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Part III

Department of Agriculture

Rural Business-Cooperative Service
Rural Utilities Service

7 CFR Parts 4279 and 4287
Guaranteed Loanmaking and Servicing Regulations; Proposed Rule

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Rural Utilities Service

7 CFR Parts 4279 and 4287

RIN 0570–AA85

Guaranteed Loanmaking and Servicing Regulations

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

ACTION: Proposed rule.

SUMMARY: The Rural Business-Cooperative Service (Agency) is an agency within the Rural Development mission area of the United States Department of Agriculture (USDA) responsible for administering the Business and Industry (B&I) Guaranteed Loan Program. The B&I Guaranteed Loan Program is authorized by the Consolidated Farm and Rural Development Act and provides loan guarantees to banks and other approved lenders to finance private businesses located in rural areas.

The Agency is proposing changes to refine the regulations for the B&I Guaranteed Loan Program in an effort to improve program delivery, clarify the regulations to make them easier to understand, and reduce delinquencies. The proposed changes to the program are expected to reduce the subsidy rate and thereby lower program subsidy costs over time as the proposed rule is implemented. By lowering the subsidy rate, the Agency may be able to provide greater leverage for the budget authority provided by Congress. This will allow the Agency to guarantee a higher total dollar amount of loan requests and, assuming the same average size of loans being guaranteed, to guarantee more loans. These changes could also result in increased lending activity, expanded business opportunities, and creation of more jobs in rural areas.

DATES: Comments on the proposed rule must be received on or before November 14, 2014. The comment period for the information collection under the Paperwork Reduction Act of 1995 continues through November 14, 2014.

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

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

• *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue SW., Washington, DC 20250–0742 with a copy to Brenda Griffin, Rural Development, Business Programs, U.S. Department of Agriculture, 1400 Independence Avenue SW., Stop 3224, Washington, DC 20250–3224.

• *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street SW., 7th Floor, Washington, DC 20024 with a copy to Brenda Griffin, Rural Development, Business Programs, U.S. Department of Agriculture, 1400 Independence Avenue SW., Room 6847, Washington, DC 20250–3224.

All written comments will be available for public inspection during regular work hours at the 300 7th Street SW., 7th Floor address listed above. Comments will also be available through regulations.gov referencing RIN number 0570–AA85.

FOR FURTHER INFORMATION CONTACT: Brenda Griffin, Rural Development, Business Programs, U.S. Department of Agriculture, 1400 Independence Avenue SW., Stop 3224, Washington, DC 20250–3224; email: *brenda.griffin@wdc.usda.gov;* telephone (202) 720–6802.

I. SUPPLEMENTARY INFORMATION

Executive Order 12866, Regulatory Planning and Review

This proposed rule has been reviewed under Executive Order (EO) 12866 and has been determined to be significant. The EO defines a ''economically significant regulatory action'' as one that is likely to result in a rule that may have an annual effect on the economy of $100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The actions in this rule collectively are not expected to have an impact of $100 million or more, which negates the need for a more detailed assessment of likely benefits and costs and analysis of potentially effective and reasonably feasible alternatives.

Programs Affected

The Catalog of Federal Domestic Assistance program number assigned to the B&I Guaranteed Loan Program is 10.768.

Executive Order 12372, Intergovernmental Review of Federal Programs

B&I Guaranteed Loans are subject to the Provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. The Agency will conduct intergovernmental consultation in the manner delineated in 7 CFR part 3015, subpart V, or successor regulations.

Executive Order 12988, Civil Justice Reform

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Agency has determined that this rule meets the applicable standards provided in section 3 of the Executive Order. Additionally, (1) all state and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to the rule; and (3) administrative appeal procedures, if any, must be exhausted before litigation against the Department or its agencies may be initiated, in accordance with the regulations of the National Appeals Division of USDA at 7 CFR part 11.

Executive Order 13132, Federalism

The policies contained in this proposed rule do not have any substantial direct effect on states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nor does this proposed rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with states is not required.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This executive order imposes requirements on the Agency in the development of regulatory policies that have tribal implications or preempt tribal laws. Rural Development has determined that this proposed rule does not have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and Indian tribes. Thus, this proposed rule is not subject to the requirements of Executive Order 13175. If a tribe determines that this rule has implications of which Rural Development is not aware and would like to engage with Rural Development on this rule, please contact Rural Development's Native American Coordinator at (720) 544–2911 or *AIAN@wdc.usda.gov.*

Regulatory Flexibility Act

Under section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Agency certifies that this rule will not have a significant economic impact on a substantial number of small entities. This proposed rule affects lenders that utilize the B&I Guaranteed Loan Program and any potential lenders that may utilize the program in the future. There are currently 1,117 active lenders in the B&I portfolio. The Agency estimates that approximately 50 percent of the lenders that utilize the program are small community banks that are considered a small entity, as defined by the Regulatory Flexibility Act. Therefore, the Agency has determined that this proposed rule will have an impact on a substantial number of small entities.

However, the Agency has determined that the economic impact of the proposed rule on these small lenders will not be significant. Many of the changes being implemented in the rule are tweaks to the program that lenders have suggested at a series of lender roundtable meetings or during annual lender visits that do not have any economic impact on the lenders. The most significant change in the rule that affects lenders is the criteria to become an approved non-regulated lender. This change by itself, however, does not have a significant economic impact on a substantial number of entities as it affects less than 2 percent of the active lenders (approximately 21 non-regulated lenders). Based on the data in the Paperwork Reduction Act (PRA) burden package, the Agency estimates the cost of the proposed rule to be approximately $1,600 per lender. This is based on determining which of the estimated costs in the PRA burden package would be incurred by the lenders applying for and participating in the program, and the estimated number of lenders. SBA's definition of a small business for lenders is total assets of $500 million or less. The Agency selected 20 small lenders at random to determine their total assets. Based on 2014 data, the range of total assets for these 20 lenders is $52.6 million to $476 million. The average cost of $1,600 per lender represents less than 0.003% of the total assets of the smallest of these 20 lenders. Therefore, this rule will not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act

This rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act of 1995.

Environmental Impact Statement

This rule has been reviewed in accordance with 7 CFR part 1940, subpart G, ''Environmental Program.'' The Agency has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment, and in accordance with the National Environmental Protection Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.,* an Environmental Impact Statement is not required.

Under this program, the Agency conducts a NEPA review for each application received. To date, no significant environmental impacts have been reported, and Findings of No Significant Impact (FONSI) have been issued for each approved application. Taken collectively, the applications show limited potential for significant adverse cumulative effects.

Paperwork Reduction Act

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

The following estimates are based on an estimated volume of activity of 100 preapplications, 600 applications, and 550 new loan guarantees. Preapplications are not required and are submitted at the option of the lender. The purpose of a preapplication is to allow a lender to submit a limited amount of information, most of which should be easily obtained, so that the Agency can determine and advise the lender whether the request is likely to meet the requirements of the program. Some lenders will skip the preapplication process and submit a full application as the first contact with the Agency. If the information is submitted in a preapplication, it would not need to be resubmitted in the application unless the financials become more than 90 days old between the time of preapplication and application. Applications are evaluated by the Agency to determine whether the borrower is eligible, the proposed loan is for an eligible purpose, there is reasonable assurance of repayment ability, there is sufficient collateral and equity, and the proposed loan complies with all applicable statutes and regulations.

Estimate of Burden: Public reporting burden for the additional proposed requirements will increase the current collection of information by an estimated total of 5,111 hours. The Agency anticipates the number of respondents to fluctuate based on funding levels. The average burden per respondent under the current rule is estimated to be 8 hours, and the average burden under the proposed rule is estimated to be 11 hours, for an estimated increase of 3 hours per respondent.

Respondents: Primary respondents for this data are lending institutions and rural for profit businesses but also include individuals, non-profit businesses, Indian tribes, public bodies, and cooperatives. The estimates below are for all three subparts associated with this rule and include the additional proposed requirements.

Estimated Number of Respondents: 3,675.

Estimated Number of Responses per Respondent: 1–4.

Estimated Number of Responses: 27,076.

Estimated Total Annual Burden (hours) on Respondents: 40,511.

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

Comments

Comments are invited on: (a) The accuracy of the new Rural Development estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (b) ways to enhance the quality, utility, and clarity of the information to be collected; and (c) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to Jeanne Jacobs, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave. SW., Washington, DC 20250. All responses to this proposed rule will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Comments can be viewed at regulations.gov under RIN number 0570–AA85.

E-Government Act Compliance

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

II. Background

Rural Development administers a multitude of Federal programs for the benefit of rural America, ranging from housing and community facilities to infrastructure and business development. Its mission is to increase economic opportunity and improve the quality of life in rural communities by providing the leadership, infrastructure, access to capital, and technical support that enables rural communities to prosper. To achieve its mission, Rural Development provides financial support—including direct loans, grants, and loan guarantees—and technical assistance to help improve the quality of life and provide the foundation for economic development in rural areas.

The B&I Guaranteed Loan Program was authorized by the Rural Development Act of 1972. The loans are made by private lenders to rural businesses for the purpose of creating new businesses, expanding existing businesses, and for other purposes that create employment opportunities in rural America. Businesses in rural areas are eligible for this program. Rural area, as defined by 7 CFR 4279.108(c), is defined as any area other than a city or town of more than 50,000 inhabitants and the urbanized area contiguous and adjacent to such a city or town. The types of borrowers that are served by the B&I Guaranteed Loan Program are cooperative organizations, corporations, partnerships, or other legal entities organized and operated on a profit or nonprofit basis; an Indian tribe on a Federal or State reservation or other Federally recognized tribal group; a public body; or an individual, provided the borrower is engage in, or proposing to engage, in a business. Loans can be made for a variety of purposes including business acquisition, expansion or improvement; purchase of real estate, machinery and equipment, or supplies; debt refinancing; and working capital. The rate and term of the loan is negotiated between the business and the lender.

The regulations for the B&I Guaranteed Loan Program were rewritten in 1996 to streamline and simplify the regulations for the program while shifting primary responsibility for loan documentation and analysis from the Agency to the lenders to make the program more responsive to the needs of lenders and rural businesses.

III. Executive Summary

Purpose of the Regulatory Action

The Agency is promulgating these regulations to improve program delivery, clarify the regulations to make them easier to understand, and reduce delinquencies. The changes should reduce the cash outflows and increase the cash inflows associated with the B&I Guaranteed Loan Program portfolio, resulting in a lower subsidy rate. A lower subsidy rate should result in increased lending activity, the expansion of business opportunities, and the creation of more jobs in rural areas. Changes proposed originated from informal third party comments and Agency experience in administering the program, including observations from assessment reviews and recommendations from the Agency's internal Business Programs Advisory Team.

The Agency believes the proposed changes in the rule may increase lending activity, resulting in the expansion of business opportunities and the creation of more jobs in rural America, and improve the program's effectiveness by improving the prosperity of rural residents through guarantees of targeted investments that may improve rural competitiveness, facilitate industrial conversion, and enable rural residents to profit from private sector activity. The revisions contained herein may improve the efficiency and effectiveness of the program and make the regulation more customer friendly and easier to understand. The Agency thinks that errors may be reduced because the guidelines and requirements will be clearer and better organized.

The proposed rule's incremental effect to the public will be to nominally increase the burden for lenders seeking to be an eligible lender and for ''new'' investors in projects that receive B&I loan guarantees after the Loan Note Guarantee is issued by a total of approximately $4,800 per year. The cost to participating lenders and borrowers was estimated to be approximately $2.5 million. The cost to the Federal government to administer the program was estimated to be approximately $2.1 million.

Summary of the Major Provisions of the Regulatory Action

This proposed rule is intended to replace the B&I Guaranteed Loan Program regulations under 7 CFR parts 4279 and 4287, which will not significantly depart from the current program of loan guarantees for businesses in rural areas.

The rule will strengthen criteria for non-regulated lenders to participate in the program. It will also codify provisions of the 2008 Farm Bill, including two types of rural area exceptions and eligibility of local foods projects and cooperative equity security guarantees. The rule also includes provisions for New Markets Tax Credits and the Cooperative Stock Purchase Program. Changes are also made to the loan scoring criteria. Loan servicing changes include the termination of interest accrual to the lender after 90 days from the delinquency effective date or to a holder 90 days from the date of the first demand letter from any holder of the guaranteed portion. Additionally, attorney/legal fees that the lender can claim in the liquidation process will be reduced from full reimbursement to being shared equally between the lender and the Agency. The rule also adds the ability to obtain personal and corporate guarantees from those owning 20 percent of the business when there is a sale of the borrower's stock.

IV. Discussion of the Proposed Rule

Following is a discussion of some of the most significant policy revisions included in this proposed rule.

Eligible lenders for the program include regulated lenders (formerly known as ''traditional lenders'') and Agency-approved non-regulated lenders (formerly known as ''other lenders''). Insurance companies will no longer be considered traditional or regulated lenders under the program because historically, insurance companies have had significant default and loss rates in the Agency B&I Guaranteed Loan portfolio. However, insurance companies will be able to apply to become Agency-approved eligible lenders by meeting criteria of a non-regulated lender established in the regulation. Lenders will have to execute a new Lender's Agreement to originate new guaranteed loans; however, existing lenders are bound by their existing Lender's Agreements and must continue to service existing guaranteed loans in their portfolio regardless of whether they wish to originate new guaranteed loans.

