

PART 4279 – GUARANTEED LOANMAKING

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

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PART 4279 - GUARANTEED LOANMAKING

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

General

§ 4279.201 Purpose and scope.

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

- (a) This subpart and subpart D of part 4287 of this chapter contain the regulations for this Program.
- (b) The Lender is responsible for ascertaining that all requirements for making, securing, servicing, and collecting the loan are complied with.
- (c) Whether specifically stated or not, whenever Agency approval is required, it must be in writing.
- (d) Copies of all forms, regulations, and instructions referenced in this subpart are available in any Agency office and from the USDA Rural Development Web site at <http://www.rd.usda.gov/programs-services/biorefinery-assistance-program>. Whenever a form is designated in this subpart, it is initially capitalized and its reference includes predecessor and successor forms, if applicable.

DISTRIBUTION:

Guaranteed Loanmaking

§ 4279.202 Definitions and abbreviations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Biofuel. A fuel derived from Renewable Biomass.

Biogas. Renewable Biomass converted to gaseous fuel.

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

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

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

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

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

- (1) Quarter 1 begins on January 1 and ends on March 31;
- (2) Quarter 2 begins on April 1 and ends on June 30;
- (3) Quarter 3 begins on July 1 and ends on September 30;
- (4) Quarter 4 begins on October 1 and ends on December 31.

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

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

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- (1) Its revenue will be sufficient to recover the full cost of the Project over its expected life and result in an anticipated annual rate of return sufficient to encourage investors or Lenders to provide funding for the Project;
- (2) It will be able to operate profitably without public and private sector subsidies upon completion of construction (volumetric excise tax is not included as a subsidy);
- (3) Contracts for feedstock are adequate to address proposed off-take; and
- (4) It has the ability to achieve market entry, suitable infrastructure to transport product to its market is available, and the technology and related products are generally competitive in the market.

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

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

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

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

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

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

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

- (1) A technology that is being adopted in a viable Commercial-Scale operation of a Biorefinery that produces an Advanced Biofuel; or
- (2) A technology not described in paragraph (1) of this definition that has been demonstrated to have Technical and Economic Potential for commercial application in a Biorefinery that produces an Advanced Biofuel.

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

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

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

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

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

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

Good cause. A justification representing a reasonable approach given:

- (1) the reasonably available alternatives,
- (2) all known relevant factors,
- (3) program requirements, and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Person. An individual or entity.

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

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

Pro rata. On a proportional basis.

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

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

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

Renewable biomass.

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

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

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

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

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

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

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

Rural or rural area. See 7 USC 1991(a)(13)((A) and (D) et seq.

Secretary. The Secretary of the Department of the Agriculture.

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

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

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

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

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

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

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

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

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

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

§ 4279.203 Exception authority.

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

§ 4279.204 Appeals.

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

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

§ 4279.205 Prohibition under Agency programs.

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

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

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

(d) The Agency may not guarantee lease payments.

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

§ 4279.206 Agency representation.

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

§ 4279.207 [Reserved]

ELIGIBILITY REQUIREMENTS

§ 4279.208 Lender eligibility requirements.

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

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

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

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

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

§ 4279.209 Borrower eligibility requirements.

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

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

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

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

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

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

(3) Is delinquent on a Federal Debt; or

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

§ 4279.210 Project eligibility requirements.

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

(b) The Project must be for either:

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

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

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

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

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

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

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

(4) Working Capital.

(5) Cost of necessary insurance and bonds.

(6) Cost of financing, including capitalized Interest during construction period, legal fees, transaction costs, and customary fees charged by the lender, excluding the guaranteed loan fee and annual renewal fees.

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

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

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

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

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

(e) Ineligible Project costs include:

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

(2) Any line of credit;

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

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

§§ 4279.211 - 4279.213 [Reserved]

LENDER FUNCTIONS AND RESPONSIBILITIES

§ 4279.214 General functions and responsibilities.

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

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

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

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

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

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

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

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

- (6) Supervising construction;
- (7) Distributing loan funds;
- (8) Servicing guaranteed loans in a reasonable manner, including liquidation if necessary;
- (9) Following Agency regulations and agreements;
- (10) Obtaining Agency approvals or concurrence as required; and
- (11) Reporting all Conflicts of Interest, or appearances thereof, to the Agency.

§ 4279.215 Credit evaluation.

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

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

- (1) The feasibility of the Project and Borrower and likelihood that the Project and Borrower will produce sufficient revenues to service the Project's debt obligations over the life of the loan guarantee and result in sufficient returns to investors;
- (2) Project and Borrower debt structure and characteristics and debt repayment ability;
- (3) Revenues of the Project and Borrower, strength and duration of off-take contracts and counterparty agreements, market demand and competitive position;
- (4) Technical feasibility, demonstrated performance of the technology and readiness to commercialize the technology;

§ 4279.215(b) (Con.)

- (5) Ownership structure of the Project and Borrower, strength of ownership and sponsors, commitment and amount of equity investment from ownership, sponsors and other equity investors;
- (6) Operational management and experience;
- (7) Complexity of construction/completion, terms of construction contracts, experience and financial strength of the construction contractor or engineering, procurement, and construction (EPC) contractor;
- (8) Availability and depth of resource/feedstock market, strength and duration of purchase agreements, and availability of substitutes;
- (9) Contracts and intellectual property rights, and state and local regulations;
- (10) Energy, infrastructure and environmental considerations;
- (11) The extent to which Project Costs are funded by the guaranteed loan or other Federal and non-Federal governmental assistance such as grants, tax credits, or other loan guarantees;
- (12) Economic safeguards of the Project including contingency reserve funds and protections and safeguards provided to the Agency and Lender in the event of default through loan collateral and ownership and sponsorship guarantors, and;
- (13) Other criteria that the Agency deems relevant.

§ 4279.216 Environmental responsibilities.

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

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

(b) Lenders must ensure that the Borrower has:

(1) Provided the necessary environmental information to enable the Agency to undertake its environmental review process in accordance with 7 CFR part 1940, subpart G, or successor regulations, including the provision of all required Federal, State, and local permits, and has completed Form RD 1940-20, "Request for Environmental Information," and Exhibit H "Environmental Assessment for Class II Actions" (when required by 7 CFR part 1940, subpart G);

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

(3) Not taken any actions or incurred any obligations with respect to the proposed Project that will either limit the range of alternatives to be considered during the Agency's environmental review process or which will have an adverse effect on the environment.

