

§ 4274.352

Agency IRP loan funds will be used remain substantially unchanged.

§ 4274.352 Loan documentation for ultimate recipients.

(a) *Agency IRP loans.* Prior Agency concurrence is required when an intermediary makes loans to an ultimate recipient from its Agency IRP loan funds (this applies to each Agency IRP loan received). A request for Agency concurrence in approval of a proposed loan to an ultimate recipient, whether made directly or through a loan participation purchase, must contain or comply with, as appropriate, the items identified in paragraph (b)(1) through (5) of this section and must include information listed in the IRP Revolving Loan Fund File Checklist, on the Agency website at the USDA Rural Development Intermediary Relending Program website:

(1) Certification by the intermediary that:

(i) The ultimate recipient is eligible for the loan;

(ii) The loan is for an eligible purpose;

(iii) Agency IRP loan funds are not more than 75 percent of the total project costs;

(iv) The loan complies with all applicable statutes and regulations;

(v) The ultimate recipient is unable to finance the proposed project through commercial credit or other Federal, State, or local programs at reasonable rates and terms; and

(vi) The intermediary and its principal officers (including immediate family) hold no legal or financial interest or influence in the ultimate recipient, and the ultimate recipient and its principal officers (including immediate family) hold no legal or financial interest or influence in the intermediary. The interest and influence of a cooperative member when the intermediary is a cooperative is an allowable exception to this paragraph.

(2) A completed and executed request for environmental information on a form provided by the Agency for projects that meet the criteria for a NEPA review categorical exclusion, NEPA environmental assessment or NEPA environmental impact statement in accordance with § 4274.305(b)(2).

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(3) All comments obtained in accordance with § 4274.305(a) regarding intergovernmental consultation (if required).

(4) Copies of sufficient material from the ultimate recipient's application and the intermediary's related files to allow the Agency to determine the:

(i) Name, address, DUNS number, Federal ID number, and North American Classification System (NAICS) Code of the ultimate recipient;

(ii) Loan purpose;

(iii) Interest rate and term;

(iv) Location, nature, and scope of the project being financed;

(v) Uses and sources of funds; and

(vi) Nature and lien priority of the collateral.

(5) Such other information as the Agency may request.

(b) *Revolved IRP loan funds.* An intermediary may use revolved funds to make loans to ultimate recipients in accordance with § 4274.320(b) without obtaining prior Agency concurrence as required in § 4274.352(a) and are also exempted from completion of items required by paragraphs (a)(2) and (3) of this section.

§ 4274.353–§ 4274.359 [Reserved]

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AUTHORITY: 5 U.S.C. 301; 7 U.S.C. 1989; 7 U.S.C. 310B(a)(2); and 7 U.S.C. 8103.

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Subpart A—General

SOURCE: 81 FR 35997, June 3, 2016, unless otherwise noted.

§ 4279.1 Introduction.

(a) As of October 1, 2020, this subpart is specifically applicable to and only contains regulations for Business and Industry loans under the authority of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116–136) to provide B&I guarantees for loans needed as a result of the Coronavirus Disease 2019 (COVID–19) pandemic for working capital loan purposes to support business operations and facilities in rural areas (B&I CARES Act Program Loans). Some of the requirements of this subpart are waived or altered for B&I CARES Act Program Loans. The waivers and alterations are provided in § 4279.190 of this subpart. Other than B&I CARES Act Program Loans, this subpart is no longer used for making Business and Industry (B&I) loans guaranteed by the Agency. Subpart B of part 4287 of this chapter is retained for servicing B&I CARES Act Program Loans and B&I loans guaranteed by the Agency prior to October 1, 2020. Requirements for B&I loans guaranteed by the Agency after October 1, 2020 (other than B&I CARES Act Loans) may be found at 7 CFR part 5001.

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

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(c) Whether specifically stated or not, whenever Agency approval is required, it must be in writing. Copies of all forms and regulations referenced in this subpart may be obtained from any Agency office and from the USDA Rural Development Web site at <http://www.rd.usda.gov/publications>. Whenever a form is designated in this subpart, it is initially capitalized and its reference includes predecessor and successor forms, if applicable.

[81 FR 35997, June 3, 2016, as amended at 85 FR 31040, May 22, 2020; 85 FR 62196, Oct. 2, 2020]

§ 4279.2 Definitions and abbreviations.

(a) *Definitions.* The following definitions apply to this subpart:

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

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

Agency. The Rural Business-Cooperative Service or successor Agency assigned by the Secretary of Agriculture to administer the B&I Guaranteed Loan Program. References to the National or State Office should be read as prefaced by “Agency” or “Rural Development” as applicable.

Agricultural production. The breeding, raising, feeding, or housing of livestock for fiber or food for human consumption and the cultivation, growing, or harvesting of crops.

Annual renewal fee. The annual renewal fee is a fee that is paid once a year by the lender and is required to maintain the enforceability of the Loan Note Guarantee.

Appraisal surplus. The difference between the fair market value of an asset and its depreciated book value when the fair market value is higher.

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

Assignment Guarantee Agreement. Form RD 4279-6, "Assignment Guarantee Agreement," is the signed agreement among the Agency, the lender, and the holder containing the terms and conditions of an assignment of a guaranteed portion of a loan, using the single note system.

Bankruptcy Code. The provisions of title 11 of the United States Code or any successor statute.

Biofuel. A fuel derived from Renewable Biomass.

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

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

Certificate of Incumbency and Signature. Form RD 4279-7, "Certificate of Incumbency and Signature," is used to validate authenticity of Agency representatives' signatures on Forms RD 4279-4, 4279-5, and 4279-6.

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

Commercially available. A system that has a proven operating history for at least 1 year specific to the proposed application. Such a system is based on established design and installation procedures and practices. Professional service providers, trades, large construction equipment providers, and labor are familiar with installation procedures and practices. Proprietary and the balance of system equipment and spare parts are readily available, and service is readily available to properly maintain and operate the system. An established warranty exists for major parts and labor. If the system is currently commercially available only outside of the United States, authoritative evidence of the foreign operating history, performance, and reliability is required in order to address the proven operating history.

Conditional Commitment. Form RD 4279-3, "Conditional Commitment," is the Agency's notice to the lender that the loan guarantee it has requested is

approved subject to the completion of all conditions and requirements set forth by the Agency and outlined in the attachment to the Conditional Commitment.

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

Cooperative organization. An entity that is legally chartered as a cooperative or an entity that is not legally chartered as a cooperative but is owned and operated for the benefit of its members, with returns of residual earnings paid to such members on the basis of patronage.

Debt Collection Improvement Act. The Debt Collection Improvement Act of 1996, 31 U.S.C. 3701 *et seq.* requires that any monies that are payable or may become payable from the United States under contracts and other written agreements to any person not an agency or subdivision of a State or local government may be subject to certain collection options, such as administrative offset, for a delinquent debt the person owes to the United States.

Default. The condition that exists when a borrower is not in compliance with the promissory note, the loan agreement, or other documents relating to the loan. Default could be a monetary or non-monetary default.

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

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

Energy projects. Commercially available projects that generate energy or power or projects that produce biofuel. Projects that have energy outputs that are a by-product of operations or that the Agency otherwise determines is not an energy project are not subject to the increased equity requirement for energy projects required by § 4279.131(d)(1).

Existing business. A business that has been in operation for at least 1 full year. Mergers or changes in the business name or legal type of entity of a

business that has been in operation for at least 1 full year are considered to be existing businesses as long as there is not a significant change in operations. Newly-formed entities that are buying existing businesses will be considered an existing business as long as the business being bought remains in operation and there is no significant change in operations.

Existing lender debt. A debt owed by a borrower to the same lender that is applying for or has received the Agency guarantee.

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

Future recovery. Funds collected by the lender after a final loss claim is processed.

High impact business development investment. A business that scores at least 25 points under § 4279.166(b)(4).

High-priority project. A project that scores more than 50 percent of the priority points available under § 4279.166(b)(1) through (5).

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

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

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

Interest. A fee paid by a borrower to the lender as a form of compensation for the use of money. When money is borrowed, interest is paid as a fee over

a certain period of time (typically months or years) to the lender as a percentage of the principal amount owed. The term interest does not include default or penalty interest or late payment fees or charges.

Interim financing. A temporary or short-term loan made with the clear intent when the loan is made that it will be repaid through another loan that provides permanent financing. Interim financing is frequently used to pay construction and other costs associated with a planned project, with permanent financing to be obtained after project completion.

Lender. The eligible lender approved by the Agency to make, service, and collect the Agency guaranteed loan that is subject to this subpart. Agency approval of the lender will be evidenced by an outstanding Form RD 4279-4, "Lender's Agreement," between the Agency and the lender.

Lender's Agreement. Form RD 4279-4, "Lender's Agreement," or predecessor form, between the Agency and the lender setting forth the lender's loan responsibilities.

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

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

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

Loan Note Guarantee. Form RD 4279-5, "Loan Note Guarantee," issued and executed by the Agency, containing the terms and conditions of the guarantee.

Loan packager. A person, other than the applicant borrower or lender, that prepares a loan application package.

Loan service provider. A person, other than the lender of record, that provides loan servicing activities to the lender.

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

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

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

Material adverse change. Any change in circumstance associated with a guaranteed loan, including the borrower's financial condition or collateral, that, individually or in the aggregate, has jeopardized, or could be reasonably expected to jeopardize, loan performance.

Natural resource value-added product. Any naturally occurring resource, including agricultural resources, that is processed to add value or to generate renewable energy from a natural resource.

Negligent loan origination. The failure of a lender to perform those services that a reasonably prudent lender would perform in originating its own portfolio of loans that are not guaranteed. The term includes the concepts of failure to act, not acting in a timely manner, or acting in a manner contrary to the manner in which a reasonably prudent lender would act.

Negligent loan servicing. The failure of a lender to perform those services that a reasonably prudent lender would perform in servicing (including liquidation of) its own portfolio of loans that are not guaranteed. The term includes the concepts of failure to act, not acting in a timely manner, or acting in a manner contrary to the manner in which a reasonably prudent lender would act.

New business. A startup or otherwise new business that has been in operation for less than 1 full year. New businesses include newly-formed entities leasing space or building ground-up facilities, even if the owners of the

new or startup business own affiliated businesses doing the same kind of business.

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

Participation. Sale of an interest in a loan by the lead lender to one or more participating lenders wherein the lead lender retains the note, collateral securing the note, and all responsibility for managing and servicing the loan. Participants are dependent upon the lead lender for protection of their interests in the loan. The relationship is typically formalized by a participation agreement. The participants and the borrower have no rights or obligations to one another.

Person. An individual or entity.

Poverty. A community or area (including a county, city, or equivalent such as parish, borough, municipio, or census designated place) where at least 20 percent of the population have income below the poverty line.

Pro rata. On a proportional basis.

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

Protective advances. Advances made by the lender for the purpose of preserving and protecting the collateral where the debtor has failed to, and will not or cannot, meet its obligations to protect or preserve collateral. Protective advances include, but are not limited to, advances affecting the collateral made for property taxes, rent, hazard and flood insurance premiums, and annual assessments. Legal/attorney fees are not a protective advance.

Public body. A municipality, county, or other political subdivision of a State; a special purpose district; an Indian tribe on a Federal or State reservation or other federally-recognized Indian tribe; or an organization controlled by any of the above.

Renewable biomass. (1) Materials, pre-commercial thinnings, or invasive species from National Forest System land or public lands (as defined in section 103 of the Federal Land Policy and

Management Act of 1976 (43 U.S.C. 1702)) that:

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

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

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

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

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

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

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

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

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

data, spot trends, and make comparisons.

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

Subordination. An agreement among the lender, borrower, and Agency whereby lien priorities on certain assets pledged to secure payment of the guaranteed loan will be reduced to a position junior to, or on parity with, the lien position of another loan.

Tangible balance sheet equity. Tangible equity divided by tangible assets. Formula: ((Assets—intangible assets)—liabilities)/(Assets—intangible assets) or (Equity—intangible assets)/(Assets—intangible assets).

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

USDA Lender Interactive Network Connection (LINC). The portal Web site currently at <https://usdalinc.sc.egov.usda.gov/> used by lenders to update loan data in the Agency’s Guaranteed Loan System. Current LINC capabilities include loan closing and status reporting.

Veteran. For the purposes of assigning priority points, a veteran is a person who is a veteran of any war, as defined in title 38 U.S.C. 101(12).

Working capital. Current assets available to support a business’ operations and growth. Working capital is calculated as current assets less current liabilities.

(b) *Abbreviations.* The following abbreviations apply to this subpart:

B&I—Business and Industry
CFR—Code of Federal Regulations
DCIA—Debt Collection Improvement Act
FDIC—Federal Deposit Insurance Corporation
FSA—Farm Service Agency
GAAP—Generally Accepted Accounting Principles of the United States
LINC—USDA Lender Interactive Network Connection
NAD—National Appeals Division
OMB—Office of Management and Budget

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REAP—Rural Energy for America Program
U.S.—United States of America
USDA—U.S. Department of Agriculture

(c) *Accounting terms.* Accounting terms not otherwise defined in this part shall have the definition ascribed to them under GAAP.

§§ 4279.3–4279.14 [Reserved]

§ 4279.15 Exception authority.

The Administrator may, on a case-by-case basis, grant an exception to any requirement or provision of this subpart provided that such an exception is in the best financial interests of the Federal government. Exercise of this authority cannot be in conflict with applicable law.

§ 4279.16 Appeals.

Applicants, borrowers, lenders, and holders have appeal or review rights for Agency decisions made under this subpart, subpart B of this part, or subpart B of part 4287 of this chapter. Programmatic decisions based on clear and objective statutory or regulatory requirements are not appealable; however, such decisions are reviewable for appealability by the National Appeals Division (NAD). The borrower, lender, and holder can appeal any Agency decision that directly and adversely impacts them. For an adverse decision that impacts the borrower, the lender and borrower must jointly execute a written request for appeal for an alleged adverse decision made by the Agency. An adverse decision that only impacts the lender may be appealed by the lender only. An adverse decision that only impacts the holder may be appealed by the holder only. A decision by a lender adverse to the interest of the borrower is not a decision by the Agency, whether or not concurred in by the Agency. Appeals will be conducted by USDA NAD and will be handled in accordance with 7 CFR part 11.

§§ 4279.17–4279.28 [Reserved]

§ 4279.29 Eligible lenders.

An eligible lender must be domiciled in a State as defined in § 4279.2 or the District of Columbia and must not be debarred or suspended by the Federal government. If the lender is under a

cease and desist order, or similar constraint, from a Federal or State agency, the lender must inform the Agency. The Agency will evaluate the lender's eligibility on a case-by-case basis, given the risk of loss posed by the cease and desist order. The Agency will only approve loan guarantees for lenders with adequate capital to fund and cover potential liquidation expenses for guaranteed loans it proposes to make and adequate experience and expertise to make, secure, service, and collect B&I loans. The lender must provide documentation as to its capital and experience in commercial lending. The lender and the Agency will execute a Lender's Agreement for each lender approved to participate in the program. If a valid Lender's Agreement already exists, it is not necessary to execute a new Lender's Agreement with each loan guarantee; however, a new Lender's Agreement must be executed with any existing lenders making new loans on or after August 2, 2016. The Agency may revoke a lender's eligible status at any time for cause, including those examples cited in § 4279.29(c).

(a) *Regulated lenders.* A regulated lender is any Federal or State chartered bank, or other financial institution, Farm Credit Bank, other Farm Credit System institution with direct lending authority, Bank for Cooperatives, Savings and Loan Association, Savings Bank, or mortgage company that is part of a bank-holding company. These entities must be subject to credit examination and supervision by either an agency of the United States or a State. Eligible lenders may also include the National Rural Utilities Cooperative Finance Corporation and credit unions provided that they are subject to credit examination and supervision by either the National Credit Union Administration or a State agency.

(b) *Non-regulated lenders.* The Agency may consider an applicant lender that does not meet the criteria of paragraph (a) of this section for eligibility to become a guaranteed lender for a 3-year period provided that the Agency determines that the applicant lender has the legal authority to operate a lending program and sufficient lending expertise and financial strength to operate a

successful lending program. When the applicant lender is a multi-tiered entity, it will be considered in its entirety. Insurance companies (formerly included as traditional lenders) and non-regulated lenders (formerly known as other lenders) previously approved as guaranteed lenders prior to August 2, 2016 must reapply to become an approved non-regulated lender in order to originate new guaranteed loans. However, both insurance companies and non-regulated lenders that have executed a Lender's Agreement must continue to service the guaranteed loans in their portfolios in accordance with that agreement.

(1) In order to become an eligible lender, non-regulated lenders must:

(i) Have been making commercial loans for at least 5 years;

(ii) Have a record of successfully making at least 10 commercial loans annually totaling at least \$1 million for each of the last 5 years, with lender's delinquent commercial loan portfolio over this period not exceeding (a) 6 percent of all commercial loans made and (b) 3 percent in commercial loan losses (based on the original principal loan amount);

(iii) Have and maintain tangible balance sheet equity of at least 10 percent of tangible assets and sufficient funds available to disburse the guaranteed loans it proposes to approve within the first 6 months of being approved as a guaranteed lender;

(iv) Have and maintain a line of credit issued by a regulated lender that is acceptable to the Agency;

(v) Agree to establish and maintain an Agency approved loss reserve equal to 3 percent of each B&I loan closed and agree to increase the loss reserve for anticipated losses as required by the Agency;

(vi) Have adequate policies and procedures to ensure that internal credit controls provide adequate loanmaking and servicing guidance; and

(vii) Have undergone a credit examination at its own expense from a recognized independent reviewer acceptable to the Agency. The applicant lender should consult with the Agency prior to receiving an examination to ensure the examiner will be acceptable.

(2) A non-regulated lender that wishes consideration to become a guaranteed lender must submit a request in writing to the Agency. The Agency will notify the prospective lender whether the lender's request for eligibility is approved or rejected. If rejected, the Agency will notify the prospective lender, in writing, of the reasons for the rejection. The lender must include in its written request the following:

(i) An audited financial statement not more than 1 year old that evidences the lender has the required tangible balance sheet equity and the resources to successfully meet its responsibilities;

(ii) A copy of any license, charter, or other evidence of authority to engage in the proposed loanmaking and servicing activities. If licensing by the State is not required, an attorney's opinion stating that licensing is not required and that the entity has the legal authority to engage in the proposed loanmaking and servicing activities must be submitted;

(iii) Information on lending experience, including length of time in the lending business; range and volume of lending and servicing activity, including a list of the industries for which it has provided financing; status of its loan portfolio, including a list of loans in the portfolio with each loan's current loan classification code and delinquency and loss rates as outlined in § 4279.29(b)(1)(ii); experience of management and loan officers; sources of funds for the proposed loans; office location and proposed lending area; an estimate of the number and size of guaranteed loan applications the lender will develop; and proposed rates and fees, including loan origination, loan preparation, and servicing fees;

(iv) A copy of the examination required under paragraph (b)(1)(vii) of this section; and

(v) Documentation as to how the lender will fulfill the requirements of § 4279.30.

(3) Non-regulated lenders must submit audited financial statements to the Agency annually for monitoring purposes.

(4) Renewal of eligible lender status to continue making B&I loans is not automatic. Eligible lender status will

lapse 3 years from the date of Agency approval and execution of the Lender's Agreement unless the lender obtains a renewal. A lender whose eligible status has lapsed must continue to service any outstanding loans guaranteed under this part but may not submit requests for new loan guarantees. Lenders whose eligibility has lapsed may file a subsequent request under this subsection. Lenders requesting renewal must complete and execute a new Lender's Agreement, along with a written update of the eligibility criteria required by this section for approval. Lenders requesting renewal must re-submit the information required by paragraph (b)(2) of this section and must address how the lender is complying with each of the required criteria described in paragraph (b)(1) of this section. The written update of the eligibility criteria must also include any change in the persons designated to process and service Agency guaranteed loans or change in the operating methods used in the processing and servicing of loans since the original or last renewal date of eligible lender status. The lender must provide this information to the Agency at least 60 days prior to the expiration of the existing agreement to be assured of a timely renewal.

(c) *Revocation of eligible lender status.* The Agency may revoke a lender's status at any time for cause. Cause for revoking eligible status includes:

(1) Failure to maintain status as an eligible lender as set forth in § 4279.29 of this subpart;

(2) Knowingly submitting false information when requesting a guarantee or basing a guarantee request on information known to be false or which the lender should have known to be false;

(3) Making a guaranteed loan with deficiencies that may cause losses not to be covered by the Loan Note Guarantee, such as negligent loan origination;

(4) Conviction of the lender or its officers for criminal acts in connection with any loan transaction whether or not the loan was guaranteed by the Agency;

(5) Violation of usury laws in connection with any loan transaction whether

or not the loan was guaranteed by the Agency;

(6) Failure to obtain and maintain the required security for any loan guaranteed by the Agency;

(7) Using loan funds guaranteed by the Agency for purposes other than those specifically approved by the Agency in the Conditional Commitment or amendment thereof in accordance with § 4279.173(b);

(8) Violation of any term of the Lender's Agreement;

(9) Failure to correct any Agency-cited deficiency in loan documents in a timely manner;

(10) Failure to submit reports required by the Agency in a timely manner;

(11) Failure to process Agency guaranteed loans as would a reasonably prudent lender;

(12) Failure to provide for adequate construction planning and monitoring in connection with any loan to ensure that the project will be completed with the available funds and, once completed, will be suitable for the borrower's needs;

(13) Repetitive recommendations for servicing actions or guaranteed loans with marginal or substandard credit quality or that do not comply with Agency requirements;

(14) Negligent loan origination;

(15) Negligent loan servicing;

(16) Failure to conduct any approved liquidation of a loan guaranteed by the Agency or its predecessors in a timely and effective manner and in accordance with the approved liquidation plan; or

(17) Violation of applicable non-discrimination law, including, but not limited to, statutes, regulations, USDA Departmental Regulations, the USDA Non-Discrimination Statement, and the Equal Credit Opportunity Act. USDA's Non-Discrimination Statement is located at the following Web site: http://www.usda.gov/wps/portal/usda/usdahome?navtype=FT&navid=NON_DISCRIMINATION.

(d) *Debarment of lender.* The Agency may debar a lender in addition to the revocation of the lender's status.

[81 FR 35997, June 3, 2016, as amended at 81 FR 54477, Aug. 16, 2016]

§ 4279.30 Lenders' functions and responsibilities.

(a) *General.* (1) Lenders have the primary responsibility for the successful delivery of the guaranteed loan program. Any action or inaction on the part of the Agency does not relieve the lender of its responsibilities to originate and service the loan guaranteed under this subpart, subpart B of this part, and subpart B of part 4287 of this chapter. Lenders may contract for services but are ultimately responsible for underwriting, loan origination, loan servicing, and compliance with all Agency regulations. No person may act as, or work for, both a loan packager and loan service provider on the same guaranteed loan. All lenders obtaining or requesting a loan guarantee are responsible for:

- (i) Processing applications for guaranteed loans;
- (ii) Developing and maintaining adequately documented loan files, which must be maintained for at least 3 years after any final loss has been paid;
- (iii) Recommending only loan proposals that are eligible and financially feasible;
- (iv) Properly closing the loan and obtaining valid evidence of debt and collateral in accordance with sound lending practices prior to disbursing loan proceeds;
- (v) Keeping an inventory accounting of all collateral items and reconciling the inventory of all collateral sold during loan servicing, including liquidation;
- (vi) Monitoring construction and operation;
- (vii) Distributing loan funds;
- (viii) Servicing guaranteed loans in a prudent manner, including liquidation if necessary;
- (ix) Reporting all conflicts of interest, or appearances thereof, to the Agency;
- (x) Following Agency regulations and agreements; and
- (xi) Obtaining Agency approvals or concurrence as required.

