

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

RIN 0570-AA73

**Biorefinery Assistance Guaranteed Loans****AGENCY:** Rural Business-Cooperative Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** Rural Business-Cooperative Service, a mission area within the U.S. Department of Agriculture, is proposing a guaranteed loan program for biorefineries. The proposed rule will establish guaranteed loan regulations for the development and construction of commercial-scale biorefineries and for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels.

**DATES:** Comments on the proposed rule must be received on or before June 15, 2010. The comment period for the information collection under the Paperwork Reduction Act of 1995 continues through June 15, 2010.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250-0742.

- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

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

**FOR FURTHER INFORMATION CONTACT:** Energy Branch, Biorefinery Assistance Program, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 3225, Washington, DC 20250-3201; telephone (202) 720-1400.

**SUPPLEMENTARY INFORMATION:****Executive Order 12866**

This proposed rule has been reviewed under Executive Order (EO) 12866 and

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

The Agency conducted a benefit-cost analysis to fulfill the requirements of Executive Order 12866. In this analysis, the Agency identifies potential benefits and costs of the Section 9003 program to lenders, borrowers, and the Agency. The analysis contains both quantitative estimates and qualitative descriptions of the expected benefits and costs of the Biorefinery Assistance guaranteed loan program. The environmental and energy impacts associated with the Section 9003 program were qualitatively assessed.

**Unfunded Mandates Reform Act**

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

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

**Environmental Impact Statement**

This renewable energy program under Title IX of the 2008 Farm Bill has been operated on an interim basis through the issuance of a Notice of Funds Availability (NOFA). During this initial round of applications, the Agency conducted National Environmental Policy Act (NEPA) reviews on each individual application for funding. No significant environmental impacts were reported, and Findings of No Significant Impact (FONSI) were issued for each approved application. Taken collectively, the applications show no potential for significant adverse cumulative effects.

The Agency is preparing a programmatic environmental assessment (PEA), pursuant to 7 CFR subpart 1940-G, to analyze the environmental effects to air, water, and biotic resources; land use; historic and cultural resources, and greenhouse gas emissions affected by the Section 9003 proposed rule. The purpose of the PEA is to assess the overall environmental impacts of the programs related to the goals of the Administration for advancing biofuels production for the purposes of energy independence and greenhouse gas emission reductions. The environmental analyses will be national in scope and will be supported by site by site analysis per each application to the program. Site-specific NEPA documents prepared for those facilities funded under Sections 9003 and 9004 in FY 2008 and/or 2009 will be utilized, to forecast likely environmental impacts under the proposed rules. The draft PEA will be made available to the public for comment on the USDA Rural Business Service's Web site by May 3, 2010, and all comments will be addressed as part of any revision of the PEA, or prior to the publication of any Finding of No Significant Impact (FONSI).

**Executive Order 12988, Civil Justice Reform**

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

**Executive Order 13132, Federalism**

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

**Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601–602) (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have an economically significant impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

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

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

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

**Executive Order 12372, Intergovernmental Review of Federal Programs**

Rural Development guaranteed loans are subject to the Provisions of Executive Order 12372, which require intergovernmental consultation with

State and local officials. Rural Development will conduct intergovernmental consultation in the manner delineated in RD Instruction 1940–J, “Intergovernmental Review of Rural Development Programs and Activities,” available in any Rural Development office, on the Internet at <http://www.rurdev.usda.gov/reggs>, and in 7 CFR part 3015, subpart V.

**Executive Order 13175, Consultation and Coordination With Indian Tribal Governments**

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

**Programs Affected**

The Catalog of Federal Domestic Assistance Program numbers assigned to affected program is: 10.865, Biorefinery Assistance Program.

**Paperwork Reduction Act**

The collection of information requirements contained in the notice have received temporary emergency clearance by the Office of Management and Budget (OMB) under control Number 0570–0055. However, in accordance with the Paperwork Reduction Act of 1995, USDA Rural Development will seek OMB approval of the reporting and recordkeeping requirements contained in this Notice and hereby opens a 60-day public comment period.

*Title:* Biorefinery Assistance Guaranteed Loans.

*Type of Request:* New collection.

*Abstract:* Rural Development is providing guaranteed loans to assist in the development and construction of commercial-scale biorefineries and the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. Consistent with Congressional intent, preference will be given to projects where first-of-a-kind technology will be deployed at the commercial scale. To that end, the program will promote the development of the first commercial scale biorefineries that do not rely on corn kernel starch as the feedstock or standard biodiesel technology.

The collection of information is vital to Rural Development to make wise decisions regarding the eligibility of projects and borrowers in order to ensure compliance with the regulations and to ensure that the funds obtained from the Government are used appropriately (*i.e.*, being used for the purposes for which the guaranteed loans were awarded). Persons seeking loan guarantees under this program will have to submit applications that include specified information including, but not limited to, the lender’s analysis and credit evaluation, financial statements on the borrower, a feasibility study, a business plan, a technical assessment, an economic analysis, and a description of the borrower’s bioenergy experience. The information included in applications for loan guarantee will be used to determine applicant and project eligibility and to ensure that funds are used for projects that are likely to be financially sound.

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

The following estimates are based on the average over the first three years the program is in place.

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

*Respondents:* Individuals, entities, Indian Tribes, units of State or local government, corporations, farm cooperatives, farmer cooperative organizations, associations of agricultural producers, National Laboratories, institutions of higher education, rural electric cooperatives, public power entities, and consortia of any of these entities.

*Estimated Number of Respondents:* 23.

*Estimated Number of Responses per Respondent:* 27.4.

*Estimated Number of Responses:* 630.  
*Estimated Total Annual Burden (hours) on Respondents:* 2,920.

Copies of this information collection may be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services

Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250-0742 or by calling (202) 692-0043.

### Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of Rural Development, including whether the information will have practical utility; (b) the accuracy of the new Rural Development estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Cheryl Thompson, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250. All responses to this proposed rule will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

### E-Government Act Compliance

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

### I. Background

Rural Development administers a multitude of Federal programs for the benefit of rural America, ranging from housing and community facilities to infrastructure and business development. Its mission is to increase economic opportunity and improve the quality of life in rural communities by providing the leadership, infrastructure, venture capital, and technical support that enables rural communities to prosper.

To achieve its mission, Rural Development provides financial support (including direct loans, grants, and loan guarantees) and technical assistance to help enhance the quality of life and provide the foundation for economic development in rural areas. Section 9003 of the Food, Conservation, and

Energy Act of 2008 (2008 Farm Bill) provides financial assistance in the form of grants and guaranteed loans to assist in the development of new and emerging technologies for the development of advanced biofuels.

The following types of financial assistance under section 9003 are authorized:

- Grants for the development and construction of demonstration-scale biorefineries to demonstrate the commercial availability of one or more processes for converting renewable biomass to advanced biofuels.
- Guaranteed loans for the development, construction or the retrofitting of commercial biorefineries using eligible technology, where eligible technology is defined as:

(a) Any technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel, and

(b) Any technology not described in paragraph (a) above that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

*Overview of Section 9003.* Section 9003 of the Farm Security and Rural Investment Act of 2002 as added by the Food Conservation and Energy Act of 2008, authorizes the Secretary of Agriculture to establish the Biorefineries Assistance Loan Guarantee Program to provide loan guarantees for the construction of biorefineries to “assist in the development of new and emerging technologies for the development of advanced biofuels”.

Under the proposed rule, the Agency will establish a rolling process for the consideration of loan guarantee requests for the development and construction of commercial-scale biorefineries or for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. Consistent with the authorizing legislation, the proposed rule defines the term “advanced biofuel” as a “fuel derived from renewable biomass, other than corn kernel starch.” The Agency is proposing that the maximum percentage of the loan guarantee be 80 percent of loan and the maximum amount of the loan guarantee be \$250 million.

Consistent with the authorizing legislation, the goal of this program is to encourage the development of commercial scale biorefineries that produce advanced biofuels. To help meet this goal, the program proposes to be open to all feasible technologies. At this stage in the development of biofuels industry, it is impossible to know what technologies will become the most

effective. Further, the Agency believes that unlike other Rural Development renewable energy programs, this program should be conducted on a rolling application acceptance basis. The Agency’s experiences with its Business and Industry Loan Guarantee Program has taught the Agency that the development of financing arrangements between lenders and borrowers frequently do not fit within pre-prescribed application windows. Once these arrangements are agreed upon, the Agency needs to be able to make a decision within a relatively short period of time or the deal will likely collapse. With respect to all of these points, the Agency welcomes feedback from the public during the comment period.

The Agency views this program in conjunction with its other renewable energy programs in the context of an overall Federal renewable energy strategy. The goal of this strategy is to foster the development of a strong, expanding, and economically sustainable group of renewable energy industries in the United States to supply an increasing share of the country’s energy needs. The success of these industries will depend on their ability to produce energy sources that meet the demands of the country’s energy markets. These markets are driven by a number of factors including the price of oil and other fossil fuels, developments in technologies, the acceptance of the public, the capacity of distribution systems, and the impact of government regulation such as the renewable fuels standard.

The Biorefinery Assistance Loan Guarantee Program is one part of Rural Development’s contribution to the Department of Agriculture’s renewable energy efforts that support the overall Federal renewable energy strategy. This program provides critical assistance to the development of biorefineries in the United States by facilitating the financing of a number of biorefineries through the leveraging of Federal government biorefinery assistance loan guarantees and private capital sources.

Over time, the Agency believes that these private capital sources will look at the Federal government investments in biorefineries under this program more generally as a sign that these facilities are worth financing, even without the Federal government, which will further support the development of the renewable energy industries of in the U.S. The Agency believes that this program will provide examples of how private capital can successfully invest in biorefineries that adopt new and more effective technologies that will enable energy from renewable sources to

supply an increasing share of the energy needs of the country.

*Notice of Funds Availability.* Rural Development published a Notice of Funds Availability (NOFA) for the section 9003 guaranteed loan program on November 20, 2008 [73 FR 70544] (referred to in this notice as the Section 9003 NOFA) and an Advanced Notice of Proposed Rulemaking (ANPRM) on the same day [73 FR 70542]. The ANPRM requested comments in several areas including definitions and terms (established a market, by-products, co-products, area, local market); oversight and monitoring (reporting requirements once the project is established and stabilized; evaluation of project performance); eligible borrowers (National laboratories); loan applications (technical reports, private sector credit rating); evaluation of guaranteed loan applications (scoring criteria); origination responsibilities (credit evaluation and equity); and basic guarantee and loan provisions (project costs and issuance of the loan note guarantee). The Agency received nine comment letters in response to the ANPRM, and has considered the comments in developing this proposed rule.

The following section describes the proposed Biorefinery Assistance program.

## II. Discussion of Proposed Rule for Biorefinery Assistance Guaranteed Loans

In this section of the Notice, the proposed rule for Biorefinery Assistance Guaranteed loans is described. The Agency is adding a new subpart to 7 CFR part 4279, Guaranteed Loanmaking, and a new subpart to 7 CFR part 4287, Servicing, which taken together represent the regulatory provisions for the Biorefinery Assistance program. This approach is consistent with the Agency's intent to use the structure of its B&I program when the Agency withdrew 7 CFR part 5001 on September 21, 2009 (74 FR 48005).

### A. Background

In developing the Biorefinery Assistance program, the Agency considered two primary factors:

- *Statutory requirements.* The authorizing statute requires the Agency to include certain provisions when implementing the Biorefinery Assistance program.

- *The nature of the program.* The Biorefinery Assistance program is a new program for the Agency. With the exception of the Rural Energy for America Program, the type of technologies associated with

biorefineries will be very different than those associated with other Business Programs currently being run by Rural Development. This led the Agency to consider whether new and more detailed requirements than found in the B&I regulation were needed for biorefinery guaranteed loans. Furthermore, the size of the loans that will be involved (up to \$250 million) is substantially larger than under other Business programs, including the Rural Energy for America Program. This also results in the Agency's consideration for additional requirements for Biorefinery Assistance Guaranteed loans.

A third factor considered by the Agency is comments submitted in response to the ANPRM. In the ANPRM, the Agency requested comments specific to several areas for consideration in developing the guaranteed loan program for biorefinery assistance. The Agency received nine public comment letters. The Agency reviewed each comment letter and, where the Agency determined it appropriate, incorporated recommendations into the proposed rule.

As noted above, the Agency is proposing to add new subparts to 7 CFR part 4279, Guaranteed Loanmaking, and 7 CFR part 4287, Servicing, as discussed in Section II.B of this preamble.

### B. The Biorefinery Assistance Program

The following paragraphs discuss the proposed Biorefinery Assistance program. Conceptually, the Agency is proposing to add a new subpart C to 7 CFR part 4279 and a new subpart D to 7 CFR part 4287, with extensive incorporation of many of the B&I guaranteed loan provisions.

The new 7 CFR part 4279, subpart C, identifies the purpose and scope of the Biorefinery Assistance program, identifies the relationship of this program to the general B&I provisions found in 7 CFR part 4279, subpart A, and identifies the loan processing requirements for Biorefinery Assistance guaranteed loans. While many of the loan processing requirements are the same as for B&I guaranteed loans, there are significant loan processing provisions being proposed that are specific to Biorefinery Assistance Guaranteed loans.

The new 7 CFR part 4287, subpart D, identifies the servicing requirements for Biorefinery Assistance Guaranteed loans. Most of the servicing requirements being proposed are the same as found in the servicing regulation (7 CFR part 4287) for the B&I guaranteed loans.

### Purpose and Scope (§ 4279.201)

This section describes the purpose and scope of the Biorefinery Assistance program.

### Compliance With §§ 4279.1 Through 4279.99 (§ 4279.202)

In general, the B&I provisions found in §§ 4279.1 through 4279.99 will be applicable to Biorefinery Assistance Guaranteed loans. There are several areas where there are exceptions or additions. These areas are:

1. *Definitions.* This paragraph presents the definitions applicable to the Biorefinery Assistance program. Many of the applicable definitions are incorporated by reference from the B&I regulations (§ 4279.2). Other definitions are specific to the Biorefinery Assistance program. The following paragraphs present many of the definitions required for the implementation of the Biorefinery Assistance program. Two of these definitions are statutorily driven, while the others are being proposed by the Agency in order to implement the program more clearly.

*Statutorily-driven terms.* The 2008 Farm Bill defines "advanced biofuel" and "eligible technology." Because these two terms are statutorily defined, the Agency must use them as defined in the 2008 Farm Bill.

*Other terms.* The Agency identified a number of terms that are needed in order to implement the Biorefinery Assistance program. These terms are:

- Biofuel;
- Biorefinery;
- By-product;
- Farm cooperative;
- Farmer Cooperative Organization;
- Immediate family;
- Indian Tribe;
- Institution of higher education;
- Local owner;
- Offtake agreement;
- Regulated or supervised lender;
- Renewable biomass; and
- Total project costs.

The 2008 Farm Bill provides a definition for biorefinery, which is included in the proposed rule. With the exception of renewable energy and renewable energy system, these terms are being defined because they are associated with implementing the Biorefinery Assistance program.

With the exception of farm cooperative, farm cooperative organization, by-product, and local owner these terms and their definitions are the same, or essentially the same, as found in the Section 9003 NOFA. With regard to farm cooperative, the definition is being revised to reflect the

structure of the farm cooperative, rather than its operational aspects. Therefore, the Agency revised the definition to track the one used in the Value Added Producer Grant program, which requires the applicant to be incorporated as a cooperative. As a result, the program will require the cooperative to comply with State law. The NOFA did not state that the cooperative had to be incorporated as a cooperative.

With regard to farm cooperative organization, the definition is being revised to make it clearer as to what constitutes a farm cooperative organization.

With regard to by-product, a definition for by-product is being added in response to comments received on the ANPRM. The Section 9003 NOFA did not have a definition for by-product. The term biorefinery is defined in the statute, and includes language concerning products other than the biofuel. By-products are an important revenue source for many biorefineries. The definition requires that they be typical to the operation, and measurable. The Agency wanted to ensure for the technical and financial analysis, that a standard for a byproduct is established and that the applicant can document the same.

With regard to local owner, the Agency is proposing the method for determining local ownership under the scoring criteria by looking at the percent of local owners whose primary residence is within 20 miles of the area supplying feedstock to the biorefinery (see 4279.265(d)(9)). Thus, it is necessary to define "local owner."

The Agency also identified a number of terms associated with the definition of "eligible technology", with project eligibility, or with lender eligibility:

- Retrofitting;
- Semi-work scale;
- Technical and economic potential;
- Tier 1 capital;
- Tier 2 capital;
- Tier 1 leverage capital ratio;
- Tier 1 risk-based capital ratio;
- Total qualifying capital;
- Total risk-based capital ratio; and
- Viable commercial-scale operation.

The proposed definition for retrofitting is the same as found in the Section 9003 NOFA.

The definition of technical and economic potential is essentially the same as found in the Section 9003 NOFA, but has been modified, in paragraph (ii), to refer to the demonstration of the "potential success of the project" rather than to the demonstration of the "success of the project." In addition, to clarify paragraph (iii) of this definition, the

Agency is adding a definition for "semi-work scale."

The Section 9003 NOFA provided a definition for "viable commercial-scale." The Agency believes that it is clearer to define "viable commercial-scale operation" and, thus, has revised the term being defined. The definition is the same as found in the Section 9003 NOFA for "viable commercial-scale," but with minor editing.

Two of the other terms are agricultural producer and association of agricultural producers. The definition of association of agricultural producer is very similar to the definition of the term as found in the Section 9003 NOFA. The Agency is adding the definition of "agricultural producer" to further clarify the term "association of agricultural producers."

Lastly, the Agency also identified a number of terms used in making guaranteed loans that have not been previously defined for the B&I Guaranteed Loan program and that will be applicable to the Biorefinery Assistance program. These terms are:

- Business plan;
- Default;
- Eligible project costs;
- Existing business;
- Feasibility study;
- Future recovery;
- Loan classification;
- Market value;
- Material adverse change;
- Negligent loan origination;
- Project;
- Protective advance;
- Startup business;
- Surety;
- Tangible net worth; and
- Working capital.