(c) Lenders must assist in the collection of additional data when the Agency needs such data to complete its environmental review of the proposal and assist in the resolution of environmental issues.

§ 4279.217 Oversight and monitoring.

The Lender must permit representatives of the Agency (or other agencies of the United States) to inspect and make copies of any records of the Lender pertaining to Program guaranteed loans during regular office hours of the Lender or at any other time upon agreement between the Lender and the Agency. In addition, the Lender must cooperate fully with Agency oversight and monitoring of all Lenders involved in any manner with any loan guarantee under this Program to ensure compliance with this subpart. Such oversight and monitoring will include, but is not limited to, reviewing Lender records and meeting with Lenders (in accordance with § 4287.307(d) of this chapter).

§ 4279.218 [Reserved]

§ 4279.219 [Reserved]

CONDITIONS OF GUARANTEE

§ 4279.220 General conditions of guarantee.

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

(a) Full faith and credit.

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

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

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

(ii) The violation of usury laws;

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

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

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

(3) The Agency will guarantee payment as follows:

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§ 4279.220(a)(3) (Con.)

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

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

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

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

(b) Credit quality of Borrower. The Agency will provide guarantees only after consideration is given to the Borrower's overall credit quality and to the terms and conditions of any applicable subsidies, tax credits, and other such incentives.

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

(d) Gross Negligence. Upon written request of the Lender, the Agency will consider changing the negligence standard to Grossly Negligent Loan Origination and Grossly Negligent Loan Servicing on a case-by-case basis. The Lender must establish to the Agency's satisfaction that changing to the gross negligence standard does not materially impair the Agency's interests, solely at the Agency's discretion, subject to:

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

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

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

§ 4279.221 Rights and liabilities.

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

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

(b) A guarantee and right to require purchase will be directly enforceable by a Holder notwithstanding any fraud or misrepresentation by the Lender or any unenforceability of the guarantee by the Lender, except for fraud or misrepresentation of which the Holder had actual knowledge at the time it became the Holder or in which the Holder participates or condones.

(c) The Lender must reimburse the Agency for any payments the Agency makes to a Holder of Lender's guaranteed loan that, under the Loan Note Guarantee, would not have been paid to the Lender had the Lender retained the entire interest in the guaranteed loan and not conveyed an interest to a Holder.

§ 4279.222 Payments.

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

§ 4279.223 Sale or assignment of guaranteed loan.

The Lender may Participate or sell all or part of the guaranteed portion of the loan or retain the entire loan. The Lender must fully disburse and properly close a loan prior to sale of any portion of the Promissory Note(s). The Lender cannot Participate or sell any amount of the guaranteed or unguaranteed portion of the loan to the Borrower or its parent, subsidiary or Affiliate or to officers, directors, stockholders, other owners, or members of their Immediate Families. The Lender cannot share any premium received from the sale of a guaranteed loan in the secondary market with a Loan Packager or other Loan Service Provider. The participating Lenders and Holders and the Borrower can have no rights or obligations to one another. If the Lender desires to market all or part of the guaranteed portion of the loan at or subsequent to loan closing, such loan must not be in Default. Lenders may use either the single Promissory Note or multi-note system as outlined in paragraphs (a) and (b) of this section.

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

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

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

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

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

(i) The original was lost, stolen, destroyed, mutilated, or defaced and

(ii) The reissue is in accordance with § 4279.226.

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

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

§ 4279.224 Minimum retention.

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

§ 4279.225 Repurchase from Holder.

(a) Repurchase by Lender. A Lender has the option to repurchase the unpaid guaranteed portion of the loan from a Holder within 30 days of written demand by the Holder when the Borrower is in Default not less than 60 days on principal or Interest due on the loan; or when the Lender has failed to remit to the Holder its Pro Rata share of any payment within 30 days of the Lender's receipt thereof from the Borrower. The repurchase by the Lender will be for an amount equal to the unpaid guaranteed portion of principal and accrued Interest less the Lender's servicing fee. The Holder must concurrently send a copy of the demand letter to the Agency. The Lender must accept an assignment without recourse from the Holder upon repurchase. The Lender is encouraged to repurchase the loan, upon written demand from the Holder, to facilitate the accounting of funds, resolve any loan problem, and resolve the Default, where and when reasonable. The benefit to the Lender is that it may re-sell the guaranteed portion of the loan in order to continue collection of its servicing fee if the Default is cured. The Lender must notify, in writing, the Holder and the Agency of its decision.

(b) Agency repurchase.

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

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

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

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

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

(6) The Holder's demand to the Agency must include a copy of the written demand made upon the Lender. The Holder must also include evidence of its right to require payment from the Agency. Such evidence must consist of either the original of the Loan Note Guarantee properly endorsed to the Agency or the original of the Assignment Guarantee Agreement properly assigned to the Agency without recourse including all rights, title, and interest in the

§ 4279.225(b)(6) (Con.)

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

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

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

(c) Repurchase for servicing. If the Lender, Borrower, and Holder are unable to agree to restructuring of loan repayment, Interest rate, or loan terms to resolve any loan problem or resolve the Default and repurchase of the guaranteed portion of the loan is necessary to adequately service the loan, the Holder must sell the guaranteed portion of the loan to the Lender for an amount equal to the unpaid principal and Interest on such portion less the Lender's servicing fee. The Lender must not repurchase from the Holder for arbitrage or other purposes to further its own financial gain. Any repurchase must only be made after the Lender obtains the Agency's written approval. If the Lender does not repurchase the guaranteed portion from the Holder, the Agency may, at its option, purchase such guaranteed portion for servicing purposes.

§ 4279.226 Replacement of document.

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

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

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

(i) Name and address of owner;

(ii) Name and address of the Lender of record;

(iii) Capacity of Person certifying;

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

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

§ 4279.226(b)(1) (Con.)

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

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

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

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

§ 4279.227 Equal Credit Opportunity Act.

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

§§ 4279.228 - 4279.230 [Reserved]

LOAN PROCESSING

§ 4279.231 Fees.

(a) Guarantee fee. The guarantee fee is paid to the Agency by the Lender and is nonrefundable. The fee may be passed on to the Borrower. Issuance of the Loan Note Guarantee is conditioned on payment of the guarantee fee by closing. The guarantee fee will be the percentage specified in paragraphs (a)(1) or (2) of this section, as applicable, unless otherwise specified by the Agency in a notice published in the Federal Register, multiplied by the principal loan amount multiplied by the percent of guarantee and will be paid one time only at the time the Loan Note Guarantee is issued.

