limited to, chips, ice cream, crackers, cupcakes, cookies, popcorn, pastries, and candy, and other food items that complement or supplement meals, such as, but not limited to, coffee, tea, cocoa, carbonated and uncarbonated drinks, condiments, spices, salt, and sugar. Items shall not be classified as accessory food exclusively based on packaging size but rather based on the aforementioned definition and as determined by FNS. A food product containing an accessory food item as its main ingredient shall be considered an accessory food item. Accessory food items shall not be considered staple foods for purposes of determining the eligibility of any firm.

* * * * *

PART 278—PARTICIPATION OF RETAIL FOOD STORES WHOLESALE FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS

■ 3. In § 278.1:
■ a. Amend the last sentence in paragraph (b)(1)(i)(A) by removing the word ''two'' and adding in its place the word ''three''.
■ b. Revise paragraph (b)(1)(ii)(A);
■ c. Amend the first sentence in paragraph (b)(1)(ii)(B) by removing the word ''two'' and adding in its place the word ''three''.
■ d. Revise paragraph (b)(1)(ii)(C);
■ e. Revise the fourth sentence in paragraph (b)(1)(iv);
■ f. Redesignate paragraph (b)(6) as paragraph (b)(7);
■ g. Add new paragraph (b)(6).
■ h. Add paragraph (q)(5).

The additions and revisions read as follows:

§ 278.1 Approval of retail food stores and wholesale food concerns.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(A) Offer for sale and normally display in a public area, qualifying staple food items on a continuous basis, evidenced by having, on any given day of operation, no fewer than seven different varieties of food items in each of the four staple food categories with a minimum depth of stock of three stocking units for each qualifying staple variety and at least one variety of perishable foods in at least three staple food categories. Documentation to determine if a firm stocks a sufficient amount of required staple foods to offer them for sale on a continuous basis may be required in cases where it is not clear that the firm has made reasonable stocking efforts to meet the stocking requirement. Such documentation can be achieved through verifying information, when requested by FNS, such as invoices and receipts in order to prove that the firm had ordered and/or received a sufficient amount of required staple foods up to 21 calendar days prior to the date of the store visit. Failure to provide verifying information related to stock when requested may result in denial or withdrawal of authorization. Failure to cooperate with store visits shall result in the denial or withdrawal of authorization.

* * * * *

(C) Offer a variety of staple foods which means different types of foods within each staple food category. For example: Apples, cabbage, tomatoes, bananas, pumpkins, broccoli, and grapes in the vegetables or fruits category; or cow milk, almond milk, soy yogurt, soft cheese, butter, sour cream, and cow milk yogurt in the dairy products category; or rice, bagels, pitas, bread, pasta, oatmeal, and whole wheat flour in the bread or cereals category; or chicken, beans, nuts, beef, pork, eggs, and tuna in the meat, poultry, or fish category. Variety of foods is not to be interpreted as different brands, nutrient values (*e.g.,* low sodium and lite), flavorings (*e.g.,* vanilla and chocolate), packaging types or styles (*e.g.,* canned and frozen) or package sizes of the same or similar foods. Similar food items such as, but not limited to, tomatoes and tomato juice, different types of rice, whole milk and skim milk, ground beef and beefsteak, or different types of apples (*e.g.,* Empire, Jonagold, and McIntosh), shall count as depth of stock but shall not each be counted as more than one staple food variety for the purpose of determining the number of varieties in any staple food category. Accessory foods shall not be counted as staple foods for purposes of determining eligibility to participate in SNAP as a retail food store.

* * * * *

(iv) * * * In addition, firms that are considered to be restaurants, that is, firms that have more than 50 percent of their total gross sales in foods cooked or heated on-site by the retailer before or after purchase; and hot and/or cold prepared foods not intended for home preparation or consumption, including prepared foods that are consumed on the premises or sold for carryout, shall not qualify for participation as retail food stores under Criterion A or B. * * *

* * * * *

(6) *Need for access.* FNS will consider whether the applicant firm is located in an area with significantly limited access to food when the applicant firm fails to meet Criterion A per paragraph (b)(1)(ii) or Criterion B per paragraph (b)(1)(iii) of this section so long as the applicant firm meets all other SNAP authorization requirements. In determining whether an applicant is located in such an area, FNS may consider access factors such as, but not limited to, the distance from the applicant firm to the nearest currently SNAP authorized firm and transportation options. In determining whether to authorize an applicant despite its failure to meet Criterion A and Criterion B, FNS will also consider factors such as, but not limited to, the extent of the applicant firm's stocking deficiencies in meeting Criterion A and Criterion B and whether the store furthers the purposes of the Program. Such considerations will be conducted during the application process as described in paragraph (a) of this section.

* * * * *

(q) * * *

(5) *Public disclosure of firms sanctioned for SNAP violations.* FNS may disclose information to the public when a retail food store has been disqualified or otherwise sanctioned for violations of the Program after the time for administrative and judicial appeals has expired. This information is limited to the name and address of the store, the owner(s') name(s) and information about the sanction itself. FNS may continue to disclose this information for as long as the duration of the sanction. In the event that a sanctioned firm is assigned a civil penalty in lieu of a period of disqualification, as described in § 278.6(a), FNS may continue to disclose this information for as long as the duration of the period of disqualification or until the civil penalty has been paid in full, whichever is longer.

* * * * *

Dated: December 7, 2016.

Audrey Rowe,

Acting Under Secretary, Food, Nutrition and Consumer Services.

[FR Doc. 2016–29837 Filed 12–14–16; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF ENERGY

10 CFR Part 609

RIN 1901–AB38

Loan Guarantees for Projects That Employ Innovative Technologies

AGENCY: Loan Programs Office, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE or the Department) publishes a final rule to amend the existing regulations for the loan guarantee program authorized by Title XVII of the Energy Policy Act of 2005 (Title XVII or the Act). Section 1703 of Title XVII (section 1703) authorizes the Secretary of Energy (Secretary) to make loan guarantees for projects that avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases. Such projects must also employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued. The two principal goals of section 1703 are to encourage commercial use in the United States of new or significantly improved energy-related technologies and to achieve substantial environmental benefits. Section 1703 also identifies ten categories of technologies and projects that are potentially eligible for loan guarantees. Commercial use of these technologies is expected to help sustain and promote economic growth, produce a more stable and secure energy supply and economy for the United States, and improve the environment.

As a result of experience gained implementing the loan guarantee program authorized by section 1703, and information received from program participants, including applicants, borrowers, sponsors, and lenders, as well as various energy industry groups, DOE finalizes amendments to the existing regulations to provide increased clarity and transparency, reduce paperwork, and provide a more workable interpretation of certain statutory provisions in light of DOE's experience with operation of the Title XVII program.

DATES: This rule is effective on January 17, 2017.

FOR FURTHER INFORMATION CONTACT: Mark S. Westergard, Assistant Chief Counsel Regulatory Affairs, Loan Programs Office, United States Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–0121, (202) 287–5621, email: *lgprogram@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

This final rule amends the regulations implementing the loan guarantee program authorized by Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16514) (referred to as Title XVII). Section 1703 of Title XVII (section 1703) authorizes the Secretary of Energy (Secretary) to make loan guarantees for projects that: (1) Avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and (2) employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued. (42 U.S.C 16513(a)).

Section 1702 of Title XVII (section 1702) authorizes the Secretary, after consultation with the Secretary of the Treasury, to enter into loan guarantees on such terms and conditions as he or she determines to be appropriate, in accordance with the provisions of section 1702. Section 1702 also directs the Secretary to include in loan guarantees ''such detailed terms and conditions as the Secretary determines appropriate to (i) protect the interests of the United States in the case of a default; and (ii) have available all the patents and technology necessary for any person selected, including the Secretary, to complete and operate the project.'' (42 U.S.C. 16512(g)(2)(c)).

On October 3, 2016, the Department published a proposed rule and request for comment on amendments to the regulations for the Title XVII loan guarantee program. (81 FR 67924) The proposed rule also provides additional background on DOE's experience in implementing the loan guarantee program and the history of its implementing regulations. In this final rule, DOE adopts the changes set forth in the proposed rule, except where DOE made changes in consideration of comments received on the proposal. In Section II of this final rule, DOE summarizes the comments received, and provides its responses to those comments and a discussion of the changes made to the proposal in this final rule.

In this final rule, DOE adopts the proposed rule changes that clarify the circumstances under which potential applicants may communicate with DOE prior to submitting an application. DOE expects that the changes will increase transparency and result in more applications by qualified applicants with respect to potential eligible projects.

The final rule eliminates the pre-application process and codifies procedures that divide the application into two parts.

The final rule revises the definition of Eligible Project to explicitly state that a project may be located at two or more locations in the United States if the project is comprised of installations or facilities employing a single New or Significantly Improved Technology that is deployed pursuant to an integrated and comprehensive business plan.

