by the Agency. An adverse decision that only impacts the Lender may be appealed by the Lender only. An adverse decision that only impacts the Holder may be appealed by the Holder only. A decision by a Lender adverse to the interest of the Borrower is not a decision by the Agency, whether or not concurred in by the Agency. Appeals will be conducted by NAD and will be handled in accordance with 7 CFR part 11.

##### § 4287.307 Routine servicing.

The Lender is responsible for servicing the entire loan and for taking all servicing actions that a reasonable Lender would perform in servicing its own portfolio of loans that are not guaranteed. The guarantee is unenforceable by the Lender to the extent any loss is occasioned by violation of usury laws, use of loan funds for unauthorized purposes, Negligent Loan Servicing or Grossly Negligent Loan Servicing as established in the Loan Note Guarantee, or failure to maintain the required security interest regardless of the time at which the Agency acquires knowledge of the foregoing. The Lender may contract for services and may rely on certain written materials (including but not limited to certifications, evaluations, appraisals, financial statements and other reports) to be provided by the Borrower or other qualified third parties (including, among others, one or more independent engineers, appraisers, accountants, consultants or other experts) but is ultimately responsible for underwriting, loan origination, loan servicing, and compliance with all Agency regulations. The Lender's Agreement is the contractual agreement between the Lender and the Agency that sets forth

some of the Lender's loan servicing responsibilities. This responsibility includes but is not limited to periodic Borrower visits, the collection of payments, obtaining compliance with the covenants and provisions in the Loan Agreement, obtaining and analyzing financial statements, ensuring payment of taxes and insurance premiums, and maintaining liens on Collateral, and keeping an inventory accounting of all Collateral items and reconciling the inventory of all Collateral sold during loan servicing, including liquidation.

(a) *Periodic reports.* Each Lender must submit reports by the end of each Calendar Quarter, 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. The Lender must report the outstanding principal and Interest balance and the current Loan Classification on each guaranteed loan using either the USDA Lender Interactive Network Connection (LINC) system or Form RD 1980-41, "Guaranteed Loan Status Report."

(b) *Default reports.* Lenders must submit monthly Default reports, including Borrower payment history, for each loan in monetary Default using a form approved by the Agency.

(c) *Annual Renewal Fee.* The Lender must transmit the Annual Renewal Fee to the Agency in accordance with § 4279.231(b) of this chapter calculated based on the December 31 loan status report.

(d) *Agency and Lender conference.* At the Agency's request, the Lender must consult with the Agency to ascertain how the guaranteed loan is being serviced and that the conditions and covenants of the Loan Agreement are being enforced.

(e) *Borrower Financial reports.* The Lender must obtain, analyze, and forward to the Agency the Borrower's and any guarantor's financial statements required by the Loan Agreement within 45 days of the end of each Calendar Quarter and audited financial statements within 180 days of the end of the Borrower's fiscal year. The Lender must analyze these financial statements and provide the Agency with a written summary of the Lender's analysis, ratio analysis, and conclusions, which, at a minimum, must include trends, strengths, weaknesses, extraordinary transactions, violations of loan covenants and covenant waivers

proposed by the Lender, any routine servicing actions performed, and other indications of the financial condition of the Borrower. Spreadsheets of the financial statements must also be included. Following the Agency's review of the Lender's financial analysis, the Agency will provide a written report of any concerns to the Lender. Any concerns based upon the Agency's review must be addressed by the Lender. If the Lender makes a reasonable attempt to obtain financial statements, but is unable to obtain the Borrower's cooperation, the failure to obtain financial statements will not impair the validity of the Loan Note Guarantee.

(f) *Audits.* Any Public Body, nonprofit corporation or Indian Tribe that receives a guaranteed loan that meets the thresholds established by 2 CFR part 200, subpart F, must provide an audit for the fiscal year (of the borrower) in which the Loan Note Guarantee is issued. If the loan is for development or purchases made in a previous fiscal year through interim financing, an audit will also be provided for the fiscal year in which the development or purchases occurred. Any audit provided by a Public Body, nonprofit corporation, or Indian Tribe in accordance with this paragraph (f) will be considered adequate to meet the audit requirements of the Program for that year.

(g) *Protection of Agency interests.* 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 to rectify the situation. In determining any loss, the Agency will assess against the Lender any cost to the Agency associated with such action.

(h) *Additional loans.* The Lender must notify the Agency in writing when the Lender makes any additional expenditures or new loans to the Borrower. 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. Any additional expenditure or loan made by the Lender must be junior in priority to the BAP 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 § 4279.235(a) of this chapter and in § 4287.323.

#### §§ 4287.308–4287.311 [Reserved]

#### § 4287.312 Interest rate changes.

(a) *Reductions.* The Borrower, Lender, and Holder (if any) may collectively initiate a permanent or temporary reduction in the Interest rate of the guaranteed loan at any time during the life of the loan upon written agreement among these parties. The Lender must obtain prior Agency concurrence and must provide a copy of the modification agreement to the Agency. If any of the guaranteed portion has been purchased by the Agency, the Agency (as a Holder) will affirm or reject Interest rate change proposals in writing.

(1) Fixed rates can be changed to variable rates to reduce the Borrower's Interest rate only when the variable rate has a ceiling which is less than or equal to the original fixed rate.