The Agency believes that providing definitions for these terms will be beneficial to the Section 9003 guaranteed loan program.

Approximately one-half of these terms are based on the definitions found in the Section 9003 NOFA. Most of the other terms are based on the definitions found in the withdrawn Rural Development Guaranteed Loans rule.

2. *Exception authority (§ 4279.202(b)).* This section identifies those conditions under which the Administrator may make, on a case-by-case basis, exceptions to any requirement or provision of this subpart. The proposed provisions are the same as found in 7 CFR part 4280, subpart B, for the renewable energy systems and energy efficiency improvements program. These provisions are very similar to those currently found in § 4279.15.

3. *Lender eligibility requirements (§ 4279.202(c)).* This paragraph presents the requirements for lenders to

participate in the Biorefinery Assistance program. Consistent with the Section 9003 NOFA, only lenders that are regulated or supervised will be eligible to originate and service Biorefinery Assistance Guaranteed loans. The Agency is not allowing lending entities that are not regulated or supervised to participate in order to manage Agency risk associated with this program.

Although the lenders eligible for participation in the Biorefinery Assistance program are regulated or supervised, the Agency is proposing additional requirements associated with minimum acceptable level of capital requirements that are not being required for lenders participating in other Rural Development guaranteed loan programs. The additional level of capital requirements, which are the same as found in the Section 9003 NOFA, are being proposed because of the size of projects under the Biorefinery Assistance program. The Agency believes these additional requirements are necessary to limit Agency risk.

Lastly, under this section, the Agency will approve loan guarantees under this subpart only for lenders with adequate experience (as determined by the Agency) with similar projects and the expertise to make, secure, service, and collect loans approved under this subpart. The Agency believes this provision is necessary to further limit Agency risk.

4. *Independent credit risk analysis (§ 4279.202(d)).* Under this paragraph, the Agency will require an independent credit risk analysis from a nationally-recognized rating agency for loans of \$100 million or more. The threshold level for the independent credit risk analysis is less than found in the Section 9003 NOFA.

5. *Environmental responsibilities (§ 4279.202(e)).* The Agency is proposing that lenders comply with the environmental responsibilities in proposed § 4279.202(e) rather than with those requirements specified in § 4279.30(c) of the B&I regulation. The proposed provisions are very similar to those found in the Section 9003 NOFA.

6. *Additional lender functions and responsibilities § 4279.202(f)).* The Agency is proposing to add three new paragraphs to § 4279.30, Lenders' functions and responsibilities. These three paragraphs, which were part of the Section 9003 NOFA, address:

- *Agency action or inaction.* 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.
- *Lender files.* The lender must compile and maintain in its files a

complete application for each guaranteed loan for at least 3 years after the final loss has been paid.

• *Conflicts of interest.* The lender must report to the Agency all conflicts of interest and appearances of conflicts of interest.

7. *Certified lender program* (§ 4279.202(g)). The Agency is not including either a preferred or certified lender program because the Agency does not believe a preferred lender program, or a certified lender program as provided in § 4279.43, is appropriate for the biorefinery assistance program.

8. *Oversight and monitoring* (§ 4279.202(h)). This paragraph addresses the recording keeping, oversight, and monitoring requirements with which lenders would have to comply. These provisions are the same as found in the Section 9003 NOFA.

9. *Conditions of guarantee* (§ 4279.202(i)). The Agency is proposing that the guarantee for a biorefinery assistance loan will have to be secured by a first lien on all collateral necessary to run the project in the event of the borrower's default. The Agency is adding this requirement because of the size of the guaranteed loans under this section. The Section 9003 NOFA also required a first lien on all collateral.

The Agency is also proposing to include two other provisions, which are found in the Section 9003 NOFA: the rights of the holder of the guaranteed portion and the requirement to show the lender as an additional insured on insurance policies.

Lastly, the Agency is proposing that if a lender does not satisfactorily comply with the changes and cost overrun provisions found in § 4279.256(c) and such failure leads to losses, then such losses may not be recoverable under the guarantee. This provision was not found in the Section 9003 NOFA, but is being added to protect the Agency's interests.

10. *Sale or assignment of guaranteed loan* § 4279.202(j)). The Agency is proposing to supplement § 4279.75 by requiring the guaranteed portion of the loan to be fully transferable to any accredited investor and allowing the Agency to not guarantee a loan funded with the net proceeds of a bond described in section 142(a) of the Internal Revenue Code of 1986. These two provisions were part of the Section 9003 NOFA.

11. *Minimum retention* (§ 4279.202(k)). The Agency is proposing the same provisions for minimum retention as found in the Section 9003 NOFA. The Agency believes that these minimum retention provisions are better suited to the size of the loans that will be guaranteed

under the Section 9003 program than those found in the corresponding B&I provisions for minimum retention at § 4279.77.

12. *Replacement of document* 4279.202(l)). The Agency is proposing to supplement § 4279.84(b)(1)(v) by identifying additional circumstances (defacement or mutilation) under which documents will be replaced.

#### Loan Processing (§ 4279.225)

This section states that Biorefinery Assistance Guaranteed loans will be processed in accordance with the B&I provisions found in §§ 4279.107 through 4279.199, subject to a number of important exceptions. These exceptions are identified in the proposed rule in §§ 4279.226 through 4279.299 and are discussed below.

#### Fees (§ 4279.226)

This section addresses guarantee fees and renewal fees. The B&I provisions for the guarantee and renewal fees, which are found at § 4279.107, apply to this program. The following paragraphs summarize differences from these B&I provisions.

*Guarantee Fee.* The guarantee fee rates, which are based on the size of the loan relative to total project costs, are the same as found in the Section 9003 NOFA.

*Renewal Fee.* As found in the Section 9003 NOFA, the annual renewal fee must be paid to the Agency for as long as the guaranteed loan is outstanding and is payable during the construction period. The renewal fee rates are also the same as found in the Section 9003 NOFA. The Agency notes that the Section 9003 NOFA allowed the guarantee fee to be passed on to the borrower, but did not address whether the renewal fee could be passed on to the borrower. Under the proposed rule, the renewal fee can be passed on to the borrower.

#### Borrower Eligibility (§ 4279.227)

This section identifies the eligible borrowers for a guaranteed loan under the Biorefinery Assistance program; the borrower eligibility requirements in § 4279.108 will not apply to this subpart. Instead, eligible borrowers, which are defined in the 2008 Farm Bill, must be one of the following:

- An individual;
- An entity;
- An Indian Tribe;
- A unit of State or local government;
- 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.

Because these entities, including units of State and local governments, National laboratories, and institutions of higher education, are statutorily defined, the Agency cannot make changes to this list. The Agency has defined several of the entities to clarify who will be eligible. Lastly, the Agency notes that "entity" was not included in the Section 9003 NOFA; this was an oversight.

In addition to being an eligible type of borrower, borrowers must also meet citizenship requirements and must possess the legal authority and responsibility necessary to construct, operate, and maintain the proposed facility and services and to obtain, give security for, and repay the proposed loan. The proposed citizenship requirements are very similar to those found in the Section 9003 NOFA, but with the following three additions:

- When an entity owns an interest in the borrower, its citizenship will be determined by the citizenship of the individuals who own an interest in the entity or any sub-entity based on their ownership interest;
- If an entity is composed solely of members of an immediate family, that entity is eligible to participate provided that at least one of the immediate family members meets the citizenship requirement for an individual; and
- Corporate borrowers traded on major United States stock exchanges will be presumed to have more than 51 percent of their owners as United States citizens.

This section also identifies conditions under which the borrower will be considered ineligible for a guarantee. Further, if an applicant does not meet the citizenship requirement, the applicant is not eligible for this program. While this citizenship requirement is not required by statute, it is consistent with the Agency's other programs. As found in Section III of this preamble, the Agency is seeking comment on this requirement.

#### Project Eligibility (§ 4279.228)

This section presents the requirements for a project to be eligible for a Biorefinery Assistance Guaranteed loan; the project eligibility requirements in § 4279.113 will not apply to this subpart. Instead, the Agency is proposing five specific project eligibility requirements, as discussed below.

The Agency is proposing that the project must be located in a rural area

in order to be eligible for this program. If the project is not located in a rural area, it is not eligible for this program. While not statutorily required, the Agency is proposing this rural area requirement for consistency with its other programs and its mission to improve the economic conditions of rural America. Lastly, as found in Section III of this preamble, the Agency is seeking comment on this requirement.

The second requirement (that the project must be for either the development and construction of commercial-scale biorefineries using eligible technology or the retrofitting of existing facilities) is statutorily-driven. Both of the first and second requirements are the same as found in the Section 9003 NOFA.

The third requirement, use of an eligible feedstock, is being proposed in response to comments on the ANPRM. These comments requested that the Agency clarify the various types of feedstocks that biorefineries could use to make advanced biofuels and still be eligible for funding under this program. The commenters referred to both the statutory language and the Manager's Report on the statute, pointing out that certain types of feedstocks were considered, but not clearly identified, as potential feedstocks for biorefineries. The Agency believes that the statute clearly defines eligible feedstock and no further clarification is needed in the proposed rule.

The Agency received a comment on the ANPRM that requested the Agency to consider excluding paper that is commonly recycled from the definition of "waste," thus excluding it as an eligible feedstock. The Agency has adopted this position in this rule and is seeking specific comments on this request and on any other feedstocks that should not be considered eligible under this program.

The fourth requirement, more than 70 percent of revenues from the sale of advanced biofuel, attempts to address the Agency's concern that loans guaranteed under this program go to projects at biorefineries whose primary purpose is the production of advanced biofuel. This provision was not included in the Section 9003 NOFA.

The fifth requirement is that the project must have cash equity injection of not less than 20 percent of eligible project costs not attributed to other Federal grant or loan programs such as the Department of Energy. By limiting the maximum loan guaranteed to 80 percent of eligible project costs, the statute requires that at least 20 percent of the project's costs come from sources

other than loan proceeds. The Agency requested comment in the ANPRM as to:

- What should the equity requirements be?
- Should there be minimum equity requirements that may vary depending on the size of the project?
- Will it differ between construction and development versus retrofitting?

After considering the responses to these questions, the Agency believes that equity should be cash equity, because cash equity represents the best commitment of the borrower to the project and it can help reduce project risk by making cash available during construction and project startup. The Agency is proposing the same cash equity requirement for all biorefinery assistance projects.

Lastly, this section identifies what areas qualify as rural. The definition being proposed is the same as in the Section 9003 NOFA with the addition that projects that are located in areas determined to be "rural in character" will be eligible. When making a "rural in character" determination under the Section 9003 program, the Agency will do so in a manner that is consistent with making similar determinations under its Business and Industry Guaranteed Loan program.

#### Guaranteed Loan Funding (§ 4279.229)

Instead of complying with the B&I provisions for guaranteed loan funding found at § 4279.119, the Agency is proposing a separate set of provisions for Biorefinery Assistance Guaranteed loans. These provisions, which are the same as those found in the Section 9003 NOFA, address:

- Distribution of budget authority each fiscal year;
- Maximum amount of the loan;
- Maximum principal amount to one borrower;
- Maximum guarantee; and
- Eligible project costs.

As required by the 2008 Farm Bill, of the funds made available for loan guarantees for a fiscal year, 50 percent of the funds must be reserved for obligation during the second half of the fiscal year. To implement this provision, the Agency will allocate up to, but no more, than 50 percent of its budgetary authority to fund applications received by the end of the first application window. If any of this budgetary authority is not obligated by the end of the first application window, the Agency will carry it over into the second application window. Thus, the Agency will have at a minimum 50 percent of its budgetary authority available for the second application window.

As required by the 2008 Farm Bill, the amount of a guaranteed loan for a project under this section cannot exceed 80 percent of total eligible project costs, which are identified later in this preamble. In addition, total Federal participation for a biorefinery project will not exceed 80 percent of total eligible project costs. The project is the biorefinery or portion of the biorefinery that is producing eligible advanced biofuels and any eligible biobased by-products receiving funds under this program.

The Agency is proposing to limit the maximum principal amount of a loan guaranteed under this section to one borrower to \$250 million; the Agency is not proposing a minimum amount. This is the same as found in the Section 9003 NOFA. The Agency notes that the 2008 Farm Bill provides for a maximum principal amount of a loan guaranteed under the Biorefinery Assistance program to \$250 million on a loan basis. The Agency is proposing to apply the \$250 million limit on a borrower basis in order to make funds available to more entities.

In addition, and as required by the 2008 Farm Bill, the amount of a loan guaranteed under this section will be reduced by the amount of other direct Federal funding (*i.e.*, direct loans and grants) that the eligible borrower receives for the same project. For example, an eligible borrower is applying for a loan guarantee on a \$1 million project. The borrower provides the minimum matching requirement of 20 percent, or \$200,000. This leaves \$800,000 in other funding needed to implement the project. If the borrower receives no other direct Federal funding for this project and requests a guarantee for the \$800,000, the Agency will consider a guarantee on the \$800,000. However, if this borrower receives \$100,000 in other direct Federal funding for this project, the Agency will only consider a guarantee on \$700,000. These provisions are the same as those found in the Section 9003 NOFA.

This section also establishes the maximum percent guarantees for loans under this subpart, which are the same as found in the Section 9003 NOFA. The last paragraph in this section contains the list of items the Agency is proposing as eligible project costs, provided the items are an integral and necessary part of the total project. The list of eligible project costs are the same as found in the Section 9003 NOFA, except that professional service fees, feasibility studies, and business plans have been removed from this list. The Agency is deleting these three items because these are expenses that the applicant will

otherwise incur in evaluating project capability and suitability prior to seeking financial assistance.

#### Subordination of Lien Position (§ 4279.230)

In addition to complying with the provisions found in § 4279.123, a subordination must not extend the term of the guaranteed loan made under this subpart.

#### Interest Rates (§ 4279.231)

This section identifies the requirements for interest rates for loans that are guaranteed under this program, which are the same as found in the Section 9003 NOFA.

#### Terms of Loan (§ 4279.232)

As found in the Section 9003 NOFA, the repayment term for a loan guaranteed under this subpart will be for a maximum period of 20 years or 85 percent of the useful life of the project, whichever is less, as determined by the lender and confirmed by the Agency. In addition, the length of the loan term will be required to be the same for both the guaranteed and unguaranteed portion of the loan. Additional provisions, which are also found in the Section 9003 NOFA, address when guarantees can be provided and that all loans guaranteed must be financially sound and feasible with reasonable assurance of repayment.

Lastly, repayment of the loan will be subject to the B&I provisions found at § 4279.125(a) and § 4279.126(b), (c), and (d).

#### Credit Evaluation (§ 4279.233)

Instead of complying with the B&I provisions at § 4279.131 concerning credit quality, the Agency is proposing a separate set of provisions under this subpart.

As proposed, lenders must conduct a credit evaluation for each application submitted. The proposed rule identifies what the Agency considers to be an acceptable credit evaluation. Specifically, the lender must use credit documentation procedures and an underwriting process that are consistent with generally accepted commercial lending practices, and the lender must include an analysis of all credit factors associated with each guarantee application to ensure loan repayment.

In making this analysis, the proposed rule requires the lender to consider the following:

- *Credit worthiness.* This refers to those qualities that generally impel the prospective borrower to meet its obligations as demonstrated by its credit history.

- *Cash flow.* This refers to a prospective borrower's ability to produce sufficient cash to repay the loan as agreed.

- *Capital.* This refers to the financial resources that the prospective borrower currently has and those it is likely to have when payment is due. The prospective borrower must be adequately capitalized.

- *Collateral.* This refers to the assets, including the processing technology owned by the borrower, pledged by the prospective borrower in support of the loan.

- *Conditions.* This refers to the general business environment and status of the prospective borrower's industry.

When determining the credit quality of the borrower, the lender must include the following:

- Borrowers must demonstrate evidence of cash equity injection in the project of not less than 20 percent of eligible project costs. The fair market value of equity in real property that is to be pledged as collateral for the loan may be substituted in whole or in part to meet the cash equity requirement. However, the appraisal completed to establish the fair market value of the real property must not be more than 1 year old unless a more recent appraisal is requested by the Agency in order to reflect market conditions. The appraisal used to establish fair market value of the real property must conform to the requirements of § 4279.244. Otherwise, cash equity injection must be in the form of cash.

- The credit analysis must also include spreadsheets of the balance sheets and income statements of the borrower for the 3 previous years (for existing businesses), pro forma balance sheets at startup, and projected yearend balance sheets and income statements for a period of not less than 3 years of stabilized operation, with appropriate ratios and comparisons with industrial standards (such as Dun & Bradstreet or Robert Morris Associates) to the extent available.

- 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.

The Agency is including these additional details because of the size and complexity of the anticipated biorefinery assistance projects.

#### Financial Statements (§ 4279.237)

Instead of complying with the B&I provisions for financial statements found at § 4279.137, the Agency is proposing that biorefinery assistance

projects comply with the financial statement provisions found at § 4279.261(c), which are presented later in this preamble.

#### Appraisals (§ 4279.244)

In addition to complying with the B&I provisions for appraisals at § 4279.144, the appraisals for proposed biorefineries must be self-contained appraisals. Further, lenders will be required to complete, for all applications, a Phase I Environmental Site Assessment (ESA) in accordance with ASTM International standards, which should be provided to the appraiser for completion of the self-contained appraisal.

To conduct these appraisals, lenders are required to use specialized appraisers, unless a specialized appraiser does not exist, in which case the Agency may waive this requirement. This exception, that a specialized appraiser will not be required if such an appraiser does not exist for the technology required, is being proposed in recognition that one of the purposes of this program is to help push the technological envelop regarding the production of advanced biofuels and, as a result, specialized appraisers may not exist for all technologies under this program. Including this exception allows the Agency to avoid determining a project ineligible simply because the lender cannot find a specialized appraiser for a new technology.

#### Feasibility Studies (§ 4279.250)

Because the Agency is proposing feasibility studies specific to biorefinery assistance projects, which are found at § 4279.261(f), the B&I provisions for feasibility studies found at § 4279.150 do not apply to this subpart.