The final rule provides for the use of Risk-Based Charges. Use of Risk-Based Charges is permitted pursuant to the grant of authority to the Secretary in Section 1702(a) to determine the terms and conditions of the Title XVII loan guarantee program.

The final rule increases clarity and transparency. For example: Definitions have been clarified, shortened where possible, and added; specific references to the Cargo Preference Act and the Davis Bacon Act have been added; an introductory section on how the rule is to be interpreted has been added; and various provisions of the existing rule have been re-organized to more-appropriate places in the rule.

DOE received comments on the proposed rule, which are summarized in Section II of this final rule. DOE also provides its responses and explains any changes to the proposal made in response to the comments received. (For additional background on DOE's experience in implementing the loan guarantee program and the history of its implementing regulations, please see the proposed rule.)

II. Public Comments on the NOPR and DOE's Responses

A. Competition With Potential Future Applications

Public comment: One commenter requests clarification and revision of the proposed changes in § 609.5(a) to the competitive process for evaluating completed Applications, which would require completed Applications to be evaluated against potential projects that may become the subject of an Application. The commenter is concerned that the proposed changed will delay the Application process and put otherwise qualified projects in ''limbo'' while the DOE awaits the filing of Applications that may be filed on other projects. In the commenter's view, this may result in a longer and more opaque process, because fewer projects would be able to withstand the additional timing delays, as well as in greater market uncertainty about the DOE loan guarantee program.

DOE Response: DOE notes that applications are reviewed against all other applications filed within the same round. For that reason DOE does not believe the proposed change would delay the application process or put otherwise qualified projects in ''limbo.'' Nevertheless, DOE agrees that the proposed change could cause a more opaque process and market uncertainty regarding, among other matters, whether a project will be competed against potential projects that may become the subject of an application. The proposal to consider potential future Applications is inconsistent with competing filed Applications against all other Applications filed within the same round. For those reasons DOE has decided to withdraw the proposed change to the competitive process which would allow consideration of potential projects during the competition.

B. Risk-Based Charge

Public comments: Both commenters requested clarification regarding the ''Risk-based-charge'' which they believe is duplicative of other existing fees. The commenters urge DOE not to impose this additional fee on recipients of DOE's Title XVII loan guarantees.

One commenter also pointed out that the Title XVII loan guarantee program currently charges two fees to compensate DOE for the credit risk it assumes. First, the program charges a ''Credit-Based Interest Rate Spread'' based on the credit rating of the Applicant's project. Second, the program charges a ''Credit Subsidy Fee'' to directly compensate the United States for the specific credit risk of the applicant's project. The commenter requested clarification that the reference to a ''Risk-based charge'' means the ''Credit Based Interest Rate Spread'', and that the program is not intending to impose a new fee and increase the interest rate spreads beyond the current spreads.

DOE Response: Section 1702(e) of Title XVII requires the Secretary to establish interest rates that do not exceed a level that the Secretary determines appropriate, taking into account the prevailing rate of interest in the private sector for similar loans and risks. In the proposed rule, DOE proposed a ''Risk-Based Charge'' that, taking into account all interest and interest-related costs, is intended to make DOE's charges and costs consistent with the commercial markets and other federal credit programs. Thus, the Risk-Based Charge will be used only to the extent the aggregate of other interest-related charges do not sufficiently reflect creditworthiness or specific risks arising from individual transactions. The Risk-Based Charge, while distinct from the fee for the Credit Subsidy Cost, may incidentally affect that fee by increasing expected inflows to the United States that are considered in calculating the amount of the fee. In that respect, taking into account the time value of money, the Risk-Based Charge can be viewed as affecting the time of payment rather than the amount of payment based on the creditworthiness of the borrower and the expectations regarding probability of repayment. After factoring in the Risk-Based Charge, DOE does not expect the present value of the interest amounts expected to be paid by the borrower as the cost of the loan should be significantly different than the interest amounts that would be paid without the Risk-Based Charge.

C. Section 609.8(c)(2) and Section 609.8(c)(3)

Public comment: One commenter requested clarification of what it views as an apparent inconsistency between §§ 609.8(c)(2) and 609.8(c)(3) of the proposed rule. The commenter stated that § 609.8(c)(2) appears to require that the guaranteed and nonguaranteed portions of a loan partially guaranteed by DOE be repaid pro rata, and on the same amortization schedule. Section 609.8(c)(3) appears to the commenter to provide for exceptions to this requirement under certain conditions.

The commenter also requested that DOE modify § 609.8 to allow for commercial co-lenders to provide structured loan facilities that would have the same amortization schedule as the guaranteed portion of the facility but with a shorter loan tenor and a related refinancing requirement at maturity of the structured loan facility.

DOE Response: DOE does not view §§ 609.8(c)(2) and 609.8(c)(3) as inconsistent. Section 609.8(c)(2) deals with the guaranteed and nonguaranteed portions of loans partially guaranteed by DOE. Section 609.8(c)(3) deals with financing or credit arrangements not guaranteed by DOE.

The commenter's request for a shorter loan tenor in connection with certain commercial loan products is similar to a comment DOE received in response to a proposed rule to amend the Title XVII regulations published in 2009. (74 FR 39569, Aug. 7, 2009) In the final rule, published on December 4, 2009, DOE made adjustments, retained by the proposed rulemaking and subject to the same conditions set forth in the current rule, to permit shorter or faster amortization schedules for project-related financing or other credit arrangements not guaranteed by DOE. See 74 FR 63544, 63546, Section II.C. Shorter Amortization of Non-Guaranteed Obligations. DOE has reviewed the issue in response to the comment and has determined that the provisions established in the 2009 rule address the concern while at the same time protecting the interests of the United States. For that reason, DOE has determined that no change in the existing language of the final rule is warranted.

Other Changes: While reviewing the proposed rule in response to public comments, DOE found certain areas in the proposed rule that should be modified consistent with DOE's intent to increase transparency and clarity. On further consideration, DOE determined that its treatment of the prohibition in Section 149(b) of the Internal Revenue Code in § 609.8(c)(4) created ambiguity and made application of the provision more complicated. Therefore, DOE eliminated the changes in the proposed rule and restored the language of the existing rule to tie the rule to the requirements of law as they related to tax-exempt debt obligation financing. Finally, DOE clarified a provision relating to communications with applicants by deleting a sentence that was unclear and not required by law.

III. Regulatory Review

A. Executive Order 12866

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

B. National Environmental Policy Act

DOE has determined that this final rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.5 of appendix A to subpart D, 10 CFR part 1021, which applies to rulemaking that amends an existing rule or regulation which does not change the environmental effect of the rule or regulation being amended.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if

promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's Web site: *http://www.energy.gov/gc/downloads/executive-order-13272-consideration-small-entities-agency-rulemaking.*

DOE is not obligated to prepare a regulatory flexibility analysis for this rulemaking because there is not a requirement to publish a general notice of proposed rulemaking for rules related to loans under the Administrative Procedure Act (5 U.S.C. 553(a)(2)).

D. Paperwork Reduction Act

Information collection requirements for the DOE regulations at 10 CFR part 609 have been submitted for approval to OMB pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and the procedure implementing that Act (5 CFR 1320.1 *et seq.*) under OMB Control Number 1910–5134. The revised recordkeeping and reporting requirements associated with this rulemaking are not mandatory until the information collection is approved by OMB.

Public reporting burden for the revised requirements in this final rule is estimated to average 130 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses are expected to be collected electronically.

Notwithstanding any other provision of law, a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Act) (Pub. L. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. The term ''Federal mandate'' is defined in the Act to mean a Federal intergovernmental mandate or a Federal private sector mandate. Although the final rule would impose certain requirements on non-Federal governmental and private sector applicants for loan guarantees, the Act's definitions of the terms ''Federal intergovernmental mandate'' and ''Federal private sector mandate'' exclude among other things, any provision in legislation, statute, or regulation that is a condition of Federal assistance or a duty arising from participation in a voluntary program. The final rule would establish requirements that persons voluntarily seeking loan guarantees for projects that would use certain new and improved energy technologies must satisfy as a condition of a Federal loan guarantee. Thus, the final rule falls under the exceptions in the definitions of ''Federal intergovernmental mandate'' and ''Federal private sector mandate'' for requirements that are a condition of Federal assistance or a duty arising from participation in a voluntary program. The Act does not apply to this rulemaking.

F. Treasury and General Government Appropriations Act, 1999

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

G. Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this final rule and has determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

H. Executive Order 12988

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

I. Treasury and General Government Appropriations Act, 2001

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

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

J. Executive Order 13211

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

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

K. Executive Order 12630

The Department has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), that this rule would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

IV. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 609

Administrative practice and procedure, Energy, Loan programs, and Reporting and recordkeeping requirements.