(2) This subpart, subpart B of this part, and subpart B of part 4287 of this chapter contain the regulations for this program, including the lenders' responsibilities. If a lender fails to comply with these requirements, the Agen-

cy may reduce any loss payment in accordance with the applicable regulations.

(b) *Credit evaluation.* The lender must analyze all credit factors associated with each proposed loan and apply its professional judgment to determine that the credit factors, considered in combination, ensure loan repayment. The lender must have an adequate underwriting process to ensure that loans are reviewed by persons other than the originating officer, and there must be good credit documentation procedures. The Agency will only issue guarantees for loans that are sound and have reasonable assurance of repayment. The Agency will not issue guarantees for marginal or substandard loans.

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

(1) Lenders must assist the borrower in providing details of the project's impact on the environment and historic properties in accordance with 7 CFR part 1970, "Environmental Policies and Procedures," (or successor regulation), when applicable; assist in the collection of additional data when the Agency needs such data to complete its environmental review of the proposal; and assist in the resolution of environmental problems.

(2) Lenders must ensure the borrower has:

- (i) Provided the necessary environmental information to enable the Agency to undertake its environmental review process in accordance with 7 CFR part 1970, "Environmental Policies and Procedures," or successor regulation, including the provision of all required Federal, State, and local permits;
- (ii) Complied with any mitigation measures required by the Agency; and
- (iii) Not taken any actions or incurred any obligations with respect to the proposed project that will either limit the range of alternatives to be

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considered during the Agency's environmental review process or that will have an adverse effect on the environment.

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

§§ 4279.31–4279.43 [Reserved]

§ 4279.44 Access to records.

The lender must permit representatives of the Agency (or other agencies of the United States) to inspect and make copies of any records of the lender pertaining to Agency guaranteed loans during regular office hours of the lender or at any other time upon agreement between the lender and the Agency. In addition, the lender must cooperate fully with Agency oversight and monitoring of all lenders involved in any manner with any guarantee to ensure compliance with this subpart, subpart B of this part, and subpart B of part 4287 of this chapter. Such oversight and monitoring will include, but is not limited to, reviewing lender records and meeting with lenders in accordance with subpart B of part 4287 of this chapter.

§§ 4279.45–4279.58 [Reserved]

§ 4279.59 Environmental requirements.

The Agency is responsible for ensuring that the requirements of the National Environmental Policy Act of 1969 (under 40 CFR part 1500) and related compliance actions, such as Section 106 of the National Historic Preservation Act (under 36 CFR part 800) and Section 7 of the Endangered Species Act, are met and will complete the appropriate level of environmental review in accordance with 7 CFR part 1970, "Environmental Policies and Procedures," or successor regulation. Because development of the loan application occurs simultaneously with development of the environmental review, applicants, including lenders and borrowers, must not take any actions or incur any obligations that would either limit the range of alternatives to be considered in the environmental review or that would have an adverse effect on the environment. Satisfactory comple-

tion of the environmental review process must occur prior to issuance of the Conditional Commitment to the lender.

§ 4279.60 Civil rights impact analysis.

Issuance of a Conditional Commitment is conditioned on the Agency being able to satisfactorily complete a civil rights impact analysis.

§ 4279.61 Equal Credit Opportunity Act.

In accordance with the Equal Credit Opportunity Act (15 U.S.C. 1691 *et seq.*), with respect to any aspect of a credit transaction, neither the lender nor the Agency will discriminate against any applicant on the basis of race, color, religion, national origin, sex, marital status, or age (providing the applicant has the capacity to contract), or because all or part of the applicant's income derives from a public assistance program, or because the applicant has, in good faith, exercised any right under the Consumer Protection Act. The lender must comply with the requirements of the Equal Credit Opportunity Act as contained in the Federal Reserve Board's Regulation implementing that Act (see 12 CFR part 202) prior to loan closing.

§§ 4279.62–4279.70 [Reserved]

§ 4279.71 Public bodies and nonprofit corporations.

Audits will be required of any public body, nonprofit corporation or Indian Tribe that receives a guaranteed loan that meets the thresholds established by 2 CFR part 200, subpart F. Any audit provided by a public body, nonprofit corporation, or Indian Tribe required by this paragraph will be considered adequate to meet the audit requirements of the B&I program for that year.

§ 4279.72 Conditions of guarantee.

A loan guarantee under this part will be evidenced by a Loan Note Guarantee issued by the Agency. The provisions of this part and part 4287 of this chapter will apply to all outstanding guarantees. In the event of a conflict between the guarantee documents and these regulations as they exist at the time

the documents are executed, these regulations will control.

(a) *Full faith and credit.* A guarantee under this part constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which a lender or holder has actual knowledge at the time it becomes such lender or holder or which a lender or holder participates in or condones. The guarantee will be unenforceable by the lender to the extent that any loss is occasioned by a provision for interest on interest or default or penalty interest. In addition, the guarantee will be unenforceable by the lender to the extent any loss is occasioned by the violation of usury laws, use of loan proceeds for unauthorized purposes, negligent loan origination, negligent loan servicing, or failure to obtain or maintain the required security regardless of the time at which the Agency acquires knowledge thereof. Any losses occasioned will be unenforceable by the lender to the extent that loan funds were used for purposes other than those specifically approved by the Agency in its Conditional Commitment or amendment thereof in accordance with § 4279.173(b). The Agency may for cause terminate or reduce the Loan Note Guarantee at any time. The Agency will guarantee payment as follows:

(1) To any holder, 100 percent of any loss sustained by the holder on the guaranteed portion of the loan it owns and on interest due on such portion less any outstanding servicing fee. For those loans closed on or after August 2, 2016, the lender or the Agency will issue an interest termination letter to the holder(s) establishing the termination date for interest accrual. The guarantee will not cover interest to any holder accruing after the greater of: 90 days from the date of the most recent delinquency effective date as reported by the lender or 30 days from the date of the interest termination letter.

(2) To the lender, subject to the provisions of this part and subpart B of part 4287 of this chapter, the lesser of:

(i) Any loss sustained by the lender on the guaranteed portion, including principal and interest (for loans closed

on or after August 2, 2016, the guarantee will not cover note interest to the lender accruing after 90 days from the most recent delinquency effective date) evidenced by the notes or assumption agreements and secured advances for protection and preservation of collateral made with the Agency's authorization; or

(ii) The guaranteed principal advanced to or assumed by the borrower and any interest due thereon. For loans closed on or after August 2, 2016, the guarantee will not cover note interest to the lender accruing after 90 days from the most recent delinquency effective date.

(b) *Rights and liabilities.* When a guaranteed portion of a loan is sold to a holder, the holder will succeed to all rights of the lender under the Loan Note Guarantee to the extent of the portion purchased. The full, legal interest in the note must remain with the lender, and the lender will remain bound to all obligations under the Loan Note Guarantee, Lender's Agreement, and Agency program regulations. A guarantee and right to require purchase will be directly enforceable by a holder notwithstanding any fraud or misrepresentation by the lender or any unenforceability of the guarantee by the lender, except for fraud or misrepresentation of which the holder had actual knowledge at the time it became the holder or in which the holder participates in or condones. The lender will reimburse the Agency for any payments the Agency makes to a holder on the lender's guaranteed loan that, under the Loan Note Guarantee, would not have been paid to the lender had the lender retained the entire interest in the guaranteed loan and not conveyed an interest to a holder.

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

[81 FR 35997, June 3, 2016, as amended at 83 FR 11634, Mar. 16, 2018]

§§ 4279.73–4279.74 [Reserved]

§ 4279.75 Sale or assignment of guaranteed loan.

The lender may sell all or part of the guaranteed portion of the loan on the secondary market or retain the entire loan. The lender must fully disburse and properly close a loan prior to sale of the note(s) on the secondary market. The lender cannot sell or participate any amount of the guaranteed or unguaranteed portion of the loan to the borrower or its parent, subsidiary, or affiliate or to officers, directors, stockholders, other owners, or members of their immediate families. The lender cannot share any premium received from the sale of a guaranteed loan in the secondary market with a loan packager or other loan service provider. If the lender desires to market all or part of the guaranteed portion of the loan at or subsequent to loan closing, such loan must not be in default. Lenders may use either the single note or multi-note system as outlined in paragraphs (a) and (b) of this section. The lender may also obtain participation in the loan under its normal operating procedures; however, the lender must retain title to the notes if any of them are unguaranteed and retain the lender's interest in the collateral.

(a) *Single note system.* The entire loan is evidenced by one note, and one Loan Note Guarantee is issued. The lender must retain title to the note, retain the lender's interest in the collateral, and retain the servicing responsibilities for the guaranteed loan. When the loan is evidenced by one note, the lender may not at a later date cause any additional notes to be issued. The lender may assign all or part of the guaranteed portion of the loan to one or more holders by using an Assignment Guarantee Agreement. The lender must complete and execute the Assignment Guarantee Agreement and return it to the Agency for execution prior to holder execution. In order to validate authenticity, holders are encouraged to consult with the Agency. Additionally, a Certificate of Incumbency and Signature may be requested. The holder, with written notice to the lender and the Agency, may reassign the unpaid

guaranteed portion of the loan, in full, sold under the Assignment Guarantee Agreement. Holders may only reassign the entire guaranteed portion they have received and cannot subdivide or further split the guaranteed portion of a loan or retain an interest strip. Upon notification and completion of the Assignment Guarantee Agreement, the assignee shall succeed to all rights and obligations of the holder thereunder. Subsequent assignments require notice to the lender and Agency using any format, including that used by the Securities Industry and Financial Markets Association (formerly known as the Bond Market Association), together with the transfer of the original Assignment Guarantee Agreement. The Agency will neither execute a new Assignment Guarantee Agreement to effect a subsequent reassignment nor reissue a duplicate Assignment Guarantee Agreement unless the original was lost, stolen, destroyed, mutilated, or defaced in accordance with § 4279.84. The Assignment Guarantee Agreement clearly states the percentage and corresponding amount of the guaranteed portion it represents and the lender's servicing fee. A servicing fee may be charged by the lender to a holder and is calculated as a percentage per annum of the unpaid balance of the guaranteed portion of the loan assigned by the Assignment Guarantee Agreement. The Agency is not and will not be a party to any contract between the lender and another party where the lender sells its servicing fee. The Agency will not acknowledge, approve, nor have any liability to any of the parties of this contract.

(b) *Multi-note system.* Under this option, the lender may provide one note for the unguaranteed portion of the loan and no more than 10 notes for the guaranteed portion. All promissory notes must reflect the same payment terms. The lender must retain its interest in the collateral and servicing responsibilities for the guaranteed loan. When the lender selects this option, the holder will receive one of the borrower's executed notes and a Loan Note Guarantee. The Agency will issue a Loan Note Guarantee for each note, including the unguaranteed note, to be attached to each note. An Assignment

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Guarantee Agreement will not be used when the multi-note option is utilized.

§ 4279.76 [Reserved]

§ 4279.77 Minimum retention.

The lender is required to hold in its own portfolio a minimum of 5 percent of the original total loan amount. The amount required to be maintained must be of the unguaranteed portion of the loan and cannot be participated to another. The lender may enter into no agreement that reduces its exposure below the minimum 5 percent it is required to retain in its portfolio. The lender may sell the remaining amount of the unguaranteed portion of the loan only through participation.

§ 4279.78 Repurchase from holder.

(a) *Repurchase by lender.* A lender has the option to repurchase the unpaid guaranteed portion of the loan from a holder within 30 days of written demand by the holder when the borrower is in default not less than 60 days on principal or interest due on the loan; or when the lender has failed to remit to the holder its pro rata share of any payment made by the borrower within 30 days of the lender's receipt thereof. The repurchase by the lender must be for an amount equal to the unpaid guaranteed portion of principal and accrued interest less the lender's servicing fee. The holder must concurrently send a copy of the demand letter to the Agency. The lender must accept an assignment without recourse from the holder upon repurchase. For those loans closed on or after August 2, 2016, the lender or the Agency will issue an interest termination letter to the holder(s) establishing the termination date for interest accrual if the default is not cured. The guarantee will not cover interest to any holder accruing after the greater of: 90 days from the date of the most recent delinquency effective date as reported by the lender or 30 days from the date of the interest termination letter. If, in the opinion of the lender, repurchase of the guaranteed portion of the loan is necessary to adequately service the loan, the holder must sell the guaranteed portion of the loan to the lender for an amount equal to the unpaid principal and interest on

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such portion less the lender's servicing fee. The lender must not repurchase from the holder for arbitrage or other purposes to further its own financial gain. Any repurchase must only be made after the lender obtains the Agency's written approval. If the lender does not repurchase the guaranteed portion from the holder, the Agency may, at its option, purchase such guaranteed portion for servicing purposes. The lender is encouraged to repurchase the loan to facilitate the accounting of funds, resolve any loan problems, and prevent default, where and when reasonable. The benefit to the lender is that it may resell the guaranteed portion of the loan in order to continue collection of its servicing fee if the default is cured. When the lender repurchases the guaranteed portion from the secondary market for servicing purposes, the lender must discontinue interest accrual if Federal or State regulators place the loan in non-accrual status if the default is not cured within 90 days. The lender will notify the holder and the Agency of its decision.

(b) *Agency repurchase.* (1) The lender's servicing fee will stop on the date that interest was last paid by the borrower when the Agency purchases the guaranteed portion of the loan from a holder. The lender cannot charge such servicing fee to the Agency and must apply all loan payments and collateral proceeds received to the guaranteed and unguaranteed portions of the loan on a pro rata basis.

(2) If the Agency repurchases 100 percent of the guaranteed portion of the loan and becomes the holder, interest accrual on the loan will cease, and the Agency will not continue collection of the annual renewal fee from the lender.

(3) If the lender does not repurchase the unpaid guaranteed portion of the loan as provided in paragraph (a) of this section, the Agency will purchase from the holder the unpaid principal balance of the guaranteed portion together with accrued interest to date of repurchase, less the lender's servicing fee, within 30 days after written demand to the Agency from the holder. For those loans closed on or after August 2, 2016, the lender or the Agency will issue an interest termination letter to the holder(s) establishing the

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termination date for interest accrual. The guarantee will not cover interest to any holder accruing after the greater of: 90 days from the date of the most recent delinquency effective date as reported by the lender or 30 days from the date of the interest termination letter. Once the holder makes demand upon the Agency, the request cannot be rescinded.

(4) When the guaranteed loan has been delinquent more than 60 days and no holder comes forward, the Agency may issue a letter to the holder(s) establishing the cutoff date for interest accrual. Accrued interest to be paid the holder will be calculated from the date interest was last paid on the loan with a cutoff date being no more than 90 days from the date of the most recent delinquency effective date as reported by the lender.

(5) When the lender has accelerated the account and holds all or a portion of the guaranteed loan, an estimated loss claim (loan in the liquidation process) must be filed by the lender with the Agency within 60 days. Accrued interest paid to the lender will be calculated from the date interest was last paid on the loan with a cutoff date being no more than 90 days from the most recent delinquency effective date as reported by the lender.

(6) The holder's demand to the Agency must include a copy of the written demand made upon the lender. The holder must also include evidence of its right to require payment from the Agency. Such evidence must consist of either the original of the Loan Note Guarantee properly endorsed to the Agency or the original of the Assignment Guarantee Agreement properly assigned to the Agency without recourse, including all rights, title, and interest in the loan. When the single-note system is utilized and the initial holder has sold its interest, the current holder must present the original Assignment Guarantee Agreement and an original of each Agency-approved reassignment document in the chain of ownership, with the latest reassignment being assigned to the Agency without recourse, including all rights, title, and interest in the guarantee. The holder must include in its demand the amount due, including unpaid prin-

cipal, unpaid interest to date of demand, and interest subsequently accruing from date of demand to proposed payment date. The Agency will be subrogated to all rights of the holder.

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

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

§§ 4279.79–4279.83 [Reserved]**§ 4279.84 Replacement of document.**

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

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

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

- (i) Name and address of owner;
- (ii) Name and address of the lender of record;

(iii) Capacity of person certifying;

(iv) Full identification of the Loan Note Guarantee or Assignment Guarantee Agreement, including the name of the borrower, the Agency's case number, date of the Loan Note Guarantee or Assignment Guarantee Agreement, face amount of the evidence of debt purchased, date of evidence of debt, present balance of the loan, percentage of guarantee, and, if an Assignment Guarantee Agreement, the original named holder and the percentage of the guaranteed portion of the loan assigned to that holder. Any existing parts of the document to be replaced must be attached to the certificate;

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

(vi) For the holder, evidence demonstrating current ownership of the Loan Note Guarantee and promissory note or the Assignment Guarantee Agreement. If the present holder is not the same as the original holder, a copy of the endorsement of each successive holder in the chain of transfer from the initial holder to present holder must be included. If copies of the endorsement cannot be obtained, best available records of transfer must be submitted to the Agency (*e.g.*, order confirmation, canceled checks, etc.).

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

(3) All indemnity bonds must be issued and payable to the United States of America acting through the Agency. The bond must be in an amount not less than the unpaid principal and interest. The bond must hold

the Agency harmless against any claim or demand that might arise or against any damage, loss, costs, or expenses that might be sustained or incurred by reasons of the loss or replacement of the instruments.

(4) The Agency will not attempt to obtain, or participate in the obtaining of, replacement notes from the borrower. The holder is responsible for bearing the costs of note replacement if the borrower agrees to issue a replacement instrument. Should such note be replaced, the terms of the note cannot be changed. If the evidence of debt has been lost, stolen, destroyed, mutilated, or defaced, such evidence of debt must be replaced before the Agency will replace any instruments.

§§ 4279.85–4279.99 [Reserved]

§ 4279.100 OMB control number.

In accordance with the Paperwork Reduction Act of 1995, the information collection requirements contained in this subpart have been submitted to the Office of Management and Budget (OMB) under OMB Control Number 0570–0069 for OMB approval.

Subpart B—Business and Industry Loans

SOURCE: 81 FR 36005, June 3, 2016, unless otherwise noted.

§ 4279.101 Introduction.

(a) *Content.* As of October 1, 2020, this subpart is specifically applicable to and only contains loan processing regulations for Business and Industry loans under the authority of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116–136) to provide B&I guarantees for loans needed as a result of the Coronavirus Disease 2019 (COVID–19) pandemic for working capital loan purposes to support business operations and facilities in rural areas (B&I CARES Act Program Loans). Some of the requirements of this subpart are waived or altered for B&I CARES Act Program Loans. The waivers and alterations are provided in § 4279.190 of this subpart. This subpart is supplemented by subpart A of this part, which contains general guaranteed loan regulations, and subpart B of

part 4287 of this chapter, which contains loan servicing regulations. Other than the B&I CARES Act Program Loans, this subpart is no longer used for loan processing requirements for Business and Industry (B&I) loans guaranteed by the Agency. Requirements for regular B&I loans (other than the B&I CARES Act Program Loans) may be found at 7 CFR part 5001.

(b) *Purpose.* The purpose of the B&I Guaranteed Loan Program is to improve, develop, or finance business, industry, and employment and improve the economic and environmental climate in rural communities. This purpose is achieved by bolstering the existing private credit structure through the guarantee of quality loans that will provide lasting community benefits. It is not intended that the guarantee authority will be used for marginal or substandard loans or for relief of lenders having such loans.

(c) *Documents.* Whether specifically stated or not, whenever Agency approval is required, it must be in writing. Copies of all forms and regulations referenced in this subpart may be obtained from any Agency office and from the USDA Rural Development Web site at <http://www.rd.usda.gov/publications>. Whenever a form is designated in this subpart, that designation includes predecessor and successor forms, if applicable, as specified by the Agency.

[81 FR 36005, June 3, 2016, as amended at 85 FR 31040, May 22, 2020; 85 FR 62196, Oct. 2, 2020]

§ 4279.102 Definitions and abbreviations.

The definitions and abbreviations in § 4279.2 are applicable to this subpart.

§ 4279.103 Exception authority.

Section 4279.15 applies to this subpart.

§ 4279.104 Appeals.

Section 4279.16 applies to this subpart.

§§ 4279.105–4279.107 [Reserved]

§ 4279.108 Eligible borrowers.

(a) *Type of entity.* A borrower may be a cooperative organization, corporation, partnership, or other legal entity organized and operated on a profit or nonprofit basis; an Indian tribe on a Federal or State reservation or other federally recognized tribal group; a public body; or an individual. A borrower must be engaged in or proposing to engage in a business. A business may include manufacturing, wholesaling, retailing, providing services, or other activities that will provide employment and improve the economic or environmental climate.

(b) *Citizenship.* Individual borrowers must be citizens of the United States or reside in the United States after being legally admitted for permanent residence. For purposes of this subpart, citizens and residents of the Republic of Palau, the Federated States of Micronesia, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Republic of the Marshall Islands are considered U.S. citizens. Individuals that reside in the United States after being legally admitted for permanent residence must provide a permanent green card as evidence of eligibility. Private entity borrowers must demonstrate, to the Agency's satisfaction, that loan funds will remain in the United States and the facility being financed will primarily create new or save existing jobs for rural U.S. residents.

(c) *Rural area.* The business financed with a guaranteed loan under this subpart must be located in a rural area, except for cooperative organizations financed in accordance with § 4279.113(j)(2) and local foods projects financed in accordance with § 4279.113(y)(2). Loans to borrowers with facilities located in both rural and non-rural areas will be limited to the amount necessary to finance the facility located in the eligible rural area, except for those cooperative organizations financed in accordance with § 4279.113(j)(2) and those local foods projects financed in accordance with § 4279.113(y)(2).

(1) Rural areas are any area of a State other than a city or town that

has a population of greater than 50,000 inhabitants and any urbanized area contiguous and adjacent to such a city or town, and which excludes certain populations pursuant to 7 U.S.C. 1991(a)(13)(H) and (I). In making this determination, the Agency will use the latest decennial census of the United States.

(2) For the purposes of this definition, cities and towns are incorporated population centers with definite boundaries, local self government, and legal powers set forth in a charter granted by the State.

(3) For the Commonwealth of Puerto Rico, the island is considered rural, except for the San Juan Census Designated Place (CDP) and any other CDP with greater than 50,000 inhabitants. However, CDPs with greater than 50,000 inhabitants, other than the San Juan CDP, may be eligible if they are determined to be “not urban in character.”

(4) For the State of Hawaii, all areas within the State are considered rural, except for the Honolulu CDP within the County of Honolulu.

(5) For the Republic of Palau, the Federated States of Micronesia, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Republic of the Marshall Islands, the Agency will determine what constitutes a rural area based on available population data.

(6) Notwithstanding any other provision of this definition, in determining which census blocks in an urbanized area are not in a rural area, the Agency will exclude any cluster of census blocks that would otherwise be considered not in a rural area only because the cluster is adjacent to not more than two census blocks that are otherwise considered not in a rural area under this definition.

(7) The Under Secretary, whose authority may not be redelegated, may determine that an area is “rural in character.” Any determination made by the Under Secretary under this provision will be to areas that are determined to be “rural in character” and are within: An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town

that has a population of greater than 150,000 inhabitants or the urbanized area of such city or town; or an area within an urbanized area contiguous and adjacent to a city or town of greater than 50,000 inhabitants that is within ¼ mile of a rural area.