(1) For loans receiving a 90 percent guarantee, the guarantee fee is three percent.

(2) For loans receiving less than a 90 percent guarantee, the guarantee fee is:

(i) Two percent for guarantees on loans greater than 75 percent of total Eligible Project Costs.

(ii) One and one-half percent for guarantees on loans of greater than 65 percent but less than or equal to 75 percent of total Eligible Project Costs.

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

§ 4279.231 (Con.)

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

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

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

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

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

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

(ii) Seventy five basis points (0.75 percent) for guarantees on loans that were originally greater than 65 percent but less than or equal to 75 percent of total Eligible Project Costs.

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

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

§ 4279.232 Guaranteed loan funding.

(a) The amount of a loan guaranteed for a Project under this subpart will not exceed 80 percent of total Eligible Project Costs. Total Federal participation will not exceed 80 percent of total Eligible Project Costs. The Borrower needs to provide the remaining 20 percent from non-Federal sources to complete the Project. Eligible Project Costs are specified in § 4279.210(d). If an eligible Borrower receives other direct Federal funding (i.e., direct loans or grants) for a Project, the maximum amount of the loan that the Agency will guarantee under this subpart must be reduced by the same amount of the other direct Federal funding that the eligible Borrower received for the Project. For example, an eligible Borrower is applying for a loan guarantee on a \$100,000,000 Project. If the Borrower receives no other direct Federal funding for this Project and requests an \$80,000,000 guaranteed loan, the Agency will consider a guarantee on the \$80,000,000. However, if this Borrower receives \$10,000,000 in other direct Federal funding for this Project, the Agency will only consider a guarantee on \$70,000,000.

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

(c) The maximum guarantee on the principal and Interest due on a loan guaranteed under this subpart will be determined as specified in paragraphs (c)(1) through (4) of this section.

(1) If the loan amount is equal to or less than \$125 million, 80 percent for the entire loan amount unless all of the conditions specified in paragraphs (c)(1)(i) through (iii) are met, in which case 90 percent for the entire loan amount.

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- (i) Total Federal participation, sum of the amount of the loan requested and other direct Federal funding, must not be greater than 60 percent of total Eligible Project Costs;
 - (ii) Feedstock and Off-Take Agreements of at least 1 year in duration; and
 - (iii) Total of revenues from tax credits, carbon credits, or other Federal or State subsidies cannot be greater than 10 percent of the Project's total revenues on an annual basis, in the Borrower's base case of financial projections.
- (2) If the loan amount is more than \$125 million and less than \$150 million, 80 percent for the entire loan amount.
 - (3) If the loan amount is equal to or more than \$150 million but less than \$200 million, 70 percent on the entire loan amount.
 - (4) If the loan amount is \$200 million up to and including \$250 million, 60 percent on the entire loan amount.

§ 4279.233 Interest rates.

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

- (a) A variable Interest rate must be a rate that is tied to a published base rate. The variable Interest rate must be specified in the Promissory Note and may be adjusted at specified intervals during the term of the loan, but the adjustments may not be more often than once each Calendar Quarter. The Lender must incorporate, within the variable rate Promissory Note at loan closing, the provision for adjustment of payment installments. The Lender must properly amortize the outstanding principal balance within the prescribed loan maturity in order to eliminate the possibility of a balloon payment at the end of the loan.

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

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

§ 4279.234 Terms of loan.

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

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

(b) A loan's maturity will take into consideration the use of proceeds, the useful life of assets being financed, and the Borrower's ability to repay the loan.

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

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

§ 4279.235 Collateral.

The Lender is responsible for obtaining and maintaining proper and adequate Collateral to protect the interest of the Lender, the Holder, and the Agency. Collateral must be of such a nature that repayment of the loan is reasonably ensured when considered with the integrity and ability of Project management, soundness of the Project, and the Borrower's prospective earnings. The Collateral may include, but is not limited to, the following: revenue, land, easements, rights-of-way, buildings, machinery, equipment, inventory, accounts receivable, contracts, cash, or other accounts, licenses and assignments of leases or leasehold interest.

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

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

§§ 4279.236 - 4279.242 [Reserved]

§ 4279.243 Insurance.

The Lender is responsible for ensuring that required insurance is maintained by the Borrower. The Lender must be shown as an additional insured on insurance policies (or other risk sharing instruments) that benefit the Project and must be able to assume any contracts that are material to the Project, including any feedstock or Off-Take Agreements, as may be applicable.

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

(b) Life. The Lender may require as Collateral an assignment of life insurance to insure against the risk of death of persons critical to the success of the business. When required, coverage must be in amounts necessary to provide for management succession or to protect the business. The Agency may require life insurance on key individuals for loans where the Lender has not otherwise proposed such coverage. The cost of insurance and its effect on the applicant's Working Capital must be considered as well as the amount of existing insurance that could be assigned without requiring additional expense.

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

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

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

§ 4279.244 Appraisals.

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

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

(2) Specialized appraisers will be required to complete appraisals under this section. The Agency may approve a waiver of this requirement only if a specialized appraiser does not exist in a specific industry. The Agency will require documentation that the appraiser has the necessary experience and competency to appraise the property in question.

§ 4279.244(a) (Con.)

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

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

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

§ 4279.245 Personal and corporate guarantees.

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

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

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

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

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

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

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

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

§§ 4279.246- 4279.255 [Reserved]

§ 4279.256 Construction planning and performing development.

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

§ 4279.256 (Con.)

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

(b) Project control.

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

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

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

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

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

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

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

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

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

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

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

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

- (1) Certification by the Project engineer to the Lender that the work referred to in the draw has been successfully completed;
- (2) Certification that all debts have been paid and all mechanics' liens have been waived; and
- (3) Certification that the Borrower is complying with the Davis-Bacon Act (see paragraph (h) of this section).

§ 4279.256 (Con.)

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

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

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

(h) Wage rates. As a condition of receiving a loan guaranteed under this subpart, each Borrower shall ensure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with guaranteed loan funds under this subpart shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with sections 3141 through 3144, 3146, and 3147 of title 40, U.S.C. Awards under this subpart are further subject to the relevant regulations contained in 29 CFR part 5.

