

DEPARTMENT OF AGRICULTURE**Rural Utilities Service****7 CFR Part 5001**

[Docket No. RUS–19–Agency–0030]

RIN 0572–AC63

OneRD Guarantee Loan

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

ACTION: Final rule; request for comments.

SUMMARY: Rural Development’s Rural Business-Cooperative Service, Rural Housing Service, and Rural Utilities Service, agencies of the United States Department of Agriculture (USDA), collectively referred to as the Agency in this document, are publishing this final rule for the OneRD Guarantee Loan Program (OneRD). The intent of this rule is to make necessary revisions to the policy and procedures which will strengthen oversight and management of the growing Community Facilities (CF), Water and Waste Disposal (WWD), Business and Industry (B&I), and Rural Energy for America (REAP) guarantee portfolios. This action is part of a continuing effort by the Agency to improve customer service for its lenders and create a more efficient work process for its staff.

DATES:

Effective date: This final rule is effective November 29, 2024.

Comments due date: Comments must be submitted on or before October 30, 2024.

ADDRESSES: You may submit comments, identified by docket number RUS–19–Agency–0030 and Regulatory Information Number (RIN) number 0572–AC63 through <https://www.regulations.gov>.

Instructions: All submissions received must include the Agency name and docket number or RIN for this rulemaking. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>.

Additional information about Rural Development and its programs is available on the internet at <https://www.rd.usda.gov>.

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SUPPLEMENTARY INFORMATION:**I. Background**

The Rural Housing Service (RHS), the Rural Business-Cooperative Service (RBCS), and the Rural Utilities Service (RUS), agencies of the USDA Rural Development mission area, hereinafter collectively referred to as the Agency, published a final rule with comment on July 14, 2020 (85 FR 42494) that created a unified guaranteed loan platform for enhanced delivery of four existing guaranteed loan programs: Community Facilities (CF) administered by RHS; Water and Waste Disposal (WWD) administered by RUS; and Business and Industry (B&I) and Rural Energy for America (REAP) administered by RBCS. The final rule was effective on October 1, 2020, and Rural Development began operating under the new guaranteed loan platform on that date.

Collectively, Rural Development’s guaranteed loan programs work to assist in building and maintaining sustainable rural communities. Through the public comment period and monthly office hours with lenders and staff, the Agency has solicited feedback on the requirements and policies contained in the rule implemented on October 1, 2020. The Agency has identified areas for revision or clarification that are amended with this final rule with comment. This OneRD final rule with comment incorporates revisions intended to simplify, clarify, improve, expand, and enhance the delivery of the four guaranteed loan programs.

II. Summary of Changes to Regulation**1. § 5001.3 Definitions**

a. The definition of “affiliate” is updated to provide additional information on affiliation determination and include a reference to 13 CFR 121.03.

b. The definition of “agricultural producer” is updated to include additional information regarding what constitutes agricultural operations income for the calculation of the five-year average for eligibility determinations. Additional information on the location of an agricultural producer for eligibility determinations is also added.

c. The definition of “collateral” is updated to include assignments of relevant agreements as acceptable collateral.

d. The definition of “Debt Collection Improvement Act” is updated to correct the title of the act and provide additional information on the Debt Collection Improvement Act of 1996.

e. The definition of “delinquency” is updated to provide additional information on how this term is used in the Part.

f. The definition of “energy efficient equipment and systems” is updated to include clear demonstration of energy efficiency as an application requirement.

g. The definition of “federal debt” is updated to include additional information on the Debt Collection Improvement Act of 1996.

h. The definition of “guarantor” is updated to include responsibility for repayment as an undertaking of a guarantor.

i. The definition of “hospital” is updated to include additional information on Certification Numbers.

j. The definition of “hybrid” is updated to include additional information and an example on the eligibility of hybrid systems.

k. The definition of “local owner” is updated to include information on what constitutes a normal commuting area.

l. The definition of “matching funds” is updated to include the percentage of matching funds required to be eligible for a REAP guaranteed loan.

m. The definition of “natural resource value-added product” is updated to provide non-definitive examples of eligible and ineligible projects.

n. The definition of “professional service” is updated to include that a loan finder fee is not considered a professional service under the Part.

o. The definition of “refurbished” is updated to provide an example of an acceptable refurbishment and also to provide information on what is considered as ineligible.

p. The definition of “renewable energy system (RES)” is updated to include information on items that are not considered RES.

q. The definition of “retrofitting” is updated to include examples of eligible projects.

r. The definition of “rural and rural area” is updated to include additional information to identify ineligible areas, define rural-in-character determinations as project specific determinations, provide additional information on “strings” or areas that are attached to the urbanized area by a contiguous area of urbanized blocks, and to specify that applications cannot be approved subject to meeting rural area requirements.

s. The definition of “simple payback” is updated to include additional

information on items to include in the calculation and calculating shared meter proration.

t. The definition of “small business” is updated to include additional information on average net income, net worth thresholds and to update the size standard to meet the new Small Business Administration’s definition.

u. The definition of “total project costs” is updated to include additional information on ineligible project costs and retrofitting for existing RES.

v. The definition of “underserved communities” is updated to expand on populations that should be considered for awarding of priority points.

2. Section 5001.9 Standards for Financial Information

a. The Agency added language at § 5001.9(a) to reinforce that the loan is the lender’s, and their standard operating procedures apply.

b. “For those situations,” is added to § 5001.9(b) to clarify the subject of the last sentence.

c. At § 5001.9(c) additional language is added to provide information on the use of tax returns as financial statements and their suitability for eligibility determinations.

3. Section 5001.101 Introduction

a. § 5001.101(a) is amended to add “. . . through 5001.119 . . .” to include all four program areas.

b. § 5001.101(f) is added to identify the location in the regulation of eligible and ineligible uses of funds respectively.

4. Section 5001.102 Project Eligibility—General

a. To direct REAP applicants to refinancing information specific to the REAP program, language is added to § 5001.102(d).

b. § 5001.102(d)(1) is modified to provide further clarification on refinancing limits on debts owed to another creditor and (d)(2) provides an expanded description of “better rates or repayment terms”.

c. “Special conditions and limitations on loans” and “Loan Guarantees for Water, Wastewater, and Essential Community Facilities Loans” is added to paragraph 5001.102(d)(3) to further identify sections 333 and 306(a)(24)(C), respectively, of the Consolidated Farm and Rural Development Act.

d. § 5001.102(d)(4)(iii) is modified to provide additional information for loans where debt refinancing is the majority purpose.

e. § 5001.102(d)(5) is modified to specify program applicability, lender’s responsibility for providing the

requested information and update information on total debt service coverage ratio as the current language implies an acceptable ratio that is not intended.

5. Section 5001.103 Eligible CF Projects and Requirements

a. Assisted living facilities are added to § 5001.103(a)(1) to identify them, in certain situations, as health care facilities.

b. § 5001.103(a)(3) is updated to include eligibility requirements for business incubators (when not inherently commercial), thrift stores, and fairgrounds, agricultural exposition centers, farmers markets, food distribution and food banks.

c. § 5001.103(b)(1) is updated to include information on public use requirements of Veterans of Foreign Wars and American Legion post facilities.

d. § 5001.103(d) is added to provide limitations on leased space in a CF project.

e. § 5001.103(e) is added to provide the documentation necessary when the project is to otherwise improve an essential community facility through the purchase of an existing facility.

6. Section 5001.104 Eligible WWD Projects and Requirements

a. Introductory paragraph is updated to correct regulatory references and remove duplication.

b. § 5001.104(a) is updated to better describes eligible WWD projects.

c. § 5001.104(a)(1) is updated by removing “To construct, enlarge, extend, or otherwise improve the following types of facilities: . . .” as those actions are eligible uses of funds and not types of projects.

d. Remove § 5001.104(a)(2) as these items are listed at § 5001.121(b)(10) “Eligible use of loan funds”. The duplication has caused confusion.

7. Section 5001.105 Eligible B&I Projects and Requirements

a. § 5001.105(b)(7) is updated to add examples of eligible agricultural production projects.

b. § 5001.105(b)(14) is updated to include additional information on what constitutes a leasehold improvement for this part and to provide further security enhancements.

c. § 5001.105(b)(15)(i)(D) is updated to include the timing of agreements with retail and institutional clients in regard to locally or regionally produced agricultural products.

d. § 5001.105(b)(20) is updated to include information on independent living facilities’ eligibility for a guarantee.

e. § 5001.105(b)(22) (vii) is updated to expand on the demonstration of technical merit for energy projects.

f. § 5001.105(d) is updated to add information on balance sheets used to show that capital and equity requirements are met.

g. § 5001.105(d)(1)(iii) is updated to reflect the correct owner-contributed capital calculation.

h. § 5001.105(d)(6) is deleted and the content moved to § 5001.452(b)(8)(iii)(X) as this certification was not intended to be separate from the lender’s certification required as part of the documents submitted for issuance of the loan note guarantee.

8. Section 5001.106 Eligible REAP—Renewable Energy System (RES) Projects and Requirements

§ 5001.106(e)(2) is updated to include how a non-response in an area of a technical report will be scored.

9. Section 5001.108 Eligible REAP—Energy Efficient Equipment and Systems (EEE) Projects and Requirements

The introductory paragraph for § 5001.108 is updated to include that EEE projects may be located in rural or non-rural areas as long as the energy efficient equipment of systems are used for agricultural production or processing in accordance with this part.

10. § 5001.115 Ineligible Projects—General

a. § 5001.115(l) is updated to provide additional information to clarify when telephone systems may be considered as an eligible project.

b. § 5001.115(n) is updated to provide additional information to clarify when owner-occupied housing may be considered for funding.

b. § 5001.115(r) is updated to provide additional information to religious organizations on items that may cause their project to be deemed ineligible.

11. § 5001.116 Neligible CF Projects

a. § 5001.116(b) is updated to add a reference to § 5001.103(d) for eligibility of commercial enterprises leasing space in an eligible CF project.

b. § 5001.116(e) is updated to include characteristics of ineligible purchase transactions.

12. § 5001.121 Eligible Uses of Loan Funds

a. § 5001.121(a)(2) is updated to include the installed conduit is not essential to the operation of the eligible essential community facility or service to be financed and to add an example.

b. § 5001.121(a)(3)(iv) is updated to clarify that guaranteed loan proceeds

may be used to pay interim financing in full, if used, and that payment in full includes interest on that interim financing.

c. § 5001.121(b) is revised in its entirety to classify eligible uses of funds as those that must be part of a construction project and those that are non-construction. Additionally, the purchase and installation of RES for use by an eligible facility, the use of up to 10 percent of project funds to construct, improve, or acquire broadband infrastructure, and professional service fees, such as engineering or environmental services and preplanning evaluation procedures are added as eligible uses of funds. Additional information regarding the purchase of land and/or rights, including water rights is added as well as providing clarification on payment of interim financing, limiting initial operating expenses to newly constructed facilities and clarifying that purchase of equipment must include installation and is not for the purpose of increasing inventory is also included.

d. § 5001.121(d)(14)(vi) is added to provide additional information on what is considered refinancing under the REAP program.

13. § 5001.121 Eligible Uses of Loan Funds

a. § 5001.121(c)(6) is updated to provide additional flexibility to the programs.

b. § 5001.121(d) is updated to clarify what the percentage includes.

c. § 5001.121(d)(14) is updated to add information that paying interim financing is not considered refinancing.

14. § 5001.122 Ineligible Uses of Loan Funds

a. § 5001.122(k) is updated to include as an additional ineligible use of loan funds any costs for RES and/or EEI projects that are used to improve a vehicle's ability to propel itself.

b. § 5001.122(l) is updated to clarify that a former owner may remain as an employee of the business during a reasonable transition period and to align the language with the definition of conflict of interest.

c. § 5001.122(n) is added to include lease payments as ineligible uses of funds.

15. § 5001.126 Borrower Eligibility

a. § 5001.126 (a) and (a)(1) are updated to clarify that the borrower must own and retain control of the project at all times under all ownership structures.

b. § 5001.126(c)(2) is updated to notify lenders that they are required to certify in writing that their borrower is unable

to afford commercial credit at reasonable rates and terms without the guarantee.

c. § 5001.126(d)(3)(iii) is updated to reference the definition of citizen and to clarify that applications will not be approved, nor will conditional commitments be issued subject to meeting the citizenship requirement.

d. § 5001.126(d)(4) is updated to further ensure benefit to U.S. residents.

e. § 5001.126(e)(1) is updated to provide more specificity on eligible borrower entity types.

f. § 5001.126(e)(2) is updated to clarify the timing of when and how long a borrower must own or control a project and the site for the project to at the time of application or no later than guaranteed loan closing and for the term of the guaranteed loan.

16. § 5001.127 Borrower Ineligibility Conditions

a. § 5001.127(a) is updated to specify that the 20 percent ownership interest in the borrower does not apply to passive investors and expands on delinquent debt under a repayment plan.

b. § 5001.127(a)(4) is updated to add that lenders must check SAM exclusions at <https://sam.gov> to ensure compliance with 2 CFR 180.300.

c. § 5001.127(d) is updated to include a prohibition on projects receiving income from marijuana operations.

d. § 5001.127(f) is updated to specify that lender's directors, stockholders, or other owners that are officers, directors, stockholders, or other owners of the borrower without management control or ownership of less than 5% must recuse themselves from the decision-making process associated with the guaranteed loan.

17. § 5001.130 Lender Eligibility Requirements

a. § 5001.130(a)(3) is updated to reduce risk and meet the requirements of 31 U.S.C. 3354.

b. § 5001.130(c)(2) is updated to include instructions on how non-regulated lending entities may apply for approved lender status.

c. § 5001.130(c)(4) is updated to provide additional information on what an approved lender renewal review will include.

d. § 5001.130(c)(4)(iv) is updated to provide additional information to lenders that have not been active in the Agency's guaranteed loan program or whose loans have caused a loss to the Agency on approved lender status renewal.

e. § 5001.130(c)(4)(v) is added to notify lenders that the renewal term are for a period of 5 years.

f. § 5001.130(d)(2) is updated to provide non-regulated lending entities serving Tribal trust lands additional guidance on submittal of information needed for applications to be determined as approved lenders.

g. § 5001.130(d)(4) is updated to provide non-regulated lending entities serving Tribal trust lands information on what will be considered during the approved lender renewal review.

h. § 5001.130(d)(4)(v) is added to notify lenders that renewals are for a period of 5 years.

18. § 5001.131 Lender's Agreement

Section 5001.131 is updated to include that approval as a lender under one program is approval for all programs covered under this part, that non-regulated lenders approval expires January 31st of the fifth year after the date of Agency approval and that only one lenders agreement will be issued for each lending entity based on their tax identification number. This paragraph is also updated to include the requirement that a lending entity continue to service their outstanding loan guarantees made under this part even if they fail to renew its lenders agreement and loses its approved lender status.

19. § 5001.132 Maintenance of Approved Lender Status

a. § 5001.132(a)(4) is updated to clarify that a non-regulated lending entity that fails to renew its approval status within 5 years from the execution of the lender's agreement will lose its approved status.

b. § 5001.132(b) is updated to include that revocation of approved lender status may apply to the entire entity, specific branches, or personnel as appropriate. This addition also requires the lender to revoke the level II eAuthentication privileges of all individuals included in the revocation notice.

20. § 5001.140 Cooperative Stock/ Cooperative Equity

a. § 5001.140(a)(4) is updated to include that in event of default if the stock is not sufficient to satisfy the debt, the borrower is fully liable for the entire debt regardless of the success or failure of the cooperative; the lender will maximize recovery; and, that DCIA may impose significant restrictions on delinquent Federal debtors.

b. § 5001.140(b) is updated to include that in event of default if the stock is not sufficient to satisfy the debt, the borrower is fully liable for the entire debt regardless of the success or failure of the cooperative; the lender will maximize recovery; and, that DCIA may

impose significant restrictions on delinquent Federal debtors.

c. § 5001.140(d)(3) is updated to include that in event of default if the stock is not sufficient to satisfy the debt, the borrower is fully liable for the entire debt regardless of the success or failure of the cooperative; the lender will maximize recovery; and, that DCIA may impose significant restrictions on delinquent Federal debtors.

21. § 5001.141 *New Markets Tax Credit*

a. The title is updated to New Markets Tax Credit Program. The introductory paragraph is updated to reinforce that requests for loan guarantees that include NMTC are subject to all applicable program eligibility requirements, credit analysis and due diligence as required by 7 CFR part 5001. Additional information is provided on the treatment of tax benefit or loss of tax benefits in the servicing actions of a guaranteed loan.

b. § 5001.141(b)(iii) is updated to clarify leveraged lender entity requirements.

c. § 5001.141(b)(6) is updated to include guidance for QALICB's and their owners regarding guarantees of the guaranteed loan as stipulated in § 5001.204.

d. § 5001.141(b)(14) is added to inform applicants that they NMTC structure must be approved by the Agency.

22. § 5001.202 *Lender's Credit Evaluation*

a. The introductory paragraph is updated to provide additional information to lenders on timing of application submittal and completion of the lender's internal credit evaluation process as part of a complete application package. The update also includes a requirement for the lender's credit evaluation to include a written review and comment on the "Five Cs" of credit as outlined in § 5001.202(b)(1) through (5).

b. § 5001.202(a) is updated to include reference to the lender's responsibility to evaluate the relationships between all associated parties in the event of affiliated entities.

c. § 5001.202(b)(6)(iii) is amended to add that any steps taken or proposed to address any financial or industry weakness must be reasonable and adequately addressed.

d. § 5001.202(b)(6)(iv) is updated to include additional guidance on borrower projections and substantiation of increases of revenues, profit margins or profitability.

e. § 5001.202(b)(6)(iv) is updated to include the source of the cash flow in the analysis of the operational cash flow when lenders are requesting the loan note guarantee prior to project completion.

23. § 5001.203 *Appraisals*

a. The introductory paragraph is updated to include, ". . . as determined by the approval official." to indicate who determines appraisal acceptability. Additionally, information on the handling of value attributed to business valuation or as a going concern and discounting is added. For applications that include an existing facility, the Agency is including that it is expected that the appraiser will physically visit the property unless otherwise approved by the Agency approval official, as these "desktop products" are not reliable and present the potential for additional valuation risk to the Agency.

b. § 5001.203(b) is updated to provide additional assurances during the loan underwriting review process.

c. § 5001.203(c) is updated to incorporate the language from § 5001.203(c)(1)(i).

d. § 5001.203(c)(1) is removed. The language from the current § 5001.203(c)(1)(i) is incorporated into § 5001.203(c). The current language in § 5001.203(c)(1)(ii) is not necessary as the Agency's expectations are adequately covered in previous language.

e. § 5001.203(d) (1) is updated to allow for other than a State Certified General Appraiser when approved by the Agency as some project types are unique enough that a qualified appraiser may not be available.

f. § 5001.203(f) is updated to require immediate notification to the Agency if potential contamination is observed or identified.

g. § 5001.203(h) is updated to reiterate that appraisal fees are eligible project costs, and that the Agency does not pay for appraisals at the time of application but that servicing appraisals will be handled in accordance with 7 CFR 5001 subpart F.

24. § 5001.205 *General Project Monitoring Requirements*

a. § 5001.205(a)(4) is added to include compliance with section 70914 of the Build America, Buy America Act within the Infrastructure Investment and Jobs Act (Pub. L. 117–58).

b. § 5001.205(b)(1) is updated to include compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 to ensure that all property transactions are conducted accordingly.

c. § 5001.205(e)(1)(i) is removed and the information combined with § 5001.205(e)(1) as a separate (i) was not necessary.

d. § 5001.205(e)(2)(iii) is updated to include the requirement that the lender must provide evidence of sufficient cash flow to complete the project construction, including contingencies for cost overruns, plus working capital during the business start-up period.

e. § 5001.205(e)(2)(iv) is updated to include the requirement that, in all cases, borrower equity must be injected prior to any guaranteed loan funds.

f. § 5001.205(e)(2)(vii) is updated so that the credit underwriting of the independent technology development firm is not limited only to renewable energy projects, but may include energy efficiency, renewable chemical, and biobased manufacturing projects.