(2) The Interest rates, after adjustments, must comply with the requirements for Interest rates on new loans as established by § 4279.233 of this chapter.

(3) The Lender is responsible for the legal documentation of Interest rate changes by an endorsement or any other legally effective amendment to the Promissory Note; however, no new Promissory Notes may be issued. The Lender must provide copies of all legal documents to the Agency.

(b) *Increases.* Increases in fixed Interest rates and increases in variable rate basis are not permitted (except the normal fluctuations in approved variable Interest rates), unless a temporary Interest rate reduction occurred. Any increase in rates must be for Good Cause.

#### § 4287.313 Release of Collateral.

The Lender must inspect the Collateral as often as necessary to properly service the loan. The Agency must give prior written approval for the release of Collateral, except as specified in paragraph (a) of this section or where the release of Collateral is made of Collateral under the abundance of caution provision of the applicable security agreement, subject to the provisions of paragraph (c) 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 of this chapter. The sale or release of Collateral must be based on an Arm's Length Transaction, unless otherwise approved by the Agency in writing.



(a) Within the parameters of paragraph (c) of this section, Lenders may, over the life of the guaranteed loan, release Collateral (other than personal and corporate guarantees) with a cumulative value of up to 20 percent of the original loan amount without Agency concurrence if the proceeds generated are used to reduce the guaranteed loan or to buy replacement Collateral. Working assets, such as accounts receivable, inventory, and work-in-progress that are routinely depleted or sold and the proceeds used for the normal course of business operations, may be used in and released for routine business purposes without prior concurrence of the Agency as long as the loan has not been accelerated.

(b) If a release of Collateral does not meet the requirements of paragraph (a) of this section, the Lender must complete a written evaluation to justify the release and must obtain written Agency concurrence in advance of the release.

(c) The Lender must support all releases of Collateral with a value exceeding \$250,000 with a current appraisal on the Collateral being released. The appraisal must meet the requirements of § 4279.244 of this chapter. The cost of this appraisal will not be paid for by the Agency. The Agency may, at its discretion, require an appraisal of the remaining Collateral in cases where it has been determined that the Agency may be adversely affected by the release of Collateral. The sale or release of the Collateral must be at Fair Market Value based on an Arm's Length Transaction, and there must be adequate consideration for the release of Collateral. Such consideration may include, but is not limited to:

(1) Application of the net proceeds from the sale of Collateral to the Borrower's debts in order of their lien priority in the sold Collateral;

(2) Use of the net proceeds from the sale of Collateral to purchase other Collateral of equal or greater value which the Lender will obtain as security for the benefit of the guaranteed loan with a lien position equal or superior to the position previously held;

(3) Application of the net proceeds from the sale of Collateral to the Borrower's business operation in such a manner that a significant improvement to the Borrower's debt service ability is clearly demonstrated. The Lender's written request must detail how the Borrower's debt service ability will be improved; and

(4) Assurance that the release of Collateral is essential for the success of the business, thereby furthering the goals of the Program. Such assurance

must be supported by written documentation from the Lender acceptable to the Agency.

(d) Any release of Collateral must not adversely affect the Project's operation or financial condition.

#### §§ 4287.314–4287.322 [Reserved]

#### § 4287.323 Subordination of lien position.

A Subordination of the Lender's lien position must be requested in writing by the Lender and concurred with in writing by the Agency in advance of the Subordination. The Lender's Subordination proposal must include a financial analysis of the servicing action and be fully supported by current financial statements of the Borrower and guarantors that are less than 90 days old.

(a) The Subordination of the Lender's lien position must enhance the Borrower's business and be in the best financial interest of the Agency.

(b) The lien to which the guaranteed loan is subordinated is for a fixed dollar limit and for a fixed term after which the guaranteed loan lien priority will be restored. Notwithstanding, a Subordination of lien position on inventory and accounts receivable may be made to a line of credit.

(c) Collateral must remain sufficient to provide for adequate Collateral coverage. The Agency may require a current independent appraisal in accordance with § 4279.244 of this chapter.

(d) Lien priorities must remain for the portion of the loan Collateral that was not subordinated.

(e) Subordination of the Lender's lien position must be for Good Cause.

#### § 4287.324 Alterations of loan instruments.

The Lender must neither alter nor approve any alterations or modifications of any loan instrument without the prior written approval of the Agency.

#### §§ 4287.325–4287.333 [Reserved]

#### § 4287.334 Transfer and Assumption.

The Lender may request a Transfer and Assumption of a guaranteed loan when the total indebtedness, or less than the total indebtedness, is assumed by another Borrower. If the assumption is for less than the total indebtedness of the guaranteed loan, the Transfer and Assumption must be an Arm's Length Transaction and the transfer must be of all loan Collateral. In the event of Default of the guaranteed loan, a Transfer and Assumption of the Borrower's operation and guaranteed loan can be accomplished before or after the loan goes into liquidation. However, if the Collateral has been purchased

through foreclosure or the Borrower has conveyed title to the Lender, no Transfer and Assumption is permitted.

(a) *Documentation of request.* All Transfers and Assumptions cannot be conducted unless the Agency gives prior written approval. An individual credit report must be provided for transferee and its partners, officers, directors, and stockholders with 20 percent or more interest in the business, along with such other documentation as the Agency may request to determine eligibility and credit worthiness. The new Borrower must sign Form RD 4279–1.