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

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

(i) Certifications for each draw request:

(A) Certification by the independent engineer to the Lender that the work referred to in the draw has been successfully completed;

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

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

- (ii) List of invoices;
- (iii) Detail of equity and Guaranteed Loan funds paid to date;
- (iv) Status of construction and inspection reports; and
- (v) Concerns, potential problems, cost overruns, etc.

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

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

- (i) A copy of all required material building permits, with sign-offs;
- (ii) Notice of Completion or an Agency approved equivalent; and
- (iii) Final accounting of sources and uses of all Project funds.

§ 4279.257 [Reserved]

§ 4279.258 [Reserved]

§ 4279.259 Borrower responsibilities.

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

- (1) Land use zoning;
- (2) Health, safety, and sanitation standards as well as design and installation standards; and
- (3) Protection of the environment and consumer affairs.

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

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

(d) Access to Borrower's records. Except as provided by law, upon request by the Agency, the Borrower will permit representatives of the Agency (or other Federal agencies as authorized by the Agency) to inspect and make copies of any of the records of the Borrower's Project. Such inspection and copying may be made during regular office hours of the Borrower or at any other time agreed upon between the Borrower and the Agency.

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

APPLICATIONS

§ 4279.260 Guarantee applications - general.

(a) Application submittal.

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

(2) For each guarantee request, the Lender must submit to the Agency an application that is in conformance with § 4279.261. The methods of application submittal will be specified in the annual Federal Register notice.

(b) Application deadline. Unless otherwise specified by the Agency in a notice published in the Federal Register, application deadlines are October 1 and April 1 of each year. Complete applications must be received by the Agency on or before April 1 of each year to be considered for funding for that fiscal year. If the application deadline falls on a weekend or an observed holiday, the deadline will be the next Federal business day. The deadlines in this paragraph relate to Phase 1 applications in accordance with § 4279.261.

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

(d) Application withdrawal. During the period between the submission of an application and closing, the Lender must notify the Agency, in writing, if the Project is no longer viable or the Borrower is no longer requesting financial assistance for the Project. When the Lender so notifies the Agency, the Agency will rescind the selection or withdraw the application.

§ 4279.260 (Con.)

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

§ 4279.261 Application for loan guarantee content.

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

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

- (1) Title. Provide a descriptive title of the Project.
- (2) Borrower eligibility. Describe how the Borrower meets the eligibility criteria identified in § 4279.209.
- (3) Project eligibility. Describe how the Project meets the eligibility criteria identified in § 4279.210. Clearly state whether the application is for the construction and development of a Biorefinery or for the Retrofitting of an existing facility. Additional Project description information will be needed later in the application process.
- (4) Project funds. Submit a Spreadsheet identifying sources, amounts, and availability of funds. The Spreadsheet must also include a directory of funds source contact information. Attach any applications, correspondence, or other written communication between Borrower and fund source.

- (5) Project timeline. A projected timeline detailing the timeline commencing with the loan application phase 1, including the loan application phase 2, final Project planning and engineering, obtaining required permits, loan closing, plant construction, commissioning and ramp up through stabilized state of operation.
- (b) Application form. Form RD 4279-1 or other Agency-approved application form if specified in a Federal Register notice.
- (c) Financial statements.
- (1) The most recent audited financial statements of the Borrower, unless alternative financial statements are authorized by the Agency; and
- (2) A current (not more than 90 days old) balance sheet and a pro forma balance sheet at startup.
- (d) Financial model. Submit a financial model for the Project in the form of a financial modeling software program in an active electronic format which includes, but is not limited to, a projected Project budget and projected balance sheets, income and expense statements, cash flow statements, and Working Capital and capital expense projections for not less than the term of the loan. The projections must be displayed in a monthly format for a period of three years after stabilized operation and annually thereafter. Projections should be supported by a list of assumptions showing the basis for the projections. Depending on the complexity of the Project and the financial condition of the Borrower, the Agency may require additional financial statements and additional related information.
- (e) Feasibility Study. The Feasibility Study should be prepared by a qualified, independent third party using information gathered from other qualified parties and documents such as: independent engineer reports, marketing studies, feedstock studies, business plans and financial statements prepared by a certified public accountant. Any information used to prepare the Feasibility Study should be submitted as attachments. Elements in an acceptable Feasibility Study include, but are not limited to, the elements outlined in Table 1.

§ 4279.261(e) (Con.)

Table 1. Feasibility Study Components

(A) Executive Summary
Introduction/Project Overview (Brief general overview of Project location, size, etc.)
Economic feasibility determination
Market feasibility determination
Technical feasibility determination
Financial feasibility determination
Management feasibility determination
Recommendations for implementation
(B) Economic Feasibility
Description of feedstock and confirmation that the feedstock is not used elsewhere in the production of Advanced Biofuels or Biobased Products including Renewable Chemicals.
Feedstock: Feedstock source management, Estimates of feedstock volumes and costs, Collection, pre-treatment, transportation, and storage, and Feedstock risks.
Documentation that woody biomass feedstock from National Forest system lands or public lands cannot be used for a higher-value product.
Impacts on any other similar Biorefineries in the area in which the Borrower proposes to place the Project, defined as the area that will supply the feedstock to the proposed Project, if any.
Impacts on existing manufacturing plants or other facilities that use similar feedstock if the Borrower's proposed production technology is adopted.
Projected impact on resource conservation, public health, and the environment.
Information regarding Project site.
Availability of trained or trainable labor.
Availability of infrastructure, including utilities, and rail, air and road service to the site.
Overall economic impact of the Project, including direct jobs, indirect jobs, additional markets created for agricultural and forestry products and agricultural waste material and the potential for Rural economic development.

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Feasibility/plans of Project to work with producer associations or cooperatives and the estimated amount of annual feedstock purchased from or sold to producer associations and cooperatives.
(C) Market Feasibility
Information on the sales organization and management.
Nature and extent of market and market area.
Marketing plans for sale of projected output - principal products and Byproducts.
Extent of competition, including other similar facilities in the market area.
Commitments from purchasers of off-take - principal products and secondary products, degree of commitment, duration or terms of Off-Take Agreements, and financial strength of counterparties.
Risks related to the industry, including: Industry status; Specific market risks; and Competitive threats and advantages.
(D) Technical Feasibility
Suitability of the selected site for the intended use.
Scale of development for which the process technology has been proven (i.e., pilot, demonstration, or Semi-Work Scale Facility). Provide results from pilot, demonstration, or Semi-Work Scale Facilities that prove that the technology proposed to be used is feasible and stands a good chance of being successful. The proposed technology must meet the definition of Eligible technology.
The degree of integration of all processes should be detailed and a summary of any integrated demonstration unit test results should be submitted.
Specific volume produced from the technology of the process (expressed either as volume of feedstock processed [tons per unit of time] or as product [gallons per unit of time]).
Identification and estimation of Project operation and development costs. Specify the level of accuracy of these estimates and the assumptions on which these estimates have been based. Detailed analysis of Project costs including: Project management and professional services; resource assessment; Project design and permitting; land agreements and site preparation; equipment requirements and system installation; startup and shakedown; and warranties, insurance, financing and operation and maintenance costs.