25. § 5001.206 *Compliance With USDA Departmental Regulations, Policies, and Other Federal Laws*

Section 5001.206(b) is updated to include compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as a requirement if the proposed project requires the acquisition of real property or will displace people from their homes, business, or farms, and Section 70914 of the Build America, Buy America Act within the Infrastructure Investment and Jobs Act, and 31 U.S.C. 3354 Do Not Pay Initiative.

Subpart D

26. § 5001.301 *Beginning the Application Process*

Section 5001.301(a) is updated in its entirety to reflect current application submittal practices.

27. § 5001.303 *Applications for Loan Guarantee*

Section 5001.303(c)(15) is updated to include the entire title of SEC Form 10–K.

28. § 5001.307 *Specific Application Requirements for REAP Projects*

Section 5001.307(b) is updated to include clarification on application documentation requirements for rural small businesses and agriculture operations owned by Tribes.

28. § 5001.315 *Application Evaluation and Award Provisions*

a. § 5001.315(b) is updated to include the word "complete" to describe applications that the Agency will review.

b. § 5001.315(c)(1) is updated to include the word "priority" to better describe scoring.

c. § 5001.315(e)(2) is updated to include notification in writing when their application is withdrawn from further funding consideration.

29. § 5001.319 REAP Project Priority Point System

a. The introductory paragraph is updated to add, “. . . and subject to the availability of funds . . .” to state when the Agency will compete each complete and eligible application for RES, EEI and EEE projects.

b. § 5001.319(b)(1)(i) is updated to include when priority points will be awarded for retrofitting RES projects and how off-the-grid and direct-use projects will be awarded priority points.

c. § 5001.319 (b)(2)(i) is updated to include information on calculating the percentage of energy being replaced, whether it is categorized a replacement or generation. This does not change the underlying calculation but provides clarification.

d. § 5001.319 (b)(2)(i)(A) is updated to include a requirement for documentation to show that the borrower entity incurred the cost of the historical energy to be replaced and what may be considered in the calculation. This does not change the underlying calculation but provides clarification.

e. § 5001.319(b)(2)(ii) is updated to add information on RES projects that are not projecting to increase the amount of renewable energy generated and that if documentation of prior energy usage is not provided the project will be scored as an energy generation project.

f. § 5001.319(b)(2)(iii) is updated to add “vendor certification” as acceptable documentation of energy savings by the installation of the EEI project.

g. § 5001.319(d) is updated to clarify the meaning of “received and accepted”.

h. § 5001.319(e) is updated to specify that an existing business must be in operation for at least one full year, not simply a year since legal business formation.

i. § 5001.319(f)(1) is updated to add, for clarity, that RES include replacement, generation, and direct-use RES projects.

j. § 5001.319(g)(6) is updated to clarify that the United States Census Bureau information to determine population living in poverty is for the last 30 years.

Subpart E

30. § 5001.401 Interest Rate Provisions

Section 5001.401 is updated to include that in the event of an interest rate swap, the Agency’s guarantee can only cover principal and interest and

does not cover any fees related to the swap. A requirement for the lender to provide the Agency with an overall effective interest rate charged to the borrower in the swap transaction is also added.

31. § 5001.402 Term Length, Loan Schedule, and Repayment

Section 5001.402(b)(2) is updated to provide additional information to lenders on Agency requirements regarding loan amortizations including requirements, that balloon payments are not acceptable except in some loan servicing cases and that payments must be amortized to maximize successful loan repayment and may vary by business type or company cash flow.

32. § 5001.406 Guaranteed Loan Amounts

Section 5001.406(c) is updated to place a limit on total guarantor loans.

Section 5001.406(d) is updated to include that borrowers must demonstrate evidence of a financial contribution in the project of at least 25 percent of total eligible project costs. Federal grant funds, if authorized by the grantor, may be used as the financial contribution.

33. § 5001.408 Participation or Assignment of Guaranteed Loan

Section 5001.408(a)(5) is updated to include a clarification of default and that lenders using the multi-note system may sell the guarantee on the secondary market for a specific note once that note is fully disbursed.

34. § 5001.450 General

a. § 5001.450(b)(1) is updated to add, “. . . during the loan approval process” to provide information on when approval of a parity or junior lien position request must be approved by the Agency. A statement regarding where to find the requirements for guaranteed loans to purchase cooperative stock was also added.

b. § 5001.450(c)(1) is updated to include language on requesting the payment of interest up to 180 days past the most recent delinquency effective date.

c. § 5001.450(c)(1)(iii) is updated to provide lenders with information on requesting extensions of accrued interest and that approved collection efforts that extend beyond 180 days will be limited to 90 days of accrued interest payments from the Agency.

d. § 5001.450(c)(2) is updated to add “. . . and provide the Agency with a copy.” to provide information for the lender on Agency notification of holders in the event of interest termination.

35. § 5001.452 Loan Closing and Conditions Precedent to Issuance of Loan Note Guarantee

a. § 5001.452(a) is updated to add that if at a later date it is discovered that all conditions of the conditional commitment had not been met prior to loan closing that full enforceability of the guarantee may be compromised.

b. § 5001.452(b)(8)(iii)(U) is updated to include that “. . . or will perform . . .” may be part of the lender’s certification of steady state operating level.

c. § 5001.452(b)(8)(iii)(W) is added to include certification of compliance with American Iron and Steel and Build America, Buy America requirements for applicable WWD projects.

d. § 5001.452(b)(8)(iii)(X) is added to include certification that, for B&I projects, the capital/equity requirements of the Conditional Commitment were met.

e. § 5001.452(c) is updated to add that a permission to operate letter from the energy off-taker is required.

36. § 5001.454 Guarantee Fee

a. To ensure that the correct guarantee fee is applied, the opening paragraph to § 5001.454 is updated to include that the guarantee fee rate applied will be the rate as established in the **Federal Register** for the fiscal year in which a guaranteed loan is obligated.

b. § 5001.454(b) is updated to include that once the guarantee is obligated, the guarantee fee rate in effect at the time of obligation will remain in place even if the guarantee fee rate changes before the loan note guarantee is issued.

c. § 5001.454(d)(5) is updated to provide additional information on what constitutes an additional market for existing local business.

Subpart F—Servicing Provisions

37. § 5001.505 Collateral Inspection and Release

Section 5001.505(b)(3) is revised to add additional information to further specify requirements of an arm’s length transaction.

38. § 5001.510 Subordination of Lien Position

Section 5001.510(b)(3) is updated to include additional information on discounting of collateral when determining sufficient collateral coverage.

39. § 5001.516 Protective Advances

a. § 5001.516(c) is updated to inform lender that payment of real estate taxes is not considered a protective advance and does not require Agency approval.

b. § 5001.516(d) is updated to inform lenders that it is their responsibility to ensure that protective advances will be secured by the collateral of the guaranteed loan.

40. § 5001.517 Liquidation

a. § 5001.517(c)(1) is updated to include items that may be used to establish the lender's ownership of the guaranteed loan promissory note and related security instruments.

b. § 5001.517(c)(2) is updated to include additional requirements of the liquidation plan including: transaction history for the loan; if the interest rate was a variable rate, the lender must include documentation of changes to the agreed upon base rate and when the changes in the loan rate became effective; and explanation of any special accommodations that were made.

c. § 5001.517(c)(6)(i) is updated to include that a copy of the appraisal or valuation will be provided to the Agency with the liquidation plan or as soon as it is available.

d. § 5001.517(c)(10) is updated to include a non-exhaustive list of examples of liquidation expenses that may be incurred.

e. § 5001.517(c)(11) is updated to include: a non-exhaustive list of possible protective advances; that protective advances may be made to maintain services or address unique situations with proper justification; and non-Agency approved advances of funds will not be guaranteed.

f. § 5001.517(e)(1)(i) is updated to add "actively marketing the collateral." Additionally, consideration of submitting a final loss claim is added as a possible next action if the lender is unable to sell the collateral.

41. § 5001.521 Loss Calculations and Payment

Section 5001.521(d)(2) is updated to include information to borrowers and lenders on project development issues that could reduce any loss claim payable.

The Agency also plans to correct minor spelling, grammatical and capitalization errors. All changes to appendices C, D and E to Subpart D of Part 5001 correct spelling, grammatical or capitalization errors.

III. Executive Orders and Acts

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches to maximize net benefits

(including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This final rule has been determined to be not significant for purposes of Executive Order (E.O.) 12866 and therefore has not been reviewed by the Office of Management and Budget (OMB).

National Environmental Policy Act

In accordance with the National Environmental Policy Act of 1969, Public Law 91-190, this final rule has been reviewed in accordance with 7 CFR part 1970 ("Environmental Policies and Procedures"). The Agency has determined that i) this action meets the criteria established in 7 CFR 1970.53(f); ii) no extraordinary circumstances exist; and iii) the action is not "connected" to other actions with potentially significant impacts, is not considered a "cumulative action" and is not precluded by 40 CFR 1506.1. Therefore, the Agency has determined that the action does not have a significant effect on the human environment, and therefore neither an Environmental Assessment nor an Environmental Impact Statement is required.

Executive Order 12988, Civil Justice Reform

This final 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. In addition, all State and local laws, and regulations that conflict with this rule will be preempted. No retroactive effect will be given to this rule.

Executive Order 13132, Federalism

The policies contained in this final rule do not have a 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 rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with the states is not required.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-602) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements

under the Administrative Procedure Act ("APA") or any other statute. The APA exempts from notice and comment requirements rules "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" (5 U.S.C. 553(a)(2)), so therefore an analysis has not been prepared for this rule.

Executive Order 12372, Intergovernmental Consultation

This final rule is excluded from the scope of Executive Order 12372 (Intergovernmental Consultation), which may require a consultation with State and local officials. See the final rule related notice entitled, "Department Programs and Activities Excluded from Executive Order 12372" (50 FR 47034).

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This executive order imposes requirements on the Agency. The Agency has determined that the 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 rule is not subject to the requirements of Executive Order 13175. If Tribal leaders are interested in consulting with the Agency on this rule, they are encouraged to contact USDA's Office of Tribal Relations or the Agency's Native American Coordinator at: AIAN@usda.gov to request such a consultation.

Assistance Listing Number

The Assistance Listing (formerly known as the Catalog of Federal Domestic Assistance (CFDA)) numbers assigned to the 4 programs within this rule are: 10.766 for Community Facility Programs, 10.760 for Water and Waste Disposal Programs, 10.768 for Business and Industry Programs and 10.868 for Rural Energy for America Program. The complete catalog is available on the internet at <https://sam.gov/content/assistance-listings>.

Paperwork Reduction Act and Recordkeeping Requirements

This rule contains no new reporting or recordkeeping burdens under OMB control number 0572-0166 that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

E-Government Act Compliance

Rural Development is committed to complying with the E-Government Act of 2002, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Civil Rights Impact Analysis

RD has reviewed this Final rule in accordance with USDA Regulation 4300–4, Civil Rights Impact Analysis,” to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex, disability, gender identity (including gender expression), genetic information, political beliefs, sexual orientation, marital status, familial status, parental status, veteran status, religion, reprisal and/or resulting from all or a part of an individual’s income being derived from any public assistance program. This final rule is within a guarantee-based program. Guarantees are not covered under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Title IX of the Education Amendments Act of 1972, as amended, when the Federal assistance does not include insurance or interest credit loans. Lenders must comply with other applicable Federal laws, including Equal Employment Opportunities, the Equal Credit Opportunity Act, the Fair Housing Act, and the Civil Rights Act of 1964. Guaranteed loans that involve the construction of or addition to facilities that accommodate the public must comply with the Architectural Barriers Act Accessibility Standard. The borrower and lender are responsible for ensuring compliance with these requirements.

USDA Non-Discrimination Statement

In accordance with Federal civil rights laws and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint

filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (e.g., Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; or the 711 Relay Service.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, *USDA Program Discrimination Complaint Form*, which can be obtained online at <https://www.usda.gov/sites/default/files/documents/ad-3027.pdf> from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant’s name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

- (1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; or
- (2) *Fax:* (833) 256–1665 or (202) 690–7442; or
- (3) *Email:* program.intake@usda.gov.

Severability

It is USDA’s intention that the provisions of this rule shall operate independently of each other. In the event that this rule or any portion is ultimately declared invalid or stayed as to a particular provision, it is USDA’s intent that the rule nonetheless be severable and remain valid with respect to those provisions not affected by a declaration of invalidity or stayed. USDA concludes it would separately adopt all of the provisions contained in this final rule.

USDA is an equal opportunity provider, employer, and lender.

List of Subjects in 7 CFR Part 5001

Business and industry, Community facility, Energy efficiency improvement, Loan programs, Renewable energy, Rural areas, Rural development, Water and waste disposal.

For the reasons set forth in the preamble, under the authority at 5 U.S.C. 301 and 7 U.S.C. 1989, 7 CFR part 5001 is amended as follows:

PART 5001—Guaranteed Loans

- 1. The authority citation for part 5001 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1926(a); 7 U.S.C. 1932(a); and 7 U.S.C. 8107.

Subpart A—General Provisions

- 2. Amend § 5001.1 by revising (b) to read as follows:

§ 5001.1 General.

* * * * *

(b) The applicability of the provision of this part for processing and approving applications and for servicing guaranteed loans depend on when a complete application is received. The Agency will process and approve applications, and service guaranteed loans according to the provisions of this part for all complete guaranteed loan applications that it receives on or after October 1, 2020, including guaranteed loan applications submitted under any of the programs whose authorization is identified in this section. All complete applications received before October 1, 2020, will be processed, and awarded and guaranteed loans serviced in accordance with the existing regulations in effect at the complete application date for the program under which the application was submitted.

- 3. Amend § 5001.2 by revising paragraphs (b) and (d) to read as follows:

§ 5001.2 Structure.

* * * * *

(b) *Subpart B.* This subpart contains provisions for determining project, borrower, and lender eligibility that are applicable to each guaranteed loan made under this part. It also contains a list of eligible and ineligible uses of loan funds, ineligible projects and conditions that would make an otherwise eligible borrower ineligible. The lender’s agreement is addressed as well as maintenance of approved lender status.

* * * * *

(d) *Subpart D.* This subpart contains provisions relating to applications for a loan guarantee under this part, including preliminary eligibility reviews, the application process, application evaluation, and the application award processes that are applicable to each guaranteed loan made under this part.

* * * * *

- 4. Amend § 5001.3 by revising the definitions of “Affiliate”, “Agricultural producer”, “Collateral”, “Commercially available”, “Debt Collection Improvement Act”, “Delinquency”, “Energy efficient equipment and

systems”, “Federal debt”, “Guarantor”, “Hospital”, “Hybrid”, “Local owner”, “Matching funds”, “Natural resource value-added product”, “Professional service”, “Refurbished”, “Renewable energy system (RES)”, “Retrofitting”, “Rural and rural area”, “Simple payback”, “Small business”, “Total project costs”, and “Underserved communities” to read as follows:

§ 5001.3 Definitions.

* * * * *

Affiliate means a person that is connected with or controlled by another organization. Factors such as ownership, management, current and previous relationships with or ties to another person, and contractual relationships, will be considered in determining whether affiliation exists. Affiliation is determined using the principles outlined in 13 CFR 121.103.

* * * * *

Agricultural producer means a person, including non-profits, directly engaged in the production of agricultural products through labor management and operations, including the cultivating, growing, and harvesting plants and crops (including farming); breeding, raising, feeding, or housing of livestock (including ranching); forestry products; hydroponics; nursery stock; or aquaculture, whereby 50 percent or greater of their gross income is derived from the operations. All gross income of the applicant entity is included for agricultural producer eligibility. The percentage is calculated as the average of gross agricultural operations income of the concern divided by the gross non-farm income of the concern for the five most recent years. If the concern has been in operation for less than 60 months but for at least 12 months, average gross agricultural operations income, and gross non-farm income for as long as the concern has been in operation will be used. Agricultural operations income may include such items as production contracts, crop insurance, commodity payments, etc. Total income may include W-2 wages, schedule C income, and other income not related to the agricultural operation. Calculations will be using the applicant’s five most recent tax years. Each year’s gross agricultural operations income will be divided by the applicant’s gross total income, then the five years will be averaged to determine eligibility. An agricultural producer could be located in either a rural or a non-rural area.

* * * * *

Collateral means the asset(s), including assignments of relevant

agreements, pledged by the borrower to the lender as security for the guaranteed loan.

* * * * *

Debt Collection Improvement Act (DCIA) means the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701 *et seq.*, which requires that any nontax monies that are payable or may become payable from the United States under contracts and other written agreements to any person not an agency or subdivision of a state or local government may be subject to certain collection options, such as administrative offset, for a delinquent debt the person owes to the United States implemented under 7 CFR part 3.

* * * * *

Delinquency means a situation that exists when a scheduled loan payment on a guaranteed loan made under this part is more than 30 calendar days past due and cannot be cured within the next 30 calendar days. For purposes of this part, delinquency provides guidance for completing borrower status reports and is not used to define monetary or non-monetary default or undertaking-related servicing actions.

* * * * *

Energy efficient equipment and systems (EEE) means equipment or systems for agricultural production or processing that exceed any of the following standards. Applications for energy efficient equipment and systems must clearly demonstrate energy efficiency.

* * * * *

Essential community facility means a public improvement, operated on a non-profit basis, needed for the orderly development of a rural community where the rural community is a city or town, or its equivalent county or multi-county area. The term “facility” refers to both the physical structure financed, and the resulting service provided to rural residents or rural businesses. Facilities may include, but are not limited to, courthouses, community centers, libraries, firehouses, health care, education, transportation, and industrial parks. An industrial park consists of land and the necessary access ways and utilities to the site, but not improvements erected on such site.

* * * * *

Federal debt means debt owed to the Federal Government that is subject to collection under the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701, *et seq.*

* * * * *

Guaranteed loan means a loan made and serviced by a lender for which the

Agency and lender have entered into a lender’s agreement and for which the Agency has issued a loan note guarantee. Unless otherwise specified, guaranteed loan refers to a loan that the Agency has guaranteed under this part.

* * * * *

Guarantor means a person giving assurance to the Agency under an Agency-approved written agreement that the borrower’s obligations will be fulfilled and promising *its undertaking of responsibility* for repayment of a guaranteed loan if the borrower should default.

* * * * *

Hospital (1) For the purpose of refinancing rural hospital debt in accordance with § 5001.102(d)(5), hospital means the following types of facilities defined in the Social Security Act, Section 1861 (42 U.S.C. 1395x):

- (i) Hospital (section 1861(e)).
- (ii) Psychiatric hospital (section 1861(f)).
- (iii) Long-term care hospital (section 1861(ccc)); and shall also include the following other provider types defined in the Social Security Act, Section 1861 (42 U.S.C. 1395X):

- (A) Critical access hospital (section 1861(mm)(1)).
- (B) Religious nonmedical health care institution (section 1861(ss)(1)).

(2) The Agency will use the applicant provider’s Centers for Medicare and Medicaid Services (CMS) Certification Number (CCN) to verify the applicant provider is listed as a “Hospital” for the “Provider or Supplier Type” category on the CMS Quality Certification and Oversight Reports (QCOR) website qcor.cms.gov/index_new.jsp.

* * * * *

Hybrid means a combination of two or more renewable energy technologies that are incorporated into a unified system to support a single project. Projects which propose two or more different renewable energy technologies that are not incorporated into a unified system and projects which propose different renewable energy technologies at two or more locations (a different technology at each site) are not eligible. For example, installing wind technologies at one location and solar technologies at another location is not considered hybrid but installing wind and solar technologies that are incorporated into a unified system to support a single project at both locations is considered hybrid.

* * * * *

Local owner means an individual who owns any portion of an entity that is the eligible borrower and whose primary residence is located within the normal

commuting area, typically 100 miles or less, of the guaranteed loan project.

* * * * *

Matching funds means the 25 percent of total eligible project costs required by 7 U.S.C. 8107 (REAP) to be eligible to receive a guaranteed loan. Funds provided by the borrower in excess of matching funds are not matching funds.

* * * * *

Natural resource value-added product means a product derived from any naturally occurring resource, including agricultural resources, that is further processed to add value or used to generate energy or renewable energy. For example, wind or the sun being used for energy generation, grapes that are processed into wine or jam, or straw that is processed into particle board. Feeding grain to livestock is not considered as part of this definition.