Issued in Washington, DC, on December 6, 2016.

Mark A. McCall,

Executive Director, Loan Programs Office.

For the reasons stated in the preamble, DOE revises part 609 of chapter II of title 10 of the Code of Federal Regulations as set forth below:

PART 609—LOAN GUARANTEES FOR PROJECTS THAT EMPLOY INNOVATIVE TECHNOLOGIES

Sec.

Authority: 42 U.S.C. 7254, 16511–16514.

§ 609.1 Purpose and scope.

(a) This part sets forth the policies and procedures that DOE uses for receiving, evaluating, and approving applications for loan guarantees to support Eligible Projects under section 1703 of the Energy Policy Act of 2005 (Act).

(b) This part applies to all Applications, Conditional Commitments, and Loan Guarantee Agreements.

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

§ 609.2 Definitions and interpretation.

(a) *Definitions.* When used in this part the following words have the following meanings.

Act means Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16514), as amended.

Administrative Cost of Issuing a Loan Guarantee means the total of all administrative expenses that DOE incurs during:

(1) The evaluation of an Application for a loan guarantee;

(2) The negotiation and offer of a Term Sheet;

(3) The negotiation of a Loan Guarantee Agreement and related documents, including the issuance of a Guarantee; and

(4) The servicing and monitoring of a Loan Guarantee Agreement, including during the construction, startup, commissioning, shakedown, and operational phases of an Eligible Project.

Applicant means a Person, including a prospective Borrower or Project Sponsor, that submits an Application to DOE.

Application means a written submission of materials responsive to a Solicitation that satisfies § 609.4.

Application Fee means the fee or fees required to be paid by an Applicant in connection with submission of an Application and specified in a Solicitation. The Application Fee does not include the Credit Subsidy Cost.

Attorney General means the Attorney General of the United States.

Borrower means any Person that enters into a Loan Guarantee Agreement with DOE and issues Guaranteed Obligations.

Cargo Preference Act means the Cargo Preference Act of 1954, 46 U.S.C. 55305, as amended.

Commercial Technology means a technology in general use in the commercial marketplace in the United States at the time the Term Sheet is offered by DOE. A technology is in general use if it is being used in three or more facilities that are in commercial operation in the United States for the same general purpose as the proposed project, and has been used in each such facility for a period of at least five years. The five-year period for each facility shall start on the in-service date of the facility employing that particular technology or, in the case of a retrofit of a facility to employ a particular technology, the date the facility resumes commercial operation following completion and testing of the retrofit. For purposes of this section, facilities that are in commercial operation include projects that have been the recipients of a loan guarantee from DOE under this part.

Conditional Commitment means a Term Sheet offered by DOE and accepted by the offeree of the Term Sheet, all in accordance with § 609.6(c); provided, that the Secretary may terminate a Conditional Commitment for any reason at any time prior to the execution of the Loan Guarantee Agreement; and provided, further, that the Secretary may not delegate this authority to terminate a Conditional Commitment.

Contracting Officer means the Secretary of Energy or a DOE official authorized by the Secretary to enter into, administer or terminate DOE Loan Guarantee Agreements and related contracts on behalf of DOE.

Credit Subsidy Cost has the same meaning as ''cost of a loan guarantee'' in section 502(5)(C) of the Federal Credit Reform Act of 1990, which is the net present value, at the time the

Loan Guarantee Agreement is executed, of the following estimated cash flows, discounted to the point of disbursement:

(1) Payments by the Government to cover defaults and delinquencies, interest subsidies, or other payments; less

(2) Payments to the Government including origination and other fees, penalties, and recoveries; including the effects of changes in loan or debt terms resulting from the exercise by the Borrower, Eligible Lender or other Holder of an option included in the Loan Guarantee Agreement.

Davis-Bacon Act means the statute referenced in section 1702(k) of the Act.

DOE means the United States Department of Energy.

Eligible Lender means either:

(1) Any Person formed for the purpose of, or engaged in the business of, lending money that, as determined by DOE in each case, is:

(i) Not debarred or suspended from participation in a Federal government contract or participation in a non-procurement activity (under a set of uniform regulations implemented for numerous agencies, such as DOE, at 2 CFR part 180);

(ii) Not delinquent on any Federal debt or loan;

(iii) Legally authorized and empowered to enter into loan guarantee transactions authorized by the Act and these regulations;

(iv) Able to demonstrate experience in originating and servicing loans for commercial projects similar in size and scope to the Eligible Project, or able to procure such experience through contracts acceptable to DOE; and

(v) Able to demonstrate experience as the lead lender or underwriter by presenting evidence of its participation in large commercial projects or energy-related projects or other relevant experience, or able to procure such experience through contracts acceptable to DOE; or

(2) The Federal Financing Bank.

Eligible Project means a project that:

(1) Is located in the United States at one location, except that the project may be located at two or more locations in the United States if the project is comprised of installations or facilities employing a single New or Significantly Improved Technology that is deployed pursuant to an integrated and comprehensive business plan. An Eligible Project in more than one location is a single Eligible Project;

(2) Deploys a New or Significantly Improved Technology; and

(3) Satisfies all applicable requirements of section 1703 of the Act, the applicable Solicitation, and this part.

Equity means cash contributed to the permanent capital stock (or equivalent) of the Borrower or the Eligible Project by the shareholders or other owners of the Borrower or the Eligible Project. Equity does not include proceeds from the non-guaranteed portion of a Guaranteed Obligation, proceeds from any other non-guaranteed loan or obligation, or the value of any government assistance or support.

Facility Fee means the fee, to be paid in the amount and in the manner provided in the Term Sheet, to cover the Administrative Cost of Issuing a Loan Guarantee for the period from the Borrower's acceptance of the Term Sheet through issuance of the Guarantee.

Federal Financing Bank means an instrumentality of the United States government created by the Federal Financing Bank Act of 1973, under the general supervision of the Secretary of the Treasury.

Guarantee means the undertaking of the United States of America, acting through the Secretary pursuant to Title XVII of the Energy Policy Act of 2005, to pay in accordance with the terms thereof, principal and interest of a Guaranteed Obligation.

Guaranteed Obligation means any loan or other debt obligation of the Borrower for an Eligible Project for which DOE guarantees all or any part of the payment of principal and interest under a Loan Guarantee Agreement entered into pursuant to the Act.

Holder means any Person that holds a promissory note made by the Borrower evidencing the Guaranteed Obligation (or his designee or agent).

Intercreditor Agreement means any agreement or instrument (or amendment or modification thereof) among DOE and one or more other Persons providing financing or other credit arrangements to the Borrower or an Eligible Project) or that otherwise provides for rights of DOE in respect of a Borrower or in respect of an Eligible Project, in each case in form and substance satisfactory to DOE.

Loan Agreement means a written agreement between a Borrower and an Eligible Lender containing the terms and conditions under which the Eligible Lender will make a loan or loans to the Borrower for an Eligible Project.

Loan Guarantee Agreement means a written agreement that, when entered into by DOE and a Borrower, and, if applicable, an Eligible Lender, establishes the obligation of DOE to guarantee the payment of all or a portion of the principal of, and interest on, specified Guaranteed Obligations, subject to the terms and conditions specified in the Loan Guarantee Agreement.

New or Significantly Improved Technology means a technology, or a defined suite of technologies, concerned with the production, consumption, or transportation of energy and that is not a Commercial Technology, and that has either:

(1) Only recently been developed, discovered, or learned; or

(2) Involves or constitutes one or more meaningful and important improvements in productivity or value, in comparison to Commercial Technologies in use in the United States at the time the Term Sheet is issued.

OMB means the Office of Management and Budget in the Executive Office of the President.

Person means any natural person or any legally constituted entity, including a state or local government, tribe, corporation, company, voluntary association, partnership, limited liability company, joint venture, and trust.

Project Costs mean those costs, including escalation and contingencies, that are to be expended or accrued by a Borrower and are necessary, reasonable, customary and directly related to the design, engineering, financing, construction, startup, commissioning and shakedown of an Eligible Project, as specified in § 609.10(a). Project Costs do not include costs for the items set forth in § 609.10(b).

Project Sponsor means any Person that assumes substantial responsibility for the development, financing, and structuring of an Eligible Project and, if not the Applicant, owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the proposed Eligible Project, the Borrower or the Applicant.

Risk-Based Charge means a charge that, together with the principal and interest on the guaranteed loan, or at such other times as DOE may determine, is payable on specified dates during the term of a Guaranteed Obligation.

Secretary means the Secretary of Energy or a duly authorized designee or successor in interest.

Solicitation means an announcement that DOE is accepting Applications that is widely disseminated to the public on the DOE Web site or otherwise, and which satisfies the requirements of § 609.3(b).