#### Loan Priorities (§ 4279.255)

Instead of complying with the B&I provisions for loan priorities found at § 4279.155, the Agency is proposing scoring criteria specific to biorefinery assistance projects, which are found at § 4279.265(c) and which are presented later in this preamble.

#### Construction Planning and Performing (§ 4279.256)

As proposed, the B&I provisions for construction planning and performing found at § 4279.156(a) and (b) will apply to Biorefinery Assistance Guaranteed loans. In addition, the Agency is proposing several additional requirements specific to Biorefinery Assistance Guaranteed loans, as discussed below.

*Architectural and engineering practices.* Similar to the Section 9003 NOFA, lenders would also be required

to ensure that all project facilities are designed utilizing accepted architectural and engineering practices that conform to the requirements of the proposed subpart.

*Onsite inspectors.* As proposed, lenders will be required to provide an onsite project inspector. Given the size and complexity of the anticipated biorefinery assistance projects, the Agency believes the presence of such inspectors is necessary to protect the interests of the lender and the Government.

*Changes and cost overruns.* As proposed, borrowers will be responsible for any changes or cost overruns. If any such change or cost overrun occurs, then any change order must be approved by the Agency, and neither the lender nor borrower will be allowed to divert funds from purposes identified in the guaranteed loan application approved by the Agency to pay for any such change or cost overrun. 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 costs or expenses, the borrower will be required to provide for such increases in a manner that does not diminish the borrower's operating capital. Failure to comply with the terms of this paragraph will be considered a material adverse change in the borrower's financial condition, and the lender will have to address this matter, in writing, to the Agency's satisfaction. If a lender does not satisfactorily address the matter and such failure leads to losses, then such losses may not be recoverable under the guarantee.

*New draws.* As proposed, the following three certifications will be required for each new draw:

- Certification by the project engineer to the lender that the work referred to in the draw has been successfully completed;
- Certification from the lender that all debts have been paid and all mechanics' liens have been waived; and
- Certification from the lender that the borrower is complying with the Davis-Bacon Act.

The Agency is proposing these "change or cost overruns" and new draw provisions to protect its interests. These requirements are the same as found in the Section 9003 NOFA, with one exception—the Section 9003 NOFA did not include the certification from the lender that the borrower is complying with the Davis-Bacon Act. The Agency believes such certification is appropriate to help ensure compliance with the statutory requirement for inclusion of

the Davis-Bacon Act requirements in this program.

*Surety.* The Agency is proposing that surety be required in cases when the guarantee will be issued prior to completion of construction unless the contractor will receive a lump sum payment at the end of work. In addition, surety is to be made a part of the contract, if the borrower requests it or if the contractor requests partial payments for construction work. Finally a latent defects bond may be required to cover the work in instances where no surety is provided and the project involves precommercial technology, first of its type in the U.S., or new designs without sufficient operating hours to prove their merit.

*Reporting during construction.* As proposed, lenders will be required to submit quarterly construction reports during the construction of commercial-scale biorefineries or the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. These reports must contain, at a minimum, planned and completed construction milestones, loan advances, and personnel hiring, training, and retention. The Agency believes that such reports are necessary to provide better oversight on these large projects.

#### Borrower Responsibilities (§ 4279.259)

Under the proposed rule, the Agency has consolidated and simplified the responsibilities of borrowers under the Biorefinery Assistance program. These responsibilities, which are consistent with those associated with the B&I Guaranteed Loan program, address the following areas:

- Federal, State, and local regulations;
- Permits, agreements, and licenses;
- Insurance;
- Access to borrower's records; and
- Access to the project.

#### Guarantee Applications (§§ 4279.260 and 4279.261)

Instead of complying with the B&I provisions for applications found at § 4279.161, the Agency is proposing a self-contained set of requirements for guaranteed loan applications for biorefinery assistance projects. These requirements are found in two sections of the proposed rule, as described below.

##### 1. Guarantee Applications—General (§ 4279.260)

This section of the proposed rule contains requirements associated with:

- Application submittal;
- Application deadline;

- Incomplete applications; and
- Application withdrawal.

*Application submittal.* Because of the size and complexity of the anticipated biorefinery assistance projects, the Agency proposes to manage this program out of the National Office. Lenders will be required to submit applications (one original and two copies) to the Agency.

*Application deadline.* As proposed, complete applications must be submitted to the Agency no later than June 1 of each fiscal year to be considered for funding in that fiscal year. If the Agency determines that a different application deadline is needed, it will publish a notice in the **Federal Register** identifying the new application deadline for that fiscal year. If the application deadline falls on a weekend or a federally-observed holiday, the deadline will be the next Federal business day.

Even though there is a single application deadline, to assist in the implementation of the program and to manage work flow, the Agency is proposing two competitions for funds each fiscal year. The first competition will be among those complete and eligible applications received by March 1. The Agency will then make awards to eligible applications in this first pool of applications. The second competition will be among those complete applications received by June 1. This second competition could contain any eligible applications from the first competition that were not selected for funding.

*Incomplete applications.* The Agency will reject all incomplete applications. For each incomplete application it receives, the Agency will notify the lender in writing of those elements that made the application incomplete. Lenders may resubmit such applications prior to the applicable application deadline. Applicants will be informed that the application was not processed and why.

*Application withdrawal.* Because a borrower's circumstances can change after submittal of the application, under this section, the lender must notify the Agency if the project is no longer viable or the borrower no longer is requesting financial assistance for the project. Upon receipt of such notification, the Agency will either withdraw the application or rescind the selection of project, as applicable.

##### 2. Application of Loan Guarantee Content (§ 4279.261)

This section identifies the content for each application for loan guarantee

under this program. Each loan guarantee application must contain:

- A project summary;
- Lender's analysis and credit evaluation;
- Financial statements;
- Environmental information;
- Appraisal;
- Feasibility study;
- Business plan;
- Technical assessment;
- Economic analysis;
- Loan agreement;
- Lender certifications;
- Intergovernmental consultation;
- DUNS number;
- Bioenergy experience; and
- Any other information requested by the Agency or entities working on the Agency's behalf.

Much of the application content is based on the Agency's Rural Energy for America Program, which has similar projects. However, because of the size of projects under the Biorefinery Assistance program, the Agency has modified similar provisions to require more information. The following paragraphs discuss key portions of the application content.

*Lender's analysis and credit evaluation (paragraph (b)).* This paragraph requires the lender to provide a summary of the technology to be used in the project, the viability of such technology for the particular project application, and the development type (e.g., installation, construction, retrofit).

Because of the size of the loans being guaranteed under the Biorefinery Assistance program, the Agency believes that it is necessary to provide more specific regulatory requirements for the submittal of credit reports by identifying the type of credit report (personal or commercial) that is to be submitted and on whom such credit reports are to be submitted. These additional requirements will help borrowers in preparing their applications and assist lenders during their due diligence process. The Agency is, therefore, proposing to require:

- Personal credit reports from an acceptable credit reporting company for those 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, including a proprietor (owner), each partner, officer, director, key employee, and stockholder, except for those corporations listed on a major stock exchange. Note that the 20 percent requirement is consistent with the Business and Industry Guaranteed Loan program. Credit reports are not required

for elected and appointed officials when the borrower is a public body or non-profit corporation; and

- Commercial credit reports on the borrower and any parent, affiliate, and subsidiary firms.

The lender must also include its credit evaluation, as specified in § 4279.232.

As found in the Section 9003 NOFA, the Agency is also proposing that, for loans of \$125 million or more, an evaluation and credit rating of the total project's indebtedness, without consideration for a government guarantee, from a nationally-recognized rating agency be obtained. The Agency is requiring this because of the size of the risk associated with these projects.

*Financial statements (paragraph (c)).* As proposed, financial statement will need to be submitted for all borrowers.

For businesses that have been in existence for one or more years, their most recent audited financial statements will be submitted if the guaranteed loan is \$3 million or more, unless alternative financial statements are authorized by the Agency. If the guaranteed loan is less than \$3 million, however, the borrower's most recent audited or Agency-acceptable financial statements of the borrower will be submitted. In proposing this \$3 million threshold, the Agency reviewed the comments it received on a recently withdrawn guaranteed loan rule. For that rule, the Agency originally proposed a threshold of \$1 million for requiring audited financial statements. Commenters were concerned that the expense of audited financial statements and the low threshold would be too punitive and the level should be left to the lender. After considering these comments, the Agency revised the \$1 million to \$3 million and added a provision that alternative financial statements could be submitted provided they were approved by the Agency. The Agency believes these provisions are suitable to the Section 9003 program.

For businesses that have been in existence for less than one year, their most recent Agency-authorized financial statements, regardless of the amount of the guaranteed loan request, will be submitted.

For all businesses, a current (not more than 90 days old) balance sheet; a *pro forma* balance sheet at startup; and projected balance sheets, income and expense statements, and cash flow statements for a period of not less than 3 years of stabilized operation will be submitted. Projections should be supported by a list of assumptions showing the basis for the projections.

Lastly, the Agency may find it necessary to request additional financial information from the borrower because of the complexity of the project and the financial condition of the borrower. Thus, the Agency is reserving the right to request additional financial information.

*Environmental information (paragraph (d)).* Lenders are required to submit with the application the environmental information specified in RD 1940-G, Exhibit H.

*Appraisals (paragraph (e)).* In complying with § 4279.244 (which was discussed early in this preamble), self-contained appraisals accompanied by a copy of a Phase I Environmental Site Assessment (ESA) in accordance with ASTM International standards must be submitted with the application if available.

*Feasibility study (paragraph (f)).* Lenders are required to submit a feasibility study with each application for guarantee. The Agency is identifying a detailed list of components for Biorefinery Assistance program feasibility studies. The basic elements of this study are:

- Executive Summary.
- Economic feasibility.
- Market feasibility.
- Technical feasibility (including technical assessment).
- Financial feasibility.
- Management feasibility.
- Qualifications.

Because of the size and complexity of these projects, and the loan amount being guaranteed under this program, the Agency is proposing very detailed and prescriptive requirements for the feasibility study. Each component specified for the feasibility study is generally found in other Agency programs, but in less detail.

The specific components are essentially the same as those identified in the Section 9003 NOFA. One of the specific components presented in Table 1, Feasibility Study Components, was relocated to § 4279.261(h), Technical Assessment, because it is more appropriate to that paragraph than in the table describing components of the feasibility study. In addition, the Agency has modified several of the components associated with management feasibility from those identified in the Section 9003 NOFA to more clearly articulate the type of management experience to be addressed.

*Business plan (paragraph (g)).* Each lender must submit a business plan with each application. The business plan must include the following:

- The borrower's experience and succession planning when discussing the borrower's ownership and management;
- The names and a description of the relationship when discussing the borrower's parent, affiliates, and subsidiaries;
- The borrower's business strategy;
- Possible vendors and models of major system components;
- The availability of the resources (e.g., labor, raw materials, supplies) necessary to provide those products and services;
- 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;
- The market for the product and its competition, including any and all competitive threats and advantages;
- Projected balance sheets, income and expense statements, and cash flow statements for a period of not less than 3 years of stabilized operation; and
- A description of the proposed use of funds.

If any of the information contained in the business plan is provided in the feasibility study, the lender will not be required to include such information in the business plan.

*Technical assessment (paragraph (h)).* Because of the technical challenges that confront the construction and development of biorefineries, the Agency is further detailing the type of technical assessment to be submitted with the application. The Agency modeled this technical assessment, which is similar to that found in the Section 9003 NOFA, after the current provisions for such assessments for projects under the REAP guaranteed loan program.

As noted earlier, one of the specific components from Table 1, Feasibility Study Components, was relocated to paragraph (h). This component states that the technical assessment must be based upon verifiable data and contain sufficient information and analysis so that a determination may be made on the technical feasibility of achieving the levels of income or production that are projected in the financial statements.

In addition, the Section 9003 NOFA stated that "All projects require the services of a professional engineer (PE)." In the proposed rule, the Agency has revised this to read "All projects require the services of an independent, third-party professional engineer." This change reflects a specific component, which had been in Table 1 in the Section 9003 NOFA, that discussed what constitutes an independent project engineer. The Agency believes that it is

very important that technical feasibility be assessed by independent third-parties to ensure there is no conflict of interest in the preparation of the technical assessment.

*Economic analysis (paragraph (i)).* For the same reasons it is requiring a detailed, prescriptive technical assessment, the Agency is specifying a detailed economic analysis of the project to be included in the feasibility analysis. The provisions for the economic analysis are the same as found in the Section 9003 NOFA.

*Loan Agreement (paragraph (j)).* The Agency is requiring that the lender submit with the application a proposed loan agreement or a sample loan agreement with an attached list of the proposed loan agreement provisions, which will have to be executed by the lender and borrower before the Agency will issue a loan note guarantee. The list of loan agreement provisions to be included must conform to the list found in § 4279.161(b)(11).

*Lender certification (paragraph (k)).* Lenders will be required to submit certifications as specified in the B&I regulations at § 4279.161(b)(16). In addition, lenders will be required to certify that the project is also able to demonstrate technical merit.

*Bioenergy experience (paragraph (n)).* This paragraph identifies the information lenders will be required to submit concerning the borrower's prior experience in bioenergy projects.

#### Guarantee Application Evaluation (§ 4279.265)

Instead of evaluating biorefinery assistance applications for loan guarantees using the B&I procedures specified in § 4279.165, the Agency is proposing a self-contained set of application evaluation procedures, as described below, for Biorefinery Assistance Guaranteed loan applications.

*General (paragraph (a)).* When the Agency receives a complete application from an approved lender, it will review the application to determine if the borrower, lender, and project are eligible. The Agency will also review the application to determine whether the proposed project has technical merit, as determined by the Agency, and whether it has met each of three minimum financial metric criteria. Applications from lenders not approved by the Agency specifically for the Biorefinery Assistance program will not be processed.

If it determines that the borrower, lender, or project is ineligible, the Agency will notify the lender, in writing, of the reasons and provide any

applicable appeal rights. The Agency will discontinue processing such applications.

Lastly, if the Agency determines it is unable to guarantee the loan at any time during the processing of the application and prior to issuance of the loan note guarantee, the Agency will inform the lender in writing. The Agency will include the reasons for denial of the guarantee in its notification to the lender. Because such a denial constitutes an adverse decision, the affected entities will have appeal rights.

*Technical merit determination (paragraph (b)).* The Agency will use the information provided in the application to determine a project's technical merit. Any project determined by the Agency to be without technical merit will not be selected for funding. In evaluating and rating Biorefinery Assistance Guaranteed loan applications, the Agency may, at its discretion, engage the services of other government agencies or recognized industry experts in the applicable technology field. The Agency may use this evaluation and rating to determine the level of technical merit of the proposed project.

*Financial metric criteria (paragraph (c)).* Using the information provided in the application, the Agency will determine if the project meets each of the following three financial metric criteria:

- A debt coverage ratio of 1.0 or higher;
- A debt-to-tangible net worth ratio of 4:1 or lower for startup businesses and of 9:1 or lower for existing businesses; and
- A discounted loan-to-value ratio of no more than 1.0.

These criteria are to be calculated from the realistic information in the pro forma statements or borrower financial statements of a typical operating year after the project is completed and stabilized. The Agency is requiring these minimum financial criteria to reduce the chances that loan guarantees are sought for high risk projects and that such projects, even if an application is submitted, are not guaranteed by the Agency.

*Scoring applications (paragraph (d)).* The Agency will score each eligible application that meets the minimum requirements for financial and technical feasibility using a set of evaluation criteria. The scoring criteria being proposed are specified in the 2008 Farm Bill.

For the most part, the scoring criteria are the same as found in the Section 9003 NOFA, but the Agency is proposing a few changes to the scoring criteria and points found in the Section

9003 NOFA. The changes made reflect reconsideration by the Agency on how to prioritize projects for funding. These changes are summarized below.

The Agency has revised how it will score whether the borrower is proposing to work with producer associations or cooperatives. As proposed, points will be awarded based on the dollar value of procurement or marketing agreements with producer associations and cooperatives obtained by the borrower relative to the dollar value of the project's feedstock, biofuel, and biobased by-product. In order to receive the points under this criterion, each of the following must be met:

- At least 60% of the dollar value of feedstock to be used by the proposed biorefinery will be supplied by producer associations and cooperatives;
- At least 60% of the dollar value of the advanced biofuel to be produced by the proposed biorefinery will be sold to producer associations and cooperatives; and
- At least 60% of the dollar value of the advanced biobased by-products to be produced by the proposed biorefinery will be sold to producer associations and cooperatives.

To illustrate this criterion, consider a proposed biorefinery that will purchase \$1,000,000 of feedstock and produce \$5,000,000 worth of biofuel and \$2,000,000 worth of biobased by-products. In order to receive the 5 points under this criterion, at least \$500,000 worth of feedstock purchases must be from producer associations or cooperatives, at least \$2,500,000 worth of biofuel must be sold to producer associations or cooperatives, and at least \$1,000,000 worth of biobased by-products must be sold to producer associations or cooperatives. If any one of these is not achieved, no points will be awarded.

The Agency has revised the method for awarding points under the level of financial participation by the borrower criterion. In the Section 9003 NOFA, points are awarded based on the percent tangible balance sheet equity that results from the borrower's cash equity injection plus other sources of funding. In the proposed rule, points will be awarded based on the debt-to-tangible net worth ratio that results from the borrower's cash equity injection plus other sources of funding.

The Agency has removed cellulosic feedstocks as a scoring criterion. The Agency has determined that specific feedstocks should not receive preference over other feedstocks when evaluating applications; however, the Agency has determined that feedstocks that can be used for human or animal consumption

should not receive the same preference as other feedstocks. Thus, the Agency is proposing to deduct 5 points from applications that propose to use feedstocks that can be used for human or animal consumption.

The Agency is being more specific, compared to the Section 9003 NOFA, on how points will be awarded under the scoring criterion for local ownership. As proposed, points will be awarded on the basis of the percentage of local owners whose primary residence is within 20 miles of the area supplying feedstock to the biorefinery. The Agency believes this will provide an easier metric on which to score this criterion. The Agency is also seeking comment this proposed method for scoring this criterion.