(b) *Terms.* Loan terms may be changed for Transfer and Assumptions to eligible Borrowers continuing the Project for eligible purposes with the concurrence of the Agency, all Holders, and the transferor (including guarantors). If the transferor has been or will be released from liability, the transferor's concurrence is not required. Any new loan terms must be within the terms authorized by § 4279.234 of this chapter and must be for Good Cause.

(c) *Release of liability.* The transferor, including any guarantor, may be released from liability only with prior Agency written concurrence when the Transfer and Assumption is an Arm's Length Transaction and:

(1) The assumption is for the full amount of the loan and all of the loan Collateral is transferred to the transferee; or

(2) The assumption is for less than the full amount of the loan, all of the loan Collateral is transferred to the transferee, and the Lender demonstrates to the Agency that the transferor and guarantors have no reasonable debt-paying ability considering their assets and income in the foreseeable future.

(d) *Proceeds.* The Lender must credit any proceeds received from the sale of Collateral before a Transfer and Assumption to the transferor's guaranteed loan debt in order of lien priority before the Transfer and Assumption are closed.

(e) *Additional loans.* Guaranteed loans to provide additional funds in connection with a Transfer and Assumption must be considered a new loan application, which requires submission of a complete Agency application in accordance with §§ 4279.260 and 4279.261 of this chapter.

(f) *Credit quality.* The Lender must make a complete credit analysis in accordance with § 4279.215 of this chapter.

(g) *Appraisals.* If the proposed Transfer and Assumption is for the full amount of the Agency guaranteed loan and all loan Collateral, the Agency will

not require an appraisal. If the proposed Transfer and Assumption is for less than the full amount of the Agency guaranteed loan, the Agency will require an appraisal on all of the Collateral being transferred, and the amount of the assumption must not be less than this appraised value. The Lender is responsible for obtaining this appraisal, which must conform to the requirements of § 4279.244 of this chapter. The Agency will not pay the appraisal fee or any other costs associated with this transfer.

(h) *Documents.* Prior to Agency approval, the Lender must provide the Agency a written legal opinion that the transaction can be properly and legally transferred and assurance that the conveyance instruments will be appropriately filed, registered, and recorded.

(1) The Lender must not issue any new Promissory Notes. The assumption must be completed in accordance with applicable law and must contain the Agency case number of the transferor and transferee. The Lender will provide the Agency with a copy of the Transfer and Assumption agreement. The Lender must ensure that all Transfers and Assumptions are noted on all original Loan Note Guarantees.

(2) A new Loan Agreement, consistent in principle with the original Loan Agreement, must be executed to establish the terms and conditions of the loan being assumed. An assumption agreement can be used to establish the loan covenants.

(3) Upon execution of the Transfer and Assumption, the Lender must provide the Agency with a written legal opinion that the Transfer and Assumption is completed, valid, enforceable, and certification that the Transfer and Assumption is consistent with the conditions outlined in the Agency's conditions of approval for the transfer and complies with all Agency regulations.

(i) *Loss resulting from transfer.* (1) Any resulting loss must be processed in accordance with § 4287.358.

(2) If a Holder owns any of the guaranteed portion, such portion must be repurchased by the Lender or the Agency in accordance with § 4279.225 of this chapter.

(j) *Related party.* If the transferor and transferee are Affiliates or related parties, any Transfer and Assumption must be to an eligible Borrower to continue the Project for eligible purposes, must transfer all of the loan Collateral, and must be for the full amount of the guaranteed loan indebtedness.

(k) *Cash down payment.* The Lender may allow the transferee to make cash down payments directly to the transferor provided:

(1) The Transfer and Assumption is made for the total indebtedness to an eligible Borrower to continue the Project for eligible purposes;

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

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

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

(l) *Transfer/Annual Renewal Fees.* (1) The Agency will charge a nonrefundable transfer fee at the time of transfer, which may be passed on to the Borrower by the Lender. The transfer fee rate will be equal to the rate of the guarantee fee authorized in § 4279.231(a) of this chapter for the fiscal year in which the transfer occurs. The amount of the transfer fee is determined by multiplying the principal balance at the time of the transfer by the transfer fee rate by the percentage of guarantee on the original loan.

(2) The Lender must pay any Annual Renewal Fee in accordance with § 4279.231(b) of this chapter.

(m) *Change in control of Borrower.* Transfer and Assumption shall be deemed to occur in the event of a change in the control of the Borrower.

(n) *Personal and corporate guarantees.* Guarantees from owners are required in accordance with § 4279.245 of this chapter.

#### § 4287.335 Substitution of Lender.

The Lender is prohibited from selling or transferring the entire loan without the prior written approval of the Agency. Because the Loan Note Guarantee is associated with a specific Promissory Note and cannot be transferred to a new Promissory Note, the Lender must transfer the original Promissory Note and loan security documents to the new Lender, who must agree to its current loan terms, including the Interest rate, secondary market Holder (if any), Collateral, Loan Agreement terms, and guarantors. The

new Lender must also obtain the original Loan Note Guarantee, original personal and corporate guarantee(s), and the loan payment history from the transferor Lender. If the new Lender wishes to modify the loan terms after acquisition, the new Lender must submit a request to the Agency.