(i) Units of local government may petition the Under Secretary for a “rural in character” designation by submitting a petition to both the appropriate Rural Development State Director and the Administrator on behalf of the Under Secretary. The petition must document how the area meets the requirements of paragraph (c)(7) of this section and discuss why the petitioner believes the area is “rural in character,” including, but not limited to, the area’s population density; demographics; topography; and how the local economy is tied to a rural economic base. Upon receiving a petition, the Under Secretary will consult with the applicable Governor and Rural Development State Director and request comments within 10 business days, unless those comments were submitted with the petition. The Under Secretary will release to the public a notice of a petition filed by a unit of local government not later than 30 days after receipt of the petition by way of notice in a local newspaper and notice on the applicable Rural Development State Office Web site. The Under Secretary will make a determination not less than 15 days, but no more than 60 days, after the release of the notice. The public notice will appear for at least 3 consecutive days if published in a daily newspaper or otherwise in two consecutive publications. Upon a negative determination, the Under Secretary will provide to the petitioner an opportunity to appeal a determination to the Under Secretary for reconsideration, and the petitioner will have 10 business days to appeal the determination and provide further information for consideration.

(ii) Rural Development State Directors may also initiate a request to the Under Secretary to determine if an area is “rural in character.” A written recommendation should be sent to the Administrator, on behalf of the Under Secretary, that documents how the area meets the statutory requirements

of paragraph (c)(7) of this section and discusses why the State Director believes the area is “rural in character,” including, but not limited to, the area’s population density; demographics; topography; and how the local economy is tied to a rural economic base. Upon receipt of such a request, the Administrator will review the request for compliance with the “rural in character” provisions and make a recommendation to the Under Secretary. Provided a favorable determination is made, the Under Secretary will consult with the applicable Governor and request comments within 10 business days, unless gubernatorial comments were submitted with the request. A public notice will be published by the State Office in accordance with paragraph (c)(7)(i) of this section. There is no appeal process for requests made on the initiative of the State Director.

(d) *Other credit.* All applications for assistance will be accepted and processed without regard to the availability of credit from any other source.

(e) *Prohibition under Agency programs.* No loans guaranteed by the Agency will be conditioned on any requirement that the recipients of such assistance accept or receive electric or other services from any particular utility, supplier, or cooperative.

[81 FR 36005, June 3, 2016, as amended at 87 FR 38644, June 29, 2022]

§§ 4279.109–4279.112 [Reserved]

§ 4279.113 Eligible uses of funds.

Eligible uses of funds must be consistent with § 4279.101(b) and § 4279.108(a) and include, but are not limited to, the following:

(a) Purchase and development of land, buildings, and associated infrastructure for commercial or industrial properties, including expansion or modernization.

(b) Business acquisitions provided that jobs will be created or saved. A business acquisition is considered the acquisition of an entire business, not a partial stock acquisition in a business.

(c) Leasehold improvements when the lease contains no reverter clauses or restrictive clauses that would impair the use or value of the property as

security for the loan. The term of the lease must be equal to or greater than the term of the loan.

(d) Constructing or equipping facilities for lease to private businesses engaged in commercial or industrial operations. Financing for mixed-use properties, involving both commercial business and residential space, is authorized provided that not less than 50 percent of the building’s projected revenue will be generated from business use.

(e) Purchase of machinery and equipment.

(f) Startup costs, working capital, inventory, and supplies in the form of a permanent working capital term loan.

(g) Debt refinancing when it is determined that the project is viable and refinancing is necessary to improve cash flow and create new or save existing jobs. Debt being refinanced must be debt of the borrower reflected on its balance sheet. The lender’s analysis must document that, except for the refinancing of lines of credit, the debt being refinanced was for an eligible loan purpose under this subpart. Except as provided for in paragraph (j)(3) of this section, existing lender debt may be included provided that, at the time of application, the loan being refinanced has been closed and current for at least the past 12 months (current status cannot be achieved by the lender forgiving the borrower’s debt or servicing actions that impact the borrower’s repayment schedule), and the lender is providing better rates or terms. Unless the amount to be refinanced is owed directly to the Federal government or is federally guaranteed, existing lender debt may not exceed 50 percent of the overall loan.

(h) Takeout of interim financing. Guaranteeing a loan that provides for permanent, long-term financing after project completion to pay off a lender’s interim loan will not be treated as debt refinancing provided that the lender submits a complete preapplication or application that proposes such interim financing prior to closing the interim loan. The borrower must take no action that would have an adverse impact on the environment or limit the range of alternatives to be considered by the Agency during the environmental review process. The Agency will not

guarantee takeout of interim financing loans that prevent a meaningful environmental assessment prior to Agency loan approval. Even for projects with interim financing, the Agency cannot approve the loan and issue a Conditional Commitment until the environmental process is complete. The Agency assumes no responsibility or obligation for interim loans.

(i) Purchase of membership, stocks, bonds, or debentures necessary to obtain a loan from Farm Credit System institutions and other lenders provided the purchase is required for all of their borrowers and is the minimum amount required.

(j) Loans to cooperative organizations.

(1) Guaranteed loans to eligible cooperative organizations may be made in principal amounts up to \$40 million if the project is located in a rural area, the cooperative facility being financed provides for the value-added processing of agricultural commodities, and the total amount of loans exceeding \$25 million does not exceed 10 percent of the funds available for the fiscal year.

(2) Guaranteed loans to eligible cooperative organizations may also be made in non-rural areas provided:

(i) The primary purpose of the loan is for a facility to provide value-added processing for agricultural producers that are located within 80 miles of the facility;

(ii) The applicant satisfactorily demonstrates that the primary benefit of the loan will be to provide employment for rural residents;

(iii) The principal amount of the loan does not exceed \$25 million; and

(iv) The total amount of loans guaranteed under this paragraph does not exceed 10 percent of the funds available for the fiscal year.

(3) An eligible cooperative organization may refinance an existing B&I loan provided the existing loan is current and performing; the existing loan is not and has not been in monetary default (more than 30 days late) or the collateral of which has not been converted; and there is adequate security or full collateral for the new guaranteed loan.

(k) The purchase of cooperative stock by individual farmers or ranchers in a

farmer or rancher cooperative or the purchase of transferable cooperative stock in accordance with § 4279.115(a); or the purchase of stock in a business by employees forming an Employee Stock Ownership Plan or worker cooperative in accordance with § 4279.115(c).

(l) The purchase of preferred stock or similar equity issued by a cooperative organization or a fund that invests primarily in cooperative organizations in accordance with § 4279.115(b).

(m) Taxable corporate bonds when the bonds are fully amortizing and comply with all provisions of § 4279.126, and the bond holder (lender) retains 5 percent of the bond in accordance with § 4279.77. The bonds must be fully secured with collateral in accordance with § 4279.131(b). The bonds must only provide for a trustee when the trustee is totally under the control of the lender. The bonds must provide no rights to bond holders other than the right to receive the payments due under the bond. For instance, the bonds must not provide for bond holders replacing the trustee or directing the trustee to take servicing actions, such as accelerating the bonds. Convertible bonds are not eligible under this paragraph due to the potential conflict of interest of a lender having an ownership interest in the borrower.

(1) The bond issuer (borrower) must not issue more than 11 bonds, with no more than 10 of those bonds being guaranteed under this program. The bond issuer must obtain the services and opinion of an experienced bond counsel who must present a legal opinion stating that the bonds are legal, valid, and binding obligations of the issuer and that the issuer has adhered to all applicable laws.

(2) The bond holder must purchase all of the bonds and comply with all Agency regulations. There must be a bond purchase agreement between the issuer and the bond holder. The bond purchase agreement must contain similar language to what is required to be in a loan agreement in accordance with § 4279.161(b)(11) and must not be in conflict with subparts A or B of part 4279 or subpart B of part 4287 of this chapter. The bond holder is responsible for all servicing of the loan (bond), although the bond holder may contract

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for servicing assistance, including contracting with a trustee who remains under the lender's total control.

(n) Interest (including interest on interim financing) during the period before the first principal payment becomes due or when the facility becomes income producing, whichever is earlier.

(o) Fees and charges outlined in §4279.120(a), (c) and (d).

(p) Feasibility studies.

(q) Agricultural production, when not eligible for Farm Service Agency (FSA) farm loan programs assistance and when it is part of an integrated business also involved in the processing of agricultural products. Any agricultural production considered for guaranteed loan financing must be owned, operated, and maintained by the business receiving the loan for which a guarantee is provided. Except for cooperative stock purchase loans in accordance with §4279.115(a), independent agricultural production operations are not eligible, even if not eligible for FSA farm loan programs assistance.

(1) The agricultural-production portion of any loan must not exceed 50 percent of the total loan or \$5 million, whichever is less.

(2) This paragraph does not preclude financing the following types of businesses:

(i) Commercial nurseries engaged in the production of ornamental plants, trees, and other nursery products, such as bulbs, flowers, shrubbery, flower and vegetable seeds, sod, and the growing of plants from seed to the transplant stage; and forestry, which includes businesses primarily engaged in the operation of timber tracts, tree farms, forest nurseries, and related activities, such as reforestation.

(ii) The growing of mushrooms or hydroponics.

(iii) The boarding and/or training of animals.

(iv) Commercial fishing.

(v) Aquaculture, including conservation, development, and utilization of water for aquaculture.

(r) Educational or training facilities.

(s) Industries undergoing adjustment from terminated Federal agricultural price and income support programs or

increased competition from foreign trade.

(t) Community facility projects that are not listed as an ineligible loan purpose in §4279.117.

(u) Nursing homes and assisted living facilities where constant medical care is provided and available onsite to the residents. Independent living facilities are considered residential in nature and are not eligible in accordance with §4279.117(d).

(v) Tourist and recreation facilities, including hotels, motels, bed and breakfast establishments, and resort trailer parks and campgrounds, except as prohibited under ineligible purposes in §4279.117.

(w) Pollution control and abatement.

(x) Energy projects that are not eligible for the Rural Energy for America Program (REAP) (7 CFR part 4280, subpart B), unless sufficient funding is not available under REAP, and when the facility has been constructed according to plans and specifications and is producing at the quality and quantity projected in the application. This does not preclude the guarantee of joint REAP/B&I projects. Eligible energy projects must be commercially available. Eligible energy projects also include those that reduce reliance on nonrenewable energy resources by encouraging the development and construction of solar energy systems and other renewable energy systems (including wind energy systems and anaerobic digesters for the purpose of energy generation), including the modification of existing systems in rural areas.

(1) Projects that produce renewable biomass or biofuel as an output must utilize commercially available technologies and have completed two operating cycles at design performance levels prior to issuance of a Loan Note Guarantee.

(2) Projects that produce steam or electricity as an output must have met acceptance test performance criteria acceptable to the Agency and be successfully interconnected with the purchaser of the output. An executed power purchase agreement acceptable to the Agency will be required prior to issuance of a Loan Note Guarantee.

(3) Performance or acceptance test requirements for all other energy

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projects will be determined by the Agency on a case-by-case basis.

(y) Projects that process, distribute, aggregate, store, and/or market locally or regionally produced agricultural food products to support community development and farm and ranch income, subject to each of the following:

(1) The term “locally or regionally produced agricultural food product” means any agricultural food product that is raised, produced, and distributed in the locality or region in which the final product is marketed, so that the distance the product is transported is less than 400 miles from the origin of the product, or within the State in which the product is produced. Food products could be raw, cooked, or a processed edible substance, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption.

(2) Projects may be located in urban areas, as well as rural areas.

(3) A significant amount of the food product sold by the borrower is locally or regionally produced, and a significant amount of the locally or regionally produced food product is sold locally or regionally. The Agency is choosing not to set a threshold for “significant” but reserves the right to do so in periodic notices in the FEDERAL REGISTER.

(4) The borrower must include in an appropriate agreement, with retail and institutional facilities to which the borrower sells locally or regionally produced agricultural food products, a requirement to inform consumers of the retail or institutional facilities that the consumers are purchasing or consuming locally or regionally produced agricultural food products.

(5) The Agency will give funding priority to projects that provide a benefit to underserved communities in accordance with § 4279.166(b)(4)(i)(G). An underserved community is a community (including an urban or rural community and an Indian tribal community) that has limited access to affordable, healthy foods, including fresh fruits and vegetables, in grocery retail stores or farmer to consumer direct markets and that has either a high rate of hunger or food insecurity or a high poverty rate as reflected in the most recent de-

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cennial census or other Agency-approved census.

(z) A borrower is permitted to use up to 10 percent of the amount provided under this subpart to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

[81 FR 36005, June 3, 2016, as amended at 85 FR 57084, Sept. 15, 2020]

§ 4279.114 [Reserved]

§ 4279.115 Cooperative stock/cooperative equity.

(a) *Cooperative stock purchase program.* The Agency may guarantee loans for the purchase of cooperative stock by individual farmers or ranchers in a farmer or rancher cooperative established for the purpose of processing an agricultural commodity. The cooperative may use the proceeds from the stock sale to recapitalize, to develop a new processing facility or product line, or to expand an existing production facility. The cooperative may contract for services to process agricultural commodities or otherwise process value-added agricultural products during the 5-year period beginning on the operation startup date of the cooperative in order to provide adequate time for the planning and construction of the processing facility of the cooperative. Loan proceeds must remain in the cooperative from which stock was purchased, and the cooperative must not reinvest those funds into another entity. The Agency may also guarantee loans for the purchase of transferable stock shares of any type of existing cooperative, which would primarily involve new or incoming members. Such stock may provide delivery or some form of participation rights and may only be traded among cooperative members. Paragraphs (5) through (7) of this section are not applicable for guaranteed loans for the purchase of transferable cooperative stock.

(1) The maximum loan amount is the threshold established in § 4279.161(c), and all applications will be processed in accordance with § 4279.161(c).

(2) The maximum term is 7 years.

(3) The lender will, at a minimum, obtain a valid lien on the stock, an assignment of any patronage refund, and the ability to transfer the stock to another party, or otherwise liquidate and dispose of the collateral in the event of a borrower default.

(4) The lender must complete a written credit analysis of each stock purchase loan and a complete credit analysis of the cooperative prior to making its first stock purchase loan.

(5) The borrower may provide financial information in the manner that is generally required by commercial agricultural lenders.

(6) A feasibility study of the cooperative is required for startup cooperatives and may be required by the Agency for existing cooperatives when the cooperative's operations will be significantly affected by the proceeds that were generated from the stock sale.

(7) The Agency will conduct an appropriate environmental assessment on the processing facility and will not process individual applications for the purchase of stock until the environmental assessment on the cooperative processing facility is completed. Typically, an individual loan for the purchase of cooperative stock is considered a categorical exclusion.

(b) *Cooperative equity security guarantees.* The Agency may guarantee loans for the purchase of preferred stock or similar equity issued by a cooperative organization or for a fund that invests primarily in cooperative organizations. In either case, the guarantee must significantly benefit one or more entities eligible for assistance under the B&I program.

(1) "Similar equity" is any special class of equity stock that is available for purchase by non-members and/or members and lacks voting and other governance rights.

(2) A fund that invests "primarily" in cooperative organizations is determined by its percentage share of investments in and loans to cooperatives. A fund portfolio must have at least 50 percent of its loans and investments in cooperatives to be considered eligible for loan guarantees for the purchase of preferred stock or similar equity.

(3) The principal amount of the loan will not exceed \$10 million.

(4) The maximum term is 7 years or no longer than the specified holding period for redemption as stated by the stock offering, whichever is less.

(5) All borrowers purchasing preferred stock or similar equity must provide documentation of the terms of the offering that includes compliance with State and Federal securities laws and financial information about the issuer of the preferred stock to both the lender and the Agency.

(6) Issuer(s) of preferred stock must be a cooperative organization or a fund and must be able to issue preferred stock to the public that, if required, complies with State and Federal securities laws.

(7) A fund must use a loan guaranteed under this subpart to purchase preferred stock that is issued by cooperatives.

(8) The lender will, at a minimum, obtain a valid lien on the preferred stock, an assignment of any patronage refund, and the ability to transfer the stock to another party, or otherwise liquidate and dispose of the collateral in the event of a borrower default. For the purpose of recovering losses from loan defaults, lenders may take ownership of all equities purchased with such loans, including additional shares derived from reinvestment of dividends.

(9) Shares of preferred stock that are purchased with guaranteed loan proceeds cannot be converted to common or voting stock.

(10) In the absence of adequate provisions for investors' rights to early redemption of preferred stock or similar equity, a borrower must request from a cooperative or fund issuing such equities a contingent waiver of the holding or redemption period in advance of share purchases. This contingent waiver provides that in the event a borrower defaults on a loan financed under the guaranteed loan program, the borrower waives any ownership rights in the stock, and the lender and Agency will then have the right to redeem the stock.

(11) Guaranteed loans for the purchase of preferred stock must be prepaid in the event a cooperative or fund that issued the stock exercises an early redemption. If the cooperative enters

into bankruptcy, to the extent the cooperative can redeem the preferred stock, the borrower is required to repay the loan from the redemption of the stock.

(c) *Employee ownership succession.* The Agency may guarantee loans for conversions of businesses to either cooperatives or Employee Stock Ownership Plans (ESOP) within 5 years from the date of initial transfer of stock.

(1) The maximum loan amount is the threshold established in § 4279.161(c), and all applications will be processed in accordance with § 4279.161(c).

(2) The maximum term is 7 years.

(3) The lender will, at a minimum, obtain a valid lien on the stock, an assignment of any patronage refund, and the ability to transfer the stock to another party, or otherwise liquidate and dispose of the collateral in the event of a borrower default.

(4) The lender must complete a written credit analysis of each stock purchase loan and a complete credit analysis of the cooperative or ESOP prior to making its first stock purchase loan.

(5) If a cooperative is organized, the selling owner(s) become members with special control rights to protect their stake in the business while a succession plan is implemented. At the completion of the stock transfer, selling owners may retain their membership in the cooperative provided that their control rights are the same as all other members. Any special covenants that selling owners may have held must be extinguished upon completion of the transfer.

(6) If an ESOP is organized for transferring ownership to employees, selling owner(s) may not retain ownership in the business after 5 years from the date of the initial transfer of stock.

§ 4279.116 New Markets Tax Credit program.

This section identifies the provisions specific to guaranteed loans involving projects that include new markets tax credits available under the New Markets Tax Credit (NMTC) program. Such applicants and applications must comply with the provisions in subparts A and B of this part, except as modified in this section.

(a) *Loan guarantees for Qualified Active Low Income Community Businesses (QALICB).* (1) To be an eligible lender for a loan guarantee that involves NMTCs, the organization must meet the applicable eligibility criteria in § 4279.29 as otherwise modified by paragraphs (a)(1)(i) and (ii) of this section.

(i) Sub-entities under the control of a non-regulated lender approved as a lender for this program do not need to separately meet the requirements of § 4279.29(b). An eligible non-regulated lender may modify its list of eligible sub-entities under its control at any time by notifying the Agency in writing.

(ii) In order to take advantage of the requirement exemption in paragraph (a)(1)(i) of this section, the non-regulated lender must include in its application to be a lender each sub-entity under its control and must clearly define the multiple-entity organizational and control structure. In addition, the lender must include each such sub-entity in the audited financial statements, commercial loan portfolio, and commercial loan performance statistics.

(2) The provisions of § 4279.117(q) notwithstanding, a lender that is a Department of Treasury certified Community Development Entity (CDE) or subsidiary of a CDE (sub-CDE) may have an ownership interest in the borrower provided that each of the conditions specified in paragraphs (a)(2)(i) through (iv) of this section is met.

(i) The lender does not have an ownership interest in the borrower prior to the guaranteed loan application.

(ii) The lender does not take a controlling interest in the borrower.

(iii) The lender cannot provide equity or take an ownership interest in a borrower at a level that would result in the lender owning 20 percent or more interest in the borrower.

(iv) In its guaranteed loan application, the lender provides an Agency-approved exit strategy when the NMTCs expire after the seventh year. The CDE's (or sub-CDE's) exit strategy must include a general plan to address the lender's equity in the project, and, if the lender will divest its equity interest, how this will be accomplished and the impact on the borrower.

(3) Notwithstanding §4279.117(p), a CDE's (or sub-CDE's) ownership interest in the borrower does not constitute a conflict of interest. The Agency will mitigate the potential for or appearance of a conflict of interest by requiring appropriate loan covenants regarding limitations on dividends and distributions of earnings be established, as well as other covenants in accordance with §4279.161(b)(11). The Agency will also ensure that the lender limits waivers of loan covenants and future modifications of loan documents.

(4) For purposes of calculating tangible balance sheet equity, the CDE's or sub-CDE's loan that is subordinated to the guaranteed loan will be considered equity when calculating tangible balance sheet equity. The QALICB's financial statements must be prepared in accordance with GAAP.

(b) *Loan guarantees for the leveraged lender.* The provisions of §4279.117(s) notwithstanding, an investor fund entity, such as an investor partnership or investor LLC, may be an eligible borrower as specified in paragraph (b)(1) of this section. Paragraphs (b)(2) through (13) of this section identify modifications to subpart B of this part that apply when the eligible borrower is an investor fund entity.

(1) To be an eligible borrower for a NMTC loan, each of the following conditions must be met:

(i) The investor fund entity must be established for a single specific NMTC investment;

(ii) The lender is not an affiliate of the investor fund entity;

(iii) One hundred percent of the guaranteed loan funds are or will be invested in one or more sub-CDEs that will then be loaned directly to a Qualified Active Low Income Community Business (QALICB), as defined by applicable regulations of the Internal Revenue Service and are or will be used by the QALICB in accordance with §§4279.113 and 4279.117. All of the B&I guaranteed loan funds must be "passed through" the sub-CDE to the QALICB through a direct tracing method. The QALICB's project must be the ultimate use of the B&I guaranteed loan funds; and

(iv) The QALICB meets the requirements of §4279.108.

(2) The provisions of §4279.119 apply except that the loan guarantee limits apply to the QALICB and not to the investor fund entity, who would otherwise be understood to be the "borrower."

(3) Section 4279.126 applies to both the borrower (investor fund entity) and the QALICB. The terms and payment schedule of the lender's loan to the investor fund entity must be at least equal to the terms and payment schedule of the sub-CDE's loan to the QALICB. An Agency approved unequal or escalating schedule of principal and interest payments may be used for a NMTC loan. The lender may require additional principal repayment by a co-borrower, such as an owner or principal of the QALICB. The lender or sub-CDE may require a debt repayment reserve fund or sinking fund; however, such fund is not in lieu of a principal repayment schedule in accordance with §4279.126 as amended by this paragraph.

(4) Except for §4279.131(b), §4279.131 applies to both the lender's loan to the investor fund entity and the sub-CDE's loan to the QALICB. Section 4279.131(b) applies only to the sub-CDE's loan to the QALICB. Section 4279.116(a)(4) also applies when calculating tangible balance sheet equity.

(5) The personal and corporate guarantee provisions of §4279.132 and the insurance provisions of §4279.136 apply only to the QALICB and the sub-CDE's loan to the QALICB.

(6) Section 4279.137 applies to both the borrower (investor fund entity) and the QALICB.

(7) Sections 4279.144 and 4279.150 apply to both the QALICB and the sub-CDE's loan to the QALICB.

(8) Section 4279.161 applies to both the borrower (investor fund entity) and the QALICB. As part of the application completed by the lender in accordance with §4279.161, the application documentation must include comparable information for the loan (using the B&I guaranteed loan funds) between the sub-CDE and QALICB. The requirements of §4279.161 apply to the loan application, application analysis and underwriting, and loan documents between the sub-CDE and QALICB. The lender must include these materials in

its guaranteed loan application to the Agency.

(9) The environmental requirements specified in § 4279.165(b) apply to both the loan between the sub-CDE and QALICB and the QALICB's project.

(10) When assigning the priority score to a NMTC loan application under § 4279.166, the Agency will score the project based on the sub-CDE's loan to the QALICB, the QALICB, and the QALICB's project as the ultimate use of B&I guaranteed loan funds.

(11) When complying with the planning and performing development provisions in § 4279.167, the lender is responsible for ensuring that both the sub-CDE's loan to the QALICB and the QALICB's project comply with the provisions in § 4279.167.