The Agency has also revised the scoring criterion for "first-of-a-kind technology" from whether the project "is the first to use" a particular technology, system, or process to whether the project "uses a particular technology, system, or project that is not currently operating in the advanced biofuel market as of October 1 of the fiscal year for which funding is available."

The Agency adjusted the points that can be awarded for five of the scoring criteria, increasing the points for four criteria and decreasing the points for one criterion. The criteria for which the Agency has increased points are:

- Feedstock not previously used in the production of advanced biofuels (from 14 to 15 points);
- The potential for rural economic development (from 3 to 5 points);
- The level of local ownership (from 13 to 15 points); and
- First of a kind technology (from 10 points to 15 points).

The Agency has decreased the points that can be awarded, from 9 to 5, for the criterion that addresses whether the proposed biorefinery will have positive impact on resource conservation, public health, and the environment.

In response to the ANPRM, the Agency received a number of comments on the scoring criteria and points. After considering these comments, the Agency believes that the proposed criteria on which the Agency received comments are still appropriate for this program. In considering the comments, the Agency points out the following:

- Regarding the first scoring criterion, when determining whether a borrower has established a market, the Agency believes that it is important to have commitments and agreements on both the feedstock side of the project and on the sales side of the project. Thus, the Agency is continuing to require both supply and offtake commitments and

agreements as part of the demonstration of whether a borrower has established a market.

- Regarding the second scoring criterion, it is the Agency's intent is to promote projects that will not compete for feedstocks that are already being used to supply another advanced biofuel facility. This criterion is designed to award points to such facilities. A comment was received that "area" (to assess whether the borrower proposes to place the biorefinery in an area that has other similar advanced biofuel facilities) should be broadly defined (State or region). For the proposed rule, the Agency has recast the wording associated with this criterion to make clearer how it will be applied. Beyond this change, the Agency does not believe it is necessary to revise this criterion based on this comment.

- Regarding the fifth criterion, level of financial participation, the proposed rule requires borrowers to provide at least 20 percent cash equity into the project. It is the Agency's intent to score applications higher than can demonstrate more than this 20 percent minimum (30 percent or more). Borrowers who meet the minimum 20 percent cash equity are still eligible, but will not receive points under this criterion. Further, of all the criteria used to score applications, the Agency continues to believe that this criterion is the most important because it represents the best commitment of the borrower to the project. Therefore, the Agency continues to assign the highest potential points to this criterion.

When demonstrating that a biofuels production technology will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, the Agency would expect applicants to be able to identify the location of the biorefinery and its feedstock relative to the other biorefineries and the feedstock being used by those plants. Such an analysis would be part of the applicant's market analysis and feasibility study.

Lastly, the Agency notes that, when it evaluates an application for the projects potential for rural economic development, it will be based on projections made by the applicant as reported in its application, including in the feasibility study and technical report.

*Ranking of applications (paragraph (e)).* The Agency will rank the applications according to their scores. The Agency is proposing to rank applications twice each fiscal year. The Agency will rank the first set of applications (those complete and

eligible applications received by March 1) on or before May 31 and the second set (those complete and eligible applications received by June 1) on or before August 31.

All applications that are ranked in a given fiscal year will be considered by the Agency for selection for funding for the entire fiscal year. For example, a complete and eligible application scored and ranked in the first set of applications, but not selected for funding, will be carried forward into the second set of applications. When an application scored in first set of applications is carried forward into the second set of applications, it will be competed against all of the applications in the second set using its score from the first set of applications.

*Selection of applications for funding and for potential funding (paragraph (f)).* In selecting applications for funding, the first criterion the Agency will use is the application's score, with higher scoring applications receiving first consideration for funding. A minimum score of 55 points is required in order to be considered for a guarantee.

Before selecting applications for funding, the Agency will consider the following two factors, which may result in the Agency selecting a lower scoring application. These two factors are:

- Availability of budgetary authority; and
- Availability of other funding sources.

In considering the availability of budgetary authority, the Agency will evaluate the size of the loan request relative to the budgetary authority that remains available to the program during the fiscal year in two ways:

- If sufficient budgetary authority remains to guarantee the higher scoring loan application and
- If the amount of the funding request is greater than 25 percent of the Agency's outstanding budgetary authority for the program.

If either case exists, the Agency may elect to select, after providing the applicant of the higher scoring application the opportunity to reduce its fund request, the next highest scoring application for further processing.

*Ranked applications not funded (paragraph (g)).* This paragraph identifies how the Agency will dispose of applications that have been ranked, but not funded, including such applications that have been selected for funding but are missing information. The Agency notes that such a situation would only occur in those situations where additional information not relevant to scoring may be needed to

continue the approval process (e.g., pending receipt of a particular certification). The Agency will not carry over into the next fiscal year a ranked application that is not funded in the fiscal year in which it was submitted. In such a situation, the Agency will notify the lender in writing.

*Wage rates (paragraph (h)).* This paragraph identifies requirements associated with the wages paid to laborers and mechanics working on the project. This provision is included because it is required by the 2008 Farm Bill.

#### Changes in Borrowers (§ 4279.280)

This section states the B&I provisions for changes in borrowers found at § 4279.180 apply except that the eligibility requirements of this program apply. Note that, as specified in § 4279.180, all changes in borrowers must be approved by the Agency.

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

As proposed, the B&I provisions for conditions precedent to the issuance of the loan note guarantee found at § 4279.181(a) through (o) will apply to this subpart, with several additions. The additions are as follows:

- For loans exceeding \$150,000, the lender has certified its compliance with the Anti-Lobby Act (18 U.S.C. 1913). Also, if any funds have been, or will be, paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to guarantee a loan, the lender shall completely disclose such lobbying activities in accordance with 31 U.S.C. 1352.

- Where applicable, the lender must certify that the borrower has obtained:

(1) A legal opinion relative to the title to rights-of-way and easements. Lenders are responsible for ensuring that borrowers have obtained valid, continuous, and adequate rights-of-way and easements needed for the construction, operation and maintenance of a facility.

(2) A title opinion or title insurance showing ownership of the land and all mortgages or other lien defects, restriction or encumbrances, if any. It is the responsibility of the lender to ensure that the borrower has obtained and recorded such releases, consents, or subordinations to such property rights from holders of outstanding liens or other instruments as may be necessary for the construction, operation and

maintenance of the facility and to provide the required security. For example, when a site is for major structures for utility-type facilities (such as a gas distribution system) and the lender and borrower are able to obtain only a right-of-way or easement on such site rather than a fee simple title, such a title opinion must be requested.

- The minimum financial criteria, including those financial criteria contained in the Conditional Commitment, have been maintained through the issuance of the loan note guarantee. Failure to maintain these financial criteria shall result in an ineligible application.

- The borrower is required to 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 section 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. This certification is being required because these referenced provisions are a project eligibility requirement and the Agency needs assurance that these conditions are or will be complied with prior to issuing the loan note guarantee.

- The lender must certify that it has reviewed all contract documents and verified compliance with sections 3141 through 3144, 3146, and 3147 of title 40, U.S.C., and title 29 of the Code of Federal Regulations. Further, the lender must certify that the same process will be completed for all future contracts and any changes to existing contracts.

- The lender must certify that the proposal for the facility seeking a guarantee under this subpart complies with all Federal, State, and local laws and regulatory rules that are in existence and that affect the project, the borrower, or lender activities.

- The lender must notify the Agency in writing whenever there has been a change in the classification of a loan within 15 calendar days of such change.

The Agency notes that one of the questions in the ANPRM was whether the Agency should issue the loan note guarantee prior to construction or whether the program should be limited to post-construction financing. One comment was received on this question, and it supported issuing the loan note guarantee prior to construction. The Section 9003 NOFA provided for the issuance of the loan note guarantee prior to construction and the Agency has retained this in the proposed rule.

### Requirements After Construction (§ 4279.290)

Once the project has been constructed, the lender will be required to provide the Agency with annual reports from the borrower on the performance characteristics and results of the project and to conduct annual inspections of the project for the life of the guaranteed loan. The contents of the annual reports, which are identified in paragraphs (a)(1) through (8), are the same as those found in the Section 9003 NOFA with one exception. The one exception is the addition that these reports include the results of the inspections conducted under § 4279.290(b). These reports and inspections are being required to assist the Agency in monitoring Agency risk and to ensure that the Agency is meeting its goals in implementing this and other programs under Title IX of the 2008 Farm Bill.

### Servicing Biorefinery Assistance Guaranteed Loans (7 CFR 4287, Subpart D)

The Agency is proposing to add a new subpart D to 7 CFR part 4287, Servicing, to address the servicing of Biorefinery Assistance Guaranteed loans. In general, the Agency is proposing to use the same procedures and provisions for servicing B&I guaranteed loans, as found in 7 CFR part 4287, subpart B, for servicing Biorefinery Assistance Guaranteed loans. There are, however, a number of additions and exceptions to the B&I provisions. These are described below.

*Periodic reports (§ 4287.307(a)).* The lender must submit periodic reports, on a quarterly basis, unless otherwise determined by the Agency to meet the financial interests of the United States, regarding the condition of its Agency guaranteed loan portfolio (including borrower status and loan classification) and any material change in the general financial condition of the borrower since the last periodic report was submitted. The Agency is proposing that these reports be submitted on a quarterly basis, rather than a semi-annual basis, because it believes that such reports are required more frequently in order to provide better oversight on these large projects. This requirement is the same as found in the Section 9003 NOFA.

*Default reports (§ 4287.307(b)).* Lenders must submit monthly default reports, including borrower payment history, for each loan in monetary default using a form approved by the Agency. The Agency is requiring the submittal of this history in order to

evaluate the financial condition of the borrower.

*Financial reports (§ 4287.307(c)).* In addition to complying with the financial reports identified in § 4287.107(d), financial statements may also be specified in the Conditional Commitment, lenders would be required to submit quarterly financial statements within 45 days at the end of each quarter, and the annual financial statements must be audited financial statements. These provisions are the same as found in the Section 9003 NOFA.

*Additional loans (§ 4287.307(d)).* Instead of complying with the B&I provisions for additional expenditure identified in § 4287.107(e), lenders would be required to comply with the additional loan provisions specified in this paragraph. The additional loan provisions are the same as found in the Section 9003 NOFA.

*Collateral inspection and release (§ 4287.307(e)).* Instead of complying with the B&I provisions of § 4287.113, the Agency is proposing specific provisions for loans guaranteed under this program. These provisions, which are similar to those found in the Section 9003 NOFA, are being proposed by the Agency for Biorefinery Assistance Guaranteed loan projects because of the size of the loans being guaranteed under this section.

As proposed, lenders will be required to inspect the collateral as often as necessary to properly service the loan. Lenders must obtain Agency approval prior to the release of collateral, except in those instances where the proceeds are used to pay down debt in order of lien priority, or to acquire replacement equipment, or where the release of collateral is made under the abundance of collateral provision of the applicable security agreement. The sale or release of collateral must be based on an arm's length transaction, unless otherwise approved by the Agency in writing.

Lenders will be required to obtain appraisals on the collateral being released on all transactions exceeding \$250,000. Such appraisals, which will be at the expense of the borrower, must meet the requirements specified in § 4279.244.

In addition, lenders will be allowed, over the life of the guaranteed loan, to release collateral with a cumulative value of up to 20 percent of the original loan amount without Agency concurrence if the proceeds generated are used to pay down secured debt in the order of lien priority or to buy replacement collateral. Release of collateral with a cumulative value in excess of 20 percent of the original loan

or when the proceeds will not be used to pay down secured debt or to buy replacement collateral, will have to be requested, in writing, by the lender, and will have to be concurred by the Agency, in writing, in advance of the release. The lender will also be required to complete a written evaluation justifying the release. This is the same as found in the Section 9003 NOFA.

The Agency is proposing that under this program the value of collateral released at any one time and within any one calendar year cannot be more than 10 percent of the original loan amount.

Finally, the Agency is proposing that any release of collateral must not adversely affect the project's operation or financial condition.

*Transfers and assumptions (§ 4287.307(f)).* In addition to complying with the B&I provisions at § 4287.134, the Agency is proposing that it may charge the lender a nonrefundable transfer fee at the time of a transfer application. The Agency will set the amount of the transfer fee in an annual notice of funds availability. All transfers need to be approved by the Agency. Further, and consistent with the Section 9003 NOFA, the Agency is including provisions addressing changes in the control of a borrower and changes in terms that result in an increase in the cost of the loan guarantee.

*Substitution of lender after issuance of the loan note guarantee (§ 4287.307(g)).* Except for the provisions associated with Agency approval of a substitute lender, the provisions in § 4287.135 will apply. The requirements the Agency is proposing to approve the substitution of a new lender, which are very similar to those found in the Section 9003 NOFA, will be used instead of the provisions found in § 4287.135(a). In order to be approved by the Agency, the proposed substitute lender must:

- Be an eligible lender in accordance with § 4279.202(b);
- Be able to service the loan in accordance with the original loan documents; and
- Acquire title to the unguaranteed portion of the loan held by the original lender and assume all original loan requirements, including liabilities and servicing responsibilities.

*Default by borrower (§ 4287.307(h)).* This paragraph identifies that defaults by borrowers will be handled in accordance with the B&I provisions for default by borrowers found at § 4287.145, except with regard to when the lender must submit the notification to the Agency.

*Protective advances (§ 4287.307(i)).* In addition to complying with the B&I

provisions for protective advances found at § 4279.156, Agency written authorization will be required when cumulative protective advances exceed \$100,000 (not \$5,000 as found in the current B&I regulations) or 10 percent of the guaranteed loan, whichever is less.

*Determination of loss and payment (§ 4287.307(j)).* This paragraph identifies that determination of loss and payment will be made in accordance with the B&I provisions found at § 4279.158 and also requires the keeping of an annual report if the lender receives a final loss payment.

### III. Request for Comments

The Agency is interested in receiving comments on all aspects of the proposed rule. Areas in which the Agency is seeking specific comments are identified below. All comments should be submitted as indicated in the **ADDRESSES** section of this preamble.

a. *Preapplications.* The Agency is requesting comment on whether or not a preapplication process for the Biorefinery Assistance program will provide sufficient benefit to lenders and borrowers. If you believe a preapplication process will be beneficial, please identify what elements you recommend for including in a preapplication. Please be sure to provide rationale for your position.

b. *Feedstocks.* The Agency is requesting comment on whether a specific type of material that could serve as a feedstock for the production of advanced biofuels, as it relates to project eligibility for this program, should not be an eligible feedstock. For example, should by-products from the pulp and paper production process which are commonly used for on-site energy production or recycled be an eligible feedstock for a biorefinery seeking a loan guarantee under this program? Please be sure to provide rationale for your position.

c. *Rural area requirement.* As proposed, only biorefineries located in rural areas will be eligible for loan guarantees. The Agency is requesting comment on whether biorefineries located in non-rural areas should also be eligible for a loan guarantee under this program. Please be sure to provide rationale for your position.

d. *Foreign ownership.* The Agency is requesting comment on whether biorefineries that do not meet the proposed citizenship requirements (§ 4279.227(a)(2)) of at least 51 percent domestic ownership, including those owned entirely by immediate family members where only one of the family members meets citizenship requirements, should be eligible for a

loan guarantee under this program. Please be sure to provide rationale for your position.

e. *Program obstacles.* The Agency is requesting comments on any and all provisions for the proposed Biorefinery Assistance program and the Business and Industry Guaranteed Loan program that present an obstacle for stakeholders applying for assistance in either program. For each provision that you perceive as an obstacle, please be sure to provide your rationale and please identify potential alternatives that will improve participation in the program.

f. *Processing technology owned by the borrower.* The Agency is requesting comments on whether the processing technology owned by the borrower should be included as an eligible project cost. Examples of potential eligible project costs associated with the processing technology could include, but not be limited to: highly skilled labor, laboratory costs and testing, and equipment. If so, how should the value of such processing technology be determined? In addition, for collateral analysis, what discounting factor should be applied?

g. *Percent revenue from sale of advanced biofuel.* The Agency is requesting comments on the percentage of a biorefinery's sales that must come from the sale of eligible advanced biofuels in order to be eligible under this program. The Agency recognizes that other biobased products can potentially be a sizeable portion of a biorefinery's revenues and thus affect the viability of the biorefinery. However, the Agency's primary goal of this program is to encourage the production of advanced biofuels.

h. *Value of feedstock supplied by producer associations and cooperatives.* The Agency is requesting comments on the percentage of feedstocks that must be purchased from producer association and cooperatives in order to be awarded points in the scoring of applications (see § 4279.265(d)(4)). The Agency is proposing a 60 percent threshold for such purchases. The Agency is seeking to try to strike a balance between giving priority to the purchase of feedstocks from producer associations and cooperatives and encouraging new feedstocks and technologies.

i. *Measuring potential for rural economic development.* The Agency is requesting comments on metrics that can be used for measuring rural economic development. Please be sure to discuss the availability of data and how such data can be verified.

j. *Measuring positive impacts on resource conservation, public health, and the environment.* The Agency is

requesting comments on metrics that can be used for measuring each of these three areas—resource conservation, public health, and the environment. The Agency is considering an approach that would award more points to facilities that produce biofuels that significantly reduce lifecycle GHGs by compared to conventional fuels they replace in the market; facilities that produce biofuels that do not demonstrate significant GHG reductions of would receive fewer points. For example, in the case of liquid biofuels, fuels that have been certified as advanced biofuels, cellulosic biofuels, or bio-based diesel under EPA's Renewable Fuels Standard achieve lifecycle GHG reductions of at least 50 percent relative to conventional liquid fuels, and so facilities that produce these fuels would receive higher points. We request comments on this approach as an alternative to the proposed rule text, including comments on how such an alternative should be drafted to best address the goal of lifecycle GHG reductions. We also request comment on specific metrics to promote positive impacts on air quality, water quality, and water quantity. Please be sure to be specific and, if proposing to measure data, to discuss the availability of data and how such data can be verified.

k. *Definition of agricultural producer.* The Agency is requesting comments on the definition of agricultural producer in which "50 percent or greater of their gross income is derived from the [agricultural] operations." This definition is consistent with the current definition from in 7 CFR part 4280, subpart B, for the renewable energy system and energy efficiency improvement program. The Agency is interested in receiving comments on whether the percentage of income should be higher and, if so, at what level it should be set. Please be sure to provide rationale for your suggestions.

l. *Local ownership.* The Agency is requesting comment on the definition of "local owner" in scoring applications under § 4279.265(d)(9) for determining the percent local ownership of the biorefinery. The Agency is seeking comment in particular on the relationship of an owner to the area supplying the feedstock to the biorefinery and whether the proposed distance of 20 miles beyond the feedstock area is reasonable. Please be sure to provide rationale for your suggestions.