Term Sheet means a written offer for the issuance of a loan guarantee, executed by the Secretary (or a DOE official authorized by the Secretary to execute such offer), delivered to the offeree, that sets forth the detailed terms and conditions under which DOE and the Applicant will execute a Loan Guarantee Agreement.

United States means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa and any territory or possession of the United States of America.

(b) *Interpretations.* This part shall be interpreted using the following guidelines.

(1) The word ''discretion'' when used with reference to DOE, including the Secretary, means ''sole discretion.''

(2) Defined terms in the singular shall include the plural and vice versa, and the masculine, feminine or neuter gender shall include all genders.

(3) The word ''or'' is not exclusive.

(4) References to laws by name or popular name are references to the version of such law appearing in the United States Code and include any amendment, supplement or modification of such law, and all regulations, rulings, and other laws promulgated thereunder.

(5) References to information or documents required or allowed to be submitted to DOE mean information or documents that are marked as provided in 10 CFR 600.15(b). A document or information that is not marked as provided in 10 CFR 600.15(b) will not be considered as having been submitted to or received by DOE.

(6) A reference to a Person includes such Person's successors and permitted assigns.

(7) The words ''include,'' ''includes'' and ''including'' are not limiting and mean include, includes and including ''without limitation'' and ''without limitation by specification.''

(8) The words ''hereof,'' ''herein'' and ''hereunder'' and words of similar import refer this part as a whole and not to any particular provision of this part.

§ 609.3 Solicitations.

(a) DOE may invite the submission of Applications for loan guarantees for Eligible Projects pursuant to a Solicitation.

(b) Each Solicitation must include, at a minimum, the following information:

(1) The dollar amount of loan guarantee authority potentially being made available by DOE in that Solicitation;

(2) The place and deadline for submission of Applications;

(3) The name and address of the DOE representative whom a potential Applicant may contact to receive further information and a copy of the Solicitation;

(4) The form, format, and page limits applicable to the Application;

(5) The amount of the Application Fee and any other fees that will be required;

(6) The programmatic, technical, financial and other factors that DOE will use to evaluate response submissions, and their relative weightings in that evaluation; and

(7) Such other information as DOE may deem appropriate.

(c) Using procedures as may be announced by DOE a potential Applicant may request a meeting with DOE to discuss its potential Application. At its discretion, DOE may meet with a potential Applicant, either in person or electronically, to discuss its potential Application. DOE may provide a potential Applicant with a preliminary response regarding whether its proposed Application may constitute an Eligible Project. DOE's responses to questions from potential Applicants and DOE's statements to potential Applicants are pre-decisional and preliminary in nature. Any such responses and statements are subject in their entirety to any final action by DOE with respect to an Application submitted in accordance with § 609.4.

§ 609.4 Submission of applications.

(a) In response to a Solicitation, an Applicant must meet all requirements and provide all information specified in this part and the Solicitation in the manner and on or before the date specified therein. DOE may direct that Applications be submitted in more than one part; provided, that the parts of such Application, taken as a whole, satisfy the requirements of § 609.4(c) and this part. In such event, subsequent parts of an Application may be filed only after DOE invites an Applicant to make an additional submission. The initial part of an Application may be used by DOE to determine the likelihood that the project proposed by an Applicant will be an Eligible Project, and to evaluate such project's readiness to proceed. If there have been any material amendments, modifications or additions made to the information previously submitted by an Applicant, the Applicant shall provide a detailed description thereof, including any changes in the proposed project's financing structure or other terms, promptly upon request by DOE. Where DOE has directed that an Application be submitted in parts, DOE may provide for payment of the Application Fee in parts.

(b) An Applicant may submit only one Application for one proposed project using a particular technology. An Applicant may not submit an Application or Applications for multiple Eligible Projects using the same technology. An Applicant may submit Applications for multiple proposed projects using different technologies. For purposes of this paragraph (b), the term Applicant shall include the Project Sponsor and any subsidiaries or affiliates of the Project Sponsor.

(c) An Application must include, at a minimum, the following information and materials:

(1) A completed Application form signed by an individual with full authority to bind the Applicant, including the commitments and representations made in each part of the Application;

(2) The applicable Application Fee;

(3) A description of how and to what measurable extent the proposed project avoids, reduces, or sequesters air pollutants and/or anthropogenic emissions of greenhouse gases, including how to measure and verify those effects;

(4) A description of the nature and scope of the proposed project, including:

(i) Key project milestones;

(ii) Location or locations of the proposed project;

(iii) Identification and commercial feasibility of the New or Significantly Improved Technology to be deployed;

(iv) How the Applicant intends to deploy such New or Significantly Improved Technology in the proposed project; and

(v) How the Applicant intends to assure, to the extent possible, the further commercial availability of the New or Significantly Improved Technology in the United States.

(5) An explanation of how the proposed project qualifies as a project within the category or categories of projects referred to in the Solicitation;

(6) A detailed estimate of the total Project Costs together with a description of the methodology and assumptions used;

(7) A detailed description of the engineering and design contractor(s), construction contractor(s), and equipment supplier(s);

(8) The construction schedules for the proposed project, including major activity and cost milestones;

(9) A description of the material terms and conditions of the development and construction contracts to include the performance guarantees, performance bonds, liquidated damages provisions, and equipment warranties;

(10) A detailed description of the operations and maintenance provider(s), the plant operating plan, estimated staffing requirements, parts inventory, major maintenance schedule, estimated annual downtime, and performance guarantees and related liquidated damage provisions, if any;

(11) A description of the management plan of operations to be employed in carrying out the proposed project, and information concerning the management experience of each officer or key person associated with the proposed project;

(12) A detailed description of the proposed project decommissioning, deconstruction, and disposal plan, and the anticipated costs associated therewith;

(13) An analysis of the market for any product (including but not limited to electricity and chemicals) to be produced by, or services to be provided by, the proposed project, including relevant economics justifying the analysis, and copies of

(i) Any contracts for the sale of such products or the provision of such services, or

(ii) Any other assurance of the revenues to be generated from sale of such products or provision of such services;

(14) A detailed description of the overall financial plan for the proposed project, including all sources and uses of funding, equity and debt, and the liability of parties associated with the proposed project over the term of the Loan Guarantee Agreement;

(15) A copy of all material agreements, whether entered into or proposed, relevant to the investment, design, engineering, financing, construction, startup commissioning, shakedown, operations and maintenance of the proposed project;

(16) A copy of the financial closing checklist for the equity and debt to the extent available;

(17) The Applicant's business plan on which the proposed project is based and Applicant's financial model with respect to the proposed project for the proposed term of the Guaranteed Obligations, including, as applicable, *pro forma* income statements, balance sheets, and cash flows. All such information and data must include assumptions made in their preparation and the range of revenue, operating cost, and credit assumptions considered;

(18) Financial statements for the three immediately preceding fiscal years of the Applicant (or such shorter period as the Applicant has been in existence) that have been audited by an independent certified public accounting firm, including all associated certifications, notes and letters to management, as well as interim financial statements and notes for the current fiscal year for the Applicant and all other Persons the credit of which is material to the success of the transactions described in the Application;

(19) A copy of all legal opinions, and other material reports, analyses, and reviews related to the proposed project that have been delivered prior to submission of any part of the Application;

(20) An independent engineering report prepared by an engineer with experience in the industry and familiarity with similar projects. The report should address the proposed project's siting and permitting arrangements, engineering and design, contractual requirements, environmental compliance, testing, commissioning and operations, and maintenance;

(21) A credit history of the Applicant and each Project Sponsor;

(22) A preliminary credit assessment for the proposed project without a loan guarantee from a nationally recognized rating agency for projects where the estimated total Project Costs exceed $25 million. For proposed projects where the total estimated Project Costs are $25 million or less and where conditions justify, in the sole discretion of the Secretary, DOE may require such an assessment;

(23) A list showing the status of and estimated completion date of Applicant's required applications for federal, state, and local permits, authorizations or approvals to site, construct, and operate the proposed project;

(24) A report containing an analysis of the potential environmental impacts of the proposed project that will enable DOE to—

(i) Assess whether the proposed project will comply with all applicable environmental requirements; and

(ii) Undertake and complete any necessary reviews under the National Environmental Policy Act of 1969;

(25) A listing and description of the assets of or to be utilized for the benefit of the proposed project, and of any other asset that will serve as collateral pledged in respect of the Guaranteed Obligations, including appropriate data as to the value of such assets and the useful life of any physical assets. With respect to real property assets listed, an appraisal that is consistent with the ''Uniform Standards of Professional Appraisal Practice,'' promulgated by the Appraisal Standards Board of the Appraisal Foundation, and performed by licensed or certified appraisers, is required;

(26) An analysis demonstrating that, at the time of the Application, there is a reasonable prospect that Borrower will be able to repay the Guaranteed Obligations (including interest) according to their terms, and a complete description of the operational and financial assumptions and methodologies on which this demonstration is based; and

(27) If proposed project assets or facilities are or will be jointly owned by the Applicant and one or more other Persons, each of which owns an undivided ownership interest in such proposed project assets or facilities, a description of the Applicant's rights and obligations in respect of its undivided ownership interest in such proposed project assets or facilities.