* * * * *

Professional service means services used by the borrower for planning and developing a project, including, but not limited to, appraisals, architectural services, surveys, environmental impact analyses, implementing mitigation measures, and establishing or acquiring property rights. Such services are generally rendered by persons licensed or certified by States or accreditation associations, such as architects, engineers, accountants, attorneys, or appraisers, and those rendered by loan packagers, but not including loan finders. A loan finder fee is not considered a professional service.

* * * * *

Refurbished means a piece of equipment or renewable energy system that has been brought into a commercial facility, thoroughly inspected, and worn parts replaced and has a warranty that is approved by the Agency or its designee. An example of refurbished equipment is a diesel engine that has been rebuilt to factory specifications. The purchase of used equipment which has not been refurbished is not eligible.

* * * * *

Renewable energy system (RES) means a system that produces usable energy from a renewable energy source. Co-firing with fossil fuels, natural gas or petroleum-based products or materials such as coal and other fuels, oils, chemicals, tires, or plastic are not eligible; and may include:

- (1) Distribution components necessary to move energy produced by such system to the initial point of sale; and
- (2) Other components and ancillary infrastructure of such system, such as a storage system; however, such system may not include a mechanism for

dispensing energy at retail e.g., a flexible fuel pump.

* * * * *

Retrofitting means a modification to an existing building or installed equipment that incorporates a function or feature(s) not included in the original design when built or for the replacement of existing components with components that improve the original design and does not affect original warranty if the warranty is still in existence. Examples of retrofitting include:

- (1) Installing newly designed blades to an existing wind turbine to enhance energy production.
- (2) Adding equipment or processes to or altering or enhancing an existing RES to improve production, efficiency, or financial viability, such as a feedstock retreater on an existing biodiesel production plant;
- (3) Adding a battery system to an existing RES;
- (4) Installing a steam turbine at an ethanol plant, or;
- (5) Installing a combined heat and power system for a pellet production facility.

* * * * *

Rural and rural area means any area of a State not in a city or town that has a population of more than 50,000 inhabitants, and which excludes certain populations pursuant to 7 U.S.C. 1991(a)(13)(H), according to the latest decennial census of the United States and not in the urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants. In making this determination, the Agency will use the latest decennial census of the United States. Applications cannot be approved subject to meeting rural area requirements. Locations that are contiguous and adjacent to an urbanized area will be delineated as a non-eligible area in the Rural Development Property Eligibility Map found at: <https://eligibility.sc.egov.usda.gov/eligibility/welcomeAction.do>. This map is maintained independently by another government agency and is oriented through census tract data. The following exclusions apply:

- (1) Any area in the urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants that has been determined to be “rural in character” as follows:
 - (i) The determination that an area is “rural in character” will be made by the Under Secretary of Rural Development. *Rural in character requests and determinations are project specific; e.g.,*

if approved, the determination does not apply to any future request made within the same area. The process to request a determination under this provision is outlined in paragraph (1)(ii) of this definition. The determination that an area is “rural in character” under this definition will apply to areas that 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 a city or town; or
- (B) 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 of Rural Development for a “rural in character” designation by submitting a petition to the appropriate Rural Development State Director for recommendation to the Administrator on behalf of the Under Secretary. The petition shall document how the area meets the requirements of paragraph (1)(i)(A) or (B) of this definition and discuss why the petitioner believes the area is “rural in character,” including, but not limited to, the area’s population density, demographics, and 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 or leader in a similar position and request comments to be submitted within 5 business days, unless such 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 publication in a local newspaper and posting on the Agency’s website at rd.usda.gov/onerdguarantee, and the Under Secretary will make a determination not less than 15 days, but no more than 60 days, after the release of the notice. Upon a negative determination, the Under Secretary will provide to the petitioner an opportunity to appeal a determination to the Under Secretary, and the petitioner will have 10 business days to appeal the determination and provide further information for consideration. The Under Secretary will make a determination of the appeal in not less than 15 days, but no more than 30 days.

(iii) Rural Development State Directors may also initiate a request to the Under Secretary to determine if an area is “rural in character.” A written recommendation must document how

the area meets the statutory requirements of paragraph (1)(i)(B) of this definition and discusses why the State Director believes the area is "rural in character," including, but not limited to, the area's population density, demographics, topography, and how the local economy is tied to a rural economic base. Upon receipt of such a request, the Administrator will review the request for compliance with the "rural in character" provisions and make a recommendation to the Under Secretary. Provided a favorable determination is made, the Under Secretary will consult with the applicable Governor and request comments within 10 business days, unless gubernatorial comments were submitted with the request. A public notice will be published by the State Office in accordance with paragraph (1)(ii) of this definition. There is no appeal process for requests made on the initiative of the State Director.

(2) An area that is attached to the urbanized area of a city or town with more than 50,000 inhabitants by a contiguous area of urbanized census blocks that is not more than two census blocks wide. Applicants from such an area should work with their Rural Development State Office to request a determination of whether their project is located in a rural area under this provision. This applies to areas that would not be considered a rural area because they are attached to the urbanized area of a city or town of greater than 50,000 inhabitants by a "string" area that is two census blocks wide or less (which are typically interstates or major highways). As long as the "string" area is two census blocks wide or less, the area outside of the urbanized area, beginning with the "string" area, may be considered rural. Once an area is approved as a string exception, any project within that area is eligible.

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

(4) For the State of Hawaii, all areas within the State are considered rural and eligible except for the Honolulu CDP within the County of Honolulu and any other CDP with greater than 50,000 inhabitants. Areas within CDPs with greater than 50,000 inhabitants, other than the Honolulu CDP, may be

determined to be rural if they are "not urban in character."

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

* * * * *

Simple payback means the estimated simple payback of a project funded under this part as calculated using paragraph (1), (2), or (3) of this definition, as applicable.

(1) Energy efficiency improvement projects simple payback = (Total Project Costs) ÷ (Dollar value of energy saved).

(i) Energy saved will be determined by subtracting the projected energy (determined by the method in paragraph (1)(i)(B) of this definition) to be consumed from the historical energy consumed (determined by the method in paragraph (1)(i)(A) of this definition), and converting the result to a monetary value using a constant value or price of energy (determined by the method in paragraph (1)(i)(C) of this definition).

(A) Actual energy used in the original building and/or equipment, as applicable, prior to the EEI project, must be based on the actual average annual total energy used in British thermal units (BTU) over the most recent 12, 24, 36, 48, or 60 consecutive months of operation.

(B) Projected energy use if the proposed EEI project had been in place for the original building and/or equipment, as applicable, for the same time period used to determine that actual energy use under paragraph (1)(i)(A) of this definition.

(C) Value or price of energy must be the actual average price paid over the same time period used to calculate the actual energy used under paragraph (1)(i)(A) of this definition.

(ii) Energy efficiency improvement projects simple payback does not allow EEI to monetize benefits other than the dollar amount of the energy savings the agricultural producer or rural small business realizes as a result of the improvement.

(iii) Proposed additional energy consumption by a business which would result in greater savings if implemented is not considered in the payback calculation.

(2) Renewable energy systems projects simple payback = (total project costs) ÷ (dollar value of energy units replaced, credited, sold, or used and fair market value of byproducts as applicable in a typical year).

(i) Value of energy replaced will be calculated based on the borrower

entity's historical energy consumption with actual average price paid for the energy replaced, following the methodology outlined in paragraph (1)(i) of this definition RES replacement projects which generate more energy than the applicant's historical records document, may add to the replacement value, the value obtained by taking the excess energy generated times a documented market price in order to derive at total dollar value of energy units replaced, credited, sold, or used.

(ii) Value of energy credited or sold will be calculated based on the amount of energy units to be sold at the proposed rate per unit, as documented in utility net metering or crediting policies and/or a purchase agreement.

(iii) If proposed energy will be used in a new facility (includes any direct-use project), value of energy used will be calculated based on the amount of energy units to be used at the documented price per unit of conventional fuel alternative.

(iv) Value of byproducts produced by and used in the project or related enterprises should be documented at the fair market value to be received for the byproducts in a typical year.

(v) Renewable energy systems projects simple payback does not include any one-time benefits such as but not limited to construction and investment-related benefits, nor credits which do not provide annual income to the project, such as tax credits. These benefits may be considered when appropriate for calculating repayment ability of guaranteed loans.

(vi) For RES projects that involve a shared meter with a residence where the cost of the system has been prorated, only the eligible prorated amount of energy attributed to the rural business or agricultural producer will be used in the payback calculation. For projects that involve in-eligible expenses other than residential, the full amount of energy production will be used in the payback calculation.

(3) Energy efficiency equipment and systems projects simple payback = (total project costs) ÷ (dollar value of efficiency savings). Efficiency savings will be determined by subtracting the annual value of energy to be consumed by the proposed energy efficient equipment from the annual value of energy that a conventional equipment alternative would have consumed. Adequate documentation must be provided for all consumption estimates and values utilized in the calculation.

* * * * *

Small business means an entity that meets the requirements of paragraphs (1) and (2) of this definition:

(1) An entity or utility, as applicable, as further defined in paragraphs (1)(i) through (iv) of this definition and meeting the requirements in paragraph (2) of this definition. With the exception of the entities identified in this paragraph, all other non-profit entities are not small businesses for the purposes of REAP program eligibility:

- (i) A private for-profit entity, including a sole proprietorship, partnership, or corporation. The application must sufficiently describe the operations of the applicant's business entity;
- (ii) A cooperative (including a cooperative qualified under section 501(c)(12) of the Internal Revenue Code);
- (iii) An electric utility (including a Tribal or governmental electric utility) that provides service to rural consumers and operates independent of direct government control; or
- (iv) A Tribal corporation or other Tribal business entities that are chartered under Section 17 of the Indian Reorganization Act (25 U.S.C. 5124) or have similar structures and relationships with their Tribal governments and are acceptable to the Agency. The Agency will determine the small business status of such Tribal entity without regard to the resources of the Tribal government. This means that only the applicant entity must meet the definition of a small business; and

(2) An entity that meets the requirements of (i) or (ii) below:

(i) The Small Business Administration size standards in accordance with 13 CFR 121.301(a), and any successor regulation. The size of the applicant alone (without affiliates) must not exceed the size standard designated for the industry in which the applicant is primarily engaged. Also, the size of the applicant combined with its affiliates must not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, whichever is higher. Size standards to be utilized are found in 13 CFR 121.201, and any successor regulation. The size standards themselves are expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified. The number of employees or annual receipts indicates the maximum allowed for an entity and its affiliates and are calculated using the following criteria:

(A) The number of employees is calculated using the guidance found in 13 CFR 121.106, and any successor regulation. The average number of employees is used based on number

of employees for each of the pay periods for the preceding 24 months. Part-time and temporary employees are counted as full-time employees. If the entity has not been in business for 24 months, the average number of employees is used for each of the pay periods during which it has been in business; or

(B) Annual receipts are calculated using the guidance found in 13 CFR 121.104, and any successor regulation. Federal income tax returns and any amendments filed with the IRS on or before the date of application must be used. If an entity has not filed a Federal income tax return, the Agency will calculate the entities annual receipts using any other available information such as regular books of account, or audited financial statements; or

(ii) The size standard outlined in 13 CFR 121.301(b)(2), and any successor regulation. Including its affiliates, the entity must not have a tangible net worth in excess of \$20 million, and average net income after Federal income taxes (excluding carry over losses) for the preceding two completed fiscal year not in excess of \$6.5 million.

* * * * *

Total project costs means the sum of all costs associated with a completed project. All costs associated with a completed project, including ineligible project costs, must be included. Total project costs for retrofitting an existing RES includes the costs associated with the modifications or replacement of the existing components.

* * * * *

Underserved communities mean communities (including urban or rural communities and Indian tribal communities) that have limited access to affordable, healthy foods, including fresh fruits and vegetables, in grocery retail stores or farmer-to-consumer direct markets and that have 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. For purposes of awarding priority points, when applicable, this definition shall also include unserved or underserved populations, including minorities or protected groups, persistent poverty areas, or areas where Rural Development projects have not been awarded in the past five years. High poverty rate is based on current census data and is not the same as persistent poverty which uses data for the last 30 years.

* * * * *

■ 5. Amend § 5001.6 by revising paragraph (b) to read as follows:

§ 5001.6 General lender responsibilities.

* * * * *

(b) Lenders can contract for services, but such contracting does not relieve a lender from its responsibilities as identified in this part or, where applicable, in the applicable guaranteed loan program identified in § 5001.1.

* * * * *

■ 6. Revise § 5001.7 to read as follows:

§ 5001.7 Agency's special initiatives.

Applicants submitting applications that support the implementation of strategic or special initiatives are encouraged to review the Agency's annual notice to determine if their projects are eligible for receiving priority for projects. These projects may also support the implementation of strategic economic development and community development plans on a multi-jurisdictional and multi-sectoral basis in accordance with section 6401 of the Agriculture Improvement Act of 2018 (Pub. L. 115–334).

■ 7. Amend § 5001.8 by revising paragraphs (e) introductory text and (e)(1) to read as follows:

§ 5001.8 Approvals, regulations, and forms.

* * * * *

(e) 7 CFR part 5001 does not prohibit or consent to electronic signatures. Rural Development will accept electronic signatures from lenders for origination, loan closing, and servicing documents in accordance with the E-Sign Act unless otherwise prohibited by law or program. Lenders may use electronic signatures for electronic promissory notes (eNotes), deeds of trust and other documents relevant to the loan transaction, providing that the lender perfects and maintains a first lien position, an enforceable promissory note, and meets all other agency requirements including the following:

(1) Lenders may submit forms to Rural Development electronically using USDA's Service Center Agencies Online Services website. Registration is limited to individuals and each individual authorized by the lender must register and upon registration may electronically sign and submit certain forms on behalf of the lender.

* * * * *

■ 8. Revise and republish § 5001.9 to read as follows:

§ 5001.9 Standards for financial information.

(a) All financial information (e.g., financial statements, balance sheets, financial projections, and income statements) must be prepared and

submitted in accordance with accounting practices acceptable to the Agency. Such practices can include, but are not limited to, Generally Accepted Accounting Principles (GAAP) and the industry's standard accounting practice. Unless the applicant or borrower meets the threshold for an audit in accordance with 2 CFR part 200 subpart F, the type of financial statement, e.g., borrower prepared, compiled, reviewed, or audited, required is typically the decision of the lender.

(b) 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 applicant's project. For these situations, assets, plus any improvements, must be valued at the lower of cost or market value.

(c) A tax return is not an acceptable financial statement when underwriting a loan guaranteed under this part; however, tax return information may be used to prepare financial statements and to determine REAP eligibility.

- 9. Amend § 5001.101 by:
- a. Revising paragraphs (a) and (b); and
- b. Adding paragraph (f)

The revisions and addition read as follows:

§ 5001.101 Introduction.

* * * * *

(a) *Project eligibility.* Sections 5001.102 through 5001.108 identify requirements for projects to be eligible to receive a loan guarantee under this part. Sections 5001.115 through 5001.119 identify types of projects that are not eligible for a loan guarantee under this part. The Agency will not issue a loan guarantee under this part for any project that does not meet the applicable eligibility criteria as specified.

(b) *Borrower eligibility.* Section 5001.126 identifies the types of borrowers that are eligible to receive a loan guarantee for their projects under this part. The types of borrowers eligible to receive loan guarantees for their projects vary based on the guaranteed loan program they are applying under and that guaranteed loan program's authorizing statute as set forth in § 5001.1. Section 5001.127 identifies conditions that would make an otherwise eligible borrower ineligible for receiving a loan guarantee for its project under this part.

* * * * *

(f) *Use of funds.* Section 5001.121 identifies eligible uses of guaranteed loan funds and § 5001.122 identifies ineligible uses of guaranteed loan funds.

* * * * *

- 10. Amend § 5001.102 by revising and republishing paragraph (d) to read as follows:

§ 5001.102 Project eligibility—general.

* * * * *

(d) *Debt refinancing.* The Agency can guarantee loans for debt refinancing, as described in paragraphs (d)(1) through (5) of this section when the guaranteed loan extinguishes the debt being refinanced. These paragraphs do not apply to REAP loans, see § 5001.121(d)(14) for REAP refinancing provisions. Longer-term financing to pay off a lender's interim construction loan after project completion will not be treated as debt refinancing as long as it meets the requirements for takeout of interim financing in § 5001.121(c)(6). An eligible debt refinancing project is:

(1) Refinancing of debt on one or more loans owed to another creditor. There is no limit on percent of total use of funds if a new lender is refinancing debt owed to another creditor;

(2) Refinancing of debt owed to the applicant lender or any part thereof provided that the applicant lender debt being refinanced does not exceed 50 percent of the total use of funds in the new aggregated federally-guaranteed debt, the applicant lender debt being refinanced is in a current status for the past six months and the new guaranteed loan is providing better rates or repayment terms. Better rates or repayment terms can be shown in a variety of ways including the lender providing a fixed rate over a lower variable rate provided the change is advantageous to the borrower's long-term repayment ability. The current status cannot be achieved by the lender forgiving the borrower's debt or by servicing actions that impact the borrower's repayment schedule; or

(3) Refinancing of debt owed directly to the Federal Government or that is federally-guaranteed, including any guaranteed debt owed to the applicant lender, when a refinance of this debt is consistent with sections 333, "Special Conditions and Limitations on Loans" and 306(a)(24)(C), "Loan Guarantees for Water, Wastewater, and Essential Community Facilities Loans" of the Consolidated Farm and Rural Development Act (as amended by the Agriculture Improvement Act of 2018, Pub. L. 115-334). Such guaranteed debt shall not be included in the amount of applicant lender debt when calculating the maximum percentage of the total use of funds in the new guaranteed loan as stated in paragraph (d)(2) of this section; and,

(4) When the refinancing is in accordance with paragraphs (d)(1)

through (3) of this section, the following requirements must be met:

(i) The Agency has determined that the project is viable, and debt refinancing is necessary to improve cash flow;

(ii) The debt is reflected on the borrower's balance sheet and the original loan funds were used for project-eligible purposes. Refinancing of existing lines of credit is considered an eligible purpose for debt refinancing in the B&I program;

(iii) For loans to existing businesses where debt refinancing is a majority purpose of the guaranteed loan, the borrower must demonstrate historical debt service coverage ratios using proposed debt service requirements of not less than 1.1 times, or the borrower's current financial performance demonstrates it has corrected or recovered from impacts or issues adversely affecting its past financial performance. The debt service coverage ratio computed based on the current income statement must be at least 1:1 to demonstrate correction or recovery.

(5) For CF guaranteed loan requests only, refinancing of debt, not including new construction, incurred by a rural hospital to preserve access to a health service when the refinancing will meaningfully improve the financial position of the hospital. The debt can be existing Agency direct loan debt, Agency guaranteed debt, or another lender's debt (including other non-Agency Federal guaranteed debt). Loan requests to refinance rural hospital debt must demonstrate that the new amount of annual debt repayment on the debt being refinanced will be less than the existing amount of annual debt repayment and provide a total debt service coverage ratio of at least 1.1 based on historical cash flow. To calculate the ratio, the new debt service amount will include annual capital expense reserve and annual debt repayment reserve requirements. This information will be provided by the lender on an Agency approved application for loan guarantee and its associated supporting documentation.

- 11. Amend § 5001.103 by:
- a. Revising paragraphs (a)(1), (a)(3) and (b)(1); and
- b. Adding paragraphs (d) and (e).

The revisions and additions read as follows:

§ 5001.103 Eligible CF projects and requirements.

* * * * *

(a) * * *
 (1) Health care facilities and services, including but not limited to hospitals and assisted living facilities providing

daily living and health care assistance in compliance with Federal, Tribal and/ or State licensure or certification requirements;

* * * * *

(3) Community, public, social, educational, or cultural facilities or services, including but not limited to:

(i) Business incubators when not an inherently commercial enterprise, and the applicant demonstrates the following:

(A) Applicant is a mission-driven organization such as a local or regional economic development organization;

(B) The facility will be used to provide technical assistance, training, workforce development, administrative support services and vocational training to address workforce shortages in the community or region; and

(C) Capacity building and support services that include at a minimum the following with the borrower demonstrating expertise in one or more of these services or presents a sustainable economically feasible program to outsource such activities:

- (1) Business plan development;
(2) Administrative support services;
(3) Training and technical assistance;
(4) Mentoring, coaching, and leadership;

(5) Finance and accounting workshops;

(6) Programs to access capital; and
(7) High-speed internet access;

(ii) Thrift stores that operate as charitable organizations to enrich the quality of life for residents of the rural community they serve demonstrated by the following activities:

(A) Collect and resell used or donated merchandise to community residents and may also provide other services such as job training or food pantries;

(B) Receive donations, gifts, or bequests of money to help fund the organization and its purpose with a significant portion obtained from the rural community it serves.