Criteria to become an approved non-regulated lender for the B&I program will be strengthened under this proposed rule due to higher than usual default and loss rates for this type of lender in the Agency B&I Guaranteed Loan portfolio. Non-regulated lenders will be able to become eligible lenders for a 3-year period and may request renewals to continue originating loans under the program. Non-regulated lenders will have to have and maintain 10 percent tangible balance sheet equity, which is up from the 7 percent previously required. Non-regulated lenders will have to have a record of successfully making at least 10 commercial loans annually totaling at least $1 million for each of the last 5 years, with lender's delinquent commercial loan portfolio over that period not exceeding 6 percent of all commercial loans made and 3 percent in commercial loan losses based on the original principal loan amount. In addition, non-regulated lenders will have to maintain a loss reserve and undergo a credit examination that must be acceptable to the Agency. These requirements are being strengthened to ensure participation in the program by lenders that have a thorough knowledge of commercial lending and high standards of professional competence to operate a successful lending program.

Under the B&I program, a rural area is generally any area of a State other than a city or town that has a population of greater than 50,000 inhabitants and any urbanized area contiguous and adjacent to such a city or town. In making this determination, the Agency will use the latest decennial census from the U.S. Census Bureau. The 2008 Farm Bill added the ability to make two different types of rural area exceptions, which was incorporated into the Consolidated Farm and Rural Development Act. Section 343(a)(13)(E) of the Consolidated Farm and Rural Development Act states: ''Notwithstanding any other provision of this definition, in determining which census blocks in an urbanized area are not in a rural area, the Agency shall exclude any cluster of census blocks that would otherwise be considered not in a rural area only because the cluster is adjacent to not more than two census blocks that are otherwise considered not in a rural area under this definition.'' Additionally, the Under Secretary for Rural Development may determine that areas are ''rural in character,'' and therefore eligible for the program, under certain circumstances. Any determination made by the Under Secretary under this provision will be to areas that are determined to be ''rural in character'' in accordance with Section 343(a)(13)(D) of the Consolidated Farm and Rural Development Act and are within: (1) An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town that has a population of greater than 150,000 inhabitants or the urbanized area of such city or town; or (2) an area within an urbanized area contiguous and adjacent to a city or town of greater than 50,000 inhabitants that is within a quarter mile of a rural area.

Presently, corporations or other non public-body type borrowers must be at least 51 percent owned by persons who are either citizens of the U.S. or reside in the U.S. after being legally admitted for permanent residence to be eligible borrowers under the B&I program. The Agency is inviting public comment on whether guaranteed loans should be made to businesses that do not meet this requirement, if the facility being financed will create new or save existing jobs for rural U.S. residents and when loan funds are used only for fixed assets that will remain in the U.S. This could provide flexibility to create or save jobs in rural areas when the business is owned, in whole or in part, by a foreign interest.

The eligibility section is proposed to be revised to include cooperative equity security guarantees as eligible loan purposes in accordance with the 2008 Farm Bill. Separate sections of the regulation specifically address the requirements for New Markets Tax Credits and cooperative equity security guarantees, as well as requirements for the cooperative stock purchase program.

The eligibility section is being revised to include projects that process, distribute, aggregate, store, and/or market locally or regionally produced agricultural food products to support community development and farm and ranch income. This is also a provision of the 2008 Farm Bill. The term ''locally or regionally produced agricultural food product'' means any agricultural food product that is raised, produced, and distributed in the locality or region in which the final product is marketed, so that the distance the product is transported is less than 400 miles from the origin of the product or within the State in which the product is produced, as defined by Section 310B(g)(9)(A)(i) of the Consolidated Farm and Rural Development Act. Food products could be raw, cooked, or a processed edible substance, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption. A significant amount of the food product sold by the borrower must be locally or regionally produced, and a significant amount of the locally or regionally produced food product must be sold locally or regionally. Projects in non-rural areas may be included when the project provides an economic benefit to the surrounding rural communities. Funding priority will be given to projects that provide a benefit to underserved communities. In accordance with Section 310B(g)(9)(A)(ii) of the Consolidated Farm and Rural Development Act, an underserved community is a community (including an urban or rural community and an Indian tribal community) that has limited access to affordable, healthy foods, including fresh fruits and vegetables, in grocery retail stores or farmer to consumer direct markets and that has either a high rate of hunger or food insecurity or a high poverty rate as reflected in the most recent decennial census.

The ineligible loan purpose section is being modified to permit distribution or payment to an immediate family member of the owner to accommodate intergenerational business acquisitions. Previously, no loan proceeds could be distributed to a close relative of the owner who retained an ownership interest in the borrower. This is being changed so that an immediate family member of the owner, partner, or stockholder can purchase the business from an owner, partner or stockholder when the seller does not retain an ownership interest and the Agency determines the price paid to be reasonable.

A definition for a high priority project is being added to the rule. A high priority project is defined in the proposed rule as one that scores more than half of the points available under the scoring criteria outlined in the priority scoring section.

In an effort to reduce the cost for the taxpayer, 90 percent guarantees will be limited to loans of $5 million and less that are either high priority projects or where the lender needs the higher percentage of guarantee because of its legal or regulatory lending limit. Additionally, reduced guarantee fees will only be available on loans of $5 million or less, unless an authorizing statute provides otherwise (e.g., the Alaska Roadless Areas statute).

Previously, the interest rate on the guaranteed portion of the loan could not exceed the unguaranteed portion of the loan. This was to prevent the Agency from paying a higher loss on the guaranteed portion than it otherwise would have if the interest on the guaranteed portion was equal to or less than the unguaranteed portion. This requirement has been relaxed to prevent lenders from having to set floors and ceilings to remain compliant with this requirement. The proposed rule now allows for the interest rate on the guaranteed portion to be higher than the unguaranteed portion in situations where a fixed rate on the guaranteed portion becomes a higher rate than the variable rate on the unguaranteed portion due to the normal fluctuation in the approved variable interest rate.

Although credit quality standards have not changed, the credit quality section is being modified to be in line with the five C's of credit (capacity, capital, collateral, conditions, character). The Agency's policy on standardized collateral discounting has also been added. The Agency is adding the ability to require guarantees from persons whose ownership in the borrower is held indirectly through other companies.

The Agency is relaxing the requirement for business plans with the application for loans where the use of loan proceeds is exclusively for debt refinancing and fees, but has added a requirement for feasibility studies for all biofuels proposals, whether new or existing. The Agency is also proposing to revise the requirement for 3 years of historical financial statements for parent, subsidiary, and affiliated companies to only require current financial statements. Additionally, the number of attachments that need to be included as part a complete application for loans of $600,000 and less are reduced.

Loan scoring criteria, which is used to fund projects by priority, is being modified to award more points for the following: Leveraging B&I program dollars, the business' loan-to-job ratio, and providing quality jobs. The administrative points section has also been modified to account for community economic development strategies and State strategic plans and to allow for the awarding of points for projects that will fulfill an Agency initiative, such as the biobased product initiative or the Investing in Manufacturing Communities Partnership initiative. The proposed rule now allows for 150 possible priority points.

Loan servicing requirements under the B&I program have been clarified. The annual conference between the lender and the Agency can be held via teleconference. This change is not meant to replace a face-to-face annual lender conference. However, it does give some flexibility when face-to-face lender visits are not practical. The lender may contract loan servicing activities. However, the lender remains responsible for complying with all requirements of the regulations. The contracting out of any loan servicing activities does not relieve the lender of its responsibility to comply with the statutes and regulations governing the program. The proposed rule also clarifies that the Agency will not allow the write-down of debt while leaving the borrower in business and no new promissory notes may be issued to process a transfer and assumption since the Loan Note Guarantee references a specifically dated promissory note(s) with specific amount(s). The lender may use an allonge to the existing promissory note to facilitate the transaction.

Lenders will also be able to utilize balloon payments to restructure a guaranteed loan in default in a workout situation as long as there is a reasonable prospect for success and the remaining life of the collateral supports the workout terms.

Lenders will provide the loan classification of the guaranteed loan at loan closing rather than 90 days after the loan has closed. Additionally, lenders must notify the Agency when a borrower is 30 days past due and cannot cure the delinquency within 30 days. The lender must also provide a monthly default status report, as opposed to bimonthly. This will allow the Agency to be more responsive to delinquencies.

The lender can proceed with liquidation after the loan has been properly accelerated while the Agency has the liquidation plan under review. This will allow the lender to take such action as appropriate to protect the interest of the lender and the Agency while the liquidation plan is under review by the Agency. The appraisal requirement threshold will be increased from $100,000 to $250,000 on all collateral being released, and the requirement for a current appraisal for collateral being liquidated is being increased from $200,000 to $250,000. The $250,000 threshold is consistent with Office of Management and Budget (OMB) guidelines set forth in OMB Circular A–129.

The future recoveries section has been modified. The lender must use reasonable efforts to attempt collection from any party still liable for the guaranteed loan. Any net proceeds from that effort must be split pro rata between the lender and the Agency based on the original amount of the loan guarantee. To the extent any party to the loan has a written agreement with the Agency to repay all or part of any loss claim paid by the Agency, any collection on that agreement will not be split with the lender. This is because the Federal Government has collection remedies available to it that are not available to the lender and that are not intended to benefit private parties.

Several changes have been made in an effort to reduce the cost to the taxpayer in guaranteeing business and industry loans. Reasonable attorney/legal fees that the lender can claim in the liquidation process, as well as a Chapter 7 or Liquidating 11 bankruptcy, will be reduced from full reimbursement to being shared equally between the lender and the Agency. The Agency will not allow default or penalty interest to be charged to the borrower. This could cause the Agency to pay a loss when a solution could have been possible if the interest rate had not been increased. Additionally, the proposed rule clarifies that late payment fees and interest on interest will not be covered by the guarantee. The Agency has added the ability to require personal or corporate guarantees from those owning 20 percent or more of the borrower when stock of the borrower is sold. The ability for the Agency to charge a transfer and assumption fee has been added to the proposed rule. Notification for any such fee will be published annually in the **Federal Register**.

A significant change that is expected to decrease the cost to the taxpayer is that interest accrual is limited (1) to any holder to 90 days from the date of the first demand letter from a secondary market holder for payment and (2) to any lender 90 days from the delinquency effective date. A holder is a person or entity, other than the lender, who owns all or part of the guaranteed portion of the loan. The Agency was finding instances where holders were collecting interest on the guaranteed portion of the loan for a much longer period of time than other holders on the same loan. This was costing the Agency a substantial amount of money in interest paid and complicating the administration of the defaulted loan.

List of Subjects for 7 CFR Parts 4279 and 4287

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

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

PART 4279—GUARANTEED LOANMAKING

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

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

■ 2. Revise Subpart A to read as follows:

Subpart A—General

Subpart A—General

§ 4279.1 Introduction.

(a) This subpart contains general regulations for making and servicing Business and Industry (B&I) loans guaranteed by the Agency and applies to lenders, holders, borrowers and other parties involved in making, guaranteeing, holding, servicing, or liquidating such loans. This subpart is supplemented by subpart B of this part, which contains loan processing regulations, and subpart B of part 4287 of this chapter, which contains loan servicing regulations.

(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. Copies of all forms, regulations, and instructions referenced in this subpart may be obtained from any Agency office and from the USDA Rural Development Web site at *www.rurdev.usda.gov/rbs.* Whenever a form is designated in this subpart, it is initially capitalized and its reference includes predecessor and successor forms, if applicable.

§ 4279.2 Definitions and abbreviations.

(a) *Definitions.*

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

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

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

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

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

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

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

Assignment Guarantee Agreement. Form RD 4279–6, ''Assignment Guarantee Agreement,'' is the signed agreement 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 note system.

Biogas. Renewable biomass converted to gaseous fuel.

Biomass. Any organic material that is available on a renewable or recurring basis including agricultural crops, trees grown for energy production, wood waste and wood residues, plants, including aquatic plants and grasses, fibers, animal waste and other waste materials, and fats, oils, greases, including recycled fats, oils and greases. It does not include paper that is commonly recycled or unsegregated solid waste.

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.

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

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

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

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

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

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

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

Energy projects. Commercially available projects that produce or distribute energy or power and/or projects that produce biomass or biogas fuel.

Existing business. A business that has been in operation for at least 1 full year. Mergers or changes in the business name or legal type of entity of a currently operating business are considered to be existing businesses as long as there is not a significant change in operations. Newly-formed entities that are buying existing businesses will be considered an existing business as long as the business being bought remains in operation and there is no significant change in operations.

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

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

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

High impact business development investment. A business that scores at least 20 points under § 4279.166(b)(4).

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

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

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

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

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

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

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

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

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

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

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

Loan Note Guarantee. Form RD 4279–5, ''Loan Note Guarantee,'' 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.

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

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

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

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

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

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

Negligent loan servicing. The failure of a lender to perform those services 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.

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

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

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

Person. An individual or entity.

Poverty. A community or area is considered a poverty area if the county, city, or equivalent (such as parish, borough, municipio or census designated place) where the community or area is located has a population of which 20 percent or more have income below the poverty line.

Pro rata. On a proportional basis.

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

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

Public body. A municipality, county, or other political subdivision of a State; a special purpose district; 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.

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

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

Spreadsheet. A table containing data from a series of financial statements of a business over a period of time. 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. An agreement among the lender, borrower, and Agency whereby lien priorities on certain assets pledged to secure payment of the guaranteed loan will be reduced to a position junior to, or on parity with, the lien position of another loan in order for the Agency's borrower to obtain additional financing, not guaranteed by the Agency, from the lender or a third party.