(d) During the Application evaluation process pursuant to § 609.5, DOE may request additional information, potentially including a preliminary credit rating or credit assessment, with respect to the proposed project.

(e) DOE will not consider any part of any Application or the Application as a whole complete unless the Application Fee (or the required portion of the Application Fee related to a particular part of the Application) has been paid. An Application Fee paid in connection with one Application is not transferable to another Application. Except in the discretion of DOE, no portion of the Application Fee is refundable;

(f) DOE has no obligation to evaluate an Application that is not complete, and may proceed with such evaluation, or a partial evaluation, only in its discretion.

(g) Unless an Applicant requests an extension and such an extension is granted by DOE in its discretion, an Application may be rejected if it is not complete within four years from the date of submission (or date of submission of the first part thereof, in the case of Applications made in more than one part).

(h) Upon making a determination to engage independent consultants or outside counsel with respect to an Application, DOE will proceed to evaluate and process such Application only following execution by an Applicant or Project Sponsor, as appropriate, of an agreement satisfactory

to DOE to pay the fees and expenses charged by the independent consultants and outside legal counsel.

§ 609.5 Programmatic, technical and financial evaluation of applications.

(a) In reviewing completed Applications, and in prioritizing and selecting those as to which a Term Sheet should be offered, DOE will apply the criteria set forth in the Act, any applicable Solicitation, and this part. Applications will be considered in a competitive process, *i.e.* each Application will be evaluated against other Applications responsive to the Solicitation. Applications will be denied if:

(1) The proposed project is not an Eligible Project;

(2) The applicable technology is not ready to be deployed commercially in the United States, cannot yield a commercially viable product or service in the use proposed in the Application, does not have the potential to be deployed in other commercial projects in the United States, or is not or will not be available for further commercial use in the United States;

(3) The Person proposed to issue the loan or purchase other debt obligations constituting the Guaranteed Obligations is not an Eligible Lender;

(4) The proposed project is for demonstration, research, or development;

(5) Significant Equity for the proposed project will not be provided by the date of issuance of the Guaranteed Obligations, or such later time as DOE in its discretion may determine; or

(6) The proposed project does not present a reasonable prospect of repayment of the Guaranteed Obligations.

(b) If an Application has not been denied pursuant to § 609.5(a), DOE will evaluate the proposed Project based on the criteria set forth in the Act, any applicable Solicitation and the following:

(1) To what measurable extent the proposed project avoids, reduces, or sequesters air pollutants or anthropogenic emissions of greenhouses gases, or contributes to the avoidance, reduction or sequestration of air pollutants or anthropogenic emissions of greenhouse gases;

(2) To what extent the technology to be deployed in the proposed project—

(i) Is ready to be deployed commercially in the United States, can be replicated, yields a commercially viable product or service in the use proposed in the proposed project, has potential to be deployed in other commercial projects in the United States, and is or will be available for further commercial use in the United States; and

(ii) Constitutes an important improvement in technology, as compared to available Commercial Technologies, used to avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases;

(3) To what extent the Applicant has a plan to advance or assist in the advancement of that technology into the commercial marketplace in the United States;

(4) The extent to which the level of proposed support in the Application is consistent with a reasonable prospect of repayment of the Guaranteed Obligations by considering, among other factors:

(i) The extent to which the requested amount of the loan guarantee, the requested amount of Guaranteed Obligations and, if applicable, the expected amount of any other financing or credit arrangements, are reasonable relative to the nature and scope of the proposed project;

(ii) The total amount and nature of the Project Costs and the extent to which Project Costs are to be funded by Guaranteed Obligations; and

(iii) The feasibility of the proposed project and likelihood that it will produce sufficient revenues to service its debt obligations over the life of the loan guarantee and assure timely repayment of Guaranteed Obligations;

(5) The likelihood that the proposed project will be ready for full commercial operations in the time frame stated in the Application;

(6) The amount of Equity committed and to be committed to the proposed project by the Borrower, the Project Sponsor, and other Persons;

(7) Whether there is sufficient evidence that the Borrower will diligently implement the proposed project, including initiating and completing the proposed project in a timely manner;

(8) Whether and to what extent the Applicant will rely upon other Federal and non-Federal Government assistance such as grants, tax credits, or other loan guarantees to support the financing, construction, and operation of the proposed project and how such assistance will impact the proposed project;

(9) The levels of safeguards provided to the Federal Government in the event of default through collateral, warranties, and other assurance of repayment described in the Application, including the nature of any anticipated intercreditor arrangements;

(10) The Applicant's, or the relevant contractor's, capacity and expertise to operate the proposed project successfully, based on factors such as financial soundness, management organization, and the nature and extent of corporate and individual experience;

(11) The ability of the proposed Borrower to ensure that the proposed project will comply with all applicable laws and regulations, including all applicable environmental statutes and regulations;

(12) The levels of market, regulatory, legal, financial, technological, and other risks associated with the proposed project and their appropriateness for a loan guarantee provided by DOE;

(13) Whether the Application contains sufficient information, including a detailed description of the nature and scope of the proposed project and the nature, scope, and risk coverage of the loan guarantee sought to enable DOE to perform a thorough assessment of the proposed project; and

(14) Such other criteria that DOE deems relevant in evaluating the merits of an Application.

(c) After DOE completes its review and evaluation of a proposed project pursuant to § 609.5(b) and this part, DOE will notify the Applicant in writing of its determination whether to proceed with due diligence and negotiation of a Term Sheet in accordance with § 609.6. DOE will proceed only if it determines that the proposed project is highly qualified and suitable for a Guarantee. Upon written confirmation from the Applicant that it desires to proceed, DOE and the Applicant will commence negotiations.

(d) A determination by DOE not to proceed with a proposed project following evaluation pursuant to § 609.5(b) shall be final and non-appealable, but shall not prejudice the Applicant or other affected Persons from applying for a Guarantee in respect of a different proposed project pursuant to another, separate Application.

§ 609.6 Term sheets and conditional commitments.

(a) DOE, after negotiation of a Term Sheet with an Applicant, may offer such Term Sheet to an Applicant or such other Person that is an affiliate of the Applicant and that is acceptable to DOE. DOE's offer of a Term Sheet shall be in writing and signed by the Contracting Officer. DOE's negotiation of a Term Sheet imposes no obligation on the Secretary to offer a Term Sheet to the Applicant.

(b) DOE shall terminate its negotiations of a Term Sheet if it has not offered a Term Sheet in respect of an

Eligible Project within four years after the date of the written notification set forth in § 609.5(c), unless extended in writing in the discretion of the Contracting Officer.

(c) If and when the offeree specified in a Term Sheet satisfies all terms and conditions for acceptance of the Term Sheet, including written acceptance thereof and payment of all fees specified in § 609.11(f) and therein to be paid at or prior to acceptance of the Term Sheet, the Term Sheet shall become a Conditional Commitment. Each Conditional Commitment shall include an expiration date no more than two years from the date it is issued, unless extended in writing in the discretion of the Contracting Officer. When and if all of the terms and conditions specified in the Conditional Commitment have been met, DOE and the Applicant may enter into a Loan Guarantee Agreement.

(d) If, subsequent to execution of a Conditional Commitment, the financing arrangements of the Borrower, or in respect of an Eligible Project, change from those described in the Conditional Commitment, the Applicant shall promptly provide updated financing information in writing to DOE. All such updated information shall be deemed to be information submitted in connection with an Application and shall be subject to § 609.4(b). Based on such updated information, DOE may take one or more of the following actions:

(1) Determine that such changes are not material to the Borrower, the Eligible Project or DOE;

(2) Amend the Conditional Commitment accordingly;

(3) Postpone the expected closing date of the associated Loan Guarantee Agreement; or

(4) Terminate the Conditional Commitment.

§ 609.7 Closing on the loan guarantee agreement.

(a) Subsequent to entering into a Conditional Commitment with an Applicant, DOE, after consultation with the Applicant, will set a closing date for execution of a Loan Guarantee Agreement.