(12) Section 4279.180 applies to both the borrower (investor fund entity) and the QALICB.

(13) Section 4279.181 applies to both the borrower (investor fund entity) and the QALICB.

[81 FR 36005, June 3, 2016, as amended at 82 FR 26335, June 7, 2017]

§ 4279.117 Ineligible purposes and entity types.

(a) Distribution or payment to an individual or entity that will retain an ownership interest in the borrower or distribution or payment to a beneficiary of the borrower. Distribution or payment to a member of the immediate family of an owner, partner, or stockholder will not be permitted, except for a change in ownership of the business where the selling immediate family member does not retain an ownership interest and the Agency determines the price paid to be reasonable. As this type of transaction is not an arm's length transaction, reasonableness of the price paid will be based upon an appraisal. In situations where there is common ownership or an otherwise closely-related company is being paid to do construction or installation work for a borrower, only documented costs associated with construction or installation can be paid with loan proceeds. Documented construction or installation costs may not include any profit or wages to a related person, and all work must be done at cost with no profit built into the cost.

This paragraph does not apply to transfers of ownership for ESOPs or worker cooperatives, to cooperatives where the cooperative pays the member for product or services, or where member stock is transferred among members of the cooperative in accordance with § 4279.115.

(b) Projects in excess of \$1 million that would likely result in the transfer of jobs from one area to another and increase direct employment by more than 50 employees. However, this limitation is not to be construed to prohibit assistance for the expansion of an existing business entity through the establishment of a new branch, affiliate, or subsidiary of such entity if the establishment of such branch, affiliate, or subsidiary will not result in an increase in unemployment in the area of original location or in any other area where such entity conducts business operations, unless there is reason to believe that such branch, affiliate, or subsidiary is being established with the intention of closing down the operations of the existing business entity in the area or its original location or in any other area where it conducts such operations.

(c) Projects in excess of \$1 million that would increase direct employment by more than 50 employees, which is calculated to or likely to result in an increase in the production of goods, materials, or commodities, or the availability of services or facilities in the area, when there is not sufficient demand for such goods, materials, commodities, services, or facilities to employ the efficient capacity of existing competitive commercial or industrial enterprises, unless such financial or other assistance will not have an adverse effect upon existing competitive enterprises in the area.

(d) The financing of timeshares, residential trailer parks, housing development sites, apartments, duplexes, or other residential housing, except as authorized in § 4279.113(d).

(e) Owner-occupied housing, such as bed and breakfasts, hotels and motels, storage facilities, etc., are only allowed when the pro rata value of the owner's living quarters, based on square footage, is deducted from the use of loan proceeds.

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(f) Guaranteeing lease payments or any lines of credit.

(g) Guaranteeing loans made by other Federal agencies.

(h) Loans made with the proceeds of any obligation the interest on which is excludable from income under 26 U.S.C. 103 or a successor statute. Funds generated through the issuance of tax-exempt obligations shall neither be used to purchase the guaranteed portion of any Agency guaranteed loan nor shall an Agency guaranteed loan serve as collateral for a tax-exempt issue. The Agency may guarantee a loan for a project that involves tax-exempt financing only when the guaranteed loan funds are used to finance a part of the project that is separate and distinct from the part that is financed by the tax-exempt obligation, and the guaranteed loan has at least a parity security position with the tax-exempt obligation.

(i) Guarantees supporting inherently religious activities, such as worship, religious instruction, proselytization, or to pay costs associated with acquisition, construction, or rehabilitation of structures for inherently religious activities, including the financing of multi-purpose facilities where religious activities will be among the activities conducted.

(j) Businesses that derive more than 10 percent of annual gross revenue (including any lease income from space or machines) from gambling activity, excluding State-authorized lottery proceeds.

(k) Businesses deriving income from activities of a prurient sexual nature or illegal activities.

(l) Racetracks or facilities for the conduct of races by animals, professional or amateur drivers, jockeys, etc.

(m) Golf courses and golf course infrastructure, including par 3 and executive golf courses.

(n) Cemeteries.

(o) Research and development projects and projects that involve technology that is not commercially available.

(p) Any project that the Agency determines creates a conflict of interest or an appearance thereof between any party related to the project.

(q) Guarantees where the lender or any of the lender's officers has an ownership interest in the borrower or is an officer or director of the borrower or where the borrower or any of its officers, directors, stockholders, or other owners have more than a 5 percent ownership interest in the lender. Any of the lender's directors, stockholders, or other owners that are officers, directors, stockholders, or other owners of the borrower must be recused from the decisionmaking process.

(r) Other than cooperative stock purchase loans and cooperative equity security guarantees in accordance with §4279.115, guarantees supporting investment or arbitrage or speculative real estate investment.

(s) Lending institutions, investment institutions, or insurance companies.

(t) Charitable or fraternal organizations. Businesses that derive more than 10 percent of annual gross revenue from tax deductible charitable donations, based on historical financial statements required by §4279.161(b), are considered charitable organizations for the purpose of this paragraph. Fees for services rendered or that are otherwise ineligible for deduction under the Internal Revenue Code are not considered tax deductible charitable donations.

(u) Any business located within the Coastal Barriers Resource System that does not qualify for an exception as defined in section 6 of the Coastal Barriers Resource Act, 16 U.S.C. 3501 *et seq.*

(v) Any business located in a special flood or mudslide hazard area as designated by the Federal Emergency Management Agency in a community that is not participating in the National Flood Insurance Program unless the project is an integral part of a community's flood control plan.

(w) Any project that drains, dredges, fills, levels, or otherwise manipulates a wetland or engages in any activity that results in impairing or reducing the flow, circulation, or reach of water, except in the case of activity related to the maintenance of previously converted wetlands. This does not apply to loans for utility lines.

§ 4279.118 [Reserved]

§ 4279.119 **Loan guarantee limits.**

(a) *Loan amount.* The total amount of B&I loans to one borrower (including the guaranteed and unguaranteed portions, the outstanding principal and interest balance of any existing B&I guaranteed loans, and the new loan request) must not exceed \$10 million, except as outlined in paragraphs (a)(1) and (2) of this section. In addition to the borrower loan limit, there is a guarantor loan limit of \$50 million.

(1) The Administrator may, at the Administrator's discretion, grant an exception to the \$10 million limit for loans of \$25 million or less under the following circumstances:

(i) The project to be financed is a high-priority project as defined in § 4279.2. Priority points will be awarded in accordance with the criteria contained in § 4279.166;

(ii) The lender must document to the satisfaction of the Agency that the loan will not be made and the project will not be completed if the guaranteed loan is not approved; and

(iii) The percentage of guarantee will not exceed 60 percent. No exception to this requirement will be approved under paragraph (b) of this section for loans exceeding \$10 million.

(2) The Secretary, whose authority may not be redelegated, may approve guaranteed loans in excess of \$25 million, at the Secretary's discretion, for rural cooperative organizations that process value-added agricultural commodities in accordance with § 4279.113(j)(1).

(b) *Percentage of guarantee.* The percentage of guarantee, up to the maximum allowed by this section, is a matter of negotiation between the lender and the Agency. The maximum percentage of guarantee is 80 percent for loans of \$5 million or less, 70 percent for loans between \$5 and \$10 million, and 60 percent for loans exceeding \$10 million. For subsequent guaranteed loans, the maximum percentage of guarantee will be based on the cumulative amount of outstanding principal and interest of any existing B&I guaranteed loans and the new loan request. Notwithstanding the preceding, the Administrator may, at the Administra-

tor's discretion, grant an exception allowing guarantees of up to 90 percent on loans of \$5 million or less if the conditions of either paragraph (b)(1) or (b)(2) are met. Each fiscal year, the Agency will establish a limit on the maximum portion of guarantee authority available for that fiscal year that may be used to guarantee loans with an increased percentage of guarantee. The Agency will publish a notice announcing this limit in the FEDERAL REGISTER.

(1) The project to be financed is a high-priority project as defined in § 4279.2. Priority points will be awarded in accordance with the criteria contained in § 4279.166; or

(2) The lender documents, to the satisfaction of the Agency, that the loan will not be made and the project will not be completed due to the bank's legal or regulatory lending limit if the higher percentage of guarantee is not approved.

§ 4279.120 **Fees and charges.**

There are two types of non-refundable fees—the guarantee fee and the annual renewal fee. These fees are to be paid by the lender but may be passed on to the borrower.

(a) *Guarantee fee.* The guarantee fee is paid at the time the Loan Note Guarantee is issued and may be included as an eligible use of guaranteed loan proceeds. The amount of the guarantee fee is determined by multiplying the total loan amount by the guarantee fee rate by the percentage of guarantee. The rate of the guarantee fee is established by the Agency in an annual notice published in the FEDERAL REGISTER. Subject to annual limits set by the Agency in the published notice, the Agency may charge a reduced guarantee fee if requested by the lender for loans of \$5 million or less when the borrower's business:

(1) Supports value-added agriculture and results in farmers benefiting financially,

(2) Promotes access to healthy foods, or

(3) Is a high impact business development investment as defined in § 4279.2 and applied in accordance with § 4279.166(b)(4) and is located in a rural community that:

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(i) Is experiencing long-term population decline;

(ii) Has remained in poverty for the last 30 years;

(iii) Is experiencing trauma as a result of natural disaster;

(iv) Is located in a city or county with an unemployment rate 125 percent of the Statewide rate or greater; or

(v) Is located within the boundaries of a federally recognized Indian tribe's reservation or within tribal trust lands or within land owned by an Alaska Native Regional or Village Corporation as defined by the Alaska Native Claims Settlement Act.

(b) *Annual renewal fee.* The annual renewal fee is paid by the lender to the Agency once a year. Payment of the annual renewal fee is required in order to maintain the enforceability of the guarantee as to the lender.

(1) The Agency will establish the rate of the annual renewal fee in an annual notice published in the FEDERAL REGISTER. The amount of the annual renewal fee is determined by multiplying the outstanding principal loan balance as of December 31 of each year by the annual renewal fee rate by the percentage of guarantee. The rate that is in effect at the time the loan is obligated remains in effect for the life of the guarantee on the loan.

(2) Annual renewal fees are due on January 31. Payments not received by April 1 are considered delinquent and, at the Agency's discretion, may result in the Agency terminating the guarantee to the lender. The Agency will provide the lender 30 calendar days' notice that the annual renewal fee is delinquent before terminating the guarantee. Holders' rights will continue in effect as specified in Form RD 4279-5, "Loan Note Guarantee," and Form RD 4279-6, "Assignment Guarantee Agreement," unless the holder took possession of an interest in the Loan Note Guarantee knowing the annual renewal fee had not been paid. Until the Loan Note Guarantee is terminated by the Agency, any delinquent annual renewal fees will bear interest at the note rate, and any delinquent annual renewal fees, including any interest due thereon, will be deducted from any loss payment due the lender. For loans where the Loan Note Guarantee is issued be-

tween October 1 and December 31, the first annual renewal fee payment is due January 31 of the second year following the date the Loan Note Guarantee was issued.

(3) Lenders are prohibited from selling guaranteed loans on the secondary market if there are unpaid annual renewal fees.

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

(d) *Professional services.* Professional services are those rendered by persons generally licensed or certified by States or accreditation associations, such as architects, engineers, accountants, attorneys, or appraisers, and those rendered by loan packagers. The borrower may pay fees for professional services needed for planning and developing a project. Such fees are an eligible use of loan proceeds provided that the Agency agrees that the amounts are reasonable and customary. The lender must document these fees on Form RD 4279-1.

§§ 4279.121–4279.124 [Reserved]

§ 4279.125 Interest rates.

The interest rate for the guaranteed loan will be negotiated between the lender and the borrower and may be either fixed or variable, or a combination thereof, as long as it is a legal rate. Interest rates will not be more than those rates customarily charged borrowers for loans without guarantees and are subject to Agency review and approval. Lenders are encouraged to utilize the secondary market and pass interest-rate savings on to the borrower.

(a) A variable interest rate must be a rate that is tied to a published base rate, published in a national or regional financial publication, agreed to by the lender and the Agency. The variable interest rate must be specified in the promissory note and may be adjusted at different intervals during the term of the loan, but the adjustments may not be more often than quarterly. The lender must incorporate, within the variable rate promissory note at loan closing, the provision for adjustment of payment installments. The lender must fully amortize the outstanding principal balance within the prescribed loan maturity in order to eliminate the possibility of a balloon payment at the end of the loan.

(b) It is permissible to have different interest rates on the guaranteed and unguaranteed portions of the loan provided that the rate of the guaranteed portion does not exceed the rate on the unguaranteed portion, except for situations where a fixed rate on the guaranteed portion becomes a higher rate than the variable rate on the unguaranteed portion due to the normal fluctuations in the approved variable interest rate.

(c) Any change in the base rate or fixed interest rate between issuance of Form RD 4279-3, “Conditional Commitment,” and Form RD 4279-5 must be approved in writing by the Agency. Approval of such change must be shown as an amendment to the Conditional Commitment in accordance with § 4279.173(b) and must be reflected on Form RD 1980-19, “Guaranteed Loan Closing Report.”

(d) The lender’s promissory note must not contain provisions for default or penalty interest nor will default or penalty interest, interest on interest, or late payment fees or charges be paid under the Loan Note Guarantee.

§ 4279.126 Loan terms.

(a) The length of the loan term must be the same for both the guaranteed and unguaranteed portions of the loan. The maximum repayment for loans for real estate will not exceed 30 years; machinery and equipment repayment will not exceed the useful life of the machinery and equipment or 15 years, whichever is less; and working capital

repayment will not exceed 7 years. The term for a debt refinancing loan may be based on the collateral the lender will take to secure the loan.

(b) A loan’s maturity will take into consideration the use of proceeds, the useful life of assets being financed and those used as collateral, and the borrower’s ability to repay the loan.

(c) Only loans that require a periodic payment schedule that will retire the debt over the term of the loan without a balloon payment will be guaranteed.

(d) The first installment of principal and interest will, if possible, be scheduled for payment after the facility is operational and has begun to generate income. However, the first full installment must be due and payable within 3 years from the date of the promissory note and be paid at least annually thereafter. In cases where there is an interest-only period, interest will be paid at least annually from the date of the note.

(e) There must be no “due-on-demand” clauses without cause. Regardless of any “due-on-demand” with cause provision in a lender’s promissory note, the Agency must concur in any acceleration of the loan unless the basis for acceleration is monetary default.

§§ 4279.127–4279.130 [Reserved]

§ 4279.131 Credit quality.

The Agency will only guarantee loans that are sound and that have a reasonable assurance of repayment. The lender is responsible for conducting a financial analysis that involves the systematic examination and interpretation of information to assess a company’s past performance, present condition, and future viability. The lender is primarily responsible for determining credit quality and must address all of the elements of credit quality in a comprehensive, written credit analysis, including capacity (sufficient cash flow to service the debt), collateral (assets to secure the loan), conditions (borrower, economy, and industry), capital (equity/net worth), and character (integrity of management), as further described in paragraphs (a) through (e) of this section. The lender’s analysis is the central underwriting

document and must be sufficiently detailed to describe the proposed loan and business situation and document that the proposed loan is sound. The lender's analysis must include a written discussion of repayment ability with a cash-flow analysis, history of debt repayment, borrower's management, necessity of any debt refinancing, and credit reports of the borrower, principals, and any parent, affiliate, or subsidiary. The lender's analysis must also include spreadsheets and discussion of the 3 years of historical balance sheets and income statements (for existing businesses) and 2 years of projected balance sheets, income statements, and cash flow statements, with appropriate ratios and comparisons with industrial standards (such as Dun & Bradstreet or the Risk Management Association). All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales.

(a) *Capacity/cash flow.* The lender must make all efforts to ensure the borrower has adequate working capital or operating capital and to structure or restructure debt so that the borrower has adequate debt coverage and the ability to accommodate expansion.

(b) *Collateral.* The lender must ensure that the collateral for the loan has a documented value sufficient to protect the interest of the lender and the Agency. The discounted collateral value must be at least equal to the loan amount.

(1) The lender must discount collateral consistent with the sound loan-to-discounted value policy outlined in paragraphs (b)(1)(i) through (iv) of this section. The type, quality, and location of collateral are relevant factors used to assess collateral adequacy and appropriate levels of discounting. Other factors to be considered in the discounted value of collateral must include the marketability and alternative uses of the collateral. That is, specialized buildings or equipment will be discounted greater than multi-purpose facilities or equipment. When using discounts other than those outlined in paragraphs (b)(1)(i) through (b)(1)(iv) and when in accordance with

paragraph (b)(2), the lender must document why such discounts are appropriate.

(i) A maximum of 80 percent of current fair market value will be given to real estate. Special purpose real estate must be assigned less value.

(ii) A maximum of 70 percent of cost or current fair market value will be given to machinery, equipment, and furniture and fixtures and will be based on its marketability, mobility, useful life, specialization, and alternative uses, if any.

(iii) A maximum of 60 percent of book value will be assigned to acceptable inventory and accounts receivable; however, all accounts over 90 days past due, contra accounts, affiliated accounts, and other accounts deemed not to be acceptable collateral, as determined by the Agency, will be omitted. Calculations to determine the percentage to be applied in the analysis are to be based on the realizable value of the accounts receivable taken from a current aging of accounts receivable from the borrower's most recent financial statement. At a minimum, reviewed annual financial statements will be required when there is a predominant reliance on inventory and/or receivable collateral that exceeds \$250,000. Except for working capital loans, term debt must not be dependent upon accounts receivable and inventory to meet collateral requirements.

(iv) No value will be assigned to unsecured personal, partnership, or corporate guarantees.

(2) Some businesses are predominantly cash-flow oriented, and where cash flow and profitability are strong, loan-to-value discounts may be adjusted accordingly with satisfactory documentation. A loan primarily based on cash flow must be supported by a successful and documented financial history. Under no circumstances must the loan-to-value of the collateral (loan-to-fair market value) ever be equal to or greater than 100 percent.

(3) Intangible assets cannot serve as primary collateral. For purposes of determining compliance with this requirement, leasehold improvements are considered tangible assets and can serve as primary collateral.

(4) A parity or junior lien position may be considered provided the loan-to-discounted value is adequate to secure the guaranteed loan in accordance with this section.

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

(c) *Conditions.* The lender must consider the current status of the borrower, overall economy, and industry for which credit is being extended. The regulatory environment surrounding the particular business or industry must also be considered. Businesses in areas of decline will be required to provide strong business plans that outline how they differ from the current trends. Local, regional, and national condition of the industry must be addressed.

(d) *Capital/equity.* (1) A minimum of 10 percent tangible balance sheet equity (or a maximum debt to tangible net worth ratio of 9:1) will be required at loan closing for borrowers that are existing businesses. A minimum of 20 percent tangible balance sheet equity (or a maximum debt to tangible net worth ratio of 4:1) will be required at loan closing for borrowers that are new businesses. For energy projects, the minimum tangible balance sheet equity requirement range will be between 25 percent and 40 percent (or a maximum debt to tangible net worth ratio between 3:1 and 1.5:1) at loan closing, considering whether the business is an existing business with a successful financial and management history or a new business; the value of personal/corporate guarantees offered; contractual relationships with suppliers and buyers; credit rating; and strength of the business plan/feasibility study.

(2) Tangible balance sheet equity will be determined based upon financial statements prepared in accordance with GAAP except that, for the purposes of this subpart, leasehold improvements are to be considered tangible assets when making the tangible balance sheet equity calculation. The capital/equity requirement must be

met in the form of either cash or tangible earning assets contributed to the business and reflected on the borrower's balance sheet. Transfers of assets at fair market value between related parties, which are not arm's length transactions, must be in accordance with GAAP and require evidence that the transaction was entered into at market terms. Tangible equity cannot include appraisal surplus, bargain purchase gains, or intangible assets (except for leasehold improvements). Owner subordinated debt may be included when the subordinated debt is in exchange for cash injected into the business that remains in the business for the life of the guaranteed loan. The note or other form of evidence must be submitted to the Agency in order for subordinated debt to count towards meeting the tangible balance sheet equity requirement.

(3) The lender must certify, in accordance with § 4279.181(a)(9)(i), that the capital/equity requirement was determined, based on a balance sheet prepared in accordance with GAAP, and met, as of the date the guaranteed loan was closed, giving effect to the entirety of the loan in the calculation, whether or not the loan itself is fully advanced. A copy of the loan closing balance sheet must be included with the lender's certification.

(4) In situations where a real estate holding company and an operating entity are dependent upon one another's operations and are effectively one business, they must be co-borrowers, unless waived by the Agency when the Agency determines that adequate justification exists to not require the entities to be co-borrowers. The capital/equity requirement will apply to all borrowing entities on a consolidated basis, and financial statements must be prepared both individually and on a consolidated basis.

(5) In situations where co-borrowers are independent operations, the capital/equity requirement will apply to all co-borrowers on an individual basis.

(6) For sole proprietorships and other situations where business assets are held personally, financial statements must be prepared using only the assets and liabilities directly attributable to

the business. Assets, plus any improvements, must be valued at the lower of cost or fair market value.

(7) Increases in the equity requirement may be imposed by the Agency. A reduction in the capital/equity requirement for existing businesses may be permitted by the Administrator under the following conditions:

(i) Collateralized personal and/or corporate guarantees, in accordance with § 4279.132, when feasible and legally permissible, are obtained; and

(ii) All pro forma and historical financial statements indicate the business to be financed meets or exceeds the median quartile (as identified in the Risk Management Association's Annual Statement Studies or similar publication) for the current ratio, quick ratio, debt-to-worth ratio, and debt coverage ratio.

(e) *Character.* The lender must conduct a thorough review of key management personnel to ensure that the business has adequately trained and experienced managers. The borrower and all owners with a 20 percent or more ownership interest must have a good credit history, reflecting a record of meeting obligations in a timely manner. If there have been credit problems in the past, the lender must provide a satisfactory explanation to show that the problems are unlikely to recur.

[81 FR 36005, June 3, 2016, as amended at 83 FR 11634, Mar. 16, 2018]

§ 4279.132 Personal and corporate guarantees.

(a) Full, unconditional personal and/or corporate guarantees for the full term of the loan are required from those owning 20 percent or more interest in the borrower, where legally permissible, unless the Agency grants an exception. The Agency may grant an exception for existing businesses only when the lender requests it and documents to the Agency's satisfaction that collateral, equity, cash flow and profitability indicate an above-average ability to repay the loan. Partial guarantees for the full term of the loan at least equal to each owner's percentage of interest in the borrower times the loan amount may be required in lieu of full, unconditional guarantees when the guarantors' percentages equal 100

percent so that the loan is fully guaranteed.

(b) When warranted by an Agency assessment of potential financial risk, the Agency may require the following:

(1) Guarantees to be secured;

(2) Guarantees of parent, subsidiaries, or affiliated companies owning less than a 20 percent interest in the borrower; and

(3) Guarantees from persons whose ownership interest in the borrower is held indirectly through intermediate entities.

(c) All personal and corporate guarantors must execute Form RD 4279-14, "Unconditional Guarantee," and any guarantee form required by the lender. The Agency will retain the original, executed Form RD 4279-14.

(1) Any amounts paid by the Agency on behalf of an Agency guaranteed loan borrower will constitute a Federal debt owed to the Agency by the guaranteed loan borrower.

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

(3) In all instances under paragraphs (c)(1) and (2) of this section, interest charges will be assessed in accordance with 7 CFR 1951.133.

§§ 4279.133–4279.135 [Reserved]

§ 4279.136 Insurance.

The lender is responsible for ensuring that required insurance is maintained by the borrower.

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

(b) *Life.* The lender may require a collateral assignment of life insurance to insure against the risk of death of persons critical to the success of the business. When required, coverage must be in amounts necessary to provide for management succession or to protect

the business. The Agency may require life insurance on key individuals for loans where the lender has not otherwise proposed such coverage. The cost of insurance and its effect on the applicant's working capital must be considered, as well as the amount of existing insurance that could be assigned without requiring additional expense.