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A projected timeline detailing Borrower plans from the time of loan application through plant construction, commissioning and ramp up should be included.
Ability of the proposed system to be commercially replicated.
Risks related to: Construction of the Biorefinery; Production of the Advanced Biofuel and Biobased Product including Renewable Chemical; Regulation and governmental action; Design-related factors that may affect Project success; and Technology scale up risk.
(E) Financial Feasibility
Reliability of the financial projections and the assumptions on which the financial statements are based, including all sources and uses of Project capital, private or public Federal and non-Federal funds. Provide detailed analysis and description of projected balance sheets, income and expense statements, and cash flow statements over the useful life of the Project.
A detailed description of and the degree financial feasibility is dependent on: Investment incentives; Productivity incentives; Loans and grants; and Other Project authorities RINs value, tax credits, other credits, and subsidies that affect the Project.
Any constraints or limitations in the financial projections.
Ability of the business to achieve the projected income and cash flow.
Assessment of the cost accounting system.
Availability of short-term credit or other means to meet seasonal business costs.
Adequacy of raw materials and supplies.
Sensitivity analysis, including feedstock and energy costs and product and Byproduct prices.

Risks related to: The Project; Borrower financing plan; The operational units; and Tax issues.
(F) Management Feasibility
Borrower and/or management's previous experience concerning: Production of Advanced Biofuel, and Biobased Product including Renewable Chemicals, as applicable; Acquisition of feedstock; Marketing and sale of off-take; and The receipt of Federal financial assistance, including amount of funding, date received, purpose, and outcome.
Management plan for procurement of feedstock and labor, marketing of the off-take, and management succession.
Risks related to: Borrower as a company (e.g., development-stage); Conflicts of Interest; and management strengths and weaknesses.
(G) Qualifications
A resume or statement of qualifications of the author and contributors of the Feasibility Study, including prior experience, must be submitted.

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(f) Business Plan. The Lender must submit the Borrower's business plan that includes the information specified in paragraphs (f)(1) through (10) of this section. Any or all of this information may be omitted if it is included in the Feasibility Study specified in paragraph (e) of this section.

- (1) Describe or provide an organizational chart of the Borrower's ownership structure and affiliation with other entities, if any. The names and a description of the relationship of the Borrower's parent, Affiliates, and subsidiaries. Identify local ownership.
- (2) The Borrower's succession planning, addressing both ownership and management.
- (3) The Borrower's experience and management experience.
- (4) The products and services to be provided and the Borrower's business strategy.
- (5) Possible vendors and models of major system components.
- (6) The availability of the resources (e.g., labor, raw materials, supplies) necessary to provide the planned products and services.
- (7) Site location and its relation to product distribution (e.g., rail lines or highways) and any land use or other permits necessary to operate the facility.
- (8) The market for the product and its competition, including any and all competitive threats and advantages.
- (9) Projected balance sheets, income and expense statements, and cash flow statements for a period of not less than three years of stabilized operation.
- (10) A description of the proposed use of funds.

(g) Scoring information. The application must contain information in a format that is responsive to the scoring criteria specified in § 4279.266.

(h) Intergovernmental consultation. Intergovernmental consultation comments in accordance with 2 CFR part 415, subpart C or successor regulation.

- (i) DUNS Number. For Borrowers other than individuals, a Dun and Bradstreet Universal Numbering System (DUNS) number, which can be obtained online at <http://fedgov.dnb.com/webform>.
- (j) Other information. Any other information determined by the Agency to be necessary to evaluate the application.
- (k) Phase 2 application contents.
 - (1) Updates, as appropriate, to contents of application materials submitted in application phase 1.
 - (2) An appraisal conducted as specified under § 4279.244.
 - (3) A proposed Loan Agreement or a sample Loan Agreement with an attached list of the proposed Loan Agreement provisions as specified in paragraphs (k)(3)(i) through (ix) of this section.
 - (i) Prohibition against assuming liabilities or obligations of others.
 - (ii) Restriction on dividend payments.
 - (iii) Limitation on the purchase or sale of equipment and fixed assets.
 - (iv) Limitation on compensation of officers and owners.
 - (v) Minimum Working Capital or current ratio requirement.
 - (vi) Maximum debt-to-net worth ratio.
 - (vii) Restrictions concerning consolidations, mergers, or other circumstances.
 - (viii) Limitations on selling the business without the concurrence of the Lender.
 - (ix) Repayment and amortization of the loan.

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(4) Environmental Assessment must meet the policies and requirements of the National Environmental Policy Act and the Agency (as specified in Exhibit H of 7 CFR part 1940, subpart G.) Guidelines for preparing the Environmental Assessment are available from the Agency and published in the annual Federal Register notice.

(5) Under the direction of the Agency, an evaluation and rating of the total Project's indebtedness, without consideration for a government guarantee, from a nationally-recognized statistical rating organization (NRSRO), as defined by the U.S. Security and Exchange Commission, for all Projects with total Eligible Project Costs of \$25 million or more unless as otherwise specified by the Agency in a notice published in the Federal Register. The evaluation and rating must be in the form of an indicative private rating, private credit analysis, or comparable analysis report and include a rating in accordance with the NRSRO's credit rating scales and include a recovery analysis. An updated rating may be required at the Agency's discretion if changes are subsequently made to the Project including changes to any contracts and agreements or changes to loan terms and conditions.