(b) Prior to or on the closing date of a Loan Guarantee Agreement, DOE will ensure that:

(1) One of the following has occurred:

(i) An appropriation for the Credit Subsidy Cost has been made;

(ii) The Secretary has received from the Borrower payment in full for the Credit Subsidy Cost and deposited the payment into the Treasury; or

(iii) A combination of one or more appropriations under paragraph (b)(1)(i) of this section and one or more payments from the Borrower under paragraph (b)(1)(ii) of this section has been made that is equal to the Credit Subsidy Cost;

(2) Pursuant to section 1702(h) of the Act, DOE has received from the Applicant the remainder of the Facility Fee referred to in § 609.11(b);

(3) OMB has reviewed and approved DOE's calculation of the Credit Subsidy Cost of the Guarantee;

(4) The Department of the Treasury has been consulted as to the terms and conditions of the Loan Guarantee Agreement;

(5) The Loan Guarantee Agreement and related documents contain all terms and conditions DOE deems reasonable and necessary to protect the interest of the United States;

(6) Each holder of the Guaranteed Obligations is an Eligible Lender, and the servicer of the Guaranteed Obligations meets the servicing performance requirements of § 609.9(b);

(7) DOE has determined the principal amount of the Guaranteed Obligations expected to be issued in respect of the Eligible Project, as estimated at the time of issuance, will not exceed 80 percent of the Project Costs of the Eligible Project;

(8) All conditions precedent specified in the Conditional Commitment are either satisfied or waived by the Contracting Officer and all other applicable contractual, statutory, and regulatory requirements have been satisfied or waived by the Contracting Officer. If the counterparty to the Conditional Commitment has not satisfied all such terms and conditions on or prior to the closing date of the Loan Guarantee Agreement, the Secretary may, in his discretion, set a new closing date, or terminate the Conditional Commitment; and

(9) Where the total Project Costs for an Eligible Project are projected to exceed $25 million, the Applicant must provide a credit rating from a nationally recognized rating agency reflecting the revised Conditional Commitment for the project without a Federal guarantee. Where total Project Costs are projected to be $25 million or less, the Secretary may, on a case-by-case basis, require a credit rating. If a credit rating is required, an updated rating must be provided to the Secretary not later than 30 days prior to closing.

§ 609.8 Loan guarantee agreement.

(a) Only a Loan Guarantee Agreement executed by the Contracting Officer can obligate DOE to issue a Guarantee in respect of Guaranteed Obligations.

(b) DOE is not bound by oral representations.

(c) Each Loan Guarantee Agreement shall contain the following requirements and conditions, and shall not be executed until the Contracting Officer determines that the following requirements and conditions are satisfied:

(1) The Federal Financing Bank shall be the only Eligible Lender in transactions where DOE guarantees 100 percent (but not less than 100 percent) of the principal and interest of the Guaranteed Obligations issued under a Loan Guarantee Agreement.

(i) Where DOE guarantees more than 90 percent of the Guaranteed Obligation, the guaranteed portion cannot be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation if the loan is participated, syndicated or otherwise resold in the secondary market; and

(ii) Where DOE guarantees 90 percent or less of the Guaranteed Obligation, the guaranteed portion may be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation, if the loan is participated, syndicated or otherwise resold in the secondary debt market;

(2) The Borrower shall be obligated to make full repayment of the principal and interest on the Guaranteed Obligations and other debt of a Borrower over a period of up to the lesser of 30 years or 90 percent of the projected useful life of the Eligible Project's major physical assets, as calculated in accordance with U.S. generally accepted accounting principles and practices. The non-guaranteed portion (if any) of any Guaranteed Obligations must be repaid *pro rata,* and on the same amortization schedule, with the guaranteed portion.

(3) If any financing or credit arrangement of the Borrower or relating to the Eligible Project, other than the Guaranteed Obligations, has an amortization period shorter than that of the Guaranteed Obligations, DOE shall have determined that the resulting financing structure allocates to DOE a reasonably proportionate share of the default risk, in light of:

(i) DOE's share of the total debt financing of the Borrower,

(ii) Risk allocation among the credit providers to the Borrower, and

(iii) Internal and external credit enhancements.

(4) The loan guarantee does not finance, either directly or indirectly tax-exempt debt obligations, consistent with the requirements of section 149(b) of the Internal Revenue Code;

(5) The principal amount of the Guaranteed Obligations, when combined with funds from other sources

committed and available to the Borrower, shall be sufficient to pay for expected Project Costs (including adequate contingency amounts), the applicable items specified in § 609.10(b), and otherwise to carry out the Eligible Project;

(6) There shall be a reasonable prospect of repayment by the Borrower of the principal of and interest on the Guaranteed Obligations and all of its other debt obligations;

(7) The Borrower shall pledge collateral or surety determined by DOE to be necessary to secure the repayment of the Guaranteed Obligations. Such collateral or security may include Eligible Project assets and assets not related to the Eligible Project;

(8) The Loan Guarantee Agreement and related documents shall include detailed terms and conditions that DOE deems necessary and appropriate to protect the interests of the United States in the case of default, including ensuring availability of all relevant intellectual property rights, technical data including software, and technology necessary for DOE or any Person selected by DOE, to complete, operate, convey, and dispose of the defaulted Borrower or the Eligible Project;

(9) The Guaranteed Obligations shall not be subordinate to other financing. Guaranteed Obligations are not subordinate to other financing if the lien on property securing the Guaranteed Obligations, together with liens that are *pari passu* with such lien, if any, take priority or precedence over other charges or encumbrances upon the same property and must be satisfied before such other charges are entitled to participate in proceeds of the property's sale. In DOE's discretion, Guaranteed Obligations may share a lien position with other financing;

(10) There is satisfactory evidence that the Borrower will diligently pursue the Eligible Project and is willing, competent, and capable of performing its obligations under the Loan Guarantee Agreement and the loan documentation relating to its other debt obligations;

(11) The Borrower shall have paid all fees and expenses due to DOE or the U.S. Government, including such amount of the Credit Subsidy Cost as may be due and payable from the Borrower pursuant to the Conditional Commitment, upon execution of the Loan Guarantee Agreement;

(12) The Borrower, any Eligible Lender, and each other relevant party shall take, and be obligated to continue to take, those actions necessary to perfect and maintain liens on collateral in respect of the Guaranteed Obligations;

(13) DOE or its representatives shall have access to the offices of the Borrower and the Eligible Project site at all reasonable times in order to monitor the—

(i) Performance by the Borrower of its obligations under the Loan Guarantee Agreement; and

(ii) Performance of the Eligible Project;

(14) DOE and Borrower have reached an agreement regarding the information that will be made available to DOE and the information that will be made publicly available;

(15) The Borrower shall have filed applications for or obtained any required regulatory approvals for the Eligible Project and is in compliance, or promptly will be in compliance, where appropriate, with all Federal, state, and local regulatory requirements;

(16) The Borrower shall have no delinquent Federal debt;

(17) The Project Sponsors have made or will make a significant Equity investment in the Borrower or the Eligible Project, and will maintain control of the Borrower or the Eligible Project as agreed in the LGA; and

(18) The Loan Guarantee Agreement and related agreements shall include such other terms and conditions as DOE deems necessary or appropriate to protect the interests of the United States.

(d) The Loan Guarantee Agreement shall provide that, in the event of a default by the Borrower:

(1) Interest on the Guaranteed Obligations shall accrue at the rate stated in the Loan Guarantee Agreement or the Loan Agreement, until DOE makes full payment of the defaulted Guaranteed Obligations and, except when such Guaranteed Obligations are funded through the Federal Financing Bank, DOE shall not be required to pay any premium, default penalties, or prepayment penalties; and

(2) The holder of collateral pledged in respect of the Guaranteed Obligations shall be obligated to take such actions as DOE may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery.

(e)(1) An Eligible Lender or other Holder may sell, assign or transfer a Guaranteed Obligation to another Eligible Lender that meets the requirements of § 609.9. Such latter Eligible Lender shall be required to assume all servicing, monitoring and reporting requirements as provided in the Loan Guarantee Agreement. Any transfer of the servicing, monitoring, and reporting functions shall be subject to the prior written approval of DOE.

(2) The Secretary, or the Secretary's designee or contractual agent, for the purpose of identifying Holders with the right to receive payment under the Guaranteed Obligations, shall include in the Loan Guarantee Agreement or related documents a procedure for tracking and identifying Holders of Guaranteed Obligations. Any contractual agent approved by the Secretary to perform this function may transfer or assign this responsibility only with the Secretary's prior written approval.

(f) Each Loan Guarantee Agreement shall require the Borrower to make representations and warranties, agree to covenants, and satisfy conditions precedent to closing and to each disbursement that, in each case, relate to its compliance with the Davis-Bacon Act and the Cargo Preference Act.

(g) The Applicant, the Borrower or the Project Sponsor must estimate, calculate, record, and provide to DOE any time DOE requests such information and at the times provided in the Loan Guarantee Agreement all costs incurred in the design, engineering, financing, construction, startup, commissioning and shakedown of the Eligible Project in accordance with generally accepted accounting principles and practices.