**List of Subjects in 7 CFR Parts 4279 and 4287**

Loan programs—Business and Industry—Rural development assistance, Biorefinery assistance, Rural areas.

For the reasons set forth in the preamble, under the authority at 5 U.S.C. 301 and 7 U.S.C. 1989, Chapter XLII of title 7 of the Code of Federal Regulations is proposed to be amended as follows:

**CHAPTER XLII—RURAL BUSINESS-COOPERATIVE SERVICE AND RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE**

**PART 4279—GUARANTEED LOANMAKING**

1. The authority citation for part 4279 continues to read as follows:

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1989; and 7 U.S.C. 1932(a).

2. Part 4279 is amended by adding a new subpart C to read as follows:

**Subpart C—Biorefinery Assistance Loans**  
Sec.

- 4279.201 Purpose and scope.
- 4279.202 Compliance with §§ 4279.1 through 4279.99.
- 4279.203–4279.224 [Reserved]
- 4279.225 Loan processing.
- 4279.226 Fees.
- 4279.227 Borrower eligibility.
- 4279.228 Project eligibility.
- 4279.229 Guaranteed loan funding.
- 4279.230 Subordination of lien position.
- 4279.231 Interest rates.
- 4279.232 Terms of loan.
- 4279.233 Credit evaluation.
- 4279.234–4279.236 [Reserved]
- 4279.237 Financial statements.
- 4279.238–4279.243 [Reserved]
- 4279.244 Appraisals.
- 4279.245–4279.249 [Reserved]
- 4279.250 Feasibility studies.
- 4279.251–4279.254 [Reserved]
- 4279.255 Loan priorities.
- 4279.256 Construction planning and performing development.
- 4279.257–4279.258 [Reserved]
- 4279.259 Borrower responsibilities.
- 4279.260 Guarantee applications—General.
- 4279.261 Application for loan guarantee content.
- 4279.262–4279.264 [Reserved]
- 4279.265 Guarantee application evaluation.
- 4279.266–4279.279 [Reserved]
- 4279.280 Changes in borrowers.
- 4279.281 Conditions precedent to issuance of loan note guarantee.
- 4279.282–4279.289 [Reserved]
- 4279.290 Requirements after project construction.
- 4279.291–4279.300 [Reserved]

**Subpart C—Biorefinery Assistance Loans**

**§ 4279.201 Purpose and scope.**

The purpose and scope of this subpart is to provide financial assistance for the

development and construction of commercial-scale biorefineries or for the retrofitting of existing facilities using eligible technology for the development of advanced biofuels.

**§ 4279.202 Compliance with §§ 4279.1 through 4279.99.**

Except as specified in paragraphs (a) through (l) of this section, all loans guaranteed under this subpart shall comply with the provisions found in §§ 4279.1 through 4279.99 of this chapter.

(a) *Definitions.* The terms used in this subpart are defined in either § 4279.2 or in this paragraph. If a term is defined in both § 4279.2 and this paragraph, it will have, for purposes of this subpart only, the meaning given in this paragraph.

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

- (i) Biofuel derived from cellulose, hemicellulose, or lignin;
- (ii) Biofuel derived from sugar and starch (other than ethanol derived from corn kernel starch);
- (iii) Biofuel derived from waste material, including crop residue, other vegetative waste material, animal waste, food waste, and yard waste;
- (iv) Diesel-equivalent fuel derived from renewable biomass, including vegetable oil and animal fat;
- (v) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass;
- (vi) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass; and
- (vii) Other fuel derived from cellulosic biomass.

*Agency.* The Rural Business-Cooperative Service or successor Agency assigned by the Secretary of Agriculture to administer the Biorefinery Assistance program. References to the National Office, Finance Office, State Office or other Agency offices or officials 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.

*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.

*Biofuel.* A fuel derived from renewable biomass.

*Biorefinery.* A facility (including equipment and processes) that converts renewable biomass into biofuels and biobased products and may produce electricity.

*Borrower.* Any party that borrows or seeks to borrow money from the lender, including any party or parties liable for the guaranteed loan except guarantors.

*Business plan.* A comprehensive document that clearly describes the borrower's ownership structure and management experience including, if applicable, discussion of a parent, affiliates, and subsidiaries; a discussion of how the borrower will operate the proposed project, including, at a minimum, a description of the business and project, the products and services to be provided, pro forma financial statements for a period of 2 years, including balance sheet, income and expense, and cash flows, and the availability of the resources necessary to provide those products and services.

*By-product.* Any and all biobased products generated under normal operations of the proposed project that can be reasonably measured and monitored. By-products may or may not have a readily identifiable commercial use or value.

*Default.* The condition that exists when a borrower is not in compliance with the promissory note, the loan agreement, or other related documents evidencing the loan.

*Eligible project costs.* Those expenses approved by the Agency for the project.

*Eligible technology.* Eligible technology is defined as either:

(i) A technology that is being adopted in a viable commercial-scale operation of a biorefinery that produces an advanced biofuel; or

(ii) A technology not described in paragraph (i) of this definition that has been demonstrated to have technical and economic potential for commercial application in a biorefinery that produces an advanced biofuel.

*Existing business.* A business that has been in operation for at least one full year. Mergers, changes in the business name, or legal type of entity of a currently operating business, or expansions of product lines are considered to be existing businesses as long as there is not a significant change in operations.

*Farm cooperative.* A business incorporated as a cooperative that is solely owned and controlled by agricultural producers.

*Farmer Cooperative Organization.* An organization whose membership is composed of farm cooperatives.

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

*Future recovery.* Funds collected by lender after final loss claim.

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

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

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

*Loan classification.* The assigned score or metric reflecting the lender's analysis of the degree of potential loss in the event of default.

*Local owner.* An individual who owns any portion of an eligible advanced biofuel biorefinery and whose primary residence is located within 20 miles of the feedstock area supplying the advanced biofuel biorefinery.

*Market value.* The amount for which a property will sell for its highest and best use at a voluntary sale in an arm's length transaction.

*Material adverse change.* Any change in the purpose of the loan, the financial condition of the borrower, or the collateral, that might jeopardize loan performance.

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

*Offtake agreement.* The terms and conditions governing the sale and transportation of biofuels, biobased products, and electricity produced by the borrower to another party.

*Project.* The facility or portion of facility producing eligible advanced biofuels and any eligible biobased by-product receiving funding under this subpart.

*Protective advances.* Advances made by the lender for the purpose of preserving and protecting the collateral where the debtor has failed to, and will not or cannot, meet obligations to protect or preserve collateral.

*Regulated or supervised lender.* A lender that is subject to credit examination or supervision by an appropriate agency of the United States or a State that supervises or regulates credit institutions.

*Renewable biomass.*

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and 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) Will 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 waste and yard waste

*Retrofitting.* The modification of a building or equipment to incorporate functions not included in the original design that allow for the production of advanced biofuels.

*Semi-work scale.* A manufacturing plant operating on a limited commercial scale to provide final tests of a new product or process.

*Startup business.* A business that has been in operation for less than one full year. Startup businesses include newly formed entities leasing space or constructing facilities in a new market area, even if the owners of the startup business own affiliated businesses doing the same kind of business. Newly-formed entities that are buying existing businesses or facilities will be considered an existing business as long

as the business or facility being bought remains in operation and there is no significant change in operations.

*Surety.* An entity that agrees to be primarily liable for the conduct, obligation, or performance of another.

*Tangible net worth.* Tangible assets minus liabilities.

*Technical and economic potential.* A technology not described in paragraph (i) of the definition of "eligible technology" is considered to have demonstrated "technical and economic potential" for commercial application in a biorefinery that produces an advanced biofuel if each of the following conditions is met:

(i) The advanced biofuel biorefinery's likely financial and production success is evidenced in a thorough evaluation including, but not limited to:

(A) Feedstocks;

(B) Process engineering;

(C) Siting;

(D) Technology;

(E) Energy production; and

(F) Financial and sensitivity review

using a banking industry software analysis program with appropriate industry standards.

(ii) The evaluation in paragraph (i) of this definition is completed by an independent third-party expert in a feasibility study, technical report, or other analysis, each of which must be satisfactory to the Agency, that demonstrates the potential success of the project.

(iii) The advanced biofuel technology has at least a 12 month (four seasons) operating cycle at semi-work scale.

*Tier 1 capital.* This term has the meaning given it under 12 CFR Part 325 and as calculated under applicable Federal Deposit Insurance Corporation regulations.

*Tier 2 capital.* This term has the meaning given it under applicable Federal Deposit Insurance Corporation regulations.

*Tier 1 leverage capital ratio.* This term means the ratio of Tier 1 capital to total assets as defined and calculated in 7 CFR part 325 and its appendices.

*Tier 1 risk-based capital ratio.* This term has the meaning given it in 7 CFR part 325.

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

*Total qualifying capital.* This term has the meaning given to it under applicable Federal Deposit Insurance Corporation regulations.

*Total risk-based capital ratio.* This term has the meaning given to it in 7 CFR part 325.

*Viable commercial-scale operation.* An operation is considered to be a

viable commercial scale operation if it demonstrates that:

(i) Its revenue will be sufficient to recover the full cost of the project over the term of the loan and result in an anticipated annual rate of return sufficient to encourage investors or lenders to provide funding for the project;

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

(iii) Contracts for feedstocks are adequate to address proposed off-take from the biorefinery;

(iv) The ability to achieve market entry, suitable infrastructure to transport the advanced biofuel to its market is available, and general market competitiveness of the advanced biofuel technology and related products;

(v) It can be easily replicated and that replications can be sited at multiple facilities across a wide geographic area based on the proposed deployment plan; and

(vi) The advanced biofuel technology has at least a 12 months (four seasons) operating history at semi-work scale, which demonstrates the ability to operate at a commercial scale.

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

(b) *Exception authority.* The exception authority provisions of this paragraph apply to this subpart instead of those in § 4279.15. The Administrator may, on a case-by-case basis, make an exception 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 USDA's interest.

(c) *Lender eligibility requirements.* The requirements specified in § 4279.29 do not apply to this subpart. Instead, a lender must meet the requirements specified in paragraphs (c)(1) through (4) of this section in order to be approved for participation in this program.

(1) The lender must be a regulated or supervised lender.

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

(i) Total Risk-Based Capital ratio of 10 percent or higher;

(ii) Tier 1 Risk-Based Capital ratio of 6 percent or higher; and

(iii) Tier 1 Leverage Capital ratio of 5 percent or higher.

(3) The lender must not be otherwise debarred or suspended by the Federal government.

(4) The Agency will approve applications for loan guarantees only from lenders with adequate experience, as determined by the Agency, with similar projects and the expertise to make, secure, service, and collect loans approved under this subpart.

(d) *Independent credit risk analysis.* The Agency will require an independent credit risk analysis (e.g., a credit rating or assessment) from a nationally-recognized rating agency for loans of \$100,000 or more.

(e) *Environmental responsibilities.* The provisions of this paragraph shall be used instead of the provisions specified in § 4279.30(c) for determining a lender's environmental responsibilities under this subpart. Lenders have a responsibility to become familiar with Federal environmental requirements; to consider, in consultation with the prospective borrower, the potential environmental impacts of their proposals at the earliest planning stages; and to develop proposals that minimize the potential to adversely impact the environment.

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

(2) Lenders must help the borrower prepare Form RD 1940-20, "Request for Environmental Information" (when required by subpart G of part 1940 of this title); assist in the collection of additional data when the Agency needs such data to complete its environmental review of the proposal; and assist in the resolution of environmental problems.

(3) Lenders must ensure that the borrower has:

(i) Provided the necessary environmental information to enable the Agency to undertake its environmental review process in accordance with subpart G of either 7 CFR part 1940 or successor regulations, including the provision of all required Federal, State, and local permits;

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

(iii) Not taken any actions or incurred any obligations with respect to the proposed project that will either limit the range of alternatives to be considered during the Agency's environmental review process or which

will have an adverse effect on the environment.

(f) *Additional lender functions and responsibilities.* In addition to the requirements in § 4279.30, the requirements specified in paragraphs (f)(1) through (3) apply.

(1) Any action or inaction on the part of the Agency does not relieve the lender of its responsibilities to originate and service the loan guaranteed under this subpart.

(2) The lender must compile and maintain in its files a complete application for each guaranteed loan for at least 3 years after the final loss has been paid.

(3) The lender must report to the Agency all conflicts of interest and appearances of conflicts of interest.

(g) *Certified lender program.* Section 4279.43 does not apply to this subpart.

(h) *Oversight and monitoring.* In addition to complying with requirements specified in § 4279.44, the lender will cooperate fully with Agency oversight and monitoring of all lenders involved in any manner with any guarantee under the Biorefinery Assistance programs to ensure compliance with this subpart. Such oversight and monitoring will include, but is not limited to, reviewing lender records and meeting with lenders (in accordance with § 4287.107(c)).

(i) *Conditions of guarantee.* All loan guarantees under this subpart are subject to the provisions of § 4279.72 and as specified in paragraphs (i)(1) through (4) of this section.

(1) The guarantee under this section will be secured by a first lien on all collateral necessary to run the project in the event of the borrower's default.

(2) The holder of a guaranteed portion shall have all rights of payment, as defined in the loan note guarantee, to the extent of the portion purchased. The lender will remain bound by all obligations under the loan note guarantee, Lender's Agreement, and Agency program regulations.

(3) The lender must be shown as an additional insured on insurance policies (or other risk sharing instruments) that benefit the project and must be able to assume any contracts that are material to running the project including any feedstock or offtake agreements, as may be applicable.

(4) If a lender does not satisfactorily comply with the provision found in § 4279.256(c) and such failure leads to losses, then such losses may not be recoverable under the guarantee.

(j) *Sale or assignment of guaranteed loan.* In addition to complying with the provisions of § 4279.75, the guaranteed portion of the loan shall be fully

transferable to any accredited investor and the Agency may not guarantee a loan funded with the net proceeds of a bond described in section 142(a) of the Internal Revenue Code of 1986.

(k) *Minimum retention.* The provisions of § 4279.77 do not apply to this subpart. Instead, lenders may syndicate a portion of its risk position to other eligible lenders provided that at no time during the life of the guarantee may the original lender hold less than 50 percent of their original unguaranteed position in the loan.

(l) *Replacement of document.* Documents must be replaced in accordance with § 4279.84, except, in § 4279.84(b)(1)(v), a full statement of the circumstances of any defacement or mutilation of the Loan Note Guarantee or Assignment Guarantee Agreement would also need to be provided.

#### §§ 4279.203–4279.224 [Reserved]

#### § 4279.225 Loan processing.

Processing Biorefinery Assistance Guaranteed loans under this subpart shall comply with the provisions found in §§ 4279.107 through 4279.199 of this chapter, except as provided in the following sections.

#### § 4279.226 Fees.

Except as specified in paragraphs (a) and (b) of this section, the fee provisions specified in § 4279.107 apply to guaranteed loans under this subpart.

(a) *Guarantee fee.* The guarantee fee shall be as follows:

(1) Two percent for guarantees on loans greater than 75 percent of total project costs.

(2) One and one-half percent for guarantees on loans of greater than 65 percent but less than or equal to 75 percent of total project costs.

(3) One percent for guarantees on loans of 65 percent or less of total project costs.

(b) *Annual renewal fee.* The annual renewal fee, which may be passed on to the borrower, will be paid to the Agency for as long as the guaranteed loan is outstanding and is payable during the construction period. The annual renewal fee shall be as follows:

(1) One hundred basis points (1 percent) for guarantees on loans that were originally greater than 75 percent of total project costs.

(2) Seventy five basis points (0.75 percent) for guarantees on loans that were originally greater than 65 percent but less than or equal to 75 percent of total project costs.

(3) Fifty basis points (0.50 percent) for guarantees on loans that were originally for 65 percent or less of total project costs.

#### § 4279.227 Borrower eligibility.

Borrower eligibility will be determined according to the provisions of this section in lieu of § 4279.108.

(a) *Eligible entities.* To be eligible, a borrower must meet the requirements specified in paragraphs (a)(1) through (3) of this section, as applicable.

(1) *Type of borrower.* The borrower must be one of the following:

- (i) An individual;
- (ii) An entity;
- (iii) An Indian Tribe;
- (iv) A unit of State or local government;
- (v) A corporation;
- (vi) A farm cooperative;
- (vii) A farmer cooperative organization;
- (viii) An association of agricultural producers;
- (ix) A National Laboratory;
- (x) An institution of higher education;
- (xi) A rural electric cooperative;
- (xii) A public power entity; or
- (xiii) A consortium of any of the above entities.

(2) *Citizenship.* Citizenship requirements are as follows:

(i) Individual borrowers must be citizens of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or reside in the U.S. after legal admittance for permanent residence.

(ii) Entities other than individuals must be at least 51 percent owned or controlled by individuals who are either citizens as identified under paragraph (a)(2)(i) of this section or legally admitted permanent residents residing in the U.S. When an entity owns an interest in the borrower, its citizenship will be determined by the citizenship of the individuals who own an interest in the entity or any sub-entity based on their ownership interest. This paragraph is not applicable if the entity is owned solely by members of an immediate family. In such instance, if at least 51 percent of the immediate family members are citizens or nationals, as defined in paragraph (a)(2)(i) of this section, then the entity is eligible.

(iii) If the borrower is a subsidiary, the parent entity or the entities that have an ownership interest in that borrower must also be at least 51 percent owned by individuals who are either citizens or nationals of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or legally admitted permanent residents residing in the U.S.