(C) Profits are reinvested in the facility or in charitable activities in the rural community served to ensure the goals of the organization are met.

(iii) Fairgrounds, agricultural exposition centers, farmers markets, food distribution and food banks;

* * * * *

(b) * * *

(1) To demonstrate availability for public use, the borrower may not restrict use of or membership to its facility or service based on race, color, religion, sex, national origin, age, disability, sexual orientation, or marital or familial status Veterans of Foreign Wars and American Legion post

facilities must be open and available for use by appointment or lease to community residents or groups.

* * * * *

(d) Leased space. Eligible projects may include leased space to ineligible organizations or leased space used for ineligible commercial activities provided the floor space leased to ineligible organizations or used for ineligible commercial activity is less than 25 percent of the facility's floor space. The ineligible organization and the ineligible commercial activity must be related to and enhance the primary purpose of the eligible project. Examples include a hair salon in an assisted living facility, or a pharmacy in a medical facility.

(e) Purchase of existing facility. When the project is to otherwise improve an essential community facility through the purchase of an existing facility as defined in § 5001.3 the following are required:

(1) An appraisal which demonstrates the purchase price is fair and reasonable and represents the market value of the facility through an arm's length transaction; and

(2) If the transaction is necessary to improve the facility, documentation of the improvements that will be required and the plan, including source of funding, to complete those improvements within a reasonable timeframe; or

(3) If the transaction is necessary to prevent a loss of service, documentation in the form of a financial analysis that demonstrates the seller will not have the financial means to continue to operate the facility and provide the needed services.

■ 12. Amend § 5001.104 by revising the introductory text and paragraphs (a) and (d)(1) to read as follows:

§ 5001.104 Eligible WWD projects and requirements.

For a WWD project to be eligible for a loan guarantee under this part, it must meet the criteria specified in § 5001.102 and this section and be for a borrower eligible to submit an application for the project in accordance with § 5001.126.

(a) Type of project. The project must be for one or more of the following facilities:

(1) Drinking water facilities, including but not limited to water source, treatment and distribution;

(2) Sanitary sewage facilities, including but not limited to collection and treatment;

(3) Solid waste facilities; or,

(4) Stormwater facilities.

* * * * *

(d) * * *

(1) The project must be installed to serve any user within the service area who desires service and can be feasibly and legally served.

* * * * *

■ 13. Amend § 5001.105 by revising paragraphs (b)(7), (b)(10), (b)(14), (b)(15)(i)(D), (b)(18)(i), (b)(18)(ii) introductory text, (b)(20), (b)(22)(vii), (d) introductory text, and (d)(1)(iii) to read as follows:

§ 5001.105 Eligible B&I projects and requirements.

* * * * *

(b) * * *

(7) Agricultural production, when not eligible for Farm Service Agency (FSA) farm loan programs assistance and when it is part of an integrated business also involved in the processing of agricultural products. Any agricultural production considered for guaranteed loan financing must be owned, operated, and maintained by the business receiving the guaranteed loan. Examples of potentially eligible agricultural production include but are not limited to an apple orchard in conjunction with a food processing plant; poultry buildings linked to a meat processing operation; or sugar beet production coupled with storage and processing.

* * * * *

(10) Development and construction of broadband and telecommunication systems, including modification of existing systems, that are not otherwise eligible for funding in the RUS program or if funding is unavailable in the RUS program, subject to the public notice filing requirements of 7 CFR 1738.106(a) and the additional reporting requirements of 7 CFR 1738.107.

* * * * *

(14) 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. Leasehold improvements are physical enhancements made to property by or on behalf of the property's lessee. When improvements are made to real property and those improvements are permanently affixed to the property, the title to those improvements automatically transfers to the owner of the property upon termination of the lease.

(15) * * *

(i) * * *

(D) Includes an appropriate agreement with retail and institutional clients to inform consumers that they are

purchasing or consuming locally or regionally produced agricultural food products. The agreement(s) must be in place prior to issuance of the loan note guarantee and stated as part of the lender's certification at loan closing.

* * * * *

(18) * * *

(i) Guaranteed loans to eligible cooperatives 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 guaranteed loans exceeding \$25 million does not exceed 10 percent of the funds available for the fiscal year. Guaranteed loans in excess of \$25 million in accordance with this provision may only be approved by the Secretary, whose authority may not be redelegated.

(ii) Guaranteed loans to eligible cooperatives may also be made in non-rural areas provided:

* * * * *

(20) Nursing homes and assisted living facilities where constant medical care is provided and available onsite to the residents. Independent living facilities are not eligible in accordance with § 5001.118(a). Independent living facilities are considered residential property as they have many similarities to a multi-family housing complex, whereas nursing home and assisted living facility tenants rely on those entities to provide needed personal or medical care. Properties consisting of both assisted care facilities and independent senior living may be eligible if the availability of the on-site medical services is an optional service to the independent living residents, or if the predominant residents of the facility require assisted living care.

* * * * *

(22) * * *

(vii) Operations and maintenance. The demonstration of technical merit is the completion of two operating cycles at its designed production level. "Operating cycle" is the average time between the acquisition of materials or the providing of services and the final cash realization of that acquisition or provision of services.

* * * * *

(d) *Capital and equity.* Borrowers are required to have sufficient capital or equity to mitigate the ongoing financial and operational risks of the business. The capital/equity requirement must be met in the form of either cash or earning assets contributed to the business and reflected on the borrower's balance sheet. Transfers of assets at fair market value between related parties, which are

not arm's length transactions, must be in accordance with GAAP and require evidence that the transaction was entered into at market terms. Equity cannot include appraisal surplus or bargain purchase gains. 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 balance sheet equity requirement. Balance sheet equity will be determined based upon current and projected borrower financial statements. A balance sheet as of loan closing is required and should reflect the new debt and use of proceeds. If there are multiple borrowers, consolidated financial statements should be presented. The following capital and equity requirements must be met at the time of lender's closing of the guaranteed loan.

(1) * * *

(iii) Owner contributed capital, as reflected in the equity section of the balance sheet, that is equal to or greater than 10 percent of net total fixed assets plus depreciation.

* * * * *

■ 14. Amend § 5001.106 by revising the introductory text, paragraphs (d)(2), (e)(2) and (e)(3) introductory text to read as follows:

§ 5001.106 Eligible REAP—Renewable Energy System (RES) projects and requirements.

For a REAP RES project to be eligible for a loan guarantee under this part, it must meet the criteria specified in § 5001.102(a) through (c) and in paragraphs (a) through (e) of this section and be for a borrower eligible to submit an application for the project in accordance with § 5001.126.* * *

* * * * *

(d) * * *

(2) The borrower may install or elect to conditionalize funding upon the installation of a device (such as a second meter) that results in 100 percent of the energy generated by the RES project to be used only by the agricultural operation or rural small business.

* * * * *

(e) * * *

(2) *Pass/pass with conditions/fail assignments.* The Agency will assign each area of the technical report, as specified in paragraph (e)(1) of this section, a "pass," "pass with conditions," or "fail." An area will

receive a "pass" if the information provided for the area has no weaknesses and meets or exceeds any requirements specified for the area. An area will receive a "pass with conditions" if the information provided for the area has minor weaknesses which could be conditioned and reasonably resolved by the borrower. Otherwise, if the information provided for the area is conclusively deemed to be a major weakness, or if the area has not been addressed by the applicant, the area will receive a fail.

(3) *Determination.* The Agency will compile the results for each area of the technical report to determine if the project has technical merit.

* * * * *

■ 15. Amend § 5001.107 by revising and republishing paragraph (a) to read as follows:

§ 5001.107 Eligible REAP—Energy Efficiency Improvement (EEI) projects and requirements.

* * * * *

(a) The EEI project must use less energy on an annual basis than the original building and/or equipment that it will improve or replace as demonstrated in an energy assessment or energy audit as applicable.

(1) If the project's total project cost is greater than \$80,000, the energy assessment must be conducted by an energy auditor, an energy assessor, or an individual supervised by either an energy assessor or energy auditor. The final energy assessment must be validated and signed by the energy assessor, the energy auditor who conducted the energy assessment, or by the supervising energy assessor or energy auditor of the individual who conducted the assessment, as applicable.

(2) If the project's total project cost is \$80,000 or less, the energy assessment may be conducted in accordance with paragraph (a)(1) of this section or by a person that has at least 3 years of experience and completed at least five energy assessments or energy audits on similar type projects. Eligible EEI include, but are not limited to:

(i) Efficiency improvements to existing RES; and

(ii) Construction of a new building only when the new building is used for the same purpose as the existing building and if, based on an energy assessment or energy audit, as applicable, it is more cost effective to construct a new building that will use less energy on annual basis than to improve the energy efficiency of the existing building.

* * * * *

■ 16. Amend § 5001.108 by revising the introductory text to read as follows:

§ 5001.108 Eligible REAP—Energy Efficient Equipment and Systems (EEE) projects and requirements.

For a REAP EEE project to be eligible for a loan guarantee under this part, it must meet the criteria specified in § 5001.102(a) through (c) and in paragraphs (a) through (d) of this section and be for a borrower that is an agricultural producer eligible to submit an application for the project in accordance with § 5001.126. The EEE project can be located in a rural or non-rural area as long as the energy efficient equipment or systems are used for agricultural production or processing in accordance with paragraph (a) of this section. If the borrower plans to use taxable bonds as debt instruments the provision § 5001.105(b)(19) must be met.

* * * * *

■ 17. Amend § 5001.115 by revising paragraphs (l), (n) and (r) to read as follows:

§ 5001.115 Ineligible projects—general.

* * * * *

(l) Telephone systems. In certain circumstances, when not eligible for assistance through the Agency’s telecommunications program these projects may be eligible for assistance under this part.

* * * * *

(n) Except as provided in § 5001.105(b)(8), owner-occupied housing. Owner-occupied housing, such as bed and breakfasts, and hotels and motels, are only eligible when the pro-rata value of the owner’s living quarters, based on square footage, is deducted from the loan proceeds.

* * * * *

(r) Loans 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. However, religious organizations may participate in projects eligible for funding under section 306(a)(24) of the Consolidated Farm and Rural Development Act, 7 U.S.C. 1926(a)(24), provided they do not use Agency assistance for inherently religious activities in accordance with 7 CFR part 16, “Equal Opportunity for Religious Organizations.” If an organization conducts religious activities, they must be offered

separately, in time, or location from programs or services supported with the guaranteed loan. Participation in the religious activities must be voluntary, and not mandatory, for the beneficiaries of the program or services. Religious organizations may not discriminate against a beneficiary or prospective beneficiary, on the basis of religion or religious beliefs. Sanctuaries, chapels, or other rooms that are used as a principal place of worship are ineligible for guaranteed financing under this part.

* * * * *

■ 18. Amend § 5001.116 by revising paragraphs (b) and (e) to read as follows:

§ 5001.116 Ineligible CF projects.

* * * * *

(b) Inherently commercial enterprises: This type of project is typically operated by a private enterprise with an essential characteristic to produce profits. This term does not include projects operated by private enterprises on a not-for-profit basis that provide education, childcare, geriatric care, or health care to rural communities. Inherently commercial enterprises include but are not limited to: grocery stores; television and radio services or facilities; that portion of a water and/or waste disposal facility normally provided by a business or industrial user; and telecommunication facilities or services, including broadband or fiber network services that do not meet the requirements of § 5001.103(a)(6). See § 5001.103(d) for the eligibility of a commercial enterprise leasing space in an eligible project;

* * * * *

(e) Projects involving the purchase of existing facilities in which the transaction’s purpose is to primarily retire the debt of the seller in order for the seller to continue to use the facility at a lower cost. Characteristics of ineligible purchase transactions may include the following:

(1) An entity, which may or may not be an eligible CF borrower, forms a new eligible entity or uses an existing eligible related entity to purchase all or part of its assets;

(2) The new entity uses CF guaranteed loan funds to purchase the assets at the agreed upon price and leases the assets back to the seller, generally at a rate which equates to the new debt payments; and

(3) The seller uses the proceeds of the sale to retire its high-cost debt and continues to use the facilities at a lower cost.

■ 19. Amend § 5001.121 by revising the introductory text, paragraphs (a)(2), (a)(3)(iv), (b), (c)(6), (d) introductory

text, and (d)(14) introductory text to read as follows:

§ 5001.121 Eligible uses of loan funds.

Guaranteed loan funds can only be used for the items specified in this section and any other items the Agency identifies in the **Federal Register**. In addition, RD may allow a recipient of a loan guarantee under this part to use up to 10 percent of project funds to construct, improve, or acquire broadband infrastructure subject to the requirements of 7 CFR part 1980, subpart M.

* * * * *

(a) * * *

(2) To pay the cost of conduit, such as pipe, tube, or tile for protecting electric wires or cables, and its installation in conjunction with financing facilities authorized in § 5001.103, when the cost of the conduit is less than 25 percent of the total project cost and the conduit is not essential to the operation of the eligible essential facility or service to be financed. The borrower must be the owner of the conduit. The conduit must be installed at the time of project construction and must be for public use. A project example is construction of a road. While work is being completed in preparation for the eligible road project, the borrower takes advantage of the construction to install underground conduit in anticipation of installing fiber optic cables in the near future.

(3) * * *

(iv) Interest on guaranteed loans until the facility is self-supporting, but not for more than three years; interest on guaranteed loans secured by general obligation bonds until tax revenues are available for payment, but not for more than two years; and when the borrower obtains interim financing for the eligible project, the guaranteed loan proceeds may be used to pay off the interim financing as well as the interest on interim financing;

* * * * *

(b) *WWD projects*. Guaranteed loan funds for a WWD project receiving a loan guarantee may be used to pay the following:

(1) Constructing, extending, or otherwise improving an eligible facility outlined in § 5001.104(a), and may include the cost of materials and labor in addition to the following:

(i) Cost of acquiring interests in land, rights (e.g., water rights, leases, permits, rights-of-way), and other evidence of land or water control or protection necessary for development of the project.

(ii) Purchasing or renting equipment necessary to construct, or extend the facility services, for owner construction.

(iii) Cost of additional borrower labor and other expenses necessary to install, extend, or protect the facility.

(iv) Interest incurred during construction in conjunction with interim financing, and the payoff of the interim loan with the permanent financing.

(v) Initial operating expenses, including interest, for a period ordinarily not exceeding one year when the borrower is unable to pay such expenses, for construction of a new facility. The lender must provide justification and the Agency must document the reason for granting the longer time.

(vi) Professional service fees and charges provided the Agency approves the amounts as reasonable and customary in the area.

(vii) Water reuse, renewable energy, and other construction projects to improve the sustainability or resilience of an eligible facility.

(2) Stand-alone projects not involving construction may also be made for the following purposes:

(i) Costs of acquiring interests in land, rights (e.g., water rights, leases, permits, rights-of-way), and other evidence of land or water control or protection necessary for the maintenance or operation of the facility.

(ii) Purchase of equipment to operate, maintain, or protect facilities, such as computers, generators, vehicles, backhoes, meters, pipe, and pumps, etc. The purchase of equipment must include installation and not be for the sole purpose of increasing inventory. Owner construction or installation is an option.

(iii) The purchase or acquisition of existing facilities when it is necessary either to improve service or prevent the loss of service.

(iv) The purchase and installation of RESs for use by an eligible facility (even if it does not include construction).

(v) Planning, studies, and designs for incorporating renewable energy or water reuse, or to improve the sustainability or resilience of an eligible facility.

(vi) The Agency may allow a recipient of a loan guarantee under this part to use up to 10 percent of project funds to construct, improve, or acquire broadband infrastructure subject to the requirements of 7 CFR part 1980, subpart M.

(vii) Professional service fees for engineering and environmental services that provide services for preplanning evaluation procedures, such as leak detection, or inflow and infiltration

analysis, as reasonable and customary in the area to evaluate an existing facility's need for improvements or repairs. Such services will be in accordance with professional service agreements with copies of analysis to be provided in the application package for such reports as preliminary engineering report, final design with plans and specifications, bidding documents, or the completed environmental review analysis.

(viii) Refinancing in accordance with § 5001.102(d).

(3) Other expenses related to any project under (b)(1) and (2), including:

(i) Guarantee fees, as determined under § 5001.454.

(ii) Lender fees, as provided in § 5001.403.

(iii) Payoff of interim financing including principal and interest.

(c) * * *

(6) 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 request for preliminary eligibility review or complete application that proposes such interim financing prior to closing the interim loan. The borrower must take no action until the conclusion of the environmental review process prior to any action that would have an adverse effect on the environment or limit the choices of any reasonable alternatives to be considered by the Agency. Interim financing is typically used to pay costs associated with a planned project, such as construction or installation of equipment, however, the Agency will consider, on a case-by-case basis, other reasons to use interim financing. The term for interim financing loans should be for the construction period plus a reasonable time for the business to begin generation of working capital to amortize the loan. Guaranteed promissory notes that do not convert the interim financing payment schedule to an amortizing permanent schedule in the same note are not allowed. In certain cases, the applicant lender may use interim financing to pay-off a borrower's maturing loan with another lender if it is in the best interests of the borrower. The takeout of interim financing is only eligible when the permanent loan on which the guarantee will be placed takes out the interim financing that financed the planned project and when the lender submits a complete preliminary eligibility review or application to the Agency that proposes the interim financing prior to closing the interim loan. If the interim financing does not meet these requirements, it is

considered debt refinancing and must comply with § 5001.102(d). If the guarantee is issued prior to construction, the promissory note must contain and convert the terms of the interim financing to permanent financing. 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 nor issue a conditional commitment until the environmental process is complete. The Agency assumes no responsibility or obligation for interim loans.

* * * * *

(d) *REAP projects.* Guaranteed loan funds for a project receiving a loan guarantee under REAP may be used to pay the expenses associated with the items identified in paragraphs (d)(1) through (14) of this section, provided such items are directly related to and their use and purpose are limited to the RES, EEI, or EEE project. The expenses associated with the items specified in paragraphs (d)(8) through (11) of this section cannot exceed more than ten percent of the loan amount. Ten percent is an aggregate amount, not ten percent for each item.

* * * * *

(14) Refinancing outstanding long-term debt. It is not considered refinancing if loans were structured as construction or bridge loans for short-term financing needs (interim financing) in preparation for a long-term loan. Refinancing will be considered when—

* * * * *

■ 20. Amend § 5001.122 by revising the introductory text and paragraphs (a), (k) and (l), and adding paragraph (n) to read as follows:

§ 5001.122 Ineligible uses of loan funds.

Projects that receive a loan guarantee under this part cannot use the guaranteed loan funds for those expenses or purposes identified in paragraphs (a) through (n) of this section and for any other item the Agency identifies in accordance with § 5001.10.

(a) Payment in excess of actual costs (e.g., profit, overhead, indirect costs, and wages to owners) incurred by the contractor or other service provider on a contract or agreement that has been entered into at less than an arm's length transaction or has a potential for a conflict of interest. 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 the

construction or installation can be paid with guaranteed loan funds and cannot include any profit or wages to such related person.

* * * * *

(k) Agricultural tillage equipment, used equipment, and vehicles are ineligible for loans as specified under REAP. Costs include costs for RES and/or EEI projects that are used to improve a vehicle's ability to propel itself are ineligible uses for loan funds. For example, modifying an existing vehicle's engine to run on renewable fuels or replacing an older vehicle with a new more efficient vehicle are ineligible uses of loan funds. Projects similar to purchasing and installing solar panels to power a refrigerator or the replacement of a refrigerator for a more efficient one on a food truck may be considered eligible uses of loan funds if all other borrower and project eligibility requirements are met.