§ 609.9 Lender servicing requirements.

(a) When reviewing and evaluating a proposed Eligible Project, all Eligible Lenders (other than the Federal Financing Bank) shall at all times exercise the level of care and diligence that a reasonable and prudent lender would exercise when reviewing, evaluating and disbursing a loan made by it without a Federal guarantee.

(b) Loan servicing duties shall be performed by an Eligible Lender, DOE, or another qualified loan servicer approved by DOE. When performing its servicing duties, the loan servicer shall at all times exercise the level of care and diligence that a reasonable and prudent lender would exercise when servicing a loan made without a Federal guarantee, including:

(1) During the construction period, monitoring the satisfaction of all of the conditions precedent to all loan disbursements, as provided in the Loan Guarantee Agreement, Loan Agreement or related documents;

(2) During the operational phase, monitoring and servicing the Guaranteed Obligations and collection of the outstanding principal and accrued interest as well as undertaking to ensure that the collateral package

securing the Guaranteed Obligations remains uncompromised; and

(3) Until the Guaranteed Obligation has been repaid, providing annual or more frequent financial and other reports on the status and condition of the Guaranteed Obligations and the Eligible Project, and promptly notifying DOE if it becomes aware of any problems or irregularities concerning the Eligible Project or the ability of the Borrower to make payment on the Guaranteed Obligations or its other debt obligations.

§ 609.10 Project costs.

(a) Project Costs include:

(1) Costs of acquisition, lease, or rental of real property, including engineering fees, surveys, title insurance, recording fees, and legal fees incurred in connection with land acquisition, lease or rental, site improvements, site restoration, access roads, and fencing;

(2) Costs of engineering, architectural, legal and bond fees, and insurance paid in connection with construction of the facility;

(3) Costs of equipment purchases, including a reasonable reserve of spare parts to the extent required;

(4) Costs to provide facilities and services related to safety and environmental protection;

(5) Costs of financial, legal, and other professional services, including services necessary to obtain required licenses and permits and to prepare environmental reports and data;

(6) Costs of issuing Eligible Project debt, such as fees, transaction, and costs referred to in § 609.10(a)(5), and other customary charges imposed by Eligible Lenders;

(7) Costs of necessary and appropriate insurance and bonds of all types including letters of credit and any collateral required therefor;

(8) Costs of design, engineering, startup, commissioning and shakedown;

(9) Costs of obtaining licenses to intellectual property necessary to design, construct, and operate the Eligible Project;

(10) To the extent required by the Loan Guarantee Agreement and not intended or available for any cost referred to in § 609.10(b), costs of funding any reserve fund, including without limitation, a debt service reserve, a maintenance reserve, and a contingency reserve for cost overruns during construction; provided that proceeds of a Guaranteed Loan deposited to any reserve fund shall not be removed from such fund except to pay Project Costs, to pay principal of the Guaranteed Loan, or otherwise to be used as provided in the Loan Guarantee Agreement;

(11) Capitalized interest necessary to meet market requirements and other carrying costs during construction; and

(12) Other necessary and reasonable costs.

(b) Project Costs do not include:

(1) Fees and commissions charged to Borrower, including finder's fees, for obtaining Federal or other funds;

(2) Parent corporation or other affiliated entity's general and administrative expenses, and non-Eligible Project related parent corporation or affiliated entity assessments, including organizational expenses;

(3) Goodwill, franchise, trade, or brand name costs;

(4) Dividends and profit sharing to stockholders, employees, and officers;

(5) Research, development, and demonstration costs of readying an innovative technology for employment in a commercial project;

(6) Costs that are excessive or are not directly required to carry out the Eligible Project, as determined by DOE;

(7) Expenses incurred after startup, commissioning, and shakedown before the facility, or, in DOE's discretion, any portion of the facility, has been placed in service;

(8) Borrower-paid Credit Subsidy Costs, the Administrative Cost of Issuing a Loan Guarantee, and any other fee collected by DOE; and

(9) Operating costs.

§ 609.11 Fees and charges.

(a) Unless explicitly authorized by statute, no funds obtained from the Federal Government, or from a loan or other instrument guaranteed by the Federal Government, may be used to pay for the Credit Subsidy Cost, the Application Fee, the Facility Fee, the Guarantee Fee, the maintenance fee and any other fees charged by or paid to DOE relating to the Act or any Guarantee thereunder.

(b) DOE may charge Applicants a non-refundable Facility Fee, with a portion being payable on or prior to the date on which the Applicant executes the Commitment Letter and the remainder being payable on or prior to the closing date for the Loan Guarantee Agreement.

(c) In order to encourage and supplement private lending activity DOE may collect from Borrowers for deposit in the United States Treasury a non-refundable Risk-Based Charge which, together with the interest rate on the Guaranteed Obligation that LPO determines to be appropriate, will take into account the prevailing rate of interest in the private sector for similar loans and risks. The Risk-Based Charge shall be paid at such times and in such manner as may be determined by DOE, but no less frequently than once each year, commencing with payment of a pro-rated payment on the date the Guarantee is issued. The amount of the Risk-Based Charge will be specified in the Loan Guarantee Agreement.

(d) DOE may collect a maintenance fee to cover DOE's administrative expenses, other than extraordinary expenses, incurred in servicing and monitoring a Loan Guarantee Agreement. The maintenance fee shall accrue from the date of execution of the Loan Guarantee Agreement through the date of payment in full of the related Guaranteed Obligations. If DOE determines to collect a maintenance fee, it shall be paid by the Borrower each year (or portion thereof) in advance in the amount specified in the applicable Loan Guarantee Agreement.

(e) In the event a Borrower or an Eligible Project experiences difficulty relating to technical, financial, or legal matters or other events (*e.g.,* engineering failure or financial workouts), the Borrower shall be liable as follows:

(1) If such difficulty requires DOE to incur time or expenses beyond those customarily expended to monitor and administer performing loans, DOE may collect an extraordinary expenses fee from the Borrower that will reimburse DOE for such time and expenses, as determined by DOE; and

(2) For all fees and expenses of DOE's independent consultants and outside counsel, to the extent that such fees and expenses are elected to be paid by DOE notwithstanding the provisions of paragraphs (f) and (g) of this section.

(f) Each Applicant, Borrower or Project Sponsor, as applicable, shall be responsible for the payment of all fees and expenses charged by DOE's independent consultants and outside legal counsel in connection with an Application, Conditional Commitment or Loan Guarantee Agreement, as applicable. Upon making a determination to engage independent consultants or outside counsel with respect to an Application, DOE will proceed to evaluate and process such Application only following execution by an Applicant or Project Sponsor, as appropriate, of an agreement satisfactory to DOE to pay the fees and expenses charged by the independent consultants and outside legal counsel. Appropriate provisions regarding payment of such fees and expenses shall also be included in each Term Sheet and Loan Guaranty Agreement or, upon a determination by DOE, in other appropriate agreements.

(g) Notwithstanding payment by Applicant, Borrower or Project Sponsor, all services rendered by an independent consultant or outside legal counsel to DOE in connection with an Application, Conditional Commitment or Loan Guarantee Agreement shall be solely for the benefit of DOE (and such other creditors as DOE may agree in writing). DOE may require, in its discretion, the payment of an advance retainer to such independent consultants or outside legal counsel as security for the collection of the fees and expenses charged by the independent consultants and outside legal counsel. In the event an Applicant, Borrower or Project Sponsor fails to comply with the provisions of such payment agreement, DOE in its discretion, may stop work on or terminate an Application, a Conditional Commitment or a Loan Guarantee Agreement, or may take such other remedial measures in its discretion as it deems appropriate.

(h) DOE shall not be financially liable under any circumstances to any independent consultant or outside counsel for services rendered in connection with an Application, Conditional Commitment or Loan Guarantee Agreement except to the extent DOE has previously entered into an express written agreement to pay for such services.

§ 609.12 Full faith and credit and incontestability.

The full faith and credit of the United States is pledged to the payment of principal and interest of Guaranteed Obligations pursuant to Guarantees issued in accordance with the Act and this Part. The issuance by DOE of a Guarantee shall be conclusive evidence that it has been properly obtained; that the underlying loan qualified for such Guarantee; and that, but for fraud or material misrepresentation by the Holder, such Guarantee shall be legal, valid, binding and enforceable against DOE in accordance with its terms.

§ 609.13 Default, demand, payment, and foreclosure on collateral.

(a) If a Borrower defaults in making a required payment of principal or interest on a Guaranteed Obligation and such default has not been cured within the applicable grace period, the Holder may make written demand for payment upon the Secretary in accordance with the terms of the applicable Guarantee. If a Borrower defaults in making a required payment of principal or interest on a Guaranteed Obligation and such default has not been cured within the applicable grace period, the Secretary shall notify the Attorney General.