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

(1) The proposed substitute Lender:

(i) Is an eligible Lender in accordance with § 4279.208 of this chapter;

(ii) Is able to service the loan in accordance with the original loan documents; and

(iii) Agrees to acquire title to the unguaranteed portion of the loan held by the original Lender and assumes all original loan requirements, including liabilities and servicing responsibilities; and

(2) The substitution of the Lender is requested in writing by the Borrower, the proposed substitute Lender, and the original Lender if still in existence.

(b) The Agency will not pay any loss or share in any costs (e.g., appraisal fees and environmental assessments) with a new Lender unless a relationship is established through a substitution of Lender in accordance with paragraph (a) of this section. This includes situations where a Lender is acquired by another Lender and situations where the Lender has failed and been taken over by a regulatory agency such as the Federal Deposit Insurance Corporation (FDIC) and the loan is subsequently sold to another Lender.

(c) In cases when there is a substitution of Lender or when a Lender has been merged with or acquired by another Lender, the Agency and the new Lender must execute a new Lender's Agreement, unless a valid Lender's Agreement already exists with the new Lender.

#### § 4287.336 Lender failure.

(a) The acquiring Lender must comply with 7 CFR parts 4279, subpart C and 4287, subpart D and must take such action that a reasonable Lender would take if it did not have a Loan Note Guarantee to protect the Lender and Agency's mutual interest. The Lender cannot arbitrarily change the Lender's Agreement and related documents on the guaranteed loan, and the Agency will make the successor to the failed institution aware of the statutory and regulatory requirements.

(b) In the event of a Default and the guaranteed loan is liquidated by the FDIC rather than being sold to another Lender, the Agency will pay losses and share in costs as if the FDIC were an approved new Lender.

**§§ 4287.337–4287.344 [Reserved]****§ 4287.345 Default by Borrower.**

The Lender's primary responsibilities in Default are to act reasonably and expeditiously, to work with the Borrower to bring the account current or cure the Default through restructuring if a realistic plan can be developed, or to accelerate the account and conduct a liquidation in a manner that will minimize any potential loss. The Lender may initiate liquidation in accordance with § 4287.357.

(a) The Lender must notify the Agency in writing when a Borrower is more than 30 days past due on a payment and the Delinquency cannot be cured within 30 days or when a Borrower is otherwise in Default of covenants in the Loan Agreement by submitting Form RD 1980–44, "Guaranteed Loan Borrower Default Status," or processing the Default Status report in LINC. The Lender must provide this notification 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. The Lender must update the loan's status each month using either Form RD 1980–44 or the LINC Default Status report until such time as the loan is no longer in Default. If a monetary Default exceeds 60 days, the Lender must meet with the Agency and, if practical, the Borrower to discuss the situation.

(b) In considering options, the prospects for providing a permanent cure without adversely affecting the risk to the Agency and the Lender are the paramount objective.

(1) Curative actions (subject to the rights of any Holder) include, but are not limited to:

(i) Deferment of principal or Interest payments;

(ii) An additional unguaranteed temporary loan by the Lender to bring the account current;

(iii) Reamortization of or rescheduling the payments on the loan (subject to the rights of any Holder) excluding capitalization of accrued Interest;

(iv) Transfer and Assumption of the loan in accordance with § 4287.334;

(v) Reorganization;

(vi) Liquidation; and

(vii) Changes in Interest rates with the Agency's, the Lender's, and Holder's approval. Any Interest rate changes must be adjusted proportionately between the guaranteed and unguaranteed portion of the loan.

(2) The term of any deferment, rescheduling, reamortization, or moratorium will be limited to the lesser of the remaining life of the Collateral or

remaining limits as set forth in § 4279.234 of this chapter (excluding paragraph (d)). Balloon payments are permitted as a loan servicing option as long as there is a reasonable prospect for success and the remaining life of the Collateral supports the action.

(3) In the event of a loss or a repurchase, the Lender cannot claim Default or penalty Interest, late payment fees, or Interest on Interest.

(c) Debt write-downs by the lender are prohibited when the Lender will continue with the Project loan, except as directed or ordered by a final court order.

(d) In the event of a loss, the guarantee will not cover Interest to the Lender accruing after the Interest Termination Date.

(e) For repurchases of guaranteed loans, refer to § 4279.225 of this chapter.

**§§ 4287.346–4287.355 [Reserved]****§ 4287.356 Protective Advances.**

Protective Advances are advances made by the Lender for the purpose of preserving and protecting the Collateral where the Borrower has failed to, will not, or cannot meet its obligations. Lenders must exercise sound judgment in determining that the Protective Advance preserves Collateral and recovery is actually enhanced by making the advance. Lenders cannot make Protective Advances in lieu of additional loans. A Protective Advance claim will be paid only at the time of the final payment as indicated in the Guaranteed Loan Report of Loss.

(a) The maximum loss to be paid by the Agency will never exceed the original loan amount plus accrued Interest times the percentage of guarantee regardless of any Protective Advances made.

(b) In the event of a final loss, Protective Advances will accrue Interest at the Promissory Note rate and will be guaranteed at the same percentage of loss as provided in the Loan Note Guarantee. The guarantee will not cover Interest on the Protective Advance accruing after the Interest Termination Date.