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

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

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

§ 4279.137 Financial statements.

Except for audited financial statements required by § 4279.71, the lender will determine the type and frequency of submission of financial statements by the borrower and any guarantors. At a minimum, annual financial statements prepared by an accountant in accordance with GAAP are required, except for personal financial statements and cooperative stock purchase loans in accordance with § 4279.115(a) that do not have to be prepared in accordance with GAAP. However, if the loan amount exceeds \$10 million or if circumstances warrant, the Agency may require annual audited financial statements.

§§ 4279.138–4279.143 [Reserved]

§ 4279.144 Appraisals.

Lenders must obtain appraisals for real estate and chattel collateral when the value of the collateral exceeds \$250,000, unless the chattel is newly-acquired equipment and the value is supported by a bill of sale. For collateral values under this threshold, lenders must follow their primary regulator's policies relating to appraisals and evaluations or, if the lender is not regulated, normal banking practices and generally accepted methods of deter-

mining value. Lenders must use the fair market value as established by the appraisal and discounting policies outlined in § 4279.131(b) to meet the discounted collateral coverage requirements of this subpart. Lenders are responsible for ensuring that appraisal values adequately reflect the actual value of the collateral. The Agency will require documentation that the appraiser has the necessary experience and competency to appraise the property in question. Appraisals must not be more than 1 year old, and a more recent appraisal may be requested by the Agency in order to reflect more current market conditions. For loan servicing purposes, an appraisal may be updated in lieu of a complete new appraisal when the original appraisal is more than 1 year old but less than 2 years old. Failure by the lender to follow these requirements will be considered not acting in a reasonably prudent manner.

(a) All real property appraisals associated with Agency guaranteed loanmaking and servicing transactions must meet the requirements contained in the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989, and the appropriate guidelines contained in Standards 1 and 2 of the Uniform Standards of Professional Appraisal Practices (USPAP) and be performed by a State Certified General Appraiser. Notwithstanding any exemption that may exist for transactions guaranteed by a Federal government agency, all appraisals obtained by the lender for loanmaking and servicing must conform to the Interagency Appraisal and Evaluations Guidelines established by the lender's primary Federal or State regulator. All appraisals must include consideration of the potential effects from a release of hazardous substances or petroleum products or other environmental hazards on the fair market value of the collateral, if applicable. The lender must complete and submit its technical review of the appraisal. For construction projects, the lender must use the "as-completed" market value of the real estate to determine value of the real estate property.

(b) Values of both tangible and intangible assets, including values attributed to business valuation or as a going concern, must be reported individually/separately in the appraisal as values attributed to business valuation or as a going concern will be deducted from the reconciled fair market value of the hard assets for purposes of calculating collateral coverage.

(c) Chattels with values under the \$250,000 threshold must be evaluated in accordance with the lender's primary regulator's policies relating to appraisals and evaluations or, if the lender is not regulated, normal banking practices and generally accepted methods of determining value. Chattel appraisals must reflect the age, condition, and remaining useful life of the equipment. If the appraisal is completed by a State licensed/certified appraiser, the appraisal report must comply with USPAP Standards 7 and 8.

[81 FR 36005, June 3, 2016, as amended at 81 FR 54477, Aug. 16, 2016]

§§ 4279.145–4279.149 [Reserved]

§ 4279.150 Feasibility studies.

A feasibility study, by a qualified independent consultant acceptable to the Agency, is required for new businesses. The Agency may require a feasibility study for existing businesses when the project will significantly affect the borrower's operations, and cash flow from the existing facility is not sufficient to service the new debt. At a minimum, a feasibility study must include an evaluation of the economic, market, technical, financial, and management feasibility and an executive summary that reaches an overall conclusion as to the business' chance of success. The income approach of an appraisal is not an acceptable feasibility study.

§§ 4279.151–4279.160 [Reserved]

§ 4279.161 Filing preapplications and applications.

Borrowers and lenders are encouraged to file preapplications and obtain Agency comments before completing an application. However, if they prefer, borrowers and lenders may file a complete application without filing a

preapplication. The Agency will neither accept nor process preapplications and applications unless a lender has agreed to finance the proposal. For borrowers other than individuals, a Dun and Bradstreet Universal Numbering System (DUNS) number is required, which can be obtained online at <http://fedgov/dnd.com/webform>. Guaranteed loans exceeding \$600,000 must be submitted under the requirements specified in paragraph (b) of this section. However, guaranteed loans of \$600,000 and less may be submitted under the requirements of either paragraph (b) or (c) of this section.

(a) *Preapplications*. Lenders may file preapplications by submitting the following to the Agency:

(1) A letter or preliminary lender credit analysis, signed by the lender, containing the following:

(i) Name of the proposed borrower, organization type, address, contact person, Federal tax identification number, email address, and telephone number;

(ii) Name of the proposed lender, address, telephone number, contact person, email address, and lender's Internal Revenue Service (IRS) identification number;

(iii) Amount of the loan request, percent of guarantee requested, and the proposed rates and terms;

(iv) Description of collateral to be offered with estimated value(s) and the amount and source of equity to be contributed to the project;

(v) A brief description of the project, products or services provided, and availability of raw materials and supplies; and

(vi) The number of current full-time equivalent jobs, the number of jobs to be created as a result of the proposed loan, and the overall average wage rate.

(2) The borrower's current (not more than 90 days old) balance sheet and year-to-date income statement. For existing businesses, also include balance sheets and income statements for the last 3 years; and

(3) A completed Form RD 4279-2, "Certification of Non-Relocation and Market Capacity Information Report," if the proposed loan is in excess of \$1

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million and will increase direct employment by more than 50 employees.

(b) *Applications.* Lenders must submit the information specified in paragraphs (b)(1) through (19) of this section when filing an application with the Agency.

(1) A completed Form RD 4279–1.

(2) A completed Form RD 4279–2, if the proposed loan is in excess of \$1 million and will increase direct employment by more than 50 employees, unless already submitted in accordance with § 4279.161(a)(3).

(3) Environmental review documentation in accordance with 7 CFR part 1970, “Environmental Policies and Procedures,” or successor regulation.

(4) A personal or commercial credit report from an acceptable credit reporting company for each individual or entity owning 20 percent or more interest in the borrower, except for those corporations listed on a major stock exchange. Credit reports are not required for elected and appointed officials when the applicant is a public body or non-profit corporation.

(5) Commercial credit reports for the borrower(s) and any parent, affiliate, and subsidiary companies.

(6) Current (not more than 90 days old) financial statements for any parent, affiliate, and subsidiary companies.

(7) Current (not more than 90 days old) personal and corporate financial statements of any guarantors.

(8) For all borrowers, a current (not more than 90 days old) balance sheet and year-to-date income statement, a pro forma balance sheet projected for loan closing, and projected balance sheets, income statements, and cash flow statements for the next 2 years. Projections must be prepared in line with GAAP standards and supported by a list of assumptions showing the basis for the projections. In the event processing of the loan is not complete within 90 days, a current set of financial statements will be required every 90 days.

(9) For borrowers that are existing businesses, balance sheets and income statements for the last 3 years. If the business has been in operation for less than 3 years, balance sheets and income statements for all years for

which financial information is available.

(10) The lender’s comprehensive, written credit analysis of the proposal, as described in § 4279.131.

(11) A draft loan agreement. A final loan agreement must be executed by the lender and borrower before the Agency issues a Loan Note Guarantee and must contain any additional requirements imposed by the Agency in its Conditional Commitment. The loan agreement must establish prudent, adequate controls to protect the interests of the lender and Agency. At a minimum, the following requirements must be included in the loan agreement:

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

(ii) Prohibition against assuming liabilities or obligations of others;

(iii) Limitations on dividend payments and compensation of officers and owners;

(iv) Limitation on the purchase and sale of equipment and other fixed assets;

(v) Restrictions concerning consolidations, mergers, or other circumstances and a limitation on selling the business without the concurrence of the lender;

(vi) Maximum debt-to-net worth ratio; and

(vii) Minimum debt service coverage ratio.

(12) Intergovernmental consultation comments in accordance with 2 CFR part 415, subpart C, or successor regulation, unless exemptions have been granted by the State single point of contact.

(13) Appraisals, accompanied by a copy of the appropriate environmental site assessment, if available, and the technical review of the appraisals required by § 4279.144(a).

(14) A business plan or similar document that must include a description of the business and project; management experience; sources of capital; products, services, and pricing; marketing plan; proposed use of funds; availability of labor, raw materials, and supplies; contracts in place; distribution channels; and the names of

any corporate parent, affiliates, and subsidiaries with a description of the relationship. A business plan may be omitted if the information is included in a feasibility study. A business plan may also be omitted when loan proceeds are used exclusively for debt refinancing and fees.

(15) Independent feasibility study, if required.

(16) For companies listed on a major stock exchange or subject to the Securities and Exchange Commission regulations, a copy of SEC Form 10-K, "Annual Report Pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934."

(17) For health care facilities, a certificate of need, if required by statute or State law.

(18) For guaranteed loan applications for five or more residential units, including nursing homes and assisted-living facilities, an Affirmative Fair Housing Marketing Plan that is in conformance with 7 CFR 1901.203(c)(3).

(19) Any additional information required by the Agency to make a decision, including any information needed to score the project in accordance with § 4279.166.

(c) *Applications of \$600,000 and less.* Guaranteed loan applications may be processed under this paragraph if the request does not exceed \$600,000, provided the Agency determines that there is not a significant increased risk of a default on the loan. A lender may need to resubmit an application under paragraph (b) of this section if the application under this paragraph does not contain sufficient information for the Agency to make a decision to guarantee the loan. Applications submitted under this paragraph must include the information contained in paragraphs (b)(1) (with the short application box marked at the top of Form RD 4279-1), (b)(3), (b)(8) through (10), (b)(12), and (b)(13) of this section. The lender must have the documentation identified in paragraph (b) of this section, with the exception of paragraph (b)(2), available in its file for review.

§ 4279.162 Strategic economic and community development.

Applicants with projects that support the implementation of Strategic Com-

munity Investment Plans are encouraged to review and consider 7 CFR part 1980, subpart K, which contains provisions for providing priority to projects that support the implementation of Strategic Community Investment Plans on a multi-jurisdictional and multi-sectoral basis.

[85 FR 59395, Sept. 22, 2020]

§§ 4279.163–4279.164 [Reserved]

§ 4279.165 Evaluation of application.

(a) *General review.* The Agency will evaluate the application and make a determination whether the borrower is eligible, the proposed loan is for an eligible purpose, there is reasonable assurance of repayment ability, there is sufficient collateral and equity, and the proposed loan complies with all applicable statutes and regulations. If the Agency determines it is unable to guarantee the loan, it will inform the lender in writing.

(b) *Environmental requirements.* The environmental review process must be completed, in accordance with 7 CFR part 1970, "Environmental Policies and Procedures," or successor regulation, prior to loan approval.

§ 4279.166 Loan priority scoring.

The Agency will consider applications and preapplications in the order they are received by the Agency; however, for the purpose of assigning priority points as described in paragraph (b) of this section, the Agency will compare an application to other pending applications that are competing for funding. The Agency may establish a minimum loan priority score to fund projects from the National Office reserve and will publish any minimum loan priority score in a notice published in the FEDERAL REGISTER.

(a) When applications on hand otherwise have equal priority, the Agency will give preference to applications for loans from qualified veterans.

(b) The Agency will assign priority points on the basis of the point system contained in this section. The Agency will use the application and supporting information to determine an eligible proposed project's priority for available guarantee authority. To the extent possible, all lenders must consider

Agency priorities when choosing projects for guarantee. The lender must provide necessary information related to determining the score, if requested.

(1) *Population priority.* Projects located in an unincorporated area or in a city with a population under 25,000 (10 points).

(2) *Demographics priority.* The priority score for demographics priority will be the total score for the following categories:

(i) Located in an eligible area of long-term population decline according to the last three decennial censuses (5 points);

(ii) Located in a rural county that has had 20 percent or more of its population living in poverty based on the last three decennial censuses (10 points);

(iii) Located in a rural community that is experiencing trauma as a result of natural disaster (5 points);

(iv) Located in a city or county with an unemployment rate 125 percent of the Statewide rate or greater (5 points);

(v) Located within the boundaries of a Federally recognized Indian tribe's reservation, within tribal trust lands, or within land owned by an Alaska Native Regional or Village Corporation as defined by the Alaska Native Claims Settlement Act (5 points); and

(vi) Business is owned by a qualified veteran as defined by § 4279.2 (5 points).

(3) *Loan features.* The priority score for loan features will be the total score for each of the following categories:

(i) Lender will price the guaranteed loan at an interest rate equal to or less than the equivalent of the Wall Street Journal published Prime Rate plus 1.5 percent (5 points);

(ii) Lender will price the guaranteed loan at an interest rate equal to or less than the equivalent of the Wall Street Journal published Prime Rate plus 1 percent (5 points);

(iii) The Agency guaranteed loan is less than 60 percent of project cost (5 points);

(iv) The Agency guaranteed loan is less than 50 percent of project cost (5 points);

(v) The Agency guaranteed loan is less than 40 percent of project cost (5 points); and

(vi) For loans not requesting an exception under § 4279.119(b), the percentage of guarantee is 10 or more percentage points less than the maximum allowable for a loan of its size (5 points).

(4) *High impact business investment priorities.* The priority score for high impact business investment will be the total score for the following categories:

(i) *Business/industry.* The priority score for business/industry will be the total score for the following:

(A) Industry that is not already present in the community (5 points);

(B) Business that has 20 percent or more of its sales in international markets (5 points);

(C) Business that offers high value, specialized products and/or services that command high prices (5 points);

(D) Business that provides an additional market for existing local businesses (5 points);

(E) Business that is locally owned and managed (5 points);

(F) Business that will produce a natural resource value-added product (5 points); and

(G) Business that processes, distributes, aggregates, stores, and/or markets locally or regionally produced agricultural food products to underserved communities in accordance with § 4279.113(y)(5) (10 points).

(ii) *Occupations.* The priority score for occupations will be the total score for the following:

(A) Business that creates or saves jobs with an average wage exceeding 125 percent of the Federal minimum wage (5 points);

(B) Business that creates or saves jobs with an average wage exceeding 150 percent of the Federal minimum wage (5 points); and

(C) Business that offers a healthcare benefits package to all employees, with at least 50 percent of the premium paid by the employer (5 points).

(5) *Administrative points.* The State Director may assign up to 10 additional points to an application to account for Statewide distribution of funds, natural disasters or economic emergency conditions, community economic development strategies, State strategic

plans, fundamental structural changes in a community's economic base, or projects that will fulfill an Agency initiative. In addition to the State Director assigned points, if an application is considered in the National Office, the Administrator may assign up to an additional 10 points to account for geographic distribution of funds, emergency conditions caused by economic problems or natural disasters, or projects that will fulfill an Agency initiative.

§4279.167 Planning and performing development.

(a) *Design policy.* The lender must ensure that all facilities constructed with program funds are designed, and costs estimated, by an independent professional, utilizing accepted architectural, engineering, and design practices. The Agency may require an independent professional architect on complex projects. The lender must ensure the design conforms to applicable Federal, State, and local codes and requirements. The lender must also ensure that the project will be completed with available funds and, once completed, will be used for its intended purpose and produce in the quality and quantity proposed in the completed application approved by the Agency. Once construction is completed, the lender must provide the Agency with a copy of the Notice of Completion or similar document issued by the relevant building jurisdiction.

(b) *Issuing the Loan Note Guarantee prior to project completion.* If the lender requests that the Loan Note Guarantee be issued prior to construction or completion of a project, the lender must have a construction monitoring plan acceptable to the Agency and undertake the added responsibilities set forth in this paragraph. The lender must monitor the progress of construction and undertake the reviews and inspections necessary to ensure that construction conforms to applicable Federal, State, and local code requirements; proceeds are used in accordance with the approved plans, specifications, and contract documents; and that funds are used for eligible project costs. The lender must expeditiously

report any problems in project development to the Agency.

(1) In cases of takeout of interim financing where the Loan Note Guarantee is issued prior to construction or completion of a project, the promissory note must contain the terms and conditions of the interim financing and the permanent financing and convert the interim financing to the permanent note as the Loan Note Guarantee can only be placed on one note.

(2) Prior to disbursement of construction funds, the lender must have:

(i) A complete set of plans and specifications for the project on file;

(ii) A detailed timetable for the project with a corresponding budget of costs setting forth the parties responsible for payment. The timetable and budget must be agreed to by the borrower;

(iii) A person, who may be the project architect or engineer, with demonstrated experience relating to the project's industry, confirm that the budget is adequate for the planned development;

(iv) A firm, fixed-price construction contract with an independent general contractor with costs and provisions for change order approvals, a retainage percentage, and a disbursement schedule; a 100 percent performance/payment bond on the borrower's contractor; or a contract with an independent disbursement and monitoring firm where project construction and completion are guaranteed. A bonding agent must be listed on Treasury Circular 570; and

(v) Contingencies in place to handle unforeseen cost overruns without seeking additional guaranteed assistance. These are to be agreed to by the borrower.

(3) Once construction begins, the lender is to:

(i) Use any borrower funds in the project first;

(ii) Ensure that the project is built to support the functions at the level and quality contemplated by the borrower through the use of accepted architectural and engineering practices. There is no absolute requirement that the goal be achieved by the use of a professional inspection. However, if after careful review, it appears that the use of a professional inspector is the only

§ 4279.168

method that ensures the project is built to support the functions at the level and quality contemplated by the borrower through the use of accepted architectural and engineering practices, one may be required by the Agency. If one is required, inspections must be made by a qualified, independent inspector prior to any progress payment. If other less expensive or rigorous methods will achieve the same result, they may be utilized. The decision will be made on a case-by-case basis and must be reasonable under the specific circumstances of the case;

(iii) Obtain lien waivers from all contractors and materialmen prior to any disbursement; and

(iv) Provide at least monthly, written reports to the Agency on fund disbursement and project status.

(4) Once construction is completed, the lender is to provide the Agency with a copy of the Notice of Completion or similar document issued by the relevant building jurisdiction.

(c) *Compliance with other Federal laws.* Lenders must comply with other applicable Federal laws, including Equal Employment Opportunities, the Equal Credit Opportunity Act, the Fair Housing Act, and the Civil Rights Act of 1964. Guaranteed loans that involve the construction of or addition to facilities that accommodate the public must comply with the Architectural Barriers Act Accessibility Standard. The borrower and lender are responsible for ensuring compliance with these requirements.

(d) *Environmental responsibilities.* The lender must ensure that the borrower has:

(1) Provided the necessary environmental information to enable the Agency to undertake its environmental review process in accordance with 7 CFR part 1970, "Environmental Policies and Procedures," or successor regulation, including the provision of all required Federal, State, and local permits;

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

(3) Not taken any actions or incurred any obligations with respect to the proposed project that would either limit the range of alternatives to be considered during the Agency's envi-

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ronmental review process or that would have an adverse effect on the environment.

§ 4279.168 Timeframe for processing applications.

All complete guaranteed loan applications will be approved or disapproved within 60 days, unless approval is prevented by a lack of guarantee authority or there are delays resulting from public comment requirements of the environmental assessment or outstanding DOL clearance issues.

§§ 4279.169–4279.172 [Reserved]

§ 4279.173 Loan approval and obligating funds.

(a) Upon approval of a loan guarantee, the Agency will issue a Conditional Commitment to the lender, containing conditions under which a Loan Note Guarantee will be issued. No Conditional Commitment can be issued until the loan is obligated. If a Loan Note Guarantee is not issued by the Conditional Commitment expiration date, the Conditional Commitment may be extended at the request of the lender and only if there has been no material adverse change in the borrower or the borrower's financial condition since issuance of the Conditional Commitment. If the Conditional Commitment is not accepted, the Conditional Commitment may be withdrawn and funds may be deobligated. Likewise, if the Conditional Commitment expires, funds may be deobligated.

(b) If certain conditions of the Conditional Commitment cannot be met, the lender and borrower may request changes to the Conditional Commitment. Within the requirements of the applicable regulations and prudent lending practices, the Agency may negotiate with the lender and the borrower regarding any proposed changes to the Conditional Commitment. Any changes to the Conditional Commitment must be documented by written amendment to the Conditional Commitment.

(c) The borrower must comply with all Federal requirements then in effect for receiving Federal assistance.

§4279.174 Transfer of lenders.

(a) The Agency may approve the substitution of a new eligible lender in place of a former lender who has been issued and has accepted an outstanding Conditional Commitment when the Loan Note Guarantee has not yet been issued, provided that there are no changes in the borrower's ownership or control, loan purposes, or scope of project, and the loan terms and conditions in the Conditional Commitment and the loan agreement remain the same. Any request for a transfer of lender must be submitted in writing by the current lender, the proposed lender, and the borrower. The original lender must state the reason(s) it no longer desires to be the lender for the project.

(b) Unless the new lender is already an approved lender, the Agency will analyze the new lender's servicing capability, eligibility, and experience prior to approving the substitution. The substituted lender must execute a new part B of Form 4279-1, "Application for Loan Guarantee;" Form RD 4279-4, "Lender's Agreement" (unless a valid Lender's Agreement with the Agency already exists); and complete a new lender's analysis in accordance with §4279.131. The new lender may also be required to provide other updated application items outlined in §4279.161(b).

§§ 4279.175–4279.179 [Reserved]**§4279.180 Changes in borrower.**

Any changes in borrower ownership or organization prior to the issuance of the Loan Note Guarantee must meet the eligibility requirements of the program and be approved by the Agency.

§4279.181 Conditions precedent to issuance of the Loan Note Guarantee.

(a) The lender must not close the loan until all conditions of the Conditional Commitment are met. When loan closing plans are established, the lender must notify the Agency. Coincident with, or immediately after loan closing, the lender must provide the following to the Agency:

(1) An executed Form RD 4279-4, unless a valid Lender's Agreement exists that was issued after August 2, 2016;

(2) Form RD 1980-19 and appropriate guarantee fee;

(3) Copy of the executed promissory note(s);

(4) Copy of the executed loan agreement;

(5) Copy of the executed settlement statement;

(6) Original, executed Forms RD 4279-14, as required;

(7) Any other documents required to comply with applicable law or required by the Conditional Commitment.

(8) Borrower's loan closing balance sheet, supporting paragraph (a)(9)(i) of the lender certification, demonstrating required tangible balance sheet equity; and

(9) The lender's certification to each of the following certifications:

(i) The capital/equity requirement was determined, based on a balance sheet prepared in accordance with GAAP, and met, as of the date the guaranteed loan was closed, giving effect to the entirety of the loan in the calculation, whether or not the loan itself is fully advanced.

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

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

(iv) There is a reasonable prospect that the guaranteed loan and other project debt will be repaid on time and in full (including interest) from project cash flow according to the terms proposed in the application for loan guarantee.

(v) All planned property acquisition has been or will be completed, all development has been or will be substantially completed in accordance with plans and specifications, conforms with applicable Federal, State, and local codes, and costs have not exceeded the amount approved by the lender and the Agency.

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

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

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

(ix) When required, personal and/or corporate guarantees have been obtained in accordance with § 4279.132.

(x) The loan proceeds have been or will be disbursed for purposes and in amounts consistent with the Conditional Commitment (or Agency-approved amendment thereof) and the application submitted to the Agency. When applicable, the entire amount of the loan for working capital has been disbursed to the borrower, except in cases where the Agency has approved disbursement over an extended period of time and funds are escrowed so that the settlement statement reflects the full amount to be disbursed.

(xi) All truth-in-lending and equal credit opportunity requirements have been met.