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

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

(A) Unless otherwise determined by the Agency, a personal credit report from an Agency-approved credit reporting company for individuals who are key employees of the Borrower, as determined by the Agency, and for individuals owning 20 percent or more interest in the Borrower or any owner with more than 10 percent ownership interest in the Borrower if there is no owner with more than 20 percent ownership interest in the Borrower, except for when the Borrower is a corporation listed on a major stock exchange; and

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

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

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

(8) The technical assessment must be completed by a qualified independent engineer and must demonstrate that the design, procurement, installation, startup, operation and maintenance of the Project will permit it to operate or perform as specified over its useful life in a reliable and a cost effective manner, and must identify what the useful life of the Project is. The technical assessment must also identify all necessary Project agreements, demonstrate that those agreements will be in place at or before the time of loan closing, and demonstrate that necessary Project equipment and services will be available over the useful life of the Project. The technical assessment must be based upon verifiable data and contain sufficient information and analysis so that a determination can be made on the technical feasibility of achieving the levels of income or production that are projected in the financial statements. All technical information provided must follow the format specified in paragraphs (k)(8)(i) through (ix) of this section. Supporting information may be submitted in other formats. Design drawings and process flow charts are required as exhibits. A discussion of a topic identified in paragraphs (k)(8)(i) through (ix) of this section is not necessary if the topic is not applicable to the specific Project. Questions identified in the Agency's technical review of the Project must be answered to the Agency's satisfaction before the application will be approved. All Projects require the services of an independent, third-party professional engineer.

(i) Qualifications of Project team. The Project team will vary according to the complexity and scale of the Project. The Project team must have demonstrated expertise in similar Advanced Biofuel and Biobased Product including Renewable Chemical, as applicable, technology development, engineering, installation, and maintenance. Identify Borrower's, including its principals', prior experience in bioenergy projects and the receipt of Federal financial assistance, including the

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amount of funding, date received, purpose, and outcome, for such projects. Authoritative evidence that Project team service providers have the necessary professional credentials or relevant experience to perform the required services for the development, construction, and Retrofitting, as applicable, of technology for producing Advanced Biofuels and Biobased Products including Renewable Chemicals, if applicable, must be provided. In addition, authoritative evidence that vendors of proprietary components can provide necessary equipment and spare parts for the facility to operate over its useful life must be provided. The application must:

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

(B) Discuss the manufacturers of major components of Advanced Biofuels and Biobased Product including Renewable Chemical technology equipment being considered in terms of the length of time in business and the number of units installed at the capacity and scale being considered;

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

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

(ii) Agreements and permits. The application must identify all necessary agreements and permits required for the Project and the status and schedule for securing those agreements and permits, including the items specified in paragraphs (k)(8)(ii)(A) through (F) of this section.

(A) All facilities funded under this subpart must be installed in accordance with applicable local, State, and national codes and applicable local, State, and Federal regulations. Identify zoning and code requirements and necessary permits and the schedule for meeting those requirements and securing those permits.

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

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

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

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

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

(iii) Resource assessment. The application must provide adequate and appropriate evidence of the availability of the feedstocks required for the facility to operate as designed. Indicate the type and quantity of the feedstock, and discuss storage of the feedstock, where applicable, and competing uses for the feedstock. Indicate shipping or receiving methods and required infrastructure for shipping, and other appropriate transportation mechanisms including methods and systems to prevent the spread of invasive species. For proposed Projects with an established resource, provide a summary of the resource.

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(iv) Design and engineering. The application must provide authoritative evidence that the facility will be designed and engineered so as to meet its intended purposes, will ensure public safety, and will comply with applicable laws, regulations, agreements, permits, codes, and standards. Projects shall be engineered by a qualified entity. Each facility must be engineered as a complete, integrated facility. The engineering must be comprehensive, including site selection, systems and component selection, and systems monitoring equipment. All Projects funded under this subpart must be constructed by a qualified entity.

(A) The application must include a concise but complete description of the Project, including location of the Project; resource characteristics, including the kind and amount of feedstocks; facility specifications; kind, amount, and quality of the output; and monitoring equipment. Address performance on a monthly and annual basis. Describe the uses of or the market for the Advanced Biofuels and Biobased Product including Renewable Chemical produced by the facility. Discuss the impact of reduced or interrupted feedstock availability on the facility's operations.

(B) The application must include:

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

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

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

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

(v) Project development schedule. The application must describe each significant task, its beginning and end, and its relationship to the time needed to initiate and carry the Project through startup and shakedown. Provide a detailed description of the Project timeline including resource assessment, Project and site design, permits and agreements, equipment procurement, and Project construction from excavation through startup and shakedown.

(vi) Equipment procurement. The application must demonstrate that equipment required by the facility is available and can be procured and delivered within the proposed Project development schedule. Projects funded under this subpart may be constructed of components manufactured in more than one location. Provide a description of any unique equipment procurement issues such as scheduling and timing of component manufacture and delivery, ordering, warranties, shipping, receiving, and on-site storage or inventory.

(vii) Equipment installation. The application must provide a full description of the management of and plan for site development and systems installation, details regarding the scheduling of major installation equipment needed for Project construction, and a description of the startup and shakedown specification and process and the conditions required for startup and shakedown for each equipment item individually and for the facility as a whole.

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

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

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

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(C) A discussion of the costs and labor associated with operating and maintaining the facility and plans for insourcing or outsourcing. A description of the opportunities for technology transfer for long-term Project operations and maintenance by a local entity or owner/operator; and

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

(ix) Decommissioning. A description of the decommissioning process, when the Project must be uninstalled or removed. A description of any issues, requirements, and costs for removal and disposal of the facility.

§§ 4279.262 - 4279.264 [Reserved]

§ 4279.265 Guarantee application processing.

(a) Eligibility determination. Upon receipt of a complete Phase 1 application, the Agency will determine if the Borrower, Lender, and Project are eligible and if the Project is technically and economically feasible, as provided under paragraph (b) of this section.

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

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

(b) Technical and economic feasibility.

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

- (i) The Agency's analysis of the technical report and Feasibility Study submitted in the application conducted by qualified independent third parties;
- (ii) The Lenders credit evaluation; and
- (iii) Other application materials.

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

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

§ 4279.266 Guarantee application scoring.

Using the evaluation criteria identified in this section, the Agency will score each eligible Biorefinery application that meets the minimum requirements for technical and economic feasibility. A maximum of 125 points is possible. The Agency will award points based on its review and analysis of all application materials. Clarifications for the scoring on Biobased Product Manufacturing applications will be made available by a notice published in the Federal Register.

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

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

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

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

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

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

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

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

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

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

(i) If the Borrower commits to enter into Off-Take Agreements prior to loan closing for purchase for greater than or equal to 50 percent of the dollar value of off-take with an off-take counterparty with a corporate credit rating not less than AA, Aa2, or equivalent, 4 points will be awarded.