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

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

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

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

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

(b) *Abbreviations.*

B&I—Business and Industry
CFR—Code of Federal Regulations
DCIA—Debt Collection Improvement Act
FDIC—Federal Deposit Insurance Corporation
FSA—Farm Service Agency
GAAP—Generally Accepted Accounting Principles of the U.S.
GLS—Guaranteed Loan System
LINC—USDA Lender Interactive Network Connection
NAD—National Appeals Division
OMB—Office of Management and Budget
REAP—Rural Energy for America Program
U.S.—United States of America
USDA—United States Department of Agriculture

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

§§ 4279.3–4279.14 [Reserved]

§ 4279.15 Exception authority.

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

§ 4279.16 Appeals.

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

§§ 4279.17–4279.28 [Reserved]

§ 4279.29 Eligible lenders.

An eligible lender must be domiciled in a State as defined in § 4279.2 and must not be debarred or suspended by the Federal government. If the lender is under a cease and desist order, or similar constraint, from a Federal agency, the lender must inform the Agency. The Agency will evaluate the lender's eligibility on a case-by-case basis given the risk of loss posed by the cease and desist order. The Agency will only approve loan guarantees for lenders with adequate capital to fund and cover potential liquidation expenses for guaranteed loans it proposes to make and adequate experience and expertise to make, secure, service, and collect B&I loans. The lender must provide documentation as to its capital and experience in commercial lending. The lender and the Agency will execute a Lender's Agreement for each lender approved to participate in the program. If a valid Lender's Agreement already exists, it is not necessary to execute a new Lender's Agreement with each loan guarantee; however, a new Lender's Agreement must be executed with any existing lenders making new loans on or after [DATE OF FINAL RULE PUBLICATION]. The Agency may revoke a lender's eligible status at any time for cause, including those examples cited in § 4279.29(c).

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

(b) *Non-regulated lenders.* The Agency may consider an applicant lender that does not meet the criteria of paragraph (a) of this section for eligibility to become a guaranteed lender for a 3-year period provided that the Agency determines that the applicant lender has the legal authority to operate a lending program and sufficient lending expertise and financial strength to operate a successful lending program. When the applicant lender is a multi-tiered entity, it will be considered in its entirety. Insurance companies (formerly included as traditional lenders) and non-regulated lenders (formerly known as other lenders) previously approved as guaranteed lenders prior to [DATE OF FINAL RULE PUBLICATION] must reapply to become an approved non-regulated lender in order to originate new guaranteed loans. However, both insurance companies and non-regulated lenders that have executed a Lender's Agreement must continue to service the guaranteed loans in their portfolios in accordance with that agreement.

(1) Non-regulated lenders must:

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

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

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

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

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

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

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

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

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

(iii) Information on lending experience, including length of time in the lending business; range and volume of lending and servicing activity, including a list of the industries for which it has provided financing; status of its loan portfolio, including a list of loans in the portfolio with each loan's current loan classification code and delinquency and loss rates as outlined in § 4279.29(b)(1)(ii); experience of management and loan officers; sources of funds for the proposed loans; office location and proposed lending area; an estimate of the number and size of guaranteed loan applications the lender will develop; and proposed rates and fees, including loan origination, loan preparation, and servicing fees. Such rates and fees must not be greater than those charged by similarly located regulated commercial lenders in the ordinary course of business;

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

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

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

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

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

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

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

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

(5) Violation of usury laws in connection with any loan transaction whether or not the loan was guaranteed by the Agency;

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

(7) Using loan funds guaranteed by the Agency for purposes other than those specifically approved by the Agency in the Conditional Commitment;

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

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

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

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

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

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

(14) Negligent loan origination;

(15) Negligent loan servicing;

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

(17) Violation of applicable nondiscrimination law, including, but not limited to, statutes, regulations, USDA Departmental Regulations, the Secretary's Civil Rights Policy Statement, and the Equal Credit Opportunity Act.

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

§ 4279.30 Lenders' functions and responsibilities.

(a) *General.* (1) Lenders have the primary responsibility for the successful delivery of the guaranteed loan program. Any action or inaction on the part of the Agency does not relieve the lender of its responsibilities to originate and service the loan guaranteed under this subpart, subpart B of this part, and subpart B of part 4287. Lenders may contract for services but are ultimately responsible for underwriting, loan origination, loan servicing, and compliance with all Agency regulations. Agents and persons are prohibited from acting as both loan packager and loan service provider on the same guaranteed loan. All lenders obtaining or requesting a loan guarantee are responsible for:

(i) Processing applications for guaranteed loans;

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

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

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

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

(vi) Supervising construction;

(vii) Distributing loan funds;

(viii) Servicing guaranteed loans in a prudent manner, including liquidation if necessary;

(ix) Reporting all conflicts of interest, or appearances thereof, to the Agency;

(x) Following Agency regulations and agreements; and

(xi) Obtaining Agency approvals or concurrence as required.

(2) This subpart, subpart B of this part, and subpart B of part 4287 contain the regulations for this program, including the lenders' responsibilities. If a lender fails to comply with these requirements, the Agency may reduce any loss payment in accordance with the applicable regulations.

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

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

(1) Lenders must assist the borrower in completing Form RD 1940–20, ''Request for Environmental Information,'' (when required by 7 CFR part 1940, subpart G) or successor forms; assist in the collection of additional data when the Agency needs such data to complete its environmental review of the proposal; and assist in the resolution of environmental problems.

(2) Lenders must ensure the borrower has:

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

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

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

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

§§ 4279.31—4279.43 [Reserved]

§ 4279.44 Access to records.

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

§§ 4279.45—4279.58 [Reserved]

§ 4279.59 Environmental requirements.

The Agency is responsible for ensuring that the requirements of the National Environmental Policy Act of 1969 (under 40 CFR part 1500) and related compliance actions (such as Section 106 of the National Historic Preservation Act (under 36 CFR part 800) and Section 7 of the Endangered Species Act) are met and will complete the appropriate level of environmental review in accordance with subpart G of part 1940 or successor regulations.

Because development of the loan application occurs simultaneously with development of the environmental review, applicants, including lenders and borrowers, must not take any actions or incur any obligations that would either limit the range of alternatives to be considered in the environmental review or that would have an adverse effect on the environment. Satisfactory completion of the environmental review process must occur prior to issuance of the Conditional Commitment to the lender.

§ 4279.60 Civil Rights Impact Analysis.

Issuance of a Conditional Commitment is conditioned on the Agency being able to satisfactorily complete a Civil Rights Impact Analysis.

§ 4279.61 Equal Credit Opportunity Act.

In accordance with Title V of Public Law 93–495, the Equal Credit Opportunity Act, with respect to any aspect of a credit transaction, neither the lender nor the Agency will discriminate against any applicant on the basis of race, color, religion, national origin, sex, marital status or age (providing the applicant has the capacity to contract), or because all or part of the applicant's income derives from a public assistance program, or because the applicant has, in good faith, exercised any right under the Consumer Protection Act. The lender must comply with the requirements of the Equal Credit Opportunity Act as contained in the Federal Reserve Board's Regulation implementing that Act (see 12 CFR part 202) prior to loan closing.

§§ 4279.62—4279.70 [Reserved]

§ 4279.71 Public bodies and nonprofit corporations.

Any public body or nonprofit corporation that receives a guaranteed loan that meets the thresholds established by OMB must provide an audit in accordance with applicable regulations. Any audit meeting OMB's requirements will be adequate to meet any audit requirements of the B&I program for that year.

§ 4279.72 Conditions of guarantee.

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

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

(1) To any holder, 100 percent of any loss sustained by the holder on the guaranteed portion of the loan it owns and on interest due on such portion less any servicing fee. For those loans closed on or after [DATE OF FINAL RULE PUBLICATION], the guarantee will not cover note interest to any holder after 90 days from the date of the first repurchase demand to the lender made by a holder. Upon receipt of the first demand letter from a holder, the Agency will notify any remaining holders known by the Agency in writing that interest will discontinue after 90 days from the date of the first holder's demand.

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

(i) Any loss sustained by the lender on the guaranteed portion, including principal and interest evidenced by the notes or assumption agreements and secured advances for protection and preservation of collateral made with the Agency's authorization; or

(ii) The guaranteed principal advanced to or assumed by the borrower and any interest due thereon.

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

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

§ 4279.73 [Reserved]

§ 4279.74 [Reserved]

§ 4279.75 Sale or assignment of guaranteed loan.

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

(a) *Single note system.* The entire loan is evidenced by one note, and one Loan Note Guarantee is issued. When the loan is evidenced by one note, the lender may not at a later date cause any additional notes to be issued. The lender may assign all or part of the guaranteed portion of the loan to one or more holders by using Form RD 4279–6, ''Assignment Guarantee Agreement.'' The lender must complete and execute the Assignment Guarantee Agreement and return it to the Agency for execution prior to holder execution. The 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. Upon notification and completion of the assignment through the use of Form RD 4279–6, the assignee shall succeed to all rights and obligations of the holder there under. 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. The Agency will neither execute a new Assignment Guarantee Agreement to effect a subsequent reassignment nor reissue a duplicate Assignment Guarantee Agreement unless the original was lost, stolen, destroyed, mutilated, or defaced in accordance with § 4279.84. The Assignment Guarantee Agreement clearly states the percentage and corresponding amount of the guaranteed portion it represents and the lender's servicing fee. A servicing fee may be charged by the lender to a holder and is calculated as a percentage per annum of the unpaid balance of the guaranteed portion of the loan assigned by the Assignment Guarantee Agreement. The Agency is not and will not be a party to any contract between the lender and another party where the lender sells its servicing fee in an arm's length marketplace transaction. The Agency will not acknowledge, approve, or have any liability to any of the parties of this contract.

(b) *Multinote system.* Under this option, the lender may provide one note for the unguaranteed portion of the loan and no more than ten notes for the guaranteed portion. 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 note, including the unguaranteed note, to be attached to each note. An Assignment Guarantee Agreement will not be used when the multinote option is utilized.

§ 4279.76 [Reserved]

§ 4279.77 Minimum retention.

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

§ 4279.78 Repurchase from holder.

(a) *Repurchase by lender.* A lender has the option to repurchase the unpaid guaranteed portion of the loan from a holder within 30 days of written demand by the holder when the borrower is in default not less than 60 days on principal or interest due on the loan; or when the lender has failed to remit to the holder its pro rata share of any payment made by the borrower within 30 days of the lenders receipt thereof. The repurchase by the lender must be for an amount equal to the unpaid guaranteed portion of principal and accrued interest less the lender's servicing fee. The holder must concurrently send a copy of the demand letter to the Agency. For loans closed on or after [DATE OF FINAL RULE PUBLICATION], the guarantee will not cover note interest to any holder accruing after 90 days from the date of the first demand letter of a holder to the lender requesting the repurchase. The lender must accept an assignment without recourse from the holder upon repurchase. The lender is encouraged to repurchase the loan to facilitate the accounting of funds, resolve any loan problems, and prevent default, where and when reasonable. The benefit to the lender is that it may resell the guaranteed portion of the loan in order to continue collection of its servicing fee if the default is cured. The lender will notify the holder and the Agency of its decision.

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

(2) If the Agency repurchases 100 percent of the guaranteed portion of the loan, the Agency will not continue collection of the annual renewal fee from the lender.

(3) If the lender does not repurchase the unpaid guaranteed portion of the loan as provided in paragraph (a) of this section, the Agency will purchase from the holder the unpaid principal balance of the guaranteed portion together with accrued interest to date of repurchase, less the lender's servicing fee, within 30 days after written demand to the Agency from the holder. For loans closed on or after [DATE OF FINAL RULE PUBLICATION], the guarantee will not cover note interest to any holder accruing after 90 days from the date of the first demand letter of a holder to the lender requesting the repurchase. Accrued interest paid to the holder will be calculated from the date interest was last paid on the loan with a cutoff date being not more than 90 days from the date any holder makes demand. If there is more than one holder, all subsequent holders will be paid using the same date as the first holder (first holder's date of demand to the lender). Once the holder makes demand upon the Agency, the request cannot be rescinded.

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

(5) When the lender has accelerated the account and 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 with a cutoff date being no more than 90 days from the most recent delinquency effective date as reported by the lender.

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

reassignment document in the chain of ownership, with the latest reassignment being assigned to the Agency without recourse, including all rights, title, and interest in the guarantee. The holder must include in its demand the amount due including unpaid 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 promptly furnish a current statement certified by an appropriate authorized officer of the lender of the unpaid principal and interest then owed by the borrower on the loan and the amount then owed to any holder, along with the information necessary for the Agency to determine the appropriate amount due the holder. Any discrepancy between the amount claimed by the holder and the information submitted by the lender must be resolved between the lender and the holder before payment will be approved. Such conflict will suspend the running of the 30 day payment requirement.

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

(c) *Repurchase for servicing.* If, in the opinion of the lender, repurchase of the guaranteed portion of the loan is necessary to adequately service the loan, the holder must sell the guaranteed portion of the loan to the lender for an amount equal to the unpaid principal and interest on 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.

§§ 4279.79–4279.83 [Reserved]

§ 4279.84 Replacement of document.