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

(xiii) Neither the lender nor any of the lender's officers has an ownership interest in the borrower or is an officer or director of the borrower, and neither the borrower nor its officers, directors, stockholders, or other owners have

more than a 5 percent ownership interest in the lender.

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

(xv) If required, hazard, flood, liability, workers compensation, and life insurance are in effect.

(b) The Agency may, at its discretion, request copies of additional loan documents for its file.

(c) When the Agency is satisfied that all conditions for the guarantee have been met, the Agency will issue the Loan Note Guarantee and the following documents, as appropriate.

(1) *Assignment Guarantee Agreement*. In the event the lender uses the single note option and assigns the guaranteed portion of the loan to a holder, the lender, holder, and the Agency will execute Form RD 4279-6 in accordance with § 4279.75(a); and

(2) *Certificate of Incumbency*. If requested by the lender, the Agency will provide the lender with a certification on Form RD 4279-7, "Certificate of Incumbency and Signature," of the signature and title of the Agency official who signs the Loan Note Guarantee, Lender's Agreement, and Assignment Guarantee Agreement.

§§ 4279.182–4279.186 [Reserved]

§ 4279.187 Refusal to execute Loan Note Guarantee.

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

§§ 4279.188–4279.189 [Reserved]

§ 4279.190 Business and Industry national COVID-19 Public Health Emergency Loans.

(a) *Introduction.* This section contains regulations for the Business and Industry National COVID-19 Public Health Emergency loan program (B&I CARES Act Program Loans). The purpose of the program is to provide loan guarantees under the authority of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (Pub. L. 116-136). These B&I CARES Act Program Loans cover costs to prevent, prepare for and respond to the coronavirus. Consistent with the purposes of the CARES Act, the Agency has determined that the most effective use of these program funds is to support the cost of guaranteed loans to rural businesses to respond to the coronavirus. No B&I CARES Act Program Loan guarantee will be approved after September 30, 2021. All provisions of Subparts A and B of Part 4279 and Subpart A of Part 4287 of this chapter apply to B&I CARES Act Program Loans, except as provided in this section. All forms used in connection with a B&I CARES Act Program Loan will be those used with other Business and Industry (B&I) loans, except as provided in this section.

(b) *Eligible borrowers.* Section 4279.108 of this subpart applies to B&I CARES Act Program Loans. In addition, borrowers must have been in operation on February 15, 2020.

(c) *Eligible use of funds.* (1) The purpose of any B&I CARES Act Program Loan must be to cover costs to prevent, prepare for, and respond to the coronavirus pandemic in accordance with paragraph (a) of this section. B&I CARES Act Program Loans should not exceed the amount needed to overcome the financial distress caused by the COVID-19 National Emergency.

(2) Notwithstanding the provisions of § 4279.113, B&I CARES Act Program guaranteed loans will be limited to loans for working capital loan purposes in accordance with paragraph (c)(3) of this section. Loan proceeds may be used only to support facilities and business operations in rural areas and the Borrower must have been in operation

on February 15, 2020. Loan proceeds must be disbursed through multiple draws on an as-needed monthly basis.

(3) Eligible Working Capital uses of B&I CARES Act Program Loan funds are limited to:

- (i) Wages, salaries, sales commissions to employees, group healthcare benefits, and other employee benefits;
- (ii) Administrative expenses and administrative service contracts;
- (iii) Property insurance, hazard insurance, and other business insurance;
- (iv) Principal and interest payments excluding owner/stockholder debt and related-party debts;
- (v) Rent, payments on leases, and routine maintenance;
- (vi) Utilities;
- (vii) Inventory, feed, seed, fertilizer and chemicals, livestock (excluding livestock for breeding) and supplies;
- (viii) Marketing, shipping, and other expenses incurred through normal business operations or such additional expenses due to the national COVID-19 Public Health Emergency;
- (ix) Taxes; and
- (x) Loan costs and essential loan-related expenses.

(4) *Ineligible purposes.* Notwithstanding the provisions of § 4279.113, the following purposes are ineligible for B&I CARES Act Program guaranteed loans:

- (i) Purchase and development of land, buildings, and associated infrastructure for commercial or industrial properties, including expansion or modernization;
- (ii) Business acquisitions;
- (iii) Leasehold improvements;
- (iv) Constructing or equipping facilities;
- (v) Purchase of machinery and equipment; and
- (vi) Debt refinancing unless such debt refinancing is for debts incurred subsequent to February 15, 2020 for eligible purposes listed in paragraph (c)(3) of this section.

(5) *Agricultural production.* The provisions of § 4279.113(q) do not apply to B&I CARES Act Program Loans. Loans for working capital to support agricultural production, including independent agricultural production, is an eligible use

of funds when the applicant's loan request exceeds the maximum loan available through Farm Service Agency (FSA) guaranteed loan programs or the applicant's request is otherwise ineligible for FSA loans.

(d) *Loan amount limits.* (1) The provisions of § 4279.119(a) do not apply to B&I CARES Act Program Loans. The total amount of B&I and B&I CARES Act Program Loans to one borrower (including the guaranteed and unguaranteed portions, the outstanding principal and interest balance of any existing B&I guaranteed loans, and the new loan request) cannot exceed \$25 million.

(2) The amount of the B&I CARES Act Program Loan shall be based on a cash flow analysis and must not be greater than the amount needed to cure problems caused by the COVID-19 emergency so that the business is reestablished on a successful basis. Losses and business operating expenses that were adequately paid by insurance or by loans or grants from other sources will not be covered by B&I CARES Act Program Loans. B&I CARES Act Program Loans may be used to supplement insurance payments or assistance from other sources when the insurance coverage or other assistance is insufficient.

(3) The maximum loan amount of the B&I CARES Act Program Loan for working capital purposes may not exceed 12 times the borrower's total average monthly costs of eligible working capital loan purposes less the total amount of covered loans received under the provisions of section 1102 and Section 1110(a)(2) of the CARES Act and other Federal emergency assistance received.

(4) Borrowers receiving B&I CARES Act Program Loans in an amount less than the maximum loan amount in accordance with paragraph (d)(3) of this section, may apply for subsequent loans under this section up to an accumulative amount of B&I CARES Act Program loans not to exceed the maximum loan amount.

(e) *Percentage of guarantee.* The provisions of § 4279.119(b) do not apply to B&I CARES Act Program Loans. The percentage of guarantee is 90 percent.

(f) *Guarantee fee.* The provisions of § 4279.120(a) do not apply to B&I CARES Act Program Loans. The guarantee fee for the B&I CARES Act Program Loans shall be two (2) percent. The guarantee fee is paid at the time the Loan Note Guarantee is issued and may be included as an eligible use of guaranteed loan proceeds. The amount of the guarantee fee is determined by multiplying the total loan amount by the guarantee fee rate by the percentage of guarantee.

(g) *Annual renewal fee.* Notwithstanding the provisions of § 4279.120(b), the annual renewal fee for B&I CARES Act Program Loans shall be one half of one (0.5) percent (50 basis points.)

(h) *Loan terms.* Notwithstanding the provisions of § 4279.126, the maximum allowable repayment term of loans for working capital purposes is 10 years. Loan repayment may defer principal payments or principal and interest payments for a period up to 12 months from loan closing and may extend deferral of principal payments up to a total of three years with a maximum repayment term of 10 years from the date of loan closing.

(i) *Credit quality.* Notwithstanding the provisions of § 4279.131(a), the lender's evaluation of the borrower's repayment ability shall include an emphasis on the borrower's successful financial history and on the borrower's 2019 financial performance, present condition, and future viability.

(j) *Collateral.* B&I CARES Act Program loans must be adequately secured. Notwithstanding the provisions of § 4279.131(b), loan-to-value discounting by the lender is not required for B&I CARES Act Program Loans for working capital purposes. The value of the collateral (fair market value) must be equal to or greater than the loan amount.

(k) *Capital/equity.* Notwithstanding the provisions of § 4279.131(d), the business must meet one of the following requirements at loan closing:

(1) A minimum of 10 percent balance sheet equity (including subordinated debt when subject to a standstill agreement), or a maximum debt-to-balance sheet equity ratio of 9 to 1;

(2) A Borrower investment of equity or other funds into the project equal to

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10 percent or more of total eligible project costs, (such investment may include grants or subordinated debt when subject to a standstill agreement); or

(3) The balance sheet equity includes owner-contributed capital of 10 percent or more of total fixed assets (net total fixed assets plus depreciation).

(1) *Appraisals.* Notwithstanding the provisions of § 4279.144, appraisals of real estate and chattel collateral are required when the amount of the loan exceeds \$1,000,000, unless the chattel is newly acquired equipment and the value is supported by a bill of sale. The Agency will accept appraisals older than 1 year but completed within 2 years of the application date. Lenders may provide an updated appraisal in lieu of a new complete appraisal when the original appraisal is more than 2 years old. All appraisals of real estate must be compliant with Uniform Standards of Professional Appraisal Practices (USPAP) requirements and reflect the current market value of the collateral as required by § 4279.144(a). To protect lenders, appraisers and Agency staff during the COVID-19 pandemic, an interior or on-site inspection of the collateral is not required if an assumption can be made by the appraiser on a reasonable basis or is based on previous inspections and condition reports completed by the lender or third party for the collateral.

(m) *Filing preapplications and applications.* (1) B&I CARES Act Program Loan borrowers with existing B&I loans do not need to resubmit their historical financial statements that have been previously submitted through routine loan servicing actions.

(2) Loans for working capital are classified as categorical exclusions for purposes of the Agency's environmental review policies and procedures in accordance with 7 CFR part 1970. These actions normally do not require an applicant to submit environmental documentation with the application. However, based on the review of the project description, the Agency may request additional environmental documentation from the applicant at any time, specifically if the Agency determines that extraordinary circumstances may exist.

(3) Notwithstanding the provisions of § 4279.161(b), a draft loan agreement is not required, a business plan or feasibility study is not required, and lenders may substitute and rely on the borrower's tax returns when financial statements prepared in accordance with GAAP are not available from the borrower. Agricultural producers' financial records must meet the industry's standard accounting practices.

(4) A lender or borrower may combine applications for a B&I CARES Act Program loan for working capital with an application for B&I appropriated fiscal year funds. The provisions of this section do not apply to applications for B&I appropriated fiscal year funds.

[85 FR 31040, May 22, 2020]

§§ 4279.191–4279.199 [Reserved]

§ 4279.200 OMB control number.

In accordance with the Paperwork Reduction Act of 1995, the information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) under OMB Control Number 0570-0069 for OMB approval.

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

SOURCE: 80 FR 36425, June 24, 2015, unless otherwise noted.

GENERAL

§ 4279.201 Purpose and scope.

The purpose of the Biorefinery, Renewable Chemical, and Biobased Product Manufacturing Program is to assist in the development of new and emerging technologies for the development of Advanced Biofuels, Renewable Chemicals, and Biobased Product Manufacturing. This is achieved through guarantees for loans made to fund the development, construction, and Retrofitting of Commercial-Scale Biorefineries using Eligible Technology and of Biobased Product Manufacturing facilities that use Technologically New

Commercial-Scale processing and manufacturing equipment and required facilities to convert Renewable Chemicals and other biobased outputs of Biorefineries into end-user products on a Commercial Scale.

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

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

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

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

§ 4279.202 Definitions and abbreviations.

Terms used in this subpart are defined in this section. Terms used in this subpart that have the same meaning as the terms defined in this section have been capitalized in this subpart.

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

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

(1) Biofuel derived from cellulose, hemicellulose, or lignin;

(2) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);

(3) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;

(4) Diesel-equivalent fuel derived from Renewable Biomass, including vegetable oil and animal fat;

(5) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from Renewable Biomass;

(6) Butanol or other alcohols produced through the conversion of organic matter from Renewable Biomass; and

(7) Other fuel derived from cellulosic biomass.

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

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

Agricultural producer. An individual or entity directly engaged in the production of agricultural products, including crops (including farming); livestock (including ranching); forestry products; hydroponics; nursery stock; or aquaculture, whereby 50 percent or greater of their gross income is derived from the operations.

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

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

Assignment Guarantee Agreement. Form RD 4279-6, “Assignment Guarantee Agreement,” is the signed agreement between the Agency, the Lender, and the Holder containing the terms and conditions of an assignment of a guaranteed portion of a loan, using the single Promissory Note system.

Association of Agricultural Producers. An organization that represents Agricultural Producers and whose mission includes working on behalf of such producers and the majority of whose membership and board of directors is comprised of Agricultural Producers.

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

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

(1) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or

(2) An intermediate ingredient or feedstock.

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

Biofuel. A fuel derived from Renewable Biomass.

Biogas. Renewable Biomass converted to gaseous fuel.

Biorefinery. A facility (including equipment and processes) that converts Renewable biomass or an intermediate ingredient or feedstock of Renewable biomass into any one or more, or a combination, of Biofuels, Renewable chemicals or Biobased products, and may produce electricity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Delinquency. A loan for which a scheduled loan payment is more than

30 days past due and cannot be cured within 30 days.

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

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

(1) A technology that is being adopted in a viable Commercial-scale operation of a Biorefinery that produces any one or more, or a combination, of an Advanced biofuel; a Renewable chemical; or a Biobased product; and

(2) A technology not described in paragraph (1) of this definition that has been demonstrated to have technical and economic potential for commercial application in a Biorefinery that produces any one or more, or a combination, of an Advanced biofuel, a Renewable chemical or a Biobased product.

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

Farm cooperative. A business owned and controlled by Agricultural Producers that is incorporated, or otherwise recognized by the State in which it operates, as a cooperatively-operated business.

Farmer Cooperative Organization. An organization whose membership is composed of Farm Cooperatives.

Feasibility study. An analysis by an independent qualified consultant or consultants of the economic, market, technical, financial, and management feasibility of a proposed Project or business in terms of its expectation for success.

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

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

Good cause. A justification representing a reasonable approach given:

(1) The reasonably available alternatives;

(2) All known relevant factors;

(3) Program requirements; and

(4) The best interests of the government. Good cause must be approved by the Agency. Without prior approval by the Agency, alternatives that require the Agency to increase its guarantee, in either the Conditional Commitment or Loan Note Guarantee (including an increase of its subsidy costs under the Credit Reform Act of 1990), or provide additional assistance, will not be considered reasonable available alternatives under paragraph (1) of this definition or in the best interests of the government under paragraph (4) of this definition.

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

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

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

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

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

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

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

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

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

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

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

(2) If the guaranteed loan has a Holder(s), the Lender, or the Agency, at its sole discretion, will issue an interest termination letter to the Holder(s) establishing the termination date for Interest accrual. The Loan Note Guarantee will not cover Interest to the Holder(s) accruing after the greater of:

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

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

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

Lender's Agreement. Form RD 4279-4, "Lender's Agreement," or predecessor form, between the Agency and the Lender setting forth the Lender's loan responsibilities.

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

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

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

Loan Note Guarantee. Form RD 4279-5, "Loan Note Guarantee," or predecessor form, issued and executed by the Agency containing the terms and conditions of the guarantee.

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

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

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

Local owner. An individual who owns any portion of an eligible Biorefinery and whose primary residence is located within a certain distance from the Biorefinery as specified by the Agency in a Notice published in the FEDERAL REGISTER.

Market value. The amount for which a property will sell for its highest and best use at a voluntary sale in an Arm's Length Transaction.

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

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

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

Negligent Loan Servicing. The failure to perform those services which a reasonably prudent lender would perform in servicing (including liquidation of)

its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act, but also not acting in a timely manner, or acting in a manner contrary to the manner in which a reasonably prudent lender would act.

Off-take agreement. The terms and conditions governing the sale and transportation of Biofuels, Biobased Products including Renewable Chemicals, Biobased Product Manufacturing end-user products, and electricity produced by the Borrower to another party.

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

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

Person. An individual or entity.

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

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

Pro rata. On a proportional basis.

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

Protective advance. An advance made by the Lender for the purpose of preserving and protecting the Collateral where the Borrower has failed to, and will not or cannot, meet its obligations to protect or preserve Collateral. Protective advances include, but are not limited to, advances affecting the Collateral made for property taxes, rent, hazard and flood insurance premiums, and annual assessments. Legal/attorney fees are not a Protective Advance. Holders do not have an interest in Protective Advances.

Public body. A municipality, county, or other political subdivision of a State; a special purpose district; or an Indian Tribe on a Federal or State res-

ervation or other Federally-recognized Indian Tribe; or an organization controlled by any of the above. A Local Government would also be a Public Body.

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

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

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

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

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

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

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

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

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

Rural Development. The mission area of USDA that is comprised of the Rural Business-Cooperative Service, Rural Housing Service, and Rural Utilities

RBS and RUS, USDA

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Service and is under the policy direction and operational oversight of the Under Secretary for Rural Development.

Rural or rural area. As described in 7 U.S.C. 1991(a)(13)(A), (D), (H) and (I).

Secretary. The Secretary of the Department of the Agriculture.

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

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

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

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

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

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

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

to pay the outstanding loan debt approved by the Agency.

USDA Lender Interactive Network Connection (LINC). The portal Web site currently at <https://usdalinc.sc.egov.usda.gov/> used by Lenders to update loan data in the Agency's Guaranteed Loan System. Current capabilities include loan closing and status reporting.

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

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

[80 FR 36425, June 24, 2015, as amended at 85 FR 29595, May 18, 2020; 87 FR 38644, June 29, 2022]

§ 4279.203 Exception authority.

The Administrator may, with the concurrence of the Secretary of Agriculture, make an exception, on a case-by-case basis, to any requirement or provision of this subpart that is not inconsistent with any authorizing statute or applicable law, if the Administrator determines that application of the requirement or provision would adversely affect the Federal government's interest.

§ 4279.204 Appeals.

Borrowers, Lenders, and Holders have appeal or review rights for adverse Agency decisions made under this subpart. Adverse programmatic decisions based on clear and objective statutory or regulatory requirements are not appealable; however, such decisions are reviewable for appealability by the National Appeals Division (NAD). The Borrower, Lender, and Holder can appeal any Agency decision that directly and adversely impacts them. For an adverse decision that impacts the Borrower, the Lender and Borrower must jointly execute a written request for appeal for an alleged adverse decision

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made by the Agency. An adverse decision that only impacts the Lender may be appealed by the Lender only. An adverse decision that only impacts the Holder may be appealed by the Holder only. A decision by a Lender adverse to the interest of the Borrower is not a decision by the Agency, whether or not concurred in by the Agency. Appeals will be conducted by NAD and will be handled in accordance with 7 CFR part 11.

§ 4279.205 Prohibition under Agency programs.

(a) No loan guaranteed by the Agency under this subpart will be conditioned on any requirement that the recipient(s) of such assistance accept or receive electric service from any particular utility, supplier, or cooperative.

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

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

(d) The Agency may not guarantee lease payments.

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

§ 4279.206 Agency representation.

Notwithstanding any other provision of this subpart and 7 CFR part 4287, subpart D, the Agency reserves the right to be represented by the U.S. De-

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partment of Justice in any litigation where the Agency is named as a party.

§ 4279.207 [Reserved]

ELIGIBILITY REQUIREMENTS

§ 4279.208 Lender eligibility requirements.

(a) An eligible Lender is any Federal or State chartered bank, Farm Credit Bank, other Farm Credit System institution with direct lending authority, and Bank for Cooperatives. These entities must be subject to credit examination and supervision by either an agency of the United States or a State. Credit unions subject to credit examination and supervision by either the National Credit Union Administration or a State agency are eligible Lenders. The National Rural Utilities Cooperative Finance Corporation is also an eligible Lender. Savings and loan associations, mortgage companies, insurance companies, and other lenders not meeting the above criteria are not eligible.

(b) The Lender must demonstrate that it meets the FDIC definition of Well Capitalized at the time of application and at time of issuance of the Loan Note Guarantee. This information may be identified in FDIC Call Reports and Thrift Financial Reports. If the information is not identified in the Call Reports or Thrift Financial Reports, the Lender will be required to calculate its levels and provide them to the Agency.

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

(d) If the Lender is under a cease-and-desist order, or similar constraint, from a Federal or State agency, the Lender must inform the Agency. The Agency will evaluate the Lender's eligibility on a case-by-case basis given the risk of loss posed by the cease-and-desist order or similar constraint, as applicable.

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

§ 4279.209 Borrower eligibility requirements.

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

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

(2) *Legal authority and responsibility.* Each Borrower must have, or obtain before loan closing, the legal authority necessary to construct, operate, and maintain the proposed Project and services and to obtain, give security for, and repay the proposed loan.

(b) *Ineligible entities.* A Borrower will be considered ineligible for a guarantee if the Borrower, any owner with more than 20 percent ownership interest in the Borrower, or any owner with more than 3 percent ownership interest in the Borrower if there is no owner with more than 20 percent ownership interest in the Borrower:

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

(2) Is delinquent on the payment of Federal income taxes;

(3) Is delinquent on a Federal Debt; or

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

§ 4279.210 Project eligibility requirements.

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

(b) The Project must be for either:

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

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

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

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

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

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

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

(4) Working Capital.

(5) Cost of necessary insurance and bonds.

(6) Cost of financing, including capitalized Interest during construction period, legal fees, transaction costs,

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and customary fees charged by the lender, excluding the guaranteed loan fee and annual renewal fees.

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

(8) Any other item identified by the Agency in a notice published in the FEDERAL REGISTER.

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

(i) Permanent financing used to refinance interim construction financing of the proposed Project only if the application for the guaranteed loan under this subpart was approved prior to closing the interim loan for the construction of the Project.

(ii) Refinancing that is no more than 20 percent of the loan for which the Agency is guaranteeing and the purpose of the refinance is to enable the Agency to establish a first lien position with respect to pre-existing Collateral subject to a pre-existing lien and the refinancing would be in the best financial interests of the Federal Government.

(10) A borrower is permitted to use up to 10 percent of the amount provided under this subpart to construct, improve, or acquire broadband infrastructure related to the project financed, subject to the requirements of 7 CFR part 1980, subpart M.

(e) Ineligible Project costs include:

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

(2) Any line of credit;

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

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

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action or with an appearance of or a potential for Conflict of Interest.

[80 FR 36425, June 24, 2015, as amended at 85 FR 57085, Sept. 15, 2020]

§§ 4279.211–4279.213 [Reserved]

LENDER FUNCTIONS AND RESPONSIBILITIES

§ 4279.214 General functions and responsibilities.

(a) The Lender has the primary responsibility for loan origination and servicing. Any action or inaction on the part of the Agency does not relieve the Lender of its responsibilities to originate and service the loan guaranteed under this subpart. The Lender may contract for services and may rely on certain written materials (including, but not limited to, certifications, evaluations, appraisals, financial statements and other reports) to be provided by the Borrower or other qualified third parties (including, among others, one or more independent engineers, appraisers, accountants, consultants or other experts.) The Lender is ultimately responsible for underwriting, loan origination, loan servicing, and compliance with all Agency regulations.

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

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

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

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

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

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

(5) Keeping an inventory accounting of all Collateral items and reconciling

the inventory of all Collateral sold during loan servicing, including liquidation;

(6) Supervising construction;

(7) Distributing loan funds;

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

(9) Following Agency regulations and agreements;

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

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

§ 4279.215 Credit evaluation.

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

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

(1) The feasibility of the Project and Borrower and likelihood that the Project and Borrower will produce sufficient revenues to service the Project's debt obligations over the life of the loan guarantee and result in sufficient returns to investors;

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

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

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

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

(6) Operational management and experience;

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

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

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

(10) Energy, infrastructure and environmental considerations;

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

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

(13) Other criteria that the Agency deems relevant.

§ 4279.216 Environmental responsibilities.