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

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

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

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

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

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

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

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

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

(c) Whether the Borrower is proposing to use a feedstock or biobased output of Biorefineries not previously used in the production of Advanced Biofuels or Biobased Products including Renewable Chemicals. A maximum of 10 points can be awarded. Points to be awarded will be determined as follows:

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

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

(d) Whether the Borrower is proposing to work with producer associations or cooperatives. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:

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

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

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

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

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

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

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

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

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(f) Whether the Borrower has established that the adoption of the process proposed in the application will have a positive effect on three impact areas: resource conservation (e.g., water, soil, forest), public health (e.g., potable water, air quality), and the environment (e.g., compliance with an applicable renewable fuel standard, greenhouse gases, emissions, particulate matter). A maximum of 10 points can be awarded. Points to be awarded will be determined as follows:

- (1) If process adoption will have a positive impact on any one of the three impact areas (resource conservation, public health, or the environment), 3 points will be awarded.
- (2) If process adoption will have a positive impact on two of the three impact areas, 6 points will be awarded.
- (3) If process adoption will have a positive impact on all three impact areas, 10 points will be awarded.
- (4) If the Project proposes to use a feedstock that can be used for human or animal consumption, 5 points will be deducted from the score.

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

- (1) If the Borrower has failed to establish, through an independent third-party Feasibility Study, that the production technology proposed in the application, if adopted, will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, 0 points will be awarded.
- (2) If the Borrower has established, through an independent third-party Feasibility Study, that the production technology proposed in the application, if adopted, will not have any economically significant negative impacts on existing manufacturing plants or other facilities that use similar feedstocks, 5 points will be awarded.

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

- (h) The potential for Rural economic development. A maximum of 20 points will be awarded. Points to be awarded will be determined as follows:
 - (1) If the Project is located in a Rural Area, 5 points will be awarded.
 - (2) If the Project creates jobs through direct employment with an average wage that exceeds the County median household wages where the Project will be located, 5 points will be awarded.
 - (3) If the majority of feedstock to be utilized by the Project, on an annual basis, is harvested from the land, 10 points will be awarded.

- (i) The level of local ownership of the facility proposed in the application. A maximum of 5 points can be awarded. Points to be awarded will be determined as follows:
 - (1) If Local Owners have an ownership interest in the facility of more than 20 percent but less than or equal to 50 percent, 3 points will be awarded.
 - (2) If Local Owners have an ownership interest in the facility of more than 50 percent, 5 points will be awarded.

- (j) Whether the Project can be replicated. A maximum of 10 points can be awarded. Points to be awarded will be determined as follows:
 - (1) If the Project can be commercially replicated regionally (e.g., Northeast, Southwest, etc.), 5 points will be awarded.
 - (2) If the Project can be commercially replicated nationally, 10 points will be awarded.

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

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

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

(2) To applications that promote partnerships and other activities that assist in the development of new and emerging technologies for the development of Advanced Biofuels and Biobased Products including Renewable Chemicals, so as to, as applicable, increase the energy independence of the United States or reduce our dependence on petroleum-based chemicals and products; promote resource conservation, public health, and the environment; diversify markets for agricultural and forestry products and agriculture waste material; and create jobs and enhance the economic development of the Rural economy. These partnerships and other activities will be identified in a Federal Register notice each fiscal year.

§ 4279.267 Selecting guarantee applications.

(a) Allocation of budget authority. In administering this Program's budgetary authority each fiscal year, the Agency will allocate up to, but no more, than 50 percent of its budgetary authority, excluding funding for Biobased Product Manufacturing Projects, to fund applications received by the end of the first application window, including those carried over from the previous application period. Any funds not obligated to support applications submitted by the end of the first application window will be available to support applications received by the end of the second window, including those carried over from the previous application period. The Agency, therefore, will have a minimum of 50 percent of each fiscal year's budgetary authority for this Program available to support applications received by the end of the second application window. Administrative procedures for the funding of Biobased Product Manufacturing Projects will be made available by a Notice published in the Federal Register.

(b) Ranking of applications. The Agency will rank all complete eligible applications to create a priority list of scored Phase 1 applications for the Program. Unless otherwise specified in a notice published in the Federal Register, the Agency will rank applications by approximately October 31 for complete and eligible applications received

on or before October 1 and by approximately April 30 for complete and eligible applications received on or before April 1. All Phase 1 applications received on or before October 1 and April 1 will be ranked by the Agency and will be competed against the other applications received on or before such date.

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

(1) Ranking. The Agency will consider the score an application has received compared to the scores of other applications in the priority list created under paragraph (b) of this section, with highest scoring applications receiving first consideration for invitation to the phase 2 submittal. A minimum score of 55 points is required in order to be considered for a guarantee.

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

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

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

§ 4279.267(c) (Con.)

(3) Availability of other funding sources. If other financial assistance is needed for the Project, the Agency will consider the availability of other funding sources. If the Lender cannot demonstrate that funds from these sources are available at the time of selecting applications for funding or potential funding, the Agency may instead select the next highest scoring application for further processing ahead of the higher scoring application.

(d) Ranked applications not selected for phase 2. A ranked application that is not invited to submit phase 2 in the application cycle in which it was submitted will be carried forward one additional application cycle, which may be in the next fiscal year. The Agency will notify the Lender in writing.

§§ 4279.268 - 4279.277 [Reserved]**§ 4279.278 Loan approval and obligating funds.**

(a) Applications for loan guarantees may be approved as their Phase 2 applications are completed and approved. If an application has been selected for phase 2, but has not been approved because additional information is needed, the Agency will notify, in writing, the Lender of what information is needed, including a timeframe for the Lender to provide the information. If the Lender does not provide the information within the specified timeframe, the Agency will remove the application from further consideration and will so notify the Lender in writing.

(b) Upon approval of a loan guarantee application, the Agency will issue a Conditional Commitment to the Lender containing conditions under which a Loan Note Guarantee will be issued. The Agency will not issue a Conditional Commitment until the Agency has satisfactorily completed a Civil Rights Impact Analysis. The Conditional Commitment becomes null and void unless the conditions are accepted by the Lender and Borrower within 60 days from the date of issuance by USDA. If the conditions are not met or the Loan Note Guarantee is not issued by the Conditional Commitment expiration date, the Agency may extend the Conditional Commitment expiration date when requested by the Lender and only if there has been no Material Adverse Change in the Borrower's or Borrowers' financial condition since issuance of the Conditional Commitment.