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

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

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

(i) Name and address of owner;

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

(iii) Capacity of person certifying;

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

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

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

(2) An indemnity bond acceptable to the Agency must accompany the request for replacement except when the holder is the United States, a Federal Reserve Bank, a Federal corporation, a State or territory, or the District of Columbia. The 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 multinote system, the Agency will not attempt to obtain, or participate in the obtaining of, replacement notes from the borrower. The holder is responsible for bearing the costs of note replacement if the borrower agrees to issue a replacement instrument. Should such note be replaced, the terms of the note cannot be changed. If the evidence of debt has been lost, stolen, destroyed, mutilated or defaced, such evidence of debt must be replaced before the Agency will replace any instruments.

§§ 4279.85–4279.99 [Reserved]

§ 4279.100 OMB control number.

The information collection requirements contained in this regulation have been approved by OMB and have been assigned OMB control number ______. Public reporting burden for this collection of information is estimated to vary from 30 minutes to 12 hours per response, with an average of 6 hours per response, including time for reviewing the collection of information. The burden may increase beyond the estimate reported here, if RBS determines additional data will need to be collected to facilitate evaluation, which can enhance the operation and performance of the program. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Agriculture, Clearance Officer, OIRM, Stop 7630, Washington, DC 20250. You are not required to respond to this collection of information unless it displays a currently valid OMB control number.

■ 3. Revise Subpart B to read as follows:

Subpart B—Business and Industry Loans

Sec.

PART 4279—GUARANTEED LOANMAKING

Subpart B—Business and Industry Loans

§ 4279.101 Introduction.

(a) *Content.* This subpart contains loan processing regulations for the Business and Industry (B&I) Guaranteed Loan Program. It is supplemented by subpart A of this part, which contains general guaranteed loan regulations, and subpart B of part 4287 of this chapter, which contains loan servicing regulations.

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

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

§ 4279.102 Definitions and abbreviations.

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

§ 4279.103 Exception Authority.

Section 4279.15 of this chapter applies to this subpart.

§ 4279.104 Appeals.

Section 4279.16 of this chapter applies to this subpart.

§§ 4279.105–4279.107 [Reserved]

§ 4279.108 Eligible borrowers.

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

(b) *Citizenship.* Individual borrowers must be citizens of the United States (U.S.) or reside in the U.S. after being legally admitted for permanent residence. For purposes of this subpart, citizens and residents of the Republic of Palau, the Federated States of Micronesia, American Samoa, and the Republic of the Marshall Islands are considered U.S. citizens. Corporations or other non public-body type borrowers must be at least 51 percent owned by persons who are either citizens of the U.S. or reside in the U.S. after being legally admitted for permanent residence. Individuals that reside in the U.S. after being legally admitted for permanent residence must provide a permanent green card as evidence of eligibility.

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

(1) Rural areas are any area of a State other than a city or town that has a population of greater than 50,000 inhabitants and any urbanized area contiguous and adjacent to such a city or town. In making this determination, the Agency will use the latest decennial census of the U.S.

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

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

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

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

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

(7)(i) The Under Secretary, whose authority may not be redelegated, may determine that an area is ''rural in character.'' Any determination made by the Under Secretary under this provision will be to areas that are determined to be ''rural in character'' and are within:

(A) An urbanized area that has two points on its boundary that are at least 40 miles apart, which is not contiguous or adjacent to a city or town that has a population of greater than 150,000 inhabitants or the urbanized area of such city or town; or

(B) An area within an urbanized area contiguous and adjacent to a city or town of greater than 50,000 inhabitants that is within ¼ mile of a rural area.

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

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

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

§§ 4279.109–4279.112 [Reserved]

§ 4279.113 Eligible uses of funds.

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

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

(b) Business acquisitions provided that jobs will be created or saved.

(c) Leasehold improvements when the lease contains no reverter clauses or restrictive clauses that would impair the use or value of the property as security for the loan. The term of the lease must be equal to or greater than the term of the loan.

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

(e) Purchase of machinery and equipment.

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

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

(h) Takeout of interim financing. Guaranteeing a loan that provides for permanent, long-term financing after project completion to pay off a lender's interim loan will not be treated as debt refinancing provided that the lender submits a complete preapplication or application that proposes such interim financing prior to closing the interim loan. The borrower must take no action that would have an adverse impact on the environment or limit the range of alternatives to be considered by the Agency during the environmental review process. The Agency will not guarantee takeout of interim financing loans that prevent a meaningful environmental assessment prior to Agency loan approval. Even for projects with interim financing, the Agency cannot approve the loan and issue a Conditional Commitment until the environmental process is complete. The Agency assumes no responsibility or obligation for interim loans.

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

(j) Loans to cooperative organizations.

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

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

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

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

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

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

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

(k) The purchase of cooperative stock by individual farmers or ranchers in a farmer or rancher cooperative in accordance with § 4279.115(a).

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

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

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

(2) The bond holder must purchase all of the bonds and comply with all Agency regulations. There must be a bond purchase agreement between the issuer and the bond holder. The bond purchase agreement must contain similar language to what is required to be in a loan agreement in accordance with § 4279.161(b)(11) and must not be in conflict with subparts A or B of part 4279 or subpart B of part 4287. The bond holder is responsible for all servicing of the loan (bond), although the bond holder may contract for servicing assistance, including contracting with a trustee who remains under the lender's total control.

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

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

(p) Feasibility studies.

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

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

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

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

(ii) The growing of mushrooms or hydroponics.

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

(iv) Commercial fishing.

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

(r) Educational or training facilities.

(s) Industries undergoing adjustment from terminated Federal agricultural price and income support programs or increased competition from foreign trade.

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

(u) Tourist and recreation facilities, including hotels, motels, and bed and breakfast establishments, except as prohibited under ineligible purposes in § 4279.117.

(v) Pollution control and abatement.

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

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

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

(3) Performance or acceptance test requirements for all other energy projects will be determined by the Agency on a case-by-case basis.

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

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

(2) Projects in non-rural areas may be included when the project provides an economic benefit to the surrounding rural communities.

(3) A significant amount of the food product sold by the borrower is locally or regionally produced, and a significant amount of the locally or regionally produced food product is sold locally or regionally.

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

(5) The Agency will give funding priority to projects that provide a benefit to underserved communities in accordance with § 4279.166(b)(4)(i)(G). An underserved community is a community (including an urban or rural

community and an Indian tribal community) that has limited access to affordable, healthy foods, including fresh fruits and vegetables, in grocery retail stores or farmer to consumer direct markets and that has either a high rate of hunger or food insecurity or a high poverty rate as reflected in the most recent decennial census or other Agency approved census.

§ 4279.114 [Reserved]

§ 4279.115 Cooperative stock/cooperative equity.

(a) *Cooperative stock purchase program.* The Agency may guarantee loans for the purchase of cooperative stock by individual farmers or ranchers in a farmer or rancher cooperative established for the purpose of processing an agricultural commodity. The cooperative may use the proceeds from the stock sale to recapitalize, to develop a new processing facility or product line, or to expand an existing production facility. The cooperative may contract for services to process agricultural commodities or otherwise process value-added agricultural products during the 5-year period beginning on the operation startup date of the cooperative in order to provide adequate time for the planning and construction of the processing facility of the cooperative. Loan proceeds must remain in the cooperative from which stock was purchased, and the cooperative must not reinvest those funds into another entity.

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

(2) The maximum term is 7 years.

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

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

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

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

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

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

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

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

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

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

(5) All borrowers purchasing preferred stock or similar equity must provide a prospectus on the preferred stock being offered and financial information about the issuer of the preferred stock to both the lender and the Agency.

(6) Issuer(s) of preferred stock must be a cooperative organization or a fund and must be able to issue preferred stock to the public in accordance with the securities' regulations as set forth by the Securities and Exchange Commission and any other applicable regulatory body, if required.

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

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

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

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

(11) Guaranteed loans for the purchase of preferred stock must be pre-paid in the event a cooperative or fund that issued the stock has either exercised an early redemption or subsequently enters into bankruptcy.

§ 4279.116 New Markets Tax Credit program.

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

(a) *NMTC eligible lenders.* To be an eligible lender for a loan guarantee that involves NMTC, the organization must meet the applicable eligibility criteria in § 4279.29 as otherwise modified by paragraphs (a)(1) and (2) of this section.

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

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

(b) *NMTC eligible purposes.* The provisions of § 4279.117(r) notwithstanding, a lender that is a Department of Treasury certified Community Development Entity (CDE) or subsidiary of a CDE (sub-CDE) may have an ownership interest in the borrower provided that each of the conditions specified in paragraphs (b)(1) through (4) of this section is met.

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

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

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

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

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

(d) *Eligible borrowers.* The provisions of § 4279.117(t) notwithstanding, a sub-CDE may be an eligible borrower as specified in paragraph (d)(1) of this section. Paragraphs (d)(2) through (13) of this section identify modifications to subpart B of this part that apply when the eligible borrower is a sub-CDE.

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

(i) The sub-CDE must be established for a single specific NMTC investment;

(ii) The lender is not an affiliate of the sub-CDE;

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

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

(2) The provisions of § 4279.119 apply except that the loan guarantee limits apply to the QALICB and not to the sub-CDE, who would otherwise be understood to be the ''borrower.''

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

(4) Except for § 4279.131(b), section 4279.131 applies to both the lender's loan to the sub-CDE and the sub-CDE's loan to the QALICB. Section 4279.131(b) applies only to the sub-CDE's loan to the QALICB.

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

(6) Section 4279.137 applies to both the borrower (sub-CDE) and the QALICB.

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

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

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

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

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

(12) Section 4279.180 applies to both the sub-CDE (borrower) and the QALICB.

(13) Section 4279.181 applies to both the sub-CDE (borrower) and the QALICB.

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

§ 4279.117 Ineligible purposes and entity types.

(a) Distribution or payment to an individual or entity that will retain an ownership interest in the borrower. Distribution or payment to a member of the immediate family of an owner, partner, or stockholder will not be permitted, except for a change in ownership of the business where the selling immediate family member does not retain an ownership interest and the Agency determines the price paid to be reasonable. In situations where there is common ownership or an otherwise closely-related company is being paid to do construction or installation work for a borrower, only documented costs associated with construction or installation can be paid with loan proceeds. This paragraph does not apply to transfers of ownership for Employee Stock Ownership Plans or worker cooperatives, to cooperatives where the cooperative pays the member for product or services, or where member stock is transferred among members of the cooperative.

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

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

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

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

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

(g) Guaranteeing loans made by other Federal agencies.

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

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

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

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

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

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

(n) Cemeteries.

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

(p) Debt service reserves.

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

(r) Guarantees where the lender or any of the lender's officers has an ownership interest in the borrower or is an officer or director of the borrower or where the borrower or any of its officers, directors, stockholders, or other owners have more than a 5 percent ownership interest in the lender.

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

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

(u) Charitable institutions or fraternal organizations.

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

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

§ 4279.118 [Reserved]

§ 4279.119 Loan guarantee limits.

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

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

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

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

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

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

(b) *Percentage of guarantee.* The percentage of guarantee, up to the maximum allowed by this section, is a matter of negotiation between the lender and the Agency. The maximum percentage of guarantee is 80 percent for loans of $5 million or less, 70 percent for loans between $5 and $10 million, and 60 percent for loans exceeding $10 million. For subsequent guaranteed loans, the maximum percentage of guarantee will be based on the total amount of outstanding principal and interest of any existing B&I guaranteed loans and the new loan request. Notwithstanding the preceding, the Administrator may, at the Administrator's discretion, grant an exception allowing guarantees of up to 90 percent on loans of $5 million or less if the conditions of either paragraph (b)(1) or (b)(2) are met. Each fiscal year, the Agency will establish a limit on the maximum portion of guarantee authority available for that fiscal year that may be used to guarantee loans with an increased percentage of guarantee. The Agency will publish a notice announcing this limit in the **Federal Register**.

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

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

§ 4279.120 Fees and charges.

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

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

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

(2) Promotes access to healthy foods, or

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

(i) Is experiencing long-term population decline;

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

(iii) Is experiencing trauma as a result of natural disaster or fundamental structural changes in its economic base;

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

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

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

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

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

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

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

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

§§ 4279.121–4279.124 [Reserved]

§ 4279.125 Interest rates.

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

(a) A variable interest rate must be a rate that is tied to a published base rate agreed to by the lender and the Agency. The variable interest rate must be specified in the promissory note and may be adjusted at different intervals during the term of the loan, but the adjustments may not be more often than quarterly. The lender must incorporate, within the variable rate promissory note at loan closing, the provision for adjustment of payment installments. The lender must 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) It is permissible to have different interest rates on the guaranteed and unguaranteed portions of the loan provided that the rate of the guaranteed portion does not exceed the rate on the unguaranteed portion, except for situations where a fixed rate on the guaranteed portion becomes a higher rate than the variable rate on the unguaranteed portion due to the normal fluctuations in the approved variable interest rate.

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

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

§ 4279.126 Loan terms.

(a) The length of the loan term must be the same for both the guaranteed and unguaranteed portions of the loan. The maximum repayment for loans for real estate will not exceed 30 years; machinery and equipment repayment will not exceed the useful life of the machinery and equipment or 15 years, whichever is less; and working capital repayment will not exceed 7 years. The term for a debt refinancing loan may be based on the collateral the lender will take to secure the loan.

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

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

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

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

§§ 4279.127–4279.130 [Reserved]

§ 4279.131 Credit quality.