(iv) Corporate borrowers traded on major United States stock exchanges will be presumed to have more than 51

percent of their owners as United States citizens.

(3) *Legal authority and responsibility.* Each borrower must have, or obtain, the legal authority necessary to construct, operate, and maintain the proposed facility and services and to obtain, give security for, and repay the proposed loan.

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

- (1) Has an outstanding judgment obtained by the U.S. in a Federal Court (other than U.S. Tax Court),
- (2) Is delinquent on the payment of Federal income taxes,
- (3) Is delinquent on a Federal debt, or
- (4) Is debarred or suspended from receiving Federal assistance.

#### § 4279.228 Project eligibility.

In lieu of the requirements specified in § 4279.113, to be eligible for a guaranteed loan under this subpart, at a minimum, a borrower and project, as applicable, must meet each of the requirements specified in paragraphs (a) through (f) of this section.

(a) The project must be located in a rural area (as defined in paragraph (f) of this section).

(b) The project must be for either:

(1) The development and construction of commercial-scale biorefineries using eligible technology or

(2) The retrofitting of existing facilities, including, but not limited to, wood products facilities and sugar mills, with eligible technology.

(c) The project must use an eligible feedstock for the production of an advanced biofuel. Eligible feedstocks include, but are not limited to, renewable biomass, primarily organic biodegradable components (by weight) of municipal solid waste, and by-products of the pulping process. For the purposes of this subpart, recycled paper is not an eligible feedstock.

(d) More than 70 percent of the revenue generated by the biorefinery must be from the sale of advanced biofuel.

(e) The project must have cash equity injection of not less than 20 percent of eligible project costs.

(f) For the purposes of this subpart, the term "Rural or rural area" means any area of a State not in a city or town that has a population of more than 50,000 inhabitants, according to the latest decennial census of the United States,

and the contiguous and adjacent urbanized area. In determining which census blocks in an urbanized area are not in a rural area, the Agency shall exclude any cluster of census blocks that will otherwise be considered not in a rural area only because the cluster is adjacent to not more than 2 census blocks that are otherwise considered not in a rural area under this definition.

(1) 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.

(2) For the Commonwealth of Puerto Rico, the island is considered rural and eligible for Business Programs assistance, except for the San Juan Census Designated Place (CDP) and any other CDP with greater than 50,000 inhabitants. CDPs with greater than 50,000 inhabitants, other than the San Juan CDP, may be determined to be eligible if they are "not urban in character." Any such requests must be forwarded to the National Office, Business and Industry Division, with supporting documentation as to why the area is "not urban in character" for review, analysis, and decision by the Under Secretary of Rural Development.

(3) For the State of Hawaii, all areas within the State are considered rural and eligible for Business Programs assistance, except for the Honolulu CDP within the County of Honolulu.

(4) For the purpose of defining a Rural Area in the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, the Agency shall determine what constitutes Rural and Rural Area based on available population data.

#### **§ 4279.229 Guaranteed loan funding.**

Instead of the provisions found in § 4279.119, the provisions of this section apply to loans guaranteed under this subpart.

(a) In administering this program's budgetary authority each fiscal year, the Agency will allocate up to, but no more, than 50 percent of its budgetary authority to fund applications received by the end of the first application window. Any funds not obligated to support applications submitted during the first application window will be available to support applications received during the second window. 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 during the second application window.

(b) The amount of a loan guaranteed for a project under this subpart will not exceed 80 percent of total eligible project costs. Total Federal participation will not exceed 80 percent of total eligible project costs. Eligible project costs are specified in paragraph (d) of this section.

(c) The maximum principal amount of a loan guaranteed under this subpart is \$250 million to one borrower; there is no minimum amount. If an eligible borrower receives other direct Federal funding (*i.e.*, direct loans and grants) for a project, the amount of the loan that the Agency will guarantee under this subpart must be reduced by the same amount of the other direct Federal funding that the eligible borrower received for the project. For example, an eligible borrower is applying for a loan guarantee on a \$1 million project. The borrower provides the minimum matching requirement of 20 percent, or \$200,000. This leaves \$800,000 in other funding needed to implement the project. If the borrower receives no other direct Federal funding for this project and requests a guarantee for the \$800,000, the Agency will consider a guarantee on the \$800,000. However, if this borrower receives \$100,000 in other direct Federal funding for this project, the Agency will only consider a guarantee on \$700,000.

(d) The maximum guarantee on the principal and interest due on a loan guaranteed under this subpart will be determined as specified in paragraphs (d)(1) through (3) of this section.

(1) If the loan amount is equal to or less than \$80 million, 80 percent.

(2) If the loan amount is more than \$80 million and less than \$125 million, 80 percent on the first \$80 million and 70 percent on the loan amount that is greater than \$80 million.

(3) If the loan amount is equal to or more than \$125 million, 60 percent on the entire loan amount.

(e) Eligible project costs are only those costs associated with the items listed in paragraphs (e)(1) through (7) of this section, as long as the items are an integral and necessary part of the total project, as determined by the Agency.

(1) Purchase and installation of equipment (new, refurbished, or remanufactured), except agricultural tillage equipment, used equipment, and vehicles.

(2) Construction or retrofitting.

(3) Permit and license fees.

(4) Working capital.

(5) Land acquisition.

(6) Cost of financing, excluding guarantee and renewal fees.

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

#### **§ 4279.230 Subordination of lien position.**

In addition to complying with the provisions found in § 4279.123, a subordination must not extend the term of the guaranteed loan.

#### **§ 4279.231 Interest rates.**

Instead of the provisions found in § 4279.125, the interest rate provisions of this section apply to loans guaranteed under this subpart.

(a) *General*. The interest rate for the guaranteed loan will be negotiated between the lender and the applicant. The interest rate charged must be in line with interest rates on other similar government guaranteed loan programs, and is subject to Agency review and approval.

(1) The interest rate may be either fixed or variable, as long as it is a legal rate, and shall be fully amortizing.

(2) The interest rate for both the guaranteed and unguaranteed portions of the loan must be of the same type (*i.e.*, both fixed or both variable).

(3) The guaranteed and unguaranteed portions of the loan can bear interest at different rates, provided that the blended rate on the entire guaranteed loan shall not exceed the rate on the guaranteed portion of the loan by more than one (1) percent.

(4) Both portions of the loan must amortize at the same rate.

(b) *Variable rates*. A variable interest rate agreed to by the lender and borrower must be based on published indices, such as the Prime Rate, applicable Treasury rate, or the London Inter Bank Offering Rate (LIBOR), and agreed to by the lender and the Agency. Variable rates should have either an internal or external interest rate cap.

(1) The variable interest rate may be adjusted at different intervals during the term of the loan, but the adjustments may not be more often than quarterly and no less than yearly to prevent negative amortization, and must be specified in the loan agreement.

(2) Variable rate loans will not provide for negative amortization nor will they give the borrower the ability to choose its payment among various options.

(3) The lender must incorporate, within the variable rate Promissory Note at loan closing, the provision for adjustment of payment installments coincident with an interest-rate adjustment.

(4) The lender will ensure that the outstanding principal balance is properly amortized within the

prescribed loan maturity to eliminate the possibility of a balloon payment at the end of the loan.

(c) *Interest changes.* Any change in the interest rate between the date of issuance of the Conditional Commitment and before the issuance of the Loan Note Guarantee must be approved, in writing, by the Agency approval official. Approval of such a change will be shown as an amendment to the Conditional Commitment. Such changes are subject to the restrictions set forth in the following paragraphs.

(1) *Reductions.* The borrower, lender, and holder (if any) may collectively initiate a permanent or temporary reduction in the interest rate of the guaranteed loan at any time during the life of the loan upon written agreement among these parties. The Agency must be notified by the lender, in writing, within 15 days of the change. If any of the guaranteed portion has been purchased by the Agency, then the Agency will affirm or reject interest rate change proposals in writing. The Agency will concur in such interest-rate changes only when it is demonstrated to the Agency that the change is a more viable alternative than initiating or proceeding with liquidation of the loan or continuing with the loan in its present state.

(i) Fixed rates can be changed to variable rates to reduce the borrower's interest rate only when the variable rate has a ceiling for the life of the guaranteed loan that is less than or equal to the original fixed rate.

(ii) The interest rates, after adjustments, must comply with the requirements for interest rates on new loans as established under this Notice.

(iii) The lender is responsible for the legal documentation of interest-rate changes by an endorsement or any other legally effective amendment to the promissory note; however, no new notes may be issued. Copies of all legal documents must be provided to the Agency.

(2) *Increases.* Increases in interest rates are not permitted beyond what is provided in the loan documents. Increases from a variable interest rate to a higher interest rate that is a fixed rate are allowed, subject to concurrence by the Agency.

#### **§ 4279.232 Terms of loan.**

Instead of the provisions found in § 4279.126, the provisions of this section apply to loans guaranteed under this subpart, except as provided in § 4279.232(d).

(a) The repayment term for a loan under this subpart will be for a maximum period of 20 years or 85

percent of the useful life of the project, as determined by the lender and confirmed by the Agency, whichever is less. The length of the loan term shall be the same for both the guaranteed and unguaranteed portions of the loan.

(b) Guarantees must be provided only after consideration is given to the borrower's overall credit quality and to the terms and conditions of any applicable subsidies, tax credits, and other such incentives.

(c) All loans guaranteed under this subpart must be financially sound and feasible, with reasonable assurance of repayment.

(d) Repayment of the loan shall be in accordance with § 4279.125(a) and § 4279.126(b), (c), and (d).

#### **§ 4279.233 Credit evaluation.**

Instead of the provisions found in § 4279.131, the provisions of this section apply to loans guaranteed under this subpart. For all applications for guarantee, the lender must prepare a credit evaluation. An acceptable credit evaluation must:

(a) Use credit documentation procedures and an underwriting process that are consistent with generally accepted commercial lending practices, and

(b) Include an analysis of the credit factors associated with each guarantee application to ensure loan repayment, including consideration of each of the following five elements.

(1) *Credit worthiness.* Those financial qualities that generally impel the borrower to meet its obligations as demonstrated by its credit history.

(2) *Cash flow.* A borrower's ability to produce sufficient cash to repay the loan as agreed.

(3) *Capital.* The financial resources that the borrower currently has and those it is likely to have when payments are due. The borrower must be adequately capitalized.

(4) *Collateral.* The assets, including processing technology owned by the borrower, less those acquired with other Federal funds pledged by the borrower in support of the loan. Collateral must have documented value sufficient to protect the interest of the lender and the Agency and the discounted collateral value must be at least equal to the loan amount. Lenders will discount collateral consistent with sound loan-to-value policy.

(5) *Conditions.* The general business environment and status of the borrower's industry.

(c) When determining the credit quality of the borrower, the lender must include the following in its analysis:

(1) Borrowers shall demonstrate evidence of cash equity injection in the

project of not less than 20 percent of eligible project costs. The fair market value of equity in real property that is to be pledged as collateral for the loan may be substituted in whole or in part to meet the cash equity requirement. However, the appraisal completed to establish the fair market value of the real property must not be more than 1 year old unless a more recent appraisal is requested by the Agency in order to reflect market conditions. The appraisal used to establish fair market value of the real property must conform to the requirements of § 4279.244. Otherwise, cash equity injection must be in the form of cash.

(2) The credit analysis must also include spreadsheets of the balance sheets and income statements of the borrower for the 3 previous years (for existing businesses), pro forma balance sheets at startup, and projected yearend balance sheets and income statements for a period of not less than 3 years of stabilized operation, with appropriate ratios and comparisons with industrial standards (such as Dun & Bradstreet or Robert Morris Associates) to the extent industrial standards are available.

(3) All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales.

#### **§§ 4279.234–4279.236 [Reserved]**

#### **§ 4279.237 Financial statements.**

The provisions of § 4279.137 do not apply to this subpart. Instead, the submittal of financial statements with the loan guarantee application must meet the requirements specified in § 4279.261(c).

#### **§§ 4279.238–4279.243 [Reserved]**

#### **§ 4279.244 Appraisals.**

All appraisals must be in accordance with § 4279.144 and each appraisal must be a complete self-contained appraisal. Lenders must complete at least a Transaction Screen Questionnaire for any undeveloped sites and a Phase I Environmental Site Assessment in accordance with ASTM International Standards on existing business sites, which should be provided to the appraiser for completion of the self-contained appraisal. Specialized appraisers will be required to complete appraisals under this section. The Agency may approve a waiver of this requirement only if a specialized appraiser does not exist in a specific industry or hiring one will cause an undue financial burden to the borrower.

**§§ 4279.245–4279.249 [Reserved]****§ 4279.250 Feasibility studies.**

The provisions of § 4279.150 do not apply to this subpart. Instead, feasibility studies must meet the requirements specified in § 4279.261(f).

**§§ 4279.251–4279.254 [Reserved]****§ 4279.255 Loan priorities.**

The provisions of § 4279.155 do not apply to this subpart.

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

The lender must comply with § 4279.156(a) through (c), except as otherwise provided in paragraphs (a) through (f) of this section.

(a) *Architectural and engineering practices.* Under paragraph § 4279.156(a), the lender must also ensure that all project facilities are designed utilizing accepted architectural and engineering practices that conform to the requirements of this subpart.

(b) *Onsite inspector.* The lender must provide an onsite project inspector.

(c) *Changes and cost overruns.* The borrower shall be responsible for any changes or cost overruns. If any such change or cost overrun occurs, then any change order must be expressly approved by the Agency which approval shall not be unreasonably withheld, and neither the lender nor borrower will divert funds from purposes identified in the guaranteed loan application approved by the Agency to pay for any such change or cost overrun without the express written approval of the Agency. In no event will the current loan be modified or a subsequent guaranteed loan be approved to cover any such changes or costs. In the event of any of the aforementioned increases in cost or expenses, the borrower must provide for such increases in a manner that does not diminish the borrower's operating capital. Failure to comply with the terms of this paragraph will be considered a material adverse change in the borrower's financial condition, and the lender must address this matter, in writing, to the Agency's satisfaction.

(d) *New draw certifications.* The following three certifications are required for each new draw:

(1) Certification by the project engineer to the lender that the work referred to in the draw has been successfully completed;

(2) Certification from the lender that all debts have been paid and all mechanics' liens have been waived; and

(3) Certification from the lender that the borrower is complying with the Davis-Bacon Act.

(e) *Surety.* Surety will be required in cases when the guarantee will be issued prior to completion of construction unless the contractor will receive a lump sum payment at the end of work. Surety will be made a part of the contract, if the borrower requests it or if the contractor requests partial payments for construction work. In such cases where no surety is provided and the project involves pre-commercial technology, first of its type in the U.S., or new designs without sufficient operating hours to prove their merit, a latent defects bond may be required by the Agency to cover the work.

(f) *Reporting during construction.* During the construction of the project, lenders shall submit quarterly construction progress reports to the Agency. These reports must contain, at a minimum, planned and completed construction milestones, loan advances, and personnel hiring, training, and retention. This requirement applies to both the development and construction of commercial-scale biorefineries and to the retrofitting of existing facilities using eligible technology for the development of advanced biofuels. The lender must expeditiously report any problems in project development to the Agency.

**§§ 4279.257–4279.258 [Reserved]****§ 4279.259 Borrower responsibilities.**

(a) *Federal, State, and local regulations.* Borrowers must comply with all Federal, State, and local laws and rules that are in existence and that affect the project including, but not limited to:

(1) Land use zoning;

(2) Health, safety, and sanitation standards as well as design and installation standards; and

(3) Protection of the environment and consumer affairs.

(b) *Permits, agreements, and licenses.* Borrowers must obtain all permits, agreements, and licenses that are applicable to the project.

(c) *Insurance.* The borrower is responsible for maintaining all hazard, flood, liability, worker compensation, and personal life insurance, when required, on the project.

(d) *Access to borrower's records.* Except as provided by law, upon request by the Agency, the borrower will permit representatives of the Agency (or other agencies of the U.S. Department of Agriculture or Federal Departments as authorized by the U.S. Department of Agriculture) to inspect and make copies of any of the records of the borrower pertaining to any Agency guaranteed loan. Such inspection and copying may

be made during regular office hours of the borrower or at any other time agreed upon between the borrower and the Agency.

(e) *Access to the project.* The borrower must allow the Agency access to the project and its performance information until the loan is repaid in full and permit periodic inspection of the project by a representative of the Agency.

**§ 4279.260 Guarantee applications-General.**

The provisions of § 4279.161 do not apply to this subpart. Instead, the application provisions of this section and § 4279.261 apply to the preparation of Biorefinery Assistance Guaranteed loan applications.

(a) *Application submittal.* For each guarantee request, the lender must submit to the Agency an application that is in conformance with § 4279.261. One original completed application and two hard copies of the complete application, including all attachments, are to be submitted to the Agency.

(b) *Application deadline.* Unless otherwise specified by the Agency in a notice published in the **Federal Register**, complete applications must be received by the Agency on or before by June 1 of each year to be considered for funding for that fiscal year. If the application deadline falls on a weekend or a Federally-observed holiday, the deadline will be the next Federal business day.

(c) *Incomplete applications.* Incomplete applications will be rejected. Lenders will be informed of the elements that made the application incomplete. If a resubmitted application is received by the applicable application deadline, the Agency will reconsider the application.

(d) *Application withdrawal.* During the period between the submission of an application and the execution of documents, the lender must notify the Agency, in writing, if the project is no longer viable or the borrower is no longer requesting financial assistance for the project. When the lender so notifies the Agency, the selection will be rescinded or the application withdrawn.

**§ 4279.261 Application for loan guarantee content.**

Approved lenders must submit an Agency-approved application form for each loan guarantee sought under this subpart. Loan guarantee applications from approved lenders must contain the information specified in paragraphs (a) through (n) of this section, organized pursuant to a Table of contents in a

chapter format, and in paragraph (o) of this section as applicable.

(a) *Project Summary*. Provide a concise summary of the proposed project and application information, project purpose and need, and project goals, including the following:

(1) *Title*. Provide a descriptive title of the project.

(2) *Borrower eligibility*. Describe how the borrower meets the eligibility criteria identified in § 4279.227.