(c) Protective Advances must constitute an indebtedness of the Borrower to the Lender and be secured by the security instruments. Agency written authorization is required when the cumulative total of Protective Advances exceeds \$200,000 or 10 percent of the outstanding balance of principal, whichever is less.

**§ 4287.357 Liquidation.**

In the event of one or more incidents of Default or third party actions that the

Borrower cannot or will not cure or eliminate within a reasonable period of time, the Lender, with Agency consent, must provide for liquidation.

(a) *Decision to liquidate.* A decision to liquidate or proceed otherwise must be made when the Lender determines that the Default cannot be cured through actions such as those contained in § 4287.345, or it has been determined that it is in the best interest of the Agency and the Lender to liquidate. The decision to liquidate or proceed otherwise with the Borrower must be made as soon as possible when one or more of the following exist:

(1) A loan is 90 days behind on any scheduled payment and the Lender and the Borrower have not been able to cure the Delinquency through actions such as those contained in § 4287.345.

(2) It is determined that delaying liquidation will jeopardize full recovery on the loan.

(3) The Borrower or Lender is uncooperative in resolving the problem or the Agency or Lender has reason to believe the Borrower is not acting in good faith, and immediate liquidation would minimize loss to the Agency.

(b) *Repurchase of loan.* When the decision to liquidate is made, if any portion of the loan has been sold or assigned under § 4279.223 of this chapter and not already repurchased, provisions will be made for repurchase in accordance with § 4279.225 of this chapter.

(c) *Lender's liquidation plan.* The Lender is responsible for initiating actions immediately and as necessary to ensure a prompt, orderly liquidation that will provide maximum recovery. Within 30 days after a decision to liquidate, the Lender must submit a written, proposed plan of liquidation to the Agency for approval. The liquidation plan must be detailed and include at least the following:

(1) Such proof as the Agency requires to establish the Lender's ownership of the guaranteed loan Promissory Note and related security instruments and a copy of the payment ledger, if available, that reflects the current loan balance, accrued Interest to date, and the method of computing the Interest;

(2) A full and complete list of all Collateral, including any personal and corporate guarantees;

(3) The recommended liquidation methods for making the maximum collection possible on the indebtedness and the justification for such methods, including recommended action for acquiring and disposing of all Collateral and collecting from guarantors;

(4) Necessary steps for preservation of the Collateral;

(5) Copies of the Borrower's most recently available financial statements;

(6) Copies of each guarantor's most recently available financial statements;

(7) An itemized list of estimated Liquidation Expenses expected to be incurred along with justification for each expense;

(8) A schedule to periodically report to the Agency on the progress of liquidation;

(9) Estimated Protective Advance amounts with justification;

(10) Proposed protective bid amounts on Collateral to be sold at auction and a breakdown to show how the amounts were determined. A protective bid may be made by the Lender, with prior Agency written approval, at a foreclosure sale to protect the Lender's and the Agency's interest. The protective bid will be based on the liquidation value and estimated net recovery considering prior liens and outstanding taxes, expenses of foreclosure, and estimated expenses for holding and reselling the property. These expenses include, but are not limited to, expenses for resale, Interest accrual, length of time necessary for resale, maintenance, guard service, weatherization, and prior liens;

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

(12) Legal opinions, if needed by the Lender's legal counsel; and

(13) An estimate of Fair Market Value and potential liquidation value of the Collateral. If the value of the Collateral is \$250,000 or more, the Lender must obtain an independent appraisal report meeting the requirements of § 4279.244 of this chapter on the Collateral securing the loan, which reflects the Fair Market Value and potential liquidation value. The liquidation appraisal must evaluate the impact on Market Value of any release of hazardous substances, petroleum products, or other environmental hazards. The independent appraiser's fee, including the cost of the environmental site assessment, will be shared equally by the Agency and the Lender. In order to ensure prompt action, the liquidation plan can be submitted with an estimate of Collateral value, and the liquidation plan may be approved by the Agency subject to the results of the final liquidation appraisal.

(d) *Approval of liquidation plan.* The Lender cannot implement its liquidation plan before obtaining written approval from the Agency. The Lender and Agency must attempt to resolve any Agency concerns.

(1) If the liquidation plan is approved by the Agency, the Lender must proceed

expeditiously with liquidation and must take all legal action necessary to liquidate the loan in accordance with the approved liquidation plan. The Lender must update or modify the liquidation plan when conditions warrant, including a change in value based on a liquidation appraisal.

(2) Should the Agency and the Lender not agree on the liquidation plan, negotiations will take place between the Agency and the Lender to resolve the disagreement. The Lender must take such actions that a reasonable Lender would take without a guarantee and keep the Agency informed in writing. When the liquidation plan is approved by the Agency, the Lender will proceed expeditiously with liquidation.

(e) *Acceleration.* The Lender will proceed to accelerate the indebtedness as expeditiously as possible when acceleration is necessary, including giving any notices and taking any other legal actions required. The guaranteed loan will be considered in liquidation once the loan has been accelerated and a demand for payment has been made upon the Borrower. The Lender must obtain from the Agency concurrence prior to the acceleration of the loan if the sole basis for acceleration is a nonmonetary Default. In the case of monetary Default, prior approval by the Agency of the Lender's acceleration is not required, although Agency concurrence must still be given not later than at the time the liquidation plan is approved. The Lender will provide a copy of the acceleration notice or other acceleration document to the Agency.