The Agency will only guarantee loans that are sound and that have a reasonable assurance of repayment. The lender is responsible for conducting a financial analysis that involves the systematic examination and interpretation of information to assess a company's past performance, present condition, and future viability. The lender is primarily responsible for determining credit quality and must address all of the elements of credit quality in a comprehensive, written credit analysis including capacity (sufficient cash flow to service the debt), collateral (assets to secure the loan), conditions (borrower, economy, and industry), capital (equity/net worth), and character (integrity of management), as further described in paragraphs (a) through (e) of this section. The lender's analysis is the central underwriting document and must be sufficiently detailed to describe the proposed loan and business situation and document that the proposed loan is sound. The lender's analysis must include a written discussion of repayment ability with a cash-flow analysis, history of debt repayment, borrower's management, necessity of any debt refinancing, and credit reports of the borrower, principals, and any parent, affiliate or subsidiary. The lender's analysis must also include spreadsheets and discussion of the 3 years of historical balance sheets and income statements (for existing businesses) and 2 years of projected balance sheets, income statements and cash flow statements, with appropriate ratios and comparisons with industrial standards (such as Dun & Bradstreet or Risk Management Association). All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales.

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

(b) *Collateral.* The lender must ensure that the collateral for the loan has a documented value sufficient to protect the interest of the lender and the Agency and, except as set forth in paragraph (b)(2) of this section, the discounted collateral value must be at least equal to the loan amount.

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

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

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

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

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

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

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

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

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

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

(2) Tangible balance sheet equity will be determined based upon financial statements prepared by an accountant in accordance with GAAP. The capital/equity requirement must be met in the form of either cash or tangible earning assets contributed to the business and reflected on the borrower's balance sheet. Transfers of assets at fair market value must be an arm's length transaction. Tangible equity cannot include appraisal surplus, bargain purchase gains, or intangible assets. Owner subordinated debt may be included when the subordinated debt is in exchange for cash injected into the business that remains in the business for the life of the guaranteed loan. The note or other form of evidence must be submitted to the Agency in order for subordinated debt to count towards meeting the tangible balance sheet equity requirement.

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

(4) In situations where a real estate holding company and an operating entity are dependent upon one another's operations and are effectively one business, they must be co-borrowers. The capital/equity requirement will apply to both entities on a consolidated basis, and financial statements must be prepared both individually and on a consolidated basis.

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

(6) For sole proprietorships and other situations where business assets are held personally, financial statements must be prepared using only the assets and liabilities directly attributable to the business. Assets, plus any improvements, must be valued at the lower of cost or fair market value.

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

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

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

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

§ 4279.132 Personal and corporate guarantees.

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

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

(1) Guarantees to be secured;

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

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

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

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

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

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

§§ 4279.133–4279.135 [Reserved]

§ 4279.136 Insurance.

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

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

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

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

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

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

§ 4279.137 Financial statements.

The lender will determine the type and frequency of submission of financial statements by the borrower and any guarantors. At a minimum, annual financial statements prepared by an accountant in accordance with GAAP are required, except for personal financial statements and cooperative stock purchase loans in accordance with § 4279.115(a). However, if the loan amount exceeds $3 million or if circumstances warrant, the Agency may require annual audited financial statements.

§§ 4279.138–4279.143 [Reserved]

§ 4279.144 Appraisals.

Lenders must obtain appraisals for real estate and chattel collateral when the value of the collateral exceeds $250,000. Lenders must use the market value as established by the appraisal and discounting policies outlined in § 4279.131(b) to meet the discounted collateral coverage requirements of this subpart. Lenders are responsible for ensuring that appraisal values adequately reflect the actual value of the collateral. The Agency will require documentation that the appraiser has the necessary experience and competency to appraise the property in question. Appraisals must not be more than 1 year old, and a more recent appraisal may be requested by the Agency in order to reflect more current market conditions. For loan servicing purposes, an appraisal may be updated in lieu of a complete new appraisal when the original appraisal is more than 1 year old but less than 2 years old. Failure by the lender to follow these requirements will be considered an act of fraud or misrepresentation.

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

(b) Values attributed to business valuation or as a going concern are not allowed.

(c) 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.

§ 4279.145–4279.149 [Reserved]

§ 4279.150 Feasibility studies.

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

§ 4279.151–4279.160 [Reserved]

§ 4279.161 Filing preapplications and applications.

Borrowers and lenders are encouraged to file preapplications and obtain Agency comments before completing an application. However, if they prefer, borrowers and lenders may file a complete application without filing a preapplication. The Agency will neither accept nor process preapplications and applications unless a lender has agreed to finance the proposal. Guaranteed loans exceeding $600,000 must be submitted under the requirements specified in paragraph (b) of this section. However, guaranteed loans of $600,000 and less may be submitted under the requirements of either paragraph (b) or (c) of this section.

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

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

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

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

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

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

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

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

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

(3) A completed Form RD 4279–2, ''Certification of Non-Relocation and Market Capacity Information Report,'' if the proposed loan is in excess of $1 million and will increase direct employment by more than 50 employees.

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

(1) A completed Form RD 4279–1.

(2) A completed Form RD 4279–2, if the proposed loan is in excess of $1 million and will increase direct employment by more than 50 employees.

(3) A completed Form RD 1940–20, ''Request for Environmental Information,'' and attachments, unless the project is categorically excluded

under Agency environmental regulations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vii) Minimum debt service coverage ratio.

(12) Intergovernmental consultation comments in accordance with 7 CFR, part 3015, subpart V, or successor regulation, unless exemptions have been granted by the State single point of contact.

(13) Appraisals, accompanied by a copy of the appropriate environmental site assessment, if available.

(14) A business plan or similar document that must include a description of the business and project, management experience, sources of capital, products and services and pricing, marketing plan, proposed use of funds, availability of labor, raw materials and supplies, contracts in place, distribution channels, and the names of any corporate parent, affiliates, and subsidiaries with a description of the relationship. A business plan may be omitted if the information is included in a feasibility study. At the Agency's discretion, a business plan may be omitted when loan proceeds are used exclusively for debt refinancing and fees.

(15) Independent feasibility study, if required.

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

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

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

(19) Any additional information required by the Agency to make a decision.

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

§§ 4279.162–4279.164 [Reserved]

§ 4279.165 Evaluation of application.

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

(b) *Environmental requirements.* The environmental review process must be completed, in accordance with 7 CFR part 1940, subpart G or successor regulation, prior to loan approval.

§ 4279.166 Loan priority scoring.

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

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

(b) The Agency will assign priority points on the basis of the point system contained in this section. The Agency will use the application and supporting information to determine an eligible proposed project's priority for available guarantee authority. To the extent possible, all lenders must consider Agency priorities when choosing projects for guarantee. The lender must provide necessary information related to determining the score, if requested.

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

(2) *Demographics priority.* The priority score for demographics priority

will be the total score for the following categories:

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

(ii) Located in a rural county that has had 20 percent or more of its population living in poverty based on the last three decennial censuses (5 points);

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

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

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

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

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

(i) Lender will price a variable rate loan at a rate equal to or less than the Wall Street Journal published Prime Rate plus 1.5 percent (5 points);

(ii) Lender will price a variable rate loan at a rate equal to or less than the Wall Street Journal published Prime Rate plus 1 percent (5 points);

(iii) Lender will price a fixed rate loan equal to or less than the Farmer Mac II rate plus 2.5 percent (5 points);

(iv) Lender will price a fixed rate loan equal to or less than the Farmer Mac II rate plus 2 percent (5 points);

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

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

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

(viii) The loan-to-job ratio (loan amount/number of jobs created and saved) is less than $75,000 in loan proceeds per job created and saved (5 points);

(ix) The loan-to-job ratio is less than $50,000 in loan proceeds per job created and saved (5 points); and

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

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

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

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

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

(C) Business that offers high value, specialized products and/or services that command high prices (2 points);

(D) Business that provides an additional market for existing local businesses (3 points);

(E) Business that is locally owned and managed (3 points);

(F) Business that will produce a natural resource value-added product or an agricultural resource value-added product (2 points); and

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

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

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

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

(C) Business that offers a healthcare benefits package to all employees, with at least 50 percent of the premium paid by the employer, or a business that qualifies under the Work Opportunity Tax Credit Program authorized by the Small Business and Work Opportunity Tax Act of 2007 (5 points).

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

§ 4279.167 Planning and performing development.

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

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

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

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

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

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

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

(iv) A firm, fixed-price construction contract with an independent general contractor with costs and provisions for change order approvals, a retainage percentage, and a disbursement schedule or a 100 percent performance/payment bond on the borrower's contactor will be required in cases when the lender requests issuance of a Loan Note Guarantee prior to completion of construction. The bonding agent must be listed on Treasury Circular 570. A performance/payment bond will be made a part of the contract if the borrower requests it or if the contractor requests partial payments for construction work; and

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

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

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

(ii) Ensure that the project is built to support the functions at the level and quality contemplated by the borrower through the use of accepted architectural and engineering practices. There is no absolute requirement that the goal be achieved by the use of a professional inspection. However, if after careful review, it appears that the use of a professional inspector is the only method that ensures that the project is built to support the functions at the level and quality contemplated by the borrower through the use of accepted architectural and engineering practices, one may be required by the Agency. If one is required, inspections must be made by a qualified, independent inspector prior to any progress payments. If other less expensive or rigorous methods will achieve the same result, they may be utilized. The decision will be made on a case-by-case basis and must be reasonable under the specific circumstances of the case;

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

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

(4) Once construction is completed, the lender is to provide the Agency with a copy of the Notice of Completion.

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

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

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

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

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

§ 4279.168 Timeframe for processing applications.

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

§§ 4279.169–4279.172 [Reserved]

§ 4279.173 Loan approval and obligating funds.

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

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

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

§ 4279.174 Transfer of lenders.

(a) The Agency may approve the substitution of a new eligible lender in place of a former lender who has been issued and has accepted an outstanding Conditional Commitment when the Loan Note Guarantee has not yet been issued; provided that there are no changes in the borrower's ownership or control, loan purposes, or scope of project and the loan terms and conditions in the Conditional Commitment and the loan agreement remain the same.

(b) Unless the new lender is already an approved lender, the Agency will analyze the new lender's servicing capability, eligibility, and experience prior to approving the substitution. The 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, Form RD 4279–4, ''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 § 4279.131. The new lender may also be required to provide other updated application items outlined in § 4279.161(b).

§§ 4279.175–4279.179 [Reserved]

§ 4279.180 Changes in borrower.

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

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

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

(1) An executed Form RD 4279–4, unless a valid Lender's Agreement

exists that was issued after [DATE OF FINAL RULE PUBLICATION];

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

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

(4) Copy of the executed loan agreement;

(5) Copy of the executed settlement statement;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§§ 4279.182–4279.186 [Reserved]

§ 4279.187 Refusal to execute Loan Note Guarantee.

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

§§ 4279.188–4279.199 [Reserved]

§ 4279.200 OMB control number.

The information collection requirements contained in this regulation have been approved by OMB and have been assigned OMB control number __________. Public reporting burden for this collection of information is estimated to vary from 30 minutes to 24 hours per response, with an average of 3 hours per response, including time for reviewing the collection of information. The burden may increase beyond the estimates reported here, if RBS determines additional data will need to be collected to facilitate evaluation, which can enhance the operation and performance of the program.

PART 4287—SERVICING

■ 4. The authority citation for part 4287 is revised to read as follows:

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

■ 5. Revise Subpart B to read as follows:

Subpart B—Servicing Business and Industry Guaranteed Loans

Sec.

Subpart B—Servicing Business and Industry Guaranteed Loans

§ 4287.101 Introduction.

(a) This subpart supplements subparts A and B of part 4279 of this chapter by providing additional requirements and instructions for servicing and liquidating all B&I guaranteed loans and loans guaranteed under the Rural Energy for America Program. This includes Drought and Disaster, Disaster Assistance for Rural Business Enterprises, Business and Industry Disaster, and American Recovery and Reinvestment Act guaranteed loans.

(b) The lender is responsible for servicing the entire loan and must remain mortgagee and secured party of record notwithstanding the fact that another party may hold a portion of the loan.

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

§ 4287.102 Definitions and abbreviations.

The definitions and abbreviations contained in § 4279.2 of this chapter apply to this subpart.

§ 4287.103 Exception authority.

Section 4279.15 of this chapter applies to this subpart.

§ 4287.104 [Reserved]

§ 4287.105 [Reserved]

§ 4287.106 Appeals.

Section 4279.16 of this chapter applies to this subpart.

§ 4287.107 Routine servicing.

The lender is responsible for servicing the entire loan and for taking all servicing actions that a prudent lender would perform in servicing its own portfolio of loans that are not guaranteed. The lender may contract for services but is ultimately responsible for underwriting, loan origination, loan servicing, and compliance with all Agency regulations. Form RD 4279–4, ''Lender's Agreement,'' is the contractual agreement between the lender and the Agency that sets forth some of the lender's loan servicing responsibilities. These responsibilities include, but are not limited to, periodic borrower visits, the collection of payments, obtaining compliance with the covenants and provisions in the loan agreement, obtaining and analyzing financial statements, ensuring payment of taxes and insurance premiums, maintaining liens on collateral, and keeping an inventory accounting of all collateral items and reconciling the inventory of all collateral sold during loan servicing, including liquidation.