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

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

(b) Lenders must ensure that the Borrower has:

(1) Provided the necessary environmental documentation to enable the Agency to undertake its environmental review process in accordance with 7 CFR part 1970, including the provision of all required Federal, State, and local permits.

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

(3) Not taken any actions or incurred any obligations with respect to the

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proposed Project that will either limit the range of alternatives to be considered during the Agency's environmental review process or which will have an adverse effect on the environment.

(c) Lenders must assist in the collection of additional data when the Agency needs such data to complete its environmental review of the proposal and assist in the resolution of environmental issues.

[61 FR 67633, Dec. 23, 1996, as amended at 81 FR 11051, Mar. 2, 2016]

§ 4279.217 Oversight and monitoring.

The Lender must permit representatives of the Agency (or other agencies of the United States) to inspect and make copies of any records of the Lender pertaining to Program guaranteed loans during regular office hours of the Lender or at any other time upon agreement between the Lender and the Agency. In addition, the Lender must cooperate fully with Agency oversight and monitoring of all Lenders involved in any manner with any loan guarantee under this Program to ensure compliance with this subpart. Such oversight and monitoring will include, but is not limited to, reviewing Lender records and meeting with Lenders (in accordance with § 4287.307(d) of this chapter).

§§ 4279.218–4279.219 [Reserved]

CONDITIONS OF GUARANTEE

§ 4279.220 General conditions of guarantee.

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

(a) *Full faith and credit.* (1) A guarantee under this subpart constitutes an

obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which a Lender or Holder has actual knowledge at the time it becomes such Lender or Holder or which a Lender or Holder participates in or condones.

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

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

(ii) The violation of usury laws;

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

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

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

(3) The Agency will guarantee payment as follows:

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

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

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

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

(b) *Credit quality of Borrower.* The Agency will provide guarantees only after consideration is given to the Borrower's overall credit quality and to the terms and conditions of any applicable subsidies, tax credits, and other such incentives.

(c) *Quality of loan.* All loans guaranteed under this subpart must be financially sound and feasible, with reasonable assurance of repayment.

(d) *Gross negligence.* Upon written request of the Lender, the Agency will consider changing the negligence standard to Grossly Negligent Loan Origination and Grossly Negligent Loan Servicing on a case-by-case basis. The Lender must establish to the Agency's satisfaction that changing to the gross negligence standard does not materially impair the Agency's interests, solely at the Agency's discretion, subject to:

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

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

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

§ 4279.221 Rights and liabilities.

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

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

(b) A guarantee and right to require purchase will be directly enforceable by a Holder notwithstanding any fraud or misrepresentation by the Lender or any unenforceability of the guarantee by the Lender, except for fraud or misrepresentation of which the Holder had actual knowledge at the time it became the Holder or in which the Holder participates or condones.

(c) The Lender must reimburse the Agency for any payments the Agency makes to a Holder of Lender's guaranteed loan that, under the Loan Note Guarantee, would not have been paid to the Lender had the Lender retained the entire interest in the guaranteed loan and not conveyed an interest to a Holder.

§ 4279.222 Payments.

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

§ 4279.223 Sale or assignment of guaranteed loan.

The Lender may Participate or sell all or part of the guaranteed portion of the loan or retain the entire loan. The Lender must fully disburse and properly close a loan prior to sale of any portion of the Promissory Note(s). The Lender cannot Participate or sell any amount of the guaranteed or unguaranteed portion of the loan to the Borrower or its parent, subsidiary or Affiliate or to officers, directors, stockholders, other owners, or members of their Immediate Families. The Lender cannot share any premium received from the sale of a guaranteed loan in the secondary market with a Loan Packager or other Loan Service Provider. The participating Lenders and Holders and the Borrower can have no rights or obligations to one another. If the Lender desires to market all or part of the guaranteed portion of the loan at or subsequent to loan closing, such loan must not be in Default. Lenders may use either the single Promissory Note or multi-note system as outlined in paragraphs (a) and (b) of this section.

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

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

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

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

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

(i) The original was lost, stolen, destroyed, mutilated, or defaced; and

(ii) The reissue is in accordance with § 4279.226.

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

(b) *Multi-note system.* Under this option, the Lender may provide multiple Promissory Notes for the unguaranteed and the guaranteed portions of the loan. All Promissory Notes must reflect the same payment terms. When the Lender selects this option, the Holder will receive one of the Borrower's executed notes and a Loan Note Guarantee. The Agency will issue a Loan Note Guarantee for each Prom-

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issory Note, including the unguaranteed Promissory Note(s), to be attached to the Promissory Note(s). An Assignment Guarantee Agreement will not be used when the multi-note option is utilized.

§ 4279.224 Minimum retention.

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

§ 4279.225 Repurchase from Holder.

(a) *Repurchase by Lender.* A Lender has the option to repurchase the unpaid guaranteed portion of the loan from a Holder within 30 days of written demand by the Holder when the Borrower is in Default not less than 60 days on principal or Interest due on the loan; or when the Lender has failed to remit to the Holder its Pro Rata share of any payment within 30 days of the Lender's receipt thereof from the Borrower. The repurchase by the Lender will be for an amount equal to the unpaid guaranteed portion of principal and accrued Interest less the Lender's servicing fee. The Holder must concurrently send a copy of the demand letter to the Agency. The Lender must accept an assignment without recourse from the Holder upon repurchase. The Lender is encouraged to repurchase the loan, upon written demand from the Holder, to facilitate the accounting of funds, resolve any loan problem, and resolve the Default, where and when reasonable. The benefit to the Lender is that it may re-sell the guaranteed portion of the loan in order to continue collection of its servicing fee if the Default is cured. The Lender must notify, in writing, the Holder and the Agency of its decision.

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

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

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

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

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

(6) The Holder's demand to the Agency must include a copy of the written demand made upon the Lender. The Holder must also include evidence of its right to require payment from the Agency. Such evidence must consist of either the original of the Loan Note Guarantee properly endorsed to the Agency or the original of the Assign-

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

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

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

(c) *Repurchase for servicing.* If the Lender, Borrower, and Holder are unable to agree to restructuring of loan repayment, Interest rate, or loan terms to resolve any loan problem or resolve the Default and repurchase of the guaranteed portion of the loan is necessary to adequately service the loan, the

Holder must sell the guaranteed portion of the loan to the Lender for an amount equal to the unpaid principal and Interest on such portion less the Lender's servicing fee. The Lender must not repurchase from the Holder for arbitrage or other purposes to further its own financial gain. Any repurchase must only be made after the Lender obtains the Agency's written approval. If the Lender does not repurchase the guaranteed portion from the Holder, the Agency may, at its option, purchase such guaranteed portion for servicing purposes.

§ 4279.226 Replacement of document.

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

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

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

(i) Name and address of owner;
(ii) Name and address of the Lender of record;

(iii) Capacity of Person certifying;

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

(v) A full statement of circumstances of the loss, theft, destruction, defacement, or mutilation of the Loan Note

Guarantee or Assignment Guarantee Agreement; and

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

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

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

(4) In those cases where the guaranteed loan was closed under the provision of the multi-note system, the Agency will not attempt to obtain, or participate in the obtaining of, replacement Promissory Notes from the Borrower. The Holder is responsible for bearing the costs of Promissory Note replacement if the Borrower agrees to issue a replacement instrument. Should such Promissory Note be replaced, the terms of the Promissory

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Note cannot be changed. If the evidence of debt has been lost, stolen, destroyed, mutilated or defaced, such evidence of debt must be replaced before the Agency will replace any instruments.

§ 4279.227 Equal Credit Opportunity Act.

In accordance with the Equal Credit Opportunity Act (15 U.S.C. 1691, *et seq.*), with respect to any aspect of a credit transaction, neither the Lender nor the Agency will discriminate against any applicant on the basis of race, color, religion, national origin, sex, marital status or age (providing the applicant has the capacity to contract), or because all or part of the applicant's income derives from a public assistance program, or because the applicant has, in good faith, exercised any right under the Consumer Protection Act. The Lender must comply with the requirements of the Equal Credit Opportunity Act as contained in the Federal Reserve Board's Regulation implementing that Act (see 12 CFR part 202) prior to loan closing.

§§ 4279.228–4279.230 [Reserved]**LOAN PROCESSING****§ 4279.231 Fees.**

(a) *Guarantee fee.* The guarantee fee is paid to the Agency by the Lender and is nonrefundable. The fee may be passed on to the Borrower. Issuance of the Loan Note Guarantee is conditioned on payment of the guarantee fee by closing. The guarantee fee will be the percentage specified in paragraphs (a)(1) or (2) of this section, as applicable, unless otherwise specified by the Agency in a notice published in the FEDERAL REGISTER, multiplied by the principal loan amount multiplied by the percent of guarantee and will be paid one time only at the time the Loan Note Guarantee is issued.

(1) For loans receiving a 90 percent guarantee, the guarantee fee is three percent.

(2) For loans receiving less than a 90 percent guarantee, the guarantee fee is:

(i) Two percent for guarantees on loans greater than 75 percent of total Eligible Project Costs.

(ii) One and one-half percent for guarantees on loans of greater than 65 percent but less than or equal to 75 percent of total Eligible Project Costs.

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

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

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

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

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

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

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

(ii) Seventy five basis points (0.75 percent) for guarantees on loans that were originally greater than 65 percent

but less than or equal to 75 percent of total Eligible Project Costs.

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

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

§ 4279.232 Guaranteed loan funding.

(a) The amount of a loan guaranteed for a Project under this subpart will not exceed 80 percent of total Eligible Project Costs. Total Federal participation will not exceed 80 percent of total Eligible Project Costs. The Borrower needs to provide the remaining 20 percent from non-Federal sources to complete the Project. Eligible Project Costs are specified in § 4279.210(d). If an eligible Borrower receives other direct Federal funding (*i.e.*, direct loans or grants) for a Project, the maximum amount of the loan that the Agency will guarantee under this subpart must be reduced by the same amount of the other direct Federal funding that the eligible Borrower received for the Project. For example, an eligible Borrower is applying for a loan guarantee on a \$100,000,000 Project. If the Borrower receives no other direct Federal funding for this Project and requests an \$80,000,000 guaranteed loan, the Agency will consider a guarantee on the \$80,000,000. However, if this Borrower receives \$10,000,000 in other direct Federal funding for this Project, the Agency will only consider a guarantee on \$70,000,000.

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

(c) The maximum guarantee on the principal and Interest due on a loan guaranteed under this subpart will be determined as specified in paragraphs (c)(1) through (4) of this section.

(1) If the loan amount is equal to or less than \$125 million, 80 percent for the entire loan amount unless all of the conditions specified in paragraphs (c)(1)(i) through (iii) of this section are met, in which case 90 percent for the entire loan amount.

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

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

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

(2) If the loan amount is more than \$125 million and less than \$150 million, 80 percent for the entire loan amount.

(3) If the loan amount is equal to or more than \$150 million but less than \$200 million, 70 percent on the entire loan amount.

(4) If the loan amount is \$200 million up to and including \$250 million, 60 percent on the entire loan amount.

§ 4279.233 Interest rates.

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

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

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

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

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

§ 4279.234 Terms of loan.

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

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

(b) A loan's maturity will take into consideration the use of proceeds, the useful life of assets being financed, and the Borrower's ability to repay the loan.

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

(d) Only loans that require a periodic payment schedule that will retire the debt over the term of the loan without a balloon payment will be guaranteed

except the final payment may be the funds held in the debt service reserve account.

§ 4279.235 Collateral.

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

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

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

§§ 4279.236–4279.242 [Reserved]

§ 4279.243 Insurance.

The Lender is responsible for ensuring that required insurance is maintained by the Borrower. The Lender must be shown as an additional insured on insurance policies (or other risk sharing instruments) that benefit the Project and must be able to assume any contracts that are material to the Project, including any feedstock or Off-Take Agreements, as may be applicable.

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

(b) *Life.* The Lender may require as Collateral an assignment of life insurance to insure against the risk of death of persons critical to the success of the business. When required, coverage must be in amounts necessary to provide for management succession or to protect the business. The Agency may require life insurance on key individuals for loans where the Lender has not otherwise proposed such coverage. The cost of insurance and its effect on the applicant's Working Capital must be considered as well as the amount of existing insurance that could be assigned without requiring additional expense.

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

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

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

§ 4279.244 Appraisals.

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

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

than one year old, but less than two years old.

(2) Specialized appraisers will be required to complete appraisals under this section. The Agency may approve a waiver of this requirement only if a specialized appraiser does not exist in a specific industry. The Agency will require documentation that the appraiser has the necessary experience and competency to appraise the property in question.

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

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

(b) Chattels must be evaluated in accordance with normal banking practices and generally accepted methods of determining value. Chattel appraisals must reflect the age, condition, and

remaining useful life of the equipment. If the appraisal is completed by a State licensed/certified appraiser, the appraisal report must comply with USPAP Standards 7 and 8.

§ 4279.245 Personal and corporate guarantees.

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

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

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

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

(e) All personal and corporate guarantors must execute Form RD 4279-14, "Unconditional Guarantee," and any guarantee form required by the Lender. The Agency will retain the original, executed Form RD 4279-14.

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

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

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

§§ 4279.246–4279.255 [Reserved]

§ 4279.256 Construction planning and performing development.

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

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

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

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

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

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

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

(ii) Have a detailed timetable for the Project with a corresponding budget of

costs, setting forth the parties responsible for payment;

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

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

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

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

(c) *Changes and cost overruns.* The Borrower is responsible for any changes or cost overruns. If any such change or cost overrun occurs, then any change order must be expressly approved by the Agency, which approval shall not be unreasonably withheld, and neither the Lender nor Borrower will divert funds from purposes identified in the guaranteed loan application approved by the Agency to pay for any such change or cost overrun without the express written approval of the Agency. In no event will the current loan be modified or a subsequent guaranteed loan be approved to cover any such changes or costs. In the event of any of the aforementioned increases in cost or expenses, the Borrower must provide for such increases in a manner that does not diminish the Borrower's operating capital. Failure to comply with the terms of this paragraph (c) will be considered a Material Adverse Change in the Borrower's financial condition, and the Lender must address this matter, in writing, to the Agency's satisfaction.

(d) *New draw certifications.* The following three certifications are required for each new draw:

(1) Certification by the Project engineer to the Lender that the work re-

ferred to in the draw has been successfully completed;

(2) Certification that all debts have been paid and all mechanics' liens have been waived; and

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

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

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

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

(h) *Wage rates.* As a condition of receiving a loan guaranteed under this subpart, each Borrower shall ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with guaranteed loan funds under this subpart shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 through 3144, 3146, and 3147 of title 40, U.S.C. Awards under this subpart are further subject to the relevant regulations contained in 29 CFR part 5.

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

RBS and RUS, USDA

§ 4279.260

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

(i) Certifications for each draw request;

(A) Certification by the independent engineer to the Lender that the work referred to in the draw has been successfully completed;

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

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

(ii) List of invoices;

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

(iv) Status of construction and inspection reports; and

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

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

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

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

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

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

§§ 4279.257–4279.258 [Reserved]

§ 4279.259 Borrower responsibilities.

(a) *Federal, State, and local regulations.* Borrowers must comply with all Federal, State, and local laws and rules that are in existence and that affect the Project including, but not limited to:

(1) Land use zoning;

(2) Health, safety, and sanitation standards as well as design and installation standards; and

(3) Protection of the environment and consumer affairs.

(b) *Permits, agreements, and licenses.* Borrowers must obtain all permits, agreements, and licenses that are applicable to the Project.

(c) *Insurance.* The Borrower is responsible for maintaining all hazard, flood, liability, worker compensation, and personal life insurance, when required, for the Project.

(d) *Access to Borrower's records.* Except as provided by law, upon request by the Agency, the Borrower will permit representatives of the Agency (or other Federal agencies as authorized by the Agency) to inspect and make copies of any of the records of the Borrower's Project. Such inspection and copying may be made during regular office hours of the Borrower or at any other time agreed upon between the Borrower and the Agency.

(e) *Access to the Project.* The Borrower must allow the Agency access to the Project and its performance information until the loan is repaid in full and permit periodic inspections of the Project by a representative of the Agency.

APPLICATIONS

§ 4279.260 Guarantee applications—general.

(a) *Application submittal.* (1) For each guarantee request, the Lender or the Borrower must submit to the Agency a non-binding letter of intent to apply for loan guarantee not less than 30 calendar days prior to the application deadline as provided in paragraph (b) of this section. The letter must identify the Borrower, the Lender and Project

sponsors; describe the Project and Project location; describe the proposed feedstock, primary technologies of the facility and primary products produced; estimate the Total Project Cost and amount of loan requested; and any additional information specified in the annual FEDERAL REGISTER notice, if any. Applications that do not submit a letter of intent may be accepted by the Agency at the Agency's discretion.

(2) For each guarantee request, the Lender must submit to the Agency an application that is in conformance with § 4279.261. The methods of application submittal will be specified in the annual FEDERAL REGISTER notice.

(b) *Application deadline.* Unless otherwise specified by the Agency in a notice published in the FEDERAL REGISTER, application deadlines are October 1 and April 1 of each year. Complete applications must be received by the Agency on or before April 1 of each year to be considered for funding for that fiscal year. If the application deadline falls on a weekend or an observed holiday, the deadline will be the next Federal business day. The deadlines in this paragraph (b) relate to Phase 1 applications in accordance with § 4279.261.

(c) *Incomplete applications.* Incomplete applications will be rejected. Lenders will be informed of the elements that made the application incomplete. If a resubmitted application is received by the applicable application deadline, the Agency will reconsider the application.

(d) *Application withdrawal.* During the period between the submission of an application and closing, the Lender must notify the Agency, in writing, if the Project is no longer viable or the Borrower is no longer requesting financial assistance for the Project. When the Lender so notifies the Agency, the Agency will rescind the selection or withdraw the application.

(e) *Application revisions and updates.* During the period between the submission of an application and closing, the Lender must notify the Agency, in writing, of revisions to the Project including but not limited to revisions to technology utilized in the Project, feedstock, Off-Take Agreements, ownership structure, and Project financing.

The Agency may require submittal of updated application and supporting materials. The Agency will complete the application priority scoring in accordance with § 4279.266 based on the application materials received by the Agency prior to the application deadline. Subsequent changes to an application that result in a lower priority score could result in the Agency discontinuing processing of the application.

§ 4279.261 Application for loan guarantee content.

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

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

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

(2) *Borrower eligibility.* Describe how the Borrower meets the eligibility criteria identified in § 4279.209.

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

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

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

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

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

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

(d) *Financial model.* Submit a financial model for the Project in the form of a financial modeling software program in an active electronic format which includes, but is not limited to, a projected Project budget and projected balance sheets, income and expense statements, cash flow statements, and

Working Capital and capital expense projections for not less than the term of the loan. The projections must be displayed in a monthly format for a period of three years after stabilized operation and annually thereafter. Projections should be supported by a list of assumptions showing the basis for the projections. Depending on the complexity of the Project and the financial condition of the Borrower, the Agency may require additional financial statements and additional related information.

(e) *Feasibility Study.* The Feasibility Study should be prepared by a qualified, independent third party using information gathered from other qualified parties and documents such as: independent engineer reports, marketing studies, feedstock studies, business plans and financial statements prepared by a certified public accountant. Any information used to prepare the Feasibility Study should be submitted as attachments. Elements in an acceptable Feasibility Study include, but are not limited to, the elements outlined in Table 1 of this section.

TABLE 1—FEASIBILITY STUDY COMPONENTS

(A) Executive summary

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

(B) Economic Feasibility

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

Feedstock:

Feedstock source management,
Estimates of feedstock volumes and costs,
Collection, pre-treatment, transportation, and storage, and
Feedstock risks.

Documentation that woody biomass feedstock from National Forest system lands or public lands cannot be used for a higher-value product.

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

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

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

Information regarding Project site.

TABLE 1—FEASIBILITY STUDY COMPONENTS—Continued

Availability of trained or trainable labor.
 Availability of infrastructure, including utilities, and rail, air and road service to the site.
 Overall economic impact of the Project, including direct jobs, indirect jobs, additional markets created for agricultural and forestry products and agricultural waste material and the potential for Rural economic development.
 Feasibility/plans of Project to work with producer associations or cooperatives and the estimated amount of annual feedstock purchased from or sold to producer associations and cooperatives.

(C) Market Feasibility

Information on the sales organization and management.
 Nature and extent of market and market area.
 Marketing plans for sale of projected output—principal products and Byproducts.
 Extent of competition, including other similar facilities in the market area.
 Commitments from purchasers of off-take—principal products and secondary products, degree of commitment, duration or terms of Off-Take Agreements, and financial strength of counterparties.
 Risks related to the industry, including:
 Industry status;
 Specific market risks; and
 Competitive threats and advantages.

(D) Technical Feasibility

Suitability of the selected site for the intended use.
 Scale of development for which the process technology has been proven (*i.e.*, pilot, demonstration, or Semi-Work Scale Facility). Provide results from pilot, demonstration, or Semi-Work Scale Facilities that prove that the technology proposed to be used is feasible and stands a good chance of being successful. The proposed technology must meet the definition of Eligible technology.
 The degree of integration of all processes should be detailed and a summary of any integrated demonstration unit test results should be submitted.
 Specific volume produced from the technology of the process (expressed either as volume of feedstock processed [tons per unit of time] or as product [gallons per unit of time]).
 Identification and estimation of Project operation and development costs. Specify the level of accuracy of these estimates and the assumptions on which these estimates have been based. Detailed analysis of Project costs including: Project management and professional services; resource assessment; Project design and permitting; land agreements and site preparation; equipment requirements and system installation; startup and shakedown; and warranties, insurance, financing and operation and maintenance costs.
 A projected timeline detailing Borrower plans from the time of loan application through plant construction, commissioning and ramp up should be included.
 Ability of the proposed system to be commercially replicated.
 Risks related to:
 Construction of the Biorefinery;
 Production of the Advanced Biofuel and Biobased Product including Renewable Chemical;
 Regulation and governmental action;
 Design-related factors that may affect Project success; and
 Technology scale up risk.

(E) Financial Feasibility

Reliability of the financial projections and the assumptions on which the financial statements are based, including all sources and uses of Project capital, private or public Federal and non-Federal funds. Provide detailed analysis and description of projected balance sheets, income and expense statements, and cash flow statements over the useful life of the Project.
 A detailed description of and the degree financial feasibility is dependent on:

TABLE 1—FEASIBILITY STUDY COMPONENTS—Continued

Investment incentives; Productivity incentives; Loans and grants; and Other Project authorities RINs value, tax credits, other credits, and subsidies that affect the Project.
Any constraints or limitations in the financial projections.
Ability of the business to achieve the projected income and cash flow.
Assessment of the cost accounting system.
Availability of short-term credit or other means to meet seasonal business costs.
Adequacy of raw materials and supplies.
Sensitivity analysis, including feedstock and energy costs and product and Byproduct prices.
Risks related to:
The Project;
Borrower financing plan;
The operational units; and
Tax issues.
(F) Management Feasibility
Borrower and/or management's previous experience concerning:
Production of Advanced Biofuel, and Biobased Product including Renewable Chemicals, as applicable;
Acquisition of feedstock;
Marketing and sale of off-take; and
The receipt of Federal financial assistance, including amount of funding, date received, purpose, and outcome.
Management plan for procurement of feedstock and labor, marketing of the off-take, and management succession.
Risks related to:
Borrower as a company (<i>e.g.</i> , development-stage);
Conflicts of Interest; and
Management strengths and weaknesses.
(G) Qualifications
A resume or statement of qualifications of the author and contributors of the Feasibility Study, including prior experience, must be submitted.

(f) *Business Plan*. The Lender must submit the Borrower's business plan that includes the information specified in paragraphs (f)(1) through (10) of this section. Any or all of this information may be omitted if it is included in the Feasibility Study specified in paragraph (e) of this section.