(f) *Filing an estimated loss claim.* When the Lender owns any of the guaranteed portion of the loan, the Lender must file an estimated loss claim once a decision has been made to liquidate if the liquidation is expected to exceed 90 days. When calculating the estimated loss payment, the value of the Collateral must be based on its estimated net liquidation value. For the purpose of reporting and loss claim computation, the guarantee will not cover Interest to the Lender accruing after the Interest Termination Date. The Agency will promptly process the loss claim in accordance with applicable Agency regulations as set forth in § 4287.358.

(g) *Accounting and reports.* The Lender must account for funds during the period of liquidation and must, in accordance with the Agency-approved liquidation plan, provide the Agency with reports on the progress of liquidation including disposition of Collateral, resulting costs, and additional procedures necessary for

successful completion of the liquidation.

(h) *Transmitting payments and proceeds to the Agency.* When the Agency is the Holder of a portion of the guaranteed loan, the Lender must transmit to the Agency within 14 calendar days its Pro Rata share of any payments received from the Borrower, liquidation, or other proceeds using Form RD 1980-43, "Lender's Guaranteed Loan Payment to Rural Development."

(i) *Abandonment of Collateral.* When the Lender adequately documents that the cost of liquidation would exceed the potential recovery value of certain Collateral and receives Agency concurrence, the Lender may abandon that Collateral. When the Lender makes a recommendation for abandonment of Collateral, it must comply with 7 CFR part 1940, subpart G.

(j) *Disposition of personal or corporate guarantees.* The Lender must take action to maximize recovery from all personal and corporate guarantees, including seeking Deficiency Judgments when there is a reasonable chance of future collection.

(k) *Compromise settlement.* Compromise settlements must be approved by the Lender and the Agency. Complete current financial information on all parties obligated for the loan must be provided. At a minimum, the compromise settlement must be equivalent to the value and timeliness of that which would be received from attempting to collect on the guarantee. The guarantor cannot be released from liability until the full amount of the compromise settlement has been received. In weighing whether the compromise settlement should be accepted, among other things, the Agency will weigh whether the compromise is more financially advantageous than collecting on the guarantee.

(l) *Litigation.* In all litigation proceedings involving the Borrower, the Lender is responsible for protecting the rights of the Lender with respect to the loan and keeping the Agency adequately and regularly informed, in writing, of all aspects of the proceedings. If the Agency determines that the Lender is not adequately protecting the rights of the Lender or the Agency with respect to the loan, the Agency reserves the right to take any legal action the Agency determines necessary to protect the rights of the Lender, on behalf of the Lender, or the Agency 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.

**§ 4287.358 Determination of loss and payment.**

Unless the Agency anticipates a Future Recovery, the Agency will make a final settlement with the Lender after the Collateral is liquidated and settlement and compromise of all parties has been completed. The Agency has the right to recover losses paid under the guarantee from any party that may be liable.

(a) *Report of loss form.* Form RD 449–30, “Guaranteed Loan Report of Loss,” will be used for reporting and calculating all estimated and final loss determinations.

(b) *Estimated loss.* In accordance with the requirements of § 4287.357(f), the Lender must prepare an estimated loss claim and submit it to the Agency.

(1) Interest accrual eligible for payment under the guarantee on the Defaulted loan will be discontinued when the estimated loss is paid.

(2) A Protective Advance claim will be paid only at the time of the final payment as indicated in the Guaranteed Loan Report of Loss.

(3) The estimated loss payment is a payment to the Lender and is not to be applied as a payment on the loan for purposes of reducing the unpaid balance owed by the Borrower or for status reporting (semi-annual status/ Default status reports).

(c) *Final loss.* Except for certain unsecured personal or corporate guarantees as provided for in this section, the Lender must prepare a final Guaranteed Loan Report of Loss and submit it to the Agency within 30 days after liquidation of all Collateral is completed. Interest will not be paid beyond the Interest Termination Date. Before approval by the Agency of any final loss report, the Lender must account for all funds during the period of liquidation, disposition of the Collateral, all costs incurred, and any other information necessary for the successful completion of liquidation. Upon receipt of the final accounting and Guaranteed Loan Report of Loss, the Agency may audit all applicable documentation to determine the final loss. The Lender must make its records available and otherwise assist the Agency in making any investigation. The documentation accompanying the Guaranteed Loan Report of Loss must support the amounts reported as losses on the Guaranteed Loan Report of Loss.

(1) The Lender must make a determination regarding the collectability of unsecured personal and corporate guarantees. If reasonably

possible, the Lender must promptly collect or otherwise dispose of such guarantees in accordance with § 4287.357(j) prior to completion of the final loss report. However, in the event that collection from the guarantors appears unlikely or will require a prolonged period of time, the Lender must file the Guaranteed Loan Report of Loss when all other Collateral has been liquidated. Unsecured personal or corporate guarantees outstanding at the time of the submission of the final loss claim will be treated as a Future Recovery with the net proceeds to be shared on a Pro Rata basis by the Lender and the Agency. The Agency may consider a compromise settlement of Federal Debt after it has processed a final Guaranteed Loan Report of Loss and issued a 60 day due process letter. Any funds collected on Federal Debt will not be shared with the Lender.

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

(3) The Lender must provide receipts and a breakdown of any Protective Advance amount as to the payee, purpose of the expenditure, date paid, and evidence that the amount expended was proper.