(a) *Lender reports and annual renewal fee.* The lender must report the outstanding principal and interest balance and the current loan classification on each guaranteed loan semiannually (at June 30 and December 31) using either the USDA Lender Interactive Network Connection (LINC) system or Form RD 1980–41, ''Guaranteed Loan Status Report.'' The lender must transmit the annual renewal fee to the Agency in accordance with § 4279.120(b) of this chapter calculated based on the December 31 semiannual status report.

(b) *Loan classification.* The lender must provide the loan classification or rating under its regulatory standards as of loan closing on Form RD 1980–19, ''Guaranteed Loan Closing Report.'' When the lender changes the loan classification in the future, the lender must notify the Agency within 30 days, in writing, of any change in the loan classification.

(c) *Agency and lender conference.* At the Agency's request, the lender must consult with the Agency to ascertain how the guaranteed loan is being serviced and that the conditions and covenants of the loan agreement are being enforced.

(d) *Borrower financial reports.* The lender must obtain, analyze, and forward to the Agency the borrower's and any guarantor's annual financial statements required by the loan agreement within 120 days of the end of the borrower's fiscal year. The lender must analyze these financial statements and provide the Agency with a written summary of the lender's analysis, ratio analysis, and conclusions, which, at a minimum, must include trends, strengths, weaknesses, extraordinary transactions, violations of loan covenants and covenant waivers proposed by the lender, any routine servicing actions performed, and other indications of the financial condition of the borrower. Spreadsheets of the financial statements must also be included. Following the Agency's review of the lender's financial analysis, the Agency will provide a written report of any concerns to the lender. Any concerns based upon the Agency's review must be addressed by the lender. If the lender makes a reasonable attempt to obtain financial statements but is unable to obtain the borrower's cooperation, the failure to obtain financial statements will not impair the validity of the Loan Note Guarantee.

(e) *Protection of Agency interests.* If the Agency determines that the lender is not in compliance with its servicing responsibilities, the Agency reserves the right to take any action the Agency determines necessary to protect the Agency's interests with respect to the loan. If the Agency exercises this right, the lender must cooperate with the Agency to rectify the situation. In determining any loss, the Agency will assess against the lender any cost to the Agency associated with such action.

§§ 4287.108–4287.111 [Reserved]

§ 4287.112 Interest rate changes.

(a) The borrower, lender, and holder (if any) may collectively initiate a permanent or temporary reduction in the interest rate of the guaranteed loan at any time during the life of the loan upon written agreement among these parties. The lender must obtain prior Agency concurrence and must provide a copy of the modification agreement to the Agency. If any of the guaranteed portion has been purchased by the Agency, the Agency (as a holder) will affirm or reject interest rate change proposals in writing.

(b) No increases in interest rates will be permitted, except the normal fluctuations in approved variable interest rates, unless a temporary interest rate reduction occurred.

(c) The interest rate, after adjustments, must comply with the interest rate requirements set forth in § 4279.125 of this chapter.

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

§ 4287.113 Release of collateral.

(a) Within the parameters of paragraph (c) of this section, lenders may, over the life of the loan, release collateral (other than personal and corporate guarantees) with a cumulative value of up to 20 percent of the original loan amount without Agency concurrence if the proceeds generated are used to reduce the guaranteed loan or to buy replacement collateral. Working assets, such as accounts receivable, inventory, and work-in-progress that are routinely depleted or sold and proceeds used for the normal course of business operations may be used in and released for routine business purposes without prior concurrence of the Agency as long as the loan has not been accelerated.

(b) If a release of collateral does not meet the requirements of paragraph (a) of this section, the lender must complete a written evaluation to justify the release and must obtain written Agency concurrence in advance of the release.

(c) Collateral must remain sufficient to provide for adequate collateral coverage. The lender must support all releases of collateral with a value exceeding $250,000 with a current appraisal on the collateral being released. The appraisal must meet the requirements of § 4279.144 of this chapter. The cost of this appraisal will not be paid for by the Agency. The Agency may, at its discretion, require an appraisal of the remaining collateral in cases where it has been determined that the Agency may be adversely affected by the release of collateral. The sale or release of the collateral must be based on an arm's length transaction, and there must be adequate consideration for the release of collateral. Such consideration may include, but is not limited to:

(1) Application of the net proceeds from the sale of collateral to the borrower's debts in order of their lien priority against the sold collateral;

(2) Use of the net proceeds from the sale of collateral to purchase other collateral of equal or greater value for which the lender will obtain as security for the benefit of the guaranteed loan with a lien position equal or superior to the position previously held;

(3) Application of the net proceeds from the sale of collateral to the borrower's business operation in such a manner that a significant improvement to the borrower's debt service ability will be clearly demonstrated. The lender's written request must detail how the borrower's debt service ability will be improved; or

(4) Assurance that the release of collateral is essential for the success of the business, thereby furthering the goals of the program. Such assurance must be supported by written documentation from the lender acceptable to the Agency.

§§ 4287.114–4287.122 [Reserved]

§ 4287.123 Subordination of lien position.

A subordination of the lender's lien position must be requested in writing by the lender and concurred with in writing by the Agency in advance of the subordination. The lender's subordination proposal must include a financial analysis of the servicing action and be fully supported by current financial statements of the borrower and guarantors that are less than 90 days old.

(a) The subordination of lien position must enhance the borrower's business and be in the best financial interest of the Agency.

(b) The lien to which the guaranteed loan is subordinated is for a fixed dollar limit and for a fixed term after which the guaranteed loan lien priority will be restored.

(c) Collateral must remain sufficient to provide for adequate collateral coverage. The Agency may require a current independent appraisal in accordance with § 4279.144 of this chapter.

(d) Lien priorities must remain for the portion of the loan that was not subordinated.

(e) A subordination to a line of credit cannot exceed 1 year. The term of the line of credit cannot be extended.

§ 4287.124 Alterations of loan instruments.

The lender must neither alter nor approve any alterations or modifications of any loan instrument without the prior written approval of the Agency.

§§ 4287.125–4287.132 [Reserved]

§ 4287.133 Sale of corporate stock.

Any sale or transfer of corporate stock must be approved by the Agency in writing and must be to an eligible individual or entity in accordance with §§ 4279.108(a) and 4279.108(b) of this chapter. In the event a portion of the borrower's stock is sold or transferred, the Agency may require personal or corporate guarantees from those then owning a 20 percent or more interest in the borrower in accordance with § 4279.132 of this chapter.

§ 4287.134 Transfer and assumption.

The lender may request a transfer and assumption of a guaranteed loan in situations where the total indebtedness, or less than the total indebtedness, is transferred to another eligible borrower on the same or different terms. A transfer and assumption of the borrower's operation can be accomplished before or after the loan goes into liquidation. However, if the collateral has been purchased through foreclosure or the borrower has conveyed title to the lender, no transfer and assumption is permitted. Additionally, no transfer and assumption is permitted when the Agency has repurchased 100 percent of the guaranteed portion of the loan.

(a) *Documentation of request.* All transfers and assumptions must be approved in writing by the Agency and must be to an eligible borrower. The lender must provide credit reports for each individual or entity owning 20 percent or more interest in the transferee, along with such other documentation as the Agency may request to determine eligibility. In accordance with § 4279.132 of this chapter, the Agency will require personal and/or corporate guarantee(s) from all owners that have a 20 percent or more interest in the transferee. When warranted by an Agency assessment of potential financial risk, the Agency may also require guarantees of parent, subsidiaries, or affiliated companies (owning less than a 20 percent interest in the borrower) and may require security for any guarantee. The new borrower must sign Form RD 4279–1, ''Application for a Loan Guarantee,'' and any guarantors of the guaranteed loan must sign Form RD 4279–14, ''Unconditional Guarantee.''

(b) *Terms.* Loan terms may be changed with the concurrence of the Agency, all holders, and the transferor (including guarantors) if the transferor has not been or will not be released from liability. Any new loan terms must be within the terms authorized by § 4279.126 of this chapter.

(c) *Release of liability.* The transferor, including any guarantor, may be released from liability only with prior Agency written concurrence and only when the value of the collateral being transferred is at least equal to the amount of the loan being assumed and is supported by a current appraisal and a current financial statement of the transferee. The Agency will not pay for the appraisal. If the transfer is for less than the debt, for a release of liability, the lender must demonstrate to the Agency that the transferor and guarantors have no reasonable debt-paying ability considering their assets and income in the foreseeable future.

(d) *Proceeds.* The lender must credit any proceeds received from the sale of collateral before a transfer and assumption to the transferor's guaranteed loan debt in order of lien priority before the transfer and assumption is closed.

(e) *Additional loans.* Loans to provide additional funds in connection with a transfer and assumption must be considered a new loan application, which requires submission of a complete Agency application in accordance with § 4279.161(b) of this chapter.

(f) *Credit quality.* The lender will provide a credit analysis of the proposal that addresses capacity (sufficient cash flow to service the debt), capital (net worth), collateral (assets to secure the debt), conditions (of the borrower, industry trends, and the overall economy), and character (integrity of the transferee management) in accordance with § 4279.131 of this chapter.

(g) *Appraisals.* If the proposed transfer and assumption is for the full amount of the Agency guaranteed loan, the Agency will not require an appraisal. If the proposed transfer and assumption is for less than the full amount of the Agency guaranteed loan, the Agency will require an appraisal on all of the collateral being transferred, and the amount of the assumption must not be less than this appraised value. The lender is responsible for obtaining this appraisal, which must conform to the requirements of § 4279.144 of this chapter. The Agency will not pay the appraisal fee or any other costs associated with this transfer.

(h) *Documents.* Prior to Agency approval, the lender must provide the Agency a written legal opinion that the transaction can be properly and legally transferred and assurance that the conveyance instruments will be appropriately filed, registered, and recorded.

(1) The lender must not issue any new promissory notes. The assumption must be completed in accordance with applicable law and must contain the Agency case number of the transferor and transferee. The lender must provide the Agency with a copy of the transfer and assumption agreement. The lender must ensure that all transfers and assumptions are noted on all original Loan Note Guarantees.

(2) A new loan agreement, consistent in principle with the original loan agreement, must be executed to establish the terms and conditions of the loan being assumed. An assumption agreement can be used to establish the loan covenants.

(3) Upon execution of the transfer and assumption, the lender must provide the Agency with a written legal opinion that the transfer and assumption is completed, valid, enforceable, and certification that the transfer and assumption is consistent with the conditions outlined in the Agency's conditions of approval for the transfer and complies with all Agency regulations.

(i) *Loss/repurchase resulting from transfer.* (1) Any resulting loss must be processed in accordance with § 4287.158.

(2) If a holder owns any of the guaranteed portion, such portion must be repurchased by the lender or the Agency in accordance with § 4279.78 of this chapter.

(j) *Related party.* If the transferor and transferee are affiliated or related parties, any transfer and assumption must be for the full amount of the debt.

(k) *Cash downpayment.* The lender may allow the transferee to make cash downpayments directly to the transferor provided:

(1) The transfer and assumption is made for the total indebtedness;

(2) The lender recommends that the cash be released, and the Agency concurs prior to the transaction being completed. The lender may require that an amount be retained for a defined period of time as a reserve against future defaults. Interest on such account may be paid periodically to the transferor or transferee as agreed;

(3) The lender determines that the transferee has the repayment ability to meet the obligations of the assumed guaranteed loan as well as any other indebtedness; and

(4) Any payments by the transferee to the transferor will not suspend the transferee's obligations to continue to meet the guaranteed loan payments as they come due under the terms of the assumption.

(l) *Transfer/annual renewal fees.*

(1) The Agency will charge a nonrefundable transfer fee at the time of transfer, which may be passed on to the borrower by the lender. The transfer fee rate will be equal to the rate of the guarantee fee authorized in § 4279.120 of this chapter for the fiscal year in which the transfer occurs. The amount of the transfer fee is determined by multiplying the principal balance at the time of the transfer by the transfer fee rate by the percentage of guarantee on the original loan.

(2) The lender must pay any annual renewal fee published in the **Federal Register** and then in effect at the time the loan is closed for the duration of the Loan Note Guarantee. Annual renewal fees are due for the entire year even if the Loan Note Guarantee is terminated before the end of the year.

§ 4287.135 Substitution of lender.

After the issuance of a Loan Note Guarantee, the lender is prohibited from selling or transferring the entire loan without the prior written approval of the Agency. Because the Loan Note Guarantee is associated with a specific promissory note and cannot be transferred to a new promissory note, the lender must transfer the original promissory note to the new lender, who must agree to its current loan terms, including the interest rate, secondary market holder (if any), collateral, loan agreement terms, and guarantors. The new lender must also obtain the original Loan Note Guarantee, original personal and corporate guarantee(s), and the loan payment history from the transferor lender. If the new lender wishes to modify the loan terms after acquisition, the new lender must submit a request to the Agency.

(a) The Agency may approve the substitution of a new lender if:

(1) The proposed substitute lender:

(i) Is an eligible lender in accordance with § 4279.29 of this chapter and is approved as such;

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

(iii) Agrees in writing to acquire title to the unguaranteed portion of the loan held by the original lender and assumes all original loan requirements, including liabilities and servicing responsibilities; and

(2) The substitution of the lender is requested in writing by the borrower, the proposed substitute lender, and the original lender of record, if still in existence.