(l) Distribution or payment to an individual or entity that will retain an ownership interest in the borrower or distribution or payment to a beneficiary of the borrower. Distribution or payment to a member of the immediate family of an owner, partner, or stockholder will not be permitted, except for change in ownership interest and the Agency determines the price paid to be reasonable based upon an appraisal. This prohibition does not apply to transfers of ownership for ESOPs or worker cooperatives, to cooperatives where the cooperative pays the member for product or services, or where member stock is transferred among members of the cooperative in accordance with § 5001.140 of this part. This paragraph does not preclude the former owner from remaining an employee of the business during a reasonable transition period. The payment of personal debt is considered a distribution or payment to an owner, except for the refinancing of debt for an asset that is used in the business when the owner is a co-borrower on the loan.

* * * * *

(n) Lease payments, including lease to own or capitalized leases. This does not preclude a REAP applicant from leasing out REAP financed and installed equipment to a third party (lessee) such as a non-profit, school district, or municipal government. The third party (lessee) must directly utilize the equipment to fulfill the statutory purposes of REAP, to generate renewable energy or provide energy savings. The borrower must maintain ownership and control of the project for the entire useful life of the project, including site, income and expenses via

the lease agreement. Additionally, all other REAP requirements, must be reviewed in this scenario to ensure complete eligibility is obtained with a lease in place. This includes, but is not limited to, project eligibility, including prohibitions on residential use and other prescribed eligible project costs. A REAP applicant may lease out a commercial building, improved with REAP funds, to various tenants. This may include an office complex in which a Federal Government Agency is a tenant. This is allowable as long as conflict of interest requirements are complied with.

■ 21. Amend § 5001.126 by revising the introductory text, paragraphs (a) introductory text, (a)(1), (b)(2)(i), (c)(2), (d)(3) introductory text, (d)(3)(iii), (d)(4), (e)(1) and (2) to read as follows:

§ 5001.126 Borrower eligibility.

To be eligible for a loan guarantee under this part, a borrower must meet the requirements specified in this section at the time of each guaranteed loan's approval and through issuance of the loan note guarantee. A borrower must meet the eligibility requirements specified in paragraph (a) of this section and in paragraphs (b) through (e), as applicable, of this section.

(a) *Legal authority and responsibility.* The borrower must have, or obtain before issuance of the loan note guarantee, the legal authority necessary to construct, operate, and maintain the proposed facility and services and to obtain, give security for, and repay the proposed loan.

(1) *Operate and maintain the facility.* The borrower is responsible for operating, maintaining, and managing the facility and providing for its continued availability and use. The borrower will retain this responsibility even though the facility may be operated, maintained, or managed by a third party under contract, management agreement, or written lease. Leases may be used for certain projects when they are the only feasible way to provide the service or facility, are the customary practice to provide such service or facility within the industry or in the State and provide for the borrower's management control of the project. Contracts, management agreements, or written leases must not contain options or other provisions for transfer of ownership unless approved by the Agency. The borrower must own and retain control of the facility at all times; however, various types of ownership structures are permitted to bring in passive investor equity. These include but are not limited to partnership flips and inverted leases, which are common

in the renewable energy industry. The anticipated release of passive tax credit investor entities resulting in a change in ownership control that does not impact the financial performance of the loan, as outlined at time of loan closing, does not constitute a transfer or assumption, nor require concurrence from the Agency.

* * * * *

(b) * * *

(2) * * *

(i) Association with or control by a public body or bodies typically evidenced in the organizational documents of the borrower; or

* * * * *

(c) * * *

(2) *Credit elsewhere.* In accordance with 7 U.S.C. 1983, certify in writing, subject to Agency verification, that the borrower is unable to finance the proposed project from their own resources or through commercial credit without a guarantee, at reasonable rates and terms. A loan guarantee will not be provided to borrowers who are able to obtain sufficient credit elsewhere to finance project costs at reasonable rates and terms, taking into consideration prevailing private and cooperative rates and terms in the community in or near where the borrower resides, for loans for similar purposes and periods of time, or to borrowers who are able to finance project costs from their own resources. All lenders are required to provide written certification that their borrowers are unable to afford commercial credit at reasonable rates and terms without the guarantee.

* * * * *

(d) * * *

(3) A borrower who is an individual must meet the requirements of (i) through (iii) below. Applications will neither be approved, nor a conditional commitment issued subject to meeting the citizenship requirement.

* * * * *

(iii) Be a citizen or resident of the Republic of Palau, the Federated States of Micronesia, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, or the Republic of the Marshall Islands.

(4) A borrower must demonstrate, to the Agency's satisfaction, that guaranteed loan funds will remain in the United States and the project being financed will primarily create new or save existing jobs for rural U.S. residents. To ensure that loan funds remain in the United States, loans must be collateralized with fixed assets that remain in the United States.

(e) * * *

(1) *Type of borrower.* The borrower must be either an agricultural producer or a rural small business if applying for RES or EEI funding. The borrower must be an agricultural producer if applying for EEE funding. For-profit rural small businesses that provide long-term care services that benefit residents, such as nursing homes and assisted living facilities, are eligible. For-profit rural small businesses that provide short-term housing, such as hotels, are also eligible. Newly formed special purpose entities or equivalents that are clearly created solely for the circumvention of provisions prohibited by REAP statute are not eligible.

(2) *Ownership.* The borrower at the time of application or no later than guaranteed loan closing and for the term of the guaranteed loan must:

- (i) Own the project; and
- (ii) Own or control the site for the project at the time of application and for the term of the guaranteed loan.

* * * * *

■ 22. Amend § 5001.127 by revising paragraphs (a) introductory text, (a)(3), (a)(4), (d), and (f) to read as follows:

§ 5001.127 Borrower ineligibility conditions.

* * * * *

(a) An entity is ineligible if any of the conditions identified in paragraphs (a)(1) through (4) of this section applies to the borrower, any owner with more than 20 percent ownership interest in the borrower (does not include passive investors), or any owner with control of the borrower. Entities with delinquent debt, as identified in paragraphs (a)(1) through (a)(4), under a repayment plan are not eligible until the debt is paid in full.

* * * * *

- (3) Delinquency on Federal debt.
- (4) Debarment or suspension from receiving Federal assistance. The lender is responsible for verification of the borrower's status. Verification can be done at *sam.gov*.

* * * * *

(d) An entity is ineligible if it derives income from illegal drugs, drug paraphernalia, or any other illegal product or activity as defined under Federal statute. A borrower that intends to lease space or enter into a power purchase agreement with a marijuana dispensary is not eligible given our borrower would be receiving income from the marijuana operation which is a violation of Federal laws as marijuana is a controlled substance under Federal law and subject to Federal prosecution

under the Controlled Substances Act (21 U.S.C. 812).

* * * * *

(f) An entity is ineligible if its lender or any of the lender's officers has an ownership interest in the borrower or is an officer or director of the borrower with management control or where the borrower or any of its officers, directors, stockholders, or other owners have more than a five percent ownership interest in the lender. Any of the lender's directors, stockholders, or other owners that are officers, directors, stockholders, or other owners of the borrower without management control or ownership less than 5 percent must be recused from any decision-making process associated with the guaranteed loan.

* * * * *

- 23. Amend § 5001.130 by:
 - a. Redesignating (a)(3) through (a)(6) as (a)(4) through (a)(7) and adding new paragraph (a)(3);
 - b. Revising paragraphs (c)(1)(iii), (c)(2) introductory text, (c)(2)(viii)(H), (c)(4) introductory text, (c)(4)(iv);
 - c. Adding paragraph (c)(4)(v);
 - d. Revising paragraphs (d)(2) introductory text, (d)(4) introductory text, and (d)(4)(iv) ; and,
 - e. Adding paragraph (d)(4)(v).

The additions and revisions read as follows:

§ 5001.130 Lender eligibility requirements.

* * * * *

- (a) * * *
- (3) Be free from default and delinquency on any debt owed to the Federal Government;

* * * * *

- (c) * * *
- (1) * * *
- (iii) Have and agree to maintain balance sheet equity in accordance with § 5001.105(d) of this part of at least 10 percent of assets and sufficient funds available to disburse the guaranteed loans it proposes to approve within the first six months of being approved as a lender;

* * * * *

(2) *Written request.* A non-regulated lending entity that seeks to become a lender must submit a written request to the Agency via *OneRDlenderapproval@usda.gov*, and must include the following information:

* * * * *

- (viii) * * *
- (H) Proposed interest rate structure and loan fees, including any loan origination, loan preparation, and servicing fees.

* * * * *

(4) *Renewals.* To maintain its status as an approved lender, the non-regulated

lending entity must submit a written request to the Agency for renewal of its approved lender status at least 60, but not more than 120, calendar days prior to the expiration of the existing lender's agreement to be assured of a timely renewal. A review of the lender's performance will be completed to determine whether the lender has continually met the eligibility criteria described in paragraphs (c) and (d) of this section. The lender's activity in the program and its delinquency/default rate will also be considered when making a determination regarding renewal. Any action by the lender since it was designated an eligible lender that could be cause for revoking its status, in accordance with § 5001.132, will be considered cause for denying the renewal of eligible status. The lender will be notified in writing whether the request is approved, reasons for denial, or any conditions the lender must meet for approval. The lender's written request must provide the information specified in paragraphs (c)(2)(i) and (iii) through (v) of this section; and

* * * * *

(iv) The Agency may require lenders with limited guaranteed loan activity over the previous five years, or a lender that has originated guaranteed loans with servicing issues or a loss to the Agency, to resubmit all the information required by paragraph (c)(2) of this section. A lender who is not active in the Agency guaranteed loan programs should provide evidence that they remain active in other commercial lending activity with acceptable underwriting and servicing performance. Lenders with loans that cause a loss to the Agency are a concern and those projects will be reviewed to determine the cause of the loss, including whether the lender's analysis or servicing processes were insufficient.

(v) The renewal will be for a term of 5 years.

(d) * * *

(2) *Written request.* A non-regulated lending entity serving Tribal trust lands that seeks to become a lender must submit a written request to the Agency via *OneRDlenderapproval@usda.gov* that includes the following information:

* * * * *

(4) *Renewals.* To maintain its status as an approved lender, the non-regulated lending entity serving Tribal trust land must submit a written request to the Agency for renewal of its approved lender status at least 60 and not more than 120 calendar days prior to the expiration of the existing lender's agreement to be assured of a timely renewal. A review of the lender's

performance will be completed to determine whether the lender has continually met the eligibility criteria described in paragraphs (c) and (d) of this section. The lender's activity in the program and its delinquency/default rate will also be considered when making a determination regarding renewal. Any action by the lender since it was designated an eligible lender that could be cause for revoking its status, in accordance with § 5001.132, will be considered cause for denying the renewal of eligible status. The lender will be notified in writing whether the request is approved, reasons for denial, or any conditions the lender must meet for approval. The lender's written request must provide the information specified in paragraphs (c)(2)(i) and (iii) through (v) of this section; and

* * * * *

(iv) The Agency may require lender with limited guaranteed loan activity over the previous five years, or a lender that has originated guaranteed loans with servicing issues or a loss to the Agency, to submit updated information required by paragraph (c)(2) of this section.

(v) The renewal will be for a term of 5 years.

* * * * *

■ 24. Revise § 5001.131 to read as follows:

§ 5001.131 Lender's agreement.

When approved to participate as a lender under this part, the lender must execute a lender's agreement before the Agency will issue a loan note guarantee. A new lender's agreement must be executed with any existing lender making new loans on or after October 1, 2020. Approval under one program is approval for all programs. The eligibility expiration date for non-regulated lenders will be five years from the date of the original execution of a lender's agreement as specified in § 5001.130(c) and (d). There will be only one lender's agreement issued for each lending entity based on their tax identification number. Lender's agreements will not be issued for individual branches. Subsequent loans do not require a new lender's agreement. A lender who fails to renew its lender's agreement and loses its approved lender status must continue to service any outstanding guaranteed loans in conformance with the lender's agreement last in effect and the applicable regulation under which the lender became an approved lender. Such lenders cannot submit requests for new loan guarantees.

* * * * *

■ 25. Amend § 5001.132 by revising paragraphs (a)(3) and (4), (b) introductory text, (b)(14), and (c) to read as follows:

§ 5001.132 Maintenance of approved lender status.

* * * * *

(a) * * *

(3) Is a regulated lending entity and fails to remain in good standing with its regulator;

(4) Is a non-regulated lending entity and fails to renew its approval status within 5 years of the expiration date of the lender's agreement.

(b) *Revocation of approved status and debarment of lender.* The Agency can revoke a lender's status as an approved lender at any time for cause as specified in the lender's agreement. A decision to revoke a lender's approved status will be made by the Agency and the lender will be notified in writing. The revocation may apply to all branches of the lender, specific branches, or personnel, as appropriate. The lender must revoke the level II eAuthentication privileges of all individuals included in the revocation notice. Cause for revoking lender status includes, but is not necessarily limited to, the circumstances identified in paragraphs (b)(1) through (14) of this section.

* * * * *

(14) Violation of applicable nondiscrimination laws, including, but not limited to, statutes, regulations, USDA Departmental Regulations, the USDA Non-Discrimination Statement, and the Equal Credit Opportunity Act. USDA's Non-Discrimination Statement is located on the Agency's website, see usda.gov/non-discrimination-statement. In addition to revoking the lender's status, the Agency may debar the lender in compliance with 2 CFR part 180.

(c) *Servicing of outstanding loans.* Any lender who loses its status as an approved lender under any of the conditions identified in paragraph (a) or (b) of this section must reapply under the provisions of § 5001.130 to be reinstated as an approved lender. A lender who loses its approved lender status must continue to service any outstanding guaranteed loans in conformance with the lender's agreement last in effect and the applicable regulation under which the lender became an approved lender. In addition, such lenders cannot submit requests for new loan guarantees.

■ 26. Amend § 5001.140 by revising paragraphs (a)(4), (b) introductory text and (d)(3) to read as follows:

§ 5001.140 Cooperative stock/cooperative equity.

* * * * *

(a) * * *

(4) 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 any other right or ability necessary to liquidate and dispose of the collateral in the event of a default by the borrower. The lender and borrower understand that the borrower is fully liable for the entire debt, regardless of the success or failure of the cooperative. The lender is expected to maximize recovery on the loan, including collection of personal, partnership and corporate guarantees. In addition, provisions of the DCIA may impose significant restrictions on delinquent Federal debtors, including eligibility for other Federal programs.

* * * * *

(b) *Purchase of transferable stock shares.* The Agency may also guarantee loans for the purchase of transferable stock shares of any type of existing cooperative, which would primarily involve new or incoming members. Such stock may provide delivery or some form of participation rights and may only be traded among cooperative members. The lender and borrower understand that the borrower is fully liable for the entire debt, regardless of the success or failure of the ESOP. The lender is expected to maximize recovery on the loan, including collection of personal, partnership and corporate guarantees. In addition, provisions of the DCIA may impose significant restrictions on delinquent Federal debtors, including eligibility for other Federal programs.

* * * * *

(d) * * *

(3) The lender must, 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 default by a borrower. The lender and borrower understand that the borrower is fully liable for the entire debt, regardless of the success or failure of the cooperative or ESOP. The lender is expected to maximize recovery on the loan, including collection of personal, partnership and corporate guarantees. In addition, provisions of the DCIA may impose significant restrictions on delinquent Federal debtors, including eligibility for other Federal programs.

* * * * *

■ 27. Amend § 5001.141 by:

- a. Revising the section heading, the introductory text, and paragraphs (b)(1)(iii), (b)(4), (6) and (8); and
- b. Adding (b)(14).

The revisions and addition read as follows:

§ 5001.141 New Markets Tax Credits Program.

The New Markets Tax Credits (NMTC) Program is administered by the U.S. Department of the Treasury’s (Treasury) Community Development Financial Institutions (CDFI) Fund with NMTC credits allocated to Treasury-certified Community Development Entities (CDE) across the United States to make Qualified Equity Investments (QEI) in low-income communities. NMTC related definitions and terms in this section are governed by section 45(D) of the Internal Revenue Code (26 U.S.C. 45D), and applicable Treasury regulations (26 CFR 1.45D–1). A CDE will generally establish a new subsidiary of a CDE (sub-CDE) for individual NMTC projects. Lenders and their borrowers with guaranteed loan projects that include NMTC investments must comply with the provisions in this section. To be a lender for a guaranteed loan project that involves financing under the NMTC provisions, the lending entity must meet the applicable eligibility criteria in § 5001.130. The Agency will not waive its servicing rights to a guaranteed loan or be a party to any forbearance agreement in conjunction with a NMTC project. Requests for loan guarantees that include NMTC are subject to all applicable program eligibility requirements, credit analysis, and due diligence required by part 5001. In all cases the Agency will undertake efforts to protect the best financial interests of the Federal government and collection of its guaranteed loan. The Agency will not consider any tax benefit or loss of tax benefits to the CDE, sub-CDE or NMTC investor in the servicing actions of a guaranteed loan.

* * * * *

- (b) * * *
- (1) * * *

(iii) When the borrower is a leveraged lender entity it must relend one hundred percent of the guaranteed loan funds to an investor fund entity. In all cases one hundred percent of the guaranteed loan funds are or will be invested by the investment fund entity in one or more sub-CDEs that will then be loaned directly to a QALICB, as defined by applicable regulations of the Internal Revenue Service, through a direct tracing method, and such guaranteed loan funds are, or will be used by the QALICB in accordance with

the eligibility requirements in subpart B of this part. The QALICB’s project must be the ultimate use of one hundred percent of the guaranteed loan funds.

* * * * *

(4) The loan terms found in § 5001.402 of this part apply to both the borrower and the QALICB. The maturity and related payment schedule of the lender’s guaranteed loan to the borrower must be no longer than the maturity and related payment schedule of the sub-CDE’s loan to the QALICB. An Agency approved unequal or escalating schedule of principal and interest payments can be used for a NMTC loan. The lender may require additional principal repayment by a co-borrower, such as an owner or principal participant of the QALICB. The provisions of § 5001.402(b)(3) notwithstanding, the Agency may consider the payment of interest-only payments by a borrower pursuant to an interest-only term not to exceed seven years on a loan made under an NMTC structure if the lender requires:

- (i) A debt repayment reserve fund or sinking fund in an amount at least equal to the guaranteed loan’s principal amortization that would have otherwise applied to the loan if equally amortized payments were collected during the seven-year term; and
- (ii) Such reserve funds or sinking funds are applied to the guaranteed loan as an additional payment of principal at the end of such interest-only term. The debt repayment reserve fund or sinking fund may be accumulated during the loan terms, or the full amount may be funded at loan closing.

* * * * *

(6) The personal, partnership and corporate guarantee provisions of § 5001.204 of this part apply when the guaranteed loan borrower is a leveraged lender entity in a NMTC project. Guaranteed loans made directly to an investor fund entity as the borrower do not require a personal, partnership, or corporate guarantee from the investor fund entity’s owner, who is the NMTC tax credit investor and considered a passive investor. The Agency shall obtain the personal, partnership or corporate guarantee from the QALICB ownership for a guaranteed loan to an investor fund entity in compliance with § 5001.204, subject to the eligibility requirements of the NMTC program. The Agency may require additional personal, partnership or corporate guarantees if warranted by an Agency evaluation of potential financial risk. The QALICB is the ultimate user of the guaranteed loan funds, and their owners should provide a guarantee of the

guaranteed loan as stipulated in § 5001.204.

* * * * *

(8) The financial report provisions of § 5001.504 of this part apply to both the borrower and the QALICB.

* * * * *

(14) Agency concurrence of the NMTC structure is required on all projects leveraging the NMTC program.

* * * * *

- 28. Amend 5001.202 by revising the introductory text, paragraphs (a), (b)(5) introductory text, and (b)(6)(iii), (iv) and (vi) to read as follows:

§ 5001.202 Lender’s credit evaluation.

For each application, the lender must prepare a credit evaluation that is consistent with Agency standards found in this part. Lenders are required to only submit complete loan applications that have been approved by their institution after completion of their internal credit evaluation. The components of a lender’s credit evaluation will include a written review and comment on the “Five Cs” of credit that are outlined in § 5001.202(b)(1) through (5). The Agency should be able to obtain sufficient details on the project, the borrower, and the borrower’s ability to repay the loan from the lender’s credit evaluation.