(3) *Project eligibility*. Describe how the project meets the eligibility criteria identified in paragraph (c) of this section. Clearly state whether the application is for the construction and development of a biorefinery or for the retrofitting of an existing facility. Provide results from demonstration or pilot facilities that prove the technology proposed to be used meets the definition of eligible technology. Additional project description information will be needed later in the application process.

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

(b) *Lender's analysis and credit evaluation* (conforming to § 4279.232(b)). This analysis shall include:

(1) A summary of the technology to be used in the project;

(2) The viability of such technology for the particular project application;

(3) The development type (*e.g.*, installation, construction, retrofit);

(4) The credit reports of the borrower, its principals, and any parent, affiliate, or subsidiary as follows:

(i) A personal credit report from an acceptable credit reporting company 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, including a proprietor (owner), each partner, officer, director, key employee, and stockholder, except for when the borrower is a corporation listed on a major stock exchange. Credit reports are not required for elected and appointed officials when the borrower is a public body or non-profit corporation; and

(ii) Commercial credit reports on the borrower and any parent, affiliate, and subsidiary firms;

(5) The credit analysis specified in § 4279.232(b); and

(6) For loans of \$125 million or more, an evaluation and credit rating of the total project's indebtedness, without consideration for a government guarantee, from a nationally-recognized rating agency.

(c) *Financial statements*. Financial statements as follows:

(1) For businesses that have been in existence for one or more years,

(i) The most recent audited financial statements of the borrower if the guaranteed loan is \$3 million or more, unless alternative financial statements are authorized by the Agency; or

(ii) The most recent audited or Agency-acceptable financial statements of the borrower if the guaranteed loan is less than \$3 million.

(2) For businesses that have been in existence for less than one year, the most recent Agency-authorized financial statements of the borrower regardless of the amount of the guaranteed loan request.

(3) For all businesses, a current (not more than 90 days old) balance sheet; a *pro forma* balance sheet at startup; and projected balance sheets, income and expense statements, and cash flow statements for a period of not less than 3 years of stabilized operation. Projections should be supported by a list of assumptions showing the basis for the projections.

(4) Depending on the complexity of the project and the financial condition of the borrower, the Agency may request additional financial statements and additional related information.

(d) *Environmental information*. Environmental information required by the Agency to conduct its environmental reviews (as specified in RD 1940-G, Exhibit H).

(e) *Appraisals*. An appraisal conducted as specified under § 4279.244.

(f) *Feasibility study*. Elements in an acceptable feasibility study include, but are not limited to, the elements outlined in Table 1. In addition, as part of the feasibility study, both a technical assessment and economic analysis of the project are required, as specified in paragraphs (h) and (i) of this section.

TABLE 1—FEASIBILITY STUDY COMPONENTS

#### (A) Executive Summary

Introduction/Project Overview (Brief general overview of project location, size, *etc.*)  
 Economic feasibility determination.  
 Market feasibility determination.  
 Technical feasibility determination.  
 Financial feasibility determination.  
 Management feasibility determination.  
 Recommendations for implementation.

#### (B) Economic Feasibility

Information regarding project site;  
 Availability of trained or trainable labor;  
 Availability of infrastructure, including utilities, and rail, air and road service to the site.  
 Feedstock:  
     Feedstock source management  
     Estimates of feedstock volumes and costs  
     Collection, Pre-Treatment, Transportation, and Storage  
 Document that any and all woody biomass feedstock cannot be used as a higher value wood-based product.  
 Impacts on existing manufacturing plants or other facilities that use similar feedstock if the borrower's proposed biofuel production technology is adopted.  
 Project impact on resource conservation, public health, and the environment.  
 Overall economic impact of the project including any additional markets created for agricultural and forestry products and agricultural waste material and potential for rural economic development.

TABLE 1—FEASIBILITY STUDY COMPONENTS—Continued

|  |
|--|
| Feasibility/plans of project to work with producer associations or cooperatives including estimated amount of annual feedstock and biofuel and biobased by-product dollars from producer associations and cooperatives.  |
| <b>(C) Market Feasibility</b>  |
| Information on the sales organization and management;<br>Nature and extent of market and market area;<br>Marketing plans for sale of projected output—principle products and by-products;<br>Extent of competition including other similar facilities in the market area;<br>Commitments from customers or brokers—principle products and by-products;<br>Risks Related to the Advanced Biofuel Industry, including industry status.   |
| <b>(D) Technical Feasibility</b>   |
| Suitability of the selected site for the intended use.<br>Scale of development for which the process technology has been proven ( <i>i.e.</i> , lab or bench, pilot, demonstration, or semi-work scale).<br>Specific volume of the process (expressed either as volume of feedstock processed—tons per unit of time, or as product—gallons per unit of time).<br>Any constraints or limitations in the financial projections and any other facility or design-related factors that might affect the success of the enterprise.<br>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.<br>Ability of the proposed system to be commercially replicated.<br>Identify how the project assists in meeting or reaching the goals identified in the Renewable Fuel Standard established in the Energy Independence and Security Act of 2007 and subsequent laws.<br>Risks Related to:<br>Construction of the Advanced Biofuel Plant;<br>Advanced Biofuel Production; and<br>Regulation and Governmental Action. |
| <b>(E) Financial Feasibility</b>   |
| Reliability of the financial projections and assumptions on which the financial statements are based including all sources of project capital both private or public, such as Federal funds. Three years (minimum) projected Balance Sheets, Income and Expense Statements, and Cash Flow statements.<br>Ability of the business to achieve the projected income and cash flow.<br>Assessment of the cost accounting system.<br>Availability of short-term credit or other means to meet seasonal business costs.<br>Adequacy of raw materials and supplies.<br>Sensitivity Analysis—including feedstock and energy costs, product and by-product prices.<br>Risks Related to:<br>The Project;<br>Borrower Financing Plan;<br>The operational units; and<br>Tax Issues.  |
| <b>(F) Management Feasibility</b>  |
| Identify borrower and/or management's previous experience concerning:<br>Biofuel production;<br>Acquisition of feedstock;<br>Marketing and sale of offtake; and<br>The receipt of Federal financial assistance, including amount of funding, date received, purpose, and outcome.<br>Management plan for procurement of feedstock and labor, marketing of the offtake, and management succession.<br>Risks Related to:<br>Borrower as a Company ( <i>i.e.</i> , Development-Stage); and<br>Conflicts of Interest.  |
| <b>(G) Qualifications</b>  |
| A resume or statement of qualifications of the author of the feasibility study, including prior experience, should be submitted.   |

(g) *Business plan.* The lender must submit a business plan that includes the information specified in paragraphs (g)(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 (f) of this section.

(1) The borrower's experience;

(2) The borrower's succession planning addressing both ownership and management;

(3) The names and a description of the relationship of the borrower's parent, affiliates, and subsidiaries;

(4) The borrower's business strategy;

(5) Possible vendors and models of major system components;

(6) The availability of the resources (*e.g.*, labor, raw materials, supplies) necessary to provide those products and services;

(7) Site location and its relation to product distribution (*e.g.*, rail lines or highways) and any land use or other permits necessary to operate the facility;

(8) The market for the product and its competition, including any and all competitive threats and advantages;

(9) Projected balance sheets, income and expense statements, and cash flow statements for a period of not less than 3 years of stabilized operation; and

(10) A description of the proposed use of funds.

(h) *Technical Assessment.* As part of the feasibility study required under paragraph (f) of this section, a detailed technical assessment is required for each project. The technical assessment must demonstrate that the design, procurement, installation, startup, operation and maintenance of the project will permit it to operate or perform as specified over its useful life in a reliable and a cost effective manner, and must identify what the useful life of the project is. The technical assessment must also identify all necessary project agreements, demonstrate that those agreements will be in place at or before the time of loan closing, and demonstrate that necessary project equipment and services will be available over the useful life of the project. The technical assessment must be based upon verifiable data and contain sufficient information and analysis so that a determination can be made on the technical feasibility of achieving the levels of income or production that are projected in the financial statements. All technical information provided must follow the format specified in paragraphs (h)(1) through (9) of this section. Supporting information may be submitted in other formats. Design drawings and process flow charts are required as exhibits. A discussion of each topic identified in paragraphs (h)(1) through (9) of this section is not necessary if the topic is not applicable to the specific project. Questions identified in the Agency's technical review of the project must be answered to the Agency's satisfaction before the application will be approved. All projects require the services of an independent, third-party professional engineer.

(1) *Qualifications of project team.* The project team will vary according to the complexity and scale of the project. The project team must have demonstrated expertise in similar advanced biofuel technology development, engineering, installation, and maintenance. Authoritative evidence that project team service providers have the necessary professional credentials or relevant experience to perform the required services for the development, construction, and retrofitting, as applicable, of technology for producing advanced biofuels must be provided. In

addition, authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the biorefinery to operate over its useful life must be provided. The application must:

(i) Discuss the proposed project delivery method. Such methods include a design, bid, build where a separate engineering firm may design the project and prepare a request for bids and the successful bidder constructs the project at the borrower's risk, and a design build method, often referred to as turnkey, where the borrower establishes the specifications for the project and secures the services of a developer who will design and build the project at the developer's risk;

(ii) Discuss the advanced biofuels technology equipment manufacturers of major components being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

(iii) Discuss the project team members' qualifications for engineering, designing, and installing advanced biofuels refineries including any relevant certifications by recognized organizations or bodies. Provide a list of the same or similar projects designed, installed, or supplied and currently operating and with references if available; and

(iv) Describe the advanced biofuels refinery operator's qualifications and experience for servicing, operating, and maintaining such equipment or projects. Provide a list of the same or similar projects designed, installed, or supplied and currently operating, with references if available.

(2) *Agreements and permits.* All necessary agreements and permits required for the project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (h)(2)(i) through (vi) of this section, must be identified in the application.

(i) Advanced biofuels refineries must be installed in accordance with applicable local, State, and national codes and regulations. Identify zoning and code issues, and required permits and the schedule for meeting those requirements and securing those permits.

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

(iii) Identify land use agreements required for the project and the schedule for securing the agreements and the term of those agreements.

(iv) Identify any permits or agreements required for solid, liquid, and gaseous emissions or effluents and

the schedule for securing those permits and agreements.

(v) Identify available component warranties for the specific project location and size.

(vi) Identify all environmental issues, including environmental compliance issues, associated with the project.

(3) *Resource assessment.* Adequate and appropriate evidence of the availability of the feedstocks required for the advanced biofuels refinery to operate as designed must be provided in the application. Indicate the type and quantity of the feedstock, including storage, where applicable, and competing uses for the feedstock. Indicate shipping or receiving methods and required infrastructure for shipping, and other appropriate transportation mechanisms. For proposed projects with an established resource, provide a summary of the resource.

(4) *Design and engineering.* Authoritative evidence that the advanced biofuels refinery will be designed and engineered so as to meet its intended purposes, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards must be provided in the application. Projects shall be engineered by a qualified entity. Each biorefinery must be engineered as a complete, integrated facility. The engineering must be comprehensive, including site selection, systems and component selection, and systems monitoring equipment. Biorefineries must be constructed by a qualified entity.

(i) The application must include a concise but complete description of the project including location of the project; resource characteristics, including the kind and amount of feedstocks; biorefinery specifications; kind, amount, and quality of the output; and monitoring equipment. Address performance on a monthly and annual basis. Describe the uses of or the market for the advanced biofuels produced by the biorefinery. Discuss the impact of reduced or interrupted feedstock availability on the biorefinery's operations.

(ii) The application must include a description of the project site and address issues such as site access, foundations, backup equipment when applicable, and the environmental information documents Form RD 1940-20 and required narrative in the 7 CFR part 1940, subpart G, Exhibit H format. Identify any unique construction and installation issues.

(iii) Sites must be controlled by the eligible borrower for at least the

financing term of any associated Federal loans or loan guarantees.

(5) *Project development schedule.* Each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the project through startup and shakedown must be provided in the application. Provide a detailed description of the project timeline including resource assessment, project and site design, permits and agreements, equipment procurement, and project construction from excavation through startup and shakedown.

(6) *Equipment procurement.* A demonstration that equipment required by the biorefinery is available and can be procured and delivered within the proposed project development schedule must be provided in the application. Biorefineries may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory.

(7) *Equipment installation.* A full description of the management of and plan for site development and systems installation, details regarding the scheduling of major installation equipment needed for project construction, and a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the biorefinery as a whole must be provided in the application.

(8) *Operations and maintenance.* The operations and maintenance requirements of the biorefinery necessary for the biorefinery to operate as designed over the useful life must be provided in the application. The application must also include:

(i) Information regarding available biorefinery and component warranties and availability of spare parts;

(ii) A description of the routine operations and maintenance requirements of the proposed biorefinery, including maintenance schedules for the mechanical, piping, and electrical systems and system monitoring and control requirements, as well as provision of information that supports expected useful life of the biorefinery and timing of major component replacement or rebuilds;

(iii) A discussion of the costs and labor associated with operating and maintaining the biorefinery and plans for in-sourcing or outsourcing. A description of the opportunities for

technology transfer for long term project operations and maintenance by a local entity or owner/operator; and

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

(9) *Decommissioning.* A description of the decommissioning process, when the project must be uninstalled or removed. A description of any issues, requirements, and costs for removal and disposal of the biorefinery.

(i) *Economic Analysis.* The feasibility study required under paragraph (f) of this section must contain a detailed economic analysis of the project. The economic analysis must describe the costs and revenues of the proposed project to demonstrate the financial performance of the project by:

(1) Providing a detailed analysis and description of project costs including project management, resource assessment, project design, project permitting, land agreements, equipment, site preparation, systems installation, startup and shakedown, warranties, insurance, financing, professional services, and operations and maintenance costs;

(2) Providing a detailed analysis and description of annual project revenues and expenses over the useful life of the project;

(3) Providing a detailed description of applicable investment incentives, productivity incentives, loans, and grants; and

(4) Identifying any other project authorities and subsidies that affect the project.

(j) *Loan Agreement.* A proposed loan agreement or a sample loan agreement with an attached list of the proposed loan agreement provisions as specified in § 4279.161(b)(11).

(k) *Lender certifications.* The lender must provide certification in accordance with § 4279.161(b)(16). In addition, the lender must certify that the project is able to demonstrate technical merit.

(l) *Intergovernmental consultation.* Intergovernmental consultation comments in accordance with RD Instruction 1940-J and 7 CFR, part 3015, subpart V.

(m) *DUNS Number.* For borrowers other than individuals, a Dun and Bradstreet Universal Numbering System (DUNS) number.

(n) *Bioenergy experience.* Identify borrower's, including its principals', prior experience in bioenergy projects and the receipt of Federal financial assistance, including the amount of funding, date received, purpose, and outcome, for such projects.

(o) *Other information.* Any other information determined by the Agency to be necessary to evaluate the application.

#### §§ 4279.262–4279.264 [Reserved]

#### § 4279.265 Guarantee application evaluation.

Instead of evaluating applications using the provisions of § 4279.165, the Agency will evaluate and award applications according to the provisions specified in paragraphs (a) through (h) of this section.

(a) *Application processing.* Upon receipt of a complete application, the Agency will conduct a review to determine if the borrower, lender, and project are eligible; if the project has technical merit as determined under paragraph (b) of this section; and if the minimum financial metric criteria under paragraph (c) of this section are met.

(1) If the borrower, lender, or the project is determined to be ineligible for any reason, the Agency will inform the lender, in writing, of the reasons. No further evaluation of the application will occur.

(2) If the Agency determines it is unable to guarantee the loan, the lender will be informed in writing. Such notification will include the reasons for denial of the guarantee.

(b) *Technical merit determination.* The Agency's determination of a project's technical merit will be based on the information in the application. Projects determined by the Agency to be without technical merit will not be selected for funding.

(c) *Financial metric criteria.* The borrower must meet the financial metric criteria specified in paragraphs (c)(1) through (3) of this section. These financial metric criteria shall be calculated from the realistic information in the pro forma statements or borrower financial statements, submitted in accordance with § 4279.261(c), of a typical operating year after the project is completed and stabilized.

(1) A debt coverage ratio of 1.0 or higher.

(2) A debt-to-tangible net worth ratio of 4:1 or lower for startup businesses and of 9:1 or lower for existing businesses.

(3) A discounted loan-to-value ratio of no more than 1.0.

(d) *Scoring applications.* The Agency will score each complete and eligible application it receives on or before June 1 in the fiscal year in which it was received. The Agency will score each eligible application that meets the minimum requirements for financial and technical feasibility using the

evaluation criteria identified below. A maximum of 100 points is possible.

(1) Whether the borrower has established a market for the advanced biofuel and the by-products produced. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the business has less than or equal to a 60 percent commitment for feedstocks, marketing agreements for the advanced biofuel, and the biobased by-products produced, 0 points will be awarded.

(ii) If the business has a greater than 60 percent commitment for feedstocks, marketing agreements for the advanced biofuel, and the biobased by-products produced, 5 points will be awarded.

(2) Whether the area in which the borrower proposes to place the biorefinery, defined as the area that will supply the feedstock to the proposed biorefinery, has other similar advanced biofuel facilities. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the area that will supply the feedstock to the proposed biorefinery does not have any other advanced biofuel biorefineries, 5 points will be awarded.

(ii) If there are other advanced biofuel biorefineries located within the area that will supply the feedstock to the proposed biorefinery, 0 points will be awarded.

(3) Whether the borrower is proposing to use a feedstock not previously used in the production of advanced biofuels. A maximum of 15 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower proposes to use a feedstock previously used in the production of advanced biofuels in a commercial facility, 0 points will be awarded.

(ii) If the borrower proposes to use a feedstock not previously used in production of advanced biofuels in a commercial facility, 15 points will be awarded.

(4) Whether the borrower is proposing to work with producer associations or cooperatives. A maximum of 5 points can be awarded. Five (5) points will be awarded if all of the conditions specified in paragraphs (d)(4)(i) through (iii) of this section are met. If any one of these conditions is not met, 0 points will be awarded. For example, consider a proposed biorefinery that will purchase \$1,000,000 of feedstock and produce \$5,000,000 worth of biofuel and \$2,000,000 worth of biobased by-products. In order to receive the 5 points under this criterion, at least \$500,000 worth of feedstock purchases

must be from producer associations or cooperatives, at least \$2,500,000 worth of biofuel must be sold to producer associations or cooperatives, and at least \$1,000,000 worth of biobased by-products must be sold to producer associations or cooperatives.