(b) The Agency will not pay any loss or share in any costs (e.g., appraisal fees and environmental assessments) with a new lender unless a relationship is established through a substitution of lender in accordance with paragraph (a) of this section. This includes situations where a lender is acquired by another lender and situations where the lender has failed and been taken over by a regulatory agency such as the Federal Deposit Insurance Corporation (FDIC) and the loan is subsequently sold to another lender.

(c) Where the lender has failed and been taken over by the FDIC and the loan is liquidated by the FDIC rather than being sold to another lender, the Agency will pay losses and share in costs as if the FDIC were an approved substitute lender.

(d) In cases where there is a substitution of lender or a lender has been merged with or acquired by another lender, the Agency and the new lender must execute a new Form RD 4279–4, ''Lender's Agreement,'' unless a valid Lender's Agreement already exists with the new lender.

§ 4287.136 Lender failure.

(a) *Uninsured lender.* The lender or insuring agency cannot arbitrarily change the Lender's Agreement and related documents on the guaranteed loan, and the Agency will make the successor to the failed institution aware of the statutory and regulatory requirements. If the acquiring institution is not an eligible lender as set forth in § 4279.29 of this chapter, the Loan Note Guarantee will not be enforceable, and the institution must promptly apply to become an eligible lender. The failure of the uninsured lender to become an eligible lender will result in the Loan Note Guarantee being unenforceable. A new lender approved by the Agency will be afforded the benefits of the Loan Note Guarantee in sharing of any loss and eligible expenses subject to the limits that are set forth in the regulations governing the program.

(b) *Insured lender.* The FDIC and the Agency have entered into an Inter Agency Agreement and all parties are to abide by this Agreement or successor document(s). This document sets forth the duties and responsibilities of each Agency when an institution fails. The lender must take such action that a prudent lender would take if it did not have a Loan Note Guarantee to protect the lender and Agency's mutual interest.

§§ 4287.137–4287.144 [Reserved]

§ 4287.145 Default by borrower.

The lender's primary responsibilities in default are to act prudently and expeditiously, to work with the borrower to bring the account current or cure the default through restructuring if a realistic plan can be developed, or to accelerate the account and conduct a liquidation in a manner that will minimize any potential loss. The lender may initiate liquidation subject to submission and approval of a complete liquidation plan.

(a) The lender must notify the Agency when a borrower is more than 30 days past due on a payment and the delinquency cannot be cured within 30 days or when a borrower is otherwise in default of covenants in the loan agreement by promptly submitting Form RD 1980–44, ''Guaranteed Loan Borrower Default Status,'' or processing the Default Status report in LINC. The lender must update the loan's status each month using either Form RD 1980–44 or the LINC Default Status report until such time as the loan is no longer in default. If a monetary default exceeds 60 days, the lender must meet with the Agency and, if practical, the borrower to discuss the situation.

(b) In considering options, the prospects for providing a permanent cure without adversely affecting the risk to the Agency and the lender is the paramount objective.

(1) Curative actions (subject to the rights of any holder) include, but are not limited to:

(i) Deferment of principal and/or interest payments;

(ii) An additional unguaranteed temporary loan by the lender to bring the account current;

(iii) Reamortization of or rescheduling the payments on the loan;

(iv) Transfer and assumption of the loan in accordance with § 4287.134 of this subpart;

(v) Reorganization;

(vi) Liquidation; and

(vii) Changes in interest rates with the Agency's, the lender's, and any holder's approval. Any interest rate changes must be adjusted proportionately between the guaranteed and unguaranteed portion of the loan.

(2) The term of any deferment, rescheduling, reamortization, or moratorium will be limited to the lesser of the remaining useful life of the collateral or remaining limits as set forth in § 4279.126 of this chapter (excluding paragraph (c)). Balloon payments are permitted as a loan servicing option as long as there is a reasonable prospect for success and the remaining life of the collateral supports the action.

(3) In the event of a loss or a repurchase, the lender cannot claim default or penalty interest, late payment fees, or interest on interest. If the restructuring includes the capitalization of interest, interest accrued on the capitalized interest will not be covered by the guarantee. Consequently, it is not eligible for repurchase from the holder and cannot be included in the loss claim.

(c) Debt write-downs for an existing borrower, where the same principals retain control of and decisionmaking authority for the business, are prohibited, except as directed or ordered by the Bankruptcy Court.

(d) For loans closed on or after [DATE OF FINAL RULE PUBLICATION], in the event of a loss, the guarantee will not cover note interest to the lender accruing after 90 days from the most recent delinquency effective date.

(e) For loans closed on or after [DATE OF FINAL RULE PUBLICATION], the guarantee will not cover note interest to any holder accruing after 90 days from the date of the first demand letter from a holder to the lender requesting the repurchase of the loan guarantee.

(f) For repurchases of guaranteed loans, refer to § 4279.78 of this chapter.

§§ 4286.146–4287.155 [Reserved]

§ 4287.156 Protective advances.

Protective advances are advances made by the lender for the purpose of preserving and protecting the collateral where the debtor has failed to, will not, or cannot meet its obligations. Lenders must exercise sound judgment in determining that the protective advance preserves collateral and recovery is actually enhanced by making the advance. Lenders cannot make protective advances in lieu of additional loans. A protective advance claim will be paid only at the time of the final report of loss payment.

(a) The maximum loss to be paid by the Agency will never exceed the original loan amount plus accrued interest times the percentage of guarantee regardless of any protective advances made.

(b) In the event of a final loss, protective advances will accrue interest at the note rate and will be guaranteed at the same percentage of guarantee as provided for in the Loan Note Guarantee. The guarantee will not cover interest on the protective advance accruing after 90 days from the most recent delinquency effective date.

(c) Protective advances must constitute an indebtedness of the borrower to the lender and be secured by the security instruments. Agency written authorization is required when the cumulative total of protective advances exceeds $200,000 or 10 percent of the aggregate outstanding balance of principal and interest, whichever is less.

§ 4287.157 Liquidation.

In the event of one or more incidents of default or third party actions that the borrower cannot or will not cure or eliminate within a reasonable period of time, the lender, with Agency consent, must liquidate the loan. In accordance with § 4287.145(d), for loans closed on or after [DATE OF FINAL RULE PUBLICATION], in the event of a loss, the guarantee will not cover note interest to the lender accruing after 90 days from the most recent delinquency effective date.

(a) *Decision to liquidate.* A decision to liquidate must be made when the lender determines that the default cannot be cured through actions such as those contained in § 4287.145, or it has been determined that it is in the best interest of the Agency and the lender to liquidate. The decision to liquidate or continue with the borrower must be made as soon as possible when one or more of the following exist:

(1) A loan is 90 days behind on any scheduled payment and the lender and the borrower have not been able to cure the delinquency through actions such as those contained in § 4287.145.

(2) It is determined that delaying liquidation will jeopardize full recovery on the loan.

(3) The borrower or lender is uncooperative in resolving the problem or the Agency or lender has reason to believe the borrower is not acting in good faith, and it would improve the position of the guarantee to liquidate immediately.

(b) *Repurchase of loan.* When the decision to liquidate is made, if any portion of the loan has been sold or assigned under § 4279.75 of this chapter and not already repurchased, provisions will be made for repurchase in accordance with § 4279.78 of this chapter.

(c) *Lender's liquidation plan.* The lender is responsible for initiating actions immediately and as necessary to assure a prompt, orderly liquidation that will provide maximum recovery. Within 30 days after a decision to liquidate, the lender must submit a written, proposed plan of liquidation to the Agency for approval. The liquidation plan must be detailed and include at least the following:

(1) Such proof as the Agency requires to establish the lender's ownership of the guaranteed loan promissory note and related security instruments and a copy of the payment ledger, if available, that reflects the current loan balance, accrued interest to date, and the method of computing the interest;

(2) A full and complete list of all collateral, including any personal and corporate guarantees;

(3) The recommended liquidation methods for making the maximum collection possible on the indebtedness and the justification for such methods, including recommended action for acquiring and disposing of all collateral and collecting from guarantors;

(4) Necessary steps for preservation of the collateral;

(5) Copies of the borrower's most recently available financial statements;

(6) Copies of each guarantor's most recently available financial statements;

(7) An itemized list of estimated liquidation expenses expected to be incurred along with justification for each expense;

(8) A schedule to periodically report to the Agency on the progress of liquidation;

(9) Estimated protective advance amounts with justification;

(10) Proposed protective bid amounts on collateral to be sold at auction and a breakdown to show how the amounts were determined. A protective bid may be made by the lender, with prior Agency written approval, at a foreclosure sale to protect the lender's and the Agency's interest. The protective bid will not exceed the amount of the loan, including expenses of foreclosure, and must be based on the liquidation value considering estimated expenses for holding and reselling the property. These expenses include, but are not limited to, expenses for resale, interest accrual, length of time necessary for resale, maintenance, guard service, weatherization, and prior liens;

(11) If a voluntary conveyance is considered, the proposed amount to be credited to the guaranteed debt;

(12) Legal opinions, if needed by the lender's legal counsel; and

(13) An estimate of fair market and potential liquidation value of the collateral. If the value of the collateral is $250,000 or more, the lender must obtain an independent appraisal report meeting the requirements of § 4279.144 of this chapter for the collateral securing the loan, which reflects the fair market value and potential liquidation value. The liquidation appraisal of the collateral must evaluate the impact on market value of any release of hazardous substances, petroleum products, or other environmental hazards. The independent appraiser's fee, including the cost of the environmental site assessment, will be shared equally by the Agency and the lender. In order to assure prompt action, the liquidation plan can be submitted with an estimate of collateral value, and the liquidation plan may be approved by the Agency subject to the results of the final liquidation appraisal.

(d) *Approval of liquidation plan.* The lender's liquidation plan must be approved by the Agency in writing. The lender and Agency must attempt to resolve any Agency concerns. If the liquidation plan is approved by the Agency, the lender must proceed expeditiously with liquidation and must take all legal action necessary to liquidate the loan in accordance with the approved liquidation plan. The lender must update or modify the liquidation plan when conditions warrant, including a change in value based on a liquidation appraisal. If the liquidation plan is not approved by the Agency, the lender must take such actions that a prudent lender would take without a guarantee and keep the Agency informed in writing. The lender must continue to develop a liquidation plan in accordance with this section.

(e) *Acceleration.* The lender will proceed to accelerate the indebtedness as expeditiously as possible when acceleration is necessary, including giving any notices and taking any other legal actions required. The guaranteed loan will be considered in liquidation once the loan has been accelerated and a demand for payment has been made upon the borrower. The lender must obtain from the Agency concurrence prior to the acceleration of the loan if the sole basis for acceleration is a nonmonetary default. In the case of monetary default, prior approval by the Agency of the lender's acceleration is not required, although Agency concurrence must still be given not later than at the time the liquidation plan is approved. The lender will provide a copy of the acceleration notice or other acceleration document to the Agency.

(f) *Filing an estimated loss claim.* When the lender owns any of the guaranteed portion of the loan, the lender must file an estimated loss claim once a decision has been made to liquidate if the liquidation is expected to exceed 90 days. The estimated loss payment will be based on the liquidation value of the collateral. For the purpose of reporting and loss claim computation, for loans closed on or after [FINAL RULE PUBLICATION DATE], the guarantee will not cover note interest to the lender accruing after 90 days from the most recent delinquency effective date. The Agency will promptly process the loss claim in accordance with applicable Agency regulations as set forth in § 4287.158.

(g) *Accounting and reports.* The lender must account for funds during the period of liquidation and must, in accordance with the Agency-approved liquidation plan, provide the Agency with reports on the progress of liquidation including disposition of collateral, resulting costs, and additional procedures necessary for successful completion of the liquidation.

(h) *Transmitting payments and proceeds to the Agency.* When the

Agency is the holder of a portion of the guaranteed loan, the lender must transmit to the Agency its pro rata share of any payments received from the borrower, liquidation, or other proceeds using Form RD 1980–43, ''Lender's Guaranteed Loan Payment to Rural Development.''

(i) *Abandonment of collateral.* When the lender adequately documents that the cost of liquidation would exceed the potential recovery value of certain collateral and receives Agency concurrence, the lender may abandon that collateral. When the lender makes a recommendation for abandonment of collateral, it must comply with 7 CFR part 1940, subpart G.

(j) *Personal or corporate guarantees.* The lender must take action to maximize recovery from all personal and corporate guarantees, including seeking deficiency judgments when there is a reasonable chance of future collection.

(k) *Compromise settlement.* Compromise settlements must be approved by the lender and the Agency. Complete current financial information on all parties obligated for the loan must be provided. At a minimum, the compromise settlement must be equivalent to the value and timeliness of that which would be received from attempting to collect on the guarantee. The guarantor cannot be released from liability until the full amount of the compromise settlement has been received. In weighing whether the compromise settlement should be accepted, among other things, the Agency will weigh whether the comparison is more financially advantageous than collecting on the guarantee.

(l) *Litigation.* In all litigation proceedings involving the borrower, the lender is responsible for protecting the rights of the lender and the Agency with respect to the loan and keeping the Agency adequately and regularly informed, in writing, of all aspects of the proceedings. If the Agency determines that the lender is not adequately protecting the rights of the lender or the Agency with respect to the loan, the Agency reserves the right to take any legal action the Agency determines necessary to protect the rights of the lender, on behalf of the lender, or the Agency with respect to the loan. If the Agency exercises this right, the lender must cooperate with the Agency. Any cost to the Agency associated with such action will be assessed against the lender.