(1) Describe or provide an organizational chart of the Borrower's ownership structure and affiliation with other entities, if any. The names and a description of the relationship of the Borrower's parent, Affiliates, and subsidiaries. Identify local ownership.

(2) The Borrower's succession planning, addressing both ownership and management.

(3) The Borrower's experience and management experience.

(4) The products and services to be provided and the Borrower's business strategy.

(5) Possible vendors and models of major system components.

(6) The availability of the resources (*e.g.*, labor, raw materials, supplies) necessary to provide the planned products and services.

(7) Site location and its relation to product distribution (*e.g.*, rail lines or highways) and any land use or other permits necessary to operate the facility.

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

(9) Projected balance sheets, income and expense statements, and cash flow

statements for a period of not less than three years of stabilized operation.

(10) A description of the proposed use of funds.

(g) *Scoring information.* The application must contain information in a format that is responsive to the scoring criteria specified in § 4279.266.

(h) *Intergovernmental consultation.* Intergovernmental consultation comments in accordance with 2 CFR part 415, subpart C or successor regulation.

(i) *DUNS Number.* For Borrowers other than individuals, a Dun and Bradstreet Universal Numbering System (DUNS) number, which can be obtained online at <http://fedgov.dnb.com/webform>.

(j) *Other information.* Any other information determined by the Agency to be necessary to evaluate the application.

(k) *Phase 2 application contents.* (1) Updates, as appropriate, to contents of application materials submitted in application phase 1.

(2) An appraisal conducted as specified under § 4279.244.

(3) A proposed Loan Agreement or a sample Loan Agreement with an attached list of the proposed Loan Agreement provisions as specified in paragraphs (k)(3)(i) through (ix) of this section.

(i) Prohibition against assuming liabilities or obligations of others.

(ii) Restriction on dividend payments.

(iii) Limitation on the purchase or sale of equipment and fixed assets.

(iv) Limitation on compensation of officers and owners.

(v) Minimum Working Capital or current ratio requirement.

(vi) Maximum debt-to-net worth ratio.

(vii) Restrictions concerning consolidations, mergers, or other circumstances.

(viii) Limitations on selling the business without the concurrence of the Lender.

(ix) Repayment and amortization of the loan.

(4) Environmental documentation in accordance with 7 CFR part 1970.

(5) Under the direction of the Agency, an evaluation and rating of the total Project's indebtedness, without consideration for a government guarantee,

from a nationally-recognized statistical rating organization (NRSRO), as defined by the U.S. Security and Exchange Commission, for all Projects with total Eligible Project Costs of \$25 million or more unless as otherwise specified by the Agency in a notice published in the FEDERAL REGISTER. The evaluation and rating must be in the form of an indicative private rating, private credit analysis, or comparable analysis report and include a rating in accordance with the NRSRO's credit rating scales and include a recovery analysis. An updated rating may be required at the Agency's discretion if changes are subsequently made to the Project including changes to any contracts and agreements or changes to loan terms and conditions.

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

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

(A) Unless otherwise determined by the Agency, a personal credit report from an Agency-approved credit reporting company for individuals who are key employees of the Borrower, as determined by the Agency, and for individuals owning 20 percent or more interest in the Borrower or any owner with more than 10 percent ownership interest in the Borrower if there is no owner with more than 20 percent ownership interest in the Borrower, except for when the Borrower is a corporation listed on a major stock exchange; and

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

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

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

(8) The technical assessment must be completed by a qualified independent engineer and must demonstrate that the design, procurement, installation, startup, operation and maintenance of

the Project will permit it to operate or perform as specified over its useful life in a reliable and a cost effective manner, and must identify what the useful life of the Project is. The technical assessment must also identify all necessary Project agreements, demonstrate that those agreements will be in place at or before the time of loan closing, and demonstrate that necessary Project equipment and services will be available over the useful life of the Project. The technical assessment must be based upon verifiable data and contain sufficient information and analysis so that a determination can be made on the technical feasibility of achieving the levels of income or production that are projected in the financial statements. All technical information provided must follow the format specified in paragraphs (k)(8)(i) through (ix) of this section. Supporting information may be submitted in other formats. Design drawings and process flow charts are required as exhibits. A discussion of a topic identified in paragraphs (k)(8)(i) through (ix) of this section is not necessary if the topic is not applicable to the specific Project. Questions identified in the Agency's technical review of the Project must be answered to the Agency's satisfaction before the application will be approved. All Projects require the services of an independent, third-party professional engineer.

(i) *Qualifications of Project team.* The Project team will vary according to the complexity and scale of the Project. The Project team must have demonstrated expertise in similar Advanced Biofuel and Biobased Product including Renewable Chemical, as applicable, technology development, engineering, installation, and maintenance. Identify Borrower's, including its principals', prior experience in bio-energy projects and the receipt of Federal financial assistance, including the amount of funding, date received, purpose, and outcome, for such projects. Authoritative evidence that Project team service providers have the necessary professional credentials or relevant experience to perform the required services for the development, construction, and Retrofitting, as applicable, of technology for producing

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

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

(B) Discuss the manufacturers of major components of Advanced Biofuels and Biobased Product including Renewable Chemical technology equipment being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

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

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

(ii) *Agreements and permits.* The application must identify all necessary agreements and permits required for the Project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (k)(8)(ii)(A) through (F) of this section.

(A) All facilities funded under this subpart must be installed in accordance with applicable local, State, and national codes and applicable local,

State, and Federal regulations. Identify zoning and code requirements and necessary permits and the schedule for meeting those requirements and securing those permits.

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

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

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

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

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

(iii) *Resource assessment.* The application must provide adequate and appropriate evidence of the availability of the feedstocks required for the facility to operate as designed. Indicate the type and quantity of the feedstock, and discuss storage of the feedstock, where applicable, and competing uses for the feedstock. Indicate shipping or receiving methods and required infrastructure for shipping, and other appropriate transportation mechanisms including methods and systems to prevent the spread of invasive species. For proposed Projects with an established resource, provide a summary of the resource.

(iv) *Design and engineering.* The application must provide authoritative evidence that the facility will be designed and engineered so as to meet its intended purposes, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified entity. Each facility must be engineered as a complete, integrated facility. The engineering must be comprehensive, including site selection, systems and component selection, and systems monitoring equipment. All Projects funded under this subpart must be constructed by a qualified entity.

(A) The application must include a concise but complete description of the

Project, including location of the Project; resource characteristics, including the kind and amount of feedstocks; facility specifications; kind, amount, and quality of the output; and monitoring equipment. Address performance on a monthly and annual basis. Describe the uses of or the market for the Advanced Biofuels and Biobased Product including Renewable Chemical produced by the facility. Discuss the impact of reduced or interrupted feedstock availability on the facility's operations.

(B) The application must include:

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

(2) Environmental documentation in accordance with 7 CFR part 1970.

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

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

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

(vi) *Equipment procurement.* The application must demonstrate that equipment required by the facility is available and can be procured and delivered within the proposed Project development schedule. Projects funded under this subpart may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory.

(vii) *Equipment installation.* The application must provide a full description of the management of and plan for site development and systems installation,

details regarding the scheduling of major installation equipment needed for Project construction, and a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the facility as a whole.

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

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

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

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

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

(ix) *Decommissioning.* A description of the decommissioning process, when the Project must be uninstalled or removed. A description of any issues, requirements, and costs for removal and disposal of the facility.

[81 FR 67633, Dec. 23, 1996, as amended at 81 FR 11051, Mar. 2, 2016]

§§ 4279.262–4279.264 [Reserved]

§ 4279.265 Guarantee application processing.

(a) *Eligibility determination.* Upon receipt of a complete Phase 1 application, the Agency will determine if the Borrower, Lender, and Project are eligible and if the Project is technically and economically feasible, as provided under paragraph (b) of this section.

(1) If the Borrower, Lender, or the Project is determined to be ineligible for any reason, the Agency will inform the Lender, in writing, of the reasons. No further evaluation of the application will occur.

(2) If the Agency determines it is unable to guarantee the loan, the Agency will inform the Lender in writing. Such notification will include the reasons for denial of the guarantee.

(b) *Technical and economic feasibility.*

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

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

(ii) The Lenders credit evaluation; and

(iii) Other application materials.

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

(3) Projects determined by the Agency to be without technical or economic

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feasibility will not be selected for funding.

[80 FR 36425, June 24, 2015, as amended at 85 FR 29596, May 18, 2020]

§ 4279.266 Guarantee application scoring.

Using the evaluation criteria identified in this section, the Agency will score each eligible Biorefinery application that meets the minimum requirements for technical and economic feasibility. A maximum of 125 points is possible. The Agency will award points based on its review and analysis of all application materials. Clarifications for the scoring on Biobased Product Manufacturing applications will be made available by a notice published in the FEDERAL REGISTER.

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

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

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

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

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

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

(i) If the Borrower commits to enter into Off-Take Agreements prior to loan closing for purchase for greater than or equal to 50 percent of the dollar value

of off-take for the period not less than the loan term, 6 points will be awarded.

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

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

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

(i) If the Borrower commits to enter into Off-Take Agreements prior to loan closing for purchase for greater than or equal to 50 percent of the dollar value of off-take with an off-take counterparty with a corporate credit rating not less than AA, Aa2, or equivalent, 4 points will be awarded.

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

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

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

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

(ii) If total of revenues from tax credits, carbon credits, or other Federal or

State subsidies is greater than 10 percent but less than or equal to 20 percent of the Project's total revenues on an annual basis, in the Borrower's base case of financial projections, 2 points will be awarded.

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

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

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

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

(c) Whether the Borrower is proposing to use a feedstock or biobased output of Biorefineries not previously used in the production of Advanced Biofuels or Biobased Products including Renewable Chemicals. A maximum of 10 points can be awarded. Points to be awarded will be determined as follows:

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

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

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

(1) If at least 50 percent of the dollar value of feedstock to be used by the proposed Project will be supplied by

producer associations and cooperatives, 5 points will be awarded.

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

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

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

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

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

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

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

(f) Whether the Borrower has established that the adoption of the process proposed in the application will have a positive effect on three impact areas: resource conservation (*e.g.*, water, soil, forest), public health (*e.g.*, potable water, air quality), and the environment (*e.g.*, compliance with an applicable renewable fuel standard, greenhouse gases, emissions, particulate matter). A maximum of 10 points can be awarded. Points to be awarded will be determined as follows:

(1) If process adoption will have a positive impact on any one of the three impact areas (resource conservation, public health, or the environment), 3 points will be awarded.

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

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

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

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

(1) If the Borrower has failed to establish, through an independent third-party Feasibility Study, that the production technology proposed in the application, if adopted, will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, 0 points will be awarded.

(2) If the Borrower has established, through an independent third-party Feasibility Study, that the production technology proposed in the application, if adopted, will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, 5 points will be awarded.

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

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

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

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

(3) If the majority of feedstock to be utilized by the Project, on an annual basis, is harvested from the land, 10 points will be awarded.

(i) The level of local ownership of the facility proposed in the application. A maximum of 5 points can be awarded.

Points to be awarded will be determined as follows:

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

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

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

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

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

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

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

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

(2) To applications that promote partnerships and other activities that assist in the development of new and emerging technologies for the development of Advanced Biofuels and Biobased Products including Renewable Chemicals, so as to, as applicable, increase the energy independence of the United States or reduce our dependence on petroleum-based chemicals and products; promote resource conservation, public health, and the environment; diversify markets for agricultural and forestry products and agriculture waste material; and create jobs and enhance the economic development of the Rural economy. These partnerships and other activities will be identified in a FEDERAL REGISTER notice each fiscal year.

§ 4279.267 Selecting guarantee applications.

(a) *Allocation of budget authority.* In administering this Program's budgetary authority each fiscal year, the Agency will allocate up to, but no more, than 50 percent of its budgetary authority, excluding funding for Biobased Product Manufacturing Projects, to fund applications received by the end of the first application window, including those carried over from the previous application period. Any funds not obligated to support applications submitted by the end of the first application window will be available to support applications received by the end of the second window, including those carried over from the previous application period. The Agency, therefore, will have a minimum of 50 percent of each fiscal year's budgetary authority for this Program available to support applications received by the end of the second application window. Administrative procedures for the funding of Biobased Product Manufacturing Projects will be made available by a Notice published in the FEDERAL REGISTER.

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

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

(1) *Ranking.* The Agency will consider the score an application has received compared to the scores of other applications in the priority list created

under paragraph (b) of this section, with highest scoring applications receiving first consideration for invitation to the phase 2 submittal. A minimum score of 55 points is required in order to be considered for a guarantee.

(2) *Availability of budgetary authority.* The Agency will consider the size of the request relative to the budgetary authority that remains available to the Program during the fiscal year.

(i) If there is insufficient budgetary authority during a particular funding period to select a higher scoring application, the Agency may elect to select the next highest scoring application for further processing. Before this occurs, the Agency will provide the Borrower of the higher scoring application the opportunity to reduce the amount of its request to the amount of budgetary authority available. If the Borrower agrees to lower its request, it must certify that the purposes of the Project can be met, and the Agency must determine the Project is financially feasible at the lower amount.

(ii) If the amount of funding required is greater than 25 percent of the Program's outstanding budgetary authority, the Agency may elect to select the next highest scoring application for further processing, provided the higher scoring Borrower is notified of this action and given an opportunity to revise their application and resubmit it for an amount less than or equal to 25 percent of the Program's outstanding budgetary authority.

(3) *Availability of other funding sources.* If other financial assistance is needed for the Project, the Agency will consider the availability of other funding sources. If the Lender cannot demonstrate that funds from these sources are available at the time of selecting applications for funding or potential funding, the Agency may instead select the next highest scoring application for further processing ahead of the higher scoring application.

(d) *Ranked applications not selected for phase 2.* A ranked application that is not invited to submit phase 2 in the application cycle in which it was submitted will be carried forward one additional application cycle, which may be in the next fiscal year. The Agency will notify the Lender in writing.

§§ 4279.268–4279.277 [Reserved]

§ 4279.278 Loan approval and obligating funds.

(a) Applications for loan guarantees may be approved as their Phase 2 applications are completed and approved. If an application has been selected for phase 2, but has not been approved because additional information is needed, the Agency will notify, in writing, the Lender of what information is needed, including a timeframe for the Lender to provide the information. If the Lender does not provide the information within the specified timeframe, the Agency will remove the application from further consideration and will so notify the Lender in writing.

(b) Upon approval of a loan guarantee application, the Agency will issue a Conditional Commitment to the Lender containing conditions under which a Loan Note Guarantee will be issued. The Agency will not issue a Conditional Commitment until the Agency has satisfactorily completed a Civil Rights Impact Analysis. The Conditional Commitment becomes null and void unless the conditions are accepted by the Lender and Borrower within 60 days from the date of issuance by USDA. If the conditions are not met or the Loan Note Guarantee is not issued by the Conditional Commitment expiration date, the Agency may extend the Conditional Commitment expiration date when requested by the Lender and only if there has been no Material Adverse Change in the Borrower's or Borrowers' financial condition since issuance of the Conditional Commitment.

(c) The Lender and Borrower may request changes to the Conditional Commitment. The Agency may negotiate with the Lender and the Borrower regarding any proposed changes to the Conditional Commitment. Any changes to the Conditional Commitment must be documented by written amendment to the Conditional Commitment. The changes must be for Good Cause and the Agency may deny, solely at its discretion, changes to the Conditional Commitment even if the change is otherwise in compliance with this subpart.

(d) The Borrower must comply with all Federal requirements then in effect for receiving Federal assistance.

§ 4279.279 Transfer of Lenders.

(a) The Agency may approve the substitution of a new eligible Lender in place of a former Lender who has been issued an outstanding Conditional Commitment when the Loan Note Guarantee has not yet been issued provided that there are no changes in the:

- (1) Borrower's ownership or control, loan purposes, or scope of Project;
- (2) Loan terms and conditions in the Conditional Commitment; and
- (3) Loan Agreement.

(b) The Agency must determine that the new Lender is eligible in accordance with § 4279.208 prior to approving the substitution. The original Lender must provide the Agency with a letter stating the reasons it no longer desires to be a Lender for the Project. The substituted Lender must execute a new part B of Form 4279-1 and Lender's Agreement (unless a valid Lender's Agreement with the Agency already exists), and must complete a new Lender's analysis in accordance with § 4279.215. The new Lender may also be required to provide other updated application items outlined in § 4279.261(k).

§ 4279.280 Changes in Borrowers.

Any changes in Borrower ownership or organization prior to the issuance of the Loan Note Guarantee must meet the eligibility requirements of the Program and be approved by the Agency.

§ 4279.281 Conditions precedent to issuance of Loan Note Guarantee.

The Lender must not close the loan until all conditions of the Conditional Commitment are met or can be met. When loan closing plans are established, the Lender must notify the Agency in writing.

(a) Coincident with, or immediately after loan closing, the Lender must provide the following forms and documents to the Agency:

- (1) An executed Lender's Agreement;
- (2) Form RD 1980-19, "Guaranteed Loan Closing Report," and appropriate guarantee fee;
- (3) Copy of the executed Promissory Note(s);

(4) Copy of the executed Loan Agreement;

(5) Copy of the executed settlement statement and updated source and use statement including all Project funding;

(6) Original, executed Forms RD 4279-14, as appropriate;

(7) Borrower's loan closing balance sheet; and

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

(b) The Lender must provide their certification to each condition specified in paragraphs (b)(1) through (16) of this section. The Lender may rely on certain written materials (including but not limited to certifications, evaluations, appraisals, financial statements and other reports) to be provided by the Borrower or other qualified third parties (including, among others, one or more independent engineers, appraisers, accountants, attorneys, consultants or other experts.) If the Lender is unable to provide any of the certifications required under this section, the Lender must provide an explanation satisfactory to the Agency as to why the Lender is unable to provide the certification. The Lender can request the guarantee prior to construction, but must still certify to all conditions in paragraphs (b)(1) through (16) of this section.

(1) If required, hazard, flood, liability, worker compensation, and life insurance are in effect.

(2) All truth-in-lending and equal credit opportunity requirements have been met.

(3) The loan has been properly closed, and the required security instruments have been properly executed, or will be promptly obtained on any property that cannot be immediately secured under State law.

(4) The Borrower has or will have marketable title to the Collateral, subject to the guaranteed loan and to any other exceptions approved in writing by the Agency.

(5) The loan proceeds have been or will be disbursed for purposes and in amounts consistent with the Conditional Commitment and the application submitted to the Agency.

(6) When required, personal or corporate guarantees have been obtained in accordance with §4279.245.

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

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

(9) There has been neither any Material Adverse Change in the Borrower's financial condition nor any other Material Adverse Change in the Borrower, for any reason, during the period of time from the Agency's issuance of the Conditional Commitment to issuance of the Loan Note Guarantee regardless of the cause or causes of the change and whether or not the change or causes of the change were within the Lender's or Borrower's control. The Lender must address any assumptions or reservations in this certification and must address all Material Adverse Changes of the Borrower, any parent, Affiliate, or subsidiary of the Borrower, and guarantors.

(10) Neither the Lender nor any of the Lender's officers has an ownership interest in the Borrower or is an officer or director of the Borrower, and neither the Borrower nor its officers, directors, stockholders, or other owners have more than a 5 percent ownership interest in the Lender.

(11) The Loan Agreement includes all Borrower compliance measures identified in the Agency's environmental review process for avoiding or reducing adverse environmental impacts of the Project's construction or operation.

(12) For loans exceeding \$150,000, the Lender has certified its compliance with the Anti-Lobby Act (18 U.S.C. 1913). Also, if any funds have been, or will be, paid to any Person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this commitment providing for the United States to guarantee a loan, the

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Lender must completely disclose such lobbying activities in accordance with 31 U.S.C. 1352.

(13) Where applicable, the Lender must certify that the Borrower has obtained:

(i) A legal opinion relative to the title to rights-of-way and easements. Lenders are responsible for ensuring that Borrowers have obtained valid, continuous, and adequate rights-of-way and easements needed for the construction, operation and maintenance of a facility; and

(ii) A title opinion or title insurance showing ownership of the land and all mortgages or other lien defects, restrictions, or encumbrances, if any. It is the responsibility of the Lender to ensure that the Borrower has obtained and recorded such releases, consents, or subordinations to such property rights from holders of outstanding liens or other instruments as may be necessary for the construction, operation and maintenance of the facility and to provide the required security. For example, when a site is for utility-type facilities (such as a gas distribution system) and the Lender and Borrower are able to obtain only a right-of-way or easement on such site rather than a fee simple title, such a title opinion must be provided.

(14) Each Borrower shall certify to the Lender that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with guaranteed loan funds under this subpart shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with 40 U.S.C. 3141 through 3144, 3146, and 3147. Awards under this subpart are further subject to the relevant regulations contained in Title 29 of the CFR.

(15) The Lender certifies that it has reviewed all contract documents and verified compliance with 40 U.S.C. 3141 through 3144, 3146, and 3147 and Title 29 of the CFR. The Lender will certify that the same process will be completed for all future contracts and any changes to existing contracts.

(16) The Lender certifies that the proposed facility complies with all Fed-

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eral, State, and local laws and regulatory rules that are in existence and that affect the Project, the Borrower, or Lender activities.

(c) The Agency may, at its discretion, request copies of loan documents for its file.

(d) When the Agency is satisfied that all conditions for the guarantee have been met, the Agency will issue the Loan Note Guarantee(s) and the documents identified in paragraphs (d)(1) and (2) of this section, as appropriate.

(1) *Assignment Guarantee Agreement.* In the event the Lender uses the single Promissory Note option and assigns the guaranteed portion of the loan to a Holder, the Lender, Holder, and the Agency will execute the Assignment Guarantee Agreement.

(2) *Certificate of Incumbency.* If requested by the Lender, the Agency will provide the Lender with a certification on Form 4279-7, "Certificate of Incumbency and Signature," of the signature and title of the Agency official who signs the Loan Note Guarantee, Lender's Agreement, and Assignment Guarantee Agreement.

§ 4279.282 [Reserved]

§ 4279.283 Refusal to execute Loan Note Guarantee.

If the Agency determines that it cannot execute the Loan Note Guarantee, the Agency will inform the Lender, in writing, of the reasons and give the Lender a reasonable period within which to satisfy the objections. If the Lender satisfies the objections within the time allowed, the Agency will issue the Loan Note Guarantee. If the Lender requests additional time in writing and within the period allowed, the Agency may grant the request.

§§ 4279.284-4279.289 [Reserved]

§ 4279.290 Requirements after Project construction.

Once the Project has been constructed, the Lender must meet the requirements specified in paragraphs (a) and (b) of this section.

(a) Provide the Agency annual reports from the Borrower commencing the first full calendar year following the year in which Project construction was completed and continuing for the

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life of the guaranteed loan. The Borrower's reports will include, but not be limited to, the information specified in paragraphs (a)(1) through (8), as applicable, of this section.

(1) The actual amount of Advanced Biofuels, Biobased Products including Renewable Chemicals, and Byproducts produced.

(2) If applicable, documentation that identified health or sanitation problems have been solved.

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

(4) A description of any maintenance or operational problems associated with the facility.

(5) Certification that the Project is and has been in compliance with all applicable State and Federal environmental laws and regulations.

(6) The number of jobs created.

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

(8) The results of the annual inspections conducted under paragraph (b) of this section.

(b) For the life of the guaranteed loan, conduct annual inspections.

§§ 4279.291–4279.299 [Reserved]

§ 4279.300 OMB control number.

In accordance with the Paperwork Reduction Act of 1995, the information collection requirements contained in the subsequent interim rule have been submitted to the Office of Management and Budget (OMB) under OMB control number 0570–0065 for approval. A person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

PART 4280—LOANS AND GRANTS

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