(4) The Lender must provide receipts and a breakdown of Liquidation Expenses as to the payee, purpose of the expenditure, date paid, and evidence that the amount expended was proper. Liquidation Expenses are recoverable only from liquidation proceeds. The Agency may approve attorney/legal fees as Liquidation Expenses provided that the fees are reasonable, require the assistance of attorneys, and cover legal issues pertaining to the liquidation that could not be properly handled by the Lender and its employees.

(5) The Lender must support accrued Interest by documenting how the amount was accrued. If the Interest rate was a variable rate, the Lender must include documentation of changes in both the selected base rate and the loan rate.

(6) The Agency will pay loss payments within 60 days after it has reviewed the complete final loss report and accounting of the Collateral.

(7) If a Lender receives a final loss payment and the Agency determines there is Future Recovery, 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.

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

(e) *Liquidation Expenses.* The Agency will deduct Liquidation Expenses from the liquidation proceeds of the Collateral. The Lender cannot claim any Liquidation Expenses in excess of liquidation proceeds. Any changes to the Liquidation Expenses that exceed 10 percent of the amount proposed in the liquidation plan must be approved by the Agency. Reasonable attorney/legal expenses will be shared by the Lender and Agency equally, including those instances where the Lender has incurred such expenses from a trustee conducting the liquidation of assets. The Lender cannot claim the guarantee fee or the Annual Renewal Fee as authorized Liquidation Expenses, and no In-House Expenses of the Lender will be allowed. In-House Expenses include, but are not limited to, employee’s salaries, staff lawyers, travel, and overhead.

(f) *Rent.* The Lender must apply any net rental or other income that it receives from the Collateral to the guaranteed loan debt.

(g) *Payment.* Once the Agency approves the Guaranteed Loan Report of Loss and supporting documents submitted by the Lender:

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

(2) If the loss is less than the estimated loss payment, the Lender must reimburse the Agency for the overpayment plus Interest at the Promissory Note rate from the date of payment.

**§§ 4287.359–4287.368 [Reserved]**

**§ 4287.369 Future recovery.**

Unless notified otherwise by the Agency, after the final loss claim has been paid, the Lender must use reasonable efforts to attempt collection from any party still liable for Future Recovery. Any net proceeds from Future Recovery must be split Pro Rata between the Lender and the Agency based on the original amount of the loan guarantee. Any collection of Federal Debt made by the Federal Government from any liable party to the guaranteed loan will not be split with the Lender.

**§ 4287.370 Bankruptcy.**

(a) *Lender’s responsibilities.* It is the Lender’s responsibility to protect the guaranteed loan and all of the Collateral securing it in bankruptcy and any related appellate proceedings. These responsibilities include, but are not limited to the following:

(1) Monitoring confirmed bankruptcy plans to determine Borrower compliance, and, if the Borrower fails to comply, pursue appropriate relief;

(2) Filing all the necessary papers and pleadings concerning the case, including where appropriate a proof of claim;

(3) Attending and, where necessary, participating in meetings of the creditors and all court proceedings;

(4) Requesting modifications of any proposed bankruptcy plan whenever it appears that the Lender could obtain additional recoveries via plan modification;

(5) Keeping the Agency adequately and regularly informed in writing of all aspects of the proceedings;

(6) Submitting a Default status report within 15 days after the date when the Borrower Defaults and every 30 days thereafter until the Default is resolved or a final loss claim is paid by the Agency. The Default status report will be used to inform the Agency of the bankruptcy filing, the plan confirmation date, when the plan is complete, and when the Borrower is not in compliance with the plan; and

(7) With written Agency consent, the Lender and Agency will equally share the cost of any independent appraisal fee to protect the guaranteed loan in any bankruptcy proceedings.

(b) *Reports of loss during bankruptcy.* In bankruptcy proceedings, payment of loss claims will be made as provided in this section.

(1) *Estimated loss payments.* (i) If a Borrower has filed for bankruptcy and all or a portion of the debt has been discharged, the Lender must request an estimated loss payment of the guaranteed portion of the accrued Interest and principal discharged by the court. Only one estimated loss payment is allowed during the bankruptcy and any related appellate proceedings. All subsequent claims of the Lender during bankruptcy and any related appellate proceedings will be considered revisions to the initial estimated loss. A revised estimated loss payment may be processed by the Agency, at its option, in accordance with any court-approved changes in the bankruptcy plan. Once the bankruptcy plan has been completed, the Lender is responsible for submitting the documentation necessary for the Agency to review and adjust the estimated loss claim to reflect any actual discharge of principal and Interest and to reimburse the Lender for any court-ordered Interest rate reduction under the terms of the bankruptcy plan.

(ii) The Lender must use the Guaranteed Loan Report of Loss to request an estimated loss payment and

to revise any estimated loss payments during the course of the bankruptcy plan. The estimated loss claim, as well as any revisions to this claim, must be accompanied by documentation to support the claim.

(iii) Upon completion of a bankruptcy plan, the Lender must:

(A) Complete a Form RD 1980-44 and forward this form to the Agency; and

(B) Provide the Agency with the documentation necessary to determine whether the estimated loss paid equals the actual loss sustained.