(a) *Lender’s evaluation guidelines.* The lender must conduct a credit evaluation using credit documentation procedures and underwriting processes that are consistent with generally accepted prudent lending practices for commercial, public and project financing, and also consistent with the lender’s own policies, procedures, and lending practices. The underwriting process must include a review of each loan for which a loan guarantee is being sought under this part. Applications involving affiliated entities must include a global credit evaluation and if applicable a global historical and projected debt service coverage analysis. The lender should evaluate the relationships between all associated parties to determine potential risks which may affect our borrower and its ability to repay the loan. Entities which may have an impact on the borrower or significantly contribute to the repayment ability of the loan should provide financials for global analysis. Applications involving guarantor(s) must also include a global debt service coverage analysis of the guarantor(s) including the cash flow of the guarantor(s). In addition, the lender must review all applicable contracts, management agreements, and leases to determine they will not adversely affect

either the borrower's repayment ability or the value of the collateral securing the guaranteed loan. The lender's evaluation must address any financial or other credit weaknesses of the borrower and project and discuss risk mitigation requirements imposed by the lender.

(b) * * *

(5) *Conditions.* This paragraph (b)(5) refers to the general business environment, including the regulatory environment affecting the business or industry, and status of the borrower's industry. Consideration will be given to items listed in paragraphs (b)(5)(i) through (ix) of this section and when applicable the lender should submit supporting documentation (e.g., feasibility study, market study, preliminary architectural or engineering reports, etc.) in accordance with §§ 5001.304 through 5001.307:

* * * * *

(6) * * *

(iii) Spreadsheets and analysis of the financial statements provided in accordance with § 5001.303, with appropriate ratios and comparisons with industry standards (such as Dun & Bradstreet or the Risk Management Association). The spreadsheets should enable a reviewer to easily scan the data, spot trends, and make comparisons. Steps taken or proposed to address any financial or industry weakness must be reasonable and adequately addressed.

(iv) Financial projections deviating from historical financial performance must be substantiated and documented. The borrower's projections should be consistent with their past performance. Increases to revenues, profit margins or profitability should be reasonable and substantiated in the analysis.

* * * * *

(vi) Operational cash flow analysis on a quarterly basis from the current financial statements through start-up or occupancy for projects involving construction when lenders are requesting the loan note guarantee prior to completion of construction. The lender and borrower are required to provide a construction schedule with their application for a loan guarantee prior to construction completion. The projected cash flow needs should mirror the quarterly construction costs as the project is being completed. The cash flow analysis must indicate whether this cash flow is being provided by the guaranteed loan, borrower equity, or other sources.

■ 29. Amend § 5001.203 by revising the introductory text, paragraphs (b), (c), (d)(1), (f) and (h) to read as follows:

§ 5001.203 Appraisals.

Appraisals of collateral are required as set forth in this section. The lender is responsible for ensuring that appraisal values adequately reflect the actual value of the collateral based on an arm's length transaction. Completed appraisals should be submitted when the application is filed. If the appraisal has not been completed when the application is filed, the lender must submit an estimated appraised value. Prior to the issuance of the loan note guarantee, the estimated value must be supported with an appraisal acceptable to the approval official. If an appraisal is received containing any value attributed to business valuation or as a going concern, the business valuation or going concern value must be deducted from the reconciled market value prior to discounting. The Agency expects that, for appraisals of existing facilities, the appraiser will physically visit the property unless prior permission from the Agency is obtained. Appraisals are not typically required when security consists of either a revenue or general obligation bond or liens on real estate for WWD projects which rely on revenues of the facilities for loan repayment.

* * * * *

(b) *Existing chattel.* The lender must obtain appraisal(s) for existing chattel collateral when its value exceeds \$250,000 and will be used to meet loan to value requirements.

(c) *Real estate.* The lender must obtain appraisals for real estate collateral when the value of the collateral exceeds \$250,000 or the current limitation established under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) Public Law 101-73, 103 Stat. 183 (1989). Real estate and chattels with a value below these thresholds must be evaluated in accordance with the lender's primary regulator's policies relating to appraisals and evaluations or, if the lender is not regulated, in accordance with normal banking practices and generally accepted methods of determining value. For construction projects, the lender must obtain the "As is" market value and the "prospective" market value as of the date of construction completion to determine the value of the real estate property.

(d) * * *

(1) Each real estate appraisal must be conducted by an independent qualified appraiser in accordance with the USPAP or similar Agency approved standard. The appraiser must have the specific qualification, experience, and competency to appraise the type of

facility being financed. All real estate appraisals must meet the requirements contained in the FIRREA, and the appropriate guidelines contained in Standards 1 and 2 of the USPAP or similar Agency approved standard, and, unless approved by the Agency approval official, be performed by a State Certified General Appraiser licensed in the State in which the real estate is located.

* * * * *

(f) *Environmental considerations.* When the Agency will take a lien on real property, the real estate appraisals must include consideration of the potential effects from a release of hazardous substances or petroleum products or other environmental hazards on the market value of the collateral, as determined in accordance with the appropriate ASTM International Real Estate Assessment and Management environmental standards. Potential contamination that has been observed on the property or identified through research or interviews with individuals knowledgeable about the property should be immediately reported to the Agency.

* * * * *

(h) *Appraisal fees.* Unless otherwise stated in this part, appraisal fees or any other associated costs will not be paid by the Agency. Appraisal fees are eligible loan purposes. The Agency does not pay for appraisals required at the time of loan application. Appraisals for servicing actions are handled in accordance with section 5001 subpart F.

■ 30. Amend § 5001.204 by revising paragraphs (b)(2) and (3) to read as follows:

§ 5001.204 Personal, partnership, and corporate guarantees.

* * * * *

(b) * * *

(2) Guarantees from any person or entity owning less than a 20-percent interest or membership in the borrower; and

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

* * * * *

■ 31. Amend § 5001.205 by revising and republishing paragraph (a), and revising paragraphs (b)(1), (e)(1), (e)(2)(iii), (iv), (vii) and (f)(1)(i) to read as follows:

§ 5001.205 General project monitoring requirements.

* * * * *

(a) *Design requirements.* The lender must ensure that all facilities

constructed with guaranteed loan funds are:

(1) Designed using accepted architectural, engineering, and design practices, taking into consideration any Agency comments when the facility is being designed;

(2) Designed in conformance to applicable Federal, Tribal, State, and local codes and requirements;

(3) Constructed to support operations at the level and quality contemplated by the borrower using accepted architectural and engineering practices; and

(4) Compliant with applicable domestic procurement preference requirements including section 70914 of the Build America, Buy America Act (BABAA) within the Infrastructure Investment and Jobs Act (Pub. L. 117–58).

(b) * * *

(1) Obtained valid, continuous, and adequate rights-of-way and easements, in compliance with Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) if applicable, needed for the construction, operation, and maintenance of a project; and

* * * * *

(e) * * *

(1) *Construction inspections.* The lender must notify the Agency of any scheduled field inspections during construction. The Agency may attend any field inspections the lender may conduct. Any Agency inspection, including those with the lender, are for the benefit of the Agency only (and not for the benefit of other parties in interest) and do not relieve any parties of interest of their responsibilities to conduct necessary inspections. On a case-by-case basis in the event that the Agency determines that there is additional risk to the government, the Agency may require the use of a qualified, independent inspector to inspect construction to ensure the project is being adequately built to meet the borrower's requirements of the borrower's approved project and comply with all applicable codes and legal requirements.

(2) * * *

(iii) The borrower and lender have agreed to a detailed timetable for the project with a corresponding budget of costs setting forth the parties responsible for payment. The timetable and budget will be confirmed as adequate for the planned development by a qualified independent consultant (e.g., the project architect or engineer) with demonstrated experience relating to the project's industry. The lender

must provide evidence that there is sufficient cash flow to complete the project construction, including contingencies for cost overruns, plus working capital during the business start-up period;

(iv) The borrower has entered into a firm, fixed-price construction contract with an independent general contractor with costs outlined in detail and terms specifying change order approvals, the agreed retainage percentage, and the disbursement schedule. In all cases, borrower equity must be injected prior to any guaranteed loan funds;

(vii) When applicable, the borrower has entered into a contract with an independent technology development firm guaranteeing completion of the project with the necessary technology to successfully run the project and system performance for projects that utilize integrated processing equipment and systems, such as biorefineries, RESs, and chemical manufacturing plants. The credit underwriting of the independent technology development firm must be satisfactory to and approved by the Agency. This is not limited only to renewable energy projects, but may include energy efficiency, renewable chemical, and biobased manufacturing projects. The intent of the provision is to ensure that all technology proposed for the project can be successfully integrated together to ensure successful installation and performance of the system. The respective technology providers usually guarantee their specific technology with quality parameters of input such that the end-product is what is proposed in both quality and yield. An engineering, procurement, construction (EPC) provider is responsible for the construction and assembly of the plant or facility. They adopt the quality limits and guarantee that the integrated facility that is built will perform according to specifications such that the input and operational bounds are met. The provision is likely applicable to the following types of projects:

(A) *Anaerobic digester.* An anaerobic digester project which uses a biological process that requires specific conditions and environment to be able to produce the product of biogas that can be refined to renewable natural gas (RNG). In some simpler cases the gas will be used for heat or electricity, but in other more involved cases, it will be cleaned and refined to make RNG that is marketable, and quality assessed to enter an interconnect pipeline. These types of projects should be approved and verified by an independent technology

firm, for integrated performance integrity and operability as well as yield integrity.

(B) *Landfill biogas.* Like anaerobic digesters projects, a landfill biogas project will have multiple steps and processes such as collection, clean-up, flaring and refinement to a fuel or the gas can be used to produce electricity. These types of projects should be approved and verified by an independent technology firm for integrated performance integrity and operability, as well as yield integrity.

(C) *Biofuel, biomass, ethanol, biodiesel.* A biofuel, ethanol, biomass, or biodiesel system will have multiple steps in which it must operate in line with the design proposed that has been from demonstration campaigns. It is paramount that an independent technology firm verify and guarantee the operation and performance of these integrated systems as they will have multiple processes which need to work in concert for the project to be successful. These types of projects should be approved and verified by an independent technology firm for integrated performance integrity and yield.

(D) *Solar thermal.* Solar thermal systems must have multiple processes in order to provide the end product of power, hot water, or heat. Due to their potential complexity, these systems should be approved and verified by an independent technology firm for performance integrity and operability.

(E) *Hydrogen.* These types of projects should be approved and verified by an independent technology firm for integrated performance integrity.

(F) *Geothermal.* Depending on system complexity and if it has multiple processes, the project should be fortified with a guarantee that the system will operate definitively.

(G) *Renewable chemical.* A project utilizing a series of chemical processes and reactions to produce a polymer that can be sold to make biodegradable plastics. An example of a BBP project utilizing gasification technology to produce a biochar or soil amendment as an end-user product.

* * * * *

(f) * * *

(1) * * *

(i) Certification by the independent engineer or qualified consultant to the lender that the work referred to in the draw has been successfully completed; and;

* * * * *

■ 32. Amend § 5001.206 by revising paragraph (b) to read as follows:

§ 5001.206 Compliance with USDA Departmental Regulations, Policies, and other Federal laws.

* * * * *

(b) *Other Federal laws.* Lenders and borrowers must comply with other applicable Federal laws including, but not limited to the following:

- (1) Equal Employment Opportunity.
- (2) Americans with Disabilities Act.
- (3) Equal Credit Opportunity Act.
- (4) Fair Housing Act.
- (5) Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA).
- (6) Section 70914 of the Build America, Buy America Act (BABAA) within the Infrastructure Investment and Jobs Act (Pub. L. 117–58).
- (7) 31 U.S.C. 3354 Do Not Pay Initiative.

■ 33. Amend § 5001.207 by revising paragraphs (a)(1), and (b)(2) to read as follows:

§ 5001.207 Environmental responsibilities.

* * * * *

(a) * * *

(1) The lender is responsible for becoming familiar and ensuring compliance with Federal environmental requirements. The lender must alert the Agency to any environmental issues related to a project or items that may require extensive environmental review. Proposals that minimize the potential of any project to adversely impact the environment must be developed and provided upon request by the Agency.

* * * * *

(b) * * *

(2) The lender must assist in the collection of additional data when the Agency needs such data to complete its environmental review of the project and mitigation of environmental issues.

■ 34. Revise § 5001.301 to read as follows:

§ 5001.301 Beginning the application process.

(a) The lender must file applications and related documents through their Agency contact.

(b) The lender may complete either a request for preliminary eligibility review in accordance with § 5001.302 or a full application in accordance with §§ 5001.303 through 5001.307, as applicable, to begin the process for obtaining a guaranteed loan. The Agency encourages, but does not require, lenders to file requests for preliminary eligibility reviews in order to obtain Agency comments before submitting a full application.

■ 35. Amend § 5001.303 by revising paragraph (c)(15) and (d) to read as follows:

§ 5001.303 Applications for loan guarantee.

* * * * *

(c) * * *

(15) Securities and Exchange Commission (SEC) Form 10–K, “Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934,” as noted in § 5001.306(a)(4).

* * * * *

(d) *Application modification.* Once a complete application is accepted by the Agency and prior to Agency award of a loan note guarantee, any modification to the application will be treated as a new application and the Agency will process the information accordingly. The submission date of record for a modified application is the date the Agency receives the modified application information.

■ 36. Amend § 5001.304 by revising the introductory text and (a)(4) introductory text to read as follows:

§ 5001.304 Specific application requirements for CF projects.

In addition to the requirements specified in § 5001.303 as applicable, a lender seeking a loan guarantee for a CF project must submit a financial feasibility report prepared by a qualified firm or individual acceptable to the Agency. All projects financed under this section must meet the financial feasibility requirements of this section and must be based on projected taxes, assessments, revenues, fees, or other sources of revenues in an amount sufficient to provide for project operation and maintenance, debt payments, and compliance with lender reserve requirements, when applicable. Other sources of revenue or existence of payment guarantors are particularly important in considering the feasibility of eligible recreation projects. The financial feasibility report must take into consideration any interest rate adjustment that may be instituted under the terms of the promissory note.

Financial projections for projects that are assisted living facilities, skilled nursing facilities, or similar types of eligible residential facilities must be based on no more than 90 percent occupancy. Utility projects dependent on user fees for debt repayment shall base their income and expense forecast on user estimates supported by either a State statute or local ordinance requiring mandatory hookup or signed and enforceable user agreements. If the primary use of the essential community facility is by a business and the success or failure of the facility is dependent on that business, then the economic viability of that business must also be assessed. For projects that include the

purchase and installation of RES that meet the eligibility requirements of § 5001.103(a)(8), a technical report on the RES as outlined in § 5001.307(e)(1) and (2), as applicable, will be included with the applicable financial feasibility report. The type of financial feasibility report required will depend upon the size of the guaranteed loan, the collateral securing the guaranteed loan, and the financial history of the borrower. The two types of financial feasibility report and when they are required are described in paragraphs (a) and (b) of this section.

(a) * * *

(4) The Agency may require a feasibility study when the lender’s analysis, borrower’s business plan, or project information is not sufficient to determine the technical feasibility, market feasibility, or economic viability of the project.

* * * * *

■ 37. Amend § 5001.305 by revising paragraph (a)(2) and adding paragraph (d) to read as follows:

§ 5001.305 Specific application requirements for WWD projects.

* * * * *

(a) * * *

(2) The lender must ensure that the project is designed utilizing accepted architectural and engineering practices and conforms to applicable Federal requirements (e.g., the seismic requirements of Executive Order 12699 (55 FR 835, 3 CFR, 1990 Comp., p. 269), the debarment requirements of 2 CFR part 180 as supplemented by 2 CFR part 417, American Iron and Steel (Section 746 of Title VII of the Consolidated Appropriations Act of 2017), and the Copeland Anti-Kickback Act (18 U.S.C. 874)); State, local and Tribal codes and requirements; and facility plans or plans and specifications reviewed and approved by the applicable State, local and/or Tribal regulatory agency. The lender must also ensure that the planned project will be completed within the available funds and once completed, will be suitable for the borrower’s needs. Upon completion of the project, the lender must certify that all applicable Federal requirements were met.

* * * * *

(d) *Domestic procurement preference.*

(1) *American Iron and Steel (AIS).* Guaranteed loans must comply with AIS requirements. Lenders and borrowers are responsible for meeting the AIS requirements of Section 746 of Title VII of the Consolidated Appropriations Act of 2017 and the continuing resolutions adopted thereafter.

(2) *Build America, Buy America Act (BABAA)*. BABAA was enacted as part of the Infrastructure and Jobs Act (Pub. L. 117–58) on November 15, 2021 and became effective on May 14, 2022. Under Section 70914(a) of BABAA, “none of the funds made available for a Federal financial assistance program for infrastructure may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.” Additional information may be found on the Agency’s Build America, Buy America website at <https://www.rd.usda.gov/build-america-buy-america>.

(3) *Compliance*. Owners are ultimately responsible for compliance with the domestic procurement preference requirements and should consult with the Agency early in project development. Compliance must be certified to prior to the issuance of the loan note guarantee. The lender must include any domestic preference language, provided by the Agency, in the loan agreement and other appropriate loan documents.

* * * * *

■ 38. Amend § 5001.306 by revising paragraphs (a)(3) introductory text and (b) introductory text to read as follows:

§ 5001.306 Specific application requirements for B&I projects.

* * * * *

(a) * * *

(3) The Agency may require a feasibility study when the lender’s analysis, borrower’s business plan, or project information is not sufficient to determine the technical feasibility, market feasibility, or economic viability of the project.

* * * * *

(b) *Applications requesting a guaranteed loan in an amount of \$600,000 or less*. Guaranteed loan applications may be processed under this paragraph (b) if the amount of the guaranteed loan does not exceed \$600,000, provided the Agency determines that the lender’s analysis, borrower’s business plan, or other project or borrower information submitted by the lender is sufficient to determine the technical feasibility, market feasibility, and economic viability of the project. If any of the items in paragraphs (a)(1) through (4) of this section apply, the lender must collect the information and maintain it in their file. A lender may need to resubmit or modify an application if the application does not contain sufficient

information for the Agency to make an informed loan approval decision.

* * * * *

■ 39. Amend § 5001.307 by revising paragraphs (a)(1) and (2), (b) introductory text, (e) introductory text, (e)(1)(ii), (e)(1)(v) introductory text, (e)(1)(v)(A)(2) and (3), (e)(1)(v)(C)(2) and (3) to read as follows:

§ 5001.307 Specific application requirements for REAP projects.

* * * * *

(a) * * *

(1) Eligible borrowers must meet the definition of agricultural producer or rural small business as defined in § 5001.3. Agricultural producers seeking funding for a RES or EEI project may apply as either a rural small business or as an agricultural producer, provided they meet the applicable eligibility requirements. Agricultural producers seeking funding for an EEE project must be eligible and apply as an agricultural producer.

(2) The borrower must provide the primary NAICS code applicable to the borrower’s business concern and certify on the Agency approved application form or system that it meets the definition of agricultural producer or rural small business. The Agency reserves the right to request supporting documentation to verify borrower eligibility.

(b) *Borrower description*. Describe the ownership of the borrower, including the information specified in paragraphs (b)(1) through (3) of this section, as applicable. Include a description of the borrower’s existing farm, ranch, or business operation, including how long the borrower has been in operation. Rural small businesses and agriculture operations owned by Tribes should provide documentation to adequately show the separation of the applicant and the Tribal government.

* * * * *

(e) *Technical report*. All eligible projects must have technical merit and provide information as identified in § 5001.106(e), § 5001.107, or § 5001.108 and (e)(1) through (3) of this section.

(1) * * *

(ii) For RES projects, sufficient information to enable the calculation of the percentage of historical use of energy compared to the amount of renewable energy that will be generated once the project is operating at its steady state operating level. If the project is closely associated with a residence, satisfactory demonstration must be made that 50 percent or more of the projected renewable energy will

benefit the agricultural operation or rural small business; and

* * * * *

(v) For total project costs in the amount of \$80,000 or less, a technical report, as identified in § 5001.303(c)(16), prepared in accordance with the following paragraphs, as applicable:

(A) * * *

(2) Vendor/installer certification that the EEI project uses commercially available technology;

(3) Vendor/installer certified projections on the quantity of energy to be saved;

* * * * *

(C) * * *

(2) Vendor/installer certification that the EEE project uses commercially available technology;

(3) Vendor/installer certification of the proposed energy consumption quantity and price per unit of the energy efficiency equipment to be installed;

* * * * *

■ 40. Amend § 5001.315 by revising paragraphs (a) introductory text, (b) introductory text, (c)(1) and (2), (d)(4) and (e)(2) to read as follows:

§ 5001.315 Application evaluation and award provisions.