§ 4287.158 Determination of loss and payment.

Unless the Agency anticipates a future recovery, the Agency will make a final settlement with the lender after the collateral is liquidated or after settlement and compromise of all parties has been completed. The Agency has the right to recover losses paid under the guarantee from any party that may be liable.

(a) *Report of loss form.* Form RD 449–30, ''Loan Note Guarantee Report of Loss,'' will be used for reporting and calculating all estimated and final loss determinations.

(b) *Estimated loss.* In accordance with the requirements of § 4287.157(f), the lender must prepare an estimated loss claim, based on liquidation appraisal value, and submit it to the Agency.

(1) Interest accrual eligible for payment under the guarantee on the defaulted loan will be discontinued when the estimated loss is paid.

(2) A protective advance claim will be paid only at the time of the final report of loss payment.

(3) The estimated loss payment is a payment to the lender and is not to be applied as a payment on the loan for purposes of reducing the unpaid balance owed by the borrower or for status reporting (semi-annual status/default status reports).

(c) *Final loss.* Within 30 days after liquidation of all collateral is completed (except for certain unsecured personal or corporate guarantees as provided for in this section), the lender must prepare a final report of loss and submit it to the Agency. The Agency will not guarantee interest beyond 90 days from the date any holder makes demand, or, if the lender holds all or a portion of the guaranteed loan, no more than 90 days from the most recent delinquency effective date as reported by the lender. Before approval by the Agency of any final loss report, the lender must account for all funds during the period of liquidation, disposition of the collateral, all costs incurred, and any other information necessary for the successful completion of liquidation. Upon receipt of the final accounting and report of loss, the Agency may audit all applicable documentation to determine the final loss. The lender must make its records available and otherwise assist the Agency in making any investigation. The documentation accompanying the report of loss must support the amounts reported as losses on Form RD 449–30.

(1) The lender must make a determination regarding the collectability of unsecured personal and corporate guarantees. If reasonably possible, the lender must promptly collect or otherwise dispose of such guarantees in accordance with § 4287.157(j) prior to completion of the final loss report. However, in the event that collection from the guarantors appears unlikely or will require a prolonged period of time, the lender must file the report of loss when all other collateral has been liquidated. Unsecured personal or corporate guarantees outstanding at the time of the submission of the final loss claim will be treated as a future recovery with the net proceeds to be shared on a pro rata basis by the lender and the Agency. Debts owed to the Agency (Federal debt) may be collected using DCIA authority. The Agency may consider a compromise settlement of Federal debt after it has processed a final report of loss and issued a 60 day due process letter. Any funds collected on Federal debt will not be shared with the lender.

(2) The lender must document that all of the collateral has been accounted for and properly liquidated and liquidation proceeds have been accounted for and applied correctly to the loan.

(3) The lender must provide receipts and a breakdown of any protective advance amount as to the payee, purpose of the expenditure, date paid, and evidence that the amount expended was proper.

(4) The lender must provide receipts and a breakdown of liquidation expenses as to the payee, purpose of the expenditure, date paid, and evidence that the amount expended was proper. Liquidation expenses are recoverable only from liquidation proceeds. The Agency may approve attorney/legal fees as liquidation expenses provided that the fees are reasonable, require the assistance of attorneys, and cover legal issues pertaining to the liquidation that could not be properly handled by the lender and its employees.

(5) The lender must support accrued interest by documenting how the amount was accrued. If the interest rate was a variable rate, the lender must include documentation of changes in both the selected base rate and the loan rate.

(6) The Agency will pay loss payments within 60 days after it has reviewed the complete final loss report and accounting of the collateral.

(d) *Loss limit.* The amount payable by the Agency to the lender cannot exceed the limits set forth in the Loan Note Guarantee.

(e) *Liquidation expenses.* The Agency will deduct liquidation expenses from the liquidation proceeds of the collateral. The lender cannot claim any liquidation expenses in excess of liquidation proceeds. Any changes to the liquidation expenses that exceed 10 percent of the amount proposed in the liquidation plan must be approved by the Agency. Reasonable attorney/legal expenses will be shared by the lender and Agency equally, including those instances where the lender has incurred such expenses from a trustee conducting the liquidation of assets. The lender cannot claim the guarantee fee or the annual renewal fee as authorized liquidation expenses, and no in-house expenses of the lender will be allowed. In-house expenses include, but are not limited to, employee's salaries, staff lawyers, travel, and overhead.

(f) *Rent.* The lender must apply any net rental or other income that it receives from the collateral to the guaranteed loan debt.

(g) *Payment.* Once the Agency approves the Form RD 449–30 and supporting documents submitted by the lender:

(1) If the loss is greater than any estimated loss payment, the Agency will pay the additional amount owed by the Agency to the lender.

(2) If the loss is less than the estimated loss payment, the lender must reimburse the Agency for the overpayment plus interest at the note rate from the date of payment.

§§ 4287.159–4287.168 [Reserved]

§ 4287.169 Future recovery.

Unless notified otherwise by the Agency, after the final loss claim has been paid, the lender must use reasonable efforts to attempt collection from any party still liable on any loan that was guaranteed. Any net proceeds from that effort must be split pro rata between the lender and the Agency based on the original amount of the loan guarantee. Any collection of Federal debt made by the U.S. from any liable party to the guaranteed loan will not be split with the lender.

§ 4287.170 Bankruptcy.

(a) *Lender's responsibilities.* It is the lender's responsibility to protect the guaranteed loan and all of the collateral securing it in bankruptcy proceedings. These responsibilities include, but are not limited to the following:

(1) Monitoring confirmed bankruptcy plans to determine borrower compliance, and, if the borrower fails to comply, seeking a dismissal of the bankruptcy plan;

(2) Filing a proof of claim, where necessary, and all the necessary papers and pleadings concerning the case;

(3) Attending and, where necessary, participating in meetings of the creditors and all court proceedings;

(4) Requesting modifications of any bankruptcy plan whenever it appears that additional recoveries are likely; and

(5) Keeping the Agency adequately and regularly informed in writing of all aspects of the proceedings.

(6) The lender must submit a default status report when the borrower defaults and every 30 days until the default is resolved or a final loss claim is paid by the Agency. The default status report will be used to inform the Agency of the bankruptcy filing, the plan confirmation date, when the plan is complete, and when the borrower is not in compliance with the plan.

(7) With written Agency consent, the lender and Agency will equally share the cost of any independent appraisal fee to protect the guaranteed loan in any bankruptcy proceedings.

(b) *Reports of loss during bankruptcy.* In bankruptcy proceedings, payment of loss claims will be made as provided in this section. Attorney/legal fees and protective advances as a result of a bankruptcy are only recoverable from liquidation proceeds and not the guarantee on the loan.

(1) *Estimated loss payments.* (i) If a borrower has filed for bankruptcy and all or a portion of the debt has been discharged, the lender must request an estimated loss payment of the guaranteed portion of the accrued interest and principal discharged by the court. Only one estimated loss payment is allowed during the bankruptcy. All subsequent claims of the lender during bankruptcy will be considered revisions to the initial estimated loss. A revised estimated loss payment may be processed by the Agency, at its option, in accordance with any court-approved changes in the bankruptcy plan. Once the bankruptcy plan has been completed, the lender is responsible for submitting the documentation necessary for the Agency to review and adjust the estimated loss claim to reflect any actual discharge of principal and interest and to reimburse the lender for any court-ordered interest-rate reduction under the terms of the bankruptcy plan.

(ii) The lender must use Form RD 449–30 to request an estimated loss payment and to revise any estimated loss payments during the course of the bankruptcy plan. The estimated loss claim, as well as any revisions to this claim, must be accompanied by documentation to support the claim.

(iii) Upon completion of a bankruptcy plan, the lender must complete a Form RD 1980–44 and forward this form to the Agency.

(iv) Upon completion of the bankruptcy plan, the lender must provide the Agency with the documentation necessary to determine whether the estimated loss paid equals the actual loss sustained. If the actual loss sustained as a result of the bankruptcy is less than the estimated loss, the lender must reimburse the Agency for the overpayment plus interest at the note rate from the date of payment of the estimated loss. If the actual loss is greater than the estimated loss payment, the lender must submit a revised estimated loss claim in order to obtain payment of the additional amount owed by the Agency to the lender.

(2) *Bankruptcy loss payments.* (i) The lender must request a bankruptcy loss payment of the guaranteed portion of the accrued interest and principal discharged by the court for all bankruptcies when all or a portion of the debt has been discharged. Unless the Bankruptcy Court approves a subsequent change to the bankruptcy plan that is adverse to the lender, only one bankruptcy loss payment is allowed during the bankruptcy. Once the Bankruptcy Court has discharged all or part of the guaranteed loan and any appeal period has run, the lender must submit the documentation necessary for the Agency to review and adjust the bankruptcy loss claim to reflect any actual discharge of principal and interest.

(ii) The lender must use Form RD 449–30 to request a bankruptcy loss payment and to revise any bankruptcy loss payments during the course of the bankruptcy. The lender must include with the bankruptcy loss claim documentation to support the claim, as well as any revisions to this claim.

(iii) Upon completion of a bankruptcy plan, restructure, or liquidation, the lender must either complete a Form RD 1980–44 and forward this form to the Agency or enter the data directly into LINC.

(iv) If an estimated loss claim is paid during a bankruptcy and the borrower repays in full the remaining balance without an additional loss sustained by the lender, a final report of loss is not necessary.

(3) *Interest rate losses as a result of bankruptcy reorganization.* (i) For guaranteed loans approved prior to [DATE OF FINAL RULE PUBLICATION]:

(A) Interest losses sustained during the period of the bankruptcy plan will be processed in accordance with paragraph (b)(1) of this section;

(B) Interest losses sustained after the bankruptcy plan is confirmed will be processed annually when the lender sustains a loss as a result of a permanent interest rate reduction that extends beyond the period of the bankruptcy plan;

(C) If a bankruptcy loss claim is paid during the operation of the bankruptcy plan and the borrower repays in full the remaining balance without an additional loss sustained by the lender, a final report of loss is not necessary.

(ii) For guaranteed loans approved on or after [DATE OF FINAL RULE PUBLICATION], the Agency will not compensate the lender for any difference in the interest rate specified in the Loan Note Guarantee and the rate of interest specified in the bankruptcy plan.

(4) *Final bankruptcy loss payments.* The Agency will process final bankruptcy loss payments when the loan is fully liquidated.

(5) *Application of loss claim payments.* The lender must apply estimated loss payments first to the unsecured principal of the guaranteed portion of the debt and then to the unsecured interest of the guaranteed portion of the debt. In the event a bankruptcy court attempts to direct the payments to be applied in a different manner, the lender must immediately notify the Agency in writing.

(6) *Protective advances.* If approved protective advances, as authorized by § 4287.156 were incurred in connection with the initiation of liquidation action and were required to provide repairs, insurance, etc., to protect the collateral as result of delays in the case of failure of the borrower to maintain the security prior to the borrower having filed bankruptcy, the protective advances together with accrued interest, are payable under the guarantee in the final loss claim.

(c) *Expenses during bankruptcy proceedings.* (1) Under no circumstances will the guarantee cover liquidation expenses in excess of liquidation proceeds.

(2) Expenses, such as reasonable attorney/legal fees and the cost of appraisals incurred by the lender as a direct result of the borrower's bankruptcy filing, are considered liquidation expenses and will be shared equally by the lender and the Agency. Liquidation expenses must be deducted from collateral sale proceeds. Liquidation expenses are covered under the guarantee, provided they are reasonable, customary, and provide a demonstrated economic benefit to the lender and the Agency. Lender's in-house expenses, which are those expenses that would normally be incurred for administration of the loan, including in-house lawyers, are not covered by the guarantee.

(3) When a bankruptcy proceeding results in a liquidation of the borrower by a bankruptcy trustee, expenses will be handled as directed by the court, and the lender cannot claim liquidation expenses for the sale of the assets.

(4) If the property is abandoned by the bankruptcy trustee, the lender will conduct the liquidation in accordance with § 4287.157.

(5) Proceeds received from partial sale of collateral during bankruptcy may be used by the lender to pay reasonable costs, such as freight, labor and sales commissions, associated with the partial sale. Reasonable use of proceeds for this purpose must be documented with the final loss claim.

(6) Reasonable and customary liquidation expenses in bankruptcy may be deducted from liquidation proceeds of collateral.

§§ 4287.171–4287.179 [Reserved]

§ 4287.180 Termination of guarantee.

The Loan Note Guarantee will terminate under any of the following conditions:

(a) Upon full payment of the guaranteed loan;

(b) Upon full payment of any loss obligation; or

(c) Upon written notice from the lender to the Agency that the guarantee will terminate 30 days after the date of notice, provided that the lender holds all of the guaranteed portion and the Loan Note Guarantee is returned to the Agency to be canceled.

§§ 4287.181–4287.199 [Reserved]

§ 4287.200 OMB control number.

The information collection requirements contained in this regulation have been approved by OMB and have been assigned OMB control number ______. Public reporting burden for this collection of information is estimated to vary from 30 minutes to 25 hours per response, with an average of 2.5 hours per response, including time for reviewing the collection of information. The burden may increase beyond the estimate reported here, if RBS determines additional data will need to be collected to facilitate evaluation, which can enhance the operation and performance of the program.

Dated: August 28, 2014.

Doug O'Brien,

Acting Under Secretary, Rural Development.

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