(i) At least 60 percent of the dollar value of feedstock to be used by the proposed biorefinery will be supplied by producer associations and cooperatives;

(ii) At least 60 percent of the dollar value of the advanced biofuel to be produced by the proposed biorefinery will be sold to producer associations and cooperatives; and

(iii) At least 60 percent of the dollar value of the advanced biobased by-products to be produced by the proposed biorefinery will be sold to producer associations and cooperatives.

(5) The level of financial participation by the borrower, including support from non-Federal and other private sources. Other Direct Federal funding (*i.e.*, direct loans and grants) will not be considered as part of the borrower's cash equity participation. A maximum of 20 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower's cash equity injection plus other resources results in a debt-to-tangible net worth ratio equal to or less than 3 to 1, but greater than 2.5 to 1, 10 points will be awarded.

(ii) If the borrower's cash equity injection plus other resources results in a debt-to-tangible net worth ratio equal to or less than 2.5 to 1, 20 points will be awarded.

(iii) If a project uses other Federal direct funding, 10 points will be deducted.

(6) Whether the borrower has established that the adoption of the process proposed in the application will have a positive effect on three impact areas: resource conservation, public health, and the environment. A maximum of 5 points can be awarded. Based on what the borrower has provided in either the application or the feasibility study, points to be awarded will be determined as follows:

(i) If process adoption will have a positive impact on any one of the three impact areas (resource conservation, public health, or the environment), 1 point will be awarded.

(ii) If process adoption will have a positive impact on two of the three impact areas, 3 points will be awarded.

(iii) If process adoption will have a positive impact on all three impact areas, 5 points will be awarded.

(7) Whether the borrower can establish that, if adopted, the biofuels production technology proposed in the

application will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the borrower has not established, through an independent third party (*i.e.*, feasibility study), that the biofuels production technology proposed in the application, if adopted, will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, 0 points will be awarded.

(ii) If the borrower has established, through an independent third party (*i.e.*, feasibility study), that the biofuels production technology proposed in the application, if adopted, will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, 5 points will be awarded.

(8) The potential for rural economic development. If the business creates jobs with an average wage that exceeds both the State and County median household wages where the biorefinery will be located, 5 points will be awarded.

(9) The level of local ownership of the biorefinery proposed in the application. A maximum of 15 points can be awarded. Points to be awarded will be determined as follows:

(i) If more than 20 but less than or equal to 50 percent of the biorefinery's owners are local owners, 9 points will be awarded.

(ii) If more than 50 percent of the biorefinery's owners are local owners, 15 points will be awarded.

(10) Whether the project can be replicated. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

(i) If the project can be commercially replicated regionally (*e.g.*, Northeast, Southwest, *etc.*), 2 points will be awarded.

(ii) If the project can be commercially replicated nationally, up to 5 points will be awarded.

(11) If the project uses a particular technology, system, or process that is not currently operating in the advanced biofuel market as of October 1 of the fiscal year for which the funding is available, 15 points will be awarded.

(12) 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.

(e) *Ranking of applications.* The Agency will rank all scored applications to create a priority list of scored applications for that program. Unless

otherwise specified in a notice published in the **Federal Register**, the Agency will rank applications on or before May 31 for complete and eligible applications received by March 1 and on or before August 31 for complete and eligible applications received on or before June 1.

(1) All applications that are ranked in a given fiscal year will be considered for selection for funding for that entire fiscal year.

(2) When an application scored in first set of applications is carried forward into the second set of applications, it will be competed against all of the applications in the second set using its score from the first set of applications.

(f) *Selection of applications for funding.* Using the priority list created under paragraph (e) of this section, the Agency will select applications for funding based on the criteria specified in paragraphs (f)(1) through (3) of this section. The Agency will notify, in writing, lenders whose applications have been selected for funding.

(1) *Ranking.* The Agency will consider the score an application has received compared to the scores of other applications in the priority list, with higher scoring applications receiving first consideration for funding. A minimum score of 55 points is required in order to be considered for a guarantee.

(2) *Availability of budgetary authority.* The Agency will consider the size of the request relative to the budgetary authority that remains available to the program during the fiscal year.

(i) If there is insufficient budgetary authority during a particular funding period to select a higher scoring application, the Agency may elect to select the next highest scoring application for further processing. Before this occurs, the Agency will provide the borrower of the higher scoring application the opportunity to reduce the amount of its request to the amount of budgetary authority available. If the borrower agrees to lower its request, it must certify that the purposes of the project can be met, and the Agency must determine the project is financially feasible at the lower amount.

(ii) If the amount of funding required is greater than 25 percent of the program's outstanding budgetary authority, the Agency may elect to select the next highest scoring application for further processing, provided the higher scoring borrower is notified of this action and given an opportunity to revise their application and resubmit it.

(3) *Availability of other funding sources.* If other financial assistance is

needed for the project, the Agency will consider the availability of other funding sources. If the lender cannot demonstrate that funds from these sources are available at the time of selecting applications for funding or potential funding, the Agency may instead select the next highest scoring application for further processing ahead of the higher scoring application.

(g) *Ranked applications not funded.* A ranked application that is not funded in the fiscal year in which it was submitted will not be carried forward into the next fiscal year. The Agency will notify the lender in writing. If an application has been selected for funding, but has not been funded because additional information is needed, the Agency will notify the lender of what information is needed, including a timeframe for the lender to provide the information. If the lender does not provide the information within the specified timeframe, the Agency will remove the application from further consideration and will so notify the lender.

(h) *Wage rates.* As a condition of receiving a loan guaranteed under this subpart, each borrower shall ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with guaranteed loan funds under this subpart shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 through 3144, 3146, and 3147 of title 40, U.S.C. Awards under this subpart are further subject to the relevant regulations contained in title 29 of the Code of Federal Regulations.

#### §§ 4279.266–4279.279 [Reserved]

#### § 4279.280 Changes in borrowers.

All changes in borrowers must be in accordance with § 4279.180, but the eligibility requirements of this program apply.

#### § 4279.281 Conditions precedent to issuance of loan note guarantee.

The loan note guarantee will not be issued until the lender certifies to the conditions identified in § 4279.181(a) through (o) and paragraphs (a) through (g) of this section. If the lender is unable to provide any of the certifications required under this section, the lender must provide an explanation satisfactory to the Agency as to why the lender is unable to provide the certification.

(a) For loans exceeding \$150,000, the lender has certified its compliance with the Anti-Lobby Act (18 U.S.C. 1913).

Also, if any funds have been, or will be, paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to guarantee a loan, the lender shall completely disclose such lobbying activities in accordance with 31 U.S.C. 1352.

(b) Where applicable, the lender must certify that the borrower has obtained:

(1) A legal opinion relative to the title to rights-of-way and easements. Lenders are responsible for ensuring that borrowers have obtained valid, continuous, and adequate rights-of-way and easements needed for the construction, operation and maintenance of a facility.

(2) A title opinion or title insurance showing ownership of the land and all mortgages or other lien defects, restriction or encumbrances, if any. It is the responsibility of the lender to ensure that the borrower has obtained and recorded such releases, consents, or subordinations to such property rights from holders of outstanding liens or other instruments as may be necessary for the construction, operation and maintenance of the facility and to provide the required security. For example, when a site is for major structures for utility-type facilities (such as a gas distribution system) and the lender and borrower are able to obtain only a right-of-way or easement on such site rather than a fee simple title, such a title opinion must be requested.

(c) The minimum financial criteria, including those financial criteria contained in the Conditional Commitment, have been maintained through the issuance of the loan note guarantee. Failure to maintain these financial criteria shall result in an ineligible application.

(d) Each borrower shall certify to the lender that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with guaranteed loan funds under this subpart shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 through 3144, 3146, and 3147 of title 40 U.S.C. Awards under this subpart are further subject to the relevant regulations contained in title 29 of the Code of Federal Regulations.

(e) The lender certifies that it has reviewed all contract documents and verified compliance with Sections 3141

through 3144, 3146, and 3147 of title 40 U.S.C., and title 29 of the Code of Federal Regulations. The lender will certify the same process will be completed for all future contracts and any changes to existing contracts.

(f) The lender certifies that the proposed facility complies with all Federal, State, and local laws and regulatory rules that are in existence and that affect the project, the borrower, or lender activities.

(g) The lender will notify the Agency in writing whenever there has been a change in the classification of a loan within 15 calendar days of such change.

#### §§ 4279.282–4279.289 [Reserved]

#### § 4279.290 Requirements after project construction.

Once the project has been constructed, the lender must:

(a) Provide the Agency annual reports from the borrower commencing the first full calendar year following the year in which project construction was completed and continuing for the life of the guaranteed loan. The borrower's reports will include, but not be limited to, the information specified in the following paragraphs, as applicable.

(1) The actual amount of advanced biofuels produced to assess whether project goals are being met.

(2) If applicable, documentation that identified health and/or sanitation problems have been solved.

(3) A summary of the cost of operating and maintaining the facility.

(4) Description of any maintenance or operational problems associated with the facility.

(5) Certification that the project is and has been in compliance with all applicable State and Federal environmental laws and regulations.

(6) The number of jobs created.

(7) A description of the status of the project's feedstock including, but not limited to, the feedstock being used, outstanding feedstock contracts, feedstock changes and interruptions, and quality of the feedstock;

(8) The results of the annual inspections conducted under paragraph (b) of this section; and

(b) For the life of the guaranteed loan, conduct annual inspections.

§§ 4279.291–4279.300 [Reserved]

### PART 4287—SERVICING

3. The authority citation for part 4287 continues to read as follows:

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

4. Part 4287 is amended by adding a new subpart D to read as follows:

#### Subpart D—Servicing Biorefinery Assistance Guaranteed Loans

Sec.

4287.301 Introduction.

4287.302 Definitions.

4287.303 Exception authority.

4287.304–4287.305 [Reserved]

4287.306 Appeals.

4287.307 Servicing.

4287.308–4287.400 [Reserved]

#### Subpart D—Servicing Biorefinery Assistance Guaranteed Loans

##### § 4287.301 Introduction.

(a) This subpart supplements part 4279, subparts A and C of this chapter by providing additional requirements and instructions for servicing and liquidating all Biorefinery Assistance Guaranteed Loans.

(b) The lender will be responsible for servicing the entire loan and will remain mortgagee and secured party of record notwithstanding the fact that another party may hold a portion of the loan. The entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan. The unguaranteed portion of a loan will neither be paid first nor given any preference or priority over the guaranteed portion of the loan.

(c) Copies of all forms, regulations, and Instructions referenced in this subpart are available in any Agency office. Whenever a form is designated in this subpart, that designation includes predecessor and successor forms, if applicable, as specified by the field or National Office.

##### § 4287.302 Definitions.

The definitions and abbreviations contained in § 4279.2 subpart A and in § 4279.202 of subpart C of part 4279 of this chapter apply to this subpart.

##### § 4287.303 Exception authority.

Section 4279.15 of subpart A of part 4279 of this chapter applies to this subpart.

##### §§ 4287.304–4287.305 [Reserved]

##### § 4287.306 Appeals.

Section 4279.16 of subpart A of part 4279 of this chapter applies to this subpart.

##### § 4287.307 Servicing.

Except as specified in paragraphs (a) through (k) of this section, all loans guaranteed under this subpart shall comply with the provisions found in §§ 4287.101 through 4287.199 of this chapter. If the Agency determines that the lender is not in compliance with its servicing responsibilities, the Agency reserves the right to take any action the

Agency determines necessary to protect the Agency's interests with respect to the loan. If the Agency exercises this right, the lender must cooperate with the Agency. Any cost to the Agency associated with such action will be assessed against the lender.

(a) *Periodic reports.* Each lender shall submit periodic reports, on a quarterly basis, unless otherwise determined by the Agency to meet the financial interests of the United States, regarding the condition of its Agency guaranteed loan portfolio (including borrower status and loan classification) and any material adverse change in the general financial condition of the borrower since the last periodic report was submitted.

(b) *Default reports.* Lenders shall submit monthly default reports, including borrower payment history, for each loan in monetary default using a form approved by the Agency.

(c) *Financial reports.* In addition to complying with the financial reports specified in § 4287.107(d),

(1) The financial reports required under 4287.107(d) may be specified in either the loan agreement or the Conditional Commitment;

(2) The lender must submit to the Agency quarterly financial statements within 45 days of the end of each quarter; and

(3) The annual financial statements required under § 4287.107(d)(1)(ii) must be audited financial statements.

(d) *Additional loans.* Instead of complying with the additional expenditures provisions specified in § 4287.107(e), the lender may make additional expenditures or new loans to a borrower with an outstanding loan guaranteed under this Notice only with prior written Agency approval. The Agency will only approve additional expenditures or new loans to the extent such actions where the expenditure or loan will not violate one or more of the loan covenants of the borrower's loan agreement. In all instances, the lender must notify the Agency when they make any additional expenditures or new loans. In all cases, any additional expenditure or loan made by the lender must be junior in priority to the loan guaranteed hereunder.

(e) *Collateral inspection and release.* In lieu of complying with § 4287.113, lenders must comply with the provisions of this paragraph. The lender must inspect the collateral as often as necessary to properly service the loan. The Agency will require prior approval of the release of collateral, except in those instances where the proceeds are used to pay down debt in order of lien priority, or to acquire replacement

equipment, or where the release of collateral is made under the abundance of collateral provision of the applicable security agreement. Appraisals on the collateral being released will be required on all transactions exceeding \$250,000 and will be at the expense of the borrower. The appraisal must meet the requirements of § 4279.244. The sale or release of collateral must be based on an arm's length transaction, unless otherwise approved by the Agency in writing.

(1) Lenders may, over the life of the guaranteed loan, release collateral with a cumulative value of up to 20 percent of the original loan amount without Agency concurrence if the proceeds generated are used to pay down secured debt in order of lien priority or to buy replacement collateral.

(2) Release of collateral with a cumulative value in excess of 20 percent of the original loan or when the proceeds will not be used to pay down secured debt or to buy replacement collateral, must be requested, in writing, by the lender and concurred by the Agency, in writing, in advance of the release. A written evaluation will be completed by the lender to justify the release.

(3) Lenders may not release collateral with a value of more than 10 percent of the original loan amount at any one time and within any one calendar year without Agency concurrence.

(4) Any release of collateral must not adversely affect the project's operation or financial condition.

(f) *Transfers and assumptions.* Transfers and assumptions shall comply with § 4287.134 and with paragraphs (f)(1) through (3) of this section.

(1) The Agency may charge the lender a nonrefundable transfer fee at the time of a transfer application. The Agency will set the amount of the transfer fee in an annual notice of funds availability.

(2) Assumption shall be deemed to occur in the event of a change in the control of the borrower. For purposes of the loan, change of control means the merger, sale of all or substantially all of the assets of the borrower, or the sale of more than 25 percent of the stock or other equity interest of either the borrower or its corporate parent.

(3) The Agency will not approve any change in terms that results in an increase in the cost of the loan guarantee, unless the Agency can secure any additional budget authority that would be required.

(g) *Substitution of lender after issuance of the Loan Note Guarantee.* All substitutions of lenders must comply with § 4287.135 except that, instead of approving a new lender as a

substitute lender using the provisions of § 4287.135(a), the Agency may approve the substitution of a new lender if the proposed substitute lender:

(1) Is an eligible lender in accordance with § 4279.202(b);

(2) Is able to service the loan in accordance with the original loan documents; and

(3) Acquires title to the unguaranteed portion of the loan held by the original lender and assumes all original loan requirements, including liabilities and servicing responsibilities.

(h) *Default by borrower.* In addition to complying with § 4287.145, if a loan goes into default, the lender must provide the notification required under § 4287.145(a) to the Agency within 15 calendar days of when a borrower is 30 days past due on a payment or is otherwise in default of the Loan Agreement.

(i) *Protective advances.* All protective advances made by the lender must comply with § 4287.156 and the provisions of paragraphs (i)(1) and (2) of this section.

(1) Instead of the \$5,000 specified in § 4279.156(c), Agency written authorization is required when cumulative protective advances exceed \$100,000, unless otherwise specified by the Agency at a lesser amount.

(2) The lender must obtain written Agency approval for any protective advance that will singularly or cumulatively amount to more than \$100,000 or 10% of the guaranteed loan, whichever is less.

(j) *Determination of loss and payment.* In addition to complying with § 4279.158, if a lender receives a final loss payment, the lender must submit to the Agency an annual report on its collection activities for each unsatisfied account for 3 years following payment of the final loss claim.

#### §§ 4287.308–4287.400 [Reserved]

Dated: April 5, 2010.

**Judith A. Canales,**

*Administrator, Rural Business-Cooperative Service.*

[FR Doc. 2010–8274 Filed 4–15–10; 8:45 am]

**BILLING CODE 3410–XY–P**

## DEPARTMENT OF AGRICULTURE

### Rural Business-Cooperative Service

#### 7 CFR Part 4288

RIN 0570–AA74

#### Repowering Assistance Payments to Eligible Biorefineries

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

**ACTION:** Proposed rule.

**SUMMARY:** The Rural Business-Cooperative Service, an agency of the U.S. Department of Agriculture, proposes a program to make payments to eligible biorefineries. These payments would be to encourage the use of renewable biomass as a replacement fuel source for fossil fuels used to provide process heat or power in the operation of these eligible biorefineries. This program is authorized under Title IX, Section 9001, of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246).

**DATES:** Comments on the proposed rule must be received on or before June 15, 2010. The comment period for the information collection under the Paperwork Reduction Act of 1995 continues through June 15, 2010.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* For paper, disk, or CD-ROM submissions, mail comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Stop 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.

- *Hand Delivery/Courier:* Submit your comments via Federal Express mail, or other courier service requiring a street address, to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

*Instructions:* All submissions received must include the agency name and the docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Comments” heading of the