(a) *General*. The Agency will evaluate all applications according to the provisions of this part and may require the lender to obtain additional assistance in those areas where the lender does not have the necessary expertise to originate or service the guaranteed loan. For the purposes of this paragraph (a), “those areas” mean:

* * * * *

(b) *Evaluation and eligibility determinations*. The Agency will review each complete application to make a formal determination as to: the eligibility of the borrower, lender, project, and guaranteed loan purpose and proposed use of funds; if there is a reasonable assurance of repayment ability; if sufficient collateral and equity exists; if the proposed guaranteed loan complies with all applicable statutes and regulations; and if the environmental review is complete. The Agency will only guarantee loans that are sound and that have a reasonable assurance of repayment.

* * * * *

(c) * * *

(1) Lenders must provide necessary information related to determining the priority score, if requested by the Agency. To the extent possible, lenders should consider the established priorities of the Agency when submitting projects for a loan guarantee.

Higher scoring applications will receive first consideration for funding.

(2) The Agency may establish a minimum priority score for each guarantee program. The Agency will, if established, publish the minimum score in a document in the **Federal Register**. Applications that do not meet the applicable minimum score will compete with all other guaranteed loan applications for each specific program in a competition on the first business day of September of the Federal fiscal year in which the application is ready for funding.

* * * * *

(d) * * *

(4) If a lender agrees to the lower loan guarantee amount offered by the Agency under either paragraph (d)(1) or (2) of this section, the lender must certify that the purpose(s) of the project can still be met at the lower funding level and must provide documentation that the borrower has obtained the remaining funds needed to complete the project as originally proposed.

(e) * * *

(2) If an unfunded application has a priority score less than any applicable minimum score and remains unfunded after the competition held on the first business day of September of the fiscal year in which the application is ready for funding, the Agency will notify the applicant in writing and withdraw the application from further funding consideration.

* * * * *

■ 41. Amend § 5001.316 by adding a paragraph heading to paragraph (e) and paragraph and revising paragraph (e)(2) to read as follows:

§ 5001.316 CF project priority point system and reservation of funds.

* * * * *

(e) *Rural priority.* * * *

* * * * *

(2) On July 1 of each year, the Agency will evaluate the dollar amount of complete applications on hand for projects in rural areas with a population of not more than 20,000 inhabitants. The dollar amount of the complete applications will be subtracted from the reserved allocation identified in this paragraph (e) and the remaining amount will be made available through the end of the Federal fiscal year for projects in rural areas with a population of not more than 50,000 inhabitants.

■ 42. Amend § 5001.318 by revising paragraph (b) introductory text to read as follows:

§ 5001.318 B&I project priority point system.

* * * * *

(b) *Location priority.* An application is eligible to receive points under each of the categories identified in paragraphs (b)(1) through (3) of this section if the project is located within:

* * * * *

■ 43. Amend § 5001.319 by revising the introductory text, paragraphs (a) introductory text, (b)(1)(i) introductory text, (b)(2)(i) introductory text, (b)(2)(i)(A), (b)(2)(ii), (b)(2)(iii) introductory text, (d) introductory text, (e), (f) introductory text, (f)(1) introductory text and (g)(6) introductory text to read as follows:

§ 5001.319 REAP project priority point system.

This section applies to REAP projects seeking a loan guarantee. On a periodic basis, and subject to the availability of funds, the Agency will compete each complete and eligible RES, EEL, and EEE application that is ready to be funded and whose priority score, as determined in this section, meets, or exceeds the minimum priority score. Applications that do not meet the applicable minimum score will be considered as provided in § 5001.315(c)(2). A maximum score of 90 points is possible.

(a) *Environmental benefits.* The Agency will award up to 5 points under this criterion based on documentation or the applicant's indication in the application that the project will have a positive effect on resource conservation, public health, and the environment. If the project will have a positive impact on:

* * * * *

(b) * * *

(1) * * *

(i) *Renewable energy systems.* The quantity of energy generated or replaced per guaranteed loan dollar requested will be determined by dividing the projected total annual energy generated or replaced by the RES or RES retrofit (minus energy for residential use), which will be converted to BTUs, by the guaranteed loan dollars requested. Applications for retrofitting of a RES that are not projecting to increase the amount of renewable energy that the RES is generating, while still eligible for REAP, will not be awarded points under this criteria. Off-the-grid projects and direct-use projects which are not replacements, will be awarded points based on proposed energy generation. Points will be awarded under this sub-criterion based on the annual amount of energy generated or replaced (minus energy for residential use) per dollar of guaranteed loan amount requested for the RES project. The Agency will award up to 10 points as determined under

paragraph (b)(1)(i)(A) and (B) of this section below. If the annual amount of energy generated per dollar of guaranteed loan amount requested calculated under paragraph (b)(1)(ii) of this section is:

* * * * *

(2) * * *

(i) *Energy replacement.* The Agency will award points under this sub-criterion for an RES project based on the amount of energy replaced by the project compared to the amount of energy used by the applicable process(es) over a 12-month period. If the estimated energy produced is more than 150 percent of the energy used by the applicable process(es), the project will be scored as an energy generation project under paragraph (b)(2)(ii) of this section. When calculating the percentage of energy being replaced and whether it is categorized as a replacement or generation, the entire amount of energy produced by the new system will be used in the calculation, regardless of whether the project is being prorated because it shares a meter with a residence or if it has ineligible project costs.

(A) *Documentation for energy replacement.* For a RES project to qualify as energy replacement, the borrower must provide documentation in its application on prior energy use incurred by the borrower. Documentation must be shown that the borrower entity incurred the cost of the historical energy to be replaced, in order for the project to qualify as energy replacement. Replacement of existing direct use renewable energy can be considered in the replacement calculation as long as the borrower entity owns the existing RES system. For a project involving a recent acquisition, historical energy costs of the previous owner can be used to document prior energy use. Applicant entities cannot utilize historical energy costs of affiliate businesses to document prior energy use. Proposed energy use, such as that attributed to an expansion, is not considered in the replacement calculation. For a RES project involving new construction and being installed to serve the new facility, the project can be classified as energy replacement only if the borrower can document prior energy use from a facility that is within plus or minus 10 percent of the size of the facility it is replacing. The estimated quantities of energy must be converted to either BTUs, watts, or similar energy equivalents to facilitate scoring.

* * * * *

(ii) *Energy generation.* If the RES project is intended for production of

energy or is a proposed retrofitting of an existing RES which increases the amount of energy generated, the Agency will award 10 points. Applications for retrofitting of an RES that are not projecting to increase the amount of renewable energy that the RES is generating, while still eligible for REAP, will not be awarded points under this criterion. If the borrower cannot document prior energy use, the project will be scored as an energy generation project, regardless of whether or not there is an agreement in place to sell the power.

(iii) *Energy saved.* The Agency will award up to 15 points under this sub-criterion for an EEI project based on the percentage of estimated energy saved by the installation of the project as determined by the projections in the applicable vendor certification, energy assessment or energy audit. If the estimated energy expected to be saved over the same period used in the energy assessment or energy audit, as applicable, will be—

* * * * *

(d) *Previous grantees or borrowers.* The Agency will award up to 15 points under this criterion based on whether the borrower has received and accepted a REAP grant award under 7 CFR part 4280 or a guaranteed loan commitment under either this part or 7 CFR part 4280. Received and accepted means REAP grant funds were disbursed and/or a REAP loan note guarantee was issued by the Agency. The determination is based on the fiscal year in which the obligation was made.

* * * * *

(e) *Existing businesses.* A maximum of 5 points will be awarded for an existing agricultural producer business or rural small business that meets the definition of existing business in § 5001.3. The business must be in operation for at least one full year, not simply a year since legal business formation.

(f) *Simple payback.* A maximum of 15 points will be awarded for this criterion based on the simple payback of the project as defined in § 5001.3. Points will be awarded for either RES, EEI, or EEE; points will not be awarded for more than one category. See definition of simple payback for calculations. Simple payback calculations will be calculated based only on the documented information provided with the application.

(1) *Renewable energy systems.* RESs includes replacement, generation, and direct-use RES projects. If the simple payback of the project is:

* * * * *

(g) * * *

(6) The project is located in an area where 20 percent or more of its population is living in poverty, as defined by the United States Census Bureau, for the last 30 years; an underserved community; or an area which has experienced long-term population decline, or loss of employment.

* * * * *

■ 44. Revise and republish appendix C to subpart D of part 5001 to read as follows:

**Appendix C to Subpart D of Part 5001—
Technical Reports for Energy Efficiency
Improvement (EEI) Projects With Total
Project Costs of More Than \$80,000**

For all EEI projects with total project costs of more than \$80,000, provide the information specified in Sections A and D and in Section B or Section C, as applicable. If the application is for an EEI project with total project costs of \$80,000 or less, please see § 5001.307(e) for the technical report information to be submitted with your application.

If the application is for an EEI project with total project costs of \$200,000 and greater, you must conduct an energy audit (EA). However, if the application is for an EEI project with total project costs of less than \$200,000, you may conduct either an energy assessment or an energy audit. Energy audits that meet the American Society of Heating, Refrigeration and Air-Conditioning Engineers (ASHREA) Level II Energy Survey; Analysis and American National Standards Institute (ANSI); or American Society of Agricultural and Biological Engineers (ASABE) S162 Standard for performing on farm energy audits will be considered by the Agency to be acceptable audits.

Section A. Project Information

Describe how all the improvements to or replacement of an existing building and/or equipment meet the requirements of being commercially available. Describe how the design, engineering, testing, and monitoring are sufficient to demonstrate that the proposed project will meet its intended purpose, ensure public safety, and comply with applicable laws, regulations, agreements, permits, codes, and standards. Describe how all equipment required for the EEI(s) is available and able to be procured and delivered within the proposed project development schedule. In addition, present information regarding component warranties and the availability of spare parts.

Section B. Energy Audit

If conducting an EA, provide the following information.

(1) *Situation Report.* Provide a narrative description of the existing building and/or equipment, its energy system(s) and usage, and activity profile. Also include average price per unit of energy (electricity, natural gas, propane, fuel oil, renewable energy, etc.) paid by the customer for the most recent 12 months, or an average of 2, 3, 4, or 5 years,

for the building and equipment being audited. Any energy conversion should be based on use rather than source.

(2) *Potential Improvement Description.* Provide a narrative summary of the potential improvement and its ability to reduce energy consumption or improve energy efficiency, including a discussion of reliability and durability of the improvements.

(i) Provide preliminary specifications for critical components.

(ii) Provide preliminary drawings of project layout, including any related structural changes.

(iii) Identify significant changes in future related operations and maintenance costs.

(iv) Describe explicitly how outcomes will be measured.

(3) *Technical Analysis.* Give consideration to the interactions among the potential improvements and the current energy system(s).

(i) For the most recent 12 months, or an average of 2, 3, 4, or 5 years, prior to the date the application is submitted, provide both the total amount and the total cost of energy used for the original building and/or equipment, as applicable, for each improvement identified in the potential project. In addition, provide for each improvement identified in the potential project an estimate of the total amount of energy that would have been used and the total cost that would have been incurred if the proposed project were in operation for this same time period.

(ii) Calculate all direct and attendant indirect costs of each improvement;

(iii) Rank potential improvements measures by cost-effectiveness; and

(iv) Provide an estimate of simple payback, including all calculations, documentation, and any assumptions.

(4) *Qualifications of the auditor.* Provide the qualifications of the individual or entity which completed the energy audit.

Section C. Energy Assessment

If conducting an energy assessment, provide the following information.

(1) *Situation Report.* Provide a narrative description of the existing building and/or equipment, its energy system(s) and usage, and activity profile. Also include average price per unit of energy (electricity, natural gas, propane, fuel oil, renewable energy, etc.) paid by the customer for the most recent 12 months, or an average of 2, 3, 4, or 5 years, for the building and equipment being evaluated. Any energy conversion shall be based on use rather than source.

(2) *Potential Improvement Description.* Provide a narrative summary of the potential improvement and its ability to reduce energy consumption or improve energy efficiency.

(3) *Technical Analysis.* Giving consideration to the interactions among the potential improvements and the current energy system(s), provide the information specified in paragraphs (3)(i) through (iii) of this appendix.

(i) For the most recent 12 months, or an average of 2, 3, 4, or 5 years, prior to the date the application is submitted, provide both the total amount and the total cost of energy used for the original building and/or

equipment, as applicable, for each improvement identified in the potential project. In addition, provide for each improvement identified in the potential project an estimate of the total amount of energy that would have been used and the total cost that would have been incurred if the proposed project were in operation for this same time period.

(ii) Document baseline data compared to projected consumption, together with any explanatory notes on source of the projected consumption data. When appropriate, show before-and-after data in terms of consumption per unit of production, time, or area.

(iii) Provide an estimate of simple payback, including all calculations, documentation, and any assumptions.

(4) *Qualifications of the Assessor.* Provide the qualifications of the individual or entity that completed the assessment. If the energy assessment for a project with total project costs of \$80,000 or less is not conducted by energy auditor or energy assessor, then the individual or entity must have at least 3 years of experience and completed at least five energy assessments or energy audits on similar type projects.

Section D. Qualifications

Provide a resume or other evidence of the contractor or installer's qualifications and experience with the proposed EEI technology. Any contractor or installer with less than 2 years of experience may be required to provide additional information in order for the Agency to determine if they are qualified installer/contractor.

■ 45. Revise and republish appendix D to subpart D of part 5001 to read as follows:

Appendix D to Subpart D of Part 5001— Technical Reports for Renewable Energy System (RES) Projects With Total Project Costs of Less Than \$200,000 but More Than \$80,000

Provide the information specified in Sections A through D for each technical report prepared under this appendix.

A renewable energy site assessment may be used in lieu of Sections A through C if the renewable energy site assessment contains the information requested in Sections A through C. In such instances, the technical report would consist of Section D and the renewable energy site assessment.

Note: If the total project cost for the RES project is \$80,000 or less, this appendix does not apply. Instead, for such projects, please provide the information specified in § 5001.307(e).

Section A. Project Description

Provide a description of the project, including its intended purpose and a summary of how the project will be constructed and installed. Describe how the system meets the definition of commercially available. Identify the project's location and describe the project site.

Section B. Resource Assessment

Describe the quality and availability of the renewable resource to the project. Identify the amount of renewable energy generated that will be generated once the proposed project is operating at its steady state operating level. If applicable, also identify the percentage of energy being replaced by the system.

If the application is for a bioenergy project, provide documentation that demonstrates that any and all woody biomass feedstock from National Forest System land or public lands cannot be used as a higher value wood-based product.

Section C. Project Economic Assessment

Describe the projected financial performance of the proposed project. The description must address total project costs, energy savings, and revenues, including applicable investment and other production incentives accruing from government entities. Revenues to be considered shall accrue from the sale of energy, offset or savings in energy costs, byproducts, and green tags. Provide an estimate of simple payback, including all calculations, documentation, and any assumptions.

Section D. Project Construction and Equipment Information

Describe how the design, engineering, testing, and monitoring are sufficient to demonstrate that the proposed project will meet its intended purpose, ensure public safety, and comply with applicable laws, regulations, agreements, permits, codes, and standards. Describe how all equipment required for the RES is available and able to be procured and delivered within the proposed project development schedule. In addition, present information regarding component warranties and the availability of spare parts.

Section E. Qualifications of Key Service Providers

Describe the key service providers, including the number of similar systems installed and/or manufactured, professional credentials, licenses, and relevant experience. When specific numbers are not available for similar systems, estimations will be acceptable.

■ 46. Revise and republish appendix E to subpart D of part 5001 to read as follows:

Appendix E to Subpart D of Part 5001— Technical Reports for Renewable Energy System (RES) Projects With Total Project Costs of \$200,000 and Greater

Provide the information specified in Sections A through G for each technical report prepared under this appendix.

Provide the resource assessment under Section C that is applicable to the project. For hybrid projects, technical reports must be prepared for each technology that comprises the hybrid project.

Section A. Qualifications of the Project Team

Describe the project team, their professional credentials, and relevant experience. The description shall support that the project team key service providers have the necessary professional credentials, licenses, certifications, and relevant experience to develop the proposed project.

Section B. Agreements and Permits

Describe the necessary agreements and permits (including any for local zoning requirements) required for the project and the anticipated schedule for securing those agreements and permits. For example, interconnection agreements and power purchase agreements are necessary for all renewable energy projects electrically interconnected to the utility grid.

Section C. Resource Assessment

Describe the quality and availability of the renewable resource and the amount of renewable energy generated through the deployment of the proposed system. For all bioenergy projects, except anaerobic digesters projects, complete Section C.3 of this appendix. For anaerobic digester projects, complete Section C.6 of this appendix.

(1) *Wind.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the source of the wind data and the conditions of the wind monitoring when collected at the site or assumptions made when applying nearby wind data to the site.

(2) *Solar.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the source of the solar data and assumptions.

(3) *Bioenergy/Biomass Project.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the type, quantity, quality, and seasonality of the renewable biomass resource, including harvest and storage, where applicable. Where applicable, also indicate shipping or receiving method and required infrastructure for shipping. For proposed projects with an established resource, provide a summary of the resource. Document that any and all woody biomass feedstock from National Forest System land or public lands cannot be used as a higher value wood-based product.

(4) *Geothermal Electric Generation.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the quality of the geothermal resource, including temperature, flow, and sustainability and what conversion system is to be installed. Describe any special handling of cooled geothermal waters that may be necessary. Describe the process for determining the geothermal resource, including measurement setup for the collection of the geothermal resource data. For proposed projects with an established resource, provide a summary of the resource and the specifications of the measurement setup.

(5) *Geothermal Direct Generation.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the quality of the geothermal resource, including temperature,

flow, and sustainability and what direct use system is to be installed. Describe any special handling of cooled geothermal waters that may be necessary. Describe the process for determining the geothermal resource, including measurement setup for the collection of the geothermal resource data. For proposed projects with an established resource, provide a summary of the resource and the specifications of the measurement setup.

(6) *Anaerobic Digester Project/Biogas.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the substrates used as digester inputs, including animal wastes or other renewable biomass in terms of type, quantity, seasonality, and frequency of collection. Describe any special handling of feedstock that may be necessary. Describe the process for determining the feedstock resource. Provide either tabular values or laboratory analysis of representative samples that include biodegradability studies to produce gas production estimates for the project on daily, monthly, and seasonal basis. If an anaerobic digester project, identify the type of operation (e.g., dairy, swine, layer, etc.), along with breed, herd population size and demographics, and the type of waste collection method and frequency information available. For the biogas produced, identify the type of digester (e.g., mixed, plug-flow, attached film, covered lagoon, etc.), if applicable, or the method of capture (landfill, sewage waste treatment, etc.) and treatment. Identify the system designer and determine the digester design assumptions such as the number and type of animals, the bedding type and estimated annual quantity used, the manure and wastewater volumes, and the treatment of digester effluent (e.g., none, solids separation by screening, etc. with details including use or method of disposal).

(7) *Hydrogen Project.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the type, quantity, quality, and seasonality of the renewable biomass resource. For solar, wind, or geothermal sources of energy used to generate hydrogen, indicate the renewable resource where the hydrogen system is to be installed. Local resource maps may be used as an acceptable preliminary source of renewable resource data. For proposed projects with an established renewable resource, provide a summary of the resource.

(8) *Hydroelectric/Ocean Energy Projects.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the quality of the resource, including temperature (if applicable), flow, and sustainability of the resource, including a summary of the resource evaluation process and the specifications of the measurement setup and the date and duration of the evaluation process and proximity to the proposed site. If less than 1 year of data is used, a qualified consultant must provide a detailed analysis of the correlation between the site data and a nearby, long-term measurement site.

(9) *Renewable Energy Systems with Storage Components.* Provide adequate and appropriate data to demonstrate the amount of renewable resource available. Indicate the

type, quantity, quality, and seasonality of the renewable energy resource, where applicable. Indicate the storage system specifications and the integrity of the system in conjunction with the RES it is integrated with, including application, size, lifetime, response time, capital and maintenance costs associated with the operation as well as the distribution of the stored resource(s).