(b) Subject to the terms of the applicable Guarantee, the Secretary shall make payment within 60 days after receipt of written demand for payment from the Holder, provided that the demand for payment complies in all respects with the terms of the applicable Guarantee. Interest shall accrue to the Holder at the rate stated in the promissory note evidencing the Guaranteed Obligation, without giving effect to the Borrower's default in making a required payment of principal or interest on the applicable Guarantee Obligation or any other default by the Borrower, until the Guaranteed Obligation has been fully paid by DOE. Payment by the Secretary on the applicable Guarantee does not change Borrower's obligations under the promissory note evidencing the Guaranteed Obligation, Loan Guarantee Agreement, Loan Agreement or related documents, including an obligation to pay default interest.

(c) Following payment by the Secretary pursuant to the applicable Guarantee, upon demand by DOE, the Holder shall transfer and assign to the Secretary (or his designee or agent) the promissory note evidencing the Guaranteed Obligation, all rights and interests of the Holder in the Guaranteed Obligation, and all rights and interests of the Holder in respect of the Guaranteed Obligation, except to the extent that the Secretary determines that such promissory note or any of such rights and interests shall not be transferred and assigned to the Secretary. Such transfer and assignment shall include, without limitation, all of the liens, security and collateral rights of the Holder (or his designee or agent) in respect of the Guaranteed Obligation.

(d) Following payment by the Secretary pursuant to a Guarantee or other default of a Guaranteed Obligation, the Secretary is authorized to protect and foreclose on the collateral, take action to recover costs incurred by, and all amounts owed to, the United States as a result of the defaulted Guarantee Obligation, and take such other action necessary or appropriate to protect the interests of the United States. In respect of any such authorized actions that involve a judicial proceeding or other judicial action, the Secretary shall act through the Attorney General. The foregoing provisions of this paragraph shall not relieve the Secretary from its obligations pursuant to any applicable Intercreditor Agreement. Nothing in this paragraph shall limit the Secretary from exercising any rights or remedies pursuant to the terms of the Loan Guarantee Agreement.

(e) The cash proceeds received as a result of any foreclosure on the collateral, or other action, shall be distributed in accordance with the Loan Guarantee Agreement (subject to any applicable Intercreditor Agreement).

(f) The Loan Guarantee Agreement shall provide that cash proceeds received by the Secretary (or his designee or agent) as a result of any foreclosure on the collateral or other action shall be applied in the following order of priority:

(1) Toward the pro rata payment of any costs and expenses (including unpaid fees, fees and expenses of counsel, contractors and agents, and liabilities and advances made or incurred) of the Secretary, the Attorney General, the Holder, a collateral agent or other responsible person of any of them (solely in their individual capacities as such and not on behalf of or for the benefit of their principals), incurred in connection with any authorized action following payment by the Secretary pursuant to a Guarantee or other default of a Guaranteed Obligation, or as otherwise permitted under the Loan Agreement or Loan Guarantee Agreement.

(2) To pay all accrued and unpaid fees due and payable to the Secretary, the Attorney General, the Holder, a collateral agent or other responsible person of any of them on a pro rata basis in respect of the Guaranteed Obligation;

(3) To pay all accrued and unpaid interest due and payable to the Secretary, the Attorney General, the Holder, a collateral agent or other responsible person of any of them on a pro rata basis in respect of the Guaranteed Obligation;

(4) To pay all unpaid principal of the Guaranteed Obligation;

(5) To pay all other obligations of the Borrower under the Loan Guarantee Agreement, the Loan Agreement and related documents that are remaining after giving effect to the preceding provisions and are then due and payable; and;

(6) To pay to the Borrower, or its successors and assigns, or as a court of competent jurisdiction may direct, any cash proceeds then remaining following the application of all payment described above.

(g) No action taken by the Holder or its agent or designee in respect of any collateral will affect the rights of any person, including the Secretary, having an interest in the Guaranteed Obligations or other debt obligations, to pursue, jointly or severally, legal action against the Borrower or other liable

persons, for any amounts owing in respect of the Guaranteed Obligation or other applicable debt obligations.

(h) In the event that the Secretary considers it necessary or desirable to protect or further the interest of the United States in connection with exercise of rights as a lien holder or recovery of deficiencies due under the Guaranteed Obligation, the Secretary may take such action as he determines to be appropriate under the circumstances.

(i) Nothing in this part precludes, nor shall any provision of this part be construed to preclude, the Secretary from purchasing any collateral or Holder's or other Person's interest in the Eligible Project upon foreclosure of the collateral.

(j) Nothing in this part precludes, nor shall any provision of this part be construed to preclude, forbearance by any Holder with the consent of the Secretary for the benefit of the Borrower and the United States.

(k) The Holder and the Secretary may agree to a formal or informal plan of reorganization in respect of the Borrower, to include a restructuring of the Guaranteed Obligation and other applicable debt of the Borrower on such terms and conditions as the Secretary determines are in the best interest of the United States.

§ 609.14 Preservation of collateral.

(a) If the Secretary exercises his right under the Loan Guarantee Agreement to require the holder of pledged collateral to take such actions as the Secretary (subject to any applicable Intercreditor Agreement) may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery from the collateral, the Secretary shall, subject to compliance with the Antideficiency Act, 31 U.S.C. 1341 *et seq.,* reimburse the holder of such collateral for reasonable and appropriate expenses incurred in taking actions required by the Secretary (unless otherwise provided in applicable agreements). Except as provided in § 609.13, no party may waive or relinquish, without the consent of the Secretary, any such collateral to which the United States would be subrogated upon payment under the Loan Guarantee Agreement.

(b) In the event of a default, the Secretary may enter into such contracts as he determines are required or appropriate, taking into account the term of any applicable Intercreditor Agreement, to care for, preserve, protect or maintain collateral pledged in respect of Guaranteed Obligations. The cost of such contracts may be charged to the Borrower.

§ 609.15 Audit and access to records.

Each Loan Guarantee Agreement and related documents shall provide that:

(a) The Eligible Lender, or DOE in conjunction with the Federal Financing Bank where loans are funded by the Federal Financing Bank or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, shall keep such records concerning the Eligible Project as are necessary, including the Application, Term Sheet, Conditional Commitment, Loan Guarantee Agreement, Credit Agreement, mortgage, note, disbursement requests and supporting documentation, financial statements, audit reports of independent accounting firms, lists of all Eligible Project assets and non-Eligible Project assets pledged in respect of the Guaranteed Obligations, all off-take and other revenue producing agreements, documentation for all Eligible Project indebtedness, income tax returns, technology agreements, documentation for all permits and regulatory approvals and all other documents and records relating to the Borrower or the Eligible Project, as determined by the Secretary, to facilitate an effective audit and performance evaluation of the Eligible Project; and

(b) The Secretary and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers and records of the Borrower, Eligible Lender or DOE or other Holder or other party servicing the Guaranteed Obligation, as applicable. Such inspection may be made during regular office hours of the Borrower, Eligible Lender or DOE or other Holder, or other party servicing the Eligible Project and the Guaranteed Obligations, as applicable, or at any other time mutually convenient.

§ 609.16 Deviations.

(a) To the extent that the requirements under this part are not specified by the Act or other applicable statutes, DOE may authorize deviations from the requirements of this part upon:

(1) Either receipt from the Applicant, Borrower or Project Sponsor, as applicable, of—

(i) A written request that the Secretary deviate from one or more requirements; and

(ii) A supporting statement briefly describing one or more justifications for such deviation; or

(iii) A determination by the Secretary in his discretion to undertake a deviation;

(2) A finding by the Secretary that such deviation supports program objectives and the special circumstances stated in the request make such deviation clearly in the best interest of the Government; and

(3) If the waiver would constitute a substantial change in the financial terms of the Loan Guarantee Agreement and related documents, consultation by DOE with OMB and the Secretary of the Treasury.

(b) If a deviation under this section results in an increase in the applicable Credit Subsidy Cost, such increase shall be funded either by additional fees paid by or on behalf of the Borrower or, if an appropriation is available by means of an appropriations act. The Secretary has discretion to determine how the cost of a deviation is funded.

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 161110999–6999–01]

RIN 0694–AH21

Addition of Certain Persons to the Entity List

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This final rule amends the Export Administration Regulations (EAR) by adding seven persons to the Entity List. The seven persons who are added to the Entity List have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States. These seven persons will be listed on the Entity List under the destination of Pakistan.

DATES: This rule is effective December 15, 2016.

FOR FURTHER INFORMATION CONTACT: Chair, End-User Review Committee, Office of the Assistant Secretary, Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Email: *ERC@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Entity List (Supplement No. 4 to part 744) identifies entities and other