(1) If the actual loss sustained as a result of the bankruptcy is less than the estimated loss, the Lender must reimburse the Agency for the overpayment plus Interest at the Promissory Note rate from the date of payment of the estimated loss.

(2) If the actual loss is greater than the estimated loss payment, the Lender must submit a revised estimated loss claim in order to obtain payment of the additional amount owed by the Agency to the Lender.

(2) *Bankruptcy loss payments.* (i) The Lender must request a bankruptcy loss payment of the guaranteed portion of the accrued Interest and principal discharged by the court for all bankruptcies when all or a portion of the debt has been discharged. Unless a final court decree approves a subsequent change to the bankruptcy plan that is adverse to the Lender, only one bankruptcy loss payment is allowed during the bankruptcy. Once a final court decree has discharged all or part of the guaranteed loan and any appeal period has run, the Lender must submit the documentation necessary for the Agency to review and adjust the bankruptcy loss claim to reflect any actual discharge of principal and Interest.

(ii) The Lender must use the Guaranteed Loan Report of Loss to request a bankruptcy loss payment and to revise any bankruptcy loss payments during the course of the bankruptcy. The Lender must include with the bankruptcy loss claim documentation to support the claim, as well as any revisions to this claim.

(iii) Upon completion of a bankruptcy plan, restructuring, or liquidation, the Lender must either complete a Form RD 1980-44 and forward this form to the Agency or enter the data directly into LINC.

(iv) If an estimated loss claim is paid during a bankruptcy and the Borrower repays in full the remaining balance without an additional loss sustained by the Lender, a final Guaranteed Loan Report of Loss is not necessary.

(3) *Interest rate losses as a result of bankruptcy reorganization.* Interest rate losses as a result of bankruptcy reorganization will be paid as follows:

(i) Interest losses sustained during the period of the bankruptcy plan will be processed in accordance with paragraph (b)(1) of this section;

(ii) Interest losses sustained after the bankruptcy plan is confirmed will be processed annually when the Lender sustains a loss as a result of a permanent Interest rate reduction that extends beyond the period of the bankruptcy plan; and

(iii) If a bankruptcy loss claim is paid during the operation of the bankruptcy plan and the Borrower repays in full the remaining balance without an additional loss sustained by the Lender, a final Guaranteed Loan Report of Loss is not necessary.

(4) *Final bankruptcy loss payments.* The Agency will process final bankruptcy loss payments when the loan is fully liquidated.

(5) *Application of loss claim payments.* The Lender must apply estimated loss payments first to the unsecured principal of the guaranteed portion of the debt and then to the unsecured interest of the guaranteed portion of the debt. In the event a court attempts to direct the payments to be applied in a different manner, the Lender must immediately notify the Agency in writing.

(6) *Protective Advances.* If approved Protective Advances, as authorized by § 4287.356, were incurred in connection with the initiation of liquidation action and were required to provide repairs, insurance, etc., to protect the Collateral as result of delays in the case of failure of the Borrower to maintain the security prior to the Borrower having filed bankruptcy, the Protective Advances together with accrued Interest are payable under the guarantee in the final loss claim.

(c) *Expenses during bankruptcy proceedings.* (1) Under no circumstances will the guarantee cover Liquidation Expenses in excess of liquidation proceeds.

(2) Expenses, such as reasonable attorney/legal fees and the cost of appraisals incurred by the Lender as a direct result of the Borrower's bankruptcy filing, will be shared equally by the Lender and the Agency.

(3) Reasonable and customary Liquidation Expenses must be deducted from Collateral sale proceeds. Liquidation Expenses are covered under the guarantee, provided they are reasonable, customary, and provide a demonstrated economic benefit to the Lender and the Agency. Lender's In-

House Expenses, which are those expenses that would normally be incurred for administration of the loan, including in-house lawyers, are not covered by the guarantee.

(4) When a bankruptcy proceeding results in a liquidation of the Borrower by a bankruptcy trustee appointed under 11 U.S.C. 701, 702, 703 or 1104, expenses will be handled as directed by the court, and the Lender cannot claim Liquidation Expenses for the sale of the assets.

(5) If the property is abandoned by the bankruptcy trustee, the Lender will conduct the liquidation in accordance with § 4287.357.

(6) Proceeds received from partial sale of Collateral during bankruptcy may be used by the Lender to pay reasonable costs, such as freight, labor and sales

commissions, associated with the partial sale. Reasonable use of proceeds for this purpose must be documented with the final loss claim.

**§§ 4287.371–4287.379 [Reserved]**

**§ 4287.380 Termination of guarantee.**

The Loan Note Guarantee will terminate under any of the following conditions:

- (a) Upon full payment of the guaranteed loan;
- (b) Upon full payment of any loss obligation; or
- (c) Upon written notice from the

Lender to the Agency that the guarantee will terminate 30 days after the date of notice, provided that the Lender owns the entire guaranteed interest in the loan and the Loan Note Guarantee is returned to the Agency to be canceled.

**§§ 4287.381–4287.399 [Reserved]**

**§ 4287.400 OMB control number.**

In accordance with the Paperwork Reduction Act of 1995, the information collection requirements contained in the subsequent interim rule have been submitted to the Office of Management and Budget (OMB) under OMB Control Number 0570–0065 for approval. A person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Dated: June 12, 2015.

**Lisa Mensah,**

*Under Secretary, Rural Development.*

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