Section D. Design and Engineering

Describe the intended purpose of the project and the design, engineering, testing, and monitoring needed for the proposed project. The description shall support that the system will be designed, engineered, tested, and monitored to meet its intended purpose, ensure public safety, and comply with applicable laws, regulations, agreements, permits, codes, and standards. In addition, identify that all major equipment is commercially available, including proprietary equipment, and justify how this unique equipment is needed to meet the requirements of the proposed design. In addition, information regarding component warranties and the availability of spare parts must be presented.

Section E. Project Development

Describe the overall project development method, including the key project development activities and the proposed schedule, including proposed dates for each activity. The description shall identify each significant historical and projected activity, its beginning and end, and its relationship to the time needed to initiate and carry the activity through to successful project completion. The description shall address applicant project development cash flow requirements. Details for equipment procurement and installation shall be addressed in Section F of this Appendix. Applications should include a concise development schedule with timelines for activities.

Section F. Equipment Procurement and Installation

Describe the availability of the equipment required by the system. The description shall support that the required equipment is available and can be procured and delivered within the proposed project development schedule.

Describe the plan for site development and system installation, including any special equipment requirements. In all cases, the system or improvement shall be installed in conformance with manufacturer's specifications and design requirements, and comply with applicable laws, regulations, agreements, permits, codes, and standards.

Section G. Operations and Maintenance

Describe the operations and maintenance requirements of the system, including major rebuilds and component replacements necessary for the system to operate as designed over its useful life. The warranty must cover and provide protection against both breakdown and a degradation of performance. The performance of the RES or EEI shall be monitored and recorded as appropriate to the specific technology.

■ 47. Amend § 5001.401 by revising the introductory text and paragraph (c) to read as follows:

§ 5001.401 Interest rate provisions.

Interest rates, interest rate caps, and incremental interest rate adjustment limitations on a guaranteed loan are negotiated between the lender and the borrower. The interest rate for a guaranteed loan can be either fixed or variable, or a combination thereof, as long as it is a legal rate. Interest rates cannot be more than those rates the lender customarily charges its borrowers for non-guaranteed loans in similar circumstances in the ordinary course of business. The Agency encourages each lender to use the secondary market and pass interest-rate savings on to the borrower. If an interest rate swap is utilized, the guarantee will only cover principal and interest. The lender must provide the Agency with the overall effective interest rate charged to the borrower in the swap transaction. The Agency guarantee does not cover any fees related to the swap.

* * * * *

(c) *Multi-rates.* When multi-rates are used, the lender must provide the Agency with the overall effective interest rate for the entire loan.

* * * * *

■ 48. Amend § 5001.402 by revising paragraph (b)(2) to read as follows:

§ 5001.402 Term length, loan schedule, and repayment.

* * * * *

(b) * * *

(2) Guaranteed loans must require a periodic payment schedule that will retire the debt over the term of the loan without a balloon payment. Balloon maturities are not allowed, unless required as a loan servicing action. Payments must be amortized to maximize successful loan repayment and may vary by type of business or cash flow.

* * * * *

■ 49. Amend § 5001.403 by revising paragraph (b) to read as follows:

§ 5001.403 Lender fees.

* * * * *

(b) Default charges, penalty interest, late payment fees, and additional interest expenses are not covered by the loan note guarantee and cannot be added to the principal or interest due under any loan note guarantee in the event of a loss claim as prescribed in § 5001.521 or a repurchase as prescribed in § 5001.511.

■ 50. Amend § 5001.406 by revising paragraphs (c) and (d) introductory text to read as follows:

§ 5001.406 Guaranteed loan amounts.

(c) *B&I projects.* The maximum total amount of B&I guaranteed loans (including the guaranteed and unguaranteed portions of any B&I guaranteed loans, the outstanding principal and interest balance of any existing B&I guaranteed loans, and any new B&I guaranteed loan that is the subject of an application) that may be made to a borrower is limited to a maximum amount of \$25 million. The Secretary, whose authority may not be redelegated, may approve, at the Secretary's discretion, guaranteed loans in excess of \$25 million and up to \$40 million for rural cooperatives that process value-added agricultural commodities in accordance with § 5001.105(b)(18)(i). In addition to the borrower loan limit, there is a guarantor loan limit of \$100 million.

(d) *REAP projects.* The amount of a guaranteed loan that will be made available to an eligible project and borrower under this part will be at least \$5,000, not to exceed 75 percent of eligible project costs. Borrowers must demonstrate evidence of a financial contribution in the project of not less than 25 percent of total eligible project costs.

* * * * *

■ 51. Amend § 5001.408 by revising paragraphs (a)(5) and (e)(1) to read as follows:

§ 5001.408 Participation or assignment of guaranteed loans.

* * * * *

(a) * * *
 (5) *Secondary market.* The lender must properly close their loan and fully disburse loan funds of a promissory note for the purposes intended prior to assignment of the guaranteed portion of the promissory note(s) on the secondary market. The lender can assign all or part of the guaranteed portion of the loan only if the loan is not in default. Default includes a borrower default in payments or a lender default by unpaid periodic guarantee retention fees. A lender using the multi-note system may sell the guarantee on the secondary market for a specific note once that note is fully disbursed, even if other guaranteed notes for the project have not been fully disbursed.

* * * * *

(e) * * *
 (1) A guarantee and right to require purchase in accordance with § 5001.511 will be directly enforceable by a holder

notwithstanding any fraud or misrepresentation by the lender or any unenforceability of the loan guarantee by the lender, except for fraud or misrepresentation of which the holder had actual knowledge at the time it became the holder or in which the holder participates or condones.

* * * * *

■ 52. Amend § 5001.450 by revising paragraphs (b)(1), (c)(1) introductory text, (c)(1)(iii) and (c)(2) to read as follows:

§ 5001.450 General.

* * * * *

(b) * * *
 (1) The entire loan must be secured by the same collateral with equal lien priority for the guaranteed and unguaranteed portions of the loan. The unguaranteed portion of the guaranteed loan will neither be paid first nor given any preference or priority over the guaranteed portion. A parity or junior lien position in the guaranteed loan collateral may be considered on a case-by-case basis and must be approved by the Agency during the loan approval process. Requirements for guaranteed loans to purchase cooperative stock are found in § 5001.140.

* * * * *

(c) * * *
 (1) If the lender owns all or a portion of the guaranteed portion of the guaranteed loan or makes a protective advance, the Agency, in its sole discretion, may cover interest on the guaranteed portion for the 90 days from the most recent delinquency effective date. Per paragraph (c)(2) of this section, if applicable, the lender should issue an interest termination letter to any holder(s) and provide the Agency with a copy. The Agency will entertain the payment of interest up to 180 days past the most recent delinquency effective date only if:

* * * * *

(iii) Concurrence for inclusion of the extended period of interest to the lender is received from the Agency. The lender must request an extension of accrued interest in writing and document their collection efforts and timeframe for full resolution, which must be within 180 days from the most recent delinquency. Approved collection efforts that will extend longer than 180 days from the most recent delinquency date will be limited to 90 days of accrued interest payment from the Agency.

(2) If the guaranteed loan has one or more holders, the lender will issue an interest termination letter to each holder establishing the termination date for interest accrual and provide the Agency

with a copy. The loan note guarantee will not cover interest to any holder accruing after 90 days from the date of the interest termination letter. The Agency at its sole discretion may notify each holder of the interest termination provisions if it is determined that lender correspondence to holders is inadequate.

■ 53. Amend § 5001.452 by:

- a. Revising paragraphs (a) and (b)(8)(iii)(U);
- b. Adding paragraphs (b)(8)(iii)(W) and (X); and
- c. Revising paragraph (c).

The revisions and additions to read as follows:

§ 5001.452 Loan closing and conditions precedent to issuance of loan note guarantee.

(a) The lender must not close the guaranteed loan until all conditions of the conditional commitment are met. If, at a later date, it is discovered that all conditions were not met, the lender will be advised in writing that full enforceability of the guarantee by the lender may be compromised if the deficiencies are not corrected.

(b) * * *

(8) * * *

(iii) * * *

(U) For all RES and EEI projects, the lender must provide certification that the project has been performing or will perform at a steady state operating level in accordance with the technical requirements, plans, and specifications. Any modification to the 30-day steady state operating level requirement will be based on the Agency's review of the technical report or vendor certification and will be incorporated into the conditional commitment.

* * * * *

(W) For WWD projects, if applicable, the lender must certify that the project complied with American Iron and Steel requirements.

(X) For B&I, the capital/equity requirement set forth in the Conditional Commitment was met, as evidenced by a balance sheet 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 borrower's loan closing balance sheet must be included with the lender's certification.

(c) For RES projects where applicable, the lender must provide to the Agency a copy of the executed power purchase agreement and/or a permission to operate letter from the energy off-taker.

* * * * *

■ 54. Amend § 5001.454 by revising the introductory text, paragraphs (b)

introductory text, (d)(4) and (5) to read as follows:

§ 5001.454 Guarantee Fee.

The guarantee fee is a one-time, non-refundable fee paid by the lender to the Agency at or before loan closing and is required to be paid before the Agency will issue the loan note guarantee. The guarantee fee rate applied will be the rate as established in the **Federal Register** for the fiscal year in which a guaranteed loan is obligated. The lender may pass the guarantee fee on to the borrower.

(b) *Guarantee fee rates.* The guarantee fee rate is established by the Agency in an annual document published in the **Federal Register**. While the fee rate may vary annually, they will not exceed the limits in table 1. Once the guarantee is obligated, the guarantee fee rate in effect at the time of obligation will remain in place even if the guarantee fee rate changes before the loan note guarantee is issued.

(4) Is part of a strategic economic development and community development plan on a multi-jurisdictional and multi-sectoral basis in accordance with Section 6401 of the Agriculture Improvement Act of 2018 (Pub. L. 115–334); or

(5) Provides an additional market for existing local businesses by purchasing substantial amounts of products or services from, selling product to, or providing services to existing local and regional businesses. The additional market for existing local businesses means that the borrower uses industry clusters in the same community as a substantial part of their product manufacturing or service delivery, or the borrower is part of a product chain where they are a substantial part of another local business' product manufacturing or service delivery. The use of local janitorial or maintenance firms, for example, does not meet this criteria.

■ 55. Amend § 5005.457 by revising paragraph (b)(1)(ii) to read as follows:

§ 5001.457 Changes prior to loan closing.

(ii) Borrower's written plan, scope of work, or the purpose or intent of the project.

■ 56. Amend § 5005.459 by revising paragraph (b)(1) to read as follows:

§ 5001.459 Replacement of loan note guarantee, and assignment guarantee agreement.

(1) Be issued by a qualified surety company holding a certificate of authority from the Secretary of the Treasury and listed in Treasury Department Circular 570, except when the outstanding principal balance and accrued interest due the present holder, in accordance with § 5001.450(c), is less than \$1 million as verified by the lender via a written letter of certification of balance due;

■ 57. Amend § 5005.502 by revising paragraph (d) to read as follows:

§ 5001.502 Oversight and monitoring.

(d) *Access to the project.* Until the loan note guarantee is terminated, the borrower must allow the lender and therefore the Agency access to the project and its performance information and permit periodic inspections of the project by an authorized representative of the lender or the Agency.

■ 58. Amend § 5005.505 by revising paragraphs (a), (b)(3) introductory text, (b)(3)(iii) to read as follows:

§ 5001.505 Collateral inspection and release.

(a) *Inspection of collateral.* The lender must inspect the collateral as often as necessary to properly service the guaranteed loan.

(3) *Sale or release transaction.* The sale or release of collateral must be based on an arm's length transaction, unless otherwise approved, in writing, by the Agency when the sale or release of collateral results in paying the guaranteed loan in full and termination of the loan note guarantee. There must be adequate consideration at market value for the release of collateral. Such consideration may include, but is not limited to:

(iii) Application of the net proceeds from the sale of collateral to the borrower's guaranteed loan or to its 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; and

■ 59. Amend § 5001.506 by revising paragraphs (e) and (k) to read as follows:

§ 5001.506 Loan transfers and assumptions

(e) *Loan agreement.* A new loan agreement or an assumption agreement, acceptable to the Agency must be executed to establish the terms and conditions of the loan being assumed.

(k) *Appraisals.* If the proposed transfer and assumption is for less than the full amount of the guaranteed loan, an appraisal is required on all the collateral being transferred, and the amount of the assumption must not be less than this appraised value. The lender is responsible for obtaining the appraisal, which must conform to the requirements of § 5001.203 of this part. However, if the original appraisal is more than one year old, but less than two years old, the lender may provide an appraisal with a new effective date of evaluation in lieu of a completely new appraisal.

■ 60. Amend § 5001.507 by revising paragraphs (a)(3) and (d) to read as follows:

§ 5001.507 Lender transfer.

(3) 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

(d) In cases when there is a transfer to a new lender or when a lender has been merged with or acquired by another lender, the Agency and the new lender must execute a new lender's agreement, unless the new lender already has a valid lender's agreement with the Agency.

■ 61. Amend § 5001.510 by revising paragraph (b)(3) to read as follows:

§ 5001.510 Subordination of lien position.

(3) Remaining collateral is sufficient to provide for adequate collateral coverage of the guaranteed loan after taking into account the lender's discount of collateral consistent with the lender's sound loan-to-discounted value practices and satisfactory justification of the discount used. The Agency may require a current independent appraisal in accordance with § 5001.203. However, if the original appraisal is more than one year old, but less than two years old, the

lender may provide an appraisal with a new effective date of evaluation in lieu of a completely new appraisal;

* * * * *

■ 62. Amend § 5001.511 by revising paragraphs (b) introductory text, (c)(9) and (10) to read as follows:

§ 5001.511 Repurchase from holders.

* * * * *

(b) *Repurchase by lender for loan servicing purposes.* If the lender, borrower, and holder are unable to agree to restructuring of loan repayment, interest rate, or loan terms to resolve any loan problem or resolve any default and repurchase of the guaranteed portion of the loan is necessary to adequately service the loan, the holder must reassign the guaranteed portion of the loan to the lender. The reassignment must be for an amount not less than the holder's unpaid principal and accrued interest, in accordance with § 5001.450(c) of this part, on such portion less the lender's servicing fee.

* * * * *

(c) * * *

(9) *Accelerated loan.* When the lender has accelerated the loan and the lender holds all or a portion of the guaranteed loan, an estimated loss claim must be filed by the lender with the Agency within 60 calendar days from the date the loan was accelerated. Accrued interest paid to the lender in accordance with § 5001.450(c)(1).

(10) *Interest termination during bankruptcy.* When a borrower files a Chapter 7 liquidation plan, the lender shall immediately notify the Agency and submit a liquidation plan. The Agency will establish an interest termination date based on the date interest was last paid to the lender. When a borrower files either a Chapter 9 or Chapter 11 bankruptcy restructuring plan, the Agency and lender shall meet to discuss the bankruptcy procedure, the ability of the borrower to meet their restructuring plan, the lender's treatment of accruing interest, and potentially establish an interest termination date for the guaranteed loan. If the restructuring bankruptcy Chapter 9 or Chapter 11 is converted to a liquidation bankruptcy Chapter 7 by court order, the interest termination date will be the date of such conversion.

■ 63. Amend § 5001.516 by revising paragraphs (c) and (d) to read as follows:

§ 5001.516 Protective advances.

* * * * *

(c) A lender must obtain written Agency approval for any protective advance that will cumulatively amount

to more than \$200,000, or 10 percent of the aggregate outstanding balance of principal and interest, whichever is less, to the same borrower. Payment of real estate taxes by the lender is not considered a protective advance and does not require Agency approval.

(d) Protective advances constitute an indebtedness of the borrower to the lender and must be secured by collateral to the same extent as the original guaranteed loan. It is the lender's responsibility to ensure that any protective advances are secured by the collateral of the guaranteed loan.

* * * * *

■ 64. Amend § 5001.517 by revising paragraphs (c)(1), (c)(2), (c)(6)(i), (c)(10), (c)(11), (d), (e)(1)(i), and (f)(2) to read as follows:

§ 5001.517 Liquidation.

* * * * *

(c) * * *

(1) Such proof as the Agency requires to establish the lender's ownership of the guaranteed loan promissory note and related security instruments. Such proof may include copies of executed notes; and copies of mortgages or deeds of trust recorded in the appropriate jurisdiction;

(2) A copy of the payment ledger, if available, or other documentation that reflects the current outstanding loan balance, accrued interest to date, and the method of computing the accrued interest. If the interest rate was a variable rate, the lender must include documentation of changes in the agreed upon base rate and when the changes in the loan rate became effective.

* * * * *

(6) * * *

(i) These values or estimates of the collateral must be obtained by the lender through an independent appraisal. If the outstanding balance of principal and interest is less than \$250,000, the lender may, instead of an appraisal, obtain these values or estimates by using their primary regulator's policies relating to appraisals and evaluations or, if the lender is not regulated, normal banking practices and generally accepted methods of determining value. A copy of the appraisal or valuation will be provided to the Agency with the liquidation plan or as soon as it is available.

* * * * *

(10) An itemized list of estimated liquidation expenses expected to be incurred along with justification for each expense. These may include attorney, auctioneer, and other professional fees for services the lender will need to contract to maximize

recovery on the loan. Cost could also include legal representation to protect Agency/lender joint interest in bankruptcy or receivership;

(11) Estimated protective advance amounts with justification. Protective advances include, but are not limited to, advances made for taxes, annual assessments, ground rent, hazard and flood insurance premiums affecting the collateral, and other expenses necessary to protect the collateral. Protective advances may include advances necessary to maintain services or address unique situations with proper justification. If the lender has advanced funds without agency approval during the life of the loan, such expenditures or loans will not be guaranteed;

* * * * *

(d) *Partial liquidation plan.* If actions are necessary to immediately preserve and protect the collateral, the lender may submit a partial liquidation plan and, when approved by the Agency, submit a complete liquidation plan prepared by the lender in accordance with *paragraph (c)* of this section.

(e) * * *

(1) * * *

(i) Proceed expeditiously with liquidation. The lender must actively market the collateral for a reasonable period of time. If after this period of time the lender is unable to sell the collateral, then consideration should be given to submission of a final loss claim based on the fair market value of the collateral prior to its ultimate disposition;

* * * * *

(f) * * *

(2) The lender must provide the Agency a copy of the acceleration notice, or other acceleration document sent to the borrower.

* * * * *

■ 65. Amend § 5001.519 by revising paragraph (d)(2)(i) to read as follows:

§ 5001.519 Bankruptcy.

* * * * *

(d) * * *

(2) * * *

(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 a final court decree 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 a final court decree 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.

* * * * *

■ 66. Amend § 5001.521 by revising paragraphs (d)(2), (e)(3), (e)(4), and (e)(8)(iii) to read as follows:

§ 5001.521 Loss calculations and payment.

* * * * *

(d) * * *

(2) Non-compliance with the requirements of § 5001.205(a) or § 5001.305(a) will result in a reduction of loss claims payable. The Agency's review of the non-compliance could result in a total reduction of the loss claim payable. The Agency's review of the non-compliance could result in a total reduction of the loss claim payable. The lender must ensure during loan making and project development that the project is designed utilizing accepted architectural and engineering practices and conforms to applicable Federal requirements including the seismic requirements of Executive Order

12699 (55 FR 835, January 5, 1990), State and local codes and requirements, and facility plans or plans and specifications reviewed and approved by the applicable State regulatory agency. The lender must also ensure that the planned project will be completed within the available funds and once completed, will be suitable for the borrower's needs.

* * * * *

(e) * * *

(3) *Audit.* 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 to and otherwise assist the Agency in making any investigation or audit of the report of loss. The documentation accompanying the report of loss must support the amounts reported. The Agency must be satisfied that the lender has maximized the collections in conducting the liquidation.

(4) *Guarantees.* The lender must determine the collectability of unsecured personal and corporate

guarantees required in accordance with § 5001.204 of this part. The lender must promptly collect or otherwise dispose of such guarantees prior to completion of the final loss report. However, if 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 report of loss 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.

* * * * *

(8) * * *

(iii) If a restructuring of a guaranteed loan includes the capitalization of interest, the guarantee will not cover the interest accrued on the capitalized interest.

* * * * *

Basil I. Gooden,

Under Secretary, Rural Development.

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