(c) The Lender and Borrower may request changes to the Conditional Commitment. The Agency may negotiate with the Lender and the Borrower regarding any proposed changes to the Conditional Commitment. Any changes to the Conditional Commitment must be documented by written amendment to the Conditional Commitment. The changes must be for Good Cause and the Agency may deny, solely at its discretion, changes to the Conditional Commitment even if the change is otherwise in compliance with this subpart.

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

§ 4279.279 Transfer of Lenders.

(a) The Agency may approve the substitution of a new eligible Lender in place of a former Lender who has been issued an outstanding Conditional Commitment when the Loan Note Guarantee has not yet been issued provided that there are no changes in the:

- (1) Borrower's ownership or control, loan purposes, or scope of Project;
- (2) Loan terms and conditions in the Conditional Commitment; and
- (3) Loan Agreement.

(b) The Agency must determine that the new Lender is eligible in accordance with § 4279.208 prior to approving the substitution. The original Lender must provide the Agency with a letter stating the reasons it no longer desires to be a Lender for the Project. The substituted Lender must execute a new part B of Form 4279-1 and Lender's Agreement (unless a valid Lender's Agreement with the Agency already exists), and must complete a new Lender's analysis in accordance with § 4279.215. The new Lender may also be required to provide other updated application items outlined in § 4279.261(k).

§ 4279.280 Changes in Borrowers.

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

§ 4279.281 Conditions precedent to issuance of Loan Note Guarantee.

The Lender must not close the loan until all conditions of the Conditional Commitment are met or can be met. When loan closing plans are established, the Lender must notify the Agency in writing.

(a) Coincident with, or immediately after loan closing, the Lender must provide the following forms and documents to the Agency:

- (1) An executed Lender's Agreement;
- (2) Form RD 1980-19, "Guaranteed Loan Closing Report," and appropriate guarantee fee;
- (3) Copy of the executed Promissory Note(s);
- (4) Copy of the executed Loan Agreement;
- (5) Copy of the executed settlement statement and updated source and use statement including all Project funding;
- (6) Original, executed Forms RD 4279-14, as appropriate;
- (7) Borrower's loan closing balance sheet; and
- (8) Any other documents required to comply with applicable law or required by the Conditional Commitment or the Agency.

(b) The Lender must provide their certification to each condition specified in paragraphs (b) (1) through (16) of this section. The Lender may rely on certain written materials (including but not limited to certifications, evaluations, appraisals, financial statements and other reports) to be provided by the Borrower or other qualified third parties (including, among others, one or more independent engineers, appraisers, accountants, attorneys, consultants or other experts.) If the Lender is unable to provide any of the certifications required under this section, the Lender must provide an explanation satisfactory to the Agency as to why the Lender is unable to provide the certification. The Lender can request the guarantee prior to construction, but must still certify to all conditions in paragraphs (b) (1) through (16) of this section.

- (1) If required, hazard, flood, liability, worker compensation, and life insurance are in effect.

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

(3) The loan has been properly closed, and the required security instruments have been properly executed, or will be promptly obtained on any property that cannot be immediately secured under State law.

(4) The Borrower has or will have marketable title to the Collateral, subject to the guaranteed loan and to any other exceptions approved in writing by the Agency.

(5) The loan proceeds have been or will be disbursed for purposes and in amounts consistent with the Conditional Commitment and the application submitted to the Agency.

(6) When required, personal or corporate guarantees have been obtained in accordance with § 4279.245.

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

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

(9) There has been neither any Material Adverse Change in the Borrower's financial condition nor any other Material Adverse Change in the Borrower, for any reason, during the period of time from the Agency's issuance of the Conditional Commitment to issuance of the Loan Note Guarantee regardless of the cause or causes of the change and whether or not the change or causes of the change were within the Lender's or Borrower's control. The Lender must address any assumptions or reservations in this certification and must address all Material Adverse Changes of the Borrower, any parent, Affiliate, or subsidiary of the Borrower, and guarantors.

(10) Neither the Lender nor any of the Lender's officers has an ownership interest in the Borrower or is an officer or director of the Borrower, and neither the Borrower nor its officers, directors, stockholders, or other owners have more than a 5 percent ownership interest in the Lender.

§ 4279.281(b) (Con.)

(11) The Loan Agreement includes all Borrower compliance measures identified in the Agency's environmental review process for avoiding or reducing adverse environmental impacts of the Project's construction or operation.

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

(13) Where applicable, the Lender must certify that the Borrower has obtained:

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

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

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

(15) The Lender certifies that it has reviewed all contract documents and verified compliance with 40 U.S.C. §§ 3141 through 3144, 3146, and 3147 and Title 29 of the CFRs. The Lender will certify that the same process will be completed for all future contracts and any changes to existing contracts.

(16) The Lender certifies that the proposed facility complies with all Federal, State, and local laws and regulatory rules that are in existence and that affect the Project, the Borrower, or Lender activities.

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

(d) When the Agency is satisfied that all conditions for the guarantee have been met, the Agency will issue the Loan Note Guarantee(s) and the documents identified in paragraphs (d)(1) and (2) of this section, as appropriate.

(1) Assignment Guarantee Agreement. In the event the Lender uses the single Promissory Note option and assigns the guaranteed portion of the loan to a Holder, the Lender, Holder, and the Agency will execute the Assignment Guarantee Agreement.

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

§ 4279.283 Refusal to execute Loan Note Guarantee.

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

§§ 4279.284 - 4279.289 [Reserved]

§ 4279.290 Requirements after Project construction.

Once the Project has been constructed, the Lender must meet the requirements specified in paragraphs (a) and (b) of this section.

(a) Provide the Agency annual reports from the Borrower commencing the first full calendar year following the year in which Project construction was completed and continuing for the life of the guaranteed loan. The Borrower's reports will include, but not be limited to, the information specified in paragraphs (a)(1) through (8), as applicable, of this section.

(1) The actual amount of Advanced Biofuels, Biobased Products including Renewable Chemicals, and Byproducts produced.

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

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

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

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

(6) The number of jobs created.

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

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

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

§§ 4279.291 - 4279.299 [Reserved]

§ 4279.300 OMB control number.

In accordance with the Paperwork Reduction Act of 1995, the information collection requirements contained in the subsequent interim rule have been submitted to the Office of Management and Budget (OMB) under OMB control number 0570-0065 for approval. A person is not required to respond to a collection of information unless it displays a currently valid